

# THE FUTURE OF THE END OF DEMOCRACY

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This is the short version – about half – of my introduction to Mitchell S. Muncy,  
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If you want to know why the United States is in a constitutional crisis, a good place to begin thinking about it is the series of outrages perpetrated by the 1992 Supreme Court decision *Planned Parenthood v. Casey*, which upheld the outcome, though not the reasoning, of the infamous abortion decision *Roe v. Wade* (1973).

The first atrocity was that the *Casey* Court reaffirmed what it would seem that no government can affirm without undermining the grounds of its own authority: a private right to use lethal violence for any reasons whatsoever against an unprotected class of persons.

The second was that the Court upheld *Roe* even while admitting that it may have been decided unconstitutionally. “[W]e are satisfied,” say the jurists, “that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded the ruling.” In effect this statement sets the Court itself in the place of the Constitution, and it seems that the Justices intend no less, for they declare explicitly that “the rule of law” depends on citizens accepting their decisions.

The third was that the Court unilaterally established a religion, something the Constitution explicitly forbids: the religion of radical selfism. By contrast with the Founders, who pledged themselves to the laws of nature and of nature's God, they announce a “right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” Unborn children may be killed, it seems, because each person decides for himself which rules have “meaning” and who counts as “human.”

In such a polity no one can long be safe. Indeed, the wonder of it all is how one thing leads to another. Having declared that the Constitution somehow includes a

right to define reality, the judges must put themselves in its place: if he wishes to survive, any king who says “Everything is permitted” must add “But I decide for everyone what ‘everything’ includes.” To take a longer view of the matter, in order to justify violating the natural law against killing, the Court has at last found it necessary to defy the principle of our own republican government (the balance of powers), the principle of all republican government (that the weak have equal standing with the strong), and the principle of government as such (that rule is ordained to protect, not destroy).

As time has passed, several lower courts have followed the logic of the Casey “mystery passage” to conclusions even more murderous than its authors are yet willing to approve, involving euthanasia and assisted suicide, and in the meantime the Court has shown greater and greater readiness to assert itself against all attempts to clip its wings. It was against this background that in November 1996 an intellectual journal with a reputation for sobriety decided to do something. FIRST THINGS published a symposium entitled (please note the question mark) “The End of Democracy?”

Substantive evils like abortion had been criticized in FIRST THINGS before. So had the procedural evil whereby all of the important decisions about how to live are preempted by usurping courts. Various remedies, such as constitutional amendment and Article III legislation, had often been mooted, and the violent fringe had been firmly rejected. So how was the symposium new? For good or for ill, what distinguished it was its willingness to raise the question “whether we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime” and to consider, without endorsement, the rights and wrongs of responses “ranging from noncompliance to resistance to civil disobedience to morally justified revolution.”

In view of the controversy that followed, I think it is important to measure the tone of some of the most widely quoted passages from the introduction by the FIRST THINGS editors. Indeed many critics appear to have drawn their swords without reading further.

Perhaps the United States, for so long the primary bearer of the democratic idea, has itself betrayed the idea and become something else.

[The Founders] had no illusions that the people would always decide rightly. . . . But always the principle was clear: legitimate government is government by the consent of the governed. The Founders called this order an experiment, and it is in the nature of experiments that they can fail. . . . The proposition advanced in the

following essays is this: The government of the United States of America no longer governs by the consent of the people.

The courts have not, and perhaps cannot, restrain themselves, and it may be that in the present regime no other effective restraints are available. If so, we are witnessing the end of democracy.

Among the most elementary principles of Western Civilization is the truth that laws which violate the moral law are null and void and must in conscience be disobeyed.

America is not and, please God, will never become Nazi Germany, but it is only blind hubris that denies it can happen here and, in peculiarly American ways, may be happening here.

What is happening now is a growing alienation of millions of Americans from a government they do not recognize as theirs; what is happening now is an erosion of moral adherence to this political system. . . . What is happening now is the displacement of a constitutional order by a regime that does not have, will not obtain, and cannot command the consent of the people.

