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A CRITIQUE OF "THE CONSTITUTION AND JOB DISCRIMINATION"

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Let this comment on Dean Countryman's article begin with a statement of those portions of his analysis with which the writer is in complete agreement. First, as a matter of general constitutional approach, I agree with his opposition to the assertion that there are ascertainable "neutral principles" of constitutional law. It seems inescapable to me that neutrality or lack thereof is in the eye of the beholder.

Second, I would agree that government intervention obviously is needed to preserve constitutional job rights against discriminatory employment practices.

Third, I agree that the states cannot be relied upon to accomplish this objective. It is obvious, as Dean Countryman points out, that the states which most need to take action will not do so. We have here one of the continuing abdications of the states which have led to steadily broadening federal power and which have made the claim of "states' rights" often no more than a way to urge the perpetuation of discriminatory practices that cannot be squared with American ideals and goals.

Fourth, the governmental intervention which is needed must come, therefore, from the national government, if the objectives are to be achieved. The writer would have no dispute with Dean Countryman's recommendation that the national action take the form of an administrative board with power to enforce as well as mediate in situations of discrimination. The scope of coverage of such a federal law, will be commented upon later. I would simply point out at this stage that any attempt by one government agency to police all possibilities of job discrimination in all businesses, no matter how small, as well as in private homes, would be an over-powering administrative monster. Some limitations on the role that such an agency should play, by way of limiting the scope of its activities, would seem to be indicated. If for no other reason, this would be necessary for administrative effectiveness.

Fifth, I agree with Dean Countryman's analysis of the breadth of the concept of state action. By the term "state action," actually,

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governmental action both state and federal is meant to be covered. State action is all-permeating. If this is not so wholly on the theory of state inaction, which Dean Countryman seems to rely upon and with which I agree, it certainly is so on the basis of enforcement of discriminatory practices by police, or by recognizing a right to discriminate as a defense to a civil action by someone asserting that he has been discriminated against. As the basic paper says, the matter of licensing does not control. Dean Countryman seems to take the position, and I would agree with him, that there is no practical limit to the breadth of the concept of state action as it relates to private discriminatory actions which are enforced or enabled by the government. All such private actions ultimately are so enforced and enabled.

But it is at this point that the writer parts company to some extent with Dean Countryman. He relies upon the concept of state action as defining the scope of the constitutional privileges against discrimination. Thus, this writer reads him as saying that the Constitution forbids racial discrimination wherever there is state action, under the broad definition of state action which he develops and in which I concur. While I recognize that this has been the approach of the Supreme Court over many years of litigation, I am certain that we have now reached the point where we can no longer say that wherever state action is present, the Constitution forbids discrimination.

To evaluate my position, consider first the ultimate hypothetical situation which is so often posed. This is the right of the individual home-owner to bar Negroes from his home on a racial basis, and to call the police to have them ejected if necessary. That state action is present in such a situation seems inescapable. The use of the police to eject someone from property would clearly appear to be state action. In an even more fundamental sense, we all know that the concept of property itself is based upon state law, and we own property only by virtue of the state law and subject to the constitutional and legal inhibitions upon the absolute use of our property as we see fit. So, with the recognition that state action is involved in the ejecting of an unwanted person because of his race from one's own private property, under the Countryman analysis unless I mistake it, the state would be involved in discrimination and so the ejecting of the individual would be unconstitutional.

At this point, the reply might be made that at least as to the private home, we will not view the state's enforcement of the individual right

as state action, although under the analysis of state action set forth by Dean Countryman, this is difficult to do. But even assuming that the private home situation is to be treated as separate with no state action present, the state action analysis still cannot be used to define the scope of the constitutional privilege.

I take it that Dean Countryman would say that at least when you move away from the private home, state action would be involved in any discrimination on a racial basis. The trouble with this analysis, based upon a state action approach, is that it runs into most serious logical difficulties elsewhere. As an example, assume a private college that wishes to have students of only one religious belief. Under Dean Countryman's analysis, it seems to me that this kind of private school would be unconstitutional. Yet I would argue most vehemently that it would not be. If it is said that such a school would not be unconstitutional because there is a positive right of religious freedom to be protected, my reply would have to be that, nevertheless, the state may not engage in religious discrimination. Thus, if the test is one of state action, the state has engaged in religious discrimination, and therefore this school acts unconstitutionally.

There is no room in the Constitution for a concept that the state is acting by way of *racial* discrimination, but in precisely the same situation it is not acting by way of *religious* discrimination. If the test is one as to whether the state is acting or not, the state is discriminating equally in both instances. It appears to me there is no escape from this obvious dilemma if state action determines the scope of constitutional right. Indeed, it seems certain to me that the activities of various churches clearly enlist state action. Churches are given tax exemption; they are subject to various state controls. It is hard to see how they can be distinguished at all on the basis of being different from any other business as far as the issue of state action is concerned. Yet here religious discrimination is obvious.

