STATE OF NORTH CAROLINA

COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 OSP 1711

MARSHA TINNEN, ET. AL,
Petitioners,

v.

UNIVERSITY OF NORTH CAROLINA
AT CHAPEL HILL,
Respondent.

MEMORANDUM OF LAW

INTRODUCTION

The Administrative Law Judge ORDERED Petitioners to file a Memorandum of Law regarding an evidentiary aspect of the unique fact pattern forecast by Petitioners in this class action, due to be heard on September 23, 1996. Petitioners have alleged and believe that the demeaning racialized caste employment system presently operating at the University of North Carolina at Chapel Hill, a state actor, wherein 90% of the 400 or so UNC-CH employees in the lowest and most menial ranks are African American, is a direct result of the undisputed historical fact that UNC-CH was one of the few state-actors to own slaves and use them to do the same kind of work Petitioners do. Petitioners argue the evidence of the University's slave-holding and the evidence concerning whether this state-actor, after Emancipation, violated federal Reconstruction constitutional rights and state constitutional rights[1] of its African-American employees triggers

[1]These federal Reconstruction Amendments were duplicated in what some scholars have seen as even stronger language and mandates in North Carolina's 1868 Constitution in Article I, called the Declaration of Rights. For example, our State Constitution adopted the stirring words of the federal Declaration of Independence (which, notably, are not in the Federal Constitution) which had been adopted by President Lincoln as the war aims of the North in his Gettysburg Address:

> The equality and rights of person. We hold it to be self evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among those are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
> -NC Constitution, Art. I, Section 1.

Some of the other North Carolina Constitutional guarantees material to this action are:

> Education. The people have a right to the privilege of

education, and it is the duty of the State to guard and maintain that right.
-NC Constitution, Art. I, Section 15.

This new right, detailed in Article IX of the North Carolina Constitution, was "intended to mark a new and more positive role for state government. Not a restriction on what the state may do, it requires a commitment to social betterment." Orth, John V., **The North Carolina State Constitution**, University of North Carolina Press, 1993, p. 52.

Slavery and involuntary servitude. Slavery is forever prohibited. Involuntary servitude, except as punishment for crime whereof the parties have been adjudged guilty, is forever prohibited.
-NC Constitution, Art. I, Section 17.

"After the Civil War many Southern states including North Carolina had adopted `black codes' designed to reproduce features of slavery; this section is intended to prohibit legislation creating new forms of peonage. Legislation is not the only object of the prohibition; all enforceable arrangements, including private contracts, are also barred." **Id. p. 53.**

Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.
-NC Constitution, Art. I, Section 18.

This section which applies to civil disputes is derived from the Magna Carta of 1215, and Sir Edward Coke's seventeenth commentary on the it. Id. at 54. African Americans in the position of petitioners, however, had little or no access to the Courts until the mid-Twentieth Century, since Respondent denied legal education to would-be African American lawyers, and few if any white lawyers would represent a class of Negroes against the State.

Law of the land; equal protection of the laws. No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privilege, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.
-NC Constitution, Art. I, Section 19.

certain equitable principles which should be applied to the value placed on evidence, and the type of equitable relief granted. In this short Memorandum of Law, which the ALJ ordered produced in four days, Petitioners merely outline their argument. At the Hearing, a more detailed brief will be presented.

LEGAL QUESTION PRESENTED

The legal question presented here in this necessarily abbreviated brief can be phrased in two different forms:

> Assuming that both the federal and state constitutions, at least by 1868, made unconstitutional the practices complained of in this action; and assuming that Respondent, a corporation in perpetuity and a state actor, was on notice of these violations and continued its demeaning social and employment racialized caste system and practices in the face of this notice; what equitable and legal principles does this trigger in regard to evidence and remedies?

> What value is to be placed on the unique and continuing constitutional violations by Respondent against the petitioning class in this case, brought under G.S. 126-16, 17, and 36?

