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Edwin S. Rubenstein

"to ourselves and our posterity"
Preamble to the Constitution

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SYNOPSIS

In their 1993 *Forbes* article, "When Quotas Replace Merit, Everybody Suffers," Peter Brimelow and Leslie Spencer determined that the "total shortfall" or cost attributed to federal compliance with affirmative action policies and Equal Employment Opportunity Commission (EEOC) regulations was close to four percent of GNP or well over $225 billion. As the authors pointed out, the total economic cost of racial preferences and diversity in both the private and public sector is difficult to pinpoint in an aggregate sum, but is not impossible to calculate in terms of a reasonably reliable estimate. The following paper analyzes the economic costs to taxpayers as a result of federal compliance with affirmative action and equal employment-based regulations. Estimates show "that for every dollar spent on regulatory enforcement, about twenty dollars is spent on compliance costs by the private sector." The policy implications of federal EEOC regulations apply an unnecessary burden in terms of direct and indirect costs to taxpayers, in addition to undercutting merit-based employment practices, and therefore Executive Order 11246 and subsequent regulations should be repealed.

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President Bush says he is against quotas and racial preferences. During the 2004 presidential campaign he stated that the best way to help minority businesses is to open all contracts to competitive bidding "….so people have a chance to be able to bid and receive a contract to help get their businesses going." "Minority ownership of businesses is up," the president said, "because we created an environment for the entrepreneurial spirit to be strong."[1]
Yet from day one the Bush administration has backed affirmative action plans. The first opportunity came in August 2001 when the administration asked the Supreme Court to uphold a Transportation Department program intended to help minority contractors. In its brief the Bush Justice Department took the same position that the Clinton administration had in the case, which grew out of a challenge by a white-owned construction company in Colorado Springs.

The company, Adarand Constructors, submitted the low bid for a Transportation Department contract. But the contract was awarded to a minority contractor as part of the department's "disadvantaged business enterprise."[2]
In its 50-page brief, the Bush Justice Department asserted that "the program is not unconstitutional," noting that all companies that are economically disadvantaged could apply for the same preferences in receiving contracts.[3] Of course, their solution discriminated against the more efficient non-minority contractor, as preference programs usually do. That didn't bother the White

[1] George W. Bush, Third Bush-Kerry debate, Tempe Arizona, October 13, 2004.
[2] Neal A. Lewis, "Administration Backs Affirmative Action Plan," *New York Times*, August 11, 2001.
[3] Lewis, op.cit.

House. Even the George Bush regime seems—or at least seemed—interested in the rights of particular groups rather than colorblind equality.

When it comes to affirmative action, the Bush administration goes by the book: The Federal Code of Regulations states that individuals who certify that they are members of named groups (Black, Hispanic, Native American, Asian Pacific, Sub-continental-Asian) are to be considered socially and economically disadvantaged. Under some programs, women "shall be presumed to be socially and economically disadvantaged individuals" too.

The rules affect everything from "surface transportation," which requires that 10 percent of federal monies go to minority and female contractors, to the space program, which requires that 8 percent of the dollar value of its contracts go to such firms. The Small Business Administration reserves portions of its contracts for, among others, Asian-Americans, Sri Lankans, Tongans, and "Hasidic Jewish Americans." [4]

Nor does government intervention end when a company hires the appropriate percentage of minorities. An initiative began by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) in the early 1990s requires companies to focus on promotion and pay disparities among workers of different races and genders.[5]

DEFINING DISADVANTAGED UP

Reports of the death of affirmative action are premature. But this is not your father's affirmative action: Companies owned by white females are eligible for consideration as disadvantaged businesses under the Transportation Department program supported by the Bush Administration. Nineteen separate

[4] Linda Chavez, "Rein in Affirmative Action," Center for Equal Opportunity, web post.
[5] Buchanan Ingersoll, "Affirmative Action: What Are Your Ceilings Made Of?," *Pennsylvania Employment Law Letter*, February 1999.

federally mandated preference programs are designed to benefit "economically disadvantaged" bankers.

Wealthy minorities can buy broadcast licenses from existing license holders in so-called "distress sales" for as little as 75 percent of fair market value, while others can't even compete. The FCC also exempts "minority-controlled broadcast facilities" from rules restricting multiple ownership of such facilities.[6] Such provisions tilt the playing field against non-minority entrepreneurs striving to attain the wealth enjoyed by their minority competitors.

Obviously the government doesn't define "disadvantaged" the way you or I do. An estimated 70 percent of the nation's population is now legally eligible for federal contracts and affirmative action benefits on the basis of their alleged disadvantages. But in the government's eyes the son of an unemployed white Detroit auto worker is more privileged than the daughter of a Manhattan surgeon of color.