This analysis has led me to the conclusion that the concept of state action cannot be used to determine the scope of constitutional rights. This is why I entitled my article, which is cited by Dean Countryman in his footnote 62, "The Twilight of State Action." We have now come to the logical end of using the presence or absence of state action as the means of determining the scope of the constitutional right. Another test must be devised to evaluate the role that the government is playing in discrimination. The test has to be a balancing one which evaluates

the extent of public participation in discrimination as against the right of the individual to discriminate. Admittedly, this test appears to be very much the same as the state action test, but the inquiry is significantly different because it evaluates the kind of role that the government is playing, admitting that it is playing a role, in the discrimination. In the extreme case, for example, I would assert that the government has every right to play the complete role in protecting the right of the individual in his own home to discriminate with regard to race. This is not because there is no state action, but because the role that the government is playing is one of aiding the individual in his private right to discriminate as an individual, rather than establishing a public policy of discrimination.

Under this analysis, the legal situation with respect to each business would turn upon its own facts. I would disagree completely with Dean Countryman that there is a constitutional right not to be discriminated against on a racial basis in employment as a domestic in a private home. I would concur that state action is present, but I would insist that the personal right to discriminate in such an instance is not a case of discrimination by the public, but is a case simply of the public enforcing private discrimination. I would insist that the church or religious group have every right to discriminate on a racial or religious basis, and I would not at all view them as the same as the labor union, which is fulfilling a public function. Yet, the state action analysis would seem to be precisely applicable in each case. Rather the positive interest in allowing private individuals to discriminate, which is a function of their individuality, would be controlling in the case of the church or other similar groups, and would not be controlling in the case of the labor union.

Further, I do not believe that to escape the dilemma this analysis can be limited to religious groups because of the religious liberty established in the first amendment and read into the fourteenth amendment. I would insist that a private club formed not for public but purely for private social purposes, would have every bit as much right to discriminate even though religion had no connection with it. As a caveat, I would state that some clubs which might wish to call themselves private obviously would not be, and thus could not discriminate. A clear and certain example of the club which could not be private is the Jay Bird Club which ran the all-white primary in Texas.

I think it important to stress at this point that the discussion here is

centered around the matter of employment and not, for example, the matter of public accommodations. Certainly the public concern with public accommodations and discrimination in connection with their management is far greater than it is in the case of all instances of employment. I refer again to the situation of the domestic. I would then move on to the situation where a group of individuals, in a political campaign, for example, had some hired help in a private home engaged in mailing out campaign or other literature—not a regular business. I would say there is a constitutional right in this case, at least today, not to hire persons of a race that they did not wish to hire. I would say again that the hiring policy of the small private club, which is truly private, would be a matter for the members and not for constitutional control. Dean Countryman's analysis would even lead to the proposition, I take it, that the individual could not discriminate on a racial basis in the choice of his lawyer, doctor, insurance man, or the like, since the relationship under these circumstances will at least sometimes be one of employment rather than independent contractor under the broad definition of employment customary in modern social legislation.

The matter of Mrs. Murphy's boarding-house is on the border-line. Certainly as businesses become larger and cater to the public generally, there is less justification for recognizing a right in the individual to discriminate. My own reaction is that a typical small boarding-house which constitutes a home for one, two, three or four people, could discriminate on a racial basis without running afoul of the Constitution, and can easily be distinguished from a large boarding-house enterprise, a transient home, an apartment house, and the like.

It might well be argued at this point that this analysis is vulnerable because constitutional rights do not depend on the size of a business. We customarily make distinctions of size in various social legislation by limiting our control to businesses that have a certain number of employees, but, it may be said, the precise number is not a constitutional matter. My answer to this line of attack would be that constitutional rights in many instances are not defined or definable at any given time with precision. While a small boarding-house would, in my opinion, not be subject to the constitutional prohibition of racial discrimination today, the rule might be otherwise at some time in the future. I was interested to see Dean Countryman's remarks on page 75, with which I agree completely, that the courts in constitutional

law very properly fulfill a law-making function in the great common law tradition. Yet I get the feeling from the latter part of Dean Countryman's paper that the great common law tradition is abandoned by him, since he wants to become absolute and cover everything in one fell swoop. It seems to me this is not the way constitutional law should work in the future any more than it should have worked this way in the past.