EVIDENTIARY FORECAST

Respondent was chartered as a state University in 1789; its first building begun in 1793; and its first student enrolled in 1795. The 1776 North Carolina Constitution which accepted the institution of slavery (i.e. the classification of human beings as "chattel property" in the eyes of the law) of human beings of African descent, also directed that the new University be

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The Law of the Land (due process) section also traces its roots to the Magna Carta. The Equal Protection clause and the anti-discrimination clause, based on federal civil rights legislation (Title VII of the Civil Rights Act of 1964 was made applicable to state actors in 1972) were not added until 1971. **Id.** at 55-60.

Petitioners argue that the violation of these clear-cut state constitutional guarantees to its African American citizens by a state actor such as Respondent since 1868 -- a state actor which had full notice of its violations -- triggers certain equitable principles to be applied in the conduct of the Hearing of this case, in the value placed on certain evidence, and in crafting the equitable remedies.

financed by escheated property. "Property" included the escheated chattel property of African American slaves.

Evidence will be introduced showing that slaves owned by state actors, who taught and administered the University during its first 60 years along the Princeton model, helped to build the classrooms, auditorium, and dormitories; cleaned and maintained them; cooked and did laundry for the faculty and students; and in general served to beautify, maintain, and expand one of the most beautiful University campuses in the nation.

In 1859, on the eve of the Civil War, University President David L. Swain owned over 30 slaves who (or, in legal terms, "which") were used as cooks, laundresses, maids and groundskeepers for the University. Other faculty members also owned slaves, used for similar purposes. During the five years of the Civil War and for several years after, partially due to the rumor that a student of mixed race might be admitted, the University was closed. On the eve of the civil war, the percentage of African Americans in the Town of Chapel Hill was almost 50%.

When Federal troops left Chapel Hill, some people associated with the University began making plans for establishing secret political societies, later called the Ku Klux Klan, to insure that the African Americans, transformed to human beings and citizens from their previous legal status as chattel property, would remain in the demeaned racialized employment and social caste system. The actions of these secret political societies (still banned by the North Carolina Constitution in Article I, Section 12), resulted in the U.S. Congress holding special Hearings in the Piedmont area of North Carolina in 1867, which led to the passage of the 14th Amendment of the Constitution, mandating that all state-actors are under an affirmative duty to provide equal protection and due process under the law to all (read, African American) citizens. This added more protections to the 13th Amendment, passed three years earlier.

Despite these federal constitutional mandates and the even stronger North Carolina constitutional mandates (see n. 1), when the University re-opened in the early 1870's through the 1950's, it did not enroll any African American students, permit any African Americans to teach or to form or maintain any employment contracts with the University other than as menial laborers in the lowest ranks, mainly as janitors, maids, cooks, and laundresses. In the late 1950's, after Brown v. Board of Education, the University permitted one or two African American students to enroll, and in the 1960's began hiring a handful of African American faculty members.

After African American cafeteria workers struck, in 1969, and state troopers were brought to campus, Respondent inaugurated a few small programs of training and education aimed toward the African Americans in Chapel Hill who had long and faithfully served the University. These programs soon died out. As of the filing of this action in 1991, there were still demeaning and disparate disciplinary, supervision, training, promotional, and pay standards for the petitioning class.

ARGUMENT

1. The Respondent, as part of the State of North Carolina, Has Been Legally Obligated for over 130 years, to Enforce the Constitutional Rights of Petitioning Class.

The reconstruction program lasted only 12 years from 1865-1877. Federal troops, federal courts, and the Freedman's Bureau worked to enforce the new Federal rights of citizenship. This federal enforcement was effectively ended by the 1877 national compromise.[2]

Any hope that federal courts and the federal government would serve as guardians of the new rights and freedoms of African American citizens in North Carolina was lost when the Civil Rights cases 109 U.S. 3 (1883) were decided. The moral and constitutional course of our society was debated by Justice Bradley (for the majority) and Justice Harlan (dissent) in these cases.[3] The course charted by these cases and the political

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[2] See C. Vann Woodward, **Reunion and Reaction** (1951) and Stampp, **The Era of Reconstruction** (1965).

