FROM THE EDITOR

Jesse Taylor, Editor
Leonard Harris, Book Review Editor

I am delighted to present the return of the “Newsletter on Philosophy and the Black Experience” (NPBE), following a Fall 2000 hiatus. This issue of NPBE is fully constituted by scholars whose work have appeared in past editions. In this vein, it was most beneficial for NPBE to publish the works of these accomplished scholars on previous occasions, and I know that you are sure to find their contributions this time around even more refreshing. I know that I did.

Our first article is written by Charles Verharen of Howard University. Entitled, “Can We All Get Along: Multiculturalism and Social Justice,” Professor Verharen makes a convincing case for cultural pluralism with the help of foundational insights advanced by Alain Locke. A gleaming appeal of Verharen’s point of view comes from his extensive scholarship and charitable consideration of those opposing his position.

Professor Steven Light, of the University North Dakota, is well represented in this issue, with an article on Martin Luther King, he co-authored the article with Professor Kathryn Rand of the University of North Dakota’s School of Law. Both Light and Rand have syllabi in this issue that will prove beneficial to anyone contemplating teaching like courses. Another contributor you are sure to recognize is Professor Gail Presbev, of the University of Detroit Mercy. Her syllabus for an African Philosophy and Culture course is the most extensive I seen, but by no means overdone. Suffice it to say that I will not share Presbev’s syllabus with my Dean.

A word or two about the wonderful article submissions of Light and Rand. In “Where Do We Go From Here? The Legacy of Dr. M.L. King, Jr., the Role of Colorblindness in American Public Policy Today,” Light sets about to establish public policy correlates with King’s dream thirty-two years after his death. His observations reveal interesting insights with respect to racial division and the failure of public policy to follow King’s dream. Finally, the article “Affirmative Action, Affirmative Access, and Quota-able Quotes: Informing the Debate Over Affirmative Action in University Admissions,” gives a new twist to a rather old topic.

Special Announcement
The Committee on Blacks in Philosophy is currently in search of a new Editor. Interested persons should contact Chair Bernard Boxill at brboxill@email.unc.edu for more information. I have agreed to continue as editor until a replacement is named.

It has been my privilege to serve NPBE readers for the past five years. In the now famous words of Vice President Al Gore, “It’s time for me to go.” Thank you.

ARTICLES

"Can We All Get Along?"
Multiculturalism and Social Justice
Charles Verharen
Howard University

“A culture...is always the result of an exceedingly long series of related experiments in living in which each experiment is designed in the light of what was learned in earlier experiments” (Bernard Boxill, 1998, 118).

“Culture goods, once evolved, are no longer the exclusive property of the race or people that originated them. They belong to all who can use them; and belong most to those who can use them best” (Alain Locke, 1989, 206).

In an essay on majoritarian democracy and minority cultures, Bernard Boxill argues that social cultures are best defined as “experiments in living” (Boxill, 1998, 117). Boxill uses Mill’s arguments from On Liberty to show that majority cultures act in their own best interest by attending to the flourishing of minority cultures in their midst. If societies should give free rein to “freethinkers, eccentrics, and intellectuals” because of their potential to discover new ways of living that are “fit to be converted into customs” (Mill cited in Boxill, 117), then they have even more reason to support minority cultures. Far more than solitary groups of reformers, minority cultures present pragmatic prophecies tested over time and circumstance. They offer both experimental results and long-term reflections upon those results.
Reflecting on the conditions for social justice in multicultural societies, Boxill argues that minority cultures can not flourish without proportional political representation. He doesn’t assume that “people from the majority culture cannot care about the interests of those in minority cultures and cannot possibly understand and devise the kind of legislation that would enable them to thrive” (Boxill, 114). However, he does claim that those who share the same culture are more likely to “identify” with one another, and “consequently to love and care” for one another more than “outsiders” could (Boxill, 114).

Furthermore, Boxill argues that members of minority cultures are potentially in the best position to know what legislation would promote their thriving because they understand their own cultures intimately, both from the inside and outside: “they live in a society dominated by the majority culture and are therefore often compelled to step outside their own culture and to operate in the majority culture. Consequently, they will be able to gain the perspective necessary to assessing its strengths and weaknesses” (Boxill, 114).

Noting the exceptions, Boxill remarks that the Japanese and Jews “have done remarkably well in the United States although they are usually represented by Caucasians and Christians who neither understand them nor particularly care for them” (Boxill, 115). However, he says, such cases are anomalies.

Boxill suggests that Thomas Hare’s proposal to defuse the “tyranny of the majority” in democracies by means of a single transferrable vote deserves contemporary attention (Boxill, 119). Nevertheless, the path to ending democratic forms of tyranny cannot be easy.

If a technique for circumventing majoritarian tyranny can be found, Boxill argues, a multiculturalism sustained by a legislature that gives voice to minority cultural interests can best promote a society’s thriving. At the same time, multicultural political representation is the only sure path to social justice. A majority culture striving for social justice acts to ensure its own flourishing.

In the remainder of this essay, I want to examine several challenges to Boxill’s promotion of multiculturalism and consider the consequences of his theory for global multiculturalism. Because his brief essay does not confront these issues, I will turn to Alain Locke’s philosophy of cultural pluralism. Calling for a “new world order” (Locke, 152), Locke promotes a global multiculturalism grounded in a revised version of democracy that can itself only be styled as “monocultural.” Locke justifies this new melange of mono- and multiculturalism as the only ground for international social justice.

Challenges to Multiculturalism

The United States has become something more than a melting pot—that pleasant trope that tries to turn the injustice and hardship suffered by millions of immigrants from thousands of different cultures around the world into a faded memory of a vibrant and enjoyable time.

Now the United States is a cauldron of ethnic rage and culture wars. The Rodney King incident that gives this essay its title caps a long line of riots and rage stretching back to the ’60s and beyond. Indeed, the cauldron rather than the melting pot characterizes the very beginnings of our republic, given the rage of enslaved persons, indentured servants, women serving as virtual slaves in otherwise “respectable” households, and children working up to eighteen hours a day at labor that destroyed their health before they reached adulthood.

Can a campaign for social justice that promotes respect for minority cultures ease the rage? A phalanx of conservative thinkers insists on the contrary that cultural difference itself hinders the expression of social justice in multicultural societies. Alain Bloom, for example, compares cultures to the cave in Plato’s Republic. For Bloom, ethnocentrism is the original human condition, and only philosophy can save us from being cave-bound, or “culture-bound” (1987, 38). Bloom imagines that the Greeks were not only the “first men we know to address the problem of ethnocentrism” (1987, 37), but also the first to solve it. Ironically, Bloom’s Closing of the American Mind proposes to stop cultural conflict by dissolving cultural difference. His position is that European culture has reached the pinnacle of human achievement. Allowing other cultures prominent places in the United States would entail regression to inferior ways of living.

E.D. Hirsch offers a less presumptuous and more pragmatic reason for diminishing cultural difference in the United States. “Inasmuch as a nation’s strongest bond is a common cultural core, multiculturalism weakens national solidarity” (1987, xv).

Nathan Glazer straddles the line between rejecting and embracing multiculturalism. Proclaiming that “we are all multiculturalists now” in his book of that title, Glazer portrays himself as a reluctant multiculturalist. He argues that the driving force for multiculturalism has been the United States’ inability to assimilate African Americans into mainstream culture (1997, 160).

Anthony Appiah proposes “a multiculturalism that accepts America’s diversity while teaching each of us the ways and the world of others” (1998, 52). He defines multiculturalism as “an approach to education and to public culture that acknowledges the diversity of cultures and subcultures in the United States and that proposes to deal with that diversity in some other way than by imposing the values and ideas of the hitherto dominant Anglo-Saxon cultural tradition” (1998, 48). Appiah praises this version of multiculturalism because the “Christian, Anglo-Saxon tradition was rooted in...racism and anti-Semitism (and sexism and heterosexism...)” (1998, 48). Also, “making the culture of one subculture the official culture of a state privileges the members of that subculture...In ways that are profoundly antipluralist and, thus, antidemocratic” (1998, 48).

Appiah’s multiculturalism cannot encourage members of minority groups to dedicate themselves to passing on their cultures to their children, however. He argues, for example, that an Afrocentric strategy for healing cultural conflict is “to teach each child the culture of its group” (1998, 49). Against the Afrocentrists, he claims that attention to specific cultural history is impractical and dangerous because it “would require segregation into cultural groups either within or between public schools in ways that would be plainly unconstitutional” (1998, 50). Afrocentric emphasis on unique
group history is "dangerous" because it leads us "prefer our own kind... Culture undergirds loyalties" (1998, 52). Citing examples in Nigeria and Ghana, Appiah imagines that cultural loyalty is the greatest danger to national unity (1998, 41-44).

Alain Locke's Multiculturalism

Against Appiah's position, Locke claims that "loyalty to loyalty" must serve as the primary principle of multiculturalism (1989, 49). Cultures are grounded in philosophical principles that must command unwavering loyalty in order for them to survive and flourish. Multiculturalism must respect this commitment. Where cultural loyalties force cultures into mortal opposition, some method must be practiced to moderate cultural conflict.

Locke proposes a technique called "cultural relativism." The first step of the method is to "implement an objective interpretation of values by referring them realistically to their social and cultural backgrounds" (1989, 273). The second step "interpret[s] values concretely as functional adaptations to these backgrounds, and thus make[s] clear their historical and functional relativity. An objective criterion of functional sufficiency...would thereby be set up as a pragmatic test of value adequacy" (1989, 273). The method will "claim...no validity for values beyond this relativistic framework, and so countervail value dogmatism based on regarding them as universals good and true for all times" (1989, 274). Cultural pluralism regards ideology's function as a rationalization of values subject to pragmatic critique. The method assumes that value concepts change through time and circumstance, and tend in the direction of overgeneralization (1989, 274).

Locke assumes that cultures can get along because they are ultimately grounded in core values that all cultures share under a principle of "cultural equivalence" or "cultural cognates" or "culture-correlates" (1989, 73). He refuses to specify these values in advance of anthropological investigation, but he expects that such research will confirm the tenets of the world's major philosophical and religious precepts (1989, 76).

Philosophy in league with anthropology and other social sciences like sociology and psychology must undertake a search for universal, quasi-absolute values that undergird all cultures, so that cultures can see themselves in others and thereby all get along. Locke's new philosophical methodology is based on consilience: "a philosophy and a psychology, and perhaps too, a sociology, pivoted around functionalistic relativism" (Locke, 50). The philosophy of cultural relativism, beginning as a "mere philosophy or abstract theory of values" must depend on the social sciences for an "objective and factual base" in carrying out its "task of reconstructing our basic social and cultural loyalties or of lifting them, through some basically new perspective, to a plane of enlarged mutual understanding" (Locke, 72).

Locke specifically claims that for critical relativism to accomplish this task, "anthropology in the broadest sense must be the guide and adjutant..." (Locke, 72). Writing in advance of contemporary claims that anthropology is an inherently ethnocentric enterprise, Locke claimed that with "the aid of anthropology, whose aim is to see man objectively and impartially in all his variety, cultural relativism seems capable of opening doors to such new understandings and perspectives as are necessary for the new relationships of a world order and its difficult juxtapositions of many divergent cultures" (Locke, 72). At the same time, Locke also claims that scientific "objectivity" must keep philosophical "relativism" in check. For example, Locke is highly critical of Melville T. H. Herskovits' "overemphasis of the hypothesis of "African cultural survivals" in the United States (Locke, 218-219). Locke tags Herskovits with a "reformist zeal" that transforms the thesis of Africamism in the United States "from a profitable working hypothesis into a dogmatic obsession, claiming arbitrary interpretations of customs and folkways which in all common-sense could easily have alternative or even compound explanations" (Locke, 225).

In fact, Locke claims that scholarship like Herskovits' that insists on African retentions as the basis of African American cultures might evoke conclusions that "damn the Negro as more basically peculiar and unassimilable than he actually is or has proved himself to be" (Locke, 225). 1

Locke proposes the intervention of critical relativism as a first step for dissolving cultural conflict. Locke thought that World War II forced us to recognize a desperate need for cultural reconciliation to avoid global Holocaust. While Locke imagines science and technology to be "relatively value neutral," 2 he believes they nevertheless heighten cultural conflict "as the geographical distance between cultures is shortened and their technological disparities are leveled off" (Locke, 76). Locke didn't know about nuclear warfare when he wrote these lines in 1944, but he anticipated its effects.

The successful exercise of Locke's method depends on good will. He assumes that cultural combatants must be predisposed to tolerate, even respect, cultural difference. But this respect must be reciprocated.

Stanley Fish's Critique of Multiculturalism

Stanley Fish argues that multicultural methods like Locke's are flawed at their foundations. Fish distinguishes between two versions of multiculturalism. One he trivializes as "boutique multiculturalism" and the other he calls "strong multiculturalism." The first version respects alien cultural traditions, but "boutique multiculturalists will always stop short of approving other cultures at a point where some value at those cultures' center generates an act that offends against the canons of civilized decency" (1998, 69). Examples are intolerance of the principles that led to Salman Rushdie's death sentence, Afrocentric curricula, Native American religious ceremonies that sacrifice animals or use controlled substances, or religions advocating polygamy.

Strong multiculturalists, on the other hand, engage in a "politics of difference" that values difference for the sake of difference itself: "Whereas the boutique multiculturalist will accord a superficial respect to cultures other than his own, a respect he will withdraw when he finds the practices of a culture irrational or inhumane, a strong multiculturalist will want to accord a deep respect to all cultures at their core, for he believes that each has the right to form its own identity and nourish its own sense of what is rational and humane" (1998, 73).

Fish would agree with Locke that the first principle of strong multiculturalism is tolerance. However, Fish finds that in the most interesting cases of culture confrontation, tolerance must confront intolerance. Right-to-life advocates,
for example, will not tolerate abortion because they judge it to be murder, and no amount of Lockean critical relativism will change their judgment.

The strong multiculturalist must then either tolerate such intolerance, or retreat to the boutique position, thereby excluding right-to-life advocates from the community of critical relativists. A promising multiculturalism is cut short.

In fact, Fish goes so far as to say that no one can be a strong multiculturalist since fierce human loyalties to culture prevent reconciliation with extreme cultural opposition. In such cases, Locke’s reciprocity will be sacrificed to the intolerance that foundational loyalty to loyalty must engender. A “really strong” multiculturalist must commit himself to “the distinctiveness of a culture even at the point where it expressed itself in a determination to stamp out the distinctiveness of some other culture” (1983, 75). At that point, the “really strong” multiculturalist must “become (what I think everyone of us always is) a uniculturalist” (1983, 75).

Fish’s deconstruction of multiculturalism is a masterpiece that deserves full quotation: “It may at first seem counterintuitive; but given the alternative modes of multiculturalism—boutique multiculturalism, which honors diversity only in its most superficial aspects because its deeper loyalty is to a universal potential for rational choice; strong multiculturalism, which honors diversity in general, but cannot honor a particular instance of diversity insofar as it refuses (as it always will) to be generous in its turn; and really strong multiculturalism, which goes to the wall with a particular instance of diversity and is therefore not multiculturalism at all—no one could possibly be a multiculturalist in any interesting and coherent sense” (1983, 75).

Given Fish’s critique, Locke must say, “all cultures can play my multicultural game, but only if they follow my rules—and my rules make critical relativism’s methodology the foundation of all multiculturalism.” But how can this be multiculturalism if cultures that manifest fierce loyalty to themselves cannot play the game?

Fish forces Locke to advocate a revision of Nathan Glazer’s motto: “We are all multiculturalists now.” Locke must now claim: “In order to get along, we must all be monoculturalists now.” Granted, Locke’s new monoculturalism is a strange brand of monoculturalism. It embraces all cultures whose loyalty to loyalty permits them to respect cultural difference. In Locke’s exquisite phraseology, his monoculturalism advocates a global culture whose unity is grounded in cultural difference (1983, 75).

**Locke’s Defense of Monoculturalism**

Why should anyone fiercely loyal to her culture embrace a monoculture that while recognizing and respecting her culture, still insists that she moderate her culture on fundamental points? For example, if abortion is judged to be murder, then it cannot be tolerated simply for the sake of everyone’s getting along. Value relativism to the contrary notwithstanding, some values are higher than the impoverished value of getting along. Pro-life activists, for example, might justify their actions with the following rationale: ‘Abortion is killing innocents, and it is morally obligatory to kill those who would kill innocents.’

