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A Solution in Search of a Problem? Discrimination, Affirmative Action, and the New Public Service

This article by Professor Sally Selden raises a number of interesting points relevant to the contemporary debate over affirmative action in the United States. She provides important insights gleaned from an analysis of the burgeoning literature on the subject and offers valuable lessons for policymakers, commentators, and other interested observers. While it is impossible to address all of her points in this brief commentary, I want to provide a further elaboration and discussion of several issues of relevance to *PAR* readers. I will begin by corroborating her point that affirmative action's time has not passed: discrimination remains a pernicious problem in the United States. As such, I argue next that it is important that we continue to monitor the rep-

resentativeness of public organizations. Today we know that a more representative public workforce can be an important tool in assisting us in reconciling bureaucratic power and democratic governance. My commentary continues by urging sensitivity to conceptual and legal distinctions integral to affirmative action programs, and the importance of quality research on the ultimate impact of affirmative action on targeted populations.

A Problem Still in Need of Solutions

As Professor Selden notes, "affirmative action is not a solution chasing a problem from a by-gone era." Discrimination directed against racial and ethnic minorities and women has, unfortunately, not been eliminated.

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Some of the best evidence for the perdurability of discrimination is given by studies that send matched pairs of minority and non-minority job applicants with equivalent qualifications to apply for advertised jobs. Invariably, white applicants receive more interviews and job offers than African-American or Latino applicants. Studies documenting these outcomes were conducted in the early 1990s in Washington, DC and Chicago (Fix and Struyk 1992). In 20 to 36 percent of the cases, the minority applicant either was denied an opportunity (while the white applicant was not), was subjected to long delays, or was offered an inferior position or lower wages (see also Neumark 1996). This evidence of discrimination is supplemented by numerous economic studies conducted over the past several years documenting discriminatory wage gaps between women and men and between minorities and whites (e.g., Neal and Johnson 1998; Stanley and Jarrell 1998). Moreover, a contemporary review of data from the U.S. Labor Department's *Current Population Survey* (U.S. Bureau of Labor Statistics 2006) reveals that such wage disparities continue. Thus, while there can be no doubt that significant progress has been made in combating discrimination directed against minorities and women, much work continues to be necessary, and affirmative action can be a valuable tool when minorities or women are represented in organizations in numbers lower than would be expected given their qualifications.

Bureaucracy, Democracy, and Affirmative Action

In light of this reality, tracking the representation of minorities and women within public organizations is extremely important. In fact, the representativeness of public institutions can be a principal indicator of the progress we are making toward achieving broader social justice. Moreover, these

measurements can alert managers and attentive publics to the need to pay attention to how existing practices may be advancing or retarding this important societal goal. This is not to say, of course, that women and minorities necessarily must be found in every division of every organization, but the absence of minorities and women should, at a minimum, call selection practices into question. Government jobs are valuable public resources. Justice demands that they be distributed in such a manner that minorities, women, or individuals from other groups that have historically suffered discrimination are no longer systematically screened out of employment opportunities for which they are qualified.

Furthermore, the point often has been made that the government has an obligation to set a proper example for the private sector, since it is the government that is the enforcer of nondiscrimination law for private employers (see, e.g., Kellough 1989; Krislov 1974). If government does not pursue fair employment practices, how can we expect it to require such practices from others? Also, as Professor Selden documents and Lael Kaiser discusses more extensively in her commentary, there is a well-developed body of research demonstrating that in many circumstances the presence of minorities and women within public bureaucracies will help to ensure that the interests of those groups are not overlooked in the policy process.

A public workforce that is broadly representative of the people, in terms of characteristics such as race, ethnicity, and sex, will lead to bureaucratic policies and programs that better reflect the broad public interest. In other words, passive representation, or the presence of minorities and women in bureaucratic positions, leads to active representation of the interests of members of those

groups. As a result, programs such as affirmative action, that are intended to make the public workforce more representative of the people, help to ensure that the bureaucratic policy process reflects the values of all of the people. By doing so, they assist in easing the tension between the presence of a powerful bureaucratic state and the ideals of democracy (see, e.g., Dolan and Rosenbloom 2003; Selden 1997).