The Compromise of 1877 involved the withdrawal of the last Federal troops, with the result that "White men governed from Virginia to Texas, a vast Democratic Area, anti-Republican in politics, in which the Negro became again what he had been in 1860, the ward of the dominant race." Buck, **The Road to Reunion 1865-1900**, at 101-102 (1938).

Woodward's conclusion is equally straightforward: "The Compromise of 1877 did not restore the old order in the South, nor did it restore the South to parity with other sections. It did assure the dominant whites political autonomy and **nonintervention in matters of race policy** and promised them a share in the blessings of the new economic order." Woodward, **op. cit.** at 246. (Emphasis added.)

[3] See **Kinoy, The Constitutional Right of Negro Freedom**:21 Rutgers L. Rev. 387 (1967) Prof. Kinoy's thesis is the Harlan

compromise of 1877 placed all political and legal responsibility for the enforcement of the new rights to full citizenship for African Americans directly in the hands of the State of North Carolina, including Respondent.

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dissent in these cases, the richness of which can only be grasped in a dialectical analysis with **Dred Scott v. Sandford**, 60 U.S. (19 How.) 393, (1856), described an affirmative duty of the Federal Government toward African American citizens, mandated by the Reconstruction Amendments. In **Dred Scott** the Court set out a comprehensive theory of why the institution of slavery must be preserved, including that African Americans were a "subordinate and inferior class of beings who had been subjugated by the dominant race" and therefore could "justly and lawfully be reduced to slavery for his benefit." **Dred Scott** at 404-407. Justice Harlan dissented that the Reconstruction Amendments overturned not only **Dred Scott**, but the theories of African American inferiority upon which they were based. **Civil Rights Cases**, 109 U.S. 3, 30-36 (1883) (Harlan, J., dissenting.)

Prof. Kinoy, writing toward the end of the Warren Court's revisiting of these issues from 1954 through 1968, argued that the next logical step for the Court to take was not just to overturn the Bradley position in the **Civil Rights Cases**, but to adopt the first Justice Harlan's contemporaneous analysis of the comprehensive meaning of the Reconstruction Amendments: They created the right to "universal freedom" to enjoy whatever rights or privileges white people enjoyed. **Id.** at 35, (Harlan, J. dissenting) If this right was created nationally, then it must be guarded nationally by the whole federal government. **Id.** at 45-47, 50-51. It was here that Justice Bradley and the majority parted company with Justice Harlan, reflecting the national "consensus" of the 1877 Compromise. The majority opinion, which set the national legal context for civil rights cases for three score years, ruled that since the Fourteenth Amendment vested no direct affirmative power in the Congress or national government to protect the exercise of the new rights, the national government could (re)act only in a <u>secondary</u> manner to correct action by the states which interfered with African American citizens' rights. 109 U.S. at 13 & 14.

Respondent, a state actor of prime political standing in North Carolina (from 1814 when a UNC alumnus became governor until 1953, 27 of 44 governors of North Carolina studied at UNC), according to this decentralization of the duty to enforce the new African American citizens' rights to the states, should have acted in a <u>primary</u> manner to insure all of the rights of African American citizens.

In the face of these clear federal and state constitutional mandates, and the political and legal context that the duty to enforce the new constitutional rights was primarily the State's, and only secondarily, the national government's, Respondent did nothing to enforce the rights and, instead, continued the demeaning racialized caste system complained of here up until 1991. Thus, affirmative as well as remedial remedies are in order in this case.

2. In Light of Teamsters, Bazemore, and Croson, Petitioners Must Be Permitted to Develop a Full Historical Record, Upon Which A Court Can Make Findings That Will Withstand Appellate Attacks Upon the Basis for Affirmative Remedies Requested.

