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Robert Nagel
University of Colorado Law School

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I want to propose a small amendment to an aspect of the argument that Attorney General Meese made in his Tulane speech.[1] I think we might as well mention that speech because Attorney General Meese raised the subject we are talking about first. At any rate, I think his speech is interesting partially because, as a pragmatic matter, he is urging the citizenry to have a certain point of view with respect to their right to criticize or even their obligation to criticize the opinions of the Supreme Court. Meese addressed the public and the public's officials and emphasized that they should maintain in their own minds a clear distinction between the Court's interpretations of the Constitution and the document itself. To the extent that the document is merged in the public understanding with the Court's interpretations of the document—to the extent that the Court's opinions are the law of the land and are binding on everyone—then the Attorney General warned against losing the possibility of criticism and therefore correction of decisions.

This aspect of Meese's argument seems to me to be potentially important, but slightly wrong. When people say that the Court's judicial interpretations are the law of the land, they mean that there is a duty to obey. I agree with both Professor Neuborne and Mr. Harrison that the duty to obey does not necessarily entail any confusion of the Court's opinions with the original document. Even direct parties to a case can lose and still criticize the Court's interpretation as being wrong *vis a vis* the ultimate legal standard. I think that the Attorney General's point, however, can be shifted slightly. It is useful to focus on the effect of the "law of the land" mentality not on the public, but on the Court itself.

It is sensible to believe that the larger the Court believes the public's duty to obey is, the more the Court will perceive expressed disagreements as illicit, as evasions, or as improper confrontations rather than as points of view that are entitled to at least some attention and respect. I think that in important areas such as school de-

† Moses Lasky Professor of Law, University of Colorado School of Law. B.A. 1968, Swarthmore College; J.D. 1972, Yale Law School.

1 Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

segregation, abortion, and prison litigation, we can see that the Court's exalted view of its rulings as the law of the land have, in fact, distorted constitutional interpretation by converting the fact of disagreement or resistance in the political arena into grounds for altering and enlarging constitutional principles. Under this mentality, the Court perceives public dissent as defiance. In response to this defiance the Court interprets the meaning of the Constitution not on the basis of precedent, text, history, or even some consideration of moral philosophy that might be relevant, but on the basis of the Court's effort to protect itself from what it perceives as illegitimately motivated disagreement.

What I am suggesting to you is that the disagreement itself becomes a cause of constitutional meaning. I will give you one quick example from a case that you are probably all familiar with. In *Thornburgh*[2] the Court invalidated a series of so-called informed consent requirements for abortions. The *Thornburgh* opinion is full of extravagant claims. For example, the Court asserted that Pennsylvania's requirement that women be informed of the detrimental physical and psychological effects of abortions, including medical risks, was "the antithesis of informed consent."[3] The Court's reason for this surprising conclusion was that the information would "increase the patient's anxiety."[4] Now, it seems to me obvious that this confuses the possible effects of receiving information with ignorance. It is true that the consent provisions of the statute were almost certainly designed to discourage abortions, but I do not think that fact justifies the Court's assertion that the scheme "wholly subordinate[d] constitutional privacy interests."[5] An effort to persuade someone not to utilize her constitutional right is not the same as the total subordination of that constitutional interest. The extravagance of the claims made in the *Thornburgh* decision suggest that the opinion was driven as much by the Court's anger at perceived defiance as by the merits of the case.

In *Cooper v. Aaron*[6] the Court refused to subvert constitutional principle in the face of violent public opposition. *Thornburgh*, however, represents quite a different approach, one that I think is becoming a part of modern constitutional culture, where constitutional principles grow simply because the Court cannot tolerate expressed official disagreement. The *Thornburgh* decision demonstrates how much this attitude has expanded in recent years. After

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2 Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

3 *Id.* at 764.

4 *Id.*

5 *Id.* at 759.

6 358 U.S. 1 (1958).

all, *Roe v. Wade*[7] did not decide the consent issue raised by *Thornburgh*; the *Thornburgh* result was not a matter dictated by precedent. In theory at least, the provision of information might even enhance the right articulated in *Roe*, rather than be inconsistent with it. It seems to me that the shift that has taken place rather dramatically since *Cooper v. Aaron*, in cases like *Thornburgh*, is that we are becoming accustomed to the idea that the direction, the emphasis, even the mood of Supreme Court opinions is a kind of official orthodoxy binding on everyone else in the society. When those other parts of society do not accept that orthodoxy, the punishment is for the Court to change and expand constitutional meaning.

So, in summary, what I am trying to suggest is that, to the extent that the Court does not recognize that interpretation is a shared enterprise, the meaning and limits of constitutional principles will be defined in response to a wholly irrational and irrelevant consideration, namely the Justices' anger. *Thornburgh* suggests three circumstances where officially expressed disagreement with Supreme Court opinions is particularly appropriate. The first is that the issue was not clearly decided by any prior decision. The second is that the initial constitutional decision was exceedingly doubtful, evidenced even by dissenting views on the Supreme Court. The third is that the ordinary experience and ordinary thinking of non-lawyers were relevant to the kinds of considerations, moral and otherwise, that necessarily played a part in the constitutional judgment over which the Court had no monopoly.

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7 410 U.S. 113 (1973).