Optimism or Pessimism? Some Key Conceptual and Legal Distinctions to Keep in Mind

As Professor Selden notes in even greater detail in the extended e-version of her article on the *PAR* website, the United States has a long history of efforts to deal with historic patterns of discrimination that have disadvantaged minorities and women. However, all of those efforts are not properly referred to as affirmative action, and those programs which do legitimately bear that label come in different forms. As such, any effort to assess the short- or long-term prospects for affirmative action as we know it today must take into consideration what really constitutes affirmative action in the U.S. and the nuances of court decisions related to it. To appreciate these points, a brief historical synopsis is useful.

The earliest attempts by the federal government to combat discrimination within its own workforce and among its contractors consisted only of policy statements indicating that such activity was prohibited. Later, efforts were included to allow for formal allegations of discrimination to be registered and for those complaints to be investigated. While those policies obviously remain important to this day, by the early 1960s, affirmative action emerged as a significant additional strategy. The earliest affirmative action programs focused on inclusive recruitment activities and training programs in-

tended to ensure that all people, regardless of race, ethnicity, or sex, were afforded the opportunity to advance their careers. By the late 1960s, however, the slow rate of progress for minorities and women prompted the implementation of additional approaches to affirmative action that involved numerical goals and limited preferences for the selection of women and minorities (Kellough 1989). Eventually, similar programs were adopted by state and local governments and private employers.

Preferential policies suggest that when women or minorities are underrepresented and qualified individuals from those groups are interested in a position, they should be preferred over non-minorities or men. It is these types of programs that have generated substantial controversy, because they tip the selection process in favor of groups that have suffered discrimination in the past. Moreover, by doing so, they transcend the principle of nondiscrimination that presumably was the basis of earlier efforts. Preferences are undoubtedly what most people call to mind today when they think of affirmative action. Thus, as Professor Selden points out in her essay, such policies have been the focus of intense and often acrimonious debate and litigation over the past three decades.

Ultimately, the U.S. Supreme Court is the arbiter of what is legally permissible in terms of preferential affirmative action. Legal challenges to those policies are mounted in two ways. First, a case can be made on the basis of statutory law. The allegation here would be that affirmative action has violated the Civil Rights Act of 1964. If the issue involves employment, the charge would be that the affirmative action program under consideration is prohibited by Title VII of the 1964 law (as amended). As is widely understood, Title VII makes it an

unlawful employment practice to base employment decisions on factors such as race, ethnicity, or sex. Title VII covers private employers (with fifteen or more employees) and public employers. Any affirmative action program that involves the use of preferences would need to be reconciled with Title VII if it is challenged on that basis. The Supreme Court has ruled twice on the legality of preferential affirmative action under Title VII (*United Steelworkers of America v. Weber* [443 U.S. 193 (1979)]; *Johnson v. Transportation Agency* [480 U.S. 616 (1987)]) and has found such programs to be permissible if they (1) are targeted to address a manifest racial or sexual imbalance in traditionally segregated job categories, (2) do not trammel the rights of non-minorities or men, and (3) are constructed as a temporary strategy.

The second method of challenging preferential affirmative action is to argue that the program is inconsistent with the constitutional guarantee of equal protection of the laws. Importantly, however, such a challenge can only be initiated if the program at issue is established by a government organization. This is because the constitution limits the ability of government to deny individuals equal protection. It does not regulate private firms. This constraint on governmental authority is explicit in the Fourteenth Amendment, which applies to the states (and their local subdivisions), and is implicit in the Fifth Amendment's guarantee of due process, which limits federal authority.