This line of reasoning shows why Locke refuses to name any absolute values, although he believes that there is a universal set of values grounding all cultures—survival or flourishing, or life, the pursuit of happiness, with the latter defined by values such as truth, justice, beauty, goodness, and the like. Locke anticipates that his method of critical relativism will uncover “beneath the expected culture differentials of time and place” certain “common-denominator values that would stand out as pragmatically confirmed by common human experience” (1983, 75).

Sometimes these core values compete with one another: one can take a life to save a life (the position of advocates of abortion, just wars, and capital punishment); one can tell a lie to save a life (contra Kant); one can take a life to protect the truth (Socrates taking his own life); one can give up life for the sake of love (Christ); one can sacrifice justice for the sake of truth and community (Kwasi Wiredu’s understanding of the South African truth commissions).

Values are relative, not only to cultures but to individuals and one another. This is the fundamental assumption of Locke’s value relativism. But Locke is proposing an astounding contradiction of his value relativism. Locke’s value absolute is in fact the conviction that we all must get along, and all cultural difference that obstructs that objective must be sacrificed to that aim. Indeed, highest value.

How can Locke possibly enter into this glaring contradiction? We may hypothesize that Locke was so apprehensive about the power of modern technology that he thought that unchecked it could destroy the very possibility of tolerance, respect and reciprocity, by destroying human life itself.

What horrendous force would make us tolerate what we find to be intolerable by reason of our fierce loyalty to loyalty? A force that would end the very possibility of toleration. But how can mere tolerance be the supreme value? Doesn’t some other value ontologically precede tolerance? Only life itself can be the absolute value that allows Locke to subsume all other values to tolerance and reciprocity. How could Locke come to this position? Before Locke’s time, intolerance and exclusivity could only be local, not global threats to life. Humans exhibit a long record of genocide and decimation of populations. But never before on a scale that would wipe out all human life.

 Granted, I’m giving Locke powers of prophecy here that even Cornel West might be unwilling to claim. But all Locke had to do was extrapolate from history. The bombing of civilian populations in World War I and at Guernica in the Spanish revolution set the stage for the carpet bombing of European population centers by both the allies and axis in World War II.

Those acts signal the end of any distinction between civilian innocents and armed combatants. War has always aimed at the innocent. The most brutal hatred aims at the extermination of genes, not people. The “great” wars of the twentieth century simply translate that resolve into mass execution. Locke did not have to go far to imagine the execution of life itself in the transformation of execution through technological “prowess.”

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Is life in fact the one, good, true absolute value? We tend to revere most those humans who have given up their lives for the sake of something far higher than life—Socrates, Christ, Gandhi, King, Malcolm. But without life itself, those figures could not have exercised their choices. We can ask all humans to give up their most sacred, their most cherished differences only for the highest cause. And that cause can only be what makes the very choice of difference possible—life itself.

In the end, then, Fish is right. With Bloom, Hirsch, Glazer, and Fish, Locke must boldly proclaim that "we must all be multiculturalists now." But what a multiculturalism! It proclaims that we must all be multiculturalists now. But only under the terms of a very specific definition of "multiculturalism." As Lockeian multiculturalists, we find the ground of our unity in difference: "What we need to learn most is how to discover unity...underneath the differences which at present do disunite and sunder us, and how to establish some basic...reciprocity on the principle of unity in diversity" (1989, 135).

Making the Most of Multiculturalism

Perhaps the most difficult task that Locke faces is to furnish arguments for his version of multiculturalism. Why is it somehow wrong for one culture to lord it over another? Cultural hegemony is perhaps the dominant theme of human history. Why stop now? Bloom and Hirsch's rhetoric justifies European culture along the lines of social Darwinism. If, as Bloom claims, 'European culture' is the 'best and brightest' that's been thought and said,' then not only does it deserve to survive, but, being the best, it will survive.

Locke is tempted to fall in with this sort of thinking. He argues that culture critique can be based on more or less objective social sciences like anthropology. Such critique is based on whether a culture is actually capable of achieving its underlying objectives (functional constants) by following its own principles of action (1989, 273-274).

This is dangerous ground. The poverty of our imaginations sets limits to our powers of critique. The discoveries of the most revered thinkers beggar the imagination, as the discoveries of figures like Copernicus, Newton, Darwin, Marx, Freud, Heisenberg, and Godel have shown.

What would make a critique of culture objective would be its power to help us anticipate the future. Culture is so complex that we simply cannot command that objectivity. Du Bois captured this idea perfectly when he asked what kind of cultural critique the ancient Egyptians might have made of the rude, cave dwelling Europeans—who finally conquered Egypt and colonized the world (1996, 188).

If we could be confident that a culture's actions must doom its realization of its goals, then we could perform a competent culture critique.

If I believed in the objectivity of culture critique, for example, I would feel quite confident saying that European culture must transform itself radically. In its present form, it poses a threat to life that other cultures cannot brook.

But European culture cannot be brought down, since it's merely a summation of the history of all cultures. If European culture were erased together with all knowledge of nuclear and biochemical weapons, the successors of European culture would recreate that knowledge in an instant of geological time (Schell, 1999). It is better to solve the problem of European culture now, rather than to postpone it to the indefinite future.

Locke is confident that true democratic principles lay the foundation for a future culture with the best chances of survival. European culture is not misguided in its primary principles, but only in its execution of those principles. Locke's version of European cultural hegemony is far more enlightened than Bloom's procrustean version that would reduce cultural difference to promote political unity.

But how can Locke justify his insistence that all cultures adopt a version of multiculturalism that demands universal respect for cultural difference? In support of his position, Locke might cite the usual ethical pieties: "all men are created equal," "all have rights to "life, liberty, and the pursuit of happiness," every nation must promise "liberty and justice for all." These imperatives, while enjoining a certain version of multiculturalism, nevertheless preclude any form of multiculturalism that does not embrace all cultures acting in the spirit of tolerance and reciprocity.

In unanimously guaranteeing our right to be different, these imperatives recognize a basic fact of life: we are all born to be different, because we need difference in order to be. Variety is not simply the spice of life. Rather it's the stuff of life. However, we promote difference by insisting on unity. By insisting that we all be the same in guaranteeing the rights of others to be different, these imperatives increase our powers to multiply our differences.

We get our power from the unities we call "communities." Heretofore, because we have been relatively powerless, our communities have been grounded in unity rather than difference. Nevertheless, difference is precisely the seat of our power, so communities have always expanded to embrace difference, because difference grounded in unity yields power. The first memes to exert totalizing, universalizing force on our consciousness were those that enjoined us to embrace universal community—Hinduism, Buddhism, Molism, and Christianity.

These reflections are the prelude to the only moral question worth asking: why should I tolerate the other's difference, if it stands between me and what I desire? Only one reason can serve universally: the other's difference is the only effective means I have to reach what I desire. I desire in the end to "be all I can be," and I can only be what the other has made it possible for me to be. The larger the concept of the "other," the greater the possibility of getting what I want—even of conceiving what I want.

Given the social nature of humans, the only way I can get what I want is through the other. And if I choose to view the other as an extension of myself, a member of my most intimate community, then what I want is what the other wants. If the only way I can get what I want is through the other, then I should strive to enfold myself and all others into a universal community.

Only a perception that the other stands between me and what I want prevents a realization of a global community. What I want, I want for myself, not for the other. But in a community of perfect intimacy, what I want is what the other wants because we are united. How is it possible that self and other can be united, different as they must be? Here
metaphors must supplant arguments. I can view myself as united with the other in the same way that the cells in my fingers holding this pen as I write are united with me. Those cells, I'm convinced, are quite different from me, and yet in the best case, the present case, they are me. I could lose the fingers that those cells embody and I would still be me. But I would be a sorely impoverished me.5

I can live in a community that deliberately excludes millions of others from unity with myself. But I would be a fool to do so. I would strip myself of power by this tactic, because those millions would give me a power I could never have without them—if only those millions see themselves as me and I as them: a unity of difference, and a difference that unites.

Locke's monoculturalism has a two-fold justification, then. First, we achieve the greatest power through the largest possible community. A universal community is our best shot at moving in the direction of universal power. How can we justify this lust for power? Because in seizing power, we imitate life. Life is an expression of the power to sever and create connections. We need power to continue the mission of continuing life. Second, Locke's monoculturalism is justified because it is the best possible way of promoting diversity, the ground of life. Life is diversity, and only diversity makes life possible. The evolution of monocellular life into these vast assemblages of life we call human beings is predicated on diversity.

To summarize the argument for Locke's position, then, we can ask the whole world to give up its fiercely held loyalty to loyalty in only one case: when that loyalty threatens our very ability to be loyal. Can we say that an exclusive loyalty to family or small groups was warranted in the past? Relatively powerless groups restrict their loyalty to small, tightly knit bodies that hold their power only by taking power from those whom they've "othered": "us" versus "them."

Truly powerful groups extend their power to the widest possible community because that very community is in fact the source of their power. The tendency of human groups toward gigantism illustrates this point. History may be read as a record of groups trying to make themselves larger, more powerful. Groups tend to limit their sizes only when internal forces cause their disintegration. Human invention rapidly worked out ways to coalesce groups, from extended families to tribes, nations, and empires.

Jared Diamond in Guns, Germs, and Steel claims that one of humanity's greatest inventions was discovering how to meet the 'other' without killing him. Locke's monoculturalism proposes a second "greatest invention," a method for incorporating every "other" into a global "intimate community." In his essays on cultural relativism and ideological peace (1989, 67-78, 95-102) and moral imperatives for world order (143-152), Locke argues that a global intimate community is the indispensable condition for continuing the human mission.

Conclusion: Can Locke's Monoculturalism Help Us All Get Along?

Should Locke's monoculturalism be integrated into the political fabric of the nation? A final glance at definitions of "culture" may help resolve this question. The word has its roots in the idea of a "cycle." A culture consists of cycles of behavior, thoughts, feelings, and transformations of the environment resulting from them, shared by a group of people—or even, in the limit case, only one person. In the same way that we are unique as individual biological organisms, we are living works of art, perfectly, utterly unique, self-created "cultures of one."

Cultural differences arise for the same reasons as biological differences. As a manifestation of variety, life is both engendered by variety and prolonged by variety. Cultural variety is as important to our survival as agricultural variety. For this reason, Boxill argues that a culture is "always the result of an exceedingly long series of related experiments in living in which each experiment is designed in the light of what was learned in earlier experiments" (Boxill, 118).

But variety as the engine of survival is at the same time the most powerful agent of the destruction of life. We must be different in order to be, but difference is the gravest threat to our existence—unless we have power over difference. Cultures proliferate and become mortal enemies. Cultures increase their numbers of members in order to make themselves more powerful. As Kant pointed out (in an essay on universal peace!), universal war must follow the proliferation of culture, until only a few major cultures or powers have the resources to play the global war game.

In the end—that would be the end of history, according to Hegel—one player trumps all, and universal peace will ensue. But Kant and Hegel got it all wrong: the game will begin all over again because life enjongs difference. A global monoculture would have little chance of survival. Threats like nuclear or asteroid winter, for example, would upset its fragile ecological balance.

Given this gloss of Locke's position, monoculturalism is indispensable to human survival. However, cultural difference confronts a problem arising out of the "conservative" nature of life. Members of cultures must make the following kinds of declarations: "We have survived by following our cultural script. Other cultures threaten both our script and the "capital" (in Marx' sense) we need to sustain our culture. We must either fight the encroaching culture to the death, find our niche in that culture, or force the other culture to compromise." All three scenarios have been executed many times, as the diffusion of Indo-European languages in Eurasia and Bantu languages in Africa indicates. The human genome project will corroborate, I suspect, the linguistic record of the results of intercultural contact.

In short, we can't live with cultural diversity—and we can't live without it! What are we to do? Locke's monoculturalism can address the dilemma with some promise of success. The oldest cultures encode the wisdom of moving toward a single global community. But we have paid little attention to these injunctions. Christianity is one of the first codes enjoining universal community grounded in universal love. Yet "Christian" nations like Germany and Belgium have murdered some six million Jews and perhaps twice that number of Congolese Africans.

Can we make judgments about which codes to follow, which cultures to imitate, when we have a choice about culture? The universality of a code prompts us to consider it favorably. Hinduism, Buddhism, and Christianity still command world-wide followings. Cultures with clearly
suicidal propensities like Nazi Germany have, it is to be hoped, brief life spans. Against this hope, however, we must note that cultures with imperial propensities like China, Greece, and Rome have exhibited achingly long life-lines. Where Mill's "experiments in living" have produced cultural scripts that become nearly universal memes like Christian and Moisic universal love or European and Iroquoian fledgling democracies, we might missionaryize or try to cohere or propagate all cultures to "sell all they have and come follow us."

But while we may be smart enough to seduce the whole world into these cultural scripts, we're not wise enough to know whether that's a good idea. The missionary character of Christianity and democracy provoked a backlash from global Marxism and an Islamic fundamentalism that denies Church-State separation. We're playing with fire in heedng Locke's call to take the control of culture away from fate to entrust it to deliberate human control.

For this reason, Locke's cultural pluralism must be tempered with Boxill's vision of social justice. If a majoritarian global community grounds itself in Locke's "new world order" (1989, 152), then that community must make room for dissenting minority communities. Boxill leaves room open for the reconstruction of any community vision, no matter how unassailable it may appear to be.

Endnotes

1. Locke looks for the truth in a middle position between "that of the Negro as the empty-handed, parasitic imitator or that of the incurably atavistic nativist. In fact, because of his forced dispersion and his enforced miscegenation, the Negro must eventually be recognized as a cultural composite of more than ethnic complexity and cultural potentiality" (Locke, 225).

2. Langdon Winner's Autonomous Technology (Cambridge: Massachusetts Institute of Technology, 1986) and Paul Peyerabend's Science in a Free Society (London: NLB, 1976) make the case that neither science nor technology can be value free.

3. Deep ecologists like Arne Naess (1988) and Warwick Fox (1990) have developed concepts of an expanded or transpersonal self that encompasses both the human and non-human other. Eco-feminist philosophers Val Plumwood (1981) and Karen Warren (1990) criticize their concepts as thinly disguised versions of rationalistic egoism.

4. See Warren Wagars 'A Brief History of the Future for provocative evocation of such scenarios. This type of scenario "civilization's" breakdown is the strongest rationale for the journal, Cultural Survival's insistence that indigenous or aboriginal cultures be allowed to control territory necessary to sustain their cultures--should they freely choose to do so. Many have chosen not to, but outsiders interested in scarce resources like rare hardwoods or oil often constrain their choices.

Bibliography


"Where Do We Go From Here?" Legacies Of Dr. Martin Luther King, Jr., and the Role of "Colorblindness" In American Law And Public Policy Today

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Introduction

Thirty-three years ago, the Reverend Dr. Martin Luther King, Jr., galvanizing force in the Civil Rights Movement, winner of the 1964 Nobel Peace Prize, and lightning rod for southern segregationist fervor, was assassinated in Memphis, Tennessee. King's philosophy of employing nonviolent political protest in pursuit of radical, even revolutionary, social change had reconciled antithetical imperatives for as long as oppositional elements in American society could bear.

As a theologian, a political leader at the vanguard of a social movement, and ultimately, a martyr, King simultaneously embodied the roles of public intellectual and public activist, assuming the unforgiving mantle of spokesperson for a race. His modes of thought and action focused on the practicalities of leveraging the power of the state to achieve social equity and social justice for African Americans.1 One element of King's genius was his understanding that government in all its forms—far more extensively and intimately than the discriminatory actions of individuals—sets the terms for the distribution of societal benefits and burdens for all of its citizens.2

Despite his physical absence, King very much remains alive in American political discourse. Liberals and conservatives alike consistently invoke King's words, writings, and image to buttress overt as well as oblique justifications for advocating, legislating, implementing, and
adjudicating a wide range of laws and public policies bearing
on the politics of race. Liberals suggest that King's advocacy of
programmatic race- and class-based remediation of
African American second-class citizenship lends itself to
recognition of the continuing role of race in producing
societal cleavages, as well as the critical necessity of
deploying government power to close the gap.3 Looking
to some of the same textual evidence, conservatives draw
virtually the opposite conclusion, asserting that in the
absence of de jure segregation, King would advocate that
standards of “colorblindness” or “race neutrality” inform law
and public policy.4 Conservatives frequently cite King’s
infamous statement during the 1963 March on Washington
that he dreamed of a nation in which his children would be
judged not “by the color of their skin but by the content of
their character.”5 Which perspective on King’s views should
carry the day? Is it useful, or even appropriate, to ask,
“WAVKD?” (“What Would King Do?”)