> "In **Quarles v. Philip Morris, Inc.**. . . the Court there held that, `a departmental seniority system' that has its genesis in racial discrimination, is not a **bona fide** seniority system. . . . Insofar as the result in **Quarles** and the cases that followed it **depended upon findings** that the seniority systems themselves were `racially discriminatory' or had their `genesis in racial discrimination,' the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-act discrimination cannot be **bona fide** if an intent to discriminate entered into its very adoption. **Teamsters v. United States**, 431 U.S. 324, 1977. (Emphasis Added.)

In 1989, the Supreme Court again ruled that plaintiffs must create a full historical record in order to justify affirmative relief because "The history of racial classification in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." **Croson v. City of Richmond**, 488 U.S. 469, 501 (1989)[4]

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[4] See Hoffer, **Blind to History: The use of History in Affirmative Action Suits: Another Look at City of Richmond v. J. A. Croson Co.** 23 Rutgers L. R. 271 (1992) University of Georgia Professor Peter C. Hoffer posits that **Croson** "lies at the confluence of two great streams of precedent:" the 14th Amendment's protection of African Americans and equitable remedies for complex institutional discrimination. **Hoffer**, at 279. "Racial discrimination is historically patterned rather than idiosyncratic; it is deeply embedded in social institutions. The best weapon to ferret out and eradicate such discrimination was and remains equitable -- the injunction. It is the behavior which is the gravamen of the complaint, and the injunction roots out the discriminatory behavior. Moreover, civil rights suits are inherently class actions. Courts of equity have traditionally welcomed multiple suits with complex party structures. These

And in 1986, in a case with similar racialized employment castes as the case at bar, the Supreme Court ruled that African American agricultural extension agents were paid at 80% of the rate of their white counterparts by their common employer, the University of North Carolina, and this continuing discrimination in pay was a perpetuation of the historic practice. The Court focused on the present salary structure as a "mere continuation of pre-1965 discriminatory pay structure." **Bazemore v. Friday**, 478 U.S. 385, 396-7

These three cases illustrate the duty which Petitioners have to create a full record of the history of discriminatory pay, training, promotion, and disciplinary practices by Respondent toward the Petitioning Class. A full record and findings is necessary to develop the constitutional and statutory violations, and to justify the affirmative legal and injunctive remedies Petitioners seek.

CONCLUSION

This is a historic case. Petitioners request equitable relief in the tradition of Brown. Petitioners chose this forum, which has broad injunctive powers, because the State Personnel Commission can directly mandate substantial corrective action by Respondent.

The 200 year history of Respondent and its treatment of the Petitioners and their forebears is essential to creating a full evidentiary record. The intentional racial discrimination which created and maintained the demeaning caste system is at the heart of this claim. The federal and state constitutions' prohibitions against slavery and its badges and indices are clear.

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class actions were originally called `bills of peace' precisely because chancellors did not want to adjudicate the same question over and over." **Id.** at 281. **Brown v. Board of Education,** 347 U.S. 483 (Brown I) and 349 U.S. 294 (Brown II) led to the greatest set of behavior changes created by injunctions which our society has experienced.

It is within this context, that Prof. Hoffer analyzes the mis-use of historical analysis by white plaintiffs (Bakke, Croson, et. al) and increasingly, the Courts, to turn the historical purposes and context of the Reconstruction Amendments inside out.

Respondent's unclean hands give added weight to this evidence. And, in light of recent rulings such as **Croson**, it is necessary to create a full historical justification for the far-reaching equitable and legal remedies which Petitioners seek and which, they believe, the facts will prove.

This the 28th day of August, 1996.

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CERTIFICATE OF SERVICE

I certify that on this date I served Respondents by faxing a copy of this Memorandum of Law to Respondent's Attorney and by depositing a copy, first class postage prepaid, in the U.S. Mails, addressed as follows:

Mr. Thomas Ziko
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This the 28th day of August, 1996.

Mark Dorosin