

# Collaborative Learning in the Constitutional Law Classroom: Adapting the Concept of Inevitable Disagreement in Seven Steps

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## I. Introduction

While collaborative learning opportunities are quite valuable for students,<sup>1</sup> law professors face challenges in providing those important learning experiences in their courses.<sup>2</sup> Law professors may struggle even more with

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1. See GERALD F. HESS ET AL., *TECHNIQUES FOR TEACHING LAW* 2, 127 (2011) [hereinafter HESS ET AL.] (“Research shows that peer teaching and learning help all students learn across a variety of disciplines, learning preferences, and course goals”).
2. Collaborative learning entails law professors releasing some control of the classroom. *Id.* at 131. Further, “because working well with others is rarely emphasized in legal education, students are generally reluctant and fearful of having final grades determined by group effort.” Angela Mae Kupenda, *Risking Collaborative Learning in Core Courses*, in HESS ET AL., *supra* note 1, at 145.

utilizing collaborative learning in courses in which students inevitably disagree on core topics within the subject matter.<sup>3</sup>

In courses like constitutional law, students may especially struggle in producing one final collaborative product in which they are addressing problems involving such topics as abortion, privacy rights more generally, racial and gender discrimination, sexual orientation, the President's pardon powers, the Second Amendment, voting rights and disenfranchisement, and so on. On critical constitutional issues, students may struggle with focusing on understanding and applying the core constitutional principles while also hearing and benefiting from perspectives on the topics that are different from their own lived experiences.<sup>4</sup>

Much of the student disagreement reflects different viewpoints and experiences seen in our larger society.<sup>5</sup> This disagreement is combined with differences on the appropriate scope of constitutional protections, or even interpretations.<sup>6</sup> Therefore, structuring collaborative experiences in large con law courses where students may have vehement disagreement on certain issues can be pedagogically difficult for professors.<sup>7</sup> Yet the benefits of collaborative learning for our law students remain major.<sup>8</sup>

As to one benefit, successful collaborative engagement for students is important to help our students grow into being leaders and team members,

3. Using collaborative learning can help students think "through the nuances in problems." *Id.* at 128. Law professors have designed collaborative learning exercises for students to address "structured controversies" to help students "re-conceptualize their positions." Mary Patricia Byrn, Morgan Holcomb & Sally Zusman, *Six Collaborative Learning Techniques*, in HESS ET AL., *supra* note 1, at 142.
4. In courses with both complex principles and much disagreement, like constitutional law, the collaborative exercises must be shaped carefully with these challenges in mind. *See generally* Elizabeth A. Reilly, *Deposing the "Tyranny of Extroverts": Collaborative Learning in the Traditional Classroom Format*, 50 J. LEGAL EDUC. 593 (2000) (reflecting on shaping collaborative learning in her con law course).
5. Societal disagreement seems intense today. *See, e.g.*, Alec Tyson, *Disagreements about Trump widely seen as reflecting divides over 'other values and goals,'* PEW RESEARCH CENTER (Mar. 15, 2018), <http://www.pewresearch.org/fact-tank/2018/03/15/disagreements-about-trump-widely-seen-as-reflecting-divides-over-other-values-and-goals/>; Ryan Struyk, *Blacks and whites see racism in the United States very, very differently*, CNN (Aug. 16, 2017), <https://www.cnn.com/2017/08/16/politics/blacks-white-racism-united-states-polls/index.html>; Sopan Deb, *Camille Cosby Compares Husband to Emmett Till and Blames Media*, NEW YORK TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/arts/television/camille-cosby-emmett-till.html>.
6. Even Black male judges disagree with one another. *See, e.g.*, Angela Mae Kupenda, *The Call and the Response: The Call, The 1991 Open Letter from Federal Judge A. Leon Higginbotham, Jr., and the 25 Years of Response from Justice Clarence Thomas*, 49 J. MARSHALL L. REV. 925 (2016).
7. Yet collaborative learning, even in classes like constitutional law, is possible. *See, e.g.*, Byrn, Holcomb & Zusman, *supra* note 3, at 142 (structuring collaborative engagement to "maintain a high level of discussion on politically charges or sensitive topics").
8. HESS ET AL., *supra* note 1, at 127-28.

including on teams with those who differ in viewpoint or in lived experiences.<sup>9</sup> Our students benefit in seeing how, even with team members with whom they vehemently disagree,<sup>10</sup> collaborative results are possible and can be greater than the sum of the individual efforts.<sup>11</sup> Also, as future practitioners, our students benefit from these classroom collaborative opportunities as they prepare for their futures. Many attorneys work collaboratively with others during their professional careers.<sup>12</sup>

While providing these beneficial team-based learning opportunities may be challenging, as legal educators we do have familiar tools to help our efforts. Standard tools we already use in legal education can positively enhance our students' careers as legal collaborators.<sup>13</sup> Collaborative learning can be especially driven by overlapping lessons from specific areas of the practice<sup>14</sup> or needs in the legal education curriculum.<sup>15</sup>

