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Panel Discussion: Reaching the Private Sphere

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PANEL DISCUSSION

Professor Charles R. McManis,¹ after an initial observation, posed the following two questions to Professor Winter:

My first question grows out of my confusion over the plane on which Professor Winter's critique of the welfare state is taking place; that is to say, is the critique simply a judgment on whether the pursuit of distributive equality is a sound policy and thus basically a political critique, or is it a critique made from a constitutional plane? Part of Professor Winter's assessment of the ultimate consequences of our current welfare state is that it leads not only to economic dislocations in the private sector, but also to paralysis in the political branches of government. He also suggests that to a certain extent the paralysis has already begun to take hold, which makes a political solution unlikely. On the other hand, he denounces judicial activism, at least when aimed at promoting further social and economic equality In view of this double-barreled critique of the welfare state and judicial activism, what is the role of the courts in response to the sorry state of affairs just described?

My second question concerns Professor Winter's repeated references to the public and private sectors. It's not altogether clear to me that the public-private sector distinction is a particularly meaningful one, at least not as a description of the world as it is, and thus, I would like to posit a substitute simply for purposes of comparison. John Kenneth Galbraith, in his recent book, *Economics and the Public Purpose*,² describes a three-constituent universe: the public sector, as we have been talking about it; and a two-constituent private sector. One constituent of the private sector he describes as the market system, in which market forces still operate, and the other he describes as the planning system, or that portion of the private sector which has achieved a degree of control over market forces. These two systems exist in the private sector side-by-side—separate and now unequal. The planning system has as much in common with what we traditionally describe as the public sector as it does with what we traditionally describe as the private sector. Without attributing any of what follows to Galbraith, I would like to suggest how we arrived at the sorry state of affairs that Professor Winter described.

The inescapable fact is that big business preceded big government. The present shape of our public sector, moreover, is in no small measure the

1. Associate Professor of Law, Washington University. A.B., 1964, Birmingham-Southern College; M.A., J.D., 1972, Duke University.

2. J. GALBRAITH, *ECONOMIES AND THE PUBLIC PURPOSE* (1973).

result of judicial activism of the last century, which actively promoted rapid economic development and the corporate form of business—a form of business that, significantly, requires active government intrusion into the private sector to exist. Without laws to limit the liability of shareholders, there would be no corporate form of government. A second inescapable fact is that a tremendous inequality exists in the private sector between the market system and the planning system. Much of the legislative measures that have been criticized and even some of the judicial activism that Professor Winter criticized is, in fact, government's attempt to deal with that inequality and its own adverse economic, social, and political effects on our system. For example, he attributed inflation to the government's printing of money, but I would suggest that the significant part of our private sector that has power over its own prices accounts in part, at least, for the problem. Similarly, Professor Winter attributed voter disaffection to the growth and power of the bureaucracy in the public sector, but I would suggest that the disaffection stems in part, at least, from the growth and power of the planning system within the traditionally private sector of our society and the resulting feeling of powerlessness individuals have in the market system.

So, in a word, I would like to present Professor Winter with this three-constituent universe and an alternative explanation for why we have arrived at the welfare state. If you want to “uninvent” big government, you have to “uninvent” big business first.

Professor Winter responded:

I must say, that's the kind of speech that has gotten us where we are. There abound all kinds of studies about market concentration that challenge the view that our economy is somehow subject to enormous amounts of monopoly power. . . . I give you just one example of this kind of mythology, which continues to survive and haunt us in this society. . . . [It has been charged that] the oil companies—the Seven Sisters—have been selling oil at a monopolistic price for years, and through the control of oil have exerted enormous power over our economy. . . . Now OPEC has come into being and quadrupled the price of oil. I put it to you—if you know any economics—that if the oil companies until that time had a monopoly on the sale of oil, there would have been no way that OPEC could have quadrupled the price and made more money. The evidence is that [the pre-OPEC price] was at a competitive low. . . .