Whether one is celebrating King’s contributions to
American life on the federal holiday bearing his name, or
rumination on what might have been in the shadow of the
thirty-three years following his assassination, the topic of King
and his legacies spotlights an important ongoing ideological
debate animating the current historical moment: the
question of whether or not the principle of equal protection
of the laws truly embodies a “colorblind” ideal — and if so,
what would be the practical results of widespread
implementation of “race-neutral” law and public policy for
people of color in the near future.

Bearing these issues in mind while analyzing King’s
legacies, this essay examines briefly one policy arena in
which proponents urge the use of “colorblindness” as the
benchmark principle for determining the rationality — and
constitutionality — of law and public policy: affirmative action
in higher education. After assessing what King might believe
about how race is lived in America today, the essay makes
several modest recommendations informed by King’s
legacies. The essay closes by inquiring whether King’s
exhortations to realize “why we can’t wait,”6 and to ask,
“Where are we now,” and “Where do we go from here?”
are any less relevant, or imperative, today than they were
three decades ago.

Where are We Now?

The Move Toward the Language of “Race Neutrality”
As King observed in 1967, “[i]n order to answer the question
‘Where do we go from here?’ : we must first honestly
recognize where we are now.”7 “Where we are now”
includes a fundamental nationwide shift in the dialogue over
racial politics toward the rhetoric of deracialization. Over
the past decade it has become increasingly fashionable for
scholars, policymakers, judges, and journalists to suggest
that the achievement of King’s vision of a society without
invidious color-consciousness is hindered by the presence of
race-conscious law and policy. To correct for this problem,
America should shift toward erecting public policy upon a
foundation of “race neutrality.” From this perspective, the
ultimate goal of American race relations is to build a
“colorblind” society as measured against the Fourteenth
Amendment’s constitutional guarantee of equal protection
under the law.8

In 1998, proponents of California’s Proposition 209, the
anti-affirmative action “Civil Rights” ballot initiative,
appropriated a clip of Martin Luther King’s 1963 “I Have
a Dream” speech for use in television ads favoring the passage
of the initiative, which eradicated race-conscious public
policy.9 As one might surmise, the clip contained footage
of King’s infamous declaration of hope for a time when
whites would judge his four children on the basis of their
character, instead of their skin color. The rhetoric of
“colorblindness” thus pervaded California’s campaign to
pass an initiative that would fundamentally alter the state
government’s relationship to its hugely diverse multiracial
and multietnic populations.

As this anecdote suggests, aside from his concrete
legacies, King’s symbolic significance is not to be overstated
today. This is why it is important to examine with good faith
as well as relative precision his words and deeds before
appropriating them for use in current public policy disputes.
Based on the available evidence, it is accurate to assert that King’s
vision of a nation in which his children would not be judged
on the basis of their skin color unequivocally indicates that
he would be in favor of the end of a full range of race-
conscious policies, including what conservatives label
“reverse discrimination” and the “racial gerrymandering” of
majority-minority electoral districts, the eradication of race-
based preferences in hiring, contracting, higher education,
and the like, or the reconsideration of housing subsidies and
public entitlement programs, all to be replaced by “race-
neutral” policies. Regardless, what might be the results of
such a shift? Affirmative action in higher education
represents an instructive policy arena in which “colorblind”
standards rapidly are being implemented in lieu of race-
conscious ones.

The Demise of Affirmative Action in Higher Education?
The existence of an intimate nexus among educational
access, educational attainment, and position in the labor
force is incontrovertible. For most, the process of
socialization into civic life and the marketplace begins at
the elementary and secondary levels of the public schools.
Today, as public and institutional support for the
segregation of public school systems wanes, underwritten
in part by the rubric of “race neutrality,” the significance of
race is on the rise when it comes to childrens’ educational
opportunities. Comprehensive research conducted by the
Harvard University Civil Rights Project documents how the
segregation of blacks and Latinos is accelerating across
the nation, in cities as well as in suburbs.10 Hypersegregated
schools servicing impoverished African American and Latino
populations face a desperate lack of resources, ranging from
decaying infrastructure to inadequate staffing to out-of-date
textbooks, as well as an expanding “digital divide” created
by a lack of access to computers and the Internet.11

Educational attainment is a hallmark of an industrially
and technologically advanced and economically competitive
society. The mood among policymakers appears to reflect
a growing distaste for affirmative action programs that create
educational opportunities for people of color within colleges
and universities. “Race-neutral” administrative decisions
and jurisprudence are spreading, particularly in states with
the highest proportions of citizens of color. In 1995, the
University of California Board of Regents voted to ban the use of race during the admissions process, and the number of applicants as well as enrolled students of color promptly plummeted. In 1986, a federal appeals court overturned the University of Texas Law School's affirmative action policies, holding that diversity goals failed to meet the constitutional burdens of equal protection jurisprudence. Hopwood immediately contributed to declines in minority enrollment in the University of Texas system, particularly in professional programs in law and medicine, but the jury remains out on its long-term impacts.

Several state legislatures recently have enacted "colorblind" university admissions policies that rely on grade point average as a proxy for such other factors as test scores, racial or ethnic background, and life experience. Texas and Florida have adopted "affirmative access" programs under which the top ten and twenty percent, respectively, of graduating high school seniors are guaranteed admission to the states' public university systems. Other states are considering the adoption of such policies. Will "affirmative access" create new inroads for students of color to attend institutions of higher learning? Although it may be too soon to accurately predict or explain all of the outcomes, the early results under "affirmative access" programs raise new questions. In Florida, for instance, although the number of new students of color in the university system has increased, critics worry that the divide will increase between white "haves" enrolled at the state's flagship universities and African American and Latino "have-nots" matriculating at lesser institutions.

What ought one make of the growing pressure to turn away from affirmative action in higher education? Some believe "affirmative access" initiatives exemplify the spirit of state-based experimentation, in which otherwise-lethargic government is prodded into action to deal innovatively with tough policy questions. Others think "affirmative access" programs artificially abstract race out of the totality of circumstances shaping real peoples' lives and embody the premature rejection of efficacious affirmative action programs that produce highly desirable social effects.

In what is widely acknowledged as definitive research on affirmative action in university admissions, former Princeton University President William Bowen and former Harvard University President Derek Bok published in 1998 their exhaustive nationwide study of empirical data concerning the performance, both during and after college, of black and white students admitted to academically selective colleges and universities with affirmative action admission policies. The authors conclusively demonstrate that African Americans admitted under affirmative action programs are every bit as successful in measures of academic and career performance as are their white counterparts. Bowen and Bok reveal how race-conscious programs lead to the admission of highly successful students of all backgrounds while at the same time promoting a more diverse and socially equitable society. Will "race-neutral" admissions policies do the same?

WWKD? (What Would King Do?)

As I've phrased it, WWKD? When assessing Martin Luther King's legacies, one ought to hesitate before appropriating King's words, spoken and written more than three decades ago, or before effectively putting new words in his mouth. For some, however, when it comes to issues of race, the politics of expediency sometimes overwhelm the virtues of prudence and accuracy.

For instance, one might take a second look at the setting in which proponents of California's anti-affirmative action Proposition 209 employed the clip of King's "I Have a Dream" address as a symbolic stamp of legitimacy for the state's "colorblind" ballot initiative. King biographer and historian Clayborne Carson observes that the broader context of King's words in this speech is instructive, indeed definitive. Standing before the throng of civil rights supporters in 1963, King not only spoke of the importance of not judging people on the basis of their racial characteristics, he warned that racial justice in America could only follow the "whirlwinds of revolt" as they shook "the foundations of our nation." The totality of King's address hardly represented a call for "race-neutral" quiescence or assimilationism. Yet in 1998, King's radical rhetoric conveniently was whitewashed for the sake of a television sound bite.

In numerous settings, King advocated that law and public policy pragmatically account for skin color as a matter of practical necessity; moreover, he believed that government owed African Americans far more than such relatively limited remedies as the forms of affirmative action policymakers increasingly reject today. Indeed, King proposed an economic "Negro Bill of Rights" in which the state would be philosophically and practically obligated to spearhead a massive program of downward resource redistribution to African Americans to promote social equity. "Race neutrality," in other words, could follow only from acute racial consciousness.

Available texts and their scholarly scrutiny over the years, as well as extensive biographical material, strongly indicate that it is not consistent with King's articulated philosophies on how government should approach the remediation of racial discrimination to suggest that he supported — or today would support — a "race-neutral" approach to alleviating or remedying institutionalized racial discrimination. Moreover, even assuming for the sake of argument that King, were he alive, would deem it desirable for public policymakers to pursue a "colorblind" ideal, ample empirical evidence of institutionalized racial disparities and discrimination strongly indicates that it is neither practically feasible nor desirable to abandon race-conscious law and public policy for the foreseeable future.

Where Do We Go From Here? Learning From King's Legacies

Three Modest Recommendations

African-American scholar and NAACP founder W. E. B. Du Bois once presciently asserted that "the problem of the twentieth century will be the problem of the color line." Through heroic efforts, much changed for the better over the last century; nonetheless, eminent historian John Hope Franklin argues that "the problem of the twenty-first century will be the problem of the color line.... By any standard of measurement or evaluation the problem has not been solved in the twentieth century, and thus becomes a part of the legacy and burden of the next century." Can "colorblind" law and policy solve for the remaining political, economic,
and social disparities between whites and people of color? The wide chasm separating theoretical assertions and empirical realities suggests that it cannot yet be so. To revisit Dr. King's question, "Where do we go from here?" What follows are three modest recommendations:

First, regardless of ideological stripe, supporters of equality should acknowledge that "[w]hen it comes to race, America has a habit of claiming victories it hasn’t earned." Suppressing collective knee-jerk denial of the continuing significance of race would promote realistic assessment of the victories that have been won as well as the battles that have yet to be fought. The unfortunate paradox persists today that "race-based organizing remains necessary to dismantle institutional racism." Responses to the questions, "Where we are now?" and "Where do we go from here?" should incorporate honest recognition and scholarly examination of the role of race in determining how people of color are situated in the real world. Countless studies demonstrate the existence of active racial and ethnic prejudice, as well as the institutionalized legacies of a systematic regime of white supremacy that imposes disproportionate political, economic, and social burdens upon people of color.29

Second, those same supporters of social equity should neither cede the high ground on racial politics nor take the low road to undermine race-conscious policies. On the high ground, for instance, in many settings, diversity remains a legitimate state rationale for affirmative action programs intended to broaden America's base of well educated and productive citizens. Moreover, race-conscious hiring practices in the workplace benefit all employees. Studies find that people of color as well as white males who work for private sector companies with affirmative action programs have substantially higher incomes than do comparably situated employees at firms without such hiring practices. Significantly, however, the incomes of women and employees of color in firms with affirmative action remain dramatically lower than those of comparable white employees in the same companies.29 Race-conscious law and policy is intended to further remedy remaining disparities.

Third, as a corollary to the above recommendations, supporters of racial equality spanning the ideological spectrum should reign in their disdain for the fundamental role of the state in promoting equality. Regardless of their size or scope, government institutions propose, legislate, implement, and adjudicate law and public policy, so it must be the state's role to remedy as well as to prevent racial discrimination. This principle has animated every federal civil rights act – first change the law in order to alter behavior, and attitudinal shifts will follow, regardless of the time lag. If, however, state actors continue to prematurely enact and implement universal standards of "race neutrality," resultant law and public policy will be founded upon the current baseline of continued white privilege in political, economic, and social arenas. Aside from the deleterious impacts of institutional distancing from remedial postures, the implementation of "colorblind" law and public policy cannot help but perpetuate the preexisting, highly racialized status quo.29 Such changes clearly are regressive, rather than progressive, for all citizens.

A premature shift toward “colorblind” policy skips a fundamental step in the move toward social equity: the mitigation of economic deprivation and social stratification so that race is not regarded as a proxy in the minds of some for pathological qualities of laziness, joblessness, homelessness, apathy toward education, or criminality. Only then will color fade as viewed through the lenses of equal opportunity and equality under the law. The result will be greater democratic empowerment for all citizens. This ultimate vision of a “colorblind” society reflects the logic behind Martin Luther King's calls for government intervention in such far-reaching forms as affirmative action and a "Bill of Rights for the Disadvantaged."

**Conclusion: The Road Toward Social Justice**

How would Martin Luther King perceive the similarities between his world, drenched in the blood of those fighting to overcome overt racial prejudice, and the changed world he never lived to see, still permeated by institutionalized discrimination? How would he view "race neutrality" as political rhetoric? "Colorblindness" as a policy goal? Would King still argue that "[t]here are some instances when a law is just on its face and unjust in its application," as he wrote from a Birmingham, Alabama, jail cell in 1963?29 What would the answers to such questions tell us some thirty-eight years later about whether the state should attempt to legislate "colorblindness" in the face of the realities of a race-conscious society?

At the very least, we might assume that King would affirm that the use of his legacies to inform today's political discourse is important – not because it honors him per se, but rather because robust policy debate invariably furthers our travels along the winding road leading toward social justice. The path to social justice is constantly under construction, blocked by many obstacles, and without a discernible end in sight, thus requiring many twists and turns to navigate the rugged landscape of American political culture.

Because the route is contingent, it is up to us to choose what directions the road should, and will, take. Do we wish it to follow an increasingly determined trajectory, what some see as a sweeping U-turn back toward the days of "separate-but-equal" doctrine as manifested in today's rhetoric of "race-neutral" and "colorblind" public policy? Or instead, do we wish it to lead us forward, and forward, and forward, as we acknowledge the significance of race and ethnicity in American civic life such that we truly can walk hand-in-hand toward a future in which our similarities and differences are celebrated, not denied?

In addressing those committed to the struggle for civil rights in his infamous "I Have a Dream" speech, Martin Luther King exhorted, "We cannot walk alone. And as we walk, we must make the pledge that we shall always march ahead. We cannot turn back."29

*It is up to us.*
Endnotes

1. Originally prepared for presentation at "Thirty-Two Years Later: A Nation Divided," a panel commemorating Martin Luther King, Jr., at the University of North Dakota on April 5, 2000, in Grand Forks, ND. The author thanks MC Diop, Director of Multicultural Student Services at the University of North Dakota, for providing the opportunity to speak about Dr. King, and Professor Kathryn R.L. Rand of the University of North Dakota School of Law, for her insightful comments.


3. King embraced one possible future founded on ideals he believed were embodied in the Constitution and the Bill of Rights.

4. Over the decades since the 1960s, this insight has become both less obvious and less widely held among citizens and public officials, and surprisingly, among political scientists – individuals who for the most part describe, explain, and predict the influence of government on, Harold Lasswell's famous 1936 formulation, who gets what, when, and how. See Harold Lasswell, Politics: Who Gets What, When and How (New York: McGraw-Hill, 1936).

5. The reasons for the fundamental shift from belief in government accountability to personal and public-sector responsibility for political outcomes fall outside the scope of this essay, yet they directly implicate and impact racial politics in America.


7. October 26, 1996.

8. Although there are subtle differences in meaning between the two terms, this essay follows the literature's convention by treating "colorblindness" and "race neutrality" as interchangeable concepts.


11. Martin Luther King, Jr., Where Do We Go from Here? Chaos or Community? (Boston: Beacon, 1967).

12. Martin Luther King, Jr., "Where Do We Go From Here?" (address in Atlanta, Georgia, August 16, 1967), <http://www.stanford.edu/group/king/>.


14. See Carson (quoting King, "I Have a Dream").


22. Thus this essay will not unequivocally assert that "King would say X, would agree with Y." Such assertions are distinguishable, at best, and reflect mat political intent, at worst.

23. See Carson (quoting King, "I Have a Dream").

24. See King, Why We Can't Wait.


29. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

30. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

31. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

32. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

33. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

34. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

35. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).

