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Two "Wrongs" Do/Can Make a Right: Remembering Mathematics, Physics, & Various Legal Analogies (Two Negatives Make a Positive; Are Remedies Wrong?) The Law Has Made Him Equal, But Man Has Not

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**TWO “WRONGS” DO/CAN MAKE A RIGHT:
REMEMBERING MATHEMATICS, PHYSICS, &
VARIOUS LEGAL ANALOGIES (TWO NEGATIVES
MAKE A POSITIVE; ARE REMEDIES WRONG?)
THE LAW HAS MADE HIM EQUAL, BUT MAN HAS
NOT**

John C. Duncan, Jr.*

“It is thought that justice is equality, and so it is, but not for all persons, only those who are equal.”

Aristotle¹

Equal- “alike; uniform; on the same plane or level with respect to efficiency, worth, value, amount or rights.”²

I. INTRODUCTION

This article demonstrates the incomplete logic and inconsistent legal reasoning used in the argument against affirmative action. The phrase “two wrongs don’t make a right” is often heard in addressing various attempts to equalize, to balance, and to correct the acknowledged wrongs of slavery and segregation and their derivative effects. Yet, “two wrongs do/can make a right” has a positive connotation, or at least is not considered a wrong to correct alleged wrongful actions in other areas. One example of such a remedy is veterans’ preference to balance or make up for soldiers having put their lives in

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¹ ARISTOTLE, POLITICS (H. Rackham trans., 1977).

² BLACK’S LAW DICTIONARY 536 (6th ed. 1990).

harms way. Another example is the remedy of reparations for the wrongful internment of Japanese Americans during World War II. Some other examples of actions which have these rightful or affirmative remedies are environmental wrongs³, anti-trust violations⁴, employment discriminations⁵, labor-management unfair practices⁶, and disability concerns⁷ to name a few. Whereas in the area of remedying wrongs in civil rights involving minorities, especially Blacks, the second wrong necessary to establish Blacks⁸ on equal ground is considered “reverse discrimination.” The remedy conveys to some the disparaging connotation of a “wrong.”

The premise that “two wrongs don’t make a right” finds its origins as an English proverb in the late eighteenth century.⁹ This proverbial saying is especially applied in the context of punishment or retaliation. More “words of the wise” than deep philosophical contemplation, the slogan has been used to show that “wronging” the person that wronged you is not a socially acceptable solution.

This article reviews the history of societal and judicial wrongs against Blacks, as well as the evolution of the narrowing in legal reasoning concerning discrimination against minorities, including Blacks. Next, the legal reasoning behind legacy programs, considered true reverse discrimination by this author,

³ See *infra* pages 68-70

⁴ See *infra* page 73

⁵ See *infra* pages 77-81

⁶ *Id.*

⁷ See *infra* pages 81-83

⁸ The following terms may be used interchangeably in this paper, Afro-American, African American, Black, Colored, Negro. The use of the terms “Black” and “White” in relation to race will be capitalized in this article.

⁹ ELIZABETH KNOWLES, *THE OXFORD DICTIONARY OF QUOTATIONS* (5th ed. 1999). One of the first known citations of the saying was in J. Kerr’s *Several Trials of David Barclay*, 1814. As used in Kerr’s novel, the slogan “two wrongs don’t make a right” refers to the widespread belief that an evil act cannot be cancelled out by a second evil act. For example, school children are taught that they should not hit their schoolmate, even though the school mate may have hit him first. When many people have been wronged, it is natural instinct to want to wrong the person back to make things right, but “two wrongs don’t make a right” according to Kerr’s reasoning. Besides using retaliation to right a wrong, people also attempt to justify committing a wrong on the grounds that someone else committed an act of wrong first. Here, the second wrong is of the same type committed by the first guilty party. For example, if person A breaks into person B’s garage and steals B’s bike, B feels justified in breaking into A’s garage to steal the bike back. It is upon these situations of retaliation and acts of vengeance that the saying is most logically applied. However, two wrongs don’t make a right should not and need not be extended to all remedies that right a wrong.

will be reviewed to show the inconsistency with the rationale against affirmative action in the area of discrimination against Blacks. The statistical improbability of correcting the first "wrong," without imposing the second "wrong" of affirmative action, is then explored. This statistical approach is followed by mathematical models, including a regression analysis¹⁰ showing that if the incomplete logic and inconsistent legal reasoning continues, equality for Blacks will never be achieved.

The article then takes a brief look at the philosophy behind slavery and suppression, the first "wrong," and the possible remedy of affirmative action, the alleged "second wrong." Finally, it concludes with a review of legal analysis in areas where "two wrongs do make a right" for most Americans, including restitution to Japanese-Americans for internment during World War II, environmental wrongs, veterans preference, antitrust violations, employment disputes, and the Americans with Disabilities Act.

It has been half a century since the decision in *Brown v. Board of Education of Topeka, Kansas*¹¹ supported the colorblind principles through desegregation of the public schools. After decades of programs designed to offer opportunities to those previously denied opportunity, state and national politicians¹² are still debating re-examination of affirmative action programs. The debate includes two opposing points of view.

¹⁰ "Regression analysis provides a systematic technique for estimating, with confidence limits, the unspecified constants from a new set of data, or for testing whether the new data are consistent with the hypothesis." EDWIN CROW ET AL., STATISTICS MANUAL 147 (1960).

¹¹ 347 U.S. 483 (1954).

¹² In 1995, Pete Wilson, the Governor of California, based his brief campaign for President on an anti-affirmative action platform. Wilson supported Proposition 187, a ballot initiative passed by California voters that bars illegal immigrants from receiving free health care and education. He later endorsed the California Civil Rights Initiative, a proposed State constitutional amendment that would terminate preferences for women and minorities in jobs, education, and state-awarded contracts. President Clinton, in what appears to be an appeal to moderate Republicans and conservative Democrats, ordered an audit of federal affirmative action policies in February, 1995. In April, 1995, at the California Democratic Convention, the President said affirmative action should be reconsidered. Although he acknowledged progress for women and minorities as a good thing, he said, "We must respond to those who feel discriminated against.... This is a psychologically difficult time for the so-called 'angry White man.' ... We must ask ourselves, 'Are these programs working? Are they fair?'" Deanna Hodgins, *Health Care Examines Affirmative Action*, *Nurseweek*, Vol. 8, No. 11, May 1995 at 1-3.

The first viewpoint is that historical inequalities continue to have a negative effect on society.¹³ Progress to correct the inequities has been too slow; therefore, the government should create a more even playing field, allowing women and minorities to compete on an equal basis. Realizing that nothing of value is achieved without sacrifice; proponents of this argument believe that the price is well worth paying to achieve the net gain in fairness and diversity achieved. This is a utilitarian argument in addition to being the right thing to do according to those of this view. "The Left has told us to support it as compensation for past injustices, a guarantee of a fair share of the economic pie, and because it is a civil right, guaranteed by the Constitution and refined by later statutes."¹⁴

Alternatively, the advocates of the second, or opposing, viewpoint argue that preferences perpetuate discrimination. They further argue that set-asides and other special programs promote less qualified candidates at the expense of traditionally qualified candidates.¹⁵ This expense to the traditionally qualified

¹³ These viewpoints are from the author's perspective, and evolved through research and discussions with colleagues.

¹⁴ JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 1 (1996).

¹⁵ Today, seventy percent of us are members of at least one protected class. LEWIN G. JOEL III, *Discrimination and Related Issues*, in *EVERY EMPLOYEE'S GUIDE TO THE LAW* 132 (1993) ("Unless you are an average-looking, [W]hite, agnostic, male of no discernible national origin who is under forty and has no handicap or even something that could be perceived as a handicap, you are protected!") Yet the terms "protected class" and "affirmative action" are met with increasing hostility. Opponents of affirmative action promote the belief that gains for minority groups have resulted in reduced opportunities for other groups. White people, compelled to compete against each other, are urged to believe that advances Blacks make will be at Whites' expense.

Here, government and politics reflect a harsh economy. Indeed, this country is less a society, certainly less a community, than any of the countries with which it compares itself. A reason commonly given is that the United States is a large and diverse country. What is less commonly acknowledged is that its culture makes a point of exaggerating differences and exacerbating frictions. This appears most vividly in the stress placed on race."

ANDREW HACKER, *TWO NATIONS BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1995).

This opposition is produced, in part, by declining lifestyles and fear resulting from falling real wages. However, the data show that African Americans, Hispanics, and other minority groups not only did not gain during this period of falling real wages but, in fact, their wages declined even more. Kweisi Mfume, *Business Playing Field Still Needs Leveling for Minorities*, *WALL ST. J.*, June 6, 1995. Thus, this hostility seems illogical and unsupported by economic data analysis.

candidates (non-minorities) is labeled "reverse discrimination." "The Right has told us to resist affirmative action because it is unmeritocratic, leads to reverse discrimination, and is an un-American guarantee of equal results instead of equal opportunity."¹⁶ In addition, some feel this causes qualified minority candidates to have their credentials questioned. They conclude that people should be treated as individuals. To accomplish this, affirmative action laws should be repealed and laws banning discrimination should be enforced.¹⁷ This is a more deontological argument, which will be further explored infra. This article attempts to refute the reasoning used in arriving at such a conclusion.

Throughout the history of the United States legal system, when one has been wronged steps have been taken to make him (perhaps as opposed to her) whole. This is an area where Black and female issues coincide. These steps occur through specific performance, restitution, punitive damages, and affirmative action, all of which potentially adversely affect (or wrong) the losing party. These remedies, or second "wrongs," in this article's equation have been historically accepted in areas such as contracts and torts. In fact, remedies, or second "wrongs," have even expanded to what some consider extremes to include treble damages in areas where the courts perceive an initial wrong against society (These areas include environmental law and antitrust *inter alia*). However, the courts, failing to perceive discrimination as a

In the 21st Century, it is clear that an increasing percentage of the workforce will be oppressed minorities. "It is projected that by the year 2000, the majority of entrants in the U.S. workforce will be from minority groups, with minorities accounting for 43 percent of the workforce." *Id.* National statistics show that while minorities make up nearly 25 percent of the American population, they own only six percent of operating businesses. These minority-owned businesses account for just one percent of the nation's gross business receipts, and generate less than three percent of the employment produced in the country annually. *Id.* Additionally, a study by the California Institute of Technology projected that, by the year 2000, California will be less than 50 percent White, with the other 50 percent divided roughly equally between Blacks, Hispanics, and Asians. DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 32 (1992) quoting Joseph Supplivan, *College Leaders Focus on Enmity between Races*, N.Y. TIMES, April 23, 1988, at 34.

In 1994, operating expenditures for the Small Business Association's 8(a) Program of just \$20.5 million helped minority-owned firms obtain more than \$4.3 billion in federal contracts which, in turn, generated an estimated \$60 million in tax revenues. Thus, tax revenues exceeded minority business development costs by almost \$40 million. However, in spite of this level of performance, minority businesses received only about 3.5 percent of federal contract dollars. In contrast, McDonnell Douglas Corp. alone received \$8.2 billion in government contracts -- 93 percent of the total received by every minority firm in the country combined. Mfume, at 2. Therefore, viewing minority business programs as tools for economic development is essential. These programs are not social programs, they are investments in America's economic system.

¹⁶ *Id.* D'SOUZA, *ILLIBERAL EDUCATION* 32 (1992).

¹⁷ *Id.*

continuing wrong against society, are rapidly evolving to disallow the remedy or “second wrong” if it adversely affects another group (non-minority students). By doing this, the courts implicitly deny minorities’ their right to have a remedy. Concomitantly, legal arguments claiming reverse discrimination have progressed to disallow the second half of the equation if the second wrong has the potential of adversely affecting a non-minority group.

Here, we chose to use simple mathematical theory to illustrate why the logic against affirmative action is incomplete logic. To understand our logic, however, one must stipulate to three basic assumptions. One, a positive integer must be added to a negative integer to equal zero: for example, $-4 + 4 = 0$. Two, before treating people as equal individuals, they must first be on equal ground to be competitive. Three, there are a fixed number of opportunities in society. To provide opportunity for the previously oppressed individuals to achieve equal ground requires compromise on the opposite side of the mathematical equation. The crucial part of the equation in jeopardy is the remedial action (set asides, quotas, etc.) that compromises the previously uninjured group. This is perceived as a “negative,” the second negative in our equation. This compromise is labeled by some affirmative action opponents as “reverse discrimination.” Without compromise to some, minorities will remain on unequal ground.

While two wrongs do make a right at first glance may seem very negative, at second glance, it is essentially a semantic game. Why is balancing or rectifying an original wrong considered a wrong? Using mathematics and physics as a comparison, this article attempts to manifest that the second wrong is not really a wrong, but is often labeled as such. Perhaps, as in multiplication in math, two negatives multiplied become a positive. In physics, to offset, correct, and return to equilibrium from an original imbalance, there is an opposite reaction, or imbalance, to eventually equalize the original imbalance. Likewise in the law, there are numerous analogies such as capital punishment in criminal law, which some perceive as a wrong versus as a remedy, and in torts real damages.

Yet society is not so ready, or compelled, to label these counteractions, deterrents, repair, or actions which put one back in his/her original position as negatives, or wrongs, even though there is some discussion regarding capital punishment. Why then are affirmative action, reparations, and other actions to repair (put back in a tenable position to deter) so “wrong” in the case of Afro-Americans? Is it semantics, or something else?

There is a distinction to be made between those who had no choice in terms of their lot or station in America, such as Native Americans and Afro-

Americans who are descendents of slaves, as opposed to those who actually immigrated to the U.S. These two groups are non-immigrants.¹⁸ Another

¹⁸There are two groups that fall outside of the typical minority experience: North American Indigenous Peoples (Native Americans), and Black Slaves brought to American against their will (African Americans). These two groups find themselves outside of the typical minority experience because of their special relationship with the United States. North American Indigenous Peoples inhabited this land long before the first European explorers set foot upon the Americas. As Westward expansion began, North American Indigenous Peoples found themselves displaced, pushed aside to make room for the new wave of European settlers. Despite their displacement, because they were indigenous, Native Americans are not immigrants.

Long before the United States of America was established, as White Europeans began to colonize the Americas, they brought with them Black Slaves to build this "New World." There was never a true immigration by the Black Slaves, they were forcibly brought to the Americas. The very notion of immigration implies that it is a migration of one's own choosing. There was no choice for the Black Slaves but to follow their masters, thus placing them outside of the typical notion of an immigrant, and even if attempts were made to escape, or achieve freedom through the courts, they were denied. Over the last 400 years, these three groups have lived together, "sharing" one land. Having inhabited America since its inception, African Americans and Native Americans retain a special status within the minority as non-immigrants.

African-Americans:

There has arisen a significant difference between Blacks born within the United States, and those who immigrate to the United States. Blacks from outside the United States do not necessarily identify themselves as African Americans.

Typically, the term African American is reserved for Black individuals born in the United States. Other individuals from Africa, the Caribbean, Central or South America, and Canada usually refer to themselves by their country of origin or as Black.... Others distinguish Afro-Americans (the descendants of Black slaves) from African Americans (those who emigrated to the U.S. from elsewhere). Individuals who come to the United States from other countries note that their experiences are different from those of Blacks in the United States with respect to the legacy of slavery, discrimination, and minority status. Although many of these Black individuals had ancestors who were slaves, their cultures are tied to other indigenous peoples and European countries in ways that are different from those of Blacks born in the United States.

JANICE SANCHEZ-HUCLES, *THE FIRST SESSION WITH AFRICAN AMERICANS: A STEP-BY-STEP GUIDE TO THE MOST CRUCIAL (AND PERHAPS ONLY) OPPORTUNITY FOR EFFECTIVE CHANGE* 2-3 (2000).

Why is there a significant difference between the Black immigrant experience, and the African American experience? Black immigrants do not experience the same psychological, sociological, and philosophical hindrances that African Americans do. However, this is not to say that Black immigrants do not have their set of negative experiences from their encounters. In addition, they are often treated the same as Afro-Americans once they arrive here. Some seek to assimilate as Afro-Americans *wish* to be distinguished. Afro-Americans have lived for centuries with the stigma of slavery and its after-effects: poverty, lack of education,

group of victims could be various indigenous peoples, such as the Chamorro of Guam, or the victims of class or caste, which would really open a Pandora's Box such as the untouchables of India to raise comparisons with other societies.

Do we have the same Pandora's Box here, and is that why these remedies are labeled a wrong? This author is suggesting that these remedies are labeled a wrong because of how actions are semantically categorized or defined. Again,

discrimination, segregation, lack of respect, etc. "As a result of this history, many Afro-Americans do not believe that it is possible to "pull themselves up by their own bootstraps."" *Id.* The opposite is true for Black immigrants, or African Americans. Immigrants often come to America to explore the freedoms and opportunities that Afro-Americans (the descendants of slaves) have had to struggle to obtain. They come to America to study, to find employment, to make a life that is their own under the freedoms that the United States Constitution protects. Need citation from author.

Native Americans:

This same basic principle can be applied to Native Americans. Native Americans are not immigrants, but were rather displaced when Europeans colonized the Americas. From a practical viewpoint, Native Americans have no country, no homeland. They have nowhere to emigrate from. This makes them distinctly unique. It is not that Native Americans cannot "pull themselves up by their boot straps," but rather that they have no bootstraps to hold onto.

No economic development is allowed at all unless the indigenous people own the land, which in most cases they don't because of unresolved legal battles or the land being held as a trust for them by some government entity. When land is held in trust (a "protectorate" arrangement), banks will not loan money on it, and the only thing to do is lease it out for development to the very same government entity that "protects" it for you.

(Quote attributed to Tom O'Connor, Department of Justice Studies & Applied Criminology, North Carolina Wesleyan College Need appropriate citation from author).

There is a staggering difference when looking at the status of Afro-Americans and Native Americans when compared to Whites; both peoples have inhabited the same land, for the same amount of time (much longer in the case of Native Americans), but with unequal rights and opportunities. The total population of the United States is 281,421,000. (2000 U.S. Census). Whites total 211,460,00, or roughly 75.1%; African-Americans total 34,658,000, or 12.3%; and American Indian and Alaskan Natives total 2,475,000, or 0.9%. About 5% of Whites are consistently poor, while roughly 30% of Blacks are consistently poor. (Loretta Bass, Professor of Sociology, U. of Okla., April lecture series, 2003. 49.6% of Whites have a household net worth of \$50,000.00 or more. 21% of Blacks have a household net worth of \$50,000.00 or more. Native Americans were not listed. U.S. CENSUS (2000).

In 2000, thirty-one million people were poor, roughly 11.3% of the population. Of that Thirty-one million poor, 7.9 million of them were Afro-American. A minority group that accounts for only 12.3% of the nation's population, accounted for 25.4% of the nation's poor. There are other groups that could have been mentioned such as the descendants of the "Shanghaied" Chinese who worked on the railroads, who have suffered similarly but were allowed their original culture and were not separated if they spoke the same language. These groups could be the subjects of other articles. *The "Chinese Question" and American Labor Historians*, Stanford M. Lyman. NEW POLITICS, vol. 7, no. 4, Winter 2000 at footnote 11.

an analogy, homicide in war is justified, but in peace times, there are various gradations of unjustifiable "murder." Again, this author is suggesting a look at society's attitude and philosophy concerning the Afro-American attempt, including self-improvement, to be put back in a tenable position and to rectify an original wrong or imbalance. The original wrongs are, of course, slavery and the legalized segregation which followed.

This article reiterates what some may consider repetitive history. Although it is vogue to say "forget the past," it is unwise to forget what has forever changed the present and the future. Learning from other cultures and races, such as the Jewish people, we believe the totality of the record must include history to keep the memory alive to prevent harm in the future. Further, it must be asked, "Why is there a Holocaust museum, but not a slavery museum?"¹⁹ Americans understand the desire to have a museum to chronicle important historical occurrences; however, it seems that it is difficult for our culture to acknowledge that Americans intentionally committed such wrongs in the past. Americans ostensibly prefer to deny, and try to forget our own shortcomings. It is easier to deny and try to forget, yet, at the same time acknowledging the wrongs done in "other countries" such as with the Holocaust and apartheid in South Africa.

Having discussed the attempt being made in this paper to support, in essence correcting or remedying a wrong, there are those who strongly oppose a remedy such as reparations. One of the best overall attacks on a remedy such as reparations is by David Horowitz in his book, *Uncivil Wars: The Controversy Over Reparations for Slavery*²⁰. Using this book as a generic response in opposition to a remedy for past harms, it can be seen why many Blacks take the position of adopting an even stronger disposition in favor of some type of remedy. On the other hand, there are some Blacks who are in favor of a remedy, but recognize the futility of fighting what are seemingly the majority population's views on the subject. This is only mentioned here to give effect to the polemic of two wrongs making, or not making, a right.²¹

¹⁹ This author strongly supports the idea and institution of a Holocaust museum with no problem. The point being made here is the holocaust of slavery. We highlight Nazi Germany's wrong of the past, but do not highlight America's wrong of the past.

²⁰ DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002).

²¹ David Boyle reviewed *Uncivil Wars: The Controversy Over Reparations for Slavery* by David Horowitz. David Horowitz presents several arguments opposing reparations. His arguments are as follows:

Before an end result of equality can be maintained, it must first be achieved.²² Justice Blackman acknowledged that to achieve equality, we must first consider race. "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. We cannot-we dare not-let the Equal Protection Clause perpetuate racial supremacy."²³ Therefore, remedial action to correct the imbalance must still occur, even if "unfair" to some groups who have benefited from the disparity of opportunity in the past. An analogy could be that legislation is not always "fair" to each and every person. This article seeks to analyze and refute the incomplete logic and the inconsistent legal reasoning of "two wrongs don't make a right" as it relates to racial discrimination and those curative actions.

1. There is no single group responsible for the crime of slavery, 2. There is no single group that benefited exclusively from slavery, 3. Only a tiny minority of White Americans owned slaves, while others gave their lives to free them, 4. Most living Americans have no connection (direct or indirect) to slavery, 5. The historical precedents used to justify the reparations claim do not apply, and the claim itself is based on race not injury, 6. The reparations argument is based on the unsubstantiated claim that all African-Americans suffer from the economic consequences of slavery and discrimination, 7. The reparations claim is one more attempt to turn African-Americans into victims, and it sends a damaging message to the African-American community and to others, 8. Reparations to African-Americans have already been paid, 9. What about the debt Blacks owe to America,? and 10. The reparations claim is a separatist idea that sets African-Americans against the nation that gave them freedom.

David Boyle, *Unsavory White Omissions? A Review of Uncivil Wars*, 105 W. VA. L. REV. 655 (2003). This article does not disclaim nor disprove any of the arguments set forth by David Horowitz, however, it does wish the reader to be aware of some of the arguments against reparations for Blacks.

²² President Lyndon Johnson realized that remedial action must be achieved before a color-blind principle could be maintained. In a commencement speech at Howard University on June 4, 1965, Johnson said:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom, but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory, but equality as a fact and equality as a result.

Paul Roberts and Lawrence Stratton, *Color Code*, National Review, March 20, 1995, at 47.

²³ University of California Regents v. Bakke, 438 U.S. 265, 407 (1978) (Blackman, J. concurring in part and dissenting in part).