9. Perhaps our students will do better working collaboratively and respectfully in the future than some of our nation's leaders do today. Cf. Hannah Hartig, *Few Americans see nation's political debate as 'respectful,'* PEW RESEARCH CENTER (May 1, 2018), <http://www.pewresearch.org/fact-tank/2018/05/01/few-americans-see-nations-political-debate-as-respectful/>.
10. After all, the Court has held that diversity in legal education is a compelling governmental interest to facilitate cross-cultural understanding. See *Grutter v. Bollinger*, 539 U.S. 306 (2003). Collaborations can benefit from this larger diversity in the law school.
11. Collaborative results are greater than an additive sum, as group members bring their own strengths and learn from the strengths of other team members. HESS ET AL., *supra* note 1, at 128.
12. See, e.g., *Lessons from Practicing Lawyers: Why attorneys work together*, THE PRACTICE, HARVARD LAW SCHOOL, CENTER ON THE LEGAL PROFESSION, Vol. 1., Issue 6 (Sept. 2015), <https://thepractice.law.harvard.edu/article/lessons-from-practicing-lawyers/> ("Moreover, judging from the perspectives of legal practitioners from small, medium-sized and large national law firms, they all agree that teamwork and collaboration are critical elements to achieving better outcomes for their clients and ensuring the financial wellness of their firms.").
13. Collaborative learning and other learning tools should grow in use, especially with the current emphasis on experiential learning and other learning methods that will give our students settings similar to what they might experience in the practice. See, e.g., Robert Dinerstein, *Experiential Legal Education: New Wine and New Bottles*, SYLLABUS, vol. 44 no. 2, (Winter 2013), [https://www.americanbar.org/content/dam/aba/publications/syllabus/2013\\_syllabus\\_44\\_2\\_winter.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/syllabus/2013_syllabus_44_2_winter.authcheckdam.pdf).
14. See, e.g., Paul Maharg, *Professional Legal Education in Scotland*, 20 GA. ST. U. L. REV. 947, 967 (2004) (summarizing points used in focusing transactional learning: "Transactional learning is based on collaborative learning. Transaction as collaboration, indicating the root of the word: literally, acting across. Students are valuable resources for each other, particularly if they have opportunities to engage in both cumulative talk (the accumulation and integration of ideas) and exploratory talk ("constructive sharing of ideas around a task)") (citing Carla van Boxtel et al., *Collaborative Learning Tasks and the Elaboration of Conceptual Knowledge*, 10 LEARNING & INSTRUCTION 311, 313 (2000)) (internal quotations omitted).
15. As explained by Professor Lani Guinier, collaborative learning refocuses the educational climate from that of litigious combat to a climate more instructive for the ways many students will actually practice as lawyers; specifically, she stated:

If individualized combat were essential to lawyering, then the concerns or preferences of some women for collaborative learning environments would easily be dismissed.

As illustrated in this article, collaborative learning can be informed by the appellate practice, which already has a heightened presence in legal education. In many law schools, a curricular focus on appellate work is routinely offered to law students. In legal education, we often teach and learn using the Socratic method, and typically work with appellate court case opinions.<sup>16</sup> Further, students write briefs and conduct appellate arguments as part of courses in the required curriculum. And at various schools, moot court programs receive significant budgetary funding.<sup>17</sup>

So our schools already reflect, to some degree, the importance of being skilled appellate advocates. The widely accepted place of appellate experiences in our law school curriculum is one reason I am grounding this article on the lessons from collaborative benefits evident in appellate practices. However, I am also focusing on those lessons because appellate work was the emphasis of my own practice and informs my belief that we can learn from the appellate practice ways to foster collaborative engagement in our students. I learned the benefits of collaborative work, in the midst of great principled disagreement, in my own career as a judicial law clerk for appellate judges and as an appellate lawyer.

Many of the judges and attorneys I worked with were white males with economic privilege who had lived racial, gender, and economic experiences

However, many researchers are finding that the skills involved in lawyering are complex and are not captured in a one-size-fits-all pedagogical method that presents lawyering as a contest. Many suggest that the litigious mode of pedagogy is outdated, since many lawyers do not litigate. In fact, most lawyers now do not go to court. Most lawyers do not even work at large firms. For those who are employed as in-house counsel or are engaged in transactional lawyering, negotiation contrasts starkly to the classic notion propagated by the Socratic method of advocating one side of a dispute before an appellate court. Moreover, collaboration and teamwork are increasingly valued within the profession. Those who are good collaborators use crucial lawyerly traits of compromise, role flexibility, proffering questions as well as criticisms, and group problem-solving.

Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 10 (1998).

Collaborative learning can enhance the curriculum by helping in creating transactional lawyers:

Creating the “practice aware” lawyer, particularly the “practice aware” transactional lawyer, requires a renewed focus on law school curriculum offerings that can expose law students to the myriad issues that lawyers must consider and the problem-solving skills necessary for lawyers to facilitate and enable business transactions. One of the best resources to accomplish this task is the transactional practitioner who is able to bring the experience of practice into the classroom to supplement the doctrinal pedagogy. Experiential and collaborative learning opportunities further anchor these skills.

Jay Gary Finkelstein, *Practice in the Academy: Creating “Practice Aware” Law Graduates*, 64 J. LEGAL EDUC. 622, 643-44 (2015).

16. For a discussion of possible changes in legal education, see Kara Abramson, “*Art for a Better Life: A New Image of American Legal Education*,” 2006 BYU EDUC. & L.J. 227, 228 (2006).
17. See Richard E. Finneran, *Wherefore Moot Court?*, 53 WASH. U. J. L. & POL’Y 121 (2017) (discussing benefits of appellate moot court programs).

different from my own.<sup>18</sup> Yet when I think back about my years as an attorney before I became a law professor, the cases that I most recall were those in which we were able to collaboratively structure our final work product even in the midst of our intense disagreements. Some of these disagreements were about cases involving, for example, the degree to which jailers are responsible for providing mental health care for prisoners or arrestees; the reasonable expectation of privacy rights of female customers; judicial protections for the elderly and the poor who have relied on pension products; the parameters for determining ineffective assistance of counsel, especially where there is a death sentence and race is implicated; the scope of government's power to silence music alleged to be obscene; and so on.

