Sense Moral Judgments?" My golf example attempts to sharpen the example that Dr. George discusses on page 94ff.)

Dr. George's theory also includes other remarkable claims. It appears to be a consequence of his view of what makes non-marital sex immoral that ascetic practices are also immoral. You must not, our author thinks, use your body as an instrument to achieve certain mental sensations; but do not mystics who mortify themselves in order to attain spiritual ecstasy do just that? Dr. George's wish to defend high moral standards, I repeat, is admirable; but his reasons in support of these standards baffle me. I wish, in Byron's phrase, that he would "explain his explanations." ✦

The Social Chaos Courts Cause

The End of Democracy II: A Crisis of Legitimacy

Edited by Mitchell S. Muncy
Spence Publishing Company, 1999,
xlviii + 287 pgs.

There is nothing like a good target to get a writer going, and the contributors to this excellent symposium have found a very worthy target indeed. The Supreme Court has, since the New Deal, engaged in acts of gross usurpation of power. What principally concerns these authors, however, is more specific.

The decision of the Court in *Roe v. Wade* (1973), striking down state laws against abortion, and subsequent cases reaffirming that ruling, outrages them. They regard abortion as murder; and the fact that the government permits this practice raises doubts in the minds of some of them as to whether they can continue to recognize the American government as legitimate.

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Abortion is a subject guaranteed to induce passionate argument; and since I always avoid controversy, I shall say no more about it. At any rate, abortion is more the releasing cause of their book than its principal theme. Their anger with the Court has led them to produce some of the most original and valuable criticisms of the Court's jurisprudence that I have seen.

First, though, an objection must be dealt with. The contributors condemn abortion, and practices such as

euthanasia that they see as part of the same mind-set, because these practices violate natural law. But if ostensible laws that contravene the law of nature have no force, does this not open the door to exactly the judicial activism that our contributors deplore?

It appears to do so in this way. Suppose a court must decide a case that involves an immoral law. Must not the court strike down this law? Remember, on the view we here examine, the judgment that a law is immoral reflects more than a mere subjective preference. On the contrary, the immorality of the law, by hypothesis, is a direct dictate of the law of nature.

This argument moves too fast. Robert P. George, in "Justice, Legitimacy, and Allegiance" identifies the mistake. Yes, this is the same Robert George whose book induced me, elsewhere in this issue, to say unkind things. With strict impartiality, I am always ready to give praise where it is due.

As Dr. George points out, it does not follow from the fact that a law is wrong that it is the duty of a particular agency of the government to act against it. This depends on the legal system of the particular regime. He notes, "But if, as I think, and as the Pope teaches, and as Justice Scalia agrees, abortion is the unjust killing of innocent human beings who, as a matter of right, are entitled to the equal protection of the laws, then there is a problem for a democracy in permitting abortion. (*Of course, whether it is a problem that judges in any particular democratic society are empowered to do anything about is another question*)" (p. 92, emphasis added).

The key point, in brief, is this. It is a very different thing to say that a law violates a natural law and to say that the law is unconstitutional. Whether the Supreme Court can do the latter is a matter of constitutional interpretation and prudence. One can, then, consistently hold both that abortion violates natural law and that the Supreme Court has no business passing on its constitutionality.

Defenders of natural law, then, need not support an activist Supreme Court. But why oppose it? For one thing, as several contributors stress, the modern Court has advanced claims

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to rule that hardly fall short of dictatorship. In *Planned Parenthood v. Casey* (1992), the Court held that doubts over whether *Roe v. Wade* was properly decided should be put aside. If *Roe v. Wade* were reversed, the legitimacy of the Court would be in question.

And this, the Court made clear, must not happen. "The Court's power

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lies...in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands" (p. 31, quoting the majority opinion in *Casey*).

Russell Hittinger can barely contain himself when he examines this decision. (Incidentally, Professor Hittinger has written the best criticism of the Grisez and Finnis "new natural law": *A Critique of the New Natural Law Theory* University of Notre Dame Press, 1987. Dr. George's reply, *In Defense of Natural Law*, p. 59ff., should also be consulted.) As he sees matters, the Court has made an unprecedented claim; "Were an executive officer to define his power in this fashion (i.e., in the just quoted excerpt from *Casey*), we might suspect it was Mussolini. It is a doctrine not merely of supremacy in law, but of what I shall call exemplarism. An organ of government is legitimate insofar as it is able to speak the voice of the whole people, and insofar as the people are able to hear their own voice in it" (p. 31).

Mr. Hittinger rightly objects both to exemplarism and the Court's reasoning in *Casey*; but I do not think he is right to characterize the Court's argument as exemplarist. On Hittinger's account, an exemplarist claims that he expresses the will of the people. I cannot think that the Court in *Casey* did this.

Rather, it claimed that in special cases, where public opinion was sharply divided, the Court could end the "intensely divisive controversy" by calling upon everyone to accept "a common mandate rooted in the Constitution" (p. 32, quoting *Casey*).