II. HISTORICAL OVERVIEW: "THE LAW HAS MADE HIM EQUAL, BUT MAN HAS NOT"²⁴

The struggle for equality in America is over two centuries old. The national anthem proclaims America is "the land of the free;" the Pledge of Allegiance advocates "liberty and justice for all;" and the Declaration of Independence declares all human creatures are "created equal."²⁵ Slaves sought freedom; southern Blacks sought the right to vote; women sought full participation in society; and poor people invoked "equality" as a cry to do better.²⁶ Three eras have tested the constitutional meaning of equality for minority groups: The era of slavery,²⁷ the era of segregation,²⁸ and the era of civil rights.²⁹

²⁴ This quote is from Darrow's final summation in the 1925 *Sweet* trial. In 1925, Darrow defended eleven blacks accused of murder when gunfire from their house killed a member of a white mob that had gathered outside to protest the presence of Dr. Ossian Sweet and his family in an all white Detroit neighborhood.

²⁵ HACKER, *supra* note 15, at 52.

²⁶ ROBERT L. LINEBERRY AND GEORGE C. EDWARDS III, *GOVERNMENT IN AMERICA: PEOPLE, POLITICS, AND POLICY*, 180 (1989).

²⁷ From the 1600's to 1865, slavery took hold in the South. It characterized almost all Black-White relationships and was constitutionally justified. In 1619 Blacks were brought to Jamestown and sold to planters. In 1776 the rebels enlisted Blacks in the army to fight the British only after the British offered freedom to Blacks who would fight on their side against the rebels. In 1787 the Constitution provided for slaves to be counted as three-fifths of a person in representation and permitted Congress to forbid the importation of new slaves after 1808. In 1857 the *Dred Scott v. Sanford* decision held that slaves could not gain freedom by escaping to a free state or territory; it therefore upheld the constitutionality of slavery. 60 U.S. 393 (1856) Finally, in 1865, the Thirteenth Amendment abolished slavery and involuntary servitude. LINEBERRY, *supra* note 26, at 182.

²⁸ From 1865 through 1954, segregation was legally required in the South and sanctioned in the North. Lynching of many Blacks occurred in the South. In 1870 the Fifteenth Amendment forbade racial discrimination in voting, although many states found ways to prevent or discourage Blacks from voting. In 1877 came the end of reconstruction. Black gains in the South (i.e. antidiscrimination laws) were reversed when confederates returned to power. Jim Crow laws flourished, making segregation legal. By 1883 the Supreme Court ruled that the Fourteenth Amendment did not prohibit discrimination by private businesses and individuals. Need citation from author In 1896 the *Plessy v. Ferguson* decision permitted "separate but equal" at public facilities, thus constitutionally justifying segregation. 63 U.S. 537 (1896). In 1910, the National Association for the Advancement of Colored People (NAACP) was founded by Blacks and Whites. In 1915 *Guinn v. United States* banned the grandfather clause that had been used to prevent Blacks from voting. 238 U.S. 347 (1915). In 1941 an Executive Order forbade racial discrimination in defense industries. In 1944 the *Smith v. Allwright* decision banned all-White primaries. 322 U.S. 769 (1944). In 1948 President Truman ordered the

Most Native Americans and Blacks were not immigrants. Instead, the former group was conquered, while the latter was enslaved. Therefore, a different psychological impact resulted from these different histories. The unique impact on Blacks is manifested by the Constitutional reference to counting slaves as three-fifths of a person in representation,³⁰ the abolishment of slavery and involuntary servitude in the Thirteenth Amendment,³¹ and the prohibition of racial discrimination in voting in the Fifteenth Amendment.³²

armed forces desegregated. In 1950 *Sweatt v. Painter* found the "separate but equal" policies generally unacceptable in professional schools. 339 U.S. 629 (1950); see also *Sipuel v. Bd. of Regents of U. of Okla.*, 322 U.S. 631 (1948). LINEBERRY, *supra* note 26, at 183.

²⁹ From 1954 through 1968 the civil rights movement grew as integration became a widely accepted goal. This was followed by urban racial disorders in the 1960's and Black voting increases. Attention shifted to equal results and affirmative action. In 1954 legal segregation ended when the Supreme Court decision in *Brown v. Board of Education of Topeka* set aside its precedent in *Plessy v. Ferguson*. In *Brown* the Court held that segregated schools were inherently unequal and violated the Fourteenth Amendment's equal protection clause. In 1955 Martin Luther King, Jr., lead a bus boycott in Montgomery, Alabama (there were also boycotts in other cities such as Jacksonville, FL). In 1957 Federal troops enforced desegregation of a Little Rock, Arkansas high school. In 1963 250,000 civil rights demonstrators marched on Washington, D.C. In 1964 Title VI of the Civil Rights Act forbade discrimination in public accommodations and provided that federal grants and contracts could be withheld from violators of Title VI. Title VII of the Civil Rights Act forbade discrimination by employers and empowered the Justice Department to sue violators. In 1965 the Voting Rights Act sent federal registrars to Southern states and counties to protect Blacks' right to vote and give registrars the power to impound ballots in order to enforce the act. An Executive Order required companies with federal contracts to take affirmative action to ensure equal opportunity. Riots occurred in Watts, California, and other cities. These type of riots occurred every summer in various cities for the next five years. In 1967 Cleveland, Ohio became the first major city to elect a Black mayor (Carl Stokes). In 1968 the *Jones v. Mayer* decision found all discrimination in the sale or rental of housing illegal. In 1971 the *Swann v. Charlotte-Mecklenberg Bd. of Ed.* decision approved busing as a means of combating state-enforced segregation. 402 U.S. 1(1971). In 1978 *California Board of Regents v. Bakke* forbade rigid racial quotas for medical school admissions but did not forbid considering race as a factor when deciding admissions. 438 U.S. 265 (1978). In 1979 *Weber v. Kaiser Aluminum* again permitted an affirmative action program to favor Blacks if the program was designed to remedy past discrimination. 443 U.S. 193 (1979). *Dayton Board of Education v. Brinkman* upheld school busing to remedy northern school segregation. 443 U.S. 526 (1979). In 1972, Shirley Chisolm, member of Congress, and in 1980, the Reverend Jesse Jackson became the first serious Black candidate for president. In 1984 *Grove City College v. Bell* forbade the federal government from taking away all federal funds from a college that refused to file forms saying it did not discriminate. 465 U.S. 555 (1984) (Only a specific program risked its federal funds.). In 1988 Congress rewrote the Civil Rights Act to "overturn" the implications of *Grove City College*. LINEBERRY, *supra* note 26, at 184-85.

³⁰ U.S. CONST. art. I, § 2, cl.3.

³¹ U.S. CONST. amend. XIII, § I.

³² U.S. CONST. amend. XV, § I.

The unique impact on Native Americans is manifested in a long history of treaties, both broken and unbroken. Although the logic of this article is applicable to both categories, the issues as they apply to Native Americans are unique and deserve to be addressed separately. Therefore, this article merely provides concrete logic to contradict the incomplete logic of "two wrongs don't make a right" with decisions that have immediately affected Blacks and with derivative effects on other groups such as females and Hispanics.³³

The concept of equality was not mentioned in the Constitution of 1787. Equality was impliedly, but not explicitly, granted in the Bill of Rights.³⁴ The only appearance of the idea of equality in the Constitution is in the Fourteenth Amendment, one of three amendments passed after the Civil War.³⁵ The Fourteenth Amendment forbids states from denying citizens "equal protection of the laws."³⁶

The earliest piece of legislation concerning civil rights was the Civil Rights Act of 1866.³⁷ This statute forbids racial discrimination in making and enforcing contracts.³⁸ The civil rights movement and anti-discrimination legislation of the 1960's caused employers to examine the treatment of women, minorities, and other protected groups more closely. Affirmative action plans were implemented to remedy past acts of discrimination. Affirmative action programs have been established through court order, court-approved consent decrees, and federal and state laws that impose affirmative action obligations on government contractors.³⁹

Quotas were originally prohibited under the Civil Rights Act of 1964, but were eventually recognized as necessary to correct the imbalance.⁴⁰ Quotas were implemented by President Lyndon Johnson, who issued Executive Order

³³ However, the author fully acknowledges the impact this logic has on areas other than civil rights.

³⁴ "The Bill of Rights did not specify that only [W]hite people were guaranteed the right to protection from self-incrimination, or that only men had the right to freedom of speech", albeit impliedly so as segregation and denial of the right to vote to Blacks and females supported the implication. LINEBERRY, *supra* note 26, at 179. "When rights are granted without such specification, the concept of equality has taken root." *Id.*

³⁵ The Thirteenth Amendment abolished slavery and the Fifteenth Amendment extended the right to vote to Blacks. *Id.*

³⁶ U.S. Const. amend. XIV.

³⁷ 42 U.S.C. § 1981 (1982).

³⁸ 42 U.S.C. § 1981(a) (1982).

³⁹ CONNIE BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT* 351 (1991).

⁴⁰ 42 U.S.C. §§ 2000e et seq. (2004).

11,246, requiring all federal government contractors and sub-contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin."⁴¹ Executive Order 11,246 required federal government contractors to include in every government contract not exempted by the order, a provision that states that the contractor will not discriminate in employment.⁴² Individuals have no private cause of action alleging a violation of this order⁴³; however, the Department of Labor has sanctions available through the Office of Federal Contract Compliance Programs.⁴⁴ The sanctions for violation of this law include suspending or terminating a government contract and disqualifying the contractor from entering any future government contracts.⁴⁵

Government contractors are subject to affirmative action under additional federal laws. For example, section 503 of the Vocational Rehabilitation Act of 1973 requires employers with government contracts or subcontracts of more than \$10,000.00 to employ qualified handicapped persons and to take affirmative action with respect to such individuals. Additionally, the Vietnam Era Veterans Re-adjustment Assistance Act of 1972 requires employers with federal contracts or subcontracts of \$25,000.00 or more to take affirmative action to employ and to advance in employment of disabled Vietnam-era veterans.⁴⁶

Employers in the past have been allowed to voluntarily establish affirmative action plans. In *United Steelworkers of America v. Weber*,⁴⁷ the Supreme Court upheld a collective bargaining agreement between the union and the company that contained an affirmative action plan giving preference to Black employees entering into skilled-craft training positions. In that case, a White worker alleged that the affirmative action plan resulted in junior Black employees' receiving preference to senior White employees, thus discriminating against him and other White employees in violation of Title VII.⁴⁸ The Court reasoned that the plan: (1) was "designed to break down old patterns of racial

⁴¹ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

⁴² *Id.*

⁴³ *Manuel v. Int'l Harvester Co.*, 502 F.Supp. 45, 47 (D.C.Cir. 1980)(Finding "no evidence of a congressional intent to create a private right of action under E.O. 11,246).

⁴⁴ 41 C.F.R. § 60-1.25 (2005).

⁴⁵ 41 C.F.R. § 60-1.27 (2005).

⁴⁶ *Id.* at 351.

⁴⁷ 443 U.S. 193 (1979).

⁴⁸ *Id.* at 199-200.

segregation and hierarchy"; (2) "d[id] not unnecessarily trammel the interests of White employees," and (3) was a temporary measure intended to attain rather than maintain racial balance.⁴⁹ In 1989, however, the tide turned and made it easier for individuals to bring reverse-discrimination lawsuits based on affirmative action plans. In *Martin v. Wilks*,⁵⁰ the Court held that federal procedural rules did not preclude White firefighters from challenging the validity of an affirmative action plan adopted earlier with federal court approval to settle lawsuits by Blacks alleging discrimination in hiring and promotion. In *Martin*, White firefighters argued that the plan denied them promotions based on their race, thus violating Title VII.⁵¹ In a five to four decision, the Court ruled that the White firefighters were not precluded from challenging employment decisions taken pursuant to the affirmative action plan.⁵² "A voluntary settlement...between one group of employees and their employer cannot possibly 'settle', voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement."⁵³ Although the Supreme Court failed to decide the merits of the reverse-discrimination claim, this decision "cleared the way for future challenges to court-approved affirmative action plans adopted to settle earlier civil rights lawsuits."⁵⁴

In 1989, the Supreme Court rendered four other decisions⁵⁵ that restricted an employee's ability to recover for employment-related discrimination under the current civil rights legislation, including section 1981 of the Civil Rights

⁴⁹ *Id.* at 208. The EEOC has promulgated regulation regarding voluntary affirmative action plans. See 29 C.F.R. Sec. 1608. 1-12 (1989).

⁵⁰ 490 U.S. 755 (1989).

⁵¹ *Id.* at 759-60.

⁵² *Id.* at 758-59.

⁵³ *Id.* at 768.

⁵⁴ BAGLEY, *supra* note 39, at 354.

⁵⁵ *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (regardless of how strong the showing of a discriminatory effect, an employer is no longer required to prove that discriminatory practices are required by a business necessity); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Holding that the Civil Rights Act of 1866 did not prevent racial discrimination and harassment as it pertains to employment and other contracts, but barred discrimination *only* in the formation of the employment contract.) This was interpreted not to protect the employee from harassment or other discriminatory conduct by the employer or coworkers once the employee was on the job, or against discriminatory firing; *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (Holding that the time limitation on challenges to a seniority plan begins from the time the plan was adopted, not from the time the employee was harmed by the plan.); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Holding that employment decisions motivated partially by intentional discrimination are permitted if the employer can show that the same decision would have been made absent the same discrimination.).

Act of 1866 and title VII of the Civil Rights Act of 1964.⁵⁶ Political opposition resulted in the introduction of the Civil Rights Act of 1990.⁵⁷ The 1990 Act was intended to remedy inequities of the 1989 rulings. The intentions were "1) to . . . restor[e] the civil rights protections that were dramatically limited [by the recent Supreme Court] decisions; and 2) to strengthen existing protections and remedies. . . [in an effort] to provide more effective deterrence and adequate compensation for victims of discrimination."⁵⁸

Although Congress and the first Bush (George H.W. Bush, hereinafter Bush I) administration agreed on the need for additional civil rights legislation, they disagreed on the scope of protection and enforcement that should be provided by the bill.⁵⁹ Opponents expressed concern that the new act would force employers to adopt hiring quotas to avoid discrimination suits.⁶⁰ President Bush I, threatened to veto any civil rights legislation that constituted a "quota bill."⁶¹ The provision most concerning the Bush I administration was the one requiring employers to show that practices resulting in a disparate impact "bear a substantial and demonstrable relationship to effective job performance."⁶² Opponents claimed this provision would set impossible new standards for businesses that would force employers to adopt "'a silent practice of quota hiring and promotion' to avoid potential lawsuits."⁶³

The bill passed the Senate 62 to 34 and passed the House 273 to 154.⁶⁴ On October 22, 1990, President Bush vetoed the bill.⁶⁵ On October 24, 1990, the Senate sustained the veto by a mere 66 to 34 vote, only one vote shy of the two-thirds required to enact the bill over the presidential veto.⁶⁶ In his veto message, President Bush said, "I deeply regret having to take this action with respect to a bill bearing such a title, especially since it contains certain

⁵⁶ 42 U.S.C. §1981 (2004).

⁵⁷ 42 U.S.C. §2000a et. seq. (2004).

⁵⁸ H.R. 4000, 101st Cong. (2d Sess. 1990).

⁵⁹ See Ann Devroy and Sharon LaFraniere, *Bush Outlines Objections to Civil Rights Proposal; President Says He won't Sign 'Quota Bill'*, WASH. POST, May 18, 1990, at A6.

⁶⁰ Charles Fried, *Hands in the Quota Cookie Jar*, WALL ST. J., May 17, 1990, at A18.

⁶¹ Devroy, *supra* note 59, at A6.

⁶² Fried, *supra* note 60, at A18.

⁶³ Michael Isikoff and Ann Devroy, *Civil Rights Bill Veto Threatened; Scope of Federal Employment Discrimination Laws is at Issue*, WASH. POST, Apr. 5, 1990, at A25.

⁶⁴ L.A. Daily News. H1. October 10, 1990.

⁶⁵ *Id.*

⁶⁶ Steve McGonigle, *Override of Bias-Bill Veto Fails; Close Vote in Senate Kills Measure in 1990 Session*, DALLAS MORN. NEWS, Oct. 25, 1990. at 4A.

provisions that I strongly endorse."⁶⁷ Bush pointed out that his version of the bill would not result in quotas, but the Senate version would.⁶⁸

The Civil Rights Act of 1991 was introduced and signed by Bush into legislation.⁶⁹ The successful forces behind the Act were in the climate of pro-affirmative action groups, the "backlash" against the Clarence Thomas nomination, and the "revulsion" against the David Duke race.⁷⁰ The Supreme Court in *City of Richmond v. J. A. Croson Co.*,⁷¹ another 1989 decision, constitutionally struck down a minority-business set-aside program. In *Croson*, the Supreme Court struck down the City of Richmond's Minority Business Enterprise ("MBE") ordinance as a violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.⁷² In a six to three majority decision, the Court applied a strict scrutiny standard to reject Richmond's affirmative action program for minority businesses.⁷³ The Court held that state and local governments may implement an MBE program only if there is a compelling governmental interest justifying the program (i.e., must show the present effects of past discrimination in the marketplace), and must "narrowly tailor" the programs to remedy the identified discrimination.⁷⁴

The Richmond MBE ordinance failed under both prongs of the test. Richmond's generalized assertions of discrimination and broad statistical

⁶⁷ 136 CONG. REC. S16418-02 (daily ed. Oct. 22, 1990) (Disapproval of S.2194).

⁶⁸ *Id.*

⁶⁹ Pub. L.No. 102-166, 105 Stat. 1071 (1991).

⁷⁰ David Duke has aspired to a U.S. Senate seat as recently as February of 1996.

Campaigning for his state's U.S. Senate seat last month, David Duke sounded like a current, rather than an ex-Ku Klux Klansman. During an anti-affirmative action rally at which supporters waved Confederate flags and sang "Dixie," Duke said welfare and immigration policies "threaten to make [W]hite Americans the minority" and announced: "I think the heartbeat of this country is the [W]hite majority...and I'm speaking for them." Duke also proclaimed: "I hope you make it possible for me to go to the U.S. Senate. I've come to symbolize [W]hite people who aren't going to take it anymore.

William T. Coleman, Jr., *Discrimination by Redistricting*, WASH. POST, March 25, 1996, at A17.

David Duke's agenda, when he restarted the Ku Klux Klan in 1975 included ending affirmative action, welfare, and non-White immigration. David Waters, *Forum Speaks Up Against Religious Right*, The Commercial Appeal, March 25, 1996, at B1. Need this source from author.

⁷¹ 488 U.S. 469 (1989).

⁷² *Id.* at 511.

⁷³ *See id.*

⁷⁴ *Id.* at 509.

comparisons of disparities in contract awards to minorities versus percentages of minorities in the general population were deemed insufficient proof of discrimination.⁷⁵ Additionally, Richmond's program was not narrowly tailored since it benefited classes of minorities for whom there are no specific evidence of discrimination.⁷⁶ Therefore, the Court found no rational basis for the size of the set-aside goal, no logical ending point for the program, and no consideration given to the use of less restrictive race-neutral remedies.⁷⁷ Thus, the Court established the requirement for an individual wrong that can be corrected, but not for a societal wrong that needs correcting. Perhaps, this impliedly suggests that Congress, not the Court, is the path for correcting societal wrongs.

The *Croson* decision prompted additional litigation and has negatively affected many state and local programs seeking to improve marketplace access for minority-owned businesses.⁷⁸ The Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF) reported sixty-eight cases in twenty-seven states affected by *Croson* reasoning.⁷⁹ In the aftermath of *Croson*, thirty-one jurisdictions and governmental entities in seventeen states have taken steps to voluntarily dismantle their race and gender-conscious MBE policies and programs without any litigation being filed.⁸⁰ Additionally, ninety-one jurisdictions in twenty-seven states examined the presence of racial and sexual discrimination in the public and private marketplace sectors by reviewing and re-evaluating the programs.⁸¹ By 1994, thirty-six of fifty states had included jurisdictions negatively affected by *Croson*.⁸²

⁷⁵ *Id.* at 506.

⁷⁶ *Id.*

⁷⁷ *See id.* at 510-11.

⁷⁸ Courtney Billups, *Minority Business Enterprise Legal Defense and Education Fund, Inc., The Effect of Richmond v. Croson and Similar Attacks on Federal, State and Local M/W/DBE Programs Nationwide*, 1-2, April 4, 1994.

⁷⁹ *Id.* at 3-24.

⁸⁰ *Id.* at 25-26. States affected include: Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Illinois, Louisiana, Michigan, Minnesota, New York, New Jersey, North Carolina, Oregon, Texas, Virginia, Washington, and Wisconsin.

⁸¹ *Id.* at 26. The following states include jurisdictions that are reviewing and re-evaluating the programs, by inter alia, conducting studies and/or holding public hearings: Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin.

⁸² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Similarly, *Adarand Constructors, Inc. v. Pena*⁸³ has generated similar complaints attacking federal set-aside programs. In *Adarand*, a non-Disadvantaged Business Enterprise (DBE) guardrail subcontractor brought suit in the U.S. District Court for Colorado attacking the constitutionality of the federal DBE program on its face and as applied by the Colorado Department of Transportation and the Federal Highway Administration.⁸⁴ Federal District Court Judge Carrigan ruled that *Croson* does not apply to these laws because they are congressionally mandated, and Congress is specifically empowered by the Fourteenth Amendment to engage in affirmative action to remedy discrimination.⁸⁵ Thus, the District Court upheld the constitutionality of the DBE program as applied under the Fifth and Fourteenth Amendments.⁸⁶

The Court of Appeals for the Tenth Circuit affirmed and the Supreme Court granted certiorari.⁸⁷ The Supreme Court identified *Croson* as the proper standard to be applied.⁸⁸ Relying on *Croson*, *Adarand* argued that the administering agency must make specific findings of past discrimination.⁸⁹ As of February 20, 1996, eleven complaints asserting violations of the equal protection clause had been filed against federally funded set-aside programs.

More recently, the Supreme Court decided two cases in 2003 that had an effect on race- based discrimination, *Grutter v. Bollinger*⁹⁰ and *Gratz v. Bollinger*.⁹¹ In *Grutter*, the University of Michigan Law School denied admission to Barbara Grutter, a White female Michigan resident with a 3.8 GPA and a LSAT score of 161.⁹² Grutter claimed that the law school had “discriminated against her based on race in violation of the 14th Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §1981.”⁹³ Her primary contention was that the law school used race as a major factor in determining admission and gave applicants belonging to certain minority groups a significantly greater chance for acceptance.⁹⁴ She further argued that there was

⁸³ 515 U.S. 200 (1995).

⁸⁴ *Id.* at 204.

⁸⁵ *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 243-44 (D. Colo. 1992), *affirmed*, *Adarand v. Pena*, 16 F.3rd 1537 (10th Cir. 1994), *vacated by* 515 U.S. 200 (1995).

⁸⁶ *Id.* at 240.

⁸⁷ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210 (1995).

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁹¹ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁹² *Grutter*, 539 U.S. at 316 (2003).

⁹³ *Id.* at 317.