“God and country” is a motto that has in the past come easily, some would say too easily, to almost all Americans. What are the cultural and political consequences when many more Americans, perhaps even a majority, come to the conclusion that the question is “God or country”?

Although the editors anticipated charges of irresponsibility, provocation, and alarmism-defending themselves with the reminder that “it is the Supreme Court that has raised the question of the legitimacy of its law”-they were clearly unprepared for the hurricane of criticism that followed. Rubbing salt in the wound is that many of the critics had been close allies. While FIRST THINGS had viewed itself as pushing its good friends a little further in the direction to which they were already logically committed by their premises, not all who felt the push thought it so little or so friendly. Two distinguished neoconservatives, Gertrude Himmelfarb and Peter L. Berger, resigned from the Editorial Board. Walter Berns, whose connection with the journal had been more rarified, resigned from the Editorial Advisory Board. Commentary sponsored a symposium just to respond to the FIRST THINGS symposium. But the readership held firm, the many defenders of the symposium were as spirited as the critics, and the editors took comfort in the fact that what had opened with a quarrel might continue as a conversation.

Greater attention is due the criticisms from those whom the symposiasts (Richard John Neuhaus, Robert H. Bork, Russell Hittinger, Hadley Arkes, Charles N. Colson, and Robert P. George) had counted among their allies. Most of these reproaches are explicit, but a few must be teased out from between the lines.

First, the symposiasts are said to lack a properly conservative disposition. Their shortsightedness is said to make them ignore the great strides their cause has already made, their radicalism to threaten the political alliances by which these gains have been won, and their absolutism to poison the negotiation and compromise on which their future gains depend. Moreover, critics allege that their pessimism discourages people from seeking political remedies for political problems, their shallowness encourages them to seek political remedies even though the problems are really cultural, and their intemperance eggs on crazies who would emulate the violence of the foe. Besides, some add, the comparisons which the symposiasts offer are not only indiscriminating but offensive: Usurping judges are not like Nazis, and abortion is not like the Holocaust.

Second, critics maintain that although the judicial usurpation of legislative power is both deep and disturbing, there is something inappropriate about the manner in which the symposiasts frame their complaints. To some these complaints seem overheated, because usurpations by one branch or another are a pervasive fact of political life. To some they seem hypocritical, because the real gripe of the symposiasts is supposed to be not who legalized abortion but the sheer fact that it was legalized. Some even hint that they are futile because the American people have passively consented to what their courts have done. Others remark that the democratic opportunities for changing a law are never finished.

Finally, some critics are troubled by the religious views by which most of the symposiasts are moved. A few critics maintain that religion and religious morality do not belong in the public square at all; the genius of our constitutional system, they say, is that passions are defused by the relegation of all such things to the private realm. Whether or not these views are precisely the ones the critics have in mind, they are widely held in the culture.

Were the symposiasts really so intemperate and radical? In some instances the critics seem to have misunderstood their language; in others they seem to have understood it perfectly well but rejected it. Some of the misunderstandings are downright silly. For example, a surprising number of critics complained that America is not a “regime,” taking that expression as a snotty nineties equivalent of the sixties slam “Amerika.” The problem here is merely that the symposiasts were writing in Academic dialect while their critics were reading in Trade Media. Since everyone on

both sides of the dispute is bilingual, it's hard to see why there should have been any confusion.

The genuine disagreements are more difficult to deal with, although they become somewhat manageable once disentangled from the agreements. Because neither side thinks that our present circumstances justify anything like insurrection, the critics ask “How could you think of bringing it up?” Because both sides can imagine circumstances becoming so bad that some kind of resistance would be justified, the symposiasts ask “Why won't you let us worry out loud?” As I read the state of the conversation, a tacit agreement has been reached not to say much about extreme responses which no one thinks are yet upon us. A gap remains about whether civil disobedience is ripe for discussion; we will return to this problem.

