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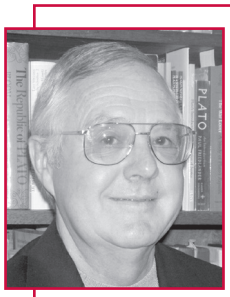

The Michigan Affirmative Action Cases: An Historical Perspective

Edward J. Erler

Professor of Political Science, California State University, San Bernardino

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EDWARD J. ERLER, professor of political science at California State University, San Bernardino, received his Ph.D. from the Claremont Graduate School. He is the author of *The American Polity: Essays on the Theory and Practice of Constitutional Government* and numerous articles on political philosophy and constitutional law. Among his most recent articles are "From Subjects to Citizens: The Social Contract Origins of American Citizenship" and "Californians and Their Constitution: Progressivism, Direct Democracy and the Administrative State." Dr. Erler has been a member of the California Advisory Commission on Civil Rights since 1988 and served on the California Constitutional Revision Commission in 1996.

The following is adapted from a lecture at a seminar sponsored by Hillsdale College's Hoogland Center for Teacher Excellence. The topic of the seminar, held at the Dow Leadership Center on the Hillsdale Campus, was "Natural Rights and Justice: Teaching the American Civil Rights Movement."

The Fourteenth Amendment cannot properly be understood except in terms of the principles of the Declaration of Independence. The Constitution itself was written to be an expression of those principles. But insofar as it allowed slavery to continue, the Constitution was only an incomplete expression. Slavery was a manifest violation of the central tenet of the Declaration that "all men are created equal," and of the injunction that just rule must therefore proceed from the consent of the governed. The framers of the Constitution went as far as they could in this direction, given the political circumstances of the time. But they could not go all the way. Understanding this, the framers of the Fourteenth Amendment described it as a completion of the Constitution. For instance, Thaddeus Stevens, a prominent member of the Joint Committee on Reconstruction, remarked that the framers of the Constitution were compelled by political necessity to postpone the "full establishment" of the principles of the Declaration "till a more propitious time. That time ought to be present now."

The formal completion of the Constitution was actually achieved with the passage of *three* amendments following the Civil War: the Thirteenth, which abolished slavery; the Fourteenth, which extended citizenship and civil rights to the newly freed slaves; and the Fifteenth, which protected the right to vote against racial discrimination. But this formal completion had to be translated into constitutional practice, a task that in some sense was the most difficult of all.

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The Fourteenth Amendment Derailed

The Fourteenth Amendment, ratified in 1868, is the most important of the post-Civil War amendments. It established the first definition of citizenship in the Constitution, making federal citizenship primary and state citizenship derivative, thereby securing the citizenship of newly freed slaves and nullifying the Supreme Court's 1854 *Dred Scot* decision. It also prohibited any State from abridging "the privileges and immunities" of Federal citizenship; from depriving "any person of life, liberty or property, without due process of law"; and from denying to "any person within its jurisdiction the equal protection of the laws." Each of these clauses has been, at one time or another, the center of fierce constitutional controversy. In the context of recent affirmative action cases, the equal protection clause is most relevant.

Equal protection means first and foremost that every individual is guaranteed the equal protection of equal rights. These rights belong to individuals because they are inherent in human nature. In this sense, "all men are created equal" and no person has a right to rule another without his consent. Rights – both natural and civil – belong to individuals, not groups, and any attempt to condition the possession and enjoyment of rights on race or other class characteristics is a violation of equal protection. Race is an accidental, not an essential feature of human nature, and the rule of law prohibits arbitrariness in its classifications. Since race is an arbitrary category, it is excluded ipso facto by the rule of law. This is the principle behind Justice John Harlan's famous dissent in the 1896 case of *Plessy v. Ferguson*. The majority in that case – which concerned segregated railway cars – held that the law could treat people separately according to their race, as long as it treated them equally. Justice Harlan disagreed, arguing that the Constitution is "colorblind." It is colorblind because the rule of law is colorblind, and because the idea of man itself – as reflected in the principles of the Declaration – is colorblind.

The pivotal case in modern equal protection jurisprudence was the 1954 school desegregation case, *Brown v. Board of Education*. Contrary to most constitutional experts today, *Brown* was one of the worst opinions ever written. Of course, the result was eminently correct. There is no doubt that racially segregated public schools violate the Constitution's equal protection clause. But the *reasoning* of the opinion was unsound, in that it utterly ignored the Constitution.