Reverse discrimination is the law of the land. To affirmative action ideologues, however, it's "pay back" time, when white American males must atone for their alleged economic advantages—even if they grew up poor. "White males are the only growth area for the modern victim movement," says John Leo, a contributing editor at *U.S. News and World Report*. "Everybody else is covered."[7] In typical Washington style, a program designed to aid "disadvantaged minorities" metastasizes into a near-universal entitlement. Is there a method to this madness? You bet: By casting a wide affirmative action net the federal government has vastly increased political support for such programs.

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[6] Chavez, op. cit.

[7] Ralph R. Reiland, "Affirmative Action or Equal Opportunity?," *Regulation*, vol. 18, no. 3, 1995.

QUOTAS BY ANY OTHER NAME

Quotas are explicitly banned in both the 1964 and 1991 Civil Rights Acts. Minority hiring ratios are officially just "goals" for achieving a balanced" workforce in which the number of female and minority employees reflects their share of the underlying population. Failure to meet a goal does not subject the employer to legal sanctions—as long as "good faith" efforts were made.

At least that's what Executive Order 11246 said when it established affirmative action programs for Federal agencies back in the late 1960s.

Two things stand out about the current system of goals/quotas. First, they cover a wide swath of U.S. companies. All employers with more than fifteen staff, public, private, or non-profit, come under the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures. All are obligated to match the mix of new hires with the racial, ethnic, and gender mix of qualified applicants. All can be sued by the EEOC for "discrimination" if the racial and gender mix of new hires differs sufficiently from the availability of such workers. EEOC regulations cover nearly 90 percent of the non-farm private sector workforce.

Then there is E.O. 11246 administered by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP). The Executive Order requires all Federal contractors and subcontractors with contracts worth more than $10,000 per year to prepare and file affirmative action plans. More than 400,000 corporations, covering about 42 percent of the private sector workforce, are under its purview.[8]

Unfortunately, what makes these statistical "guidelines" and "goals" so appealing is the very thing that undermines their credibility: They are easily distorted and misinterpreted by government bureaucrats. Any deviation

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[8] Peter Brimelow and Leslie Spencer, "When Quotas Replace Merit, Everybody Suffers," *Forbes*, February 15, 1993.

between hiring goals and population ratios can be construed as intentional discrimination—no matter what the underlying reality.

The threat of costly litigation has forced many employers to protect themselves by hiring unqualified minorities to satisfy the numerical goals. Even this isn't enough to satisfy affirmative action activists. In 1997, for example, five discrimination lawsuits were filed on behalf of black, Asian, and female employees of Boeing.

Boeing is the nation's largest defense contractor, with over $18 billion in federal contracts. It is the largest employer of minorities and females in the aerospace industry.

Boeing did not contest the two largest suits and instead agreed to pay $20 million to settle out of court. Jessie Jackson figured prominently in brokering the largest of the settlements—$15 million for black employees. Several non-profit organizations he controls profited handsomely from the deal.[9]

In its analysis of Boeing's alleged diversity lapses, the EEOC ignored seniority or years of service. Nevertheless, the contractor has subsequently spent more than $1.3 *billion* on race and gender based initiatives**.**

In November 2000, Coca Cola became the second U.S. firm to cave in to racial extortion demands of minority workers. In this case four black employees charged that the company (a) underpaid them because they are black and (b) created a hostile work environment. In addition to a $193 million cash settlement, Coke committed to spend $1 *billion* to promote business opportunities for preferred minorities and women.[10]

Oh yes: the allegations against Coke were never proven in a court of law.

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[9] Adversity.Net, "Case 33: Boeing Reverse Discrimination," Web posted March 23, 2003. http://www.adversity.net/c33_boeing.htm

[10] Adversity.Net, "Case 26: Quota Cola!", Web Update, June 15, 2003.

Similarly, Texaco agreed to settle disparate pay claims for about $3.1 million in 1999—the largest settlement in a glass ceiling case up to that time. Back pay was awarded, ranging from $1,700 to $51,000, as well as pay raises.[11] Once again the government made no finding of discrimination.

If discrimination is as widespread as activists claim, surely it exists in small and medium-sized companies also. Yet no federal lawsuit has ever been filed against such firms. Instead the legal actions have been directed solely at companies big enough to pay mega settlement amounts. Affirmative action shakedowns seem to be about money rather than equality and justice.