On all of these, as collaborators, we had much and inevitable disagreement on the underlying constitutional issues and the best interpretations for the litigants and for society at large. Yet we were able to shape a final collaborative product that benefited from all of the participants and the disagreements.

Admittedly, collaborative success where there is inevitable disagreement on the subject matter poses more challenges for the collaborative process.<sup>19</sup> When I worked as an attorney with others on constitutional issues, we experienced an inevitable conflict on principles, given our different backgrounds and perspectives. Some cases inevitably invited such disagreement. However, even then collaborative success was possible.

As law professors, then, we can and must help cultivate this skill in our students.<sup>20</sup> Thus this article offers seven steps for pedagogical success in promoting collaborative learning. These steps are informed by the appellate practice, especially the writing process of the appellate practice, as teams complete much writing for appeals collaboratively.<sup>21</sup> These collaborative

18. See, e.g., Liz Adetiba, *More Than Half Of State Judges Are White Men, Still*, HUFFINGTON POST (June 30, 2016), [https://www.huffingtonpost.com/entry/state-courts-diversity-report\\_us\\_57715c2de4b0dbb1bbb4e7e](https://www.huffingtonpost.com/entry/state-courts-diversity-report_us_57715c2de4b0dbb1bbb4e7e). As to the federal courts, until President Barack Obama's nominations, only one Black federal judge, a male, served in the state of Mississippi as a federal district court judge. For Mississippi, President Obama added two Black federal district court judges, one male and one female, and one Black Fifth Circuit Court of Appeals judge, a male. See generally Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 108-09 (2016).

19. Even with my coauthors, with whom I largely agree on many principles, in writing about race, gender, class, and so on, disagreements (especially on tone) are still inevitable. See, e.g., Adia Harvey Wingfield, *Being Black—but Not Too Black—in the Workplace*, THE ATLANTIC (Oct. 14, 2015), [www.theatlantic.com/business/archive/2015/10/being-black-work/409990/](http://www.theatlantic.com/business/archive/2015/10/being-black-work/409990/) (“minority professionals tread cautiously to avoid upsetting the majority group's sensibilities”).

20. Skills in collaborative work are essential for our students as future professionals. See, e.g., Sheila Krotz, *Who is the Effective Educator in the 21st Century?*, P21.ORG, vol. 2, issue 12, no. 1 (Nov. 2, 2015) (“A collaborative, project-based approach ensures that students develop high order thinking skills, effective communication skills, and knowledge of technology that students will need for 21st Century careers and the global environment.”).

21. See CARTER G. PHILLIPS, JEFFREY T. GREEN, SARAH O. SCHRUP, & SUSAN E. PROVENZANO, *ADVANCED APPELLATE ADVOCACY* 130 (2016).

strategies are designed by adapting the concept of inevitable disagreement in the large constitutional law classroom and in other large doctrinal classes where disagreement is highly foreseeable.

The first three steps relate to professorial growth in preparation for leading this process. The more you as a professor reflect, in your own personal experiences, on the value of inevitable disagreement and the value of collaborative work,<sup>22</sup> the more understanding and empathy you will have for your students as they learn and grow. Thus, step one is to consider the value of inevitable disagreement by examining your own story and, for you, the professional value of inevitable, though constructive, disagreement. After considering the value of inevitable disagreement, step two is to consider the value you have gained in collaborating professionally. These two steps then facilitate the third step of cultivating empathy for your students who will engage in inevitable disagreement while collaborating.

Having humbled yourself with these initial steps, step four is to keep the major goal in mind: The overriding pedagogical goal is to help the students succeed with collaboration in spite of their inevitable and strong disagreements. The next step, step five, is to fashion in-class exercises for students to begin to practice collaborating through inevitable disagreement, assisted by your in-class observation and facilitation.

Once in-class exercises are utilized, step six is in designing a more substantial final collaborative exercise for students to complete as a written product outside of the classroom. This project should be shaped in a way that allows for inevitable disagreement. Given that collaborating through disagreement may be difficult for our students, the final and concluding step seven is to be a model of collaboration and empathy during inevitable disagreement with our own peers, and to openly share our own successes and failures with our students.

These seven steps have helped me to facilitate collaborative learning in my constitutional law classes for about twenty years. I hope these proposed steps will encourage you to foster environments of collaborative learning in your classrooms, especially in courses with inevitable disagreement.

## **II. Step One: Consider the Value of Inevitable Disagreement from Your Own Story**

Being an academic is, in my view, about loving learning and loving experimenting with different processes of learning.<sup>23</sup> To do so takes a certain

22. For a detailed look at the history of, values of, and framework for collaborative learning in general, see Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation:" *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999).

23. The following article about great teachers, although not written specifically with law professors in mind, is equally applicable, I think, to law professors. See Valerie Strauss, *The 12 Qualities Great Teachers Share*, THE WASHINGTON POST (June 6, 2011), [https://www.washingtonpost.com/blogs/answer-sheet/post/the-12-qualities-great-teachers-share/2011/06/13/AGL64fTH\\_blog.html?utm\\_term=.c2c2ed478de6](https://www.washingtonpost.com/blogs/answer-sheet/post/the-12-qualities-great-teachers-share/2011/06/13/AGL64fTH_blog.html?utm_term=.c2c2ed478de6) ("Teaching requires a willingness to cast a critical eye

amount of brave reflection on our own personal, academic, and professional experiences. This reflection will give us more empathy for our students and help us to be better facilitators of their growth as students and their continued growth throughout their professional and personal lives.

Considering the value of inevitable disagreement means taking a look at our own stories. So here I will share some of my own story and my awakening to the idea that there is value in inevitable disagreement.