Chief Justice Earl Warren, who wrote the majority opinion in *Brown*, dismissed the intentions of the framers of the Fourteenth Amendment as unclear. "The most avid proponents" of the Amendment, he noted, "undoubtedly intended…to remove all legal distinctions" based on race. Its opponents, however, wanted just as vigorously to restrict the reach of the Amendment, and what others had in mind "cannot be determined with any degree of certainty." The logic of this argument is puzzling, to say the least. After all, the proponents of the Fourteenth Amendment *won*. The arguments of its opponents and the undecided are hardly relevant. But this is precisely Chief Justice Warren's argument in discounting the possibility of being guided by the Constitution.

The lead editorial on *Brown v. Board of Education* in the *New York Times*, published on May 23, 1954, celebrated the demise of the "separate but equal" doctrine of *Plessy v. Ferguson*. Finally, it announced, Justice Harlan's view of a "colorblind Constitution" has been vindicated. But the editorial was wrong. "Separate but equal" should have been overruled, but it was not. Indeed, far from being overruled, the "separate but equal" doctrine was given new life by the *Brown* decision.

Chief Justice Warren argued that to separate school children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone." "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," he wrote, "this finding is amply supported by modern authority."

In *Plessy*, the majority had argued that a legal separation of the races does not imply a relationship of superior and inferior – that any "feelings of inferiority" generated by the separation were merely subjective. Any "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority," the majority wrote, "is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

For its part, the *Brown* decision based its finding on the same ground of interpretation as *Plessy*. It differed in its interpretation of facts, not in its principle of constitutional construction. According to the *Brown* decision, *Plessy* was only in error insofar as it was inconsistent with the authority of modern psychology, which tells us that a "feeling of inferiority" is a fact of inferiority from the point of view of equal protection analysis. Thus the authority of modern psychology replaced the authority of the Constitution.

Harlan's justly celebrated dissent in *Plessy* was never mentioned by Chief Justice Warren, who seems to have gone out of his way to avoid a ruling that the Constitution is colorblind. The *Brown* decision stands for the proposition that racial classifications offend the Constitution *only when they create feelings of inferiority*. Understanding this, defenders of affirmative action and other forms of racial preference today argue that racial classifications that are designed to benefit "discrete and insular" minorities, rather than harm them, do not create "feelings of inferiority" or "stigmatize" the benefited races. Thus did *Brown* reinvigorate the "separate but equal" doctrine of *Plessy*.

The continued vitality of "separate but equal" was made abundantly clear in Justice Harry Blackmun's opinion in the 1978 affirmative action case of *Regents v. Bakke*:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful…. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

Blackmun could well have said "separately" instead of "differently" without changing his meaning. Although not generally recognized by the legal and political elites of the time – or those of today – it was a scandal to see this once justly decried doctrine making its way back to respectability.

The Civil Rights Act of 1964 Derailed

The Civil Rights Act of 1964, in the tradition of Justice Harlan's dissent, was a good expression of what the Fourteenth Amendment meant by "equal protection of the laws." It prohibited discrimination against individuals on the basis of race, ethnicity and religion. It embodied equal opportunity as its principle of distributive justice – the equal protection of equal rights. It required that natural talents and abilities, not artificial distinctions based on race or ethnicity, should be the measure of success. It insisted that rights belong to individuals, not racial classes or ethnic groups. The rule of law – as the rule of reason – demanded no less.

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But these noble aspirations of the Civil Rights Act were almost immediately deemed inadequate. In June 1965, President Lyndon Johnson set the tone for a new vision of civil rights. "Freedom is not enough," he proclaimed.

> It is not enough just to open the gates of opportunity…. We seek…not just equality as a right and a theory but equality as a fact and equality as a result…. To this end equal opportunity is essential, but not enough.

The sweep of this pronouncement was breathtaking. If equal opportunity is not enough, then some form of unequal opportunity is necessary to achieve equality of result. If freedom is not enough, restrictions on the freedom of some are necessary for the advancement of others – those who came to be known in affirmative action parlance as "specially protected classes" or "preferred classes." Courts and administrative agencies set about implementing this new vision of equal rights, which was now said to require racial classifications in order to succeed. The watchword of this new vision of civil rights was class rights rather than individual rights.

The racial genie, having finally been confined by powerful legal restraints in the Civil Rights Act of 1964, was released again. Many believed that the genie had changed its nature and could be employed as a force for good. But that was naive and dangerous. The racial genie tells us to forget the principles of the Declaration. It insists that race is not accidental, but an essential feature of the human persona. It urges us to embrace race openly and honestly – to make it the basis for an administrative state that promises genuine racial progress. But anyone with the slightest acquaintance with human history knows that this siren song presages only evil in the guise of progress.