Have the symposiasts ignored the strides their cause has already made and endangered the political alliances that achieved them? When Gertrude Himmelfarb says conservatives have begun to think the unthinkable and do the undoable she is speaking of past and future reforms in the realms of welfare, Medicare, and Social Security. Yet even she admits that in the realms the symposiasts care about most deeply, “the situation may be getting worse rather than better.” This suggests that the “conservative” coalition has been better for some kinds of social and cultural activists than for others, and it hardly seems immoderate to ask that its terms be renegotiated. From one point of view that is all the symposiasts were doing. As to the charges that they discouraged people from seeking political remedies for political problems and encouraged them to seek political remedies to cultural problems, it seems pretty clear that there is no “either-or.” Both political activism and cultural persuasion are necessary, and neither endeavor can get far without the other. That seems to be a point on which both sides can agree, so the next stage of the conversation should be how to coordinate the two endeavors.

The charge of absolutism involves a different kind of disagreement. Both the symposiasts and their critics think abortion and euthanasia are wrong; both are willing to oppose them; and both support halfway measures like prohibiting partial-birth or third-trimester abortions. So what's the problem? The problem is that how wrong it is to take innocent human life is not just an academic question; it determines strategy.

If abortion and euthanasia are bad only in the way that budget deficits are bad, then we should strike a “win some, lose some” pose and be willing to make lots of tradeoffs between saving human lives and our many other goals. But if they are bad in the way that stuffing Jews into gas chambers was bad, then it is morally unthinkable to make our peace with them; human lives cannot be traded off. Halfway measures may be the only available pathway to complete prohibition, but even so we should be

willing to sacrifice almost anything to achieve them. As to those offensive analogies, it all comes down to whether we take our premises seriously: if an abortion is really a murder then thirty-seven million abortions are really a Holocaust. They aren't something that could happen here; they are happening here. Who has the better argument? In one point the symposiasts are right: The fact that our local oligarchy privatizes the pogrom does not make it any less a pogrom, and the burden is on their critics to show why ending it is no more important than Social Security reform. But in another point their critics are right: The privatization of the pogrom does make vague talk about “resistance” a little glib, and the burden is on the symposiasts to explain more clearly what they have in mind in the here and now.

The indictment for overheating supposes that judicial usurpation is not much different from the legislative and executive usurpations the republic has suffered in the past. I think this a dubious claim. On the other hand, the indictment for futility is grave and may be true. If the charge were that passive consent makes the complaints of the symposiasts inappropriate, then it would be sufficient to note, as several of them have, that the life of a republic depends not on passive but active consent; after all, the passive sort exists even under despotism. But what if the citizens no longer want a republic? If the judicial preemption of deliberations about our common life were ended, they might be made to care; but can they be made to care enough to end the preemption? As the symposiasts and even most critics agree, the only way to know their temper is to try them. Ahead is a long unexplored road of education, entreaty, and exhortation. We scarcely know what might be required of us; all the more reason for continuing this conversation.

What of the indictment for hypocrisy? Would the symposiasts be so hot for democracy if the culture of death had been promoted not by a renegade judiciary, but by the representatives of the sovereign people? The question seems unanswerable, but it conceals a fallacy. Ancient democracy meant that the most numerous group or class could do as it pleased. Constitutional democracy—which is really more like what Aristotle called “polity,” mixed government, but ennobled (today) by the biblical understanding that human beings bear the image of God—means that many groups share power on principles of equal dignity, institutional balance, and natural justice. This is what the Founders meant when they spoke of a *novus ordo seclorum*, a new order for the ages, and a reversion to the failed model of antiquity would represent not the perfection of democracy but its corruption. In the constitutional sense, it would be no more “democratic” for a voting majority to prey on an unprotected class than for judges to tell them they may do so.

