

5-1-1982

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### Recommended Citation

Orrin Hatch and William Coleman, *Affirmative Action Debate Still Heated After Fifteen Years*, 3 B.C. Third World L.J. 49 (1982), <http://lawdigitalcommons.bc.edu/twlj/vol3/iss1/3>

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AFFIRMATIVE ACTION DEBATE STILL HEATED

AFTER FIFTEEN YEARS

William T. Coleman, Esquire \*

Senator Orrin G. Hatch \*\*

Question: Have affirmative action and Federal contract compliance programs accomplished their goals?

Mr. Coleman: I think they have made a start, but we still have a situation where blacks do not have the same opportunities and the same jobs as whites. We still have a situation where the black median income is 60 percent that of a white, where women certainly don't have the same opportunities as males. So there's still a need for the program that President Johnson started 15 years ago.

Mr. Hatch: I think we have more black youth unemployment today than we had then. I believe the affirmative action programs, though well intended, were really not writ-

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\* William Coleman, Esquire, is a partner in the Washington, D.C. law firm of O'Melveny and Myers. He currently serves as Chairman of the Board of the NAACP Legal Defense Fund. Mr. Coleman is a Republican. He served as Secretary of Transportation under President Ford from 1975-77. He co-authored the brief for the plaintiffs in the famous Brown v. Board of Education case. He was recently appointed by the U.S. Supreme Court to submit an amicus curiae brief and to argue before the high court in the controversial Bob Jones University tax-exemption case.

\*\* Senator Orrin Hatch, a Republican, is the junior Senator from the state of Utah. He serves on the Senate Judiciary Committee and is the Chairman of the Senate Sub-committee on the Constitution. He is also the Chairman of the Senate's Labor and Human Resources Committee.

An edited transcript of the debate between Senator Hatch and Mr. Coleman appeared in the Sunday New York Times on October 4, 1981, on page 20E.

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ten into Executive Order 11246, but have been interpreted since that time, under Title VII. The original intent was not to allow any discrimination based upon race, color, sex, national origin or religion. And today we find through the affirmative action programs that the Government is itself becoming the discriminator by requiring mandatory discrimination based upon race or sex only.

In the process, because the rules and regulations have become so burdensome, a number of employers are scared to death to hire the underserved, undereducated, underskilled, or underprivileged young black kids, and young women, by the way, because they're afraid they'll get snarled into a whole raft of affirmative action-type interpretations that may ruin their business and cause them all kinds of unnecessary legal and other expenses.

Mr. Coleman: I don't think that's true. In every case dealing with employment, the court has first found as a fact that there was active, intentional discrimination. Once that was done, the only issue was, what remedy do you apply? Obviously, if there's been active discrimination against blacks or against women, the only way to right that situation is to look at people by their color and say that (from) here on out you have to do differently.

Q. Senator Hatch, do you believe we still need these programs?

Mr. Hatch: I think we need programs that are positive

action programs or affirmative action programs in the sense of trying to equalize the imbalances racially that we have in our society. I have no difficulties with encouraging business in every way to hire minorities and women. I think that must be done. That's what the original Executive Order 11246 basically did. We have fewer problems from a violation of civil rights today than we had then; but that's because of the Civil Rights Act amendment of 1964.

When it was enacted, (the Act) did not require racial balancing through the use of goals, timetables and quotas, which is what affirmative action programs have been required to do through the years - and later through regulations which require no specific standards, as interpreted by the Equal Opportunity Employment Commission (E.E.O.C.) and the Office of Federal Contract Compliance (O.F.C.C.). The enforcement standards have varied greatly between them; there's a tremendous overlap in those two agencies.

Mr. Coleman: I don't think the agencies have administered the programs in a discriminatory way. In fact, they haven't been as effective as they should be.

(If) you look at society, you will find that since our Administration - I am a Republican - took over, black youth unemployment is 50 percent. You will find that unemployment is 15 percent of black males, though 7 percent for white males; that white unemployment for males is going down, black unemployment is going up.

And (if) you look at every institution - whether it be

the Government or a private corporation - you will find that blacks are not proportionately represented; you will find that women are not proportionately represented. And if you have lived in a society where, for 25 years, we finally have recognized that the Constitution should be color blind, that women shouldn't be discriminated against, and still nothing happens - well, you tell me how you would correct the situation if you don't do it by taking into consideration that a company that comes in for a major Government job - which is using your tax money, my tax money - and says, 'I want \$10 billion to build the MX,' and they have 1 percent minority employment, no supervisors, no women in positions of authority - how would you correct the situation? (sic)

Q. If there is disparity of opportunity in employment and education, how would you propose dealing with it?

Mr. Hatch: Well, number one, we can go back to the spirit of the executive order - to encourage businesses to hire minorities and women. In fact, I don't think women were even part of the executive order at that point, other than women who were minorities. The idea was to advertise, to try and get them to even up their work forces and to provide opportunities on a voluntary basis. I would encourage the advertising, both voluntary and maybe even some enforced, to encourage more applications for jobs.

I would repeal the minimum wage, or at least have a youth differential. This would benefit young blacks and

Hispanics and other young minority people because it would do away with much of the disincentive in hiring them. Who's going to hire a young underserved or undertrained black today at \$3.35 an hour if they've got to face all the rules and regulations of the agencies?