⁹⁴ *Id.*

no compelling interest to justify the use of race.⁹⁵ The District Court found the law school's use of race unlawful; however, it was reversed by the Sixth Circuit, which held that diversity was a compelling interest and the law school's program was narrowly tailored.⁹⁶ The issue before the Supreme Court was "whether the use of race as a factor in student admissions by the University of Michigan Law School is unlawful."⁹⁷ The Supreme Court held that the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause.⁹⁸

In *Gratz*, Jennifer Gratz, a White Michigan resident, was denied admission to the University of Michigan's College of Literature, Science, and Arts along with several other applicants.⁹⁹ Gratz and the other applicants filed a class action suit, alleging that the racial preferences used in the admissions process by the university was discriminatory and violated the Equal Protection Clause, Title VI, and § 1981.¹⁰⁰ The District Court held for the university with respect to the current admission guidelines; however, it held for the denied applicants with respect to the admissions guidelines from 1995-1998 since they were equivalent to a quota.¹⁰¹ The issue that the Supreme Court addressed was whether the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the 14th Amendment, Title VI of the Civil Rights Act of 1964, or 42 U.S.C. § 1981.¹⁰² The Supreme Court held that the university's admissions policy was not narrowly tailored to achieve the asserted interest in diversity.¹⁰³

The Supreme Court has drastically changed the manner in which race based classifications have been (reviewed, viewed) throughout the history of the United States. Despite these changes, Blacks are still discriminated against and the affirmative action measures that are needed to correct this "wrong" must be upheld. Strict judicial scrutiny is the current standard even though

⁹⁵ *Id.*

⁹⁶ *Id.* at 321.

⁹⁷ *Id.* at 311.

⁹⁸ *Id.* at 343.

⁹⁹ *Gratz*, 539 U.S. at 251.

¹⁰⁰ *Id.* at 252.

¹⁰¹ *Id.* at 258-59.

¹⁰² *Id.* at 250.

¹⁰³ *Id.* at 251.

Justice Thurgood Marshall believed that intermediate scrutiny would be sufficient.¹⁰⁴

III. LEGAL BACKGROUND OF THE SOCIETAL WRONG OF FAILING TO ACKNOWLEDGE BLACKS AS EQUAL

Prior to addressing remedies for the “wrong” of discrimination, a reiteration of early legal reasoning that failed to acknowledge Blacks as equal is necessary. The Supreme Court “has consistently ‘repudiated distinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”¹⁰⁵ Affirmative action plans to remedy racial discrimination must withstand strict judicial scrutiny.¹⁰⁶ Equal protection analysis is not dependent on the race of those burdened or benefited by a classification.¹⁰⁷ “Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”¹⁰⁸ A two-prong examination has been set forth by the Court.¹⁰⁹ First, “any racial classification

¹⁰⁴ Author’s opinion after review Mashall’s cases. Intermediate scrutiny is invoked when the rights of a “quasi-suspect class” are at issue. The classification must be substantially related to an important governmental objective. *See Craig v. Boren*, 429 U.S. 190 (1976), *Matthews v. Lucas*, 427 U.S. 495 (1976), *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1980). Generally, intermediate scrutiny is applied to classifications such as illegitimacy and sex. Intermediate scrutiny is the middle ground between strict scrutiny and the rational basis test. Strict scrutiny is the standard of review set out in *Korematsu v. U.S.*, 323 U.S. 214 (1944). This standard of review is used when the rights of a suspect class are at issue. There must be substantial intrusion, or the action must interfere with fundamental rights, such as the right to privacy. To pass strict scrutiny review, the action taken against these rights must be narrowly tailored, and necessary to achieve permissible ends of a compelling interest. On the other end of the spectrum is the rational basis test. The rational basis test begins with the presumption of constitutionality, and follows that so long as there is a rational basis for the action to achieve legitimate ends, the action stands. The rational basis test asks only, is this an appropriate means to a [legitimate] end. *See McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁰⁵ *Wygant v. Jackson Bd. of Ed.*, 476 U.S. at 267, 273, 2d 260 (1986), (quoting *Loving*, 388 U.S. at 11).

¹⁰⁶ *Croson*, 488 U.S. at 493; *see also Bakke*, 438 U.S. at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

¹⁰⁷ *Croson*, 488 U.S. at 494.

¹⁰⁸ *Wygant*, 476 U.S. at 273-74 (quoting *Fulilove v. Klutznick*, 448 U.S. 448, 491 (1980)).

¹⁰⁹ *Wygant*, 476 U.S. at 274.

must 'be justified by a compelling governmental interest.'"¹¹⁰ Second, "the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal."¹¹¹

In *Dred Scott v. Sanford*,¹¹² the Court held that Dred Scott, a Black American slave, lacked standing to sue in federal court because he was not a citizen under the Constitution. The following year, the Fourteenth Amendment was ratified creating the principles of "equal protection."¹¹³ *Plessy v. Ferguson*¹¹⁴ continued the Court's failure to acknowledge Blacks' rights to equal protection by holding a Louisiana statute that required Caucasians and African-Americans to be furnished with separate accommodations (but allegedly equal) on railway trains did not violate the Thirteenth¹¹⁵ and Fourteenth¹¹⁶ Amendments. In *Plessy*, the Court reasoned the statute had a neutral effect on race and did not confer inferior status based on race.¹¹⁷ This remains known as the "separate but equal" treatment of African-Americans. Here, Justice Harlan's dissent established the Constitution's "color blind" principle.¹¹⁸ It is interesting that the connotations of "color blind" have mutated from being in favor of Afro-Americans to perhaps at best a neutral, to negative, inference, not favoring Afro-Americans. So that now, "color blind" is a code word for ignoring the past and acting as if color does not matter.¹¹⁹ In

¹¹⁰ *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

¹¹¹ *Wygant*, 476 U.S.274 (quoting *Fulilove*, 448 U.S. at 480).

¹¹² 60 U.S. 393(1857).

¹¹³ U.S. CONST. amend. XIV.

¹¹⁴ 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483 (1954).

¹¹⁵ The Thirteenth Amendment provides in part that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, §.1.

¹¹⁶ The Fourteenth Amendment of the United States Constitution provides in part that: "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹¹⁷ *Plessy*, 163 U.S. at 542-48.

¹¹⁸ It is ironic that Justice Harlan's dissent in *Plessy* has provided the "backdrop in the late twentieth century for non-minorities attempting to strike down racial classifications that favor minorities." Terrence M. Lewis, *Standard of Review Under the Fifth Amendment Equal Protection Component: Adarand Expands the Application of Strict Scrutiny*, 34 DUQUESNE L. REV. 325, 330 (1996).

¹¹⁹ John C. Duncan, Jr., *The American 'Legal' Dilemma: Colorblind I/Colorblind II – The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 VA. J. SOC. POL'Y & L. 315 (2000).

*Brown v. Board of Education*¹²⁰ the "separate but equal" doctrine was reversed when the Court held that segregation of children in public schools based solely on race violated the Equal Protection Clause of the Fourteenth Amendment.¹²¹

A Fifth Amendment¹²² equal protection challenge to federal racial classification arose in *Korematsu v. United States*.¹²³ Fred Korematsu, an American citizen of Japanese descent, was convicted in federal court for violating a Civilian Exclusion Order of the United States Army.¹²⁴ The order directed all person of Japanese descent to be excluded from military areas.¹²⁵ The Court asserted that any legal restriction, which takes away the civil rights of a single racial group, is to be viewed as "immediately suspect".¹²⁶ The court ultimately reasoned that it would be impossible to separate loyal Japanese-Americans from disloyal Japanese-Americans and excluding people of Japanese descent from an entire area had a definite and close relationship with the preclusion of sabotage.¹²⁷ Thus, the Court upheld the military's exclusion order¹²⁸ (More on this general area *infra* at Section XIII A).

¹²⁰ 347 U.S. 483 (1954).

¹²¹ *Id.* at 493, 495.

¹²² The Fifth Amendment of the United States Constitution provides in relevant part that: "No person shall be...deprived of life, liberty, or property, without due process of law...." U.S. CONST. amend.V.

¹²³ 323 U.S. 214 (1944).

¹²⁴ *Id.* at 215-16.

¹²⁵ *Id.* at 216.

¹²⁶ *Id.* at 216. Additionally, the Court concluded that "pressing public necessity" can sometimes allow the use of race based restrictions. *Id.*

¹²⁷ *Id.* at 223-24.

¹²⁸ *Id.* at 218. The convictions of Hirabayashi and Korematsu were overturned in *coram nobis actions*. A writ of error *coram nobis* is a procedural tool which corrects errors of fact only. Its function is to bring before the court rendering the judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its decision. The function is to bring the error to the attention of the court and to obtain relief from errors of fact. The essence of the common law remedy of *coram nobis* is that it is addressed to the very court which renders the judgment in which injustice is alleged to have been done, in contrast to appeals or review directed to another court. (The words 'coram nobis' means 'our court'.) BLACK'S LAW DICTIONARY 337 (6th ed. 1990). Here, the error of fact was based on newly discovered documents showing that "government officials withheld evidence from the Supreme Court indicating that the claims of military necessity for the internment program were questionable or based on racial prejudice." Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 120 (1988). See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). This issue will be thoroughly discussed, *infra*.

In *Bolling v. Sharpe*,¹²⁹ the Court addressed race-based classifications. The issue in *Bolling* was whether the federal government's segregation of public schools in the District of Columbia violated the Fifth Amendment.¹³⁰ The Court held that racial segregation in public schools was not reasonably related to any proper governmental objective and was a violation of the Due Process Clause of the Fifth Amendment.¹³¹ Chief Justice Earl Warren reasoned that the concepts of "due process" and "equal protection" are not mutually exclusive.¹³² Justice Warren further reasoned the discrimination of *Bolling* was unreasonable and a denial of due process of law. The Court concluded that it was "unthinkable" that the Constitution would impose a lesser duty on the federal government than that imposed on states in examining school segregation.¹³³ The Court's standard of review combined rational basis review and intermediate scrutiny review.¹³⁴ Ultimately, the Court's acknowledgement in *Bolling* of the Fifth Amendment's equal protection component "presaged the Court's reasoning in *Adarand*".¹³⁵

The next Supreme Court opinion dealing with racial classifications was *Loving v. Virginia*.¹³⁶ The issue was whether a Virginia statute preventing interracial marriages violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹³⁷ The Court held that the statute was racially

¹²⁹ 347 U.S. 497, 498 (1954).

¹³⁰ *Id.*

¹³¹ *Id.* at 499-500.

¹³² *Id.* at 499.

¹³³ *Id.* at 500.

¹³⁴ *Id.*

¹³⁵ Lewis, *supra* note 118, at 332. "Classifications not drawn on a suspect basis' are subject to a 'low level' or 'rational basis' review and are usually upheld." Geoffrey R. Stone, et al., CONSTITUTIONAL LAW 532-33 (2d ed. 1991). Under "rational basis review," the Equal Protection Clause is satisfied if the classification is "rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Under intermediate scrutiny review, classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives to satisfy an equal protection challenge." *Craig v. Boren*, 429 U.S. 190, 197 (1976)(concluding that classifications based on gender must satisfy an intermediate scrutiny review.) Under strict scrutiny review, classifications must serve "compelling governmental interests" and be "narrowly tailored" to the achievement of those interests. See *Adarand*, 515 U.S. 200 at 220.

¹³⁶ 388 U.S. 1 (1967).

¹³⁷ The Virginia Code provided in relevant part that "(i)f any [W]hite person intermarry with a colored person, or any colored person intermarry with a [W]hite person, he shall be guilty of a felony and shall be punished...for not less than one nor more than five years." VA. CODE ANN. § 20-59 (1960)(repealed 1968). Virginia was one of sixteen states that had a statute

discriminatory, and was a violation of the Fourteenth Amendment's Equal Protection and Due Process Clauses.¹³⁸ Reasoning that the right to marry is a fundamental right of all persons, the Court held that the Equal Protection Clause required that racial classifications be examined under "the most rigid scrutiny."¹³⁹

The next significant racial classification case examined by the Court was *Board of Regents of University of California v. Bakke* in 1978.¹⁴⁰ In *Bakke*, the University of California at Davis had created a special admissions program for the medical school.¹⁴¹ Sixteen of one hundred seats for each medical school class were reserved for minority students.¹⁴² Bakke, a Caucasian male, was not admitted by the medical school in either 1973 or 1974, in spite of a grade point average and admission test scores that were higher than those of minorities admitted under the school's special admissions program.¹⁴³

The issue in *Bakke* was whether the race-based special admissions program violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁴ The Court, failing to issue a majority opinion,¹⁴⁵ held that the medical school's minority admissions program violated the Fourteenth Amendment's Equal Protection Clause.¹⁴⁶ Justice Powell reasoned that all racial and ethnic classifications of any type are "inherently suspect . . . [and require] . . . the most exacting judicial examination."¹⁴⁷ Finding that the medical school failed to establish that the race-based admissions program was adopted in response to identified discrimination, Powell concluded the school failed to carry its burden of proving a compelling governmental interest to satisfy strict scrutiny review.¹⁴⁸ Taking a fatal turn away from achieving equal opportunity, Powell concluded that

the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of societal discrimination does not justify a

that prohibited marriages on the basis of racial classifications. *Loving*, 388 U.S. at 6 (citations omitted). Lewis, *supra* note 118, at 330.

¹³⁸ *Loving*, 388 U.S. at 12.

¹³⁹ *Id.* at 11 (quoting *Korematsu*, 323 U.S. at 216).

¹⁴⁰ 438 U.S. 265 (1978).

¹⁴¹ *Id.* at 275.

¹⁴² *Id.*

¹⁴³ *Id.* at 276-77.

¹⁴⁴ *Id.* at 320.

¹⁴⁵ *Id.* at 269.

¹⁴⁶ *Id.* at 320.

¹⁴⁷ *Id.* at 291 (quoting *Korematsu*, 323 U.S. at 216).

¹⁴⁸ *Bakke*, 438 U.S. at 309-10.

classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.¹⁴⁹

Justice Powell sealed the fatal reasoning that a second “wrong” is not justified to ultimately create a “right.” Under this analysis, even when students are not on equal ground, a second “wrong” is not justified; therefore, equality can never be achieved.

More recently, *Hopwood v. State of Texas*¹⁵⁰ has acted as the latest manifestation of incomplete logic and inconsistent legal reasoning. In *Hopwood*, Judge Sparks acknowledged affirmative action as “one of the most divisive issues faced by society,”¹⁵¹ recognizing the case as highlighting the tension when the individual rights of non-minorities conflict with programs designed to aid minorities. In *Hopwood*, “non-minority applicants challenged the state university law school’s affirmative action admission program as violating equal protection.”¹⁵² “The plaintiffs [] contended that any preferential treatment . . . based on race violated the Fourteenth Amendment and [was] therefore unconstitutional.”¹⁵³ Judge Sparks reasoned,

such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination. Further, the Supreme Court, which is continually faced with trying to reconcile the meaning of words written over a century ago with the realities of the latter twentieth century, has declined to succumb to an original intent or strict constructionist argument. Therefore, the [c]ourt will decline the plaintiff’s invitation to ignore the law established by the highest court of this land and to declare affirmative action based on racial preference as unconstitutional per se.¹⁵⁴

¹⁴⁹ *Id.* at 310.

¹⁵⁰ 861 F. Supp. 551 (W. D. Tex. 1994), *reversed* by 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 533 U.S. 929 (2001).

¹⁵¹ *Id.* at 553.

¹⁵² *Id.* at 551.

¹⁵³ *Id.* at 553.

¹⁵⁴ *Id.* Judge Sparks identified the pervasiveness of discrimination in the history of Texas’s educational system. “Even after *Brown v. Board of Education*, the State of Texas adopted a policy of ‘official resistance’ to integration of its public schools [which] resulted in numerous lawsuits and court-imposed desegregation plans throughout the past twenty years.” *Id.* at 554

The court identified the issue as whether the affirmative action program met the legal standard required to "pass constitutional muster," and found that it did not.¹⁵⁵ The legal standard here is the strict scrutiny test.¹⁵⁶ However, the court acknowledged the reasoning behind affirmative action:

The reasoning behind affirmative action is simple - because society has a long history of discriminating against minorities, it is not realistic to assume that the removal of barriers can suddenly make minority individuals equal and able to avail themselves of all opportunities. Therefore, an evaluation of the purpose and necessity of affirmative action in Texas's system of higher education requires an understanding of past discrimination against Blacks and Mexican Americans, the minorities receiving preferences in this cause, and the types of barriers these minorities have encountered in the educational system.¹⁵⁷

(citations omitted). "The problem of segregated schools is not a relic of the past. Despite the fact that the public school population is approximately half White and half minority, minority students in Texas attend primarily majority-minority schools while White students attend primarily White schools." *Id.* (citations omitted). "[A]t each educational level there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and non-minorities and the percentages of the respective groups that graduate from high school and college." *Id.* at 554. "In 1990, the percentage of persons age 25 or older who completed high school was 81.5% non-Hispanic White, 66.1% Black, and 44.6% Hispanic." *Id.* at n.3 (citations omitted), "College graduate rates for the same year reflect 25.2% non-Hispanic Whites, 12% Black, and 7.3% Hispanic." *Id.* (citations omitted).

¹⁵⁵ *Id.* at 554.

¹⁵⁶ *Id.* at 568.

¹⁵⁷ *Hopwood*, 861 F.Supp. at 554-55. Acknowledging discrimination against Blacks in Texas history of higher education, Sparks noted that "Texas, by constitution and statute, required 'separate schools...for the [W]hite and colored children'" until 1969. *Id.* at 554; see TEX. CONST. art. VII, § 7 (1925, repealed 1969). This resulted in the establishment of inferior segregated schools for Blacks. Additionally, college opportunities available to Blacks were limited. *Id.* at 555.

The Texas Legislature created Prairie View State Normal & Industrial College for Colored Teachers at Prairie View (now Prairie View A & M University) for the education of "students to be taken from the colored population of this State." Until 1947, it remained the only state-supported institution of higher learning option to Black students in Texas; no type of professional training was available to Blacks. In 1947, to avoid integration of the University of Texas, the Texas Legislature created the Texas State University for Negroes (now Texas Southern University). *Id.* (citations omitted).

In 1946, when a Black man, Herman Sweatt, was refused admission to University of Texas Law School, a Texas court, holding that Article VII, § 7 of the Texas Constitution precluded his admission, ordered the state to provide a law school for Blacks. See *Sweatt v. Painter*, 210 S.W.2d 442 (Tex. Civ. App. 1948), *reversed by* 339 U.S. 629 (1950). "The state hastily created

Although the impact of a long history of discrimination against Blacks is acknowledged, the outcome of the legal reasoning is rapidly evolving in the opposite direction. In *Croson*, the majority of the Supreme Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.¹⁵⁸ Although the *Croson* Court did not address the standard of review the Fifth Amendment would require for action by the federal government, the Court's reasoning in cases through *Croson*¹⁵⁹ has established three general propositions with regard to racial classifications in governmental areas: skepticism,¹⁶⁰ consistency,¹⁶¹ and congruence.¹⁶² All components must be considered. "Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."¹⁶³

While interpreting the level of "scrutiny" appropriate in *Hopwood*, the District Court rejected the University of Texas' argument relying on *Metro Broadcasting v. FCC*.¹⁶⁴ "In *Metro Broadcasting*, the Supreme Court held that federally mandated affirmative action plans are subject to intermediate scrutiny—a determination whether the plans serve important governmental objectives and whether they are substantially related to the achievement of the objectives."¹⁶⁵ The University of Texas argued that its plan should be considered a federal mandate because it stemmed from the Office of Civil Right's (OCR) "insistence on full compliance with Title VI, an objective that is

a makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited." *Hopwood*, 861 F.Supp. at 555 (citing *Sweatt*, 339 U.S. at 632 (1950)). Finally,

in 1950, a unanimous United States Supreme Court ruled that the State of Texas' provisions regarding the legal education of [W]hite and minority students violated the Fourteenth Amendment and ordered that Sweatt be admitted to the previously all-[W]hite University of Texas School of Law. Sweatt left the law school in 1951 without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings.

Hopwood, 861 F.Supp. at 555 (citing *Sweatt*, 339 U.S. at 636).

¹⁵⁸ *Croson*, 488 U.S. at 495, 509.

¹⁵⁹ *Adarand*, 515 U.S. 200, at 222, quoting *Croson*, 488 U.S. 469 (1989)

¹⁶⁰ "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination," *Wygant*, 476 U.S. at 273-74.

¹⁶¹ "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson*, 488 U.S. at 494.

¹⁶² "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" *Buckley v. Valero*, 424 U.S. 1, 93 (1975).

¹⁶³ *Adarand*, 515 U.S. 200, at 224, quoting *Croson* 488 U.S. 469 (1989).

¹⁶⁴ 497 U.S. 547 (1990).

¹⁶⁵ *Hopwood*, 861 F.Supp. at 568, quoting *Metro Broadcasting*, 497 U.S. at 565.

within the power of Congress."¹⁶⁶ The District Court distinguished *Hopwood* from *Metro Broadcasting*. "In *Metro [Broadcasting]*, the FCC's minority ownership programs had been specifically mandated and approved by Congress."¹⁶⁷ Although Congress has the power to identify and redress the effects of discrimination and has charged the Department of Education with assuring compliance with Title VI, there is no similar congressional mandate in this cause. Further, the FCC is a licensing body that established specific minority ownership policies pursuant to a congressional mandate. "[The OCR] has ...not...required the State to adopt any specific procedures."¹⁶⁸ Thus, the University of Texas was penalized.

The District Court further distinguished equal protection analysis. "[U]nder equal protection analysis, the same level of scrutiny applies to race-conscious affirmative action plans adopted pursuant to consent agreement as to other voluntarily adopted plans."¹⁶⁹ Citing *Podberesky v. Kirwan*¹⁷⁰ as a more recent circuit court opinion analyzing an educational affirmative action plan, "a scholarship plan adopted in response to protracted litigation and OCR guidelines, upheld the lower court's application of strict scrutiny as the proper standard for review of the plan."¹⁷¹

The most compelling justification for application of strict scrutiny is to provide assurance that individual rights are afforded the full protection they merit under the Constitution. Only by applying strict scrutiny can a court honestly weigh the validity and necessity of efforts to remedy past wrongs against the rights of otherwise qualified non-minorities affected by the effort.

Although the use of racial classifications is disfavored, there are instances when such classifications serving proper purposes should be upheld. Only through diligent judicial examination can a court determine if a classification is consistent with constitutional guarantees and not related to "illegitimate notions of racial inferiority or simple racial politics." Accordingly, the Court concludes that the law school admissions process must be subjected to a strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment

¹⁶⁶ *Id.*

¹⁶⁷ *Hopwood*, 861 F.Supp. at 558.

¹⁶⁸ *Hopwood*, 861 F.Supp. at 568-69.

¹⁶⁹ *Id.* at 569.

¹⁷⁰ 956 F.2d 52 (4th Cir. 1992).