Of course it is one thing to admit that a majority can act undemocratically, and another to say what should be done if it does. Checks and balances are not a complete

answer, for a determined and unscrupulous majority can subvert any restraints the mind of man can devise. The Founders counted on checks not to force bad men to act justly, but to slow down imperfect men until they could come to their senses by themselves. But all that is becoming academic. The problem in our era is that usurping judges use the checks entrusted to them not to protect the Constitution but to destroy it, and the majority has so far been too torpid to act.

Constitutional democracy does make some forms of resistance problematic, in particular revolution. On this point the symposiasts and their critics agree. I am one of those who doubt whether revolution can ever be justified; however, all sober theories of justified revolution insist, among other things, both that peaceful alternatives to revolution must have been exhausted, and that the majority, on whose consent the authority of every government depends, must concur. So long as the republic continues, these conditions can never be satisfied. As I understand them, the contributors to the symposium did not mean to deny the claim; their point is that if the judicial branch continues to entrench its usurpations, a day may come when the republic can no longer be said to continue. As I understand the critics, however, the point is true but idle. If that day should come it will have arrived only through the sloth of the usurped majority, and a people that lets their liberties slip through their fingers will hardly stoop to pick them up. In the meantime, talk of revolution can only inflame unstable minds. Both sides make good points; let us call this match a draw.

Civil disobedience is another matter altogether. Whereas revolution responds to a government that has no right to legislate, civil disobedience responds to a law that cannot in good conscience be obeyed. The “regime” does not have to be “illegitimate” for a law to be unconscionable. I hope readers will forgive me for what may seem scholastic hairsplitting, but it seems to me that much of the “End of Democracy?” confusion is based on the failure of both sides to make necessary distinctions of principle. After that should come case-by-case prudential judgment, which has hardly begun even now.

According to the classical analysis, from Thomas Aquinas, a law can be unjust in either of two ways, and the difference makes a difference. Some laws are unjust because they hinder our relationship to God, for example because they violate the commands of the Decalogue: do not murder, do not steal, do not bear false witness, and so on. Others are unjust because they hinder our life in this world, for example because they serve private rather than public interest, impose disproportionate burdens, or exceed the authority of government.

Concerning laws unjust in the first way, our duty is simple: we must disobey, and that's flat. A law unjust in the second way may be disobeyed, but there is a catch.

Thomas framed it in negative terms, suggesting that if the harm of the ensuing scandal or disturbance would be even greater than the harm of the law itself, the law should be obeyed. Martin Luther King, Jr. framed it in positive terms, suggesting that whoever disobeys must choose means that do not cause avoidable scandal or disturbance—for example by accepting the full legal penalty for breaking the law. John Calvin allowed only subordinate magistrates to resist the second kind of unjust law, because they share in the public authority; others argue that in a republic, citizenship is a public office too.

It is important to remember that civil disobedience is not just a Christian idea. Jewish law firmly maintains the superiority of God's law to man's, and the first known case of civil disobedience to unjust laws is from Torah—the refusal of Hebrew midwives to obey Pharaoh's edict to kill male Hebrew infants, recorded in Exodus 1:15-21. At stake in our own day is the killing not just of infants but of the unborn, disabled, aged, sick, or merely depressed. Several varieties of killing are already legal; several others are on the verge.

The argument that permissive laws cannot be disobeyed is weaker than it looks, because ultimately the culture of death cannot be sustained by permissive laws alone. It requires that certain monies change hands, certain officials do what they are told, certain voices be silenced, and certain information be suppressed. For a small example, in the 1994 case *Madsen v. Women's Health Center, Inc.*, the Supreme Court upheld a provision of Florida law establishing a thirty-six-foot zone around an abortion clinic, within which demonstrations were permitted by supporters of abortion—but not by supporters of life. A possible mode of civil disobedience for those who hold no office but their citizenship might have been to pray peacefully and silently within the zone, then accept the legal penalty for demonstration. For their part, judges and magistrates might have cooperated in enforcing preexisting laws against violence and trespass by persons of all persuasions, but refused to recognize ordinances that imposed harsher penalties just for holding the pro-life opinion. The penalty for them would presumably have been removal from office. A judge might also protest a law in a manner that does not involve civil disobedience by entering a judgment of conviction, but then suspending the sentence. The latter suggestion is from Michael W. McConnell's thoughtful essay “Bending the Law, Breaking the Law” (FT, June/July 1997).