I think we've also got to have educational programs. Vocational education ought to be expanded. But it can't be expanded, because we're spending so much money down the drain in so many programs to give them welfare rather than jobs and opportunity and training. I think if we're going to subsidize jobs, we ought to subsidize them in the private sector where the training really occurs in real honest-to-goodness jobs.

Now I think that if you really look at the affirmative action programs, they have done a fairly good job at getting the educated blacks and minorities job opportunities. But they've done a lousy job, in my opinion, of giving the young underprivileged, underskilled kid or anybody - black, white, women or whatever - a job, because the disincentives to hiring are there and they're built within the structure of rules and regulations. And, unfortunately, I think that too many jobs are lost today because we've developed in our society a welfare attitude and a welfare dependency, where it's easier not to work than to work.

Now, I once suggested what was known as the social bonus, and almost got lampooned out of the Wall Street Journal for it - that was an incentive to businesses to hire

young people. We would have the Federal Government pay the youth differential. They'd have to pay the minimum wage and give them a formal training program. I can't believe the storm of criticism I got.

Mr. Coleman: You say that you want the private sector to help, but the fact is the private sector hasn't helped to the extent it should. The only way you can make business help is to place restrictions on them. Now, I think it's less intrusive on a private corporation to say, 'I don't care what you do, but when you come in here next year, if you're going to get that \$2 billion to build that cruise missile, then you have to have a plan that demonstrates that in the last two years you were able to move your women's employment from 10 percent to 25 percent.'

You also indicated that affirmative action has helped the talented tenth of the black community and not the poor blacks. That isn't so. I've tried cases involving steel companies and we've watched the increase in employment. You go back to Pittsburgh and look at the number of blacks working in those steel mills, and you can't say that any talented tenth black person, after graduating from a major university, would want to go back and work in a steel mill. You just look at the number of blacks who by any stretch of the imagination aren't the talented tenth - they're very able, good people, but they have jobs they never would have had but for affirmative action.

Q. In July (1981), Ellen M. Shong, head of the Office of Federal Contract Compliance, declared that the Reagan Administration did not intend to weaken the traditional commitment to equality of opportunity in hiring. Yet, in August (1981), the new regulations on Federal contract compliance were announced which would, in effect, exempt 75 percent of the companies doing business with the Government today. How do you reconcile that?

Mr. Hatch: I think (the proposed changes) irritate both sides. Several are welcome administrative improvements - such as deleting the requirement that contractors file certificates of subcontractor compliance. But they continue to overlap between the O.F.C.C. and the E.E.O.C. They don't resolve the confusion over availability. Availability generally represents the number of minorities capable of either being hired or promoted into a specific job opening. It's often the most controversial aspect of affirmative action.

I might add that the vast majority of what I consider overregulatory practices are against major businesses. So I don't expect much change under the Reagan rule. There will be a little less paperwork for the small businesses but there won't be much change in the officiousness.

Q. What do you think of these proposals, Mr. Coleman?

Mr. Coleman: They're shocking and wrong.



Mr. Hatch: We're finally agreed on something!

Mr. Coleman: But for a different reason! If you have a program where you're trying to end the effect of past discrimination and to moderate the effect of present racial attitudes, to say that you're going to exempt 75 percent of the people that do business with the United States - it seems to me you are, for the first time, going backwards.

My understanding is that the limitation - at one time it was any contract over \$50,000 - now it's any contract over a million. So there could be 10 separate contracts, each for \$900,000, and they still would be exempt.

Let me tell you a Secretary of Labor story, and this should even shock you. He's suggesting that when you find that (people) have committed a wrong and have actually discriminated, he'll no longer have the authority to award back pay. Which means the only thing you tell that contractor after four years of litigation, when he doesn't have women, is 'Don't do it any more.' (sic) And then if he does it again, you tell him, 'You can't even award back pay.'

Mr. Hatch: As you know, back pay relief was not brought into the forefront until the O.F.C.C. came into existence. And I think it's the best example of an agency's overreaching. For instance, in the early days, as they applied these rules and regulations, they just had individual bureaucrats assessing back pay and the people either paid it or lost the contracts - whether they were right or wrong, but without any judicial redress. It was a violation of due process of law.

Q. You both seem to agree that discrimination exists after 15 years of the current law. We are arguing about steps that should be taken.

Mr. Coleman: The one set of tools that have worked reasonably well are those tools developed over the last 15 years which go under the rubric of affirmative action. It resulted in more blacks and more women having opportunities. I think that when it's having the success that it is, it's just wrong to stop and turn the clock back unless you can say that the problem is solved. And I don't think anybody can say that.

Mr. Hatch: I think we need a continued public debate on this. It isn't pleasant for me to be in the posture of arguing against affirmative action. I think Congress ought to exercise more candor, more courage and more responsibility. We can't just continue the traditional liberal versus conservative dichotomy. We've got to start asking the tough questions, we've got to hold the right hearings, we've got to hold the agencies responsible, so this national problem does in fact get resolved. And I'm not against trying to find the best possible middle ground to doing that. Bill and I need to spend a lot more time together.