¹⁷¹ *Hopwood*, 861 F.Supp. at 569.

to protect both the integrity of the process and the important *individual rights* at issue.¹⁷²

IV. TWO NEGATIVES DO MAKE A POSITIVE OR TWO WRONGS DO MAKE A RIGHT: THE MATHEMATICAL AND PHYSICS EQUILIBRIUM ANALYSIS

"[T]he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Hugo L. Black¹⁷³

To appreciate the legal analogy and to understand the rationale for incomplete logic set forth in this article, a brief review of mathematical theory is necessary. The collection of real numbers includes natural numbers, integers, rational numbers, and irrational numbers. Real numbers can be represented on a number line such that each point on the line corresponds to exactly one real number and each real number corresponds to one point on the line. When the number zero is placed, the positive numbers are placed at regular intervals to the right of zero, and the negative real numbers are placed at regular intervals to the left of zero.¹⁷⁴ The natural numbers, also called positive integers, go on indefinitely. The number two is placed one unit to the right of one on the number line, the number three is placed one unit to the right of two, and so on.¹⁷⁵ For every real number, a , there is a real number, $-a$, called the additive inverse, such that $a + (-a) = (-a) + a = 0$. Here, $-a$ is called the negative of a .¹⁷⁶

Additionally, properties of equalities must be recognized. Merely adding a number to both sides of an equation preserves the equality. Likewise, adding a number to both sides of an inequality preserves the inequality.¹⁷⁷ Multiplying an inequality by a positive number preserves the inequality.¹⁷⁸ Therefore, incorporating these theories and importing them to our legal reasoning we have:

$$- a + a = 0$$

¹⁷² *Id.* (emphasis added).

¹⁷³ *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

¹⁷⁴ STANLEY I. GROSSMAN, *ALGEBRA & TRIGONOMETRY* 3 (2nd ed. 1992).

¹⁷⁵ *Id.* at 3-4.

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.* at 15.

¹⁷⁸ *Id.* at 16.

This implies that when the total amount of something is fixed (T =law school openings) then the quantity devoted to one thing (B =Black students) must be balanced by less than the fixed amount being devoted to the other thing (W =White students). This may be represented mathematically in the following equations:

$$T = W + B$$

$$T - B = W - B - B$$

$$T - B = W$$

Likewise, in another area of mathematics, by simply multiplying two negatives, one yields a positive. Thus reinforcing the analogy of two negatives can/do make a positive.

Additionally, a brief acknowledgement of mathematical theory is useful. Mathematical philosophers acknowledge both a priori knowledge and empirical knowledge.¹⁷⁹ A priori, attainable prior to experience, and empirical, based on experience, have distinctions.¹⁸⁰ "Empirical concepts [are] held to be ideas that have been 'abstracted' by the mind from what is 'given' in sense experience, while a priori concepts are held to be ideas not acquired by the mind in that manner."¹⁸¹ A priori knowledge, then, exists independently and does not need to be justified by experience.¹⁸² In reality, not every legal reasoning situation or mathematical equation fits into one exclusive category.¹⁸³ However, when

¹⁷⁹ STEPHEN F. BARKER, *PHILOSOPHY OF MATHEMATICS*, 3 (1964).

In addition to the distinction between a priori and empirical knowledge, philosophers have also concerned themselves with another related distinction between analytic and synthetic knowledge. This distinction was introduced into philosophy by the eighteenth-century German philosopher Immanuel Kant, and [remains controversial. Kant used the notion of judgment] when trying to explain his distinction between analytic and synthetic knowledge. Kant's view [is] to know something, or even have a belief of any kind, is to have made a judgment. [That] judgment may have been made consciously or unconsciously. . . . Kant [acknowledges the] two different sorts of judgments: . . . synthesis, the act of putting together things that are uncombined and different, and analysis, the act of separating out from something a component that was present in it.

Id. at 7.

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Id.*

¹⁸² *Id.* at 4-5.

¹⁸³ In the author's opinion, the courts have followed this reasoning in holding that statistics are persuasive but not dispositive of discrimination.

existing knowledge is a priori, not merely justified by experience, then deduction can be applied. "Deduction is reasoning in which we can know a priori that if no logical mistake has been made and if the premises are true, then the conclusion will have to be true also."¹⁸⁴ Therefore, when dealing with a finite set, remedying or balancing one "negative," or imposing a "wrong," requires compromise. This compromise, one can deduce, creates a second "negative" or "wrong".

In physics, the concept of "two negatives equal a positive" can also be inferred. The difference in physics, however, is that the "positive" is a state of equilibrium, or a state of balance.¹⁸⁵ Consider first a pendulum. If a bob is suspended vertically from its support, it will remain motionless. This is the pendulum's equilibrium position. If a pendulum is set in motion, it swings back and forth. While a pendulum is swinging back and forth, it is not in equilibrium – as the motion of the pendulum carries it past the rest position, the restoring force on the bob accelerates the bob so that it is redirected towards the rest position. The bob will continue to swing through the equilibrium point, to a maximum displacement on the other side, until it comes to a complete rest, and thus the cycle repeats. The restoring force is needed to bring the pendulum back to its rest position.

After pendulum is set in motion, it swings back and forth until it once again achieves equilibrium, see Figure 1.

This principle is similarly demonstrated in Hooke's Law.¹⁸⁶ Hooke's Law states that the restoring force due to a spring, is proportional to the length that the spring is stretched, and it acts in opposite direction.¹⁸⁷ In order to achieve equilibrium, the spring must return to the rest position.¹⁸⁸

¹⁸⁴ BARKER, *supra* note 179, at 5.

¹⁸⁵ This is in the author's conception/understanding of physics.

¹⁸⁶ See WILLIAM P. CRUMMETT AND ARTHUR B. WESTERN. UNIVERSITY PHYSICS: MODELS AND APPLICATIONS 108 (1994). When a spring is stretched it exerts a restoring force in direct proportion to the amount of stretch. When a string is compressed the restoring force increases in direct proportion to the amount of the compression. *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

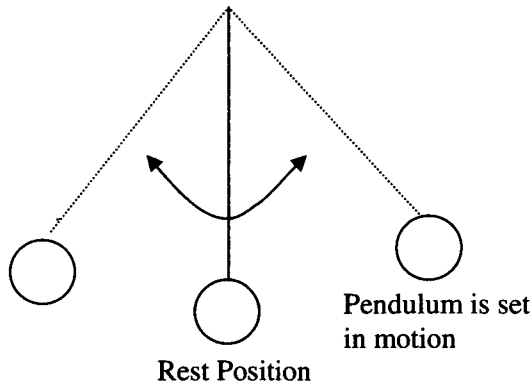


Figure 1. Pendulum in Motion

Examining kinematics,¹⁸⁹ we are presented with another theory of physics in which equality is sought. Newton’s First Law states that an object in motion, will remain in constant motion until acted upon by an outside force.¹⁹⁰ If a force in the direction opposing motion is applied over an appropriate time interval, the object will come to rest.¹⁹¹ For example, if a ball is thrown directly up into the air, the force of gravity gradually slows the velocity of the ball until it reaches its maximum height, at which time the ball has an instantaneous speed equal to zero, prior to traveling back towards the earth. Newton’s Third Law states that for every action, there is an equal and opposite reaction.¹⁹² In the sport of tennis, the tennis player swings the racket in order to strike the oncoming ball. Action/Reaction forces exist such that the player’s racket strikes the ball and in return, the ball strikes the player’s racket.

Newton’s Laws are analogous with the concept of affirmative action programs in colleges. As in Newton’s First Law, Whites will continue to be the majority in colleges until acted upon by an outside force. By instigating affirmative action programs over a period of time, the continued control of the White majority will cease to exist, leaving an equal, resting state of racial composition. Likewise, as in Newton’s Third Law, it is necessary that for

¹⁸⁹ Kinematics is the study of the motion. Interview with James A. Hilty, II. Mr. Hilty is an engineering physicist currently teaching for the non-profit Teach for America program in Baton Rouge, LA.

¹⁹⁰ In the 17th century, Isaac Newton developed his Three Laws of Motion. For the purposes of this article, there is no need to examine Newton’s Second Law of Motion. *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

equality in education to occur, an equal or opposite force must be applied. This force is the alleged "wrong" of affirmative action. Equality in education cannot occur without the opposite force of programs of assistance and opportunities for minorities. Thus, in physics, as mathematics, two "negatives" can/do equal a "positive."

V. STATISTICAL PROBABILITY: ACHIEVING EQUALITY WITHOUT IMPOSING A SECOND WRONG?

So-called formal equal opportunity has done a lot but misses the heart of the problem. It put the vampire back in its coffin, but it was no silver stake. The rules may be color-blind but people are not. The question remains, therefore, whether the law can truly shed, or exist apart from the color-conscious society in which it exists, as a skeleton is devoid of flesh; or whether law is the embodiment of society, either the creation or the reflection of a particular citizenry's arranged complexity of relations.¹⁹³

Wrong—"a violation of the legal rights of another; an invasion of right to the damage of the parties who suffer it, especially a tort."¹⁹⁴

The definition of equality has remained a subject of debate.¹⁹⁵ Additionally, measures of equality and equal opportunity are controversial. The Supreme Court has recognized three methods by which the plaintiff can attack the exclusionary effect of hiring practices. The methods include

¹⁹³ Patricia Williams, *The Obliging Shell: An Informal Essay of Formal Equal Opportunity*, 87 MICHIGAN L. REV. 2128, 2142 (1989).

¹⁹⁴ BLACK'S LAW DICTIONARY 1612 (6th ed. 1990).

¹⁹⁵ *United Steelworkers of America*, 443 U.S. at 232.

It must also be stressed that the Commission must confine its activity to correcting abuse, now promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment....Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification. The Republican supporters of the bill concluded their remarks on Title VII by declaring that "[a]ll vestiges of inequality based solely on race must be removed...." Therefore, this argument was limited to removing the obstacle to the opportunity for equality, not promoting equality.

applicant flow analysis, population comparison analysis, and requirement effect analysis.¹⁹⁶ The Court, however, "has refused to endorse one particular method."¹⁹⁷ The Supreme Court explained the value of statistics in *International Brotherhood of Teamsters v. United States*¹⁹⁸ as "probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination."¹⁹⁹ Perhaps this is another way of saying: where there is smoke, there is fire. The purpose of statistical analysis was therefore interpreted as useful only "to probe such motivation and not to require employers to maintain a balanced work force."²⁰⁰

Here statistics are introduced in a different fashion and for a different purpose. The reason for presenting the following analysis is to simply show that equality cannot be achieved without creating an alleged "second wrong."

Social Scientist Robert Klitgaard calculated that in one year, in the 1970's, if affirmative action had been eliminated, the total number of Blacks in law school in America would have dropped from 1,539 to 285.²⁰¹ This presumably meant that the total number of Whites would have risen by the same number.²⁰² In 1971, Marco DeFunis, one of the "discriminated-against" Whites, sued.²⁰³ The University of Washington law school had rejected DeFunis

even though his grades and test scores put him ahead of virtually all the Black students who were accepted. DeFunis won his case and entered the law school under a court order. The Washington State Supreme Court reversed the decision and ordered him out. DeFunis appealed to the United States Supreme Court,²⁰⁴

which agreed to hear the case. As a result, the lower-court decision was stayed, permitting him to remain in law school.²⁰⁵

¹⁹⁶ Not based on a specific source, but rather the author's opinion after research.

¹⁹⁷ MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 125 (1994).

¹⁹⁸ 431 U.S. 324 (1977).

¹⁹⁹ *Id.* at 340.

²⁰⁰ ROTHSTEIN, *supra* note 197, at 125.

²⁰¹ Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES MAG., June 11, 1995, at

52.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*; See also *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

William O. Douglas, the longest-serving member of the Supreme Court in American history, seemingly struggled with the concept of remedying past wrongs in his famous dissent.²⁰⁶ Douglas acknowledged the potential bias the LSAT might have on those with diverse cultural backgrounds.²⁰⁷

²⁰⁶ See Lemann, *supra* note 201, at 52.

Douglas's papers, now opened, provide some insight to this struggle. Douglas, then 75 years old, "was himself the product of humble origins in the state of Washington; his own meteoric rise has been set off by admission to law school." *Id.* He was "a fiery liberal and champion of the downtrodden who had come down on the side of Blacks in every landmark civil rights case." *Id.* One of Douglas's clerks wrote him a memo recommending he vote to take up the DeFunis case because "there really was some kind of quota here," which he thought was a wrong that ought to be corrected. *Id.* The Court granted DeFunis a hearing and then recessed. When DeFunis was only weeks from law school graduation the justices began working on their opinions again. Four justices wanted to kick DeFunis out of law school, four wanted to order his admission. It was apparent that Douglas would be the crucial swing vote. Douglas, known for his quick, decisive nature, seemed "genuinely torn." *Id.* "I don't know about these tests," Douglas told Ellman, one of his clerks. Douglas was questioning if the Law School Aptitude Test was biased against Blacks. "Before putting Ellman in charge of the opinion, Douglas had dashed off some wording, dated [M]arch 8, 1974, that said the L.S.A.T. was "by no means objective" and might contain "hidden bias." *Id.* Ellman obtained data from the Educational Testing Service that the L.S.A.T. did not inaccurately predict Blacks' grades. *Id.* Douglas's early wording opposed reverse discrimination. "The democratic ideal as I read the Constitution and Bill of Rights presupposes an aristocracy of talent, and all races must be permitted to compete for a position in that hierarchy," it said. *Id.* Douglas went on to propose that the law school first admit "those clearly qualified" purely on academic merit and then fill the rest of its places by a lottery. *Id.* Then, on March 11, the justices decided to declare the case moot since DeFunis was about to graduate and no clear majority position was emerging. Douglas, however, chose to produce a dissent that addressed the merits of the case. He told Ellman, "I might not be around next time this issue comes up." *Id.* On March 21, there was another draft of Douglas's opinion arguing that the school should be allowed to admit minorities with lower test scores than Whites who were rejected. However, the next day, there was another draft taking a different position. While "racial classifications cannot be used," universities should discriminate in favor of people from disadvantaged backgrounds. *Id.* The next draft, indicated an opposition to racial preferences was emerging. Another draft said, "The presence of an L.S.A.T. test is sufficient warrant for a school to separate minorities into a class in order better to probe their capacities and potentials." *Id.* Douglas instructed Ellman to circulate this draft to the other justices. But, the following morning, called Ellman to his office and said he actually had not wanted the draft circulated. After Ellman retrieved the copies from the justices' offices, Douglas told him that "from now on he would work on the opinion without any help." *Id.* He then wrote one last draft, "rather than coming down on one or another side of the case, he came down on both at the same time. He was strongly against reverse discrimination, but insisted that DeFunis had not been discriminated against on the basis of his race when he was denied admission. So, for the first time in all the drafts, he did not order DeFunis admitted to law school." *Id.* Douglas seemed to arrive at his final position by turning his attack on the L.S.A.T.

The key to the problem is the consideration of each application in a racially neutral way. Since the LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities. The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag...Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.²⁰⁸

My view is only that I cannot say by the tests used and applied he was invidiously discriminated against because of his race. I cannot conclude that the admissions procedure of the Law School of the University of Washington that excluded DeFunis is violative of the Equal Protection Clause of the Fourteenth Amendment.²⁰⁹

Even legal scholars of great character and capacity have struggled with this logic.

VI. REMEDIES: AN OVERVIEW EN BREVE

Remedy—"the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief."²¹⁰

In layman's terms, a remedy is the type and amount of relief "to which a party may be entitled."²¹¹ First, there are two broad categories of remedies:

"It is racially biased, he wrote; its bias justifies reverse bias by the law school; in fact, the L.S.A.T. should be abolished entirely. That Douglas decided to declare the L.S.A.T. biased although he had no evidence that it was is mainly a demonstration that he was intellectually trapped and couldn't find any other way out." *Id.* One year later, Justice Douglas had a stroke and retired from the Court. In 1977, a case almost exactly like *DeFunis* rose to the Supreme Court: *Bakke v. Regents of the University of California*. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *DeFunis*, 416 U.S. at 334 (Douglas, J. dissenting).

²⁰⁹ *Id.* at 344.

²¹⁰ BLACK'S LAW DICTIONARY 1296 (7th ed. 1999).

²¹¹ ELAINE W. SHOBEN, ET AL., REMEDIES, CASES AND PROBLEMS 2 (3d ed. 2002).

remedies at law and remedies in equity.²¹² Remedies at law are remedies that go against the property of a person.²¹³ Remedies in equity are remedies that go against the person.²¹⁴ "There are four basic types . . . of remedies: (1) coercive remedies, (2) damages, (3) restitution, and (4) declaratory relief."²¹⁵

A. Coercive Remedies

Coercive remedies are available from a court in equity, meaning that a judge will determine whether the party "is entitled to the 'extraordinary relief' of an order commanding the defendant to do or refrain from doing specific acts."²¹⁶ These types of remedies are supported by the contempt power of the court, which permits a judge to jail a disobedient party for the "willful disobedience of the order."²¹⁷ Coercive remedies are most likely going to be "an injunction or specific performance."²¹⁸ There are four types of injunctions: (1) preventive injunctions, (2) restorative injunctions, (3) prophylactic injunctions, and (4) structural injunctions.²¹⁹ A preventive injunction is one that prevents a future action by the defendant.²²⁰ A restorative injunction is one that undoes "the effects of a past wrong."²²¹ A prophylactic injunction is one that "seeks to safeguard the plaintiff's rights by directing the defendant's behavior so as to minimize the chance that wrongs might recur in the future."²²² Finally, a structural injunction is one where the court gets involved "in the institutional policies and practices of the defendant entit[y]."²²³ Specific performance, on the other hand, occurs when the court orders the defendant to specifically perform a certain action.²²⁴

In determining whether or not to grant an injunction, Courts have adopted a four part test: (1) is there irreparable harm?, (2) can the harms be balanced?, (3)

²¹² DAN B. DOBBS, LAW OF REMEDIES, DAMAGES-EQUITY-RESTITUTION §1.2 (2d ed. 1993).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ SHOEN, *supra* note 211, at 2.

²¹⁶ *Id.*

²¹⁷ *Id.* at 3.

²¹⁸ *Id.* at 2.

²¹⁹ *Id.* at 3.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 86-87.

what is the plaintiff's probability of success?, and (4) what is the public interest?²²⁵

While there are several factors to be looked at by the court, there are also several defenses that can prevent an injunction or specific performance from being granted. The first is unclean hands, which means that the plaintiff had committed some intentional act that prevents them from being completely innocent, but usually the court must be offended before this defense will apply.²²⁶ The second defense is duress. If the defendant was acting under duress from the plaintiff, a court may not grant a remedy to the plaintiff. In the defense of duress, a plaintiff must have removed the free will of the defendant and attempted to gain an unfair advantage. The third defense is unconscionability, which combines unclean hands and duress.²²⁷ This defense only applies to contract actions.²²⁸ The fourth defense is estoppel, which means the court will estop the plaintiff from receiving relief if there are actions inconsistent with the rights the plaintiff is trying to assert.²²⁹ The fifth defense is waiver, which basically states that a plaintiff may waive her right to relief and if she does so, then the plaintiff is not entitled to any relief.²³⁰ The last defense is laches.²³¹ Laches involves the barring of a plaintiff from bring an action due to unjust delay in bringing the action.²³²

B. Damages

Damages are a remedy, the sole purpose of which is to compensate for losses suffered in violation of one's rights.²³³ Damages arise from two types of actions: contract,²³⁴ and tort.²³⁵ In contract actions, damages are usually awarded based on the contractual arrangement and usually are awarded as compensatory damages.²³⁶ Tort actions provide for harm to real property and personal property, personal injury damages, and damages for injuries resulting

²²⁵ *Id.* at 46.

²²⁶ *Id.* at 140-41.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 126.

²³⁰ *Id.* at 155.

²³¹ *Id.* at 126.

²³² *Id.*

²³³ *Id.* at 3.

²³⁴ *Id.* at 334.

²³⁵ *Id.* at 435.

²³⁶ *Id.* at 334.

in death.²³⁷ Tort actions often lead to awards of punitive damages, or as they are often referred to exemplary damages.²³⁸ Punitive damages are awarded as punishment for the defendant rather than to compensate the plaintiff.²³⁹ Punitive damages are most often awarded for pain and suffering.²⁴⁰ The area of damages is quite broad and due to the nature of this article, the author felt the topic was worthy of mentioning, however it is also worthy of its own article.

C. Restitution

“The goal of restitution is to restore property to its rightful owner by returning the plaintiff to a position held before a wrong or to disgorge from the defendant any unjust enrichment occasioned by the wrong of the plaintiff.”²⁴¹ Restitution is based on what the defendant gains.²⁴² Unjust enrichment has three basic elements.²⁴³ First, the defendant must have gained something of value.²⁴⁴ Second, he must have gained it at the plaintiff’s expense.²⁴⁵ Finally, the circumstances are such that allowing the defendant to retain the benefit would be unjust.²⁴⁶ There are also a few minor types of restitutionary remedies, which include equitable liens, rescission, and suits-in-assumpsit for quasi-contract.²⁴⁷

D. Declaratory Relief

The main goal of declaratory remedies is to obtain a declaration of the rights and obligation of the parties.²⁴⁸ The primary form of declaratory relief is nominal damages.²⁴⁹ Often though, parties will seek a declaratory judgment

²³⁷ *Id.* at 435.

²³⁸ *Id.* at 704.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 4.

²⁴² *Id.*

²⁴³ *Id.* at 796-97.

²⁴⁴ *Id.* at 796.

²⁴⁵ *Id.* at 797.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 4.

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.*

that declares the rights or legal relations of the parties.²⁵⁰ Declaratory relief does not compensate a party.²⁵¹

The remedy that Afro-Americans are seeking is redress for the wrongs incurred during slavery and its derivative effects, as well as the wrongs incurred for the unequal treatment as citizens. This article proposes that Blacks cannot be equal until they are adequately and equally represented in professions that require intense study on the graduate student level, such as the legal profession.

VII. PHILOSOPHY: A PROLEGOMENON AND A BRIEF GLIMPSE INTO THE MIND OF SOCIETY AND A PHILOSOPHER

A. A Prolegomenon

Often various philosophical and ethical theories are placed in two camps: the teleological and deontological.²⁵² Teleological themes posit that the rightness of an action is determined by its consequences.²⁵³ Primary among these theories is utilitarianism.²⁵⁴ Teleological theories yield a relatively precise and fairly objective decision-making method or approach by which consequences are arrived at by a kind of cost benefit analysis amongst alternatives. This often leads to a description of teleological utilitarian concepts of whatever means to obtain a beneficial end for hopefully everyone. On the other "side" are the deontological theories, which appear to ignore the consequences, while highlighting or concentrating on the nature of actions or rules from which actions derive.²⁵⁵ Principles that appeal to human respect and dignity are paramount. Motives are more important than consequences.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² JOHN R. BOATRIGHT. *ETHICS AND THE CONDUCT OF BUSINESS* 31 (4th ed. 2003).

²⁵³ Teleological derives from the Greek "telos" which means "end." The teleological theories justify ends achieved as opposed to discernment or concern with actions themselves. The idea is the greatest possible good for the greatest number. A question though emerges what is good and for whom? Classical economic theory is broadly utilitarian.

²⁵⁴ "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure." *Utilitarianism*, John Stuart Mill (1863) at chapter 2.