My favorite subjects as a law school student were related to constitutional law. As a student, sometimes my heart raced reading appellate judicial opinions. I disagreed vehemently with some of the holdings of the Court and with many of the opinions of my classmates and professors.<sup>24</sup> By reading the opinions of the majority, plurality, those concurring in part, those concurring only in the judgment, dissenting, and so on, I saw that disagreement does happen frequently among the justices on hot topic issues as they try to work together.<sup>25</sup> Their stated disagreements made me more comfortable with my not fitting in with the majority viewpoint in my classes. Disagreement was inevitable. And seeing powerful judges disagree and still fashion a result, or dissent and fashion a future result,<sup>26</sup> helped me as a student to value more the inevitable disagreement I experienced in the classroom as a student.

Our student body and faculty were quite conservative.<sup>27</sup> So even though my viewpoint on many of the Court's holdings was not the same as that of the majority of students in my classes, I saw that my disagreement with my classmates was very well-stated by some of the justices on the Court. The inevitability of disagreement was obvious, especially in classes like constitutional law, First

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on your practice, your pedagogy and yourself. And it can be brutal.”).

24. Even as a law professor, sometimes my heart races in these con law discussions in the classroom. See generally Angela Mae Kupenda, *On Teaching Constitutional Law When My Race Is in Their Face*, 21 LAW & INEQ. 215 (2003) (discussions on race post-9/11 in which the vast majority of the students are white); Angela Mae Kupenda, *Equality Lost in Time and Space: Examining the Race/Class Quandary with Personal Pedagogical Lessons from a Course, a Film, a Case, and an Unfinished Movement*, 15 SEATTLE J. SOC. JUST. 391, 417-25 (2016) (discussions on economic class in which the majority of the students are seemingly economically privileged).
25. Often the justices find consensus and agree. On issues like race, gender, sexual orientation, privacy, and other hot-button issues, disagreement is far more frequent. See generally Max Bloom, *The Supreme Court Still Knows How to Find a Consensus*, NATIONAL REVIEW (June 29, 2017), <https://www.nationalreview.com/2017/06/unanimous-supreme-court-decisions-are-more-common-you-think/>.
26. The dissent from the Court's holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (separate but equal is constitutional), later became the majority view in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (separate is inherently unequal and unconstitutional in public school education). This is just one illustration of how even dissenting (with little vocal support from others) can be a powerful step toward inclusion.
27. My school is ranked in the top ten most conservative law schools. See *Law School Rankings of the Princeton Review, Most Conservative Students*, THE PRINCETON REVIEW 2018, <https://www.princetonreview.com/law-school-rankings?rankings=most-conservative-students> (last visited May 5, 2018).

Amendment law, civil rights, criminal procedure, employment discrimination, and the like. I began to see that learning how to disagree was a critical skill to attain in law school. My time became more instructive and successful as I began to understand that succeeding in law school was not about just learning by rote the rules and uncritically accepting the current status quo. I began to see a great part of my learning in critiquing that status quo with my own insights and experiences, even regarding my disagreement with some of the holdings of the appellate courts.

As a first-generation lawyer, I really had known of only two attorneys before law school.<sup>28</sup> Still, I had observed how both of them tried to work with others to improve the lives of many. They were also not afraid of the inevitable disagreement that often resulted. I definitely had not personally engaged in conversation with judges. During my externship with a state Supreme Court justice<sup>29</sup> I received great instruction. I watched how he carefully analyzed the cases to seek common ground with the other justices but was not afraid to dissent when need arose.

After completing law school, I was fortunate to have several federal appellate clerkships. Nervous about doing a good job, I retreated to my old ways of trying to say what I thought they wanted me to say, even if I saw something different in the extensive case records and related legal authorities. Such uncritical agreement was not what the judges desired. They explained to me that my job as a law clerk was to offer them my reasoned disagreement. Sometimes they could not hear or understand my disagreement. However, I learned that if these federal judges could not hear my point initially, they wanted me not to give up on a point, but to pursue it, to clarify it, to restate it, until they understood my point, even if they ultimately disagreed with it. They explained to me that bringing my own insights and research into the process, even if in disagreement with their prevailing views, was my job. So especially on cases related to constitutional law, and in the privacy of the judicial chambers, the disagreement was vigorous, intense, always respectful, but sometimes even loud.

28. Attorney R. Jess Brown and his family lived in the community I grew up in. I admired Brown and his family from a distance. For more on his life, see Associated Press, *Obituary, R. Jess Brown, 77, Civil Rights Lawyer In Mississippi Cases*, NEW YORK TIMES (Jan. 3, 1990), <https://www.nytimes.com/1990/01/03/obituaries/r-jess-brown-77-civil-rights-lawyer-in-mississippi-cases.html>. The other lawyer I felt as if I knew was Attorney (and later Justice) Thurgood Marshall. I thought of him as my father in the law. For more on his life, see Linda Greenhouse, *Thurgood Marshall, Civil Rights Hero, Dies at 84*, NEW YORK TIMES (Jan. 25, 1993), <https://www.nytimes.com/1993/01/25/us/thurgood-marshall-civil-rights-hero-dies-at-84.html>.
29. I was fortunate that a professor with whom I later worked on appellate matters, Attorney Luther Munford, introduced me to a state court judge who later became the only Black justice on the Mississippi Supreme Court, Fred L. Banks. For more about Banks's background, see MS Civil Rights Veterans, *Interview of Justice Fred L. Banks, Jr.* (May 26, 2006), [http://mscivilrightsveterans.com/uploads/3/5/1/2/35128753/judge\\_fred\\_banks.pdf](http://mscivilrightsveterans.com/uploads/3/5/1/2/35128753/judge_fred_banks.pdf) (last visited May 5, 2018).