36. See Light, 27-31 (discussing how the Supreme Court's voting rights jurisprudence during the 1990s employs a baseline standard of "race neutrality" perpetuating, rather than remedying, racial polarization).
Affirmative Action, Affirmative Access, and “Quota-able” Quotes: Informing the Debate Over Affirmative Action in University Admissions*

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Introduction

Affirmative action pointedly illustrates the tension between a "colorblind" approach to equality in law and policy and social justice imperatives to rectify persistent inequalities. Indeed, affirmative action reflects the contradictions and competing policies that historically have thwarted meaningful racial equality in the United States. The heated debate over affirmative action is a product of the current moment's political discourse, yet, properly contextualized, it provides an opportunity to posture the issue as creating an "all-win" situation.

Nowhere is the affirmative action debate more fervent than in the area of university admissions. In the late 1960s, in an attempt to eliminate and correct for race and gender discrimination in America, the first policies of affirmative action were employed in the workplace and institutions of higher learning. Now, barely a generation later, states with large and growing populations of Latinos and African Americans, such as California, Texas, and Florida, are taking political and legal steps to dismantle affirmative action in university admissions. Many have advocated that federal law and policy should be modeled after the "affirmative access" programs in these states.

At the University of North Dakota, where we both teach, we found that many students were fundamentally misinformed about the role of affirmative action in the university admissions process. Our students are not alone; the general public perception is that race is the dominant or even determinative factor in university admissions, at direct cost to white students. Even then-Governor George W. Bush demonstrated a startling unfamiliarity with affirmative action law during the presidential debates when he proclaimed, "if affirmative action means quotas, I'm against it."4

Thus, as part of the University's "Dialogue on Race and Gender Week," we set out to provide information to students in an attempt to clarify the debate. We did not attempt to redefine the terms of the dispute, or even to persuade students that affirmative action is a desirable policy; instead, our purpose was to raise the level of discourse on campus and to defuse arguments based on misinformation. Ultimately, our goal was to spur students to think about what we as a society wish to achieve in terms of racial equality, and how best to achieve it.

In this essay, we set forth many of the ideas and much of the information which we presented at the University of North Dakota. In particular, we focus on current challenges to affirmative action and the "affirmative access" program in Texas as a policy alternative to affirmative action.

Background on Affirmative Action

What is affirmative action? One definition, provided by the U.S. Commission on Civil Rights, is "[a] ny measure, beyond the simple termination of a discriminatory practice, which permits the consideration of race, national origin, sex or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or have actually been denied those opportunities, and to prevent the recurrence of discrimination in the future."5 This definition provides the guidelines both for hiring practices and for admissions policies at colleges and universities.

In thinking about affirmative action, it is helpful to recall that in many states, African Americans and other people of color were not allowed to attend school with white students until the Supreme Court ruled that "[s]eparate educational facilities are inherently unequal" in Brown v. Board of Education.6 Prior to its victory in Brown, the NAACP successfully pursued a litigation strategy to challenge segregation in higher education, where prestigious and well-endowed white universities were difficult to replicate in separate institutions for African Americans.7

The 1964 Civil Rights Act, building on Brown's watershed constitutional ruling, made it illegal for employers to discriminate on the basis of race, sex, color, religion, or national origin.8 As part of the ongoing civil rights agenda, President Lyndon Johnson articulated the first affirmative action program in 1965, with Executive Order 11246, which authorized employers to take positive steps to include people of color in their workforce.9 Under President Johnson's affirmative action policy, federal education regulations similarly allowed colleges and universities to take action to include people of color in student bodies, faculty, and staff.8

Affirmative action policies in university admissions soon were challenged in the courts. In 1978, the Supreme Court decided Regents of the University of California v. Bakke.9 In that case, Allen Bakke, a white medical school applicant who was denied admission at the University of California at Davis Medical School, claimed that the school's affirmative action program, which reserved a fixed number of slots for minority applicants, was unconstitutional. A divided Court ruled that the school's affirmative action program violated the Equal Protection Clause. Justice Lewis Powell cast the swing vote, and his opinion described a model affirmative action policy that would withstand constitutional scrutiny: race could be considered in university admissions "as a plus" in order to increase diversity, which was a compelling government interest, as long as specific quotas were not employed.10 Diversity was simply "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."11 According to Powell, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."12

The Court also recognized that diversity in the setting of higher education could yield broader societal benefits following graduation. "An otherwise qualified medical student with a particular background — whether it be ethnic,
Current Challenges and Changing Policies

For over thirty years — again, just one generation — many American colleges and universities have used race- and gender-sensitive admissions policies to increase the number of women and African American, Latino, and Native American students who have access to higher education. Such admissions policies also are intended to further the goals of inclusiveness and diversity on campus, as well as in government, among street-level bureaucrats such as law enforcement and firefighting personnel, within business, industry, and high-technology sectors, and within such professional categories as educators, attorneys, and physicians.

Affirmative action policies have received increasingly intense critical scrutiny since the early 1980s, or for more than half the time of their existence. Conservative politicians, academics, and media cutlets mostly have focused their critiques on so-called "reverse discrimination" against white males. More recently, affirmative action has met with a flurry of political and legal challenges to its soundness as public policy and its very constitutionality. Ironically, like the NAACP's school desegregation litigation strategy, opponents of affirmative action have focused their efforts on law schools and prestigious institutions of higher learning.

Critics say that using race or ethnicity as a proxy for other forms of meritorious admissions factors has lowered educational standards by admitting "unqualified" students; by extension, qualified students have been denied fair opportunities for admission and are forced to attend less prestigious institutions. Such policies also have been accused of exacerbating racial tensions on campus while lowering the self-esteem of those students of color presumably admitted only under such programs. Moreover, critics point to affirmative action as symptomatic of a larger emphasis on "diversity" — in the workplace and the classroom — that is undeserving of its status as a policy goal.

California

In 1964, the University of California at Berkeley's Law School did not graduate a single African American student. Then in 1968, the California university system implemented affirmative action, allowing race to be a factor in admissions. The changes were dramatic. By 1989, blacks and Latinos made up eight percent of the incoming first-year class.

In 1995, blacks and Latinos comprised twenty-one percent of Berkeley's law school class. At this point, prompted by the activism of University of California Regent and prominent African American businessman Ward Connerly, the Board of Regents by a 14-10 vote banned any consideration of race in admissions decisions in any branch of the university starting the following year. In 1996, prompted by a carefully orchestrated voter initiative campaign, California voters approved Proposition 209, which codified the Regents' directive and applied it to all public employers in California. The proposition provided that no state institution may "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."
The effects of the Regents' decision were immediate and dramatic. In 1997, the percentage of blacks and Latinos in Berkeley's entering law school class dropped to 5.6 percent, the lowest percentage since 1967 - the year before California implemented affirmative action in university admissions. As the state's premier public law school, Berkeley had enrolled an average of twenty-four African American students each year for the last twenty-eight years. In 1997 it enrolled only one - and he had been admitted the year before but had deferred entering. At the undergraduate level, the percentage of blacks and Latinos was cut in half.19

On November 30, 2000, a unanimous California Supreme Court ruled that "soft" affirmative action - race-conscious recruitment and outreach - was prohibited by Proposition 209.20 Although decided in the context of minority contractors, the court's ruling likely extends to similar programs in higher education. In the wake of Proposition 209, the University of California had increased its efforts to attract students of color, spending $180 million on minority outreach programs in 2000.21

Texas

In 1950, the Supreme Court ruled that the all-white University of Texas Law School, the state's premier law school, had to admit African American students, as the state's all-black law school was comparatively deficient in terms of faculty, library, and facilities.22 Less than a half-century later, the law school's affirmative action policy was dismantled by the federal courts.

Texas's population of African Americans and Latinos is among the highest in the nation. In support of its role as a public university system, the University of Texas system had adopted an affirmative action policy in accordance with the Bakke case. In 1996, however, in Hopwood v. Texas,23 the Fifth Circuit Court of Appeals declared the admissions program at the University of Texas Law School unconstitutional. Rejecting Justice Powell's conclusion in Bakke that pursuing a diverse student body was a compelling government interest, the Hopwood court held that only a remedial purpose - taking race into account in order to remedy past discrimination - likely would constitute a compelling interest.24 "The use of race, in and of itself, to choose students simply achieves a student body that looks different," the court explained. "[T]he use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional."25

Contrary to Justice Powell's opinion in Bakke, then, the Hopwood court concluded that a university could not take race into account, even as one of many relevant factors. The court was careful to point out, however, that consideration of factors having a correlation to race, such as first-generation college applicants or socioeconomic status, was permissible.26

Like Proposition 209 in California, the Hopwood decision caused a dramatic decrease in minority enrollment. In 1996, the entering class at the University of Texas Law School had thirty-one African American students. In 1997, following the Hopwood decision, the entering class included only four black students.27

Hopwood's ruling is controversial and is binding law only in the Fifth Circuit, which includes Texas, Louisiana, and Mississippi. In the rest of the country, Bakke remains good law and several courts have declined to adopt Hopwood's reasoning. However, the Supreme Court declined to review Hopwood, and similar challenges to university admissions programs are being mounted in other circuits.

Recently, though, the Fifth Circuit revisited Hopwood, and although it upheld the rationale underlying the opinion, it also reversed a federal district court injunction prohibiting the University of Texas Law School from considering race in its admissions process. The court reasoned that the district court's absolute prohibition ran afoul of the Bakke Court's holding that race is a permissible consideration in some circumstances.28

Washington

In 1998, voters in Washington state approved Initiative 200, which, like California's Proposition 209, prohibits taking race into account in public employment and public education. In the wake of Initiative 200, the president of the University of Washington issued a directive eliminating the use of race as a criterion in its admission process.29 Accordingly, a federal district court dismissed as moot a challenge brought by white students to the University of Washington Law School's admission policy.30

The University of Washington's post-Initiative 200 admissions policy recognizes that "[i]mportant academic objectives are furthered by ... students...from diverse background[s]" and allows consideration of diversity factors, including "persevering or personal adversity or other social hardships; having lived in a foreign country or spoken a language other than English at home; career goals...; employment history; education background...; evidence of potential for leadership...; special talents...; geographic diversity or unique life experiences."31 Although the policy omits race per se as a permissible factor, the Ninth Circuit Court of Appeals recently opined that Bakke was still good law and allowed for a race-conscious admissions program.32

Michigan

In 1965, of more than 1,000 students at the University of Michigan Law School, only one was African American. To increase minority enrollment, the law school adopted an affirmative action admissions policy. Now, the University of Michigan is vigorously defending its affirmative action admissions policy against constitutional challenges in federal court. Two cases, one challenging the undergraduate admissions policy and the other the law school's policy, are pending.

Lee Bollinger, the president of the University of Michigan, is an outspoken supporter of affirmative action and has rallied support from virtually every major university and dozens of multinational corporations. The University's core mission, he explained, "is to help students see the world through multiple perspectives... . Given the history of this country, there is a different life experience growing up white, growing up black, Hispanic, or Native American. Giving students a chance to cross those boundaries is the same kind of educational experience as sitting down and reading a novel that illuminates for you a perspective on life that you had not seen before."33

Echoing that sentiment is the amicus brief filed by twenty large corporations, including 3M, Microsoft, and Proctor &
Gamble, in support of the University's position. "[R]acial and ethnic diversity in institutions of higher education," the brief argues, "is vital to [the corporations'] efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated in a diverse environment. Such a talented workforce is important to [our] continued success in the global marketplace."934

In Gratz v. Bollinger, the federal district court recently ruled that the University could consider race as a factor in order to increase the diversity of its undergraduate student body. However, the court also held that an older University affirmative action policy was unconstitutional because it effectively had reserved seats for students of color. The court found that "a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students."935

At the time of this writing, trial had just drawn to a close in Grutter v. Bollinger, the challenge to the law school's policy.936 Barbara Grutter, a white student who had been denied admission to the law school, is older than the average applicant and also is a mother — two diversity factors that are taken into account under the law school's current admissions policy.937

The Current and Future Status of Affirmative Action Programs

In response to growing criticisms of existing affirmative action programs, as well as criticisms of the results of dismantling such programs, a few states have adopted what they call "affirmative access" programs, which guarantee spots in the state university system for the top students at each high school. "Affirmative access" is lauded as a compromise between taking race and gender into account in admissions and inflexible merit-based standards which often result in underrepresentation of women and people of color.

"Affirmative Access"

In Texas, then-Governor George W. Bush recently signed into law an "affirmative access" program under which the top ten percent by class rank of high school students are guaranteed a spot in the state's university system. In 1999, Florida Governor Jeb Bush unveiled his "One Florida Initiative," calling for an end to race- and gender-conscious admissions to Florida's public university system.938 The initiative guaranteed admission of the top twenty percent of Florida's high school students to an institution of higher learning. And in California, the University of California adopted a "four-percent plan." Pennsylvania has considered a proposal to admit the top fifteen percent to state colleges, while Washington state and Michigan have considered and rejected similar plans.939

If "affirmative access" programs in fact are the wave of the future, what results might we expect to see, and where does that leave affirmative action?

First, despite the much-hailed rejection of affirmative action in California, Texas, and Florida, it appears that although race no longer is taken into account in university admissions, those states still accept the need for practicing affirmative action through outreach to, and recruitment of, people of color — merely to keep qualified minority applicants from choosing private institutions or going out of state. Thus, with the possible exception of California, so-called "soft" affirmative action will continue in these states.

Second, "percent plans" generally appear to increase racial diversity in colleges in those states that have adopted them. In Florida, the first freshman class selected under the top-twenty-percent plan resulted in an increase in minority enrollment by twelve percent. Reflecting the state's diverse population, the incoming class is more than forty percent African American, Latino, Asian American, and Native American. There was an increase in students of color even at Florida's top two universities, the University of Florida and Florida State University.940 In Texas, the top-ten-percent plan has increased diversity in the state's universities. There are more black and Latino freshmen in the class of 2000 than there were in 1996, the year of the Hopwood decision. Three years after Proposition 209 and the change in policy by the University of California Board of Regents, the number of black, Latino, and Native American first-year students in the University of California system has rebounded to the levels when affirmative action was in place.

On the surface, affirmative access plans may sound like a resounding success. However, criticisms are levied by conservatives and liberals alike.

In California and Texas, for example, the rebound in minority student enrollments has not occurred within the state's premier public universities. At California's Berkeley, San Diego, and Santa Barbara campuses, numbers of minority freshmen remain below what they were before affirmative action. And at the University of Texas at Austin, the U.S. Commission on Civil Rights reports that "Undoubtedly, the end of affirmative action has resulted in a significant decline in the overall enrollment of black and Hispanic students."941 Further, the percent plans currently apply only to undergraduate admissions; minority enrollment in law, medical, and business schools has not similarly rebounded and the effect, according to the Commission, is "devastating."942

To conservative anti-affirmative action activist and California Regent Ward Connerly, the enrollment of fewer minority students at California's top schools simply reflects the lesser abilities of students of color, as well as an appropriate redistribution to where such students belong — on less competitive campuses. Others, however, fear that such an effect will lead to a "two-tier" system in California, with students of color being tracked to less-prestigious schools. According to University of California Regent Bill Bagley, the redistribution is not downward, but elsewhere — to private institutions. The best minority high school graduates are choosing to go to Harvard, Yale, or Stanford over Berkeley because of affirmative action programs in place in those schools, as well as the perception that they are not wanted in California's best public universities. Bagley also expresses concern that decreased diversity at schools like Berkeley is detrimental to both students and faculty, as well as to the school's ability to retain its place as one of the top universities in the country.943 In response to such accusations, both California and Texas expanded "soft" affirmative action; that is, outreach and recruitment of minority students.

Another criticism is that affirmative access plans will not compensate for existing societal inequalities. Affirmative
access programs may act only as a "Band-Aid" for problems of discrimination and disparate access to resources at the high school level. Central-city and rural school districts will continue to underperform compared to their suburban counterparts, suffering from low levels of funding resulting from low tax bases, inadequate classroom resources, and chronically overworked teachers. The remaining eighty or ninety percent of students at those high schools will continue to have fewer opportunities than will all students at high-performing suburban and often all-white schools. Even the top ten percent of graduates at some low-performing public high schools in Florida will not have the required pre-college credits necessary for university admission because of inadequate curricular offerings.

In California, students of color denied admission to the state’s flagship university in Berkeley have charged that without the equalizing effect of affirmative action, the university’s current admissions policy is discriminatory. They argue that the post-Proposition 209 admissions policy grants “unjustified preferential consideration to applicants who have taken certain courses that are less accessible in high schools attended largely by African American, Latino, and Filipino American students” and places “undue and unjustified reliance upon standardized test scores[,]... making judgments based on educationally insignificant differences in test scores.”

