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Indirect Constitutional Discourse: A Comment on Meese

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INDIRECT CONSTITUTIONAL DISCOURSE: A COMMENT ON MEESE

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Professor Meese begins his article by indicating three types of executive branch responses to the Supreme Court's constitutional interpretations: (1) compliance, (2) forthright disagreement, and (3) covert or disguised disagreement. He criticizes the Clinton Administration for using this third approach on affirmative action or, as he states at the end of his article, for "praising and gutting [the *Bakke* decision] at the same time."[1] This strategy, he claims, prevents political dialogue on the wisdom of *Bakke* and, therefore, may have the perverse effect of cementing the very approach to affirmative action that the Administration disfavors.

Meese's criticism presupposes a certain type of dialogue, the kind of intellectualized dialogue where terms are clarified and justifications are assessed and refined. He has in mind a discourse explicitly reassessing Justice Powell's conclusion that achieving academic diversity is a "compelling" state interest while overcoming social discrimination is not. Forthright disagreement with *Bakke* by the Clinton Justice Department, under this view, might have induced further judicial reflection on questions like these: What is "diversity"? Why is it important? Why is it more important than the objective of rectifying historical racial injustice or achieving greater future racial equality?

Because Meese defines "dialogue" as intellectualized discourse on such questions, it is clear why he assumes that neither compliance nor disguised disagreement will produce it. Compliance implies agreement, so it places nothing in question. Disguised disagreement directs attention to the propriety of the Clinton Administration's interpretations of *Bakke* rather than to the merits of *Bakke* itself, so it places the wrong issue in question.

It is true that intellectualized dialogue requires the forthright exchange of arguments. Less obvious, at least to those fortunate enough to be able to take such dialogue for granted, is that a number of other conditions are necessary as well. Intellectualized dialogue also requires, for example, a common vocabulary, capable speakers, and some agreement about purpose and procedure. Most pertinent to Meese's analysis, intellectualized discourse requires that the participants be willing to listen to one another, for otherwise

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1. ALAN J. MEESE, *Bakke Betrayed*, 63 LAW & CONTEMP. PROBS. 479, 504 (WINTER/SPRING 2000) (referring to Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978)).

there are words in the air but no real dialogue. To have their words listened to, in turn, requires that the various speakers must be viewed by the other participants as sufficiently entitled to speak that they should be heard.

Professor Meese alludes to the growing signs—in *Cooper v. Aaron*,[2] in *Planned Parenthood v. Casey*,[3] and, I would add, in *City of Boerne v. Flores*[4]—that at least some members of the Court do not believe that any branch of government is entitled to speak in a way that conflicts with a judicial interpretation.[5] He deals with this consideration by noting that a part of the American political tradition is for the executive branch, in one degree or another, to form and act on its own interpretations of the Constitution.[6] This assertion is no doubt accurate but is of questionable relevance. Whether the members of the Court or the public at large view executive branch disagreement as legitimate is an empirical, not a normative, matter. That highly respected presidents have long believed in the legitimacy of their constitutional disagreements with the Court does not establish what the current members of the Court think on that issue.

Assuming the Justices are just self-important enough to think their interpretations should be final and that executive branch disagreements are cheeky, insubordinate, and a deep threat to our constitutional form of government,[7] then the Justices might not be inclined to listen to executive branch dialogue and might even be less inclined to reconsider their own interpretations than if the executive branch had never challenged them.[8] To the extent this is true, disagreement, while forthright, will not produce dialogue.

Intellectualized dialogue may not be practicable when dealing with highly sensitive issues, but other kinds of dialogue may still be feasible. Joking or raising an issue implicitly and discreetly may be possible. Raising an issue while pretending not to raise it at all is another alternative. Such techniques involve a certain amount of indirection and even hypocrisy, but they are an everyday part of ordinary human dialogue. These common techniques do not necessarily do much to clarify terms or assess justifications; they may in fact obscure issues. As imperfect as they are, however, these ordinary conversational techniques can sometimes induce an unwilling party to reconsider a difficult issue. The

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2. 358 U.S. 1 (1958).

3. 505 U.S. 833 (1992).

4. 521 U.S. 507 (1997).

5. *See* Meese, *supra* note 1, at 479. On *Flores*, see generally Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998).

6. *See* Meese, *supra* note 1 at 480.

7. The strongest such language is found in Planned Parenthood v. Casey, 505 U.S. 833 (1992). The most relevant language for inter-branch dialogue at the federal level is in City of Boerne v. Flores, 521 U.S. 507 (1997):

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.

Id. at 535-36.

8. *See* Nagel, *supra* note 5, at 860-62.

Clinton Justice Department's treatment of *Bakke* can be viewed as an effort at just such nonacademic, everyday dialogue. If its praise of *Bakke* is loud while its interpretations are, as Meese argues, tendentious, the Department's method is not far different from, for example, the academic who softens his criticism of a colleague's manuscript by firmly praising it while subtly suggesting that the colleague probably meant something quite different from what the manuscript actually says.