I share my story to encourage you as professors to reflect on your own stories of inevitable disagreement in your practices or prior careers or educational experiences. Sometimes we forget the value in this inevitable disagreement. Trying to cover all the material in our courses, or teaching only the generally accepted rules, as quickly as possible without classroom discussion disruptions, can lead us to forget that we are preparing lawyers for life. We are not preparing humanlike law books that may take a bland, middle, legal approach without suggesting, crafting, or instigating disagreements to lead to better results. By considering your own story, I believe, you will see how inevitable disagreement helped you grow, and how it can do likewise for your students.

The next step, then, is to couple this value of inevitable disagreement with the value you have gained in collaborating professionally. Your students are entitled to the same, or even greater, value.

### **III. Step Two: Then Consider, In Addition to Your Experienced Value of Inevitable Disagreement, the Value You Experience Collaborating Professionally**

Collaborative work, along with working through the inevitable disagreement, leads to a better final product than an individual alone can construct. Again, I will start with my own story about collaborating, as I believe you should start with yours, too.

So while seeing that the value of inevitable disagreement goes back at least to my legal education, so does the value of doing collaborative work. In one course we worked in teams preparing our appellate briefs; hence, a difficult task was accomplished together. Even after our graduation, my appellate partner and I continued to collaborate on several successful projects.

In my externship and clerkships, while valuing working closely with my judges, the final written opinion belonged to the judge.<sup>30</sup> However, for a true collaborative product, the final product must belong to all the collaborators.

So the idea of more professional ownership in valuing collaborative efforts was daily seen in my appellate practice. We as attorney colleagues brainstormed, researched, argued and wrote, and edited appellate briefs together.<sup>31</sup> The final product then reflected multiple individual strengths and insights, as one person's ideas further polished those of the others.

30. And sometimes I was glad the opinion was the Court's and not my own, as in a few instances I disagreed vehemently with the result. I was much more liberal than the federal judges for whom I clerked, and my experiences were quite different from theirs as white men with privilege in the Deep South. I was the first and only Black law clerk of Chief Judge Charles Clark of the Fifth Circuit Court of Appeals (I clerked in his final year on the court before he retired). I also clerked for Senior Judge and former Chief Judge Paul H. Roney of the Eleventh Circuit Court of Appeals, who had previously worked with Black law clerks.
31. Many of the cases we worked on were decided based on the written briefs. This is often the case in federal appellate practice, with oral argument not generally the rule. See David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 199-221 (2012).

Of course, disagreement was limited to some extent. We were representing the same client, after all. Even in the practice, representing a common client and all having common economic interests, this collaborative work was not without sharp disagreement, as we clashed on strategies, arguments, and, at times, on ethical limitations and greater moral responsibility in shaping the law. Some of this collaborative work was spirited, but mostly with some respect with which we held each other's commitment and contributions. Through this process I learned that a team, even a diverse team with sharp disagreement, can produce a better work product than one person alone or the additive sum of the members—and frequently will have more fun!

After I left the practice to teach, I continued to be motivated by these experiences and developed collaborative assignments, especially with written products, for my students.<sup>32</sup> These collaborative approaches included inevitable conflict among my student groups in my constitutional law courses. Thinking back to my own experiences, and how I too hesitate to engage in certain conflicts, helps me—and will help you to help your students achieve, as you will more easily be able to see yourself in their shoes.

#### **IV. Step Three: Diligently Cultivate Empathy for Your Students Who Will Engage in Inevitable Disagreement While Collaborating**

While we want to challenge our students in their growth as future professionals, we do need to appreciate the challenges they will face in collaborating through inevitable disagreement. We will better appreciate their challenges, or have empathy for them, by seeing ourselves in them.<sup>33</sup> I learned that by having empathy for my students, by seeing myself in them, I could be more effective in helping them collaborate through these differences. Step three, then, relates to cultivating this empathy for the conflicts students will have when collaborating in subjects with inevitable disagreement. This empathy, coupled with our strong desire for them to succeed, will help us help them learn better.

As you cultivate this empathy, see yourself in them. Be honest and think about the conflicts you have when collaborating with your peers; think about the last faculty meeting or committee meeting on such an intense point as diversity on the law review or on the faculty. Then imagine students going through similar disagreements and also fearing the effect on their very important law school grades, which may affect their cumulative GPA, their chances to get on law review, on moot court teams, a judicial clerkship, or a permanent job offer before graduation.

Again, my personal story is important here in developing this empathy. I frequently collaborate and coauthor articles with academics from legal

32. Kupenda, *Risking Collaborative Learning*, in HESS ET AL., *supra* note 2, at 145.

33. For a general discussion on the value of empathy to our teaching, see Brianna Crowley & Barry Saide, *Building Empathy in Classrooms and Schools*, EDUCATION WEEK TEACHER (Jan. 20, 2016), <https://www.edweek.org/tm/articles/2016/01/20/building-empathy-in-classrooms-and-schools.html>.

education and from other disciplines. Our disagreements are inevitable—we disagree on legal principles. Especially on articles about race or gender, we disagree on tone—should we be conversational or formal, should we be more direct or tone our writing to possibly connect with a more moderate audience? We disagree even on mechanics, such as how soon before deadlines we must be finished. But I have learned that in most instances we can achieve a collaborative result.<sup>34</sup>

Considering your own inevitable conflicts in working collaboratively will help you in understanding better your students' struggles in collaborating with their peers on projects. When we have empathy for our students, we help shape the collaborative projects.