²⁵⁵ Deontological is derived from the Greek word "deon" meaning "duty." Thus, these theorists believed that actions are right due to the nature of the action or the rule followed to

Interestingly utilitarianism posits that the interests of each and every person be satisfied.²⁵⁶ That is, that the interest of everyone at least be included in this calculation. Thus, classic utilitarianism only asks that the greatest good, in essence, be for the greatest number of people.²⁵⁷ This then demands impartiality. But who or what is the population? Who does "everyone" include, or even not include? For example, should corporations be concerned with societal welfare? Jeremy Bentham and John Stuart Mill are names associated with teleological arguments and utilitarianism.²⁵⁸

In contrast, deontological theories are favored in both human reason and even more in the rightness of actions without regard to consequences. Motivation is the gravamen, vice consequences, ends, or results. Immanuel Kant is most strongly identified with this school of thought.²⁵⁹ Respect for persons, a belief in various kinds of rights, plus obligations and duties, are the foundations of the deontological approach.²⁶⁰ Natural rights, or human rights, belong to humans essentially because they are human; because one exists, one has inalienable rights as a human being.

The preceding was a dialogue leading to a very brief discussion of the American philosopher John Rawls, and his egalitarian theory of justice,²⁶¹ and of Robert Nozick's libertarian entitlement theory.²⁶² Neither Rawls nor Nozick fit neatly into the teleological or deontological "holes." In fact, even if one tried to place them into "holes," they would be square pegs trying to fit into in round "holes." Nozick is better known as a libertarian and Rawls is better

yield the action as opposed to a benefit or end for others or oneself. Of interest is the British philosopher W. B. Ross, a deontological follower who posits as one of his seven moral rules, the duty of reparations. Here the idea is to compensate persons for wrongs which were wrongfully inflicted upon them. One could use them to support Afro-Americans who are claiming reparations.

²⁵⁶ Mill, at chapter 2.

²⁵⁷ *Id.*

²⁵⁸ BOATRRIGHT, *supra* note 252, at 34. See also Anthony Quinton, *Utilitarian Ethics*, New York St. Martin's Press 1973.

²⁵⁹ BOATRRIGHT, *supra* note 252, at 51. See also IMMANUEL KANT, *FOUNDATION OF THE METAPHYSICS OF MORALS* (1785). (As commented on in ROBERT PAUL WOLFF, *THE AUTONOMY OF REASON* (1973)).

²⁶⁰ BOATRRIGHT, *supra* note 252, at 33.

²⁶¹ BOATRRIGHT, *supra* note 252, at 79. See also JOHN RAWLS, *A THEORY OF JUSTICE* (1971); ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE* (1977).

²⁶² ROBERT NOZIK, *ANARCHY, STATE, AND UTOPIA* (1979).

known as an egalitarian.²⁶³ The discussion that follows attempts to assign them to either side of the “two wrongs” precept that this article posits.

B. The Mind of Society

Rawls’s theory dwells on a kind of egalitarian justice, which ironically embodies the Kantian concept of equality.²⁶⁴ Rawls theorizes three principles. (1) The principle of equal liberty – Each person has an equal right to a base set of liberties that are compatible with a system of liberty for all.²⁶⁵ This is at once deontological and teleological depending upon how one views it. (2) The difference principle – This provides for an exception to the principle of equal liberty if some unequal arrangement benefits the least well-off person.²⁶⁶ Thus, an unequal allocation is acceptable if the worst-off person is better off with the reallocation, than any other reallocation, especially the former.²⁶⁷ This leads us towards the “two wrongs do/can make a right” direction. (3) The principle of equal opportunity – Various employment positions and school enrollment opportunities should be made available to everyone.²⁶⁸ Society has perhaps a duty to offer everyone an equal opportunity to fill these positions or openings in employment and schools by discounting differences of social condition or birth.²⁶⁹ This provides for a further tilt towards “two wrongs do/can make a right.” Thus, there is a more teleological wind.

This would appear to support the “two wrongs do/can make a right” argument, especially as to race, gender, and nationality. Rawls three principles of justice are met, even though the more just consequence may impact a few negatively.

Now we shift to perhaps a more deontological approach through the philosopher Robert Nozick. Nozick approaches justice through a historical principle that accounts for the process by which allocation or distribution came about²⁷⁰ as opposed to the end result or consequences which Rawls emphasizes.

²⁶³ This is a general understanding based on both the writings of Nozick and Rawls.

²⁶⁴ RAWLS, *supra* note 261, at 150-51.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 151.

²⁶⁷ *Id.* at 150-61, 302. *See also* BOATRIGHT, *supra* note 252, at 81-4.

²⁶⁸ *Id.*

²⁶⁹ *Id.* At 81-4.

²⁷⁰ BOATRIGHT, *supra* note 252, at 91. Nozick, to be fair, does call for just transfers, and just original acquisitions. With these principles in mind, would he support affirmative action since there were the original wrongs of slavery and segregation? He also believes in

Thus, Nozick's aim appears to be the protection of rights as opposed to equality of human well-being. In essence, it could be described as protecting what is yours (entitlement, even by birth) or not allowing the state to interfere with what one perceives as his.²⁷¹ This certainly seems to lead to a backing of "two wrongs do/can make a right."

Interestingly, Nozick and Kant, as well as Mills, Bentham, and Rawls, call for, and support, the ideas of freedom. Kant, and perhaps Nozick in a deontological frame, favor the protections of liberty, entitlement, and individual rights, at the expense of utility, while Bentham, Mills, and Rawls, perhaps more aligned with teleological principles, favor utility at the expense of freedom or rights. The preceding discussion was merely a polemical predicate to the possible philosophical and sociological protagonists for the argument in favor of "two wrongs do/can make a right."²⁷²

The necessity of an in-depth philosophical examination of the duality of remedies as both

"wrongs" and "rights," as well as the contrary views, are recognized by this author; however, the following subsection is intended to give a brief overview of two of the existing supportive theories that two "wrongs" can/do make a "right," the sophist and the egalitarian.

C. A Sophists View: The Advantage of the More Powerful

Thrasymachus, the Greek sophist, claimed that the people who have the most power impose social order on everyone else, "in every city the same thing is just, the advantage of the established ruling body. It surely is master; so the man who reasons rightly concludes that everywhere justice is the same thing, the advantage of the stronger."²⁷³ In Plato's *Republic*, Socrates refutes Thrasymachus's arguments by suggesting that the ruling body can mistake what is best for themselves, thus creating a strong disadvantage, implying a lack of

rectification where there was original unjust appropriation by force or fraud. The question here though is how about the innocent holder in due course of beneficiaries or original wrongs? Nozick also tends to feel no obligation for the rich to aid the poor (See NOZICK, *supra* note 262, at 265-68). That is, unless there were a voluntary obligation to aid the poor, which would point the decision towards being a deontological decision.

²⁷¹ BOATRIGHT, *supra* note 252, at 91. This is in essence Nozick's entitlement theory. Summarized as "From each as they choose, to each as they are chosen." Justice is not for the promotion of the well-being of mankind or equality, but for the protection of our rights. \

²⁷² The author notes that obviously philosophy can be used by either side to support one's position. See generally BOATRIGHT, *supra* note 252.

²⁷³ PLATO, *THE REPUBLIC* BOOK I 16 (Alan Bloom ed., Basic Books Inc. 1968).

justice. While Socrates ultimately wins the argument, Thrasymachus's statement is not without merit. The majority, or ruling class, tends to make laws in such a way as to maintain an advantage over the minority, making it impractical for the minority to overcome their disadvantage.

For a practical example, look to the impoverished child. A child is born into an impoverished neighborhood. The child's parent/guardian(s) works two jobs in order to provide food and shelter for the child; therefore, education is not valued at home when compared with putting food on the table. The child receives a minimal education at school due to inadequate funding. When the child reaches an age where they can participate in the workforce, they are put to the task of bringing money home for the family. With little importance placed on education at home, and lack of enthusiasm within the school system itself, the child will often not value education when compared with survival. When the child reaches the age of adulthood, they are not in a position to leave the family and focus on bettering themselves. They will continue working to support a family, be it their own, or their extended family. Thus, the cycle begins again. Thrasymachus's claim that the weaker, in this case the under-educated, will be locked into the rule of the stronger, the better educated, is reinforced. The question is then posed, when the minority has become the victim of a cyclical suppression, how does one escape? Egalitarians offer a solution.

D. Egalitarianism: Fixing the Problem: A Balancing Act

Egalitarians argue that governments should be motivated to make the move from possessing an awareness of moral equality, to actually providing some kind of equality in the lives of those they govern. Egalitarians suggest that by more equally distributing money, political power, employment, and education, members of society become more equal. How can equal distribution occur in a capitalist society? If the very nature of a capitalist society is one of competition for resources, how can the repressed minority, who has no resources with which to begin, compete with the majority ruling class who controls the resources?

To equal the playing field, the resources must be redistributed. The only way to redistribute limited resources is to move resources from one and redistribute them to another. There is the analogy of condemnation and eminent domain proceedings for "betterment" of an area. Certainly we hear the hues and cries of "wrongs" in this area. Egalitarians suggest that affirmative action programs may provide the answer. In aggressively enlisting the members of the disadvantaged minority, and placing them in a better competitive position with the advantaged majority, you are balancing the

distribution of resources, and establishing equality. An Egalitarian does not believe considering one's sex or race as a prerequisite for a position is an injustice, especially in light of past injustice, but rather is a modification of what qualities are important for that position, again with the past in mind, resulting in the extant imbalance.²⁷⁴

[G]roup identity and experience are so central a part of who we are and so strongly affect how we perceive the world that it is important that there be a variety of perspectives, so that all aspects of a situation are properly seen, and the view of the majority or dominant group is not mistaken for objectivity or universality.²⁷⁵

Affirmative action often leads to a feeling of indignation held by the majority towards the minority, thus establishing the concept of a "second wrong." The majority may claim that by placing any one person above another in order to atone for a past wrong is in a sense discrimination, "So no matter how attractive the end result of reverse discrimination may be it should be unacceptable to someone committed to equality of opportunity as a fundamental principle."²⁷⁶ In this author's opinion, when applying an egalitarian philosophy, this concept of a "second wrong" is not a strong enough reason to justify allowing the advantaged ruling class to control the majority of the resources, but rather is a rationale for the continuation of the current state of affairs.

*E. Philosopher:*²⁷⁷ *An examination of Emile Durkheim's Consciousness Collective*

Emile Durkheim was a noted philosopher and sociologist. During his years of study, Durkheim realized the importance of the interaction of the advantaged

²⁷⁴ It is acknowledged that there may be a few strict egalitarians that believe there can never be true equality in a capitalist society. The thought in this article is not as egalitarian as in communism, but egalitarian in the light of capitalism, yet avoiding or amending gross imbalances because of race and gender. For example, where there was preference/discrimination in the past, by a dominate group, there is now the need for balancing and remedies which involve that same dominate group, towards the specific dominated group in light of past injustice.

²⁷⁵ BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 230 (3d ed. 2004) quoting Drucilla Cornell.

²⁷⁶ NIGEL WARBURTON, PHILOSOPHY: THE BASICS 75.

²⁷⁷ Philosopher – (Phil-o-so-see-off-er) a term used to describe Emile Durkheim, one of the Fathers of Sociology, and the noted Philosopher who paved the way for functionalism.

and the disadvantaged to create a consciousness collective, or the active mind of society. Durkheim believed that by examining individual facts about society, social facts,²⁷⁸ you could come to understand society as a whole.

In his work *Suicide*,²⁷⁹ Durkheim notes that, "one does not advance when one proceeds toward no goal, or -- which is the same thing -- when the goal is infinity. To pursue a goal which is by definition unattainable is to condemn oneself to a state of perpetual unhappiness." A parallel emerges when Durkheim's observation is applied to the sophist theory of the disadvantaged. When vertical movement is suppressed by the control of the stronger, goals of success appear so far away as to be unattainable. This also speaks to the issue in terms of immediacy versus eventually, in regards to achieving equality in terms of time. This is what the famous phrase from the Brown case was alleging by putting forth "all deliberate speed."²⁸⁰ Once again, if left to continually recycle, there is no escape for the disadvantaged. When an egalitarian theory is applied to Durkheim's observations, the cycle breaks down. By offering an equal distribution of resources, goals of success no longer appear to be unattainable.

The suppression that is faced by Afro-Americans can readily be applied to Durkheim's theory. Faced with low incomes (*see* footnote 15), lack of proper education, and fewer job opportunities, Blacks often find themselves with no true attainable goal, in essence, spinning their wheels, but going nowhere, while watching the majority "climb the ladder of success." So, without the assistance of better jobs, better schools, and more money, how can Blacks be expected to break "free?" The principles of affirmative action, or a "second wrong," offers a way out.

²⁷⁸ "[A] category of facts which present very special characteristics: they consist of manners of acting, thinking, and feeling external to the individual, which are invested with a coercive power by virtue of which they exercise control over him." EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 52 (1895).

²⁷⁹ EMILE DURKHEIM, *SUICIDE* (1897).

²⁸⁰ CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 284-5 (Robert Weil ed., W.W. Norton & Company, 2004)

VIII. A FACTUAL REVIEW OF THE PROPORTIONALITY: THE STATUS OF
BLACK LAWYERS

I do not believe in the law of hate. I may not be true to my ideals always, but I believe in the law of love, and I believe you can do nothing with hatred. I would like to see a time when man loves his fellow-man, and forgets his color or creed. We will never be civilized until that time comes. I know the Negro race has a long road to go. I believe the life of the Negro race has been a life of tragedy, of injustice, of oppression. *The law has made him equal, but man has not* [emphasis added]. And, after all, the last analysis is, what has man done? and not what has the law done?

Clarence S. Darrow²⁸¹

Status – standing, state or condition; social position; the legal relation of individual to the rest of the community.²⁸²

To further define our logic, the actual proportionality of Black lawyers in the legal profession as the basis for demonstrating the incomplete logic of advocating that justice can be achieved for Blacks without some compromise to non-minorities will now be reviewed. The author is assuming that one mark of equality will be when Blacks are proportionately represented. “The law has made him equal but man has not.”²⁸³

After more than three decades of affirmative action programs, Black lawyers are still not proportionally equivalent.²⁸⁴ The most dramatic increase in total law school enrollment occurred during 1968 - 1971.²⁸⁵ Enrollment of Black students increased by 159% from 3,744 in 1971 to 5,955 in 1984.²⁸⁶ The small proportion of Blacks with law degrees resulted from accumulated high rates of attrition at each transition point of the educational process rather than

²⁸¹ CLARENCE S. DARROW, ATTORNEY FOR THE DAMNED 229, 262 (Arthur Weinberg ed., University of Chicago Press 1957) summation in the Sweet cases, Detroit, 1926.

²⁸² BLACK'S LAW DICTIONARY 1410 (6th ed. 1990).

²⁸³ DARROW, *supra* note 281.

²⁸⁴ Charles L. Cappell, *The Status of Black Lawyers*, WORK AND OCCUPATIONS, Vol. 17, Feb. 1990, at 101.

²⁸⁵ *Id.* at 104. The 94,408 students enrolled in 1971 represented 150% of the 1968 enrollment. The 1982 enrollment of 127,828 represented 135% of the 1971 total. However, enrollment declined in 1983 and 1984.

²⁸⁶ *Id.*

from a drop in Black enrollment.²⁸⁷ Rates for the continuation of the educational process from 1971 - 1980 were: 83% of Whites graduated from high school, whereas only 72% of Blacks graduated from high school; 45% of Whites versus 40% of Black graduates entered college; 56% of Whites versus 51% of Black college students eventually received a baccalaureate degree.²⁸⁸ Of these college graduates, an estimated 66% of Whites versus 61% of Blacks entered graduate or professional school; and 59% of Black graduate students versus 55% of White graduate students eventually earned their advanced degree.²⁸⁹ Black students are more likely to attend colleges with low admission standards.²⁹⁰ "Enrollment rates for Blacks in law school ... would have to double to become proportional."²⁹¹ Completion rates also varied for Blacks. During the 1970s, 85.1% of White students completed law school, compared to only 77.4% of Blacks. Estimates of Black student three-year completion rates in ABA-approved law schools from 1969 - 1977 averaged 72.7%.²⁹²

The statistical information in this section provides numbers and figures that show that Blacks are not equally represented in law schools or the legal profession, especially compared to White students. This statistical data is necessary to show that society must improve the view it has of African Americans. Society should no longer view African Americans as inferior or unequal in terms of who can succeed in the legal profession. "The law has made him equal, but man has not."²⁹³

²⁸⁷ *Id.* at 106.

²⁸⁸ *Id.*

²⁸⁹ *Id.* (quoting A. W. Astin, *Minorities in Higher Education*, San Francisco, 1982, Fig. 1: pp. 174-177).

²⁹⁰ *Id.*

²⁹¹ *Id.* (quoting A. W. Astin, 1982, at 76).

²⁹² *Id.* at 106 (quoting R. R. Smith, *Great Expectations and Dubious Results: A Pessimistic Prognosis for the Black Lawyer*, BLACK LAW JOURNAL, 7, at 107).

²⁹³ DARROW, *supra* note 281.

IX. WHAT WILL IT TAKE TO ACHIEVE PROPORTIONATE REPRESENTATION
IN THE LEGAL PROFESSION? PROJECTION OF BLACK LAWYERS

... [I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

Thurgood Marshall²⁹⁴

Proportional representation of Blacks in the legal profession will never occur if the existing incomplete logic of the “reverse discrimination” argument prevails. Even with the recent impact of affirmative action programs, a regression analysis has been used to project when proportional representation would occur. First, it is acknowledged that the first attack on this article’s example will be that it is merely dealing with numbers and quotas. However, categories and representation cannot be ignored. It is reiterated that this exercise is a graphic example of the potential result of the incomplete logic that “two wrongs do not make a right.” Second, it is acknowledged that the most appropriate method of statistical analysis would be comparing the pre- civil rights data (pre-1964 data) with the recent post-civil rights data. However, this was impossible because the data necessary for analysis was not kept on Blacks pre-1964.²⁹⁵

Both conservatives and liberals want well-qualified people in the legal profession. How to get there is the key question. Is it “sooner” (potentially the year 2021 with the impact of recent programs) or “later?” Who knows when?²⁹⁶ Should immediate scrutiny and questioning be suffered or should time be taken in the hope of arriving at what is acceptable on both sides?

²⁹⁴ *University of California Regents v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, T., concurring in part and dissenting in part).

²⁹⁵ Personal communication with Rick Morgan, Data Specialist, American Bar Association Section of Legal Education and Admissions to the Bar (May, 1996).

²⁹⁶ The question often arises; how long will it take to bring about equality/equilibrium for Afro-Americans? One approach is slavery has existed in this country since 1691, (*see Before the Mayflower: A History of Black America*, Larone Bennett. Johnson Publishing Co. (1980)) which means that slavery and its derivative effects have been with us for almost 400 years. Therefore, it could take at least another 400 years. Another approach was possibly,

Perhaps later may disadvantage and disenfranchise larger numbers than what is initially obvious. Sooner will ultimately disadvantage and disenfranchise less people. Whereas the conservative approach would further disadvantage the disadvantaged group, the ultimate impact would be greater. Thus, this line of reasoning is more likely to perpetuate the statistical inequality.

The real question, however, of the "later" route is whether equality can ever be achieved. This statistical analysis shows it cannot, sans affirmative action. False reassurance leads to wrong information that perpetuates a laissez-faire attitude by some and a strong opposition by others. This result will have a negative impact on the greatest number of people. Perpetuating the belief that equality can be achieved without compromise to someone or a group is wrong. This wrong information will ultimately produce a cultural and economic impact that compromises society as a whole. To assume Blacks will ever be proportionately represented without affirmative action is mathematically and logically incorrect.

Affirmative action aids Blacks in gaining proportional representation; however, many Whites, and some Blacks,²⁹⁷ see affirmative action as reverse discrimination. The idea of reverse discrimination has spurred on intense debate by all races. The theory of reverse discrimination has had the effect of limiting the remedies and opportunities that were encouraging minorities.

X. REVERSE DISCRIMINATION: INCOMPLETE LOGIC AND INCONSISTENT LEGAL REASONING

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. We cannot-we dare not-let the Equal Protection Clause perpetuate racial supremacy.

Harry A. Blackmun²⁹⁸

inadvertently referred to in *Gratz* in which Justice O'Connor used the figure of twenty-five years. The question remains, how long it will take, to whom, and who makes the determination.

²⁹⁷ Ward Connerly, Armstrong Williams, and Alan Keyes, all who are well-known Black conservatives against affirmative action.

²⁹⁸ *University of California Regents v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, H., concurring in part and dissenting in part).

Reverse discrimination – Prejudice or bias exercised against a person or class for purpose of correcting a pattern of discrimination against another person or class.²⁹⁹

The term “reverse discrimination” has recently received notoriety sufficient to support its inclusion in *Blacks Law Dictionary*.³⁰⁰ Although the concept of reverse discrimination is not the focal point of this article, it must be considered in analyzing the incomplete logic and inconsistent legal reasoning applied when dealing with the concept. Reverse discrimination, however, is worthy of a separate paper.

Sociologist Nathan Glazer is known for his views on the effect of affirmative action policies on Whites.³⁰¹ In his book, *Affirmative Discrimination*,³⁰² Glazer highlights his view that with race-based hiring policies in place, discrimination against Whites occurs. “[t]he point of setting a [racial hiring] goal is that one will hire more of one group, less of another, simply because individuals are members of one group or another.”³⁰³ Glazer stresses that discrimination is still occurring instead of adopting the original intention for affirmative action, which promoted a policy of equality of opportunity, including programs to recruit or train Blacks who could later compete in a fair competition for jobs.³⁰⁴ Opposition to affirmative action has changed form over the years as reflected by various “negative packages”³⁰⁵ identified in the media. Titles included: No Preferential Treatment (asserting “the consideration of race or ethnicity, however benignly motivated, is not the American way”),³⁰⁶ Undeserving Advantage (asserting “[a]ffirmative action gives minorities something that they have not earned and do not deserve”),³⁰⁷ and Blacks Hurt (asserting “racial preferences reinforce stereotypes that minorities cannot do it alone, thus stigmatizing them”).³⁰⁸ However, it is interesting to note that Glazer has changed his viewpoint on affirmative action. He states that the institution of programs to compensate Blacks in America and

²⁹⁹ BLACK'S LAW DICTIONARY 1319 (6th ed. 1990).

³⁰⁰ *Hopwood*, 861 F.Supp. at 569.

³⁰¹ BLACK'S LAW DICTIONARY 1319 (6th ed. 1990).

³⁰² *Id.* (citing *Regents of University of California v. Bakke*, 438 U.S. 265 (1978)).

³⁰³ SKRENTNY, *supra* note 14, at 21.

³⁰⁴ NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION, ETHNIC INEQUALITY AND PUBLIC POLICY*, (Cambridge, MA: Harvard University Press, 1975 (1987)).

³⁰⁵ SKRENTNY, *supra* note 14, at 21.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 22.

³⁰⁸ *Id.* at 22.

the increased focus on multi-culturalism in society resulted from the unwillingness of America to incorporate Blacks into society.³⁰⁹ The anger and frustration Blacks felt as a result spurred on multi-culturalism and affirmative action, according to Glazer.³¹⁰

While some Whites have fanned the flames to the reverse discrimination theory, a true reverse discrimination practice has been surfaced in recent years. This practice is the use of legacy programs in secondary schools and colleges to grant admission to these schools to descendents of alumni.