The Court's argument here is not that it expresses the popular will, but that it is the interpreter of the Constitution. The protest against the Court's language in *Casey* should not be that it makes unprecedented claims—it had asserted supremacy in interpretation before—but that it advanced a manifestly false claim. The "intensely divisive controversy" about abortion has not abated since *Roe*—far from it. People have not rallied to the common constitutional mandate proposed by the Court. Thus, it is silly for the Court to appeal to a nonexistent mandate as a reason against the reversal of *Roe v. Wade*.

The really outrageous claim of the Court is, to my mind, not that it exemplifies the popular will. Precisely the usurpatory claim is that the Court's decisions interpreting the Constitution are, by the Supremacy Clause of the Constitution, part of "the supreme law of the land." This assertion of power

stems not from *Casey* but from *Cooper v. Aaron* (1957).

Oddly, Mr. Hittinger does not take *Cooper v. Aaron* very seriously. He admits that in the opinion "we find some incautious remarks about judicial authority, which, if not qualified, would amount to a new doctrine of judicial supremacy" (p. 35). He thinks, though, that to stress unduly these passages is to read the decision in a "flat-footed way." Actually, what is at stake in the opinion "is not the exclusive supremacy of the judiciary, but of the federal government in matters reached by the Fourteenth Amendment" (p. 36).

The author fails to see the importance of states' rights for the preservation of constitutional government.

Here Mr. Hittinger, like at least two other contributors, has been led astray by overconcentration on the Court's misdeeds since *Roe*. He fails to see the importance of states' rights for the preservation of constitutional government: the unlimited assertion of federal sovereignty is, just as much as the Court decisions that aroused his ire, the product of usurpation.

Far sounder, in my opinion, is Dr. George W. Carey, who recognizes that "[S]hortly after the *Brown* decision in the mid-1950s which called for the desegregation of the public schools, a majority of the Court declared for the first time that the Constitution means what the Court says it means and that its decisions are constitutionally binding on the other branches. This declaration was something new under the constitutional sun" (p. 235).

To grasp Professor Carey's point requires us to put the civil rights decisions, and even the constitutional validity of the Fourteenth Amendment, into question. This is a step that, I suspect, several of the contributors cannot bring themselves to take. But take it they must. Otherwise, they lack an adequate basis to oppose the Court's rulings in the abortion cases.

Mr. Hittinger's criticism of exemplarism will not do the job he has in mind for it. Even if Hittinger has correctly interpreted the Court's claim in *Casey*, and one rejects exemplarism, the case for opposition to the Court remains incomplete.

A defender of the Court might say to Mr. Hittinger, "All right, you win. We shall abandon exemplarism. But the Supreme Court is still the final interpreter of the Constitution. You must accept *Roe v. Wade* as legally binding, even if the Court does not express the popular will." To challenge the Court, one needs to reject *Cooper v. Aaron*.

The Court, according to our contributors, has gone badly wrong. What intellectual errors led the Court to its repellent decisions in *Roe*? Mr. Gary

Glenn locates the source of the error as far back as *Dred Scott* (1857). Mr. Glenn sees a tension between majority rule and judicial review. Is it democratic for a few judges to overturn the public's will?

Unlike Progressives such as Theodore Roosevelt, who wished drastically to limit judicial authority to overturn acts of Congress, Mr. Glenn wishes to retain judicial review. But the Court should invalidate legislation only if it is clearly unconstitutional.

If the legislation is not on its face repugnant to the Constitution, then the Court must accept it even if there is a case to be made that Congress has acted unconstitutionally. This doctrine, termed "practical construction" was, according to Justice Curtis's dissent in *Dred Scott*, the rule of interpretation the Court followed from its inception until 1857.

Is it democratic for a few judges to overturn the public's will?

I am not sure that this position is correct. What is the textual basis in the Constitution for this rule? But Mr. Glenn, like the other contributors, has raised suggestive points. ✦

A Manifesto Without Evidence

The Great Disruption: Human Nature and the Reconstitution of Social Order

Francis Fukuyama
The Free Press, 1999, xii + 354 pgs.

This is not a bad book, but almost every major thesis in it is wrong or unproved. According to our author, human society depends to a large extent on "social capital." This he defines as "a set of informal values or norms shared among members of a group that permits cooperation among them. If members of the group come to expect that others will behave reliably and honestly, they will come to trust one another" (p. 16).

Danger lies at hand. Since the 1960s, social capital in the United States and Europe has become depleted, as rising crime rates and increased family disruption demonstrate. This is the great disruption referred to in the book's title.

Fortunately, we need not despair. Strong biological tendencies urge human beings toward cooperation, limiting the extent to which social capital can dissipate. Further, people are capable of cooperative behavior spontaneously, as game theory illustrates. But biology and spontaneous cooperative