My aim is not to recommend mass violations of the thirty-six-foot rule but to show that the option of disobedience cannot be ruled moot just because the government has not (yet) commanded us to abort our own children or euthanize our own grandmothers. The manifold regulations and intricate fiscal arrangements of the modern state present myriad opportunities to draw the line, and these need to be



patiently considered. One crucial point is that even though laws and ordinances like the thirty-six-foot rule form part of the support structure for the culture of death, in themselves they are unjust only in the second way, not in the first. They don't directly violate commands of God such as "Do not murder"; they merely undermine the temporal common good, in this case by imposing disproportionate punishments and burdening the pro-life view with official opprobrium. In such cases civil disobedience is not an unconditional duty but a matter of discretion-something to be weighed according to whether, in the circumstances, it will do more good or harm. For example, a disadvantage of drawing the line here is that hostile journalists do all they can to obscure the difference between praying in the driveway and planting a bomb in the waiting room. Then there is the fact that the knowledge of blood flowing freely only a few dozen feet away is such a terrible goad that the distinction may disappear for some demonstrators too. These are powerful objections. But they are prudential objections, so there is no reason why the conversation between the symposiasts and their critics should end.

There remain the criticisms of the symposiasts concerning the appropriate role of religion in public life. The greatest obstacle to intelligent discussion about morality and religion in the public square is not a difference in principles, but a muddle in logic. It is literally impossible to eject either morality or religion from deliberation, not because people are stubborn but because decision and neutrality are inconsistent terms. All laws and regulations, from the prohibition of homicide to the list of allowable deductions from the income tax, embody suppositions about what is good and right. If the morality of Moses and Jesus is ejected, its place will merely be filled by another morality-the morality, perhaps, of Peter Singer, the newly appointed Ira W. DeCamp Professor of Bioethics at the University Center for Human Values at Princeton University, who believes that human babies have no greater moral value than snails. Moreover, the Casey Court had one thing right-all suppositions about what is good and right rest on larger suppositions about the "meaning of existence." Secularism isn't a way of getting on without such suppositions, but a way of getting on without admitting to anyone what they are. It is, in short, a fraud.

If I say that euthanasia should be illegal because murder violates the law of God, then obviously I suppose that there is a God, that He has a law, that this law ought to be obeyed, that it forbids murder, that euthanasia is murder, and that He commands the government to back Him up on such a point. If instead I say that euthanasia should not be illegal, then obviously I suppose either that there is no God, that even if there is a God He has no law, that even if He has a law it need not be obeyed, that even if it must be obeyed it does not forbid murder, that even if it does forbid murder euthanasia is not murder, or that even if euthanasia is murder He does not command the government to back Him up on such a point. If I seek relief from

judgment in the doctrine that the state has neither the right nor the competence to decide such questions, then I deceive myself, for indecision is decision; to say that the state should not pass judgment on euthanasia is merely to suppose that euthanasia should be legal.

It is not enough to have no suppositions—at some point there must be a contrary supposition. That contrary supposition may be “secular,” but it is still “religion” in that it is still about the meaning of the universe. The relevant distinction is not between a secular public life and a religious public life, but between a public life informed by a secular religiosity and a public life informed by the older religiosity that it opposes. A particular kind of morality and religion can be pushed out of the public realm, but morality and religion as such cannot be pushed out of the public realm.

What goes for deliberation goes for deliberation about deliberation. It is no use to say that religion may be invoked in debate about particular laws but not in reference to the constitutional framework within which such debate is held. To banish the religions that call themselves religions is merely to free the religions that do not call themselves religions from the burden of competition—whether the utilitarian religion of Expedience, the yuppie religion of Autonomy, or the mammonist religion of Wealth.