There is no way to say that rights belong to classes without discarding the notion that the first object of civil society is the equal protection of equal rights. If rights belong to classes and not to individuals, then equal protection of the laws is impossible. Class considerations abstract from the individual and ascribe to him class characteristics that are different – and necessarily unequal – from those of individuals outside the class. Class claims are claims of inequality, not equality. Likewise, class remedies, such as affirmative action and racial set-asides, assume that all members of the "monolithic white majority" are guilty of racial class injuries and all members of "discrete and insular" minorities are victims of such injuries. But this is pure fiction. As Justice Clarence Thomas noted in his concurring opinion in the 1995 case of *Missouri v. Jenkins*, "it goes without saying that only individuals can suffer from discrimination, and only individuals can receive the remedy." Class remedies will afford benefits to some who have not been injured and trammel the rights of some who have not perpetrated injuries. This lack of correspondence between rights and remedies violates the rule of law by making the assignment of rights and remedies simply arbitrary.

In *Regents v. Bakke*, a minority of four members of the Court, led by Justice William Brennan, argued that the Civil Rights Act of 1964 was designed to be a class remedy for racial class rights, and that since "whites as a class" need no protection from the majoritarian political process, no individual in that class can have standing under the Act. As a member of the white majority that passed the law, the plaintiff in *Bakke* had, in effect, imposed the injury upon himself. Thus he had no standing to challenge the racial preferences in the law. This line of reasoning briefly achieved majority status in two subsequent cases, but was decisively rejected in the 1995 case of *Adarand v. Pena*.

In *Adarand* a majority of the Court, led by Justice Sandra Day O'Connor, held that any law or policy based on a racial classification – whether intended to harm or to benefit racial minorities – must be subjected to "strict scrutiny." Under strict scrutiny analysis, no racial classification is permitted unless it can be proven to further a "compelling state interest." The majority in *Adarand* was badly split on the application of the strict scrutiny doctrine. Justice O'Connor argued that racial classifications might survive in rare instances, while Justices Thomas and Scalia held that such classifications can never pass muster. Thomas cited the Declaration as support for his much maligned but correct conclusion that there is a "moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster *some current notion of equality*."

The Michigan Cases of 2003

In *Gratz v. Bollinger*, one of the two affirmative action decisions handed down this summer, the Supreme Court struck down the University of Michigan's undergraduate affirmative action

admissions program for employing a racial quota. Writing for the majority, Chief Justice Rehnquist argued that the admissions policy, "which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that [the University] claim[s] justifies [its] program." (One ingredient of strict scrutiny analysis is that even if there is a compelling state interest in considering race, the use of racial classifications must be minimal or "narrowly tailored.") Rehnquist, it is worth noting, did not concede in this opinion that the University had a compelling interest in promoting racial diversity. It was not necessary in *Gratz* to address that question because it was clear that the University operated a quota system that was not narrowly tailored to achieve its asserted interest.

Writing for the majority in the companion case, *Grutter v. Bollinger*, Justice O'Connor reached back 25 years for her authority, to an argument made by Justice Lewis Powell in *Bakke*. Powell had argued, based on the First Amendment's protection of "academic freedom," that universities have a unique interest in promoting diversity among students. No other justice in 1978 had joined in this opinion and its authority seemed to be limited. But Justice O'Connor was not deterred, and asserted that the University of Michigan Law School does indeed have a compelling interest in promoting a diverse student body through racial preferences. She did not attempt to explain the necessity of diversity in law schools, merely deferring to the good faith representations by University officials that it enhances education. Such deference to state actors is virtually unheard of in strict scrutiny analysis – for good and obvious reasons. But Justice O'Connor wrote that "universities occupy a special niche in our constitutional tradition," and that equal protection considerations must be subordinated to this privileged constitutional position. Based on this aspect of her opinion, there is some ground for arguing that the ruling will be limited to educational institutions.

The majority in *Grutter* also held that the Law School admissions policy did not employ a racial quota system, but rather sought to achieve a "critical mass" of "underrepresented minority students." Unlike a "racial quota," a "critical mass" does not involve "outright racial balancing," which would be "patently unconstitutional." A "critical mass" is defined as a sufficient number to insure that "underrepresented minority students do not feel isolated or like spokespersons for their race." (The University may not admit minority students for the purpose of having a minority point of view represented, because that would be "impermissible stereotyping." A "critical mass" can only be used to *dispel* "racial stereotypes" by demonstrating that there are "a variety of viewpoints among minority students.")