XI. LEGACY: TRUE REVERSE DISCRIMINATION

"in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

Earl Warren³¹¹

Discrimination – In constitutional law, the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found.³¹²

Legacy programs, by granting preference to those who have not been wronged, are truly a form of "reverse discrimination." Legacy programs grant preference in college admission programs to children and grandchildren of school alumni. This affirmative action by granting preference in college admissions is a common practice today, especially at Ivy League schools. Legacy preference was first used in the 1920s when increasing numbers of Jewish students were outscoring White Anglo-Saxon Protestants (WASPs) on the Ivy League entrance exams.³¹³ Today legacy policies remain widespread. For example, children of Harvard alumni typically make up 12 % of Harvard's freshman class, and University of California, Berkeley, gives preference to

³⁰⁹ NATHAN GLAZER, *WE ARE ALL MULTI-CULTURALISTS NOW* (Harvard University Press 1997).

³¹⁰ *Id.*

³¹¹ *Brown v. Bd. of Education of Topeka*, 347 U.S. 483, 495 (1954).

³¹² *Black's Law Dictionary* 457 (6th ed. 1990) quoting *Baker v. California Land Title Co.*, 349 F.Supp. 235, 238-39 (1972).

³¹³ *Connie Leslie, et al., A Rich Legacy of Preference*, NEWSWEEK, June 24, 1991, at 59 (quoting John Larew, *Washington Monthly*, June, 1991).

legacies by admitting and billing them as in-state students.³¹⁴ For over 50 years, elite universities have practiced granting legacies preference. In fact, officials at the University of California, Davis, acknowledge that Alan Bakke would have been admitted without appeal to the Supreme Court if at least five less qualified White applicants had not been accepted ahead of him because of "family clout."³¹⁵ Similarly, a review of subpoenaed records showed the parents of 270 of 349 applicants accepted at the University of Chicago medical school from 1970 through 1974 contributed almost \$11 million. This averages approximately \$40,000 per student.³¹⁶

When a federal study emerged from complaints by Asian-Americans that some colleges were discriminating against them in favor of less-qualified White students, the U.S. Department of Education reviewed Harvard's undergraduate admissions for the classes of 1983 through 1992.³¹⁷ It concluded that the practice by Harvard of routinely granting preferential admission to children of alumni was not discriminatory. This report noted that the combined SAT scores of legacies who were admitted were 35 points lower than other students.

While only 16.9 % of Harvard applicants were admitted, 35.7 % of children of Harvard alumni were admitted. Additionally, Yale, Dartmouth, and Stanford have admitted giving preference to the children of alumni.³¹⁸ The report attempted to justify the court's reasoning by saying that, "although records indicated that Asian Americans were admitted at a lower rate than White applicants, the Office of Civil Rights (OCR) could find no evidence of a quota limiting their presence at Harvard" [emphasis added].³¹⁹ The evidence revealed that Asian Americans have gone from being 5.5 % of the class in 1983 to being 19.6 % of the class of 1994.³²⁰ Quoting Michael L. Williams, Assistant Secretary for Civil Rights, (known for his strong opposition to affirmative action) "while these preferences have an adverse effect on Asian Americans, we determined that they were long-standing and legitimate, and *not* a pretext for discrimination." [Emphasis added]³²¹ Harvard acknowledged there were

³¹⁴ *Id.*

³¹⁵ THE WASH. POST, Jul. 6, 1978, at DC9.

³¹⁶ *Id.* A federal audit revealed that 25 of those admitted after their parents made sizable donations later received federal loans and scholarships on the grounds they were "needy students." *Id.*

³¹⁷ U.S. DEPT. EDUC. REP., *Harvard Cleared of Asian-American Discrimination Charges*, Washington, Oct. 5, 1990.

³¹⁸ *Id.*

³¹⁹ *Id.* at 1.

³²⁰ *Id.*

³²¹ *Id.* at 2.

three major categories of applicants for whom preferences or "tips" are given: 1) racial/ethnic minority groups, 2) recruited athletes, and 3) children of alumni (legacies).³²² Harvard had no separate instructions describing how the preference was applied to legacies. However, all legacy applicants were routinely referred to the Dean of Admissions for reading.³²³ The Office of Civil Rights found a "great deal of evidence suggesting that the preferences or 'tips' given to children of alumni and recruited athletes were significant factors in the admissions process."³²⁴ However, the OCR found "little or no evidence of an ethnic tip being given to Asian American applicants."³²⁵ Notwithstanding, the decision to fail to give a tip to Asian American applicants was found to be "a matter of institutional *policy* [emphasis added]"³²⁶ and the failure not to do so did not constitute a violation of Title VI.³²⁷ Finally, the report noted:

OCR reviewed current case law and found no legal authority to suggest that giving preferences to legacies and recruited athletes was legally impermissible. In fact, the case law suggests that if schools are to possess a desirable diversity, officials must retain wide discretion, with respect to the manner of selecting students. The courts have generally been reluctant, if not unwilling to dictate what considerations or methods of selection are to be given priority in college admissions. OCR finds that the reasons or goals provided by Harvard for giving preferences to children of alumni and recruited athletes are legitimate institutional goals, and not a pretext for discrimination against Asian Americans. [Emphasis added]³²⁸

Thus, the same incomplete logic used to deny affirmative action to remedy centuries of oppression is now used to invoke the privilege of "desirable diversity" and "wide discretion" for those who have not been wronged. That is reverse discrimination.

Carl Monk, Executive Director of the Association of American Law Schools, released a memo following *Hopwood* on March 21, 1996, warning that "the decision of the 5th Circuit in *Hopwood v. Texas*, if applied nationally, will seriously undermine the ability of law schools in the United States to provide for a legal profession that meets the needs of all Americans in a global

³²² *Id.* at 7.

³²³ *Id.*

³²⁴ *Id.* at 8.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 9.

economy and changing world."³²⁹ He noted that the *Hopwood* opinion "trivializes the benefits of racial and ethnic diversity, and ignores the effects of past racial discrimination by not only the State of Texas, but also the University of Texas School of Law."³³⁰ While finding any consideration of an applicant's race unconstitutional, the decision "specifically authorizes" the law school to consider "relationship to school alumni" in making admissions decisions.³³¹

Today, preferential treatment can be given to the children or grandchildren of alumni who attended a law school that was ordered to abandon official *de jure* race discrimination only 50 years ago. This approach would directly foster the continuation of past racial discrimination. Furthermore, the Court's suggestion that legitimate educational diversity is no more enhanced by considering race than by considering height or blood type totally ignores the role that race plays in our society.³³² "The law has made him equal, but man has not."³³³ Therefore, legacy programs by granting preference to those who have not been wronged are indeed reverse discrimination. Why is the "wrong" of giving preference to legacies acceptable here, and not in the advancement of the Black minority?

While granting preference to legacies and minorities (in the form of affirmative action) has been argued as "wrong," it in essence could be having a detrimental effect on the educational opportunities of Whites, or so some scholars argue. The reality of the situation is that universities, by diversifying their incoming classes, have begun offering courses that focus on histories and cultures of minority groups. Some argue that this is a threat to educational opportunities, but that would seem to be an oxy-moron; university offerings of other cultures is a form of education, and is no different than studying the history or culture of countries, societies, or religious groups outside of the United States.

³²⁹ Memoranda, Association of American Law Schools, comments of Carl C. Monk, Executive Director, regarding the decision in *Hopwood v. State of Texas*, March 21, 1996, Washington D.C., p. 1.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* The memo advises, "The Association of American Law Schools will take whatever action is reasonable and necessary to try to assure that this decision is, in the short term, limited to the 5th Circuit and in the long term, reversed. We must not stand idly by and permit the resegregation of legal and higher education. Although there has been great progress in recent decades, legal education still has a long road to travel to produce a truly diverse profession prepared to meet the needs of American society." *Id.*

³³³ *Id.*

XII. EDUCATIONAL OPPORTUNITIES OF NON-MINORITIES THREATENED:
INCOMPLETE LOGIC AND INCONSISTENT LEGAL REASONING

"... *the logic of words should yield to the logic of realities.*"

Louis D. Brandeis³³⁴

"Logic—the science of reasoning, or of the operations of the understanding which subservient to the estimation of evidence. The term includes both the process itself of proceeding from known truths to unknown, and all other intellectual operations, in so far as auxiliary to this."³³⁵

Additionally, educational opportunities of non-minorities have also been threatened by the incomplete logic that opposes affirmative action. In his book, *Illiberal Education*, Dinesh D'Souza, a known antagonist to affirmative action, points out that the word "liberal" is a derivative of the word "liberalis," which refers to a free person as opposed to slave.³³⁶ D'Souza, however, criticizes that most universities have changed their admissions policies so they can admit a portion of each freshman class with minority groups, 'mainly Blacks and Hispanics' who have "considerably lower grade point averages and standardized test scores than [W]hite and Asian American applicants who are refused admission."³³⁷ Questioning the effectiveness of affirmative action policies he states, "[t]he coveted perks of so-called affirmative action policies have sometimes been extended to other groups claiming deprivation and discrimination, such as American Indians, natives of Third World countries, women, Vietnam veterans, the physically disabled (now sometimes called the "differently abled"), homosexuals, and lesbians."³³⁸ While he admits that it is

³³⁴ *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927) (Brandeis, J., dissenting).

³³⁵ BLACK'S LAW DICTIONARY 942 (6th ed. 1990).

³³⁶ DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 23 (1991).

³³⁷ *Id.* at 2.

³³⁸ *Id.* at 3. D'Souza's examples include:

(1) "At Ivy League colleges ... incoming freshmen have average grade scores close to 4.0 and average SATs of 1,250 to 1,300. According to admissions officials, however, several of these schools admit black, Hispanic, and American Indian students with grade averages as low as 2.5 and SAT aggregates, 'in the 700 to 800 range.'"

... "This information was provided by official who requested anonymity, and verified by alumni and members of judiciary committees with access to admissions data. While most admissions officers will privately admit its accuracy, they will not publicly release this sort of information 'because we don't think it's anybody's business,' in the words of a source at the Princeton admissions office." *Id.* at 258, n. 2.

often difficult for minorities admitted on the basis of preferential treatment to compete, he criticizes the programs and incentives to encourage these students to pass their courses and stay in school. He argues, "it is in liberal education, properly devised and understood, that minorities and indeed all students will find the means for their true permanent emancipation."³³⁹ However, he criticizes universities admissions policies that have changed their admissions policies to increase admissions from minority groups.³⁴⁰ Furthermore, he states, "[m]ost American universities have diluted or displaced their 'core curriculum'" in the great works of Western civilization to make room for new course requirements stressing non-Western cultures, Afro-American Studies, and Women's Studies.³⁴¹ D'Souza reasons that sensitive race and gender issues result in the university leadership discouraging faculty from presenting factual material that may provoke or irritate minority students.³⁴² This adds to the resulting illiberal education.

(2) Similar patterns can be found at state schools. "Over ... five years, the University of Virginia has virtually doubled its Black enrollment by accepting more than 50 percent of Blacks who apply, and fewer than 25 percent of Whites, even though White students generally have much better academic credentials. In 1988 the average White freshman at the university scored 240 points higher on the SAT than the average Black freshman. An admissions dean to the *Washington Post*, 'We take in more from the groups with weaker credentials and make it harder for those with stronger credentials.'" *Id.* (quoting Lawrence Feinberg, *Black Freshman Enrollment Rises 40 Percent at U-Va*, WASH. POST, Dec. 26, 1988, at C-1). Additionally, D'Souza reported that, for 1988 the SAT average for Blacks was 1,004 out of a possible 1,600; for Whites it was 1,244. For 1989 the Black average was 1023; for Whites it was 1,251. Figures supplied by the University of Virginia admissions office. *Id.* at 258 n. 3.

(3) "Pennsylvania State University ... offers financial incentives to Blacks to maintain minimum grades and graduate. Black students who maintain a grade average of C to C+ during a year get checks from the school for \$580; for higher grade averages the get \$1,160." This applies for all four years of college and is not available for other minority or White students. *Id.* at 3-4.

(4) Starting in fall of 1990, Florida Atlantic University offered free tuition to every Black student who was admitted as a part of a program to increase Black enrollment. The President, Anthony Catanese, identified the measure as necessary to demonstrate the University is "serious about recruiting" Blacks. *Id.* at 4 (quoting Laura Parker, *Florida School to Offer Free Tuition to Blacks*, WASH. POST, Mar. 9, 1990, at A-7).

(5) "In 1989 the *Columbia Law Review* announced a recruitment program offering preferential treatment for homosexuals and lesbians. The journal added five seats to its editorial board to promote "diversity," including special consideration for 'sexual orientation.'" *Id.* at 5 (quoting Stephen Labaton, *Law Review Is Entangled in Debate on Bias Plan*, N.Y. TIMES, May 3, 1989.

³³⁹ *Id.* at 3.

³⁴⁰ *Id.* at 2-3.

³⁴¹ *Id.* at 5.

³⁴² *Id.*

D'Souza's argument is a perfect example of incomplete logic in three areas. First, the students in his examples were not on equal ground from the narrow perspective of what is necessary to succeed in a university that favors White, Anglo-Saxon teaching/learning methods. Second, to deny them the accommodations to put them on equal ground is not only unfair to the minority students, it compromises the non-minority students by limiting their exposure to minorities. Finally, D'Souza fails to attack other affirmative action programs such as legacy programs.³⁴³

Having analyzed the situation of Black Americans by considering mathematics, physics, statistics, philosophy, history, and the law that author now examines some other situations where a "first wrong" occurred and then a second "wrong" or remedy was offered to rectify the first "wrong." These situations have occurred in various areas of the law, as well as different periods in history.

XIII. TWO WRONGS DO MAKE A RIGHT: OTHER LEGAL ANALOGIES

The remainder of this article discusses instances in the history of the United States where two wrongs do make a right. In every example, a victim is compensated for some wrong visited upon him by someone. This author is not meaning to state that these programs or legislation are unnecessary and never should have been instituted. Nor does this article call for the repeal of any of these instances of compensation. Indeed, the fundamental tenants of all of these programs are extremely important. However, affirmative action should be afforded the same protections as say environmental protection, veterans' rights, and antitrust legislation. Many veterans, like Blacks, were impressed involuntarily, via conscription, into servitude of this country, and thus are afforded preferences and services as compensation. Antitrust legislation seeks to do away with unfair business practices. These are exactly the reasons affirmative action was instituted. The fact that cries for the abolition of affirmative action as a remedy for a long-gone problem over all of these other instances, serve only to exemplify the very real state of racism in the United States today. That is, two wrongs do make a right, but only for the right kinds of people, with "real" wrongs inflicted upon them. This position indicates a fundamental misunderstanding of race in society by the majority, and is simply untenable.

³⁴³ *Id.* (although the author has chosen legacy as an example, the same analogy can be made with athletic scholarships).

While society is unwilling to remedy wrongs to African Americans, it has been willing to rectify wrongs by the United States in other situations. The first analogy that demonstrates two wrongs do make a right is the restitution made to Japanese-Americans for internment during World War II.

A. Two Wrongs Do Make a Right: Restitution For World War II Internment of Japanese-Americans

“Racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation’s history and continues to scar our society.”

Thurgood Marshall³⁴⁴

“Restitution – an equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred.”³⁴⁵

On December 8, 1941, the United States declared war on Japan.³⁴⁶ On March 2, 1942, General J. L. DeWitt issued Public Proclamation No. 1 pursuant to Executive Order 9066 stating “the entire Pacific Coast...is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations.”³⁴⁷ Fred Korematsu, a native born United States citizen, was of Japanese ancestry.³⁴⁸ It was uncontested that Mr. Korematsu was “loyal to the United States and had no dual allegiance to Japan.”³⁴⁹ However, on September 8, 1942, he was convicted of being in a place where all persons of Japanese ancestry were excluded pursuant to Civilian Exclusion Order No. 34 issued by General DeWitt.³⁵⁰ Mr. Korematsu's conviction was affirmed.³⁵¹ In 1983, Mr.

³⁴⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting).

³⁴⁵ BLACK’S LAW DICTIONARY 1313 (6th ed. 1990).

³⁴⁶ *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984).

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* Mr. Korematsu had never left the United States, was registered for the draft, and “willing to bear arms” for the United States. *Id.*

³⁵⁰ *Id.*

³⁵¹ *Korematsu v. United States*, 323 U.S. 214 (1944). However, even then Judge Jackson argued unsuccessfully that this judicial opinion validated racial discrimination. “Once a judicial

Korematsu petitioned for a writ of *coram nobis*³⁵² to vacate his conviction based on grounds of governmental misconduct.³⁵³ He successfully argued that "evidence was suppressed or destroyed in the proceedings that led to his conviction and its affirmance."³⁵⁴ His success was largely based on the findings of The Commission on Wartime Relocation and Internment of Civilians.³⁵⁵ The Commission found that the exclusion and detention of the Japanese was not warranted by the military. The Commission concluded "broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership."³⁵⁶ As a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review, or any probative evidence against

opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim or an urgent need." *Id.* at 246 (Jackson, J., dissenting).

³⁵² The "Writ of error *coram nobis*" is a procedural tool to correct errors of fact only. Its function is to "bring before the court rendering the judgment matters of fact which, if known at time judgment was rendered, would have prevented its rendition." BLACK'S LAW DICTIONARY 337 (6th ed. 1990). Although Rule 60 (b) of Fed. R. Civ. P. abolishes some common law writs, a writ of *coram nobis* is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available. *Korematsu*, 584 F.Supp. at 1411 (quoting *United States v. Morgan* 346 U. S. 502 (1954)). "[I]t is in these unusual circumstances that an extraordinary writ such as the writ of *coram nobis* is appropriate to correct fundamental errors and prevent injustice." *Id.* (quoting *United States v. Correa-De Jesus*, 708 F.2d 1283 (7th Cir. 1983)).

³⁵³ *Korematsu*, 584 F.Supp. at 1409.

³⁵⁴ *Id.* at 1410. "The Commission on Wartime Relocation and Internment of Civilians was established in 1980 by an act of Congress. It was directed to review the facts and circumstances surrounding Executive Order 9066 and its impact on American citizens and permanent resident aliens; to review directives of the United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including those of Japanese ancestry; and to recommend appropriate remedies." *Id.* at 1416 quoting Commission on Wartime Relocation and Internment of Civilians Act of 1980, Pub. L. No. 96-317, § 2. 94 Stat. 964 (1980). The Commission was made up of former members of Congress, Supreme Court, and Cabinet in addition to private citizens. It held approximately twenty days of hearings in various United States cities, and heard the testimony of over 720 witnesses. These witnesses included "key government personnel responsible for decisions involved in the issuance of Executive Order 9066, and the military orders implementing it." *Id.* Additionally, the Commission reviewed numerous government documents, including some documents that were not previously publicly available. Considering all the above factors, the Report was considered trustworthy and worthy of judicial notice. *Id.*

³⁵⁵ *Id.* at 1416.

³⁵⁶ *Id.* at 1416, 1417.

them, were excluded, removed, and detained by the United States during World War II."³⁵⁷ In this case, District Judge Patel noted "...the court is not powerless to correct its own records where a fraud has been worked upon it or where manifest injustice has been done."³⁵⁸ Looking to define an appropriate remedy, Judge Patel wrote "[t]he question before the court is not so much whether the conviction should be vacated, as what is the appropriate ground for relief."³⁵⁹

The Civil Liberties Act of 1988 was enacted on August 10, 1988 to redress³⁶⁰ the wrongs committed by the United States government to Japanese Americans during World War II. This Act called for a formal apology written by the President and \$20,000³⁶¹ in compensation to each survivor³⁶² of America's concentration camps.³⁶³ The purpose of the Act's sections 1989 and 1989(d) included:

³⁵⁷ *Id.* at 1417 (quoting U.S. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, U.S. DEPT. OF DEFENSE, PERSONAL JUSTICE DENIED 18 (1982)).

³⁵⁸ *Korematsu*, 584 F.Supp. at 1416.

³⁵⁹ *Id.*

³⁶⁰ Redress is "a means or a possibility of seeking a remedy." ENCYCLOPEDIA OF JAPANESE AMERICAN HISTORY: AN A-TO-Z REFERENCE FROM 1868 TO THE PRESENT 289 (Brian Niiya ed., 2d ed., Facts on File 2001) (1993). "It also means 'to set right' and 'to make up for.' 'Redress' can also mean 'compensation for wrong or loss: reparation.' 'Reparations' refers to the act of making amends, usually in the form of compensation. It is a specific form of redress." *Id.* at 342. The Japanese Americans sought a remedy to compensate them for their wrongful detention in concentration camps during World War II. *Id.* The National Coalition for Redress/Reparations (NCRR) was careful in including the distinction when it named its organization. "Since 'redress' on its own could imply only a remedy or an apology, it was not seen as sufficient to only campaign around that issue. 'Reparations,' on the other hand, left no doubt that monetary compensation was to be demanded." *Id.* Eventually, however, redress and reparations became synonymous, and the term 'Redress Movement' emerged. *Id.*

³⁶¹ "There are authorized to be appropriated to the Fund \$1,650,000,000..." Pub.L. No. 100-383, 102 Stat. 903 (1988) (codified as 50 U.S.C. Sec. 1989b-3e).

³⁶² It should be noted that the benefit of the doubt was legislated in an attempt to remedy the wrongs to those who suffered. "When, after consideration of all evidence and relevant material for determining whether an individual is an eligible individual, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of eligibility, the benefit of the doubt in resolving each such issue shall be given to such individual."

Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as 50 U.S.C. Sec. 1989b-4 (a)(3)). Additionally, the authors of this act chose to make the remedy inheritable to a surviving spouse, if there was no surviving spouse then to the living children in equal shares, and if no surviving spouse or living children existed, then to the living parents of the eligible individual. Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as 50 U.S.C. Sec. 1989b-4 (a)8 (A) (i-iii)).

³⁶³ *Id.* at 119.

1. Acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
2. Apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
3. Provide for a public education fund to finance efforts to inform the public about the internment of such individuals, so as to prevent the recurrence of any similar event;
4. Make restitution to those individuals of Japanese ancestry who were interned;
5. Make restitution to Aleut residents of the Pribilof Islands, and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for---
 - A. Injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II;
 - B. Personal property taken or destroyed by United States forces during World War II;
 - C. Community property, including community church property, taken or destroyed by United States forces during World War II; and
 - D. Traditional village lands on Attu Island not rehabilitated after World War II for Aleut[]occupation or other productive use;
6. Discourage the occurrence of similar injustices and violations of civil liberties in the future; and
7. Make more credible and sincere any declaration of concern by the United States over violation of human rights committed by other nations.³⁶⁴

Not all supported the Act. Congresswoman Bentley, of Maryland, gave impassioned comments regarding the views of her constituents.

Mr. Speaker, last night when I arrived home, my husband, who served in the Army during the Korean war, came into the kitchen shaking his head and muttering, "If you want a fast divorce, you vote for that outrageous expenditure of our money." I was not sure what he was talking about. I

³⁶⁴ Pub.L. No. 100-383, 102 Stat. 903 (1988) (codified as 50 U.S.C. Sec. 1989).

asked him. He responded that he had been watching C-SPAN and had heard the floor debate concerning the reparations to those persons who had been incarcerated during World War II. "That was wartime," he shouted, "and we did not start the war. If anyone should get anything, it should be the American prisoners who were treated cruelly and frequently tortured, sometimes tortured to death. Mr. Speaker, my veteran husband, Bill Bentley, like all the veterans in my district, oppose this legislation, as do I."³⁶⁵

Congressman Lungren, California, agreed with Congresswoman Bentley, calling restitution for the Japanese Internment survivors a wrong.