Such shady practices are not an ideal form of dialogue. While the mislabeling and indirection that are a part of non-intellectualized dialogue can help get an unwelcome message across, they can also cause people to misunderstand their own experiences and motivations. Some strong proponents of affirmative action, having towed the *Bakke* line for so long, have probably half forgotten that their support for racial preferences is primarily based on a deep desire to correct the nation's generalized history of racial injustice. Nevertheless, when big egos and sensitive issues are involved, such methods sometimes represent the only form of realistic interchange. Certainly, these practices can result in some useful communication of ideas and information. Feigned or superficial compliance with *Bakke*, for example, has tended to delay the successful imposition of a uniform national rule against racial quotas in higher education. This delay has implicitly communicated disagreement with aspects of *Bakke* and, more importantly, has provided very useful experiential information concerning the benefits and harms of those quotas.[9]

Despite their benefits, because ordinary, non-intellectualized forms of dialogue utilize vagueness, indirection, confusion, and even hypocrisy, they may seem to be an exceedingly inappropriate way to influence the legal system. But consider this: Many of the Court's interpretations come with a built-in invitation for such dialogue.

For example, the Court's school desegregation cases have said repeatedly and clearly that defendants are under a constitutional obligation to remedy only the segregation they have caused.[10] Having so firmly taken this position, the Court has naturally not been receptive to arguments to the effect that all de facto segregation is unconstitutional or that the scope of the remedies for de jure segregation should be independent of the scope of segregative acts. But the Court allowed litigants and lower court judges indirectly to push both of those positions by authorizing trial judges to use various evidentiary presumptions to confound segregative acts with subsequent acts that failed to achieve racial balance, and to employ what can only be described as fanciful notions of social causality.[11] The willingness of many lower court judges to seize

9. For a vivid illustration of a position on affirmative action changed by experience with the program, see Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 1998, at 20.

10. *See, e.g.*, Milliken v. Bradley 418 U.S. 717 (1974); Keyes v. Denver Sch. Dist., 413 U.S. 189 (1973); Swann v. Charlotte-Mechklenburg Bd. of Educ., 402 U.S. 1 (1971).

11. For striking examples, see Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); *Keyes*, 413 U.S. 189.

on these options no doubt sent to the Court a deeper argument about the nature of segregation and the remedial role of modern courts.

Similarly, in *Planned Parenthood v. Casey*,[12] the Court discussed angrily and at length the illegitimacy of efforts to induce a reversal of *Roe v. Wade*[13]—or, as the Court put it, "break faith"—and insisted that the right created in *Roe* was secure. But then, somewhat more quietly, the same Court jettisoned *Roe's* trimester scheme and thus in reality created a significantly reduced constitutional right.[14] Other branches and levels of government were thereby invited to "talk back" to the Court as long as they used the ostensibly practical vocabulary of "undue burdens." In this way, the Court effectively invited indirect challenges to the moral calculus adopted in *Roe*. This invitation has since been accepted by those states that have enacted bans on "partial birth abortions." If the Court eventually determines that these prohibitions do not impose an undue burden on the right to abortion, it will have significantly—if not explicitly—departed from its earlier assessment of the states' interests in limiting abortion.[15]

Bakke,[16] as well as *Adarand*[17] and *Croson*,[18] send similar invitations for indirect dialogue. These cases clearly establish that affirmative action programs have to be specially justified and carefully tailored. But such programs continue to be the norm throughout the academic world, the federal government, and elsewhere. They are still the rule, not the exception. One reason for this inversion of the basic thrust of the Court's emphatic and elaborate constitutional interpretations is that those interpretations themselves also call for potentially endless study and redesign.[19] That is, the Court's own opinions suggest delay and permit evasion. Those, like members of the Clinton Justice Department, who disagree with the Court's grand pronouncements are free to

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12. 505 U.S. 833 (1992).

13. 410 U.S. 113 (1973).

14. *See Casey*, 505 U.S. at 872.

15. For example, discussing one state's objectives in prohibiting partial birth abortions, Judge Posner writes:

> On the merits, the most important issue . . . is that of undue burden. . . . To understand this issue requires understanding the peculiar and questionable character of these statutes. They do not protect the lives of fetuses either directly or by seeking to persuade a woman to reconsider her decision to seek an abortion. For the statutes do not forbid the destruction of any class of fetuses, but merely criminalize a method of abortion—they thus have less to recommend them than the antiabortion statutes invalidated in Roe v. Wade. . . .
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> . . .
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> The uninformed [that is, supporters of the statute] thought the D & X procedure gratuitously cruel, akin to infanticide; they didn't realize that the only difference between it and the methods of late term abortion that are conceded all round to be constitutionally privileged is which way the fetus's feet are pointing.

The Hope Clinic v. Ryan, 195 F.3d 857, 878-80 (7th Cir. 1999) (Posner, J., dissenting).

16. 438 U.S. 265 (1978).

17. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

18. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

19. For the Clinton Administration's recognition of this invitation, see Office of Legal Counsel, Memorandum to General Counsels, Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena, 1995 WL 835775 (O.L.C.) (June 28, 1995).

re-argue these large matters of principle, but only indirectly. As empirical studies are amassed, unconvincingly and stubbornly finding specific histories of racial discrimination,[20] one implicit message will be that many officials believe that the Court was wrong to distinguish between the state's interest in correcting illegal discrimination and its interest in correcting a diffuse history of racial injustice.

In sum, Professor Meese is right that the Clinton Administration's strategy does not produce the best possible form of constitutional dialogue. However, it does produce another recognizable form of dialogue, one full of confusion and hypocrisy but a surprisingly central and entrenched part of the practice of judicial review itself. Indeed, the irony is that the more the Justices view their highly intellectualized interpretations of the Constitution as supremely authoritative, the more they are likely to encourage these relatively non-intellectualized forms of dialogue.

20. *See* George R. LaNoue, *Social Science and Minority "Set-Asides,"* PUB. INT., Winter 1993, at 49.

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