As to inflation, I do not see how a monopoly causes it. Suppose that fifteen monopolies govern our economy and they continue to raise prices. That does not cause inflation. If anything, it will cause a recession, as the

OPEC price increase did, because money will be diverted out of other sectors of the economy, which will experience a downturn. There is no way that you can hang inflation on that sort of thing.

There is a gray area where government and business work in combination, and there is no question that it poses a threat. . . . But it cannot, I think, be justifiably called the private sector; I call it a kind of concealed intrusion of the public sector.

Professor Choper, responding to a question on how Shelley v. Kraemer³ differed from a mere action to enforce a contract:

Shelley v. Kraemer represented something more than neutral state enforcement of a contract through which the parties engaged in racial discrimination. The kind of contract involved in *Shelley* was not an ordinary contract; it was a contract that restrained the alienation of real property.

With an ordinary contract, a court generally does not look to the nature of the contract, but simply to whether a contract existed, and if so, enforces it irrespective of the court's approval or disapproval of the substance of the contract. A court hesitates to enforce a contract in restraint of alienation, however, unless it finds the particular restraint reasonable and consistent with public policy so as to overcome the normal presumption against restraints. To enforce the contract, therefore, the court must express its substantive approval of the particular kind of restraint.

This sort of approval in *Shelley* might well be seen as representing a judgment very similar to one that a legislature would make in enacting a state statute that required racial limitations on the transfer of property. That is the way in which *Shelley v. Kraemer* may be more than an ordinary contract enforcement case. It involved plaintiff's request for special approval by the state court to violate the constitutional norm—the prohibition of discrimination against minority races.

Professor Choper then answered a followup question on whether the state court action in Shelley, which enjoined Shelley from taking possession of the property subject to the restrictive covenant, constituted state action:

I don't know quite how far I want to generalize this. I would say that if a state court imposes its own judgment which violates a constitutional norm—puts its imprimatur on a particular policy—then that amounts to

3. 334 U.S. 1 (1948).

unconstitutional state action. I have not thought through all possible areas, but I do know that enforcement in *Shelley* of a restraint on alienation of property . . . would have placed the state's imprimatur on racial discrimination much more so than if the court had simply enforced an ordinary contract. If Professor Winter and I, in contrast, made a contract that neither of us would employ black people and I broke that contract, his suit on the contract would not involve this notion of restraints on alienation of property. Our agreement would be an ordinary contract.

Professor Winter:

I am not sure that I agree with the proposition that employers can, under the fourteenth amendment, freely agree not to hire blacks.

Professor Choper:

I was suggesting a different theory.

Professor Winter:

I understand, but suppose that two very large employers in an area, at the behest of an all-white union, agreed with the union and with each other not to hire blacks.

Professor Choper:

I would suggest that you may not need two; that even one sufficiently large employer could be a monopolistic force in employment opportunities, and thus its action would constitute state action.

Professor Winter:

Well, all right, if the reason for not liking a restraint on alienation is that it cannot be eroded by competitive forces. That is why I think you can call *Shelley* a state action case without getting into balancing [the interests on the side of the claim to equality with those on the side of enforcing the restrictive covenant]. I think the questioner has a very good point: if you find state action every time the court balances interests, you may open up an area without easily identifiable outer limits.

Professor Choper, in response to a question on why the issue is not one of freedom of contract:

If Professor Winter and I contract to do or not do something and one of us allegedly breaks the contract and the other seeks to enforce it, I don't think any constitutional freedom of contract issues are involved. We had freedom to contract . . . [without any restraint] on us analogous to the ordinary presumption against restraints on alienation.

Professor Winter:

Professor Choper's point, I take it, is that the law, particularly antitrust law, distinguishes between contracts in which two people agree to exchange something and contracts in which two competitors agree to deal with third parties only on certain terms. Views may differ on what to do about the latter type of contract because it may break up of its own force. But certainly, in the case of land and mutual covenants that run with land, the land will always be there. *Shelley* thus seems to be a paramount case for the Court to hold that private activity is, in effect, state action when it so closely resembles a government.

Professor McManis, addressing a question to Professor Winter:

If you do not advocate judicial activism to cut back on the welfare state, yet you think that the political branches are paralyzed, what do we do? Call a constitutional convention?

