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COMMENTARY

REFLECTIONS ON DISCRIMINATION IN THE PRIVATE SECTOR

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I approached this assignment with some trepidation until I realized that I brought to this program a dimension that perhaps no other participant could bring. Both Professor Winter and Professor Choper referred to the *Shelley* case¹ from the perspective of the legal profession. My references to the *Shelley* case arise from first-hand experience because I lived it with my father for several years while we struggled with the two people who bought that house. My father was the broker for the sale of that house and he hired me as his lawyer to incorporate the organization that started the suit which set the case in motion. I was a very young lawyer—just out of law school, in fact—and I remember how I struggled with the papers required for incorporation. Thus, it is fascinating to reflect on the subject from this personal perspective. Perhaps my comments will come from the dimension of having been on the firing line; perhaps I am still on a firing line.

Professor Winter has made a very important distinction. He suggested that there has been a shift in our society from the idea of, or emphasis on, equality before the law to what he describes as equality in social-political-economic status. Although I strongly believe that equality before the law without economic, political, and social opportunities is a mockery, I am not quite sure that I agree with his premise. Rather, I am inclined to think that we have shifted from the principle of equality before the law to an emphasis on what I call equal access to opportunity. The shift, it seems to me, is not only from equality before the law to equality in social-political-economic status, but also from equality before the law to a process by which we seek equal access to obtain equality before the law. There exists a distinction, in my judgment and I think that there are learned writers who would agree with

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1. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

me, between equality as a right and equality as a public policy. The question of reaching the private sphere requires assessment of those individual rights to equality which might defeat programs aimed at important economic and social policies, including obviously, the social policy of improving access to equality. These ideas are not original to me, but it is in this context that one must begin to look at this subject.

Some civil rights advocates have described the individual right to equality under the fourteenth amendment as a right to equal treatment. Certainly, those of us in the civil rights movement clearly understand that principle, but also are very much aware that the right to treatment as an equal is fundamental; that the right to equal treatment—and I make a distinction between the two—may not be as fundamental, or may even be a derivative of the former.

Let me give an example. In instances of racial discrimination, there is unquestionably a basic right to equal treatment, and one who is mistreated because of race has a claim under our laws and the fourteenth amendment. I am very intrigued, however, by the several instances in Professor Winter's article in which he refers to quotas and suggests that the quota issue goes to the very heart of the kind of society we desire for ourselves. I am not sure that this is the fundamental issue. The fundamental issue has to do with equal access to opportunity, and I think we have moved into the so-called "welfare climate" in this country out of a consciousness that up until now we, as a country, have not really made economic, political, and social opportunities equally available to everyone.

Having noted that, I must agree with Professor Winter that we have situations today in which we are overwhelmed by the bureaucracy that presumably functions in an effort to address the problems of this society. I also am inclined to think Professor Winter is absolutely right that some of the regulatory regimen has moved so far that it now defeats the effort, but I would remind Professor Winter—when he suggests that we ought to move back to the private sector—that much of what we deal with now and much of what has occurred is a result of the failure of the private sector to address the issue forthrightly.

For that reason, we turn to the federal government to find some way to resolve some of these issues. In other words, I perceive Professor Winter's view of inequality as perhaps another stage in the process that this country is going—and obviously must go—through to attain those opportunities that will advance the entire notion of equality. I hesitate

to use the word “equality” because I think the comment is absolutely true that “equality” has become a kind of catchword—a word that has lost most of its meaning and value except as a political slogan used in many instances to confuse rather than to illuminate issues.

It seems to me, however, that we do have a challenge and a responsibility under the constraints of our Constitution to begin to address seriously the problems that Professor Winter described so vividly and that now plague us, not the least of which is the idea that each group must advocate and insist upon its piece of the pie.

I am most disturbed by the suggestion that the only way to deal with this challenge is to look seriously at the notion of a constitutional convention in which all these forces would act as one instead of addressing themselves to “after you.” I have nightmares of that constitutional convention—if and when it is convened—concerning the character of its composition. This country would never be the same. Frankly, I hope we can find some other solution than to move to that kind of mechanism because it is fraught with danger. We in the civil rights movement know that the “Big Fourteen” has been the bulwark of the achievements that we have made to date. There is no earthly reason why a group of people assembled for a constitutional convention might not reexamine that amendment in the course of discussing a balanced budget. To us in the civil rights movement, this would be catastrophic because the fourteenth amendment has, in fact, been the keystone and the leverage by which we have been able to move toward peaceful and significant social change.

The philosophy of equal protection is individualistic, but the philosophy of equal access is concerned with the group as a whole. Somehow we must deal with approaches, strategies, legislation, and systems that remove these two concepts from their present collision course. Somehow we must find an accommodation by which both can be supportive of the basic ideals and principles upon which this country was founded. I frankly think that there is a way to accomplish this; that it can be done within a context that will address these problems responsibly and will lead to a partnership encompassing the best of both worlds.

I think there is a role for government. I think there is a role for the private sector. And I think the job of those of us who struggle with some of these awesome problems is to find more effective ways in which these two, the government and the private sector, can work together. To abandon the structure of the social-political-economic sta-

tus that we now have would be unwise at this stage in the development of this country.

I hope for a studied effort to provide for the needs of those who really and genuinely need support and to eliminate those who government serves only gratuitously. I further hope for a determined effort to achieve in the private sector that kind of economic growth and productivity which will make it unnecessary to look to government for solutions to some of these problems.