Nevertheless, the list of companies that have capitulated to unsubstantiated charges of racial discrimination reads like a Who's Who of U.S. business. The legal threats have created a "quota culture" in many U.S. corporations. Kodak's employee manual spells out in great detail what constitutes unacceptable views towards its diversity policies, along with steps employees should follow to notify management of violators.[12] Xerox ties a portion of its managers' bonuses to how well they promoted diversity efforts at the company.

Most ominous of all, United Airlines has reportedly reduced training requirements and pilot qualifications in order to hire the "right" number of selected minorities.[13]

LOOKING FOR DISCRIMINATION

No discrimination? That may sound improbable to the average citizen, but not to the economists who study labor markets. In a free market economy competition

[11] Ingersoll, op.cit.
[12] Adversity.Net, "Case 35: Kodaquota Introduction and Background," Web posted July 3, 2003.
[13] Adversity.Net, "Part 0: Introduction to United Airlines Affirmative Discrimination," September 13, 2004 update.

among employers for the most productive workers precludes discrimination. Employers who pay minority workers less than their "marginal product" will lose those workers to competitors. They will not survive. This process can be forestalled only by monopoly or government intervention—both f which occurred, for example, in South Africa under apartheid. And now in the U.S., under affirmative action.

Education and work experience are the two most reliable predictors of a worker's earnings. Black workers have historically been far less educated than white workers. Adjusting for racial differences in education levels, test scores, and work experience, 70 percent to 85 percent of the gap in income levels between white and black workers disappears. For black college graduates, the gap more than vanishes. Harvard economist Richard Freeman finds: "By the late 1970s, young black male college graduates attained rough income parity with young white graduates. Joseph Conti reports [in *Challenging the Civil Rights Establishment: Profiles of a New Black Vanguard*] that 'black college-educated females currently earn 125 percent of what white college educated females earn.'"[14]

All of which shows the fallacy underlying affirmative action in the American labor market.

The programs may even be counter-productive. Since the onset of affirmative action in the 1960s, the employment-population ratio for black workers has deteriorated relative to that of whites and Hispanics.[15] This could reflect the reluctance of employers to hire workers likely to file affirmative action lawsuits.

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[14] Reiland, op.cit.

[15] *Affirmative Action Review: Report to the President*, Clinton White House Staff, Chapter 3, July 19, 1995.

Minority unemployment usually responds to changing economic conditions more than white unemployment, reflecting the over-representation of blacks in manufacturing and other highly cyclical sectors of the economy. The trend held in the early 1990s; it abruptly ended with the economic recovery under the second Bush Administration. Indeed, the black unemployment rate is higher today than it was when the current economic recovery started thirteen quarters ago.[16]

Why the persistently high black unemployment rate? Discrimination may be the best explanation—but not the sort of discrimination affirmative action is designed to combat. The most racist policy in this country for the past quarter century has been immigration policy. U.S. companies knowingly employ millions of illegal immigrants while the government looks the other way. The illegals are paid less than comparable native minorities, but they obviously cannot sue their employers.

ECONOMIC COSTS

The onslaught of poorly educated, mainly Hispanic, immigrants has stymied good faith efforts of low income Americans—minority and white alike—to climb up the economic ladder.

If contracts were awarded to the lowest qualified bid, discrimination would not enter the picture. Firms that pay minority and female workers less than their "marginal product" would lose qualified workers—and their competitive advantage—to non-discriminating competitors. Eventually they would fold.

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[16] Edwin S. Rubenstein, "Why Has Black Unemployment Risen (Yes, Risen!) in the Bush Boom?," VDARE website, posted May 5, 2005. http://www.vdare.com/rubenstein/050504_nd.htm

The Bush White House seems immune to this point, however. Using Clinton-era standards, the Commerce Department has labeled industries awarded roughly three-quarters of all federal contracts—a truly staggering sum—guilty of discrimination, thereby making female- and minority-owned firms in these industries eligible for a 10-percent bid shelter.[17] Translation: Ten percent wiggle room on federal contracts for anyone of the appropriate skin color.

How much do federal set asides cost taxpayers?

Data provided to us by the Federal Procurement Data System shows $15.7 billion of federal contracts were awarded to firms owned by minorities and females in fiscal 2004. The amount of such contracts more than doubled since 2000:

FEDERAL CONTRACTS AWARDED TO MINORITY AND FEMALE OWNED FIRMS, 2000–2004			
(Obligated Amount in Billions of Dollars)			
Fiscal Year	**Minority Owned Firms**	**Female Owned Firms**	**Total**
2000	$0.089	$5.921	$6.010
2001	$0.161	$7.178	$7.339
2002	$0.342	$7.178	$7.520
2003	$0.761	$8.824	$9.585
2004	$6.019	$9.634	$15.653
Source: Federal Procurement Data System; unpublished statistics sent to author in July 2005.			