Cultivating this empathy can be reflected in the processes of shaping the collaborative projects.

**V. Step Four: Having Humbled Yourself with the Earlier Steps,  
Remember the Overriding Pedagogical Goal is to Help your  
Students Succeed Collaboratively, in Spite of their Inevitable  
and Strong Disagreements**

A key to collaborative learning in courses with inevitable disagreement is for the professor to maintain some flexibility and to remember to help students succeed, in spite of some students' desire to give up when they discover the sharp disagreements among themselves. Over the years, I have had several student groups come close to not succeeding. However, with some encouragement from me, in each instance the group has completed the project well, in spite of the inevitable disagreements.

At my school, students who take my constitutional law course generally take it in the fall semester of their second year. At that point they have spent a year with their classmates and have some friendly relationships after bonding through the 1L experience.

I allow them to select their own group members, with all of them signing an agreement that they will resolve conflicts among themselves.<sup>35</sup> In my

34. In one article collaboration, though, we wrote two different subparts on a concluding point, because of our disagreement. When we presented the paper at a law school forum, we purposefully took that disagreement into the presentation, and the audience enjoyed the friendly tension. My coauthor is more than twenty years younger than I. Interestingly, the people of my age and older in the audience agreed with my point, while the younger members of the audience tended to side with my coauthor's counterpoint. See Angela Mae Kupenda & Tiffany R. Paige, *Why Punished for Speaking President Obama's Name within the Schoolhouse Gates—And Can Educators Constitutionally Truth-en Marketplace of Ideas about Blacks?*, 35 T. MARSHALL L. REV. 57 (2009). In many other peer collaborations, while we had some inevitable disagreements, we ended with a collaborative result that allowed for a final result that we all could agree upon. Over the past twenty-four years, I have collaborated on at least fourteen articles with coauthors. Every collaboration is a rich experience with coauthors who are different, some in race, gender, age, religion, background, professional experience, discipline, and so on.

35. I know some professors assign group membership. Since collaborative work counts for more than forty percent of the grade, I allow students to make their own choices. I think this also

observation, many of the students have become casual friends as they have suppressed their individual differences and assumed that “good people” all think alike. So after selecting group members, they are often surprised, as the course develops, to see that they do not agree with their friends on issues like racial inequality, gender discrimination, abortion, privacy, presidential powers, mandated health insurance, the extent of Second Amendment rights, and so on.

I usually begin my con law course with individual rights and liberties to allow the students to see these differences early on. Specifically, I begin with the *Civil Rights Cases*,<sup>36</sup> in which the Court, soon after the Civil War, held as unconstitutional Congress’s attempt to outlaw private racial discrimination in such public places as restaurants, conveyances, etc. This topic leads to an extended discussion on the power of Congress to address private discriminatory conduct under the Equal Protection Clause or under the Thirteenth Amendment, examining just what is a badge and incident of slavery. Continuing with the dissenting opinion of the first Justice Harlan, who had a slave brother<sup>37</sup> and as a result likely had a more empathetic view about racial inequality, brings more tension and disagreement into the discussion.

As we cover the cases, students brief the cases and discuss the various opinions of the justices. As they learn to read the cases and determine the rules and principles, I ask them individually to consider which opinion they are more closely aligned with, and why. Similarly, I ask which of all the cases we covered

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teaches them about the traits to look for in choosing collaborators. They have learned that choosing classmates of the same gender, race, social sorority, and so on, is not always the best choice. See, e.g., Kupenda, *Risking Collaborative Learning*, in HESS ET AL., *supra* note 2, at 145. I also generally allow student groups from two to four members, and sometimes I allow five, depending on the class size. Some students think a larger group always means less work. Often students form groups of four in my fall con law course, then select in my spring First Amendment course groups of two or three. The group registration form provides:

We, the following students, have agreed to work together for our group components. We understand that we will all receive the same grade for each group component. We agree to work together diligently and to share the responsibilities as equally as possible.

We understand it is our responsibility to resolve any intragroup conflicts, except for those that raise the possible violation of policies and rules of the law school, the university, and other governing authorities.

We have been informed that a “disbanding” of a group has never occurred in this course, and we resolve to do our best to resolve any group conflicts.

We have selected group member \_\_\_\_\_ to be our group liaison, or chairperson, or leader. We understand that the professor will communicate through this person for any needed out-of-class group communication. Following are our signatures and the liaison’s contact information.

36. 109 U.S. 3 (1883).

37. See Gilbert King, *The Great Dissenter and His Half-Brother*, SMITHSONIAN.COM (Dec. 20, 2011), <https://www.smithsonianmag.com/history/the-great-dissenter-and-his-half-brother-10214325/>.

so far they agree with most or disagree with most. Many students initially hesitate to discuss their disagreement with the Court,<sup>38</sup> with their classmate or friend sitting next to them,<sup>39</sup> and with their own views that perhaps they articulated a week earlier. However, these early discussions help students as they learn what the Court ruled, versus whether they inevitably disagree with what the Court ruled.

Even more importantly, in these class discussions students begin to look at each other with more open eyes and acknowledge the inevitable disagreements between them and the differences in their worldviews and experiences. I try to encourage them to wait on selecting group members until they have a more knowing view of each other.<sup>40</sup> But sometimes their awareness comes only after they have committed to one another.

Of course, diverse experiences and views will lead to better collaborative products, and better learning experiences. Still, disagreement among them is inevitable given these topics. So while I state in the group registration form they agree to and sign that they must work out all disagreements, I take a more empathetic approach in line with the goal of the collaborative exercise: that they all complete the collaborative learning experience well and grow through the inevitable disagreement.