As a practical matter, these observations lead to a conclusion which may appear illogical but one which I feel is most pragmatic. Are we not talking about three possible areas here rather than two? One area is the area of unconstitutional discrimination by the private business in its employment practices. Elimination of this unconstitutional discrimination would be enforced by the courts, if the issue were presented to them or could be enforced by legislative enactment under section five of the fourteenth amendment. Then, at the other extreme, there would be the clear area where there is no constitutional protection against discrimination, and as such there could be no enforcement even by legislation of a privilege against discrimination. This would most obviously be in the realm of religious discrimination where there would be no doubt of the right of the individual to discriminate and no doubt of the absence of power on the part of the government to eliminate the discrimination.

I read Dean Countryman's paper as recognizing only these two areas. But I would assert that there is a broad middle ground where the individual is entitled to discriminate as against an attempt to enforce a ban upon discrimination in a court. Yet, if it was decided as a matter of affirmative legislative policy to eliminate the discrimination in question, it would be constitutional to do so. It is my reaction that the matter of the small business, such as Mrs. Murphy's brooding-house, or the small newsstand, may well be in such a category. I would not anticipate that the courts would take it upon themselves, if the matter were presented to them, to say that all racial discrimination in such small businesses were forbidden by the Constitution and the elimination of discrimination would be enforced. Yet I would assert that discrimination in these instances could be done away with by federal statute.

This certainly would be the case as to those businesses which were shown to have a constitutional effect upon commerce, and certainly Dean Countryman is correct at this point. But I would go on and

assert that the power given the Congress under section five of the fourteenth amendment to enforce it would also include the power to accomplish this elimination of discrimination by legislation. Inescapably to me, the power to enforce contained in section five of the fourteenth amendment includes the power to define to some extent the scope of the constitutional right. The justification for this point of view could be found either in the claim that it was probably what the framers intended, or it could be found in the quite proper judicial role of self-restraint, which leads the court to avoid establishing constitutional rights which require detailed patterns of legislation.

When these principles are coupled with the assertion made earlier that it should be accepted that the Constitution will continue to change and develop in the common law tradition, the flexibility, which I view as needed in this as well as in all other areas of the law, is achieved. It seems to me that pragmatically we must recognize an area where the federal government is not forced to intervene to eliminate discrimination, but it can do so if it wishes to do so.

Dean Countryman effectively points out that there are justifications for Congressional legislation eliminating job discrimination to be found elsewhere in the Constitution, such as in the thirteenth amendment, the fifth amendment, and in the fourteenth amendment, through recognition that these rights may be attributes of United States citizenship which are not subject to the test of state action within the amendment. I agree with his analysis in these areas. But, as is indicated above, I see the problem as not one of state action, but one of balancing the public's interest against discrimination with the private right to discriminate.

As such, I cannot accept Dean Countryman's assertion that the federal legislative control should be without limits. When the constitutional right against discrimination is spoken of in terms of absolutes, it does become difficult to think of restricting this absolute constitutional right by not making it applicable in every conceivable situation. But when the constitutional right is recognized, as a relative and balanced right, as it is in this analysis, then limitations established by statute as a means of implementing the balancing would seem to be in the best tradition of the law. Thus, my own reaction would be that the size of businesses to which the anti-discrimination employment principle would be applicable should clearly be limited, by the number of employees or some other such device.

It is quite obvious to all of us, I believe, that there has been a significant recent public reaction against attempting to solve the tragedy of 175 years of discrimination by one absolute legislative fiat. Whether this is irrational, or is justified or not on a rational basis, this is a factor which must be taken into account. Legislation to eliminate discrimination in employment can accomplish virtually all its objectives without an insistence that every employer, no matter how small or how private, be made subject to it. I would agree, of course, that businesses of substantial size could be covered by the legislation. Just what that size should be is not something that I could evaluate accurately, but I would think in terms of any business establishment employing ten to fifteen people. My guess would be that if there was any trouble with this figure, it would cover too many businesses for the actual mechanical process of trying to enforce such a federal statute, rather than that it would be unduly limiting to businesses which would be too few in number to open sufficient job opportunities.

By way of summary, I would state that I make no apologies for insisting on the right of the individual as an individual to engage in racial discrimination, religious discrimination, discrimination upon whether his friends are Republicans or Democrats, men or women, Catholic or Protestant, rich or poor, whether they have high or low I.Q.'s, or for any other reason or no reason at all. It seems to me that this right to discriminate is an essential of individuality and freedom. It is only when this personal concern is lessened by the individual moving out into the world of more impersonal relationships, as in the world of commerce where he caters to the public generally, that his right to discriminate lessens. This right to discriminate is not grounded upon a property right asserted as such. It is an interest of personality and is as entitled to protection as is a right of religious liberty. The push is strong to relieve the tragic deprivation of rights which has occurred in the past. But there is danger that the push will go too far and individuality will be sacrificed to a drive for the mass good. This comment on Dean Countryman's paper, an excellent and provocative paper indeed, is no more than the assertion that significant American values of individuality must not be sacrificed in the name of protecting other values which should have been protected a long time ago.