[W]hen I came to this Congress 10 years ago, one of the concerns that was raised to me by some folks who worked with me plus some people in my district was the question of the treatment of the Japanese Americans during World War II. Having been someone who grew up in southern California, an area which was dramatically changed as a result of the Executive order signed by President Franklin Delano Roosevelt, but having been born after the war and not knowing that much about it, I began to investigate it. Once I realized what had occurred, I decided that I ought to be part of bringing this to the attention of the American people. Therefore, I cosponsored the original legislation to create the Commission and served as the only Member of this House on that Commission.

I have fought against the idea of individual reparations. I still believe it is a wrong thing to do. I do not think we expiate our guilt by paying money from a subsequent generation... When I was on the Commission, I voted with all the other Commissioners in favor of the overall report, although I dissented with respect to the recommendations with respect to individual reparations.³⁶⁶

Finally, on October 9, 1990, the first redress payment was made to the oldest living survivors of America's concentration camps.³⁶⁷ A letter from President George Bush accompanied the \$20,000 check to attempt to compensate for the grave injustices toward the Japanese Americans. The letter stated:

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify

³⁶⁵ CONFERENCE REPORT ON H.R. 442, CIVIL LIBERTIES ACTS OF 1988. 100th Cong. 2nd Sess. 134 Cong Rec. H 6307, Vol. 134 No. 115.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 291.

injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II. In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes.³⁶⁸

It took 40 years, and two generations, for the full story of the camps to emerge in the public arena.³⁶⁹ United States officials were "reluctant to re-open a dark chapter of our history, in which citizens were rounded up and shipped away without due cause."³⁷⁰ However, the government did choose to acknowledge the wrong as is noted in Judge Patel's opinion. Where, as here, the government offers no opposition and, in effect, joins in a similar request for relief, an expansive inquiry is not necessary.³⁷¹ In fact, the government agrees that the petitioner is entitled to relief and concedes: "There is, therefore, no continuing reason in this setting for the court to convene hearings or make findings about petitioner's allegations of governmental wrongdoing in the 1940's."³⁷² Judge Patel continues

[t]he government has, however, while not confessing error, taken a position tantamount to confession of error.³⁷³ It has eagerly moved to dismiss without acknowledging any specific reasons for dismissal other than that "there is no further usefulness to be served by conviction under a statute which has been soundly repudiated."³⁷⁴

In support of this statement, the government points out that in 1971, legislation was adopted requiring congressional action before an Executive Order, such as Executive Order 9066, can ever be issued again; then in 1976, the statute under which petitioner was convicted was repealed; and that in 1976, all authority conferred by Executive Order 9066 was formally proclaimed terminated as of December 31, 1946. While these are compelling reasons for concluding that vacating the conviction is in the best interests of this petitioner,

³⁶⁸ Letter from President George Bush.

³⁶⁹ Misha Berson, *Plays Tell Three Aspects of WWII's Effect on Japanese Americans*, THE SEATTLE TIMES, Sept. 18, 1995, at F3.

³⁷⁰ *Id.*

³⁷¹ *Korematsu*, 584 F.Supp. at 1413.

³⁷² *Id.* (quoting Response at 3).

³⁷³ *Id.*

³⁷⁴ *Id.* (quoting R.T. 13:20-22, November 19, 1983).

respondent, and the public, the court declines the invitation of the government to treat this matter in the perfunctory and procedurally improper manner that it has suggested.³⁷⁵

On the issue of an appropriate remedy, Judge Patel concludes, "[f]ortunately, there are few instances in our judicial history when courts have been called upon to undo such profound and publicly acknowledged injustice. Such extraordinary instances require extraordinary relief, and the court is not without power to redress its own errors."³⁷⁶

Here, it is clear that the Court chose to correct the wrong that emerged from racial prejudice by reversing a conviction. Additionally, the government chose to publicly correct the wrong by monetary compensation, which in this analogy would be a "second wrong." Of course, here it is not recognized or seen as a wrong, but were this same type of remedy to be awarded to African-Americans; it would evoke the cries of "two wrongs don't make a right!"

When compared to the wrongs that Blacks have suffered there are no major distinctions. Decades of slavery can surely be compared to "internment," segregation to "exclusion," and lynchings to "war hysteria." In fact, the distinction is only that the wrong to Blacks has continued for centuries rather than a brief period of years. This is not to minimize what happened to those interned Japanese Americans.³⁷⁷ Why, then, did the court choose to apply a remedy that arguably "wronged" the taxpayers to remedy something that no longer exists. Why does the court claim "reverse discrimination" when striking down affirmative action, while the government chooses to remedy the "grave injustice" to the Japanese by monetary compensation and public apology?

There is no justification for the distinction. However, there is a plausible, yet unacceptable explanation based in economics. To understand this explanation, a brief review of the international economic climate prior to the Civil Rights Act of 1964, is in order.

In 1944, democracy in the United States was more than an abstract idea; it was a principle Americans were dying to protect. Ironically, U.S. soldiers fighting against Nazi racism and anti-Semitism, fought in a segregated

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ In this authors considered opinion, Blacks support the interned Japanese Americans as well as their descendants in their quest for reparations.

army.^{378/379} In the years after World War II, other countries increased their attention toward the racial discrimination in the United States.³⁸⁰ "At a time when the U.S. hoped to reshape the postwar world in its own image, the international attention given to racial segregation was troublesome and embarrassing for the U.S. This has been the focus of American foreign policy at this point was to promote democracy and to 'contain' communism."³⁸¹ The contradictions between American political ideology and actual practice created foreign policy difficulties with countries in Asia, Africa, and Latin America.³⁸² United States government officials, realizing their ability to promote democracy in the Third World countries was impaired by racial unrest at home, promoted civil rights.³⁸³ Ultimately, this potential impairment would have grave political and economic consequences if not remedied.³⁸⁴ Thus, Dudziak argues, the desegregation movement must be examined through economics "within the context of the cultural and political period in which they occurred."³⁸⁵

The restitution made to Japanese-Americans was an incident that involved wrongs similar to those wrongs against African Americans. However, there have been other situations not based on a racial or ethnic classification where two wrongs have made a right.

B. Two Wrongs Do Make a Right: Environmental Wrongs

"The State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

Oliver Wendell Holmes, Jr. ³⁸⁶

³⁷⁸ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 68 (1988).

³⁷⁹ This author's family has an exemplary military tradition, albeit in the segregated army. His grandfather fought during World War I, under the French Flag, because Blacks (coloreds) were not allowed to fight under the American Flag. He earned two Croix de Guerre (the French Medal of Honor), one individually, and one as a member of his unit which earned the until Croix de Guerre. The author's father, rose to the rank of major through the segregated army. Segregation and equal rights for African-Americans has been the Achilles heel for the U.S. since its inception (note the 3/5th clause).

³⁸⁰ *Id.* at 62.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* at 62-3.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 64.

³⁸⁶ *Georgia v. Tenn. Cooper Co.*, 206 U.S. 230, 237 (1907).

“Interest – the most general term that can be employed to denote a right, claim, title, or legal share in something.”³⁸⁷

Rachael Carson’s book, *Silent Spring*, served as a wake-up call to America that the environment was being endangered by the tendency of man to try to reap as much as he could out of this environment without having to deal with the consequences of his actions.³⁸⁸ For the most part, Carson was right. Nearly three centuries after the founding of this country, there could hardly be what one might think of today as any serious environmental movement, except the Native American movement. The most successful area of environmental initiatives before the mid-twentieth century was undoubtedly the preservationist-conservationist ethic of Teddy Roosevelt, Gifford Pinchot, and other silk-stocking mavericks.³⁸⁹ Their movement, however, did not define or address environmental threats broadly. National park legislation focused on isolated niches of the American landscape, not on regulatory objectives.³⁹⁰

From that time to this, the environmental movement has built up quite a body of law in a relatively short period of time. This phenomena intensified in 1978 with the Love Canal debacle. Love Canal, near Niagara Falls, was built on top of an abandoned waste dump containing approximately 352 million pounds of chemical waste, including dioxin, one of the most deadly substances known to man.³⁹¹ Residents suffered increased cancer rates, genetic damage, miscarriages, and chemical burns as a result of leachate and toxic fumes.³⁹²

The wake of Love Canal prompted Congress to enact Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. This portion of the article will focus on CERCLA due to the expansive nature of its effect on the environment. The Act created a “Superfund” to be used to clean up hazardous sites.³⁹³ CERCLA’s policy, since enactment in 1980, essentially takes the burden of paying for environmental problems of the ordinary citizen. The Environmental Protection Agency (EPA) can order those who are responsible for the pollution to pay for the clean-up. Furthermore, the

³⁸⁷ BLACK’S LAW DICTIONARY 812 (6th ed. 1990).

³⁸⁸ RACHEL CARSON, *SILENT SPRING* (1962).

³⁸⁹ Zygmunt, J.B. Plater, *From the beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994).

³⁹⁰ *Id.*

³⁹¹ H.R.REP. NO. 1016, 96th Cong., 2d Sess. pt. 1, at 18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6121.

³⁹² Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 396 n. 13 (1991).

³⁹³ 42 U.S.C. § 9611 (1980).

EPA can order any potentially responsible party (PRP) to clean up a site.³⁹⁴ Failure of a PRP to comply with such an order, without sufficient cause, results in a fine of up to \$25,000 per day.³⁹⁵ Since CERCLA liability is interpreted as joint and several,³⁹⁶ an individual PRP who contributed a small portion of the hazardous substances at a site can be in a position of either cleaning up the entire site, or facing massive fines.³⁹⁷

Thus, it seems that Congress and the states are more than willing to ensure that those who pollute pay the costs of clean-up. This is also the goal of affirmative action in a sense. That is, those who have reaped the rewards of "polluting" behavior and attitudes should have to pay to compensate those who have been damaged for the clean-up of the landscape of American society. This was not a revolutionary concept in the 1990s and yet, environmental legislation was touted while affirmative action was castigated.

Certainly, there are those on the anti-affirmative action side who state that those who did the "polluting" of American Blacks are gone. In other words, no presently living being either brought Blacks to America, or set up the caste system in this country. However, the descendents of those who instigated this system still continue to benefit from the legacy of discrimination. If someone must "pay" in some form, be it lost job opportunities or scholarships, this "payment" is necessary to balance to racial system under which they have they have prospered for many years. This is obviously a more teleological/utilitarian argument. Society would not allow those who pollute the environment to state that they have quit polluting, and, thus should not be responsible for the mess their company made, even if run by their father, grandfather, or other predecessor.³⁹⁸

³⁹⁴ 42 U.S.C. § 9606(a) (1988).

³⁹⁵ 42 U.S.C. § 9606(b)(1) (1988).

³⁹⁶ See, e.g., *United States v. Wade*, 577 F.Supp. 1326 (E.D. Pa.1983) (applying federal common law to impose joint and severally liability under CERCLA unless the defendant can establish a reasonable basis for allocating the harm).

³⁹⁷ See, e.g., *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989) (finding a company jointly and severally liable for 20% of the cleanup cost although it supplied only 10 barrels of toxic waste at a site where over 10,000 barrels were found), *cert. denied*, 493 U.S. 1071 (1990).

³⁹⁸ Another example could be that military bases, that have had air fuel, are currently required to clean-up carcinogenic substances from the fuels and other contaminants having to do with airplanes, even though the military has taken great steps to cease pollution. Currently they are not only very aware, but are very active participants in environmental clean-up methods. In essence, derivative or inherited defects are being remedied again today, even though those responsible are no longer here to contribute. With regard to the acts of the past, the current

Why then, do two wrongs make a right with regard to the environment, and not with race-based discrimination? The answer is that two wrongs do make a right in both cases. Thus, the logic utilized by those who call for the end of affirmative action, while believing that environmental legislation is appropriate, is misguided at best and duplicitous at worst. Society is willing to grant the environment special consideration, but not African-Americans, even though African Americans have most likely suffered more intense and longer "wrongs." In another situation, the United States is willing to grant special consideration to those who served their country in the armed forces. Why is it that priority and preference granted to veterans is acceptable or "right," while preference to minorities is unfair and unjust?

C. Two Wrongs Do Make a Right: Veterans

"No one has been barred on account of his race from fighting or dying for America—there are no "white" or "colored" signs on the foxholes or graveyards of battle."

John F. Kennedy³⁹⁹

"Prefer – to give advantage, priority, or privilege."⁴⁰⁰

The Veterans' Preference Act of 1944⁴⁰¹ grants preference in a variety of matters concerning federal employment to individuals, and their survivors, if those individuals are honorably discharged from active duty in the United States Armed Services.⁴⁰² This Act, a codification of prior preference policies, extends a favored status to more than 50% of the federal work force.⁴⁰³ Through benefits codified in various sections of Title 5 of the United States Code, "preference eligible" persons are offered increased opportunities for appointment to Federal service and reduced risks of removal; all at the "expense" of non-veteran workers.⁴⁰⁴ Some feel this legislation "though

people could easily say that it is not of their doing, but of those that preceded us. Doesn't this sound familiar in terms of remedial/affirmative action programs?

³⁹⁹ John F. Kennedy, special Message to Congress on Civil Rights, June 19, 1963, in PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY, 1963, at 485 (1964).

⁴⁰⁰ BLACK'S LAW DICTIONARY 1178 (6th ed. 1990).

⁴⁰¹ Act of June 27, 1944, ch. 287, 58 Stat. 387 (codified in scattered sections of 5 U.S.C.).

⁴⁰² Stewart S. Manela, *Veterans' Preference in Public Employment: The History, Constitutionality, and Effect on Federal Personnel Practices of Veterans' Preference Legislation*, 44 GEO. WASH. L. REV. 623 (1976).

⁴⁰³ *Id.* at 623 (quoting, Fact Sheet distributed by Veterans' Affairs Division, Bureau of Recruitment and Examining, U.S. Civil Service Commission (1975)).

⁴⁰⁴ *Id.*

constitutionally sound, unnecessarily burdens the efficient administration of government and unduly restricts the employment opportunities of non-veterans."⁴⁰⁵ This "expense," or wrong to non-veteran workers, is justified in policy statements such as the Veteran's Readjustment Assistance Act of 1952, which states:

The Congress of the United States hereby declares that the veteran's educational and training program created by this Act is for the purpose of providing vocational readjustment and restoring lost educational opportunities to those service men and women whose educational or vocational ambitions have been interrupted or impeded by reason of active service in the Armed Forces during a period of national emergency and for the purpose of aiding such persons in attaining the educational and training status which they might normally have aspired to and obtained had they not served their country; and that the home, farm, and business-loan benefits, the unemployment compensation benefits, the mustering out payments, and the employment assistance provided for by this Act are for the purpose of assisting in the readjustment of such persons from military to civilian life. (Emphasis added)⁴⁰⁶

The federal government has offered special advantages to veterans since the Civil War.⁴⁰⁷ However, attitudes have varied toward the propriety of exempting veterans from employment requirements. For example, in 1881, veterans were required to achieve examination scores equal to the scores of non-veterans before a preference was granted.⁴⁰⁸ Are they qualified? Does not this sound familiar? However, in 1910, the Attorney General reversed itself, announcing that "preference points should be added irrespective of the veteran's performance on required competitive examinations."⁴⁰⁹ The policy was reversed again by an executive order thirteen years later.⁴¹⁰ By the time of

⁴⁰⁵ *Id.* at 624.

⁴⁰⁶ The Veteran's Readjustment Assistance Act of 1952, 82 Pub. L. 550 (1952).

⁴⁰⁷ Manela, *supra* note 402. "In 1865, Congress passed a joint resolution giving disabled veterans who possessed the capacity to handle government business a preference in appointment to civil offices." *Id.* (quoting Resolution of Mar. 3, 1865, No. 27, 13 Stat. 571).

⁴⁰⁸ *Id.* (quoting 17 Op. Att'y Gen. 194 (1881)).

⁴⁰⁹ *Id.* (quoting 28 Op. Att'y Gen. 298 (1910)). This opinion stated veterans did not have to pass the competitive examination to have their scores augmented. If the bonuses gave veterans passing scores, the appointing authorities were required to place the veterans at the top of the eligibles register.

⁴¹⁰ *Id.* (quoting Exec. Order No. 3,801 (Mar. 3, 1923)). The order withdrew from all veterans their right to absolute preference, and limited the preference to the award of bonus points.

the Pendleton Act,⁴¹¹ preference was granted in appointment and retention "only to those veterans who had qualifications superior or equal to the non-veterans with whom they were competing; the policy did not permit preferential advancement of veterans of lesser qualification."⁴¹²

To qualify to receive examination and other appointment preferences granted by the Act of 1944, eligibility was assessed. The Act required that five points be added to the test score of any veteran achieving a passing grade.⁴¹³ An applicant with permanent service-related disabilities received an additional five points,⁴¹⁴ and if the disability was rated at 10 %, his name was placed at the top of the list of applicants for the job.⁴¹⁵ This 10-point advantage extended to unmarried widows or mothers of deceased veterans; "and to wives or mothers of veterans disqualified for appointment by their disabilities."⁴¹⁶

In addition to bonus points for examinations, the Act gave preference eligible individuals an exclusive right to compete for certain positions, including guards, elevator operators, messengers, and custodians. Additionally, if the position required previous experience, an eligible veteran was credited for the total time in military service if his vocation, before entering the service, was similar to that being sought. Finally, if age, height, or weight qualification were prerequisites for the job, the 1944 Act waived the requirements unless the requirements were essential to performance of the position's duties. Finally, physical requirements were waived for any veteran whose medical evidence established that he could do the job.

Veterans were given preference due to the nature of their service to the United States, yet Blacks, who served involuntarily as workers, are not afforded that same type of consideration. In yet another area of law, antitrust law, victims are given the opportunity to seek injunctions and treble damages. Why then are Blacks not afforded even the opportunity to be put on equal ground as the rest of society?

⁴¹¹ The Pendleton Act was proposed to eliminate the "spoils system" of staffing the Government. It substituted a system grounded on the principle that individual merit, as measured by the capacity to perform a specified job, should determine eligibility for government employment. *Id.* at fn. 17.

⁴¹² *Id.* (quoting Act of Aug. 15, 1876, ch. 287, § 3, 19 Stat. 169; Resolution of Mar. 3 1865, No. 27, 13 Stat. 571).

⁴¹³ *Id.* (quoting 5 U.S.C. § 3309 (2) (1970)).

⁴¹⁴ *Id.* at 626 (quoting § 3309 (1)).

⁴¹⁵ *Id.* at 626 (quoting 5 U.S.C. § 3313 (2) (A) (1970)).

⁴¹⁶ *Id.* at 626 (quoting §§ 218, 3309 (1), *as amended*, (Supp. IV, 1974)).

D. Two Wrongs Do Make a Right: Antitrust

"Free competition is worth more to society than it costs."

Oliver Wendell Holmes, Jr.⁴¹⁷

"Where a trust becomes a monopoly the State has an immediate right to interfere."

Theodore Roosevelt⁴¹⁸

Monopoly – a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity. A form of market structure in which one or only a few firms dominate the total sales of a product or service.⁴¹⁹

The advent of the Industrial Revolution and the completion of the transcontinental railroad in the United States were harbingers of a growing place of prominence for American industry in the late 1800s.⁴²⁰ Many of the major industrial forces of the latter 19th century sought to corner various markets through unscrupulous, or at least anti-competitive, business practices, and drive up prices as the burgeoning economy increased in size. In an attempt to stem these activities, Congress passed the watershed legislation known as the Sherman Anti-Trust Act.⁴²¹ There exists heated debate regarding the true intentions of the legislators in passing the Sherman Act. There are those who hold the opinion that Congressional intent rested on allocating efficiency within modern economic theory; still, others argue that the Sherman Act was promulgated as a direct result of political pressure from small business owners who, being trampled by big business, saw the need for fairness to be introduced into the economy.

The enforcement of the Sherman Act was lessened by the narrow interpretation given to it by the courts. For example, in the landmark case of

⁴¹⁷ *Id.* at 626 (quoting §§ 218, 3309(1), *as amended* (Supp. IV, 1974)).

⁴¹⁸ *Vegeahn v. Guntner*, 44 N.E. 1077, 1080 (Mass. 1896). (Holmes, O., dissenting.)

⁴¹⁹ Theodore Roosevelt, Annual Message to New York Legislature, 3 Jan. 1900, in *WORKS OF THEODORE ROOSEVELT* 17:34, 54 (Hagedorn ed., Hermann 1925).

⁴²⁰ An over looked minority were the Chinese who had been Shanghaied for work on the railroads.

⁴²¹ 15 U.S.C.A. § 1 *et seq.* (1890).

United States v. E. C. Knight Co.,⁴²² the Supreme Court stated that the Sherman Act did not apply to sugar producers because they, as manufacturers, fell outside the scope of interstate commerce.⁴²³ The fundamental operation of antitrust analysis shifted with the opinion of the court in *United States v. Addyston Pipe & Steel Co.*,⁴²⁴ in which Judge Taft, using controversial reasoning, delineated the difference between *per se* anti-competitive practices, which necessitated the imposition of damages, and those that were “ancillary” to the creation of joint ventures, deemed to be permissible.⁴²⁵

Dr. David R. Henderson⁴²⁶ wrote of the “wrongs” antitrust laws and the Sherman Antitrust Act impose on the American economy.

Economists and others argue that antitrust laws are necessary because companies might otherwise collude to keep prices high or merge with potential rivals to reduce competition. But study the past effects of antitrust enforcement, and you get a very different picture: It often hurts competition or prevents mergers that would reduce costs and prices.

One antitrust advocate at the time, Rep. William Mason, admitted that ‘trusts have made products cheaper’ but argued that the trusts ‘have destroyed legitimate competition and driven honest men from legitimate business enterprises’ (Translation: the competitors couldn’t cut it). Sen. John Sherman, after whom the antitrust law was named, was also a proponent of tariffs, another measure that reduces competition, keeps prices high, and gives inefficient companies a break.⁴²⁷

Henderson then continues to give an example of one of the most devastating “wrongs” to ever be considered a right:

The scariest lesson from history is what antitrust can do to the stock market. George Bittlingmayer of the University of California at Davis notes that many major market declines were preceded by announcements of stepped-up antitrust enforcement. On Friday, Oct. 25, 1929, to take the most notorious

⁴²² 156 U.S. 1, 15 (1895).

⁴²³ *Id.* at 15.

⁴²⁴ 85 F. 271 (6th Cir. 1898).

⁴²⁵ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE*, § 2.1b, at 53-4 (1994).

⁴²⁶ David R. Henderson, Ph.D. Economics from the University of California at Los Angeles in 1976, is a research fellow at the Hoover Institution, an Associate Professor at the Naval Postgraduate School in Monterey, California.