University of Michigan officials said that a "critical mass" could be anywhere between 12 and 20 percent of the student body. Although there is no single fixed number involved, dissenters pointed out that "critical mass" is merely a quota in disguise. Indeed, Justice Thomas contended that the distinction between the two was "purely sophistic." At any rate, in one of the most bizarre turns in an already strange opinion, Justice O'Connor said that the University could employ these "racial preferences" only for another 25 years. By that time, she claimed, the playing field will have been leveled and preferences will no longer be necessary.

Forty years ago, skeptics were assured that affirmative action was only a temporary measure, and that it would end when genuine equal opportunity had been achieved. But everyone knew – or should have known – that once racial class entitlements are established, they are not easily abolished. Twenty-five years from now, the idea they are based on will only become stronger. There is no self-limiting "termination point" in the regime of racial entitlements.

In a powerful dissent in *Grutter*, Justice Thomas noted that "the Constitution abhors classifications based on race…because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." Thomas concluded that the majority decision "has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause." Just so.

- Hillsdale Highlights -

New at Hillsdale College: Professional Sales Internship Program and Entrepreneurial Seminar Series

Bob Thomas
Author, *The Fail-Proof Enterprise – A Success Model for Entrepreneurs*

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BOB THOMAS has co-founded and served as CEO of two companies: UNI-LOC, a high-tech instrumentation company which is now a division of Emerson Process, and TBI, a high-tech company which was sold to Bailey Controls. He has also served four years as a governor's appointee to the Nevada State Welfare Board, four years on the Carson City School Board and three terms in the Nevada Legislature. Mr. Thomas is the author of a new book, *The Fail-Proof Enterprise – A Success Model for Entrepreneurs*, which has been selected for use in Hillsdale's Entrepreneurial Seminar Series.

The following is adapted from a presentation at Hillsdale College.

Exciting things are always happening at Hillsdale College. One of the latest is the Department of Business Administration's creation of the Professional Sales Internship Program, which provides qualified students an introduction to actual work in the field of professional sales.

Professional salespersons are college graduates who sell goods and services to other professionals. They represent the most prestigious companies in the world, and their customers include doctors, lawyers, scientists, universities, libraries, research labs and high-tech companies.

It's a good bet that sales is one of the least talked about of possible careers on college campuses, despite how critical it is to the American economy – not to mention the fact that it is perhaps the fastest track into top management. When I talk to young people about sales, I'm invariably asked, "Besides car salesmen, telemarketers and retail clerks, who else is in sales?" I answer, "Just about everybody." Some of the greatest salespeople I've ever known are college presidents and corporate CEOs. After all, what is sales but persuasion?

Whether we are aware of it or not, every day of our lives we are surrounded by people selling things, from gizmos all the way to ideas. And the most successful at the art of sales are those with a college education – especially those with liberal arts degrees. Why? Because selling at the professional level calls for dealing with the widest variety of well-educated customers.

That is why Hillsdale is the perfect setting for the Professional Sales Internship Program. It works like this: Each year, eight of the College's top junior class business students are identified on the basis of intelligence and character. Six of the eight are then selected to be placed as interns, during the summer following their junior year, with six top companies across the country. Their salaries and living expenses are paid for by the College. In return, the companies immerse them in sales activities and grade them at summer's end.

Increasing numbers of companies are exploring participation in this program, which will grow with demand.

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Another of Hillsdale's notable new business programs is the Entrepreneurial Seminar Series. "Entrepreneurship" is a word often misused these days. Over the past 30 years, much has been written about the subject, and most of it comes up short. Colleges and universities typically know and care little about entrepreneurship, as a result of which students are rarely exposed to the character and way of thinking that is the driving force of the free-market system.

Misfits, mavericks, restless guns or whatever else you call them, those who are best

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suited to be entrepreneurs make bureaucrats uncomfortable. And because institutions of higher learning tend to be bureaucratic, they (like bureaucratic governments and big corporations) are not inclined either to encourage the entrepreneurial spirit or to respect entrepreneurs. It is one of the great distinctions of Hillsdale College that this is not the case there.

Well known as the home of the Ludwig von Mises library and as an institution devoted from its beginning to the principles of the American Constitution, Hillsdale College supports the system of free enterprise which alone is compatible with America's founding principles of individual rights and limited government. As such, it has the highest regard for the character and work of the entrepreneurial businessman. The Entrepreneurial Seminar Series, which attempts to bridge the gap between entrepreneurial theory and entrepreneurial practice, reflects Hillsdales's long-standing support of freedom.

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