The premium for awarding contracts to minority- and female-headed enterprises is not supposed to exceed 10 percent, but on some contracts it can be

[17] Katherine Post, Director of the Center for Enterprise and Opportunity, "White House Makeover for Affirmative Action," June 30, 1998.

as high as 25 percent.[18] Two billion dollars (less than 15 percent of the $15.7 billion awarded in 2004) is thus a reasonable estimate of what such contracts cost taxpayers today.

Set asides are just the tip of the affirmative action iceberg. *All* firms awarded a federal contract worth $50,000 are subject to strict racial- and gender-based hiring regulations. Such firms must submit a written "affirmative action plan" to the Office of Federal Contract Compliance Programs (OFCCP), laying out, in excruciating detail, the special recruitment, monitoring, notification, review, and record-keeping procedures they will implement to hire the target percentages of minority and female employees.

A typical "Affirmative Action/Non-Discrimination/MBE-WBE Requirement" document lists "participation goals" for the construction trades. Carpenters for one job were expected to be 42.74 percent minority and 1.58 percent female; iron workers are expected to be 58.53 percent minority and 7.63 percent female.[19] There is no clue as to how those numbers were derived—but you can see the value of a minority female ironworker.

Contractors must keep records of each applicant and document reasons for not hiring a woman or minority candidate. Even if there are no openings, help wanted ads must be published—just to add potential female and minority hires to company files. The process is so onerous that the OFCCP's explanatory manual is about 700 pages long.

Public sector costs are substantial. The staffing and budget appropriations for the Equal Employment Opportunity Commission mushroomed during the 1990s, and have continued rising during the Bush years:

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[18] Brimelow and Spencer, op.cit.

[19] Tama Starr, "A Small Contractor Learns Affirmative Action Arithmetic," *Reason*, February 1996.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION OUTLAYS	
(Millions of Dollars; Fiscal years)	
1990	$181
2000	$290
2003	$315
2004 est.	$325
2005 est.	$347
Source: Susan Dudley and Melinda Warren, "Regulators' Budget Continues to Rise: An Analysis of the U.S. Budget for Fiscal Years 2004 and 2005," Mercatus Center, George Mason University and Weidenbaum Center, Washington University, July 2004.	

In 2005 an estimated 79,432 grievances will be filed with the EEOC—about the same annual amount as during its Clinton Administration heyday.

Research at the Center for the Study of American Business estimates that for every dollar spent on regulatory enforcement, about twenty dollars is spent on compliance costs by the private sector. Applying the 20-to-1 ratio to EEOC's estimated outlays, we arrive at $6.5 billion as the estimated cost to private sector firms of complying with federal affirmative action regulations in 2005.

Federal agencies spent a total of $1.7 billion to enforce all workplace regulations (affirmative action-related and others) in 2005. That translates to private sector compliance costs of $21.4 billion. How many more minorities and females would be working today had that amount been plowed back into businesses?

WHO BENEFITS?

Minorities have made considerable social and economic progress since the 1960s. Dropout rates have declined, college attendance rates are up, and the

black middle-class has expanded. Minority wages have come closer to parity with whites. These gains have occurred despite, rather than because of, affirmative action.

Here are some of the unintended consequences of the race and gender preferences enforced by the federal government:

● They benefit primarily the upper echelon of the preferred group (e.g., minority millionaires and political leaders) often to the detriment of non-preferred groups (e.g., poor whites).

● They put a cloud over minority workers who have advanced because of their innate ability.

● They encourage non-preferred groups to fraudulently present themselves as members of preferred groups.

● They reduce incentives of both groups to perform at their best—the preferred because they don't have to, the non-preferred because extra effort seems futile.

● They've increased incentives to hire illegal immigrants who cannot sue for alleged EEOC violations.

● They've forced employers to spend billions on compliance instead of productive investments, thereby reducing employment opportunities for all groups.

A rollback of affirmative action may be one of the most efficient pro-growth policies available to the federal government.

Edwin S. Rubenstein, President, ESR Research, has 25 years experience in business research, financial analysis, and economics journalism. Mr. Rubenstein joined Hudson Institute, a public policy think tank headquartered in Indianapolis, as Director of Research in November 1997. At Hudson he wrote proposals and conducted research on a wide array of topics, including work-

force development, the impact of AIDS on South Africa's labor force, Boston's "Big Dig" the economic impact of transportation infrastructure, and the future of the private water industry in the U.S. Mr. Rubenstein is also an adjunct fellow at the Manhattan Institute, where he is principal investigator in the institute's ongoing analysis of New York State's budget and tax structure.

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