Further, affirmative access programs will not work everywhere. According to Thomas Kane of Harvard University, the top-ten percent plans will not work to increase diversity in states where high schools are not already highly segregated. For example, if affirmative access programs spread to states like Vermont or North Dakota, where few schools, if any, are filled with minority students, state college campuses would simply look the same as the predominantly white high schools, even with an affirmative access program.

Critics also charge that affirmative access lowers the quality of students. In Texas, freshmen admitted under the ten-percent policy on average have lower SAT scores than past classes. This reflects an influx of students from low-performing high schools, which have predominantly black and Latino populations. Critics are concerned that the policy in effect lowers the standard of the state’s universities. Without affirmative action efforts to encourage the success of minority students, and without efforts to equalize high school education, some students simply will be unprepared for college courses.

Similarly, critics are concerned that qualified students may be precluded from admission under affirmative access plans. By guaranteeing admission to a set percentage across the board, students at high schools with traditionally high academic performance, such as suburban, private, or magnet schools, might not fall within the top percentage of their class, yet still have taken a more rigorous or challenging course load, and have higher test scores than do students in underperforming high schools — often rural or urban schools with fewer resources and less funds. Class rank is relative, according to these critics, and the plan will hinder qualified students from being admitted.

Additionally, the set-percentage plans are oversimplistic: they take into account a single factor. By paying attention only to class rank, the policy lacks the nuance needed to draw a truly diverse student body. According to John Swiney, the University of Washington's Associate Director of Admissions, “When we read students' essays, it gives us a much better insight into the qualities of the individual beyond the numbers. Not all students come from a level playing field, and there are many barriers on the road to academic success.” Liz Barry, an Associate Vice President at the University of Michigan, agrees. “[The percent plans are] one dimensional, and we want to consider the whole person when making admissions decisions.”

Perceptions of Public Opinion

Two key perceptions of public opinion fuel the political strength of affirmative access as a policy "solution" for the alleged flaws of affirmative action. First is the vehement reaction of many Americans to “reverse discrimination.” Proponents of affirmative action, however, take issue with the view that “reverse discrimination” is a pervasive phenomenon. Far from significantly disadvantaging white students, the empirical effects of affirmative action on non-minority students are limited. According to the National Organization for Women, "if half of the people of color who are admitted to schools under affirmative action programs were cut, the acceptance rates of white men would only increase by two percent." University of Michigan president Lee Bollinger concur: “[A] white student's chances of getting in are barely affected by our consideration of race.”

Moreover, "reverse discrimination" claims rest on assumptions of "objective merit" which do not have to be taken at face value. In their comprehensive 1998 book, The Shape of the River, former Harvard University President Derek Bok and former Princeton University President William Bowen examine extensive evidence refuting the argument that minority students with lower test scores would underperform at prestigious schools. Cataloguing information on more than 80,000 undergraduates enrolled at prestigious colleges and universities in 1951, 1976, and 1989, Bok and Bowen find that many students of color not only had higher standardized test scores than the white average, but during their four years in college, performed comparably with white students with higher test scores. Students of color also were twice as likely to engage in community service after graduation than were their white counterparts.

Building on Bok and Bowen's research, a study conducted of University of Michigan Law School graduates indicated that LSAT (law schools' version of the SAT) scores and undergraduate grade-point averages did not predict achievement after law school. In an intriguing corresponding finding, the study found a "mildly negative relationship" between LSAT scores and performance of community service. Additionally, a majority of Michigan Law School graduates, including about half of white graduates, agreed that the school's ethnic diversity enhanced their educational experience. The study concluded that "the University of Michigan Law School's admissions program has brought into the profession large numbers of minority lawyers who have become financially successful, happy with their careers, and generous with their time through community service." Second, many policymakers assume that the majority of Americans are against affirmative action. This is not necessarily the case. One frequently cited poll conducted
in 1997 by the anti-affirmative action American Civil Rights Institute (ACRI) indeed indicated that most Americans opposed affirmative action. However, the poll’s wording asked whether people supported legislation abolishing “preferences,” a politically charged term. In contrast to the ACRI poll, many reputable nonpartisan and nonideological polling firms consistently and repeatedly have found that the American public favors affirmative action programs. For example, in 1996, the National Opinion Research Center at the University of Chicago found that an overwhelming seventy-nine percent of those polled supported affirmative action, accurately defined as “measures for promoting equal opportunity in hiring, promotion, and government contracts without the use of quotas” (emphasis added). These results are consistent with many other polls.53

Indeed, in Florida, one poll touted by Ward Connerly suggested that over eighty percent of Floridians would vote to abolish affirmative action. But another poll, conducted by the nonpartisan Florida Voter Poll, indicated that less than fifty percent of Florida voters supported abolishing affirmative action. What was the difference between the two polls? The wording. The Connerly poll asked whether voters would support prohibiting “discrimination” and “preferential treatment,” while the Florida Voter Poll asked whether voters would support prohibiting “affirmative action.”54

In a recent nationwide poll commissioned in connection with an academic study designed to reveal Americans’ reactions to affirmative action in college admissions, a majority of respondents opposed using race as a “tiebreaker” between equally qualified students. Yet, a majority of respondents supported using criteria beyond grade-point averages and test scores to measure merit, including “consideration of the obstacles and hurdles that a given person has had to overcome to achieve whatever record is presented to the admissions committee.”55 As one commentator put it, “people don’t want to give the rich daughter of an African American lawyer special treatment. But the poor African American woman from the wrong part of town and the poor school is a different story.”56

Conclusion

“Quotas are bad for America. It’s not the way America is all about.”57 President Bush may be right, but affirmative action is not quotas. Instead, it is an attempt to remedy the underrepresentation of people of color in higher education, in careers requiring college or graduate degrees, and in other employment sectors that may not require such degrees – underrepresentation caused by past institutionalized discrimination in law and policy.

Diversity, on the other hand, is good for America. All students – minority and non-minority alike – benefit from exposure to different perspectives. Students who have overcome discrimination, poverty, or barely adequate schooling demonstrate the perseverance necessary to successfully pursue college and a career. All students who are given the opportunity to negotiate a racially and ethnically diverse campus and move into an equally diverse workplace increase their chances of leading productive and fulfilling lives in an increasingly global community. When realized, diversity in schools, the workplace, and in civic life reflects both demographic realities and the pluralist democratic ideal.

The ongoing erosion of affirmative action is premature. Outright bans on race-conscious law and policy are counterproductive, at best perpetuating the status quo, and at worst producing regressive outcomes. In turn, affirmative action plans may appear beneficially egalitarian and “colorblind,” but they pose more problems than they solve. They will not achieve diversity in the public universities of many states, especially at states’ flagship universities. They will not correct the underrepresentation of people of color in professions such as law and medicine, professions that historically were closed to non-whites. They ultimately may harm the prestige of public universities, as talented students and faculty choose minority-friendly private universities. Americans agree that numbers don’t tell the whole story of a college applicant’s abilities, yet top-percentage plans rely on a single number to determine who should be admitted. And the plans do nothing to correct for endemic underperformance in rural and urban high schools.

Affirmative action may be flawed, but affirmative access is unlikely to fix it. The one sure thing in the debate over affirmative action is that the debate will continue, as the law continues to change, and states and the federal government continue to experiment with different policy solutions to the realities of ongoing racial, ethnic, and gender inequality in America.

Endnotes

*. Originally prepared for presentation at the University of North Dakota’s “Dialogue on Race and Gender Week,” on September 26, 2000, in Grand Forks, ND. The original title of our presentation was “Race and Gender Wars in America,” and while the pursuit of equality in our society has often been described in terms which analogize it to war — “fighting” for equal rights, “struggling” for equality, even “batting” the forces of evil — we chose to take a more optimistic and inclusive approach to our discussion. “War” presumes two sides, one winning and one losing, but we believe that issues of race and gender in our society pose the challenge of finding an “all-win” solution. This, we believe, should be the goal of a democracy.


2. During the presidential debate on October 17, 2000, then-Governor Bush responded to a question concerning affirmative action. He indicated that if elected president, he would pursue “good, smart policy, policy that rejects quotas,” such as Texas’s “affirmative access” plan (discussed below). Demonstrating a misunderstanding of current constitutional law, which prohibits racial quotas, he continued, “I don’t like quotas. Quotas tend to pit one group of people against another. Quotas are bad for America. It’s not the way America is all about.” Then-Vice President Al Gore replied, “[W]ith all due respect, Governor, that’s a red herring. Affirmative action isn’t quotas. I’m against quotas. They’re illegal.” Bush further responded, “If affirmative action means quotas, I’m against it. If affirmative action means what I just described, what I’m for, then I’m for it. You heard what I was for.” Gore then asked Bush, “Are you for [affirmative action] without quotas?” and Bush replied, “I may not be for your version. Mr. Vice President. But I’m for what I just described to the lady.” Presidential Debates Transcripts, <http://www.cnn.com/ELECTION/2000/debates/transcripts/010717.html>, October 17, 2000.


9. 438 U.S. 265 (1978). Civil rights activists have expressed frustration that while Bakke stands as the watershed case on affirmative action, minority interests were not party to the litigation. See Derrick Bell, *Race, Racism, and American Law*, 4th ed. (New York: Aspen, 2000), 252-56.


11. Ibid. at 314.

12. Ibid. at 315.

13. Ibid. at 314.

14. *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 235 (1995); 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.").


24. Ibid. at 944-46.

25. Ibid. at 945-46.

26. Ibid. at 946.

27. Dworkin.


29. See *Smith v. University of Washington*, 233 F.3d 1188, 1192 (9th Cir. 2000).

30. Ibid.

31. Ibid.

32. Ibid. at 1200-01.


37. Weiss.


40. See note 30, above.

41. Rick Bragg, "Minority Enrollment Rises in Florida College System," *New York Times*, August 30, 2000, A18. But see Kidder, 26 (noting that some contend that while enrollment at Florida’s universities generally increased, actual percentages of minority students remained constant or dropped).


43. Ibid.


45. U.S. Commission on Civil Rights.

46. Ibid.

47. See Healy, 7B.

48. Ibid.


50. Weiss.

51. See generally Bok and Bowen.


53. For instance, the 1997 Gallup Poll Social Audit on Black/White Relations in the United States found that fifty-one percent of whites and eighty-two percent of blacks thought America needed to "increase" or "keep the same" affirmative action programs. Similarly supportive results were found in polls by USA Today/Gallup (1995), Time/CNN (1995), and the Wall Street Journal/NBC (1995).


55. Swain et al., 148.


57. "Presidential Debates Transcripts."
The syllabus for an African Philosophy and Culture Course

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I found myself re-thinking the way that I had taught African Philosophy when I got to a new university. Here, philosophy majors were few, and most students were taking a course entitled "African Philosophy and Culture" as one of their options to fill a general core requirement in philosophy. The course was also trying to fill gaps left by the lack of other courses on African cultures. While African History and African Politics were offered once every two to three years, and while courses on African American religion and history often included a background section on African culture, there was no course devoted fully to the topic. However, since there is a growing body of writing in philosophy that discusses issues related to the philosophy of culture, it was not difficult to construct a syllabus with readings that would fill this dual purpose.

Since many of my students do not have much background in African studies (many on the first day confess to knowing nothing about Africa at all, while others know the headline problems of Africa such as political instability, famine, and the AIDS crisis), I decided to use two novels of Chinua Achebe as introductions to African society, and to form of background of vicarious experience upon which to draw when discussing specific topics in African philosophy. I also divided the course into three rough sections: pre-colonial Africa; colonial conquest of Africa and the fight against colonialism; and contemporary Africa.

Achebe's book, Things Fall Apart, up to chapter 14, serves as the introduction to the first section, since in that part of the novel, Igolando prior to European colonialism is illustrated in a way that makes the students feel like they live there with the characters. As Abiola Irele notes in his recent article on the book, however, we must remember that however realistic and authentic the book seems, it is still written by a contemporary African who has been Christianized, and the author's viewpoint shows up subtly in the way in which pre-colonial society is portrayed. So I must carefully explain to students that, when we speak of "pre-colonial Africa," we depend largely on oral or colonial sources, or in other ways the experience is mediated through our contemporary, often Westernized, consciousness. We can't turn back the clock, but in many ways the pre-colonial beliefs and philosophies endure to this day, sometimes mixing with other ideas, and always changing in some way. Also, pre-colonial society itself was changing and varied from community to community across Africa. The presence of this internal view of pre-colonial society is shown by Achebe's inclusion of the character Obierika in the novel.

Starting with chapter 15 of Things Fall Apart to its concluding chapter, we have a compelling description of how Christian missionaries, and later colonial rulers, affect the equilibrium of pre-colonial African societies. This helps to introduce topics by Mudimbe and others, who ask how our conceptions of Africa have been shaped by the violence of this colonial encounter. I next go to the point of the fight against colonialism. I rely on part on Basil Davidson's account of the tension between the more traditional chiefs who wanted to emphasize continuity with the past by their taking over the rulership of Africa, (by being handed the power by departing colonialists), in contrast to the younger nationalists who wanted to take charge instead, in order to make modern nations (influenced by ideas of democracy and/ or socialism)

Focusing on this tension also serves as a turning point between the values of the old and the new in Africa. While a short course like this cannot do justice to the immense details of history, we can at least sample some philosopher's writings who are responding to this historical situation.

The third part of the course is introduced by another Achebe novel, No Longer At Ease. Here the characters, decedents of the earlier Umofia characters, grapple with acquiring Western education and working in Western-style government bureaucracies, all the while being called upon to uphold African community traditions as well. This novel serves as an experiential entrance point into some of the biggest problems facing contemporary Africa. It is followed by readings from African philosophers who are tackling such issues in their writings.

There are shortcomings to a tripartite historical division whose terminology makes European colonialism a pivotal point, which then marks all events in Africa as having come before or after it. One could certainly devise a course otherwise, which began in Egypt and then marched forward throughout time in a linear fashion. However, the course would not then be able to begin with Achebe's novel. Another shortcoming of the course is that by focusing on themes connected to Achebe, the focus is on West Africa, with possible parallels to East Africa (which I stressed due to my background familiarity with East Africa), while North and South Africa are relatively ignored. While this is certainly a shortcoming, there are always limits to how much one can do in one course. I encourage students who are interested in Egyptian or Ethiopian philosophy, or in North or South African issues, to pursue these as topics for their research papers.

On the other hand, there are also strengths to devising the course in this way, in that a course in African philosophy might otherwise err in sticking to the pre-colonial or "traditional," while ignoring (or being in denial of) the ways that Africa has changed. It is also dangerous to think of Africa in a romanticized past sense. By dividing the course into three, it is certain that the issues of colonialism and fight against colonialism get their coverage. The course also focuses on the current problems and crises facing the continent, something that recent African philosophers of some note have exhorted the community of African philosophers to address. For example, Dismas Masolo, near the end of his substantive book on the history of African philosophy, argues that African philosophers should spend more time studying corruption, nepotism, tribalism, mismanagement, authoritarianism, oppression, and population growth. Achebe's novel introduces many of these concerns, and the authors that follow add their analysis.
My experience from 1995 to 2000 of teaching African Philosophy at University of Nairobi had led me to embrace a standard syllabus in use at that time of charting the "four trends" of African Philosophy, based on Odera Oruka, who identified these four trends in the early 1980's: ethnophilosophy (the now-discredited approach of Tempels), sage philosophy (Odera Oruka's own project), national-ideological philosophy (Nkrumah and Nyerere), and professional philosophy (Wiredu's analytic approach, or Houngondji's scientific Marxist approach). Odera Oruka later added the hermeneutic and literary trends. The basic purpose of the "four trends" setup was to show how ethnophilosophy was an erroneous approach (and, coincidentally, how Oruka's own project of sage philosophy was preferable to ethnophilosophy). D.A. Masolo's book, African Philosophy in Search of Identity exhibits the influence of the Orukan framework popular in Kenya. It devotes four of eight chapters to early ethnophilosophers Tempels, Griaule, Kagame and Mbti, who are then resoundingly debunked as practitioners of a fatally flawed ethnophilosophy.