⁴²⁷ David R. Henderson, *The Case Against Antitrust*, *FORTUNE*, Apr. 1998, at 40-41.

example, the Justice Department declared it would deal 'vigorously with every violation of the antitrust law.' By the closing bell on Oct. 29, 1929, the Dow had fallen 23%.⁴²⁸

Furthermore, the Clayton Act and the Federal Trade Commission Act were passed in 1914 as a response to the "rule of reason" developed by the Court in *Standard Oil Co. v. United States* and *United States v. American Tobacco Co.*,⁴²⁹ which many lawmakers felt would derogate the Sherman Act. The Clayton Act directly denounced exclusive dealing arrangements and anti-competitive price fixing, provided for expanded enforcement through greater damage provisions, and criticized mergers much more strongly than the Sherman Act.⁴³⁰ The Federal Trade Commission (FTC) Act went even farther than the Clayton Act in expanding the power of the government regarding anti-competitive practices of private business.⁴³¹ The FTC Act created the Federal Trade Commission, an agency that could investigate, and take enforcement action against businesses that engaged in anti-competitive behavior that did not encroach on any of the previous anti-competitive legislation.⁴³² Whatever were the true intentions of Congress, and despite the initial interpretations of the Court, the effect of the triad of the Sherman Act, Clayton Act, and the Federal Trade Commission Act has been to give victims the right to seek an injunction, or treble damages, to remedy the anti-competitive practices visited upon them by violators of these laws.

Although there has been a shift in the application of anti-trust laws from social and political concern, to reflecting the increasing importance given to economic efficiency theories, the remedies provided by the laws themselves continue to be an important factor in the operation of fairness in American business. The provision for treble damages provided for in § 7 of the Clayton Act has received the most attention. Many have wondered why damages awarded should be three times their actual impact. The answer lies in several foundations, primarily that of punishment and deterrence.⁴³³ From the time of the English Statute of Monopolies in 1623, legal scholars have held that single

⁴²⁸ *Id.*

⁴²⁹ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁴³⁰ 15 U.S.C.A. § 12 *et seq.*

⁴³¹ 15 U.S.C.A. § 41 *et seq.*

⁴³² *Id.*

⁴³³ HOVENKAMP, *supra* note 425, § 17.3 at 599.

damages would still make what are now referred to as antitrust violations profitable since not all such incidents are detected.⁴³⁴

Why then is it that the goals of anti-trust legislation and affirmative action are viewed as disparate? The two have exactly the same purpose: to compensate those who are victims of continuing discrimination. To be sure, there are those in the majority group that will suffer as a result of affirmative action. That was demonstrated in the mathematical formula expressed supra. It is this very fact that inspires many to call for the death of affirmative action. However, under anti-trust legislation, there likewise are those in the majority groups who fail to benefit as they had in the past. However, there has been no groundswell of support for the repeal of antitrust legislation as there has been recently for the repeal of affirmative action.

Affirmative action has been threatened and opposed practically since its inception, yet in areas such as employment law, it would seem only natural that there be no type of racial discrimination.

E. Two Wrongs Do Make a Right: Employment Law

You know, I am disturbed by what seems to becoming habit in this country, to adopt certain theories that Marx advanced. One is that there is inevitable a bitter and implacable warfare against the man that works, between the man that works and the man who (sic) hires him. To my mind this is absolutely and completely Un-American. It is not the way a free country must work. Every last workman, down to the lowliest, the most menial task you can think of, is just as important as any manager or any capitalists that invests in a company.

Dwight D. Eisenhower⁴³⁵

“Slave – A person who is wholly subject to the will of another; one who has no freedom of action, but whose person and services are wholly under the control of another. One who is under the power of a master, and who belongs to him; so that the master may sell and dispose of his person, of his industry, and of his labor, . . . The 13th Amendment abolished slavery.”⁴³⁶

⁴³⁴ *Id.*

⁴³⁵ Dwight D. Eisenhower, *Fourteenth Amendment*, N.Y. TIMES, June 4, 1959.

⁴³⁶ BLACK'S LAW DICTIONARY 1388 (6th ed. 1990).

Forced labor, including slavery, was in existence when the nation was founded. The pre-Civil War period was characterized by public tolerance of forced labor, particularly for slaves, apprentices, indentured servants, orphans, and debtors to labor. The law recognized a variety of direct and indirect methods to enforce labor. The existence of forcible labor statutes created a legal tolerance of subservience rather than equality of arms-length negotiators as the principal paradigm of the relationship between an employer and an employee.⁴³⁷

Racial Discrimination in Employment

The American experience of slavery was one that involved the forcible capture of Africans for involuntary transport to the United States. African slavery was then a heritable condition, so the children of slaves were then destined also to be slaves of the master. The antebellum law of slavery was primarily state law, therefore it varied from state to state. However, there was federal involvement in the constitutional provision allowing for interstate extradition of slaves, and the slave trade was fostered by the federal government at one time. In *Dred Scott v. Sanford*,⁴³⁸ the Supreme Court held that Dred Scott, his wife, and their two daughters were still the property of their former master although they had been taken from a slave state into a free state.⁴³⁹ The Court held that Dred Scott and his family were not "citizens" under the Constitution, nor entitled to sue in the courts of the United States.⁴⁴⁰ Therefore, the courts had no jurisdiction over the case. Furthermore, Congress could not pass any law depriving a slave owner of his property in a slave.

At the close of the Civil War, Congress finally took steps to ban slavery constitutionally. The Thirteenth Amendment failed to pass on its first attempt in the House. It finally passed the House by narrow margins in January of 1865. The Reconstruction Congress, motivated by the feeling that a single constitutional amendment was not enough, passed two additional amendments to the Constitution, the Fourteenth Amendment and Fifteenth Amendment. The Fourteenth Amendment is aimed at guaranteeing equality of rights, and the Fifteenth Amendment at granting male freedmen the right to vote.⁴⁴¹

⁴³⁷ MARK ROTHSTEIN ET AL., *EMPLOYMENT LAW* 4, 5 (West Publishing Co. 1994).

⁴³⁸ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁴³⁹ *Id.* at 453.

⁴⁴⁰ *Id.*

⁴⁴¹ Every Southern state that sought readmission to the Union, in addition to each new state entering the Union, was required to ratify it and the later Reconstruction Amendments as a

Additionally, statutes to amplify the Reconstruction Amendments were passed.⁴⁴² The Civil Rights Act of 1866, although passed over President Andrew Johnson's veto, stated that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," were citizens of the United States, and were granted the same right to make and enforce contracts, sue, give evidence, acquire property, and were entitled "to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by [W]hite citizens."⁴⁴³ This is an even stronger statute than the 1964 Civil Rights Act under President Lyndon Johnson.

These reforms theoretically rectified some of the legal disabilities slaves, free Blacks, and other workers had endured under state laws and customs. However, in the coming years, courts gave many of the provisions "miserly interpretations."⁴⁴⁴ Despite that, these Reconstruction enactments continue to form the core of the antidiscrimination tradition in employment law today. For example, Title VI of the Civil Rights Act of 1964 is the most expansive of all pieces of federal legislation in defining the rights and remedies of those who have been discriminated against in employment law. It prohibits discrimination based upon "race, color, sex, religion, or national origin" in any of the "terms, conditions, or privileges" of employment.⁴⁴⁵ Those subject to violations of this law are entitled to injunctive relief or may receive back pay, reinstatement or hire, back pay, and other equitable relief. These remedies seem to have won general acceptance in the population-at-large, for they correct perceived individualized injustices in hiring perpetrated on those of certain groups. Does the systemic culmination of these individual wrongs deserve any less? It is this author's opinion that it does not. The development of racial discrimination in the individual workplace is a derivative byproduct of the macro-level problem

condition to being admitted to the Union. To show commitment to free labor, states were encouraged to include parallel provisions in their state constitutions. These state constitutional provisions speak in terms of the right to labor freely. *Id.* at 8. There is some concern over the "forced" acceptance of these amendments (13, 14, 15) as a condition precedent for the confederate states (succeeding states) to reenter the Union.

⁴⁴² The Fifteenth Amendment provided that neither the United States nor any of the states could deny or abridge the right to vote on account of race, color, or previous condition of servitude. This language had the effect of giving men only the right to vote. *Id.* at 8 (quoting U.S. CONST. Amend. XV).

⁴⁴³ These statutes include the Civil Rights Act of 1866 (now codified as 42 U.S.C.A. §§ 1981, 1982), the Anti-Peonage Statute (now codified as 42 U.S.C.A. §§ 1981, 1982, 1994), and the Civil Rights Act of 1871 (now codified as 42 U.S.C.A. § 1983).

⁴⁴⁴ 42 U.S.C.A. §§ 1981-1982.

⁴⁴⁵ 42 U.S.C.A. §2000e-2(a)(1) (West 1993).

of racial hatred and discrimination in the society as a whole.⁴⁴⁶ Those who advocate civil rights legislation for individual instances of discrimination and yet oppose affirmative action in the boardroom or classroom generally do not see the connection between the two and, as a result, work against themselves.

Employment-at-Will

Working people whose employment relationship was defined by a status category of master-servant law had their employment governed by law and custom rather than by mutual obligation. With the rise of industrialization, traditional status categories defining employment relationships did not readily apply to the changing conditions and relationships of the new industrial workplace. Therefore, a category reflecting traditional notions of a master's authority, but lacking any paternalistic notions of duty and commitment emerged.⁴⁴⁷ Courts submerged this new category under the rhetoric of freedom of contract. Legal rules governing employment of individuals who did not fall under contract were unclear.⁴⁴⁸ However, near the end of the nineteenth century many issues were resolved by the “employment at will” rule.

The at-will doctrine was first announced in a treatise on masters and servants in 1877.⁴⁴⁹ Here, H.G. Wood stated the rule, in the United States, is that an employee is presumed to be hired as an at-will employee.⁴⁵⁰ Although the doctrine lacked legal foundation, all states eventually adopted the at-will

⁴⁴⁶ An anecdotal comment is offered here that this author has heard though the years. In the North they (White) like the group (Black), but dislike the individual. In the South they dislike the group (Blacks), but like the individual (Black). Also of note some American Blacks, having lived in England, have noted by comparison that Brit's dislike their former colonial Caribbean Blacks because they are seen as arrogant. While Americans on the other hand, like the Caribbean Blacks because they are seen as being more industrious, confident, and success oriented. Isn't it interesting that the Blacks “of” each country tend to be more preferred by the other country in the view of some American Blacks who have lived in England?

⁴⁴⁷ ROTHSTEIN, *supra* note 437.

⁴⁴⁸ *Id.* at 9.

⁴⁴⁹ The English rule maintained that agricultural workers who were not under contract for a fixed term could be considered to be retained for a one-year term, a unit of time determined by the growing season. Other rules considered the pay-period the term of employment. The issues at stake included:

1. Whether employees could be held liable for damages for breach of contract, or even forfeiture of wages if they left before the end of the contract term;
2. In what situation, at what times, and with what consequences could employees quit; and
3. In what circumstances and with what consequences could employees be fired. *Id.* at 9.

⁴⁵⁰ H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

doctrine. The doctrine is currently applied in all U.S. jurisdictions except Montana, which has enacted a just cause termination statute. The at-will doctrine has been judicially created in most jurisdictions following it, with the exception of California and Georgia, both of which have statutes containing at-will language.

The at-will doctrine had only one exception until the 1950s. That exception was that a written contract between the employer and the employee, for a determinate duration of time, could be terminated only for just cause. In 1959, the California Court of Appeals adopted the first judicially recognized exception to the at-will doctrine: the public policy exception. The public policy exception provided that an employer cannot terminate an employee for a reason that violates public policy without liability for wrongful termination.⁴⁵¹ Although this exception did not gain widespread recognition until the 1970s and 1980s, it is now recognized by most jurisdictions.⁴⁵² Employers may not act in bad faith, even if terminating an at-will employee. Again, it is obvious that in taking this stance, the court allows some who should benefit, to suffer some unfavorable consequences due to broader concerns for public policy. So it is with affirmative action.

While courts and legislators are willing to allow unfavorable consequences to affirmative action, they are not so willing to allow discriminatory practices or discrimination to be given to the physically disabled, even if it means an employer will have to accommodate or adjust to hire a physically disabled individual.

F. Two Wrongs Do Make a Right: Disability Discrimination

Title I of the Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals because of disability in job application procedures, hiring, promotions, discharge, compensation, and general terms and conditions of employment. This precludes the use of selection criteria, which screen out individuals with disabilities, unless the criteria are job related and consistent with business necessity. Even when criteria are job related and meet business necessity, an employer may not exclude a disabled individual if the individual, with reasonable

⁴⁵¹ The case cited by this 1877 treatise supporting the at-will presumption actually provided no support for the doctrine. LIONEL J. POSTIC, *WRONGFUL TERMINATION: A STATE-BY-STATE SURVEY* xix (The Bureau of National Affairs, Inc., Washington, D.C. 1994).

⁴⁵² *Id.*

accommodation, could perform the job. This is true unless the necessary accommodation would constitute an "undue hardship" for the employer.⁴⁵³

Under the ADA employers are not only prohibited from intentional discrimination against disabled persons, they are also prohibited from practices that have the effect of discriminating against disabled persons, and /or perpetuating the past effects of discrimination. The following practices are prohibited:

1. Limiting, segregating, or classifying an applicant or employee because of his disability so as to adversely affect his opportunities or status;
2. Entering into a contractual relationship with an employment or referral agency, union, or other organization that has the effect of subjecting employees or applicants with a disability to prohibited discrimination;
3. Utilizing standards, criteria, or methods of administration that have the effect of discrimination or perpetuating the effects of discrimination because of disability;
4. Denying equal job benefits to a qualified individual because of the known disability of a person with whom the qualified individual is known to have a relationship of association;
5. Not making reasonable accommodations to the known physical or mental limitations of a otherwise qualified employee or applicant with a disability unless to do so would impose undue hardship on the employer;
6. Denying job opportunities to an otherwise qualified employee or applicant with a disability in other to avoid having to make reasonable accommodations for that disability;
7. Using qualification standards or employment tests that tend to screen out individuals with disabilities, unless the qualification standards or

⁴⁵³ CONSTANCE BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT* 347-348 (West Publishing Company 1991). The ADA defines "undue hardship" as an activity requiring "significant difficulty or expense" when considered in light of: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility, the number of persons employed at the facility, the effect on expenses and resources or any other impact of the accommodation on the facility; (3) the overall financial resources of the employer and the overall size of the business with respect to the number of employees and the type, number, and location of its facilities; and (4) the type of operation of the employer including the composition, structure and functions of the workforce, the geographic separateness, and administrative or fiscal relationship of the facility in question to the employer.

employment tests are shown to be job related and are consistent with business necessity;

8. Failing to select and conduct job testing in such a way as to ensure that when the test is administered to an applicant or employee with a disability that impairs his sensory, manual, or speaking skills, the results of the test accurately reflect the skills or aptitude that test is designed to measure, rather than reflecting the sensory, manual, or speaking impairment.⁴⁵⁴

Are not the preceding practices very similar to those desired by minorities in terms of affirmative action? Is this not affirmative action for the disabled, and rightly so?

If an applicant /employee is disabled, he may only be excluded from the employment opportunity if, due to his disability, he cannot perform the essential functions of the job, or if the employment of the individual with the disability poses a significant health or safety risk to others. The ADA requires that employers make reasonable accommodations to an employee's disability as long as it does not cause "undue hardship." Therefore, even if the disability prevents an individual from performing the essential functions of the position, or presents a safety risk, the employer is required to assess if there is a reasonable accommodation that will permit the individual to be employed despite his disability.⁴⁵⁵ Why are accommodations required for differences here and no longer required in general affirmative action areas?

In *Board of Trustees of University of Alabama in Birmingham v. Garrett*,⁴⁵⁶ the Supreme Court observed some of the "wrongs" that have been created by the Americans with Disabilities Act. "... the Court believed that if the mentally retarded were afforded suspect status, the Court would not know where to draw the line when it came to other individuals with similar immutable disabilities."⁴⁵⁷ Upon full review of the case, "The Court concluded that as long as states are acting rationally they are not required under the

⁴⁵⁴ *Id.* at 348.

⁴⁵⁵ Additionally, Title I includes a non-exhaustive list of what might constitute "reasonable accommodation" including: (1)making work facilities accessible; (2)restructuring jobs or modifying work schedules; (3)acquiring or modifying equipment or devices; (4)modifying examinations, training materials or policies; and (5)providing qualified readers or interpreters or other similar accommodations for individuals with disabilities. *Id.* at 348-49.

⁴⁵⁶ 531 U.S. 356 (2001).

⁴⁵⁷ Jaclyn A. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of the University of Alabama v. Garrett and Its Impact on People With Disabilities*, 9 AM. U.J. GENDER SOC. POL'Y & L. 663 (2001).

Fourteenth Amendment to make special accommodations for people with disabilities."⁴⁵⁸ Here, the Court demonstrates that while the Americans with Disabilities Act may be a "remedy," it is also a "wrong," having blurred lines of application, and leading to possible infringement upon state's rights.

The above legal analogies from interned Japanese Americans to the ADA represent several areas and events which have led to a second "wrong" being introduced to correct an original wrong. Yet, society's incomplete logic and inconsistent legal reasoning have led to the failure to place Blacks in an equal position as their non-minority counterparts. Ostensibly, "the law has made him equal, but man has not." In comparison, "two wrongs do/can make a right." Again, consider the various analogies in math, physics, and the law.

XIV. CONCLUSION

This article has attempted to refute the incomplete logic and legal reasoning that has led to the demise of affirmative action through justification of the reverse discrimination concept by refuting the misconception and connotation that one wrong can be remedied without creating a second "wrong," or remedy. The connotation of "wrong" is important. This incomplete logic has produced legal reasoning that is not accurate and often misleading, producing opponents who inconsistently apply their logic alleviating the hope that Blacks will some day be "equal." Additionally, this incomplete logic had encroached on those who favor affirmative action leaving them with misinformation and an absence of conviction. James Madison once noted, "Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations."⁴⁵⁹ Incorporating diversity brings strength, while challenge, to some causes confusion, and fear for others. If people lack clear goals to strive toward, they are more comfortable staying where they are. Therefore, without clear vision of the impact, both cultural and economic, that the defeat of affirmative action programs for minorities could have, the entire nation will ultimately suffer. This notion was further explained by taking a brief look into some philosophical concepts, noting that without the imposition of a "second wrong," it is unlikely that minorities will break free of the cyclical

⁴⁵⁸ *Id.* at 672.

⁴⁵⁹ EUGENE C. GERHART, QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS 158 (William S.Hein Company 1988) (quoting James Madison, Speech in the Virginia Convention, June 16, 1788).

suppression of the “first wrong.” This article has attempted to clarify the incomplete logic used against affirmative action by using mathematics, physics, and statistics to define the impact of this incomplete logic of “two wrongs do not make a right,” using law school admissions as an example. To buttress these analogies and arguments, areas in law have been identified where two wrongs do apparently make a right such as veteran's preference, environmental law, and labor law. Without affirmative action, equality of Blacks will remain an elusive goal. “The end of law is not to abolish or restrain, but to preserve and enlarge freedom.”⁴⁶⁰ Ultimately, no one will be free if achieving Black equality remains opposed.

“To allow the rights of one person to be violated puts at risk the rights and liberties of all.”

David Boren⁴⁶¹

“ubi jus ibi remedium” – ‘where there is law (a right) there is a remedy.’ If the law provides a right it follows that it provides a remedy for violation of it.⁴⁶² Perhaps *neither* the law nor man has made him equal?

XV. EPILOGUE

As this article goes to press, there was another set back for African-Americans in Tulsa, Oklahoma. First, some background information is necessary. On May 31, 1921, a White mob was deputized, and some individuals were armed with weapons by the Mayor of the City of Tulsa and the Tulsa Chief of Police.⁴⁶³ Reports on the cause of the riot vary. The Mayor also deputized members of the National Guard. The Mayor, the Chief of Police,

⁴⁶⁰ JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT: BOOK II *IN* THE GREAT LEGAL PHILOSOPHERS: SELECTED READING IN JURISPRUDENCE 145 (Clarence Morris ed. 1959).

⁴⁶¹ Attributed to David Boren, University President of the University of Oklahoma. The author notes that *Sipuel v. Bd. of Regents of Univ. of Oklahoma* was a key case in Black America's continuing drive for equality in education. The school in question at the time of that case was the University of Oklahoma. That case was a forerunner to *Brown v. Bd. of Educ. of Topeka, Kansas*. President Boren was not the University of Oklahoma President then. He graduated from the University of Oklahoma School of Law in 1963, twelve years after the case.

⁴⁶² JOHN GRAY, *LAWYERS' LATIN, AVADE-MECUM* 136 (Robert Hale Ltd., London 2002).

⁴⁶³ Amicus Brief in Opposition to Motion to Dismiss on Behalf of Defendants the State Of Oklahoma and the City of Tulsa at 5, *Alexander, et al., v. Governor of Oklahoma, City of Tulsa, City of Tulsa Police Department* (No. 03-CV-133E(c)) (Northern District of Oklahoma) (2003).

and the new deputies killed African American residents of a section of Tulsa called Greenwood, also known at the time as the Black Wall Street, by dragging them from their homes.⁴⁶⁴ The mob looted buildings and burned Greenwood to the ground.⁴⁶⁵ Then officials fired a machine gun on the residents, as well as using airplanes to shoot at, and drop incendiary devices on, the residents.⁴⁶⁶ Other citizens were detained and forced to work in captivity in conditions reminiscent of slavery.⁴⁶⁷ The riot resulted in the death of over 300 residents of Greenwood.⁴⁶⁸ After the riot was over, Tulsa city officials refused to help the victims, and impeded attempts to rebuild.⁴⁶⁹ Oklahoma state officials, as well as City of Tulsa officials, tried to suppress any information and talks of the riots.⁴⁷⁰ There has been a vocal and written diatribe of accusations and denials over the years. In addition, Greenwood has not been a cause celebre, nor has this lingering, simmering issue received string national attention. In 2000, the legislature of the State of Oklahoma created the Oklahoma Commission to Study the Riot of 1921.⁴⁷¹ While the state has acknowledged the wrong of the response to the Tulsa riot,⁴⁷² Blacks have been denied rights based on the poor excuse of the statute of limitations. Of course, there was no opportunity for Blacks to resolve their complaints or wrongs committed against them. Look who was against them. All roads were closed to the state, so now it uses the statute of limitations to deny any remedy, which is an equitable wrong. It appears that legislation may be the best way to correct this wrong. This injustice to the Tulsa victims is mentioned primarily to

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 5 and 6.

⁴⁶⁷ *Id.* at 6.

⁴⁶⁸ *Id.* at 6 and 2.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 7.

⁴⁷¹ *Id.* at 2.

⁴⁷² "[T]he mayor of Tulsa promised to compensate the victims of the riot for the losses they had suffered. He declared that a claims commission would be established to compensate the victims of the riot. Finally, the Tulsa Chamber of Commerce states that as 'quickly as possible rehabilitation will take place and reparation made... Tulsa feels intensely humiliated.' ... a commission created by the Oklahoma state legislature... reiterated, 'reparations are the right thing to do.'" CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 284-6* (Robert Weil ed., W.W. Norton & Company 2004) citing Scott Ellsworth, "[T]he Tulsa Race Riot," in *Tulsa Race Riot: A Report by the Oklahoma Commission to Study the Race Riot of 1921* ([Oklahoma City]: The Commission, 2001.) available at <http://www.ok-history.mus.ok.us/trrc/freport.htm>.

emphasize the need for a remedy, and yet the remedy is labeled a "wrong." Denying a remedy in the Courts is itself, a injustice.

"Justice or Just Us."⁴⁷³

⁴⁷³ A saying amongst many Afro-Americans.