Professor Selden notes that there has been a narrowing of affirmative action by the courts since the late 1980s. That observation is correct, however, only with regard to *constitutional* limitations on affirmative action, and (as just noted) those limitations only apply to governmental programs. No statutory case has been heard since 1987 by the Supreme

Court. That case—*Johnson v. Transportation Agency*—affirmed a standard of legality that had been articulated earlier in *Steelworkers v. Weber*. Relatedly, many private businesses—some but not all of which may be involved in partnering with government agencies in the networked state—operate preferential affirmative action programs. However, the standard of legality with which they must comply is, at least currently, less restrictive than the constitutional constraints imposed on government agencies. This is why it is important when reviewing affirmative action jurisprudence to distinguish between constitutional and statutory cases.

Thus, as Professor Selden correctly notes, it has been clear since the late 1980s that, under the U.S. Constitution, state or local government affirmative action programs must serve a "compelling governmental interest" and must be "narrowly tailored" to meet that interest. That standard, fashioned by the court under a level of review known as "strict scrutiny," is much more difficult to meet than the statutory limitations that provide the only restrictions on private sector programs. Moreover, the more difficult strict scrutiny standard was applied to federal government programs in 1995 in *Adarand v. Peña* (505 U.S. 200).

It is also important to reinforce Professor Selden's point that many of the constitutional challenges to affirmative action have involved preferential programs for minorities and women in admissions procedures at state colleges and universities. Through the 1990s, several cases were heard at the circuit court level, and depending on which circuit was involved, different decisions were reached. The standard, again, was strict scrutiny, as defenders had to show that these programs served compelling governmental interests and were narrowly tailored. Typi-

cally, as Professor Selden notes, the schools involved in these cases argued that diversity within a student body was a sufficiently compelling interest of the state to warrant a program that involved limited preferences.

By the summer of 2002, two circuits (the 6th and the 9th) had agreed with that argument, but two others (the 5th and the 11th) rejected it and ruled that preferential affirmative action could not pass constitutional review. As Professor Selden also writes, in two cases that arose from undergraduate and law school admissions at the University of Michigan, the U.S. Supreme Court later determined that diversity among students at a state university is indeed a compelling interest of government (*Gratz v. Bollinger*, 539 U.S. 244 [2003]; *Grutter v. Bollinger*, 539 U.S. 306 [2003]). Ultimately, the undergraduate admissions program was struck down. The court found that it was not narrowly tailored, since the preferences were applied to minority applicants in a formulaic fashion. The law school program was upheld, however, since it provided for individualized consideration of each applicant's file and their contributions to campus diversity.

Cutting Through the Rhetoric: Why the Quality of Research on Impacts Matters

Finally, in sorting out the debate over affirmative action and assessing its future prospects, it is important to consider the impact of the policy itself. As Professor Selden implies, the context of the argument would shift if it were found that affirmative action had little effect on the distribution of opportunities. Several important supplemental points should be made, however, when considering assessments of impact. First, care must be taken to be sure that studies purporting to measure the effects of affirmative action are able to separate the effects of the

policy from the effects of other variables. This is a question of research methodology and the internal validity of the research design utilized [*Editors' Note*: See Professor Keiser's additional points regarding methodology in her commentary].

The question is, "What does employment or university enrollment of minorities, for example, look like following affirmative action and, importantly, what would those levels have been were it not for affirmative action?" The estimate of "what would have been" is critical, and it is, in fact, always an estimate—generated typically from a comparison group or pre-intervention data. An observation that more women and minorities are entering college today than in the 1960s, for example, does not necessarily mean that affirmative action produced that result. For example, there have been notable shifts in attitudes on issues related to integration and broad social change caused by a variety of factors since the 1960s, and the impact of those changes are, in the aggregate, mixed with those of affirmative action policies [*Editors' Note*: See Professor Bearfield's comments more broadly on this point]. As such, affirmative action in higher education or employment is best assessed by examining specific programs in identified organizations and observing selection patterns before and after those programs were put into place. Fortunately, a number of systematic and rigorous studies taking this approach have been conducted. On balance, that research shows that preferential affirmative action programs have made a significant and positive difference for targeted groups (for a review of much of this research, see Kellough 2006).