While the "four trends" are helpful to a certain extent, I feel that at this point they have become ossified. Many teachers overlooked that Oruka himself modified them; others like Sophie Oluwole have charted many more trends than that. Oluwole added negritude, Egyptologists and "the historical group," "critical traditionalists," "the universalists," those who want to deconstruct the myth of inferiority, and the socialists who think philosophy is meant to change the world. She describes the group of "critical traditionalists" of whom she considers herself a part (along with Makinde, Gyekye, and Sodipo) as engaged in critically exploring concepts such as witchcraft, reincarnation, destiny, truth, and God. So why was University of Nairobi teaching African philosophy according to four trends for the past twenty years, without great change?

A repetition of the same course syllabi, modified only in a minor way or no at all, is not that unusual in many academic contexts, even here in the U.S. where opportunities to do so are not so constrained; and it is understandable in a situation such as the one that University of Nairobi finds itself, with a faculty that is overworked by an academic calendar that includes no breaks except for Easter and Christmas, where salaries are so low that all who have the chance teach in the newly introduced evening college (called the "parallel program,") where the lack of current philosophy journals prevents faculty from keeping up on the debates, and the lack of computers also encourages faculty to use last year's syllabus instead of retyping. Nevertheless, when visiting Canadian philosopher Bruce Janz and myself were invited to co-teach African Philosophy at the graduate level, we kept the same familiar "four trends" framework, while trying to update the material used to support the framework. I also found it to be very interesting when the department of philosophy at UON was asked to re-work its graduate course offerings, faculty there decided to offer four courses instead of one in African philosophy, conveniently naming each course after one of the four trends. This tendency began to frustrate me. (As it is, the department was also "frustrated" but for different reasons: a curriculum committee reviewing their suggestions thought that some of the trends made funny-sounding or confusing course titles). Weren't the four trends meant to be a temporary mapping of a philosophical movement, and hasn't that map changed over time? There have been books in the U.S. which also followed the four trends framework, such as English and Kalumba's introductory text. However, this text is soon to be out of print; perhaps that is a signal that it is time to look for a new framework.

Focusing on the "four trends" also keeps metaphilosophical issues at the forefront. Each person's philosophy is seen as an illustration of what philosophy should or should not be. While such an approach makes sense in certain contexts, such as a graduate-level course or an upper-division undergraduate course attended by many philosophy majors, I am no longer convinced that it is the best approach for students taking one course on Africa (and one elective in philosophy). After all, who insists that students' one course in Ethics must focus primarily on issues of metaethics? Such approaches in African Philosophy were criticized many years ago. Tsaner Serequeberhan's text, African Philosophy: "The Essential Readings," was criticized by some at the time for focusing too single-mindedly on the metaphilosophical issues while giving those issues the title of "essential." Serequeberhan himself began his book listing the strengths and shortcomings of relying on Oruka's "four trends" as an outline for an African philosophy study. For example, the four trends are not distinct; there is a lot of overlap between them. He noted that the task of African philosophers was ultimately "the concrete resurrection of Africa" which requires, among other things, "the revitalization of the broken and suppressed indigenous African heritage." His subsequent books gave shorter indulgence to the topic of the nature of African philosophy, and focused instead on its liberation.

Several authors have complained recently that it is time to leave aside the debate over whether there is an African philosophy or not, and instead proceed directly to the practice of African philosophy. While there is danger in neglecting or giving short shrift to important theoretical issues, the sentiment here seems to be that the point has been over-proven to the point of being obvious. Sefro Kwame, in a recent article in Philosophy Now, clearly gives the impression that continuing to press the question of African philosophy's existence at this late date gives rise to feelings of pain and Insult. The recent Blackwell Companion to World Philosophies contains two articles by African scholars. While D.A. Masolo's article on the history of African philosophy comes at the beginning, covering the details of where African philosophy has been so far (and in this way Masolo plays a key role as chronicler in this field, because he keeps intact a detailed memory of where the intellectual discussion has been so far), Segun Gbadegesan's article comes at the end, where he charts a course for current and future studies of African philosophy.

I have used Gbadegesan's article as the springboard for my selections in the course I have structured. Still influenced by this paradigm of "four trends," but now updated, he charts four ways in which African philosophy can proceed fruitfully. First, while agreeing with the charges against ethnophilosophy, he nevertheless defends the possibility, and importance, of a "critical culture philosophy" which studies the philosophies held by cultural groups. As early as 1991 in
his book, *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities* (Peter Lang, 1991). Gbadegesin asserted that the idea that philosophical positions could only be held by individuals, was in fact a philosophical position held in common by a group of European and American philosophers. Since this group of European and American philosophers were then caught in a performative contradiction, they would have to give up their narrow definition of philosophy. Kwame Gyekye as early as 1987 devoted the first several chapters of his book, *An Essay on African Philosophy: The Akom Conceptual Scheme* to showing that the project of discerning a group’s philosophy from their oral literature, artwork, and rituals, was not to be abandoned as obsolete. Gbadegesin and Gyekye as well as Wieredg therefore want to rehabilitate the practice of culture philosophy, with the stipulation that we avoid mere description and practice critical evaluation of any group’s philosophy, jettisoning what is irrational or outdated to come up with a vibrant contemporary resource, enabling us to reject the options of wholesale discarding of traditional ideas for the embrace of a foreign paradigm.\footnote{13}

After critical culture philosophy, the next current trend of importance with which Gbadegesin concerns himself is sage philosophy. In this case, one of Oruka’s “four trends” continues to hold its same position in Gbadegesin’s schema. Gbadegesin is not alone in continuing to insist on the importance of sage philosophy studies. Olusegun Oladipo states in his 1998 article, “Emerging Issues in African Philosophy,” that Oruka’s sage philosophy project is an attempt “to promote cultural self-understanding in Africa.”\footnote{14} Safrro Kwame, in his 2000 article, What’s New In African Philosophy, notes that Odera Oruka has been one of the most active East African philosophers, and that his passing away in 1995 is depriving Africa of one of its most influential African philosophers.\footnote{15} In my own work in this area, I have explained at length what I think are the strengths and shortcomings of this trend, and in what form it can and should go forward.\footnote{16}

Nevertheless, while Gbadegesin supports the continued work in sage philosophy, he criticizes what he thinks are Odera Oruka’s attempts to distance sage philosophy from critical culture philosophy, by the emphasis on the individual and the seeming denigration of those who still uphold the communal views of their communities. I agree with Gbadegesin that sage philosophy and critical culture philosophy are better seen as in partnership rather than in opposition to each other. I could also point out the ways in which Oruka’s project as he himself conceived and implemented it supported efforts in culture philosophy.\footnote{17}

The first two trends of Gbadegesin, “critical culture philosophy” and “sage philosophy,” along with the category that Sophie Oluwole says needs still to be invented and practiced, “feminist African philosophy,” makes up the subject matter for the first third of my course. I include feminist critique in part one because, as Irele points out in his article, the theme of relations between men and women is central to *Things Fall Apart*. When students notice Okonkwo beating his multiple wives, the issue of women’s rights is immediately raised by the students. Luckily there are several African women scholars who address the issue in the context of the “traditional” African home, without capitulating to Western feminist issues and understandings of the situation.

Oluwole had argued, however, that feminist African philosophy did not yet exist; that what had been written on African women so far was sociological and anthropological, belonging to “women’s studies” and not African feminist philosophy. She argues that for a work to be feminist philosophy, it is not good enough for it to just describe sexism. Instead, it “must challenge basic African assumptions about the nature of reality, man, woman, and knowledge such that they can critically examine the intellectual edifice on which African types of sexism are or were based.”\footnote{18} However, she does hint at the development of some scholars who are looking to songs, liturgies, proverbs, stories and aphorisms in order to find texts that can be approached hermeneutically to develop an African feminist philosophy. While she does not name a single African feminist philosopher in her article on the topic, I have included essays in my course that accomplish, at least to some extent, what Oluwole said must be done.\footnote{19}

Gbadegesin’s third and fourth trends are found in the second and third sections. In addition to his third trend, contemporary African political philosophy (Nyere’s arguments for one-party democracy, for example), Gbadegesin includes as well “critical philosophy of Africa,” a field which studies the meaning of the concept of Africa (inspired by Mudimbe, Appiah and others).\footnote{20} These last two trends, albeit under different names, are also singled out by Olusegun Oladipo, as central to the future project of African philosophy. The first of Oladipo’s categories is the quest for African self-definition in the contemporary world. Here he speaks of the tension between the “traditionists” and the “modernists,” and the need for “cultural syncretism,” in which one extracts the best from all of the multiple influences on Africa, to construct an identity which is most conducive to human flourishing. This chosen identity would be in contrast to the usual trend in the past, of having African identity formed by influences beyond the control of Africans themselves. Oladipo considers the “particularist studies” of Gyekye, Wieredg, Hallen and Sodipo, as well as Oruka’s sage philosophy project, as part of this necessary work of studying African traditions, to combat the tendency of uncritical assimilation of foreign conceptual schemes. These themes are found across the different parts of the course.

Still, for Oladipo, there are two additional areas of engagement for contemporary African philosophy. The second concerns how to acquire and apply both scientific knowledge and wisdom. As he explains, there is an urgent need to widen the horizons of African philosophy and make it interdisciplinary. Thirdly, there is the need to discuss African institutions, to bring about order and social control (without which the first two goals will be hampered). In order to reconstruct society, he explains, there is a need to appeal to principles; discerning those principles is a goal for philosophy.\footnote{21} I see Gbadegesin’s and Oladipo’s visions of the future of African philosophy as complementary. For example, Oladipo’s third trend is compatible with what Gbadegesin describes as contemporary African political philosophy, and together they serve as the basis for especially the third part of the course.

This course is based on a model of meeting twice a week for 14 weeks, so it is modeled to fit in 28 sessions. The sessions would follow this schedule of readings and topics.
For each section I list in addition other related articles that would also be excellent regarding the topics covered in the section. Limitations of time and assessment of what students could keep up with encouraged me to draw the line as regarding the reading list. If you think your students can cover more material more quickly, you may want to assign the optional readings as well.

African Philosophy and Culture

Required Texts: (available in University Bookstore)
Chinua Achebe, Things Fall Apart (abbreviated as TFA)
Chinua Achebe, No Longer at Ease (abbreviated as NLE)

Articles on reserve, as stated below.

PURPOSE OF THE COURSE: To give a broad introduction to African philosophy and culture. We will read key texts which describe the field of African philosophy today. We will read texts, hear lectures, and watch video excerpts that will supply the background in African history, politics, economics, and culture that is needed in order to understand African philosophy in its context. Required reading, lecture and discussion will form the basis of our shared knowledge, while each student, through additional research, will study a particular topic in-depth.

Outline of Course Topics and Readings

The course is divided into three broad sections:
1) Pre-Colonial Africa
2) Colonial Africa and the struggle against colonialism
3) Post-colonial or contemporary Africa

For each section, we will first read chapters from Achebe’s novels that describe these eras in Africa. Then we will look at articles that philosophically reflect upon and analyze this aspect of African experience and culture.

READING AND TOPIC SCHEDULE:

1: Introduction of each other, review of syllabus, discussion, “What is African Philosophy?”

SECTION 1: PRE-COLONIAL AFRICA


SECTION 2: COLONIAL AFRICA

10: Final exam

Comments for the teacher, on part one:

I realize that the novel is set in Igboland in Nigeria while Gyekye’s book is about the Akan of Ghana. Nevertheless, after cautioning students against imagining that all Africans have the same beliefs and ideas, I ask them if they can nevertheless see any parallels between what Gyekye is speaking of, and what we encounter in the novel. There are plenty of parallels. A good supplement to chapters 1 and 2 of Gyekye are two articles by N.K. Dzobo called “Knowledge and Truth: Ewe and Akan Conceptions” and “African Symbols and Proverbs as Sources of Knowledge and Truth,” both found in K. Wriedu and K. Gyekye, eds. Person and Community: Ghanaian Philosophical Studies, I published by Washington, D.C.; The Council for Research and Values in Philosophy, 1992, pp. 73-100. One can find these two articles on line at; However, the online version does not have the illustrations for Dzobo’s article, which is a real drawback.

There is much longer and more complicated version of the topics which Gyekye treats in his chapter 10, in a later work of his called Tradition and Modernity: Philosophical Reflections on the African Experience (Temple U. Press, 1997). See especially pp. 35-76 and 252-260. A good background on the idea of African reincarnation is provided by Innocent Nyewuonyi, “A Philosophical Reappraisal of African Belief in Reincarnation,” International Philosophical Quarterly 22 (September 1982): 157-168. Kwame Anthony Appiah has a good (albeit controversial) chapter on the issue of African religious practices (from a skeptical point of view) called “Old Gods, New Worlds,” in his book In My Father’s House: Africa in the Philosophy of Culture. However, the argument there depends on the reader’s familiarity with recent (demythologizing) theologians, as Appiah argues that in contrast, old fashioned religion (whether in Africa or the U.S.) tries to do what we think science does. It does raise issues of self-understanding when, for example, the egwuwu appear to judge their cases: do they knowingly engage in a theatrical psycho-drama (as Gyekye, and maybe Achebe as well, hints at in his treatment of ethics) with real behavioral results, or are they convinced of their causal agency in a more direct way (scientific or spiritual)? Mosley’s text in African Philosophy has an entire section devoted to Magic, Witchcraft, and Science, bringing together several...
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authors with diverse positions. Masolo's chapter 6 is also helpful on this topic.

There are several good videos that can be used with these topics, especially regarding women's issues. All Mazrui's series The Africans: A Triple Heritage has a video entitled Legacy of Lifestyles that is good at showing the clash of ideas regarding polygamy and monogamy in contemporary Africa. The Disappearing World series has a video entitled Masai Women that shows the role women occupy compared to men. It shows that women can own property (cattle), that they must get married and have children in order to survive, and that marriage entails leaving the home in which they grew up to join their husband's home. It is filled with interesting passages where Masai women state enthusiastically that they like polygamy and insist upon practicing female circumcision. Another video series, Millennium: Tribal Wisdom for the Modern World has an episode called Strange Relations, where a polyandrous community in Nepal (where a woman is married by a family of brothers) is contrasted with the polygamous community of the Woodabe in Niger (who have a yearly ceremony during which wives can leave their husbands and run off with other men) and the Canadian monogamous couple that had earlier married, divorced, and is now marrying again. It does raise questions about what is considered "normal" marriage (since most students will presume monogamy is best, a point that Dophyne challenges).

SECTION 2: Colonial Africa and the struggle against colonialism

19: Second Exam

Comments for the teacher, regarding part two:

Another good source for an example of the effect of colonialism on the rural communities is Cohen and Adhiambo's book Staya, the chapter on 'The Hunger of Obalo,' pp. 61-84. Of course, if one only had the time, it would be good to cover Serequeberhan's whole book, and/or to cover Fanon's The Wretched of the Earth as a primary text rather than rely on Serequeberhan's analysis. Lewis Gordon has also written extensively on Fanon. Also, Basil Davidson's book has sections which explain how colonialism distorted the economy and government in such a way that the pattern continued through to independent (or neo-colonial) Africa; see chapters 6, 7, and 8, pp. 166-265. Davidson also had helpful videotapes covering this period of history in his series Africa: The Study of a Continent, especially episodes 5 "The Bible and the Gun," and 6 "The magnificent African cake." Episode 7 covers the independence movements and elections of Nkrumah and Nyerere and others. The old series on religions, The Long Search, has an episode called "Zulu Zion" which covers many of the syncretic religions in southern Africa, and might go well with the Okot p'Bitek readings.