Professor Winter:

One thing we might attempt to do is draft a constitutional amendment that would somehow limit federal spending. I am convinced that we can draft a workable amendment in the state government to limit state spending, but I foresee a number of problems with an amendment to the federal constitution to limit federal spending. One problem, yet unsolved by proponents of a federal spending limit amendment, is the power of the federal government over expenditures just through regulation. If OSHA can compel expenditures by employers in the interest of job safety, the federal government could run a national health program through laws regulating private insurance companies. . . . My query is whether that kind of regulation, which compels expenditures in the private sector, may not be less efficient than direct government spending. What I am afraid of is that we might wind up in a situation in which government spending in the broadest sense grows larger than ever because Congress, under the constraints of a spending limit, chooses to do indirectly what it could no longer do directly—force private parties to spend. Until that problem is

solved, I cannot come out in favor of a constitutional amendment to limit federal spending.

A member of the audience asked each member of the panel to discuss whether either state or federal regulations should be promulgated to prohibit discrimination in private clubs.

Professor Choper:

This question raises a difficult constitutional issue: do members of an organization have a constitutionally protected right to engage in discrimination that violates the constitutional norm? That is the first hurdle to be overcome. Certain Supreme Court opinions quite recently—*Runyon v. McCrary*⁴ is one—suggest this possibility for members of private clubs.

A further question arises if there is no constitutional right to discriminate, but neither Congress nor the state legislatures pass antidiscrimination statutes: should the Court on its own find that discrimination by private clubs, or the like, amounts to state action in violation of the fourteenth amendment? This question tests the notion of when a privately developed monopoly with sufficient exclusionary force may be justifiably brought under the restrictions of the fourteenth amendment.

This statement of the principle requires some qualification; namely, that the monopoly must employ its exclusionary force against something—and I don't know that I can do any better than this—something quite "important" or "fundamental." I think it has to be more, for example, than the ability to play golf on a lovely golf course. Perhaps the power to exclude, however, may not extend to playing golf period; that is, if the only three golf courses in a particular area all excluded blacks or women or some other suspect group. Another issue concerning the question of whether the exclusionary power involves something "important" is whether this is a subjectively or objectively determined fact. Suppose the discriminated-against golfer alleges: "The most challenging of the three golf courses that exists in this community excludes blacks; therefore, I am effectively excluded from playing the kind of golf that I want to play." I think that puts a nice question. What constitutes a sufficient exclusionary force?

Margaret Bush Wilson:

Obviously, if the public accommodation laws apply, then we have no

4. 427 U.S. 160 (1976).

problems; it's the private aspect that is troublesome. Just recently, we have seen a situation in which key leaders in a community made informal decisions in a private club. At that point a strong feeling existed that a significant nonprivate aspect was present; that we have the additional factor that makes the situation one in which there is need for some discipline. That's as far as I can go. The problem plagues us and we have no easy answers.

Professor Choper:

I think that you have begun to develop the notion of what is sufficient exclusionary power in respect to some important interest that people have. If a private club is the place to do business effectively with city officials, then you have gone several steps, at least, to find that the organization does present the sort of monopolistic force that we have been discussing.

Professor Dixon, the moderator, observed:

Sufficient exclusionary power is very hard to measure under a standardized rule. Perhaps that is the key problem.

Professor Winter:

Public accommodation laws raise other issues; for example, the issue of the continuing public insult on enterprises of a particular size and obviousness that engage in racist behavior. I certainly do not see any major reason not to force country clubs and other organized recreational facilities to abide by any public accommodations law. It seems to me that the costs of antidiscrimination legislation do not become very high until the prohibition really invades the home. The costs become high then only because the insult—the *public* insult—is no longer obvious. I don't see any reason why we should not limit racism to the home where its impact is limited, where it is clear that it is idiosyncratic behavior, and where it is not a statement by the society. So I think the problem is more than one of monopoly; it is also a problem of imminence. Even if, for example, a large country club did admit blacks openly, it would not solve for me the problem of whether there should be a law that prohibits discrimination by all of them.