Some of these more rigorous research designs also have lent additional support for the efficacy of affirmative action approaches by addressing critics' arguments that it pro-

duces reverse discrimination. Several have found that while underrepresented groups do benefit from affirmative action programs, the disadvantage it causes non-minorities is typically small (Kellough 2006; for a broader summary of this literature, see Professor Keiser's commentary). This is particularly true for affirmative action targeted toward underrepresented racial and ethnic minorities. This is the case because, even if qualifications are distributed proportionately (which they often are not), the number of minority group members qualified for selection is smaller than the number of non-minority individuals.

When minorities are disproportionately underrepresented among the qualified, the number of minority group members qualified for selection will be significantly smaller than the number of non-minorities. As a result, the inclusion of qualified minorities in competition for various opportunities will usually diminish the odds of selection of any particular non-minority individual only slightly. This point is true for women, as well, when the inclusion of previously excluded qualified women does not substantially increase the size of the selection pool. For instance, if an applicant pool was expanded from fifty individuals to sixty following the inclusion of women, the odds of any particular male being selected decline only from 0.020 to 0.016 (Kellough 2006, 154, note 24).

This general point can be further illustrated by pretest-posttest research looking at data from the University of California at Berkeley immediately following the termination of preferential affirmative action on that campus. As reported by William G. Bowen and Derek Bok (1998), the black probability of admission at Berkeley fell from 48.5 percent in 1997 (under affirmative action) to 15.6 percent in 1998 (post affirmative ac-

tion), while the white probability of admission rose from 29.9 percent to 30.3 percent during that same period (Bowen and Bok 1998, 32-33). This trend produced a decline in black enrollment from 6.8 percent to 2.4 percent. As a result, termination of affirmative action clearly had a visible and negative effect on African-American students. However, because they and other targeted minorities comprised such a small segment of student enrollment at Berkeley compared to whites even when affirmative action was in place, the termination of affirmative action did not lead to a significant increase in white student admission.

In trying to account for critics' opposition despite little evidence of actual reverse discrimination, Bowen and Bok use the example of parking spaces reserved for disabled drivers as an analogy for preferential affirmative action. They cite Thomas Kane (1998) who argues that "eliminating the reserved space would have only a minuscule effect on parking options for non-disabled drivers. But the sight of the open space will frustrate many passing motorists who are looking for a space. Many are likely to believe that they would now be parked if the space were not reserved" (Bowen and Bok 1998, 36-37). The point is that the proportion of all spaces that is reserved for disabled drivers is quite small, and it is likely that if the spaces were not reserved, at any given time a passing non-disabled driver would find them occupied by other non-disabled drivers.

Some Thoughts on Future Research

Where should research on these issues go in the future? I believe it would be helpful if scholars expanded the line of inquiry that examines the impact of diversity on organizations and their performance. Much important work has already been undertaken on the relationship between productivity and

racial diversity in workgroups, and findings suggest that diversity can increase productivity when a group is confronted with complex tasks and the members have been together long enough for effective interaction and communication processes to emerge (Kellough 2006, 78-79).

Further work on this topic could prove beneficial in view of the Supreme Court's finding in 2003 in the University of Michigan cases. As we know, diversity was judged to be a compelling interest in those cases, because it enhanced the educational environment. In other words, diversity helped the organization (the University) to better achieve its goal of providing a quality education. Similar arguments could be made in the context of public employment if it could be demonstrated that workforce diversity helped to make government agencies and bureaus more effective in reaching their goals.

In a sense, the literature that has already been amassed on the issues of representative bureaucracy and the link between passive and active representation makes this point (again, see Lael Keiser's commentary). We know that at least in some circumstances public agencies with employees that are representative of the general public (in those that employ men and women from diverse racial and ethnic backgrounds) are more likely to implement policies that reflect the full array of values of the people than are organizations whose workforces are less representative. Research that further specifies the circumstances under which active representation occurs could contribute importantly to discussions of the future of affirmative action.

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