SECTION 3: Post-colonial or contemporary Africa

20: Achebe, NLE chapters 1-9
21: Achebe, NLE chapters 10-18

Comments to the teacher regarding Section Three:

There are some good videos from the Mazrui series The Africans about "development" projects gone awry, including Tools of Exploitation and A Garden of Eden in Decay; and regarding political instability and military coups, there is The Search for Stability, although the tapes might be a little

The entire book by Judith Abwunza is very good, and can be recommended to those who are interested in women’s issues in Africa today. It gives a detailed account which will help students experience contemporary rural life for African women. It’s true that it is a social studies approach rather than a philosophical one, but the situation of women in Africa today can be discussed by reference to ideas of equality, human rights, and justice, for example. California Newsreel is now marketing a video made in Mali called Finzari, which shows women struggling with abusive husbands, against practices of wife inheritance, and against female excision. (Not all of my male students have enjoyed it, despite the fact that in a subplot, men get to challenge corrupt government officials.) There is an article by Marie Pauline Eboh called “The Woman Question: African and Western Perspectives” in a collection edited by Herta Nagl-Doczekal and Franz Wimmer, called Postcoloniale Philosophieren: Afrika (Vienna and Munich: Wiener Reihe, Oldenbourg Verlag, 1992), 206-213, which gives a brief contrast between Western feminist and Africanist approaches. There is a recent collection called Sisterhood, Feminisms, and Power: From Africa to the Diaspora, ed. Obioma Nnaemeka (Trenton, NJ: Africa World Press, 1998) which addresses some of the issues raised regarding women in Africa from many disciplines. There is also an article available in African Studies Quarterly over the internet, entitled “Women’s Human Rights in Africa: Beyond the

Debate over the Universality or Relativity of Human Rights,” by Diana J. Fox. The web address is: http://web.africa.ub.edu/asq/v2/v2i3a2.htm

Grading:
The grade is divided into five parts, with a total of 100 points possible.
1) First exam, 20 points
2) Second exam, 20 points
3) Third/final exam, 20 points
4) Research paper, 20 points
5) Reading quizzes, unannounced, of various sizes, total 20 points.

Further descriptions of the above assignments:
Exams:
Each is worth 20 points. Each exam is divided clearly into two parts.

Part One: There will be a series of short questions, true and false, multiple choice, matching, short answer, and/or fill in the blank questions that make up 10 points of the exam. These questions will test your retention of key information covered in the class. This is an in-class exam, no notes are allowed.

Part Two: There will also be an essay question worth ten points. This will test your ability to make links, synthesize, and/or critically evaluate the course material. You will receive the essay questions (2 or 3 options) ahead of time, and you must choose one. This is a take-home exam, due on the same day as the exam. You must type your answers. Answers should be 3 pp. typed double spaced.

Research Paper
By the end of our second month, you will submit a paper topic to me, with a list of your sources for your paper. I will give you feedback on your topic. Your paper is due at the end of the third month. Papers should be 6-8 pp. typed and double spaced.

Reading Quizzes
On any class day I may decide to give a reading quiz. These quizzes will be brief, consisting of one or two questions that cover the reading due that period. Quizzes cannot be made up later; you must be present that day in order to complete the quiz.

Here are some examples of take home essay questions which can be used for section one of the course.
1. What are some of the key claims that Gyekye makes regarding Akan morality? Cover the major topics of whether morality is grounded in religion or not (and if so in what way), what are considered good or bad acts and why, and what kinds of sanctions are invoked, for what reasons. Choose aspects of his argument for which you can find illustrations, or counter-illustrations, in the novel, Things Fall Apart. After each point of Gyekye, cite your illustration with page numbers in parentheses, and summarize the action. Use quotes, but only sparingly, and always use quotation marks to surround your quotes. Do you think that the novel backs up Gyekye’s ideas or not? What do you think of the Akan/ Igbo ideas of morality – are they different than, and/or better than, notions of morality that you grew up with, that our society endorses, or that you hold today? Explain.
2. Describe the relationship between men and women as it is illustrated in *Things Fall Apart*. Refer to specific passages. Drawing upon at least two of our other authors in our course who address issues of the roles of men and women in traditional African society, what would some of our other authors say about women's roles and treatment of women by men as described in the episodes in the book? Then compare the situation with our own contemporary society. In what ways might women in Africa be better off than women in our own society today, and in what ways do you think they might be worse off? Explain your views.

In closing, let me state that I offer this course outline as only one possible suggestion for a course in African philosophy. I am sure that there are many different ways, equally valid in importance to the way in which I have stated it here. It would be wonderful to have even more syllabi posted to this newsletter in the future. More importantly, I want to encourage faculty who have never yet tried to teach African philosophy, to do so. Teaching these novels can be fun and it really grips the students' interests. The articles I have paired here will not be difficult for you to relate to the subject matter of the books. African philosophy is too important a subject matter to be neglected by most philosophy departments. Those of you who have read this far show the initial interest and commitment to begin teaching the course, if you have already done so. To those of you who have been teaching it for years and years, I put forward these suggestions in case they may help you in your revision of your syllabus.

**Endnotes**

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7. That syllabus is posted on Bruce Janz's African Philosophy resources web page, at:
8. English, P. and Kalumba, K. *African Philosophy: A Classical Approach* (Prentice Hall, 1996), had modified the original four trends in a way that made more sense to them, for example, speaking of liberation philosophy rather than "nationalistic-ideological" philosophy. However, English and Kalumba's book going out of print is part of the evidence that there is not enough demand for textbooks in African philosophy. I have approached major publishers on display at the APA who have stated to me that African philosophy texts do not "sell." This points to a crisis, since even innovative new courses in African Philosophy will not easily be able to get textbooks published. One cure for this situation is to encourage more departments to offer African philosophy in their course listings. There are, however, other philosophy texts available that do not follow the "four trends" outline. There is Albert Mosley's *African Philosophy: Selected Readings* (Prentice Hall, 1995). Mosley's book does a fine job in emphasizing Pan-African issues and linking African-American interests in race with topics in African philosophy. There is P.H. Costeez and A.J.P. Roux, *Philosophy from Africa: A Text with Readings* (Wadsworth/ International Thompson Publishers, 1998). Look for the future home of the second edition of that text at Oxford University Press. Also see Emmanuel Ezze, *African Philosophy: An Anthology* (Blackwell).
9. While some history of ethics is necessary, some teachers choose to cover the history of ethical theory in the first half, to move onto applied contexts in the second half.
17. For example, Oruka clearly delineates ethnophilosophy from culture philosophy and argues that sage philosophy is closely
Race, Gender, And The Law

Law 291

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COURSE DESCRIPTION

Although equality is one of the founding principles of our country, social inequality has existed in America throughout our nation's history. Women and people of color continue to feel the effects of racism and sexism, despite being assured equal protection of the laws. What is equality? Why is it so difficult to achieve? What effect does law have on social inequality?

This course inquires into the relationship between inequality in society and inequality under the law, critically examining the role of the law in perpetuating, prohibiting, and remedying discrimination based on race and gender. The course will also address concrete issues of race and gender in contemporary society. In particular, the course will examine the efficacy of the civil rights paradigm as an approach to confronting the legacy of social inequality in the twenty-first century.

REQUIRED READINGS


In the syllabus, “B&B” refers to the reader. In addition to the required text, I occasionally will hand out supplementary readings in class designed to contextualize a particular topic or to suggest a problem for class discussion.

INTERNET RESOURCES

Much of what we cover in class will have real contemporary relevance. I occasionally will hand out a pertinent newspaper article, but you may wish to connect class topics to current events on your own as well. Additionally, you may find that a particular topic piques your interest. Toward that end, you may wish to take a look at some of the following web sites:

United States Commission on Civil Rights
http://www.usccr.gov/

American Civil Liberties Union’s Freedom Network
http://www.aclu.org/index.html

Michigan Journal of Race & Law
http://www.law.umich.edu/pubs/journals/mjrl/

University of Minnesota Law School’s Institute on Race and Poverty
http://www.law.umn.edu/centers/race-pov.htm

U.S. Department of State Perspectives on Race Relations in the U.S.
http://usinfo.state.gov/usa/race/

National Organization for Women
http://63.111.42.146/home/

Harvard Women’s Law Journal
http://www.law.harvard.edu/studorgs/woman_law_journal/

Columbia Journal of Gender and Law
http://www.columbia.edu/cu/lgl/

Lambda Legal Defense and Education Fund
http://www.lambdalegal.org/

Queer Legal Resources
http://www.qrd.org/www/legal/

CLASS FORMAT

Class participation is expected and preparation is assumed. Because we will meet only once each week, please do your best to attend every class. Relevant information will be conveyed to you not only through the assigned readings and lecture, but through class discussion, which includes not only my questions and comments, but your classmates’ answers and questions as well. It is imperative that you come to class prepared by completing the assigned reading and thinking about what you’ve read prior to class.

COURSE REQUIREMENTS

There will be an in-class, modified open-book (restricted to course materials and student-written outlines) final exam. One third of the exam will consist of short-answer and/or multiple choice questions; the remaining two-thirds of the exam will consist of essay questions.

COURSE OUTLINE

I. Introduction

Topic and Assigned Reading

A. Introduction to the course; law, legal education, and inequality

B&B pp. 1-20: hooks, Toward a Revolutionary Feminist Pedagogy; Carrington, Of Law and the River; Gordon, “Of Law and the River” and of Nihilism and Academic Freedom; Cover, Violence and the Word; Minow, Partial Justice and Minorities

B. Meanings of privilege and power

1. On a personal level

B&B pp. 21-59: Freeman, Racism, Rights and the Quest for Equality of Opportunity; McIntosh, White Privilege and Male Privilege; Flagg, “Was Blind, But Now I See”;

Williams, The Alchemy of Race and Rights; Kotlowitz, There Are No Children Here; Kozol, Rachel and Her Children; Funmilayo, The Poverty Industry
B. Meanings of privilege and power
   2. On a structural level
   B&B pp. 59-123: Frye, Oppression; Young, Five Faces of Oppression; Lawrence, The Id, the Ego and Equal Protection; Delgado & Stefancic, Images of the Outsider in American Law and Culture; Minow, Making All the Difference; Gotanda, Asian American Rights and the "Miss Saigon Syndrome"; Walker, Advancing Luna — and Ida B. Wells
   "Racism," "sexism," and "homophobia" are provocative words in American society. Although perhaps decried in polite circles, it is beyond dispute that women, people of color, and gays and lesbians experience institutional and individual discrimination. What does it mean to be a woman or person of color in America? What does it mean to be a woman of color in America? What role does law play in our society in rectifying or inflicting injustice?

II. Constructions of Race and Gender

   Topic and Assigned Reading

   A. Exclusion and the Constitution

   B. Race
   1. The concept of "race"
   B&B pp. 141-65: People v. Hall; United States v. Third; St. Francis College v. Al-Khazraj; Franceschi v. Hyatt Corp.; Orni & Winant, Racial Formations

   2. Race
   B&B pp. 165-232: Johnson v. McIntosh, Williams, The American Indian in Western Legal Thought; The Dred Scott Case; Plessy v. Ferguson; Flagg, "Was Blind, But Now I See"; Korematsu v. United States; Chang, Toward an Asian American Scholarship; United States v. Antelope; City of Memphis v. Greene; Hernandez v. New York Video: In the White Man's Image

   C. Gender and sexuality
   1. Concepts of gender and sexuality
   B&B pp. 232-63: Riger, Rethinking the Distinction Between Sex and Gender; MacKinnon, On Difference and Dominance; Pharr, Homophobia

   2. Exclusion based on gender
   B&B pp. 263-309: Bradwell v. Illinois; Mississippi Univ. for Women v. Hogan; General Electric v. Gilbert; Bray v. Alexandria Women's Health Clinic

   C. Gender and sexuality
   3. Exclusion based on sexual orientation

How has the law worked to concretize racial and gender difference? Why is race so important? Why is gender so important? Race might be understood as the framework by which the human population is segmented; racialization as the assignment of certain humans to certain categories of race; and racism as the negative valuation of certain traits shared by humans in the same race category. What can the social hierarchy of race teach us about the social hierarchy of gender? What is the relationship between sexuality and gender? Is discrimination based on sexual orientation also discrimination based on gender? Is there a real difference between women and "pregnant persons"? What is the relationship between race and sex?

III. Identity

   Topic and Assigned Reading

   A. Identity
   B&B pp. 465-94: Crenshaw, Demarginalizing the Intersection of Race and Sex; Spelman, Inessential Woman; Martinez v. Santa Clara Pueblo; MacKinnon, Feminism Unmodified; Resnick, Dependent Sovereigns; Harris, Race and Essentialism in Feminist Legal Theory; Hutchinson, Identity Crisis; Williams, Dissolving the Sameness/Difference Debate; Wicke, Postmodern Identity and the Legal Subject

   B. Patterns of power
   B&B pp. 494-547: Spelman, Inessential Woman; Cain, Feminist Jurisprudence; Lorde, Age, Race, Class, and Sex; Jordan, Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings; Williams, Gendered Check and Balances; Polakow, The Other Motherhood; Grillo & Wildman, Obscuring the Importance of Race; Harris, Race and Essentialism in Legal Theory; Scales-Trent, Commonalities

What is identity? How would you describe your identity? What role does a person's or a group's identify play in public policy? Does recognition of human rights intrude on the cultural identity of certain groups? If so, what solutions are available?

IV. Justice and Equality

   Topic and Assigned Reading

   A. Critiques and alternatives

   B. Lawyering for social justice
   B&B pp. 565-617: White, Subordination, Rhetorical Survival Skills, and Sunday Shoes; Gabel & Harris, Building Power and Breaking Images; Lehmann v. Toys 'R Us; Swenson v. Northern Crop Ins. Co.; Twymon v. Twymon; Lawrence, If He Hollers Let Him Go

If law can cause injustice, or if it can rectify injustice, how should lawyers work to affect social change through the law? Do opportunities for social change appear in seemingly ordinary legal problems?
CONSTITUTIONAL LAW II
Civil Rights and Civil Liberties

Pols 306

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COURSE DESCRIPTION
From this nation’s inception to the present, Americans have debated politics, policy, and institutional issues. The United States Constitution is the foundational document that creates and limits governmental powers. The Bill of Rights, the first ten amendments to the Constitution, sets forth certain values government must guarantee (civil rights), as well as certain protections against government infringement (civil liberties).

All governmental action, whether federal, state, or local, must comply with the Constitution. But who decides whether a government action is constitutional, and how? Beyond merely interpreting the Constitution, the Supreme Court plays a unique role in setting the terms of political discourse and framing political and legal outcomes. Law enforcement and correctional officers must understand the Court’s interpretations of rights and liberties, for courts have held that they may be liable for failing to protect or to enforce them.

This course introduces students to the constitutional system of the United States and the modes of thought and criticism appropriate to assessing constitutional law in the political context. It will provide a broad introduction to the Court’s civil rights and civil liberties decisions to ascertain the political values and processes it has defended historically, the standards it has developed to implement its principles, and its relationship to other institutions in the American political system. The course will focus on three major themes of constitutional law: the role of the Supreme Court (“judicial review”), civil rights (rights guaranteed by government), and civil liberties (protections from government intrusion).

The course will illuminate how the Supreme Court makes public policy through constitutional interpretation, focusing on decisions germane to law enforcement and criminal justice. By emphasizing the social and political variables that affect constitutional interpretation, and how political scientists study constitutional outcomes, the course will address what American government does, who benefits, and who loses out. By the course’s end, students will be able to situate constitutional law and discourse within broad understandings of democracy in the American context, and will have furthered their ability to think clearly and critically about current events.

REQUIRED READINGS

In the syllabus, “EW” refers to the casebook. In addition to the required text and supplement, I occasionally will hand out supplementary readings in class designed to contextualize a particular topic or to suggest a problem for class discussion. The complete text of many cases also is available online at http://supct.law.cornell.edu/supct/ (Cornell’s Legal Information Institute) or http://supreme.findlaw.com/Supreme_Court/decisions.html (Findlaw Law Center).

You also are expected to pay attention to current events. Online newspapers are available without charge. The two best for political coverage are The New York Times, found at http://www.nytimes.com/, and the Washington Post, found at http://www.washingtonpost.com/.

CLASS FORMAT
We will be thinking critically about the Constitution, the Supreme Court, and American politics and government. Such analysis requires close reading of case law, command of fact, holdings, and legal doctrine, and formulation of cogent arguments supporting or criticizing constitutional interpretations. Relevant information will be conveyed to you not only through the assigned readings and lecture, but through class discussion, which includes not only my questions and comments, but your classmates’ answers and questions as well. Interaction is required and the clash of ideas is encouraged. Class participation is expected and preparation is assumed. It is imperative that you come to class prepared by completing the assigned reading and thinking about what you’ve read prior to class. I suggest that you take the time to brief the cases included in the assigned reading. (Attached to the syllabus is advice on briefing cases.) This course’s teaching approach will differ from that of many other courses, and will challenge you. In order for you to rise to the challenge and excel, you must read the assignments on time and attend class regularly.