Before I more fully understood this predicament, I addressed these issues on a more ad hoc basis. For group members having differences of opinion on legal questions, I tried to get them to see the value of differences and those they could address both sides of the issue. For students having leadership issues in their view resting on cultural differences, I tried to help them grow as leaders or as followers. Though I have never disbanded a group, several times I had to intervene in group meetings to provide more direct engagement, and to remind the group that if they did not finish the exercise I could serve a “show cause” order on them in class.

38. Some students even fear publicly discussing race, as they do not want to offend their classmates. Some semesters we pause and together repeat out loud: White, Black, Caucasian, African American, Race and so on. I always think that with like friends, they use these (and other) words privately. So, my goal is to teach them how to publicly state these words and engage in mixed company on topics with inevitable disagreement.
39. For most students, this person may be “standing” right beside them. Unless students are excused from standing by the Office of Student Services, I require students to stand when I call on them to participate, and I stand throughout the class. I think standing helps them to own what arguments they are making and to grow in confidence to discuss the law and critique the law. In addition, on day one I give the students a copy of my “Greensheet of Professionalism,” which covers the goals of the course and respectful disagreement in the course.
40. Another benefit of these class discussions is that students get to see that classmates of the same gender, race, economic background, etc., do not necessarily think alike. My con law class is predominantly white. So, for example, on the days that the Black students have an intense disagreement on cases, it is a point of great cross-cultural learning and awakening for the white students.

As time went on, though, I understood that I needed a more formal process, and preliminary exercises, to help them learn to work together through their inevitable disagreements, especially as my collaborative final exams now have a gag rule once the final collaborative exam assignment is formally distributed in class.<sup>41</sup>

### **VI. Step Five: Construct In-Class Exercises to Help Groups Engage with One Another To Manage their Inevitable Disagreements about Con Law**

In addition to the class participation process that allows students to engage with one another in inevitable disagreement as a steppingstone to the final collaborative product, I ultimately additionally constructed a number of in-class games to help group members collaboratively work together and work through disagreement.

One set of games involved a class review session competition among groups, with several groups serving, along with me, as judges. This helped with team-building. Another in-class game involved groups making impromptu presentations or PowerPoint presentations or infomercials of cases. I had group panels present arguments, with my assigning one side of the issue or another. This helped them to work under time pressures and to address disagreement on principles quickly.

In one exercise, during class groups drafted an exam hypothetical involving issues we had covered in class, created a scoring rubric and then constructed a detailed outline of an essay answer that addressed the various sides or positions. This exercise was designed to help students see the value in disagreement on case applications. Students seem to always enjoy an exercise I constructed called “the grass is not always greener on the other side.” In this exercise, each group is paired with another group to complete an assignment; they see that other groups have disagreement and tension, too.

I also developed a group formal case presentation as a part of the course requirements. The presentation is a warmup to the final collaborative examination. For this presentation, using a lottery system for case preferences, groups present in class more recent con law cases. The formal case presentation allows for agreement and disagreement, with emphasis on the disagreement. Respectful disagreement evident in the group’s discussion makes for excellent and interesting presentations, especially as classmates can see that students who

41. In the course syllabus, students receive advance notice of the “gag rule” that will apply during the two-to-three-week period in which students work on the collaborative final examination. Essentially the rule provides:

Until grades are assigned: Do not discuss with professor (by any means: in person, phone, e-mail, etc.), except for in formally designated class meetings for questions (please see syllabus). Other than with the law students in your signed-up group, do not discuss with or share work with any other law students, former law students, law graduates, lawyers, judges, law professors, law school directors or administrators or staff, paralegals, or anyone with any legal training, or any professor or instructor or administrator or staff of any college, university, or law school.

are generally very good friends have such different views on some of the case opinions. For example, in the presentation while I ask for the group's position on whether the majority opinion was correct, the presentation allows too for dissenting views. The goal is to help group members see that disagreement is not fatal to group success, but can fuel group success. I usually reserve for these presentations some of the recent con law cases in which the students are more in tune with their disagreements on the issues.<sup>42</sup>

Students especially enjoy these, and they enjoy seeing classmates who are friends have sharp disagreements over the law. For example, one semester a group had a very good understanding of the abortion case they would present. Their disagreement was focused on the materials to use in the presentation. Conservative members wanted to use pictures of the abortion process that the pro-choice members of the group found very prejudicial and inflammatory. These groups debated the presentation for weeks in meetings and by e-mail, but were able to reach a compromise before their presentation without any major intervention on my part.

42. The general instructions from the syllabus provide:

Group Class Case Presentation

Each group will present a recent case, or cases, in class. While the entire class will have a reading assignment from the casebook, groups are expected to read the ENTIRE OPINION(s) of the case(s) (using library reporters, Westlaw, etc.). Every group member is expected to have a major role in the presentation. Time for answering questions from the professor and class at the end of the presentation should also be allotted. Group presentations and the group handout distributed in class immediately before the presentation (two sheets of paper maximum) should include the following:

- Names of all group members and brief description of each member's work contribution
- Case citation and brief procedural history
- The "Appetizer" (which explains the issue and tells the facts of the case)
- The "Soup/Salad" (which explains related cases that we have discussed and the relevant constitutional provisions)
- The "Main Course" (the majority or plurality opinion)
- The "alternative Main Course" (the concurring and dissenting opinions)
- The "Coffee and Dessert" (commentary on the case, whether group agrees with holding, issues of morality and ethics, implications for communities and country, etc.)
- The "Packing up Leftovers" (the takeaway of the case)
- "After-Dinner Mints" (the presentation should include evidence of additional research, outside the full case opinion, especially that demonstrates lingering issues or open questions or debates even after the case was decided)

Each group should have sufficient copies of the handout for every student in the class and for the professor (ask the professor for this count later in the semester).