What goes for deliberation also goes for passion. Walter Berns suggests that by pushing morality and religion out of the public square, the Founders cooled those specially dangerous passions that wreck republics. This could be true only if the kinds of morality and religion they are supposed to have pushed out of the public square (assuming they pushed out any) are more responsible for reckless passion than the kinds that would have taken their place. Empirical grounds for such a claim would seem to be lacking. Consider simply the history of our century.

Much more difficult to deal with is the idea that “generic” religious considerations may be invoked in the public square but that “sectarian” considerations should be avoided—that one may speak of God, but not quote Him. What makes the problem difficult is the vagueness of the idea of generic religion.

One possibility is that generic religion is “neutral” religion: just those ideas about God, good, and evil that all human beings embrace. The problem here is that no such ideas exist. Theravada Buddhists, for example, do not believe in a God at all, and Hindus believe that what they call God is beyond good and evil. Another possibility is that generic religion is “general revelation”: not the ideas all humans do embrace, but the ones they all ought to embrace because God has “written them on their hearts.” Here the problem is different; some traditions maintain strongly the

reality of general revelation, while others deny it. Paradoxically, then, even the appeal to the generic presupposes the particular; for insight into what we hold in common, we must fall back on traditions we do not hold in common. The result is that to say “You must not speak of God except generically” is to say “The most important things about God you must not speak.”

Another way to put the problem is that what is known to all is not admitted by all. Hebrew and Christian Scriptures portray the human race as in denial. This may seem an abstract point. In reality it is very practical. Consider for example the abortionist. We say the duty to protect innocent human life is known to every human being. The abortionist says it can't be, because it isn't known to him. What do we say? “Forgive us, we are mistaken, we thought you knew but you do not”? No, we say, “You are lying. Perhaps also to yourself, but you are lying. You say you do not know, but you do. On this point, we know what you know better than you know what you know.” It is not from the lowest common denominator that we know this, not from Hallmark Cards, not from the Gallup Poll, but from the Letter to the Romans, from the Magisterium of the Catholic Church, from the seven laws given to the sons of Noah and explained by learned rabbis. No wonder the symposiasts quote from the “sectarian” documents of their traditions.

Their critics have a point. Not even Scripture says believers must always be quoting Scripture. When Paul spoke to the Athenians he began not with the Law and Prophets, but with what they knew already, quoting their poets and commenting on their altar “To An Unknown God.” Just so must we begin with modern pagans.

But must we never stop beginning? Must all our anthems be nursery rhymes? Must we always serve porridge, never meat? Richard John Neuhaus denies it: “Short of the Kingdom,” he says, “our public or political task in an inescapably pluralistic world is to find common moral ground for establishing and maintaining a humane life together. Christianity is unique in providing conceptual and practical resources for doing precisely that.”

A final difficulty in continuing the conversation has been raised by Georgetown Government Professor George Carey—that our efforts to teach what the Constitution meant to the Framers will inevitably seem partisan. In a sense they are. We do have different commitments than the usurpers do, not only as to procedure, but also as to substance. We are no more “neutral” than they are; we are only more objective. A fair examination of the Founding documents does not support their claim to fulfill the intention of these texts, so the usurpers must ultimately take refuge in hocus-pocus like “non-interpretivist” interpretation. A fair presentation of their goals does not support their claim to fulfill the moral law, so they must ultimately take refuge in

jabberwocky like a “different” moral law that lets everyone do as he likes. For a while people can be overawed by such incantations, but eventually they say “I don't get it-it seems like double-talk.” At that point we can say, “It is”-and show them the mirrors, if only they are willing to look.

It may seem a terrible waste of time that so much of our teaching must be unteaching, that almost all our effort must be expended just to prepare for Lesson One. I think we do very well to reach Lesson One-if we do reach it. Certainly the Founders reached no further. Lesson One is the highwater mark of all previous generations; speaking strictly of human wisdom, there is no Lesson Two.