To facilitate challenging and effective class discussion, and to allow each of you to shine, I will assign students to a “participation group.” Each participation group will be responsible for a particular topic and will lead the class discussion on that particular topic. Although all students are expected to prepare for and participate in each class, members of the participation group will be expected to summarize the assigned topics for the class, suggest questions to pose to the class, and be the “first responders” to my questions. I suggest that each participation group meet and discuss its assigned topic prior to the class sessions covering the topic, in order to analyze the cases and issues and to anticipate questions.

COURSE REQUIREMENTS AND EVALUATION TOOLS
There will be three in-class exams, each worth 40 points, and a final exam, also worth 40 points. Exams will consist of essay questions modeled on those found in this syllabus.

This course fundamentally is driven by your participation. You will be assigned to a “Participation Group” during one particular segment of the course. As part of the Group, each student is expected to be familiar with all cases and be ready to serve as “first responders” during class discussion. This is worth 30 points. During the rest of the semester, you are expected to complete the assigned reading prior to its coverage in class, and to be prepared to be called on to discuss all case law. These additional responsibilities will be worth 10 points. Frequent absenteeism and a lack of
preparation will be noted, and can count against your participation score.

Those who fail to complete assignments on time due to a lack of preparation will be penalized on appropriate make-up materials by ten percent for each day late. Serious medical problems and family emergencies are excepted only with sufficient advance notification and documentation. Penalties for academic dishonesty will conform to University guidelines.

Points will be assigned as follows:
Test 1: 40 points
Test 2: 40 points
Test 3: 40 points
Test 4 (final exam): 40 points
Presentation Group: 30 points
Semester participation: 10 points
Total: 200 points

The grading scale will be subject to deviation from a standard 90-80-70-60 scale based on the instructor’s prerogative in ascertaining relative individual and class performance.

COURSE OUTLINE

I. Introduction: The Supreme Court and the Constitution

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading (Note: You are expected to use the Web to find cases in bold, which are not discussed extensively in EW)</th>
<th>Presentation Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction to the course</td>
<td>Syllabus</td>
<td>None</td>
</tr>
<tr>
<td>B. How to brief cases</td>
<td>Syllabus (“On Briefing Cases”) EW pp. 43-46</td>
<td>None</td>
</tr>
<tr>
<td>C. What are rights and liberties?</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>D. Historical and political context of the Constitution and the Bill of Rights</td>
<td>EW pp. 1-9 EW App. 1: U.S. Constitution</td>
<td>None</td>
</tr>
<tr>
<td>E. 42 U.S.C. § 1983 and liability of government actors</td>
<td>None</td>
<td>None</td>
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</tbody>
</table>

In 1787, Congress called for a convention to revise the Articles of Confederation and ended up framing a new national charter: the Constitution, which was ratified on the condition that the first Congress would propose a Bill of Rights. The first ten amendments to the Constitution set forth certain values government must guarantee (civil rights), as well as certain protections against government infringement (civil liberties). Law enforcement and correctional officers must understand these civil rights and civil liberties, for courts have held that they may be liable for failing to protect or to enforce them.

Think about: How did the Constitution come about? The Bill of Rights? How is it that these founding documents are flexible enough to provide the framework for government today? How do civil liberties differ from civil rights? What responsibilities does government have for protecting and preserving each? Why must law enforcement officers be familiar with the text of the Bill of Rights, as well as its contemporary interpretations?

II. The Judiciary: Institutional Powers and Constraints

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Organization of federal courts how cases reach the Supreme Court</td>
<td>EW pp. 10-21</td>
<td>None</td>
</tr>
<tr>
<td>B. Traditional vs. institutional models of judicial decision making</td>
<td>EW pp. 22-42</td>
<td>None</td>
</tr>
</tbody>
</table>

The Constitution only provides for “one supreme court,” giving Congress the power to create other courts as it deemed necessary. The federal court system as we know it is like a pyramid, with district courts at the base, appellate courts in the middle, and the Supreme Court at the apex. Judicial review, the most powerful tool of the federal courts, is not mentioned in the Constitution, yet in Marbury v. Madison, the Court invoked judicial review to strike down legislation it deemed incompatible with the Constitution. The Bill of Rights originally applied only to the national government; over time, the Court used the Fourteenth Amendment to guarantee that states would protect rights and liberties.

Think about: What role does the Supreme Court play in American government? What role should it play? How does judicial review mediate that role? How do the Justices make decisions? Do they leave their beliefs at the courthouse door when they don their black robes? How did the Bill of Rights come to apply to the states, not just the national government?

III. Civil Liberties: The First Amendment and Regulating Freedom of Speech, Assembly, and Association

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. What is “freedom of speech”?</td>
<td>EW pp. 208-10; 238-39 EW App. 1: amend. I</td>
<td>Group 1</td>
</tr>
<tr>
<td>C. Regulating expression 2. Flag burning</td>
<td>EW pp. 251-57: Texas v. Johnson</td>
<td>Group 1</td>
</tr>
<tr>
<td>D. Regulating expression 3. Political protests and the preservation of order</td>
<td>EW pp. 257-71: Cohen v. California; Hill v. Colorado</td>
<td>Group 1</td>
</tr>
<tr>
<td>F. Civil liberties 1. What is “obscene?”</td>
<td>EW pp. 348-49</td>
<td>Group 2</td>
</tr>
<tr>
<td>H. Civil liberties 3. Internet regulation</td>
<td>EW pp. 399-34; 372-78: Reno v. ACLU</td>
<td>Group 2</td>
</tr>
</tbody>
</table>
TEST 1

Parts I – III

The First Amendment appears to provide a bright-line standard guaranteeing that government cannot restrict the four components of expression: speech, press, assembly, and petition. Yet the Supreme Court never has held that such liberties are absolute. A focus on issues of anti-war and anti-abortion protests, Internal flag burning, restrictions on hate speech, obscenity, and libel demonstrates the degree to which the First Amendment flexes with societal changes.

Think about: Is it possible to develop a universal standard concerning what is offensive? How are freedoms of assembly and association tied to freedom of speech? How have political protests changed America? Whom does hate speech target, individuals or groups? How would you define “obscenity” and “libel”? How far can government go in regulating speech without imposing a “chilling effect” on freedom of expression?

IV. Civil Rights: The Rights of the Criminally Accused

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
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</thead>
<tbody>
<tr>
<td>A. What is the “criminal justice system?”</td>
<td>EW pp. 478-84</td>
<td>Group 3</td>
</tr>
<tr>
<td>B. Investigations and evidence 2. Today</td>
<td>TBA</td>
<td>Group 3</td>
</tr>
<tr>
<td>B. Investigations and evidence 3. The Exclusionary Rule</td>
<td>EW pp. 517-31; Mapp v. Ohio; United States v. Leon; TBA</td>
<td>Group 3</td>
</tr>
<tr>
<td>D. Attorneys 1. Right to counsel</td>
<td>EW pp. 556-67; Powell v. Alabama; Gideon v. Wainwright</td>
<td>Group 4</td>
</tr>
<tr>
<td>1. Right to bail</td>
<td>EW pp. 557-71; United States v. Salerno</td>
<td>Group 4</td>
</tr>
<tr>
<td>F. Punishment 2. Double jeopardy and emerging issues</td>
<td>EW pp. 615-15</td>
<td>Group 4</td>
</tr>
</tbody>
</table>

The Second Amendment's wording gives rise to (at least) two possible interpretations, one of which emphasizes the individual right to keep and bear arms and one of which emphasizes the collective right of the states to arm their militias. The Supreme Court has issued one authoritative decision concerning the Second Amendment that takes the latter tack, and has been extremely reluctant to revisit it. Scholars, gun control organizations, police associations, the National Rifle Association, state and local lawmakers, and many citizens remain highly polarized over the issue of guns, gun violence, and gun control.

Think about: What are the two possible interpretations of the Second Amendment? Which should control? Why hasn't the Supreme Court been more involved in the debate? Is there a possible compromise over a “right?” What role do interest groups play in shaping the terms of the political debate over the Second Amendment? Who should decide the future of gun control: the states? Congress? Interest groups? The courts? The American people?
VI. Civil Rights: The Right to Privacy

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Abortion</td>
<td>BW pp. 421-37, Roe v. Wade; Akron v. Akron Center for Reproductive Health; Webster v. Reproductive Health Services; Planned Parenthood of Southeastern Louisiana v. Casey</td>
<td>Group 5</td>
</tr>
<tr>
<td>D. The right to die</td>
<td>BW pp. 463-72, Cruzan v. Director, Missouri Department of Health; Washington v. Glucksberg</td>
<td>Group 5</td>
</tr>
</tbody>
</table>

TEST 3

Parts V – VI

A right to privacy is not specifically spelled out in the Constitution or the Bill of Rights. The Supreme Court has extended the concept of liberty from government intrusion and the individual’s “right to be let alone” primarily through the penumbras, or shadows, of the First, Third, Fourth, Fifth, and Ninth Amendments. Most controversial has been the moves to guarantee reproductive freedom and questions of personal autonomy, such as sexual freedom and the right to die.

Think about: Why do you expect the right to privacy? Is there a point or a particular policy issue where the government has the right to invade your zone of privacy? In whose interest? Has public opinion changed over the years concerning the rights encompassed in privacy? Has the Supreme Court responded to such changes, or reflected them? Can changes in the Court’s composition effectively “end” a right, such as the right to an abortion, or are rights inherent in individuals?

VI. Civil Rights: Categorical Discrimination and Equal Protection

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. What are “civil rights”?</td>
<td>None</td>
<td>Group 6</td>
</tr>
<tr>
<td>C. Racial discrimination 1. “Separate but equal” and segregation in education</td>
<td>BW pp. 628-38; Plessy v. Ferguson; Sweatt v. Fair</td>
<td>Group 6</td>
</tr>
<tr>
<td>C. Racial discrimination 4. The “state action” requirement</td>
<td>BW pp. 550-60; Shelley v. Kramer; Burton v. Wilmington Parking Authority; Moore v. City of Detroit; Moore v. City of East Cleveland; Tawes v. United States</td>
<td>Group 6</td>
</tr>
<tr>
<td>D. Sex discrimination 1. “Eady” cases</td>
<td>BW pp. 566-68; Reed v. Reed; Frontiero v. Richardson; Craig v. Boren</td>
<td>Group 7</td>
</tr>
<tr>
<td>D. Sex discrimination 2. Education and the military</td>
<td>BW pp. 568-91; United States v. Virginia; Rostker v. Goldberg</td>
<td>Group 7</td>
</tr>
<tr>
<td>E. Discrimination based on sexual orientation</td>
<td>BW pp. 568-62; Bowers v. Hardwick (review); BW pp. 566-70; Romer v. Evans</td>
<td>Group 7</td>
</tr>
</tbody>
</table>

The Constitution is not “colorblind.” The Fourteenth Amendment’s guarantee of “the equal protection of the laws” has never been interpreted to forbid all discrimination. The degree to which it precludes racial discrimination has been contested in political struggles within the Supreme Court, and mirrored throughout America, over the historical quest for equality. Challenges to discrimination based on gender and sexual orientation also illustrate the degree to which true equality is more mythical than real.

Think about: Why do civil rights often depend on shared characteristics, whereas civil liberties focus on individual personal freedoms? How and why is the history of racial discrimination so important to understanding current debates over the best way to bring about equality? What are the three basic tests of the Equal Protection Clause, and how does it use based on group categories? How and why have women, gays and lesbians, and other social groups used equal protection litigation to try to bring about social change? In what policy areas have they succeeded? Failed?
1. Civil Rights: Remediary Categorical Discrimination

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
</tr>
</thead>
</table>

A. Affirmative action 2. Sex discrimination | EW pp. 729-32: Johnson v. Transportation Agency of Santa Clara County, California | Group 8 |


B. Voting and representation 1. Racial restrictions on voting | EW 759-63: Louisiana v. United States; South Carolina v. Katzenbach | Group 8 |


Eliminating and correcting for governmental discrimination sometimes requires complex remedies that seem to stretch the bounds of equal protection. Few public policies are as controversial and as misunderstood as affirmative action programs, which have brought about important social changes for women as much as people of color. The Supreme Court’s jumbling of affirmative action law may soon be clarified by a changing Court; in any case, many states are implementing new forms of "affirmative access" policies or eliminating affirmative action on their own. Remedies for racial discrimination in voting and representation also are changing based on the Court’s recent voting rights jurisprudence.

Think about: What are the myths and realities of affirmative action? What roles have the courts played in shaping affirmative action policy? How will conflicts over affirmative action ultimately be resolved? How has equal protection come to be so important in thinking about voting rights and the representation of people of color in government? What do the Court’s recent decisions and the 2000 Census portend for litigation over race-based districting?

IX. Expanding Ideas of Law and Legal Institutions

<table>
<thead>
<tr>
<th>Topic</th>
<th>Assigned Reading</th>
<th>Presentation Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Is the Supreme Court democratic, or countermajoritarian?</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>B. The law and legal institutions as constitutive bodies</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

TEST 4 (FINAL EXAM)

Parts VII – IX

Although the Constitution's original words remain the same, the Supreme Court’s interpretation of those words has been extraordinarily fluid. The Founders could not have anticipated the economic, political, and cultural changes that have shaped America, nor could they have foreseen the degree to which political contestation among the various institutions of government has resulted. The law, as debated, enacted, and implemented by policymakers, as well as the legal institutions that have interpreted or mediated the law's meanings, have both affected and been affected by social change. This is the "constitutive" significance of law: it creates and is created by the actions of people. It may be easier to see these processes if we view the law through different lenses. Perspectives derived from thinking about what rights and liberties mean to people with different backgrounds allow us to understand why the law is so important.

Think about: How does a "supreme court" jibe with a system of democratic accountability? Are all people represented by political institutions? What if we viewed the law through different lenses than those usually employed by policy makers or legal scholars? How would society differ if women, people of color, gays and lesbians, or the poor were in charge of lawmaking and interpreting the law?

ON BRIEFING CASES

One of the most commonly asked questions at the start of a constitutional law course is, "How do I prepare for class?" While there is no one "right" way to prepare for class, you should first think in terms of commanding the knowledge necessary to participate in class discussions. This basically means pretending that you are going to be quizzed on the facts of the case, the arguments deployed by the parties, the legal analysis employed by the Court (including legal precedent and doctrines), and what the Court held. This is called "briefing" a case – which gives rise to another commonly asked question: "How do I brief a case?"

Unfortunately, there is also no perfect way to brief a case. You have to develop your own techniques and strategies, and in part, that comes with practice. Here are some basic suggestions:

- What is the title and citation of the case at hand? Use legal citation form (e.g., Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803)).
- What is the background and what are the facts in the case? For example, who are the parties involved in the litigation? (Who brought suit against whom?) Under what statute was the claim litigated (or is it a direct constitutional claim)? What other factual history can you bring to bear (i.e., what did the lower courts hold, and what did the parties do before they brought suit)?
- What is the legal question presented; that is, what are the issues? Keep in mind that there usually is more than one, and that the Court itself may not always address the most important ones. The justices speaking for the majority may be looking at entirely different questions than may those speaking in concurring opinions, or for the dissent. Revisit what you have identified as the pertinent questions when you discuss the Court’s holding.
- What is the holding? What did the majority actually decide on behalf of the Court? Did it address all of the parties’ arguments? If not, why not? If the opinion is not unanimous, make sure you understand where and why the opinions differ. Look to the concurrences and the dissents. Remember that five Justices make a majority, and anything less is not binding on the lower courts; moreover, today’s dissent might be tomorrow’s majority opinion.
What is the legal reasoning? That is, what are the arguments contained in the opinion for the Court? The Court tells you its decision, but teasing out the arguments will help you understand how and why it reached that outcome. Don’t forget to think about what arguments were not made, for those, too, may be quite informative.

What do the separate opinions (concurring or dissenting) emphasize?

What are the loose ends? What is left out of the opinion? What is the legal or historical or political significance of the case? What will the next case addressing similar issues tell us?

In determining the answers to these questions, you will engage with larger questions of precedent (prior controlling cases), legal standards and doctrine (often ideologically developed and applied), institutional constraints (i.e., the nature of courts and litigation and the differences between individual judicial behavior and that of the entire Court), and predictability (i.e., in what direction is the Court heading on a given issue?)

Ideally, you should be able to brief a case in less than one page. Do not expect to nail all of these questions down for every case, particularly as our textbook often does not present all of the tools necessary to answer all of the above questions. (Most cases in the text are presented in truncated form.) As you move through the semester, you can revisit and revise your earlier briefs in order to streamline and improve them.

? Use Crunch