Please, do NOT "read" your presentations to the class. If you plan to use any PowerPoint, videos, tapes, or other technology in the presentation, you are responsible for making arrangements to gain access to any necessary equipment. In the unfortunate event of technological difficulties at the time of the presentation, you are expected to be prepared to present, and to present without the use of the technology. In the unfortunate event that a group member(s) is (are) suddenly unable to be present for the presentation, the group is still expected to present. The presentations will cover provocative topics. So if you have concerns about whether any portion of the planned presentation is potentially problematic or unprofessional, please consult with the professor far in advance of the presentation.

More information on presentations, dates, and time limits will follow.

In the final exam collaborative exercise, I employ a gag rule to distance myself from group dynamics in the final group exercise. With the collaborative group case presentation, however, I work more closely with groups having difficulty collaborating through inevitable disagreement.

### **VII. Step Six: Try to Shape the Final Collaborative Project in a Way that Allows for Disagreement, and Allow Student Input into the Processes**

Pre-tenure, I was hesitant to assign students collaborative work for a grade, although I collaborated with student coauthors myself on articles.<sup>43</sup> While I had incorporated a few group exercises in my classes, I had never given a collaborative examination in any course, and certainly not in a course with inevitable disagreement.

Post-tenure I went away to visit at several different law schools. At Boston College Law School in the fall of 2000, I realized deep into the semester that a collaborative exam would have been perfect for my civil rights (Section 1983) class. My students agreed, in part, while pointing out that unfortunately I had not indicated such in the syllabus. Still, we spent a class meeting brainstorming (and much time, with individual students, in my office during office hours continuing our brainstorming) as we considered how I could set up a collaborative exam in a future course, and I thought about the concerns students might have about such a process and how I could address those concerns.

My Boston College students were quite fascinated with the idea of a collaborative final in a class with much disagreement on the issues. They certainly impressed upon me that if I wanted to assign collaborative work in courses with so much disagreement, like civil rights or constitutional law, I would have to have much empathy through the process.

The following spring semester, in 2001, I taught more than a hundred students in the constitutional law class at what was then Franklin Pierce (now named the University of New Hampshire School of Law). This large podium class became my first such class to take a final collaborative exam.<sup>44</sup> Since then, in most semesters a significant portion<sup>45</sup> of the final grade in my large courses is based on a collaborative group take-home examination.<sup>46</sup>

43. See Angela Mae Kupenda, *On the Receiving End of Influence: Helping Craft the Scholarship of My Students and How Their Work Influences Me*, JOTWELL (2014), <http://jotwell.com/wp-content/uploads/2014/07/KupendaPersonal-essay-on-influence.pdf>.

44. See Kupenda, *Risking Collaborative Learning*, in HESS ET AL., *supra* note 1, at 145.

45. The final semester grade is often based on a combination of both individual and group work, usually including several of the following: properly documented individual class participation (documented by the students through weekly business letters); group formal case presentations; other in-class group exercises; individual multiple-choice examinations; and final examinations consisting of group collaborative take-home essays and other group collaborative take-home projects.

46. Generally, groups have two to three weeks to complete the collaborative take-home exam. Class meetings are used only as question sessions or as designated sessions to meet with

Usually for the collaborative take-home examination I provide a two-page typical fact hypothetical for students to address all related issues. I try to explain how disagreement is beneficial in structuring the IRAC or CREAC response.

Occasionally the final requires something other than an essay memorandum. In one take-home collaborative examination, each group created its own fact hypothetical, designed a grading rubric, took the exam individually, graded one another, and evaluated the process. I based this exam on an exercise I had created for another student who had had difficulty in passing another professor's course.<sup>47</sup> I had hinted at this different structure during the semester,

their groups, as they know that each member is available during these times. So the only assignment they have during this time is to work with their groups. Specific instructions vary.

Following, though, are general instructions:

#### TAKE-HOME GROUP COLLABORATIVE ESSAY EXAM

Instructions:

1. Each group should prepare one memo addressing all of the constitutional law issues in the fact pattern on the next two pages.
2. When the group submits the memo, place no group identifying information EXCEPT, on a cover page, the group's confidential exam number obtained from the Dean's office, the name of the course, the date, and this statement: "All members of this group understand and agree that all group members in this group will receive the same points for this exam." In addition to a cover page, include a table of contents.
3. No outside research is required.
  - Properly cite to materials from your course book and supplement. If you are citing to a case, for example, use the case name in italics followed by a comma and the page number where you obtained the information from, for example, *Smith v. U.S.*, 100. If the case is from the supplement, state, for example, *Smith v. U.S.*, 100 supp.
  - If you cite to the casebook or supplement, not for a case but for other materials, state, for example, *Casebook*, 100 or *Supplement*, 105.
4. Although no outside research is required, outside research is allowed.
  - If you cite to any sources outside the casebook or supplement, use the citation form from the Bluebook or ALWD. AND FOR ALL MATERIALS CITED OTHER THAN THE CASEBOOK AND SUPPLEMENT, attach a copy of the pages used from the materials as an appendix to your group's memo. This includes other cases covered in class and any handouts used from the class.
5. Place citations within the text of the memo.
6. The honor policy applies, of course. Furthermore, you should not seek or obtain the assistance of anyone from outside your group. The only exception is that you may seek assistance from the professor in the open-class question sessions held.
7. The memo should be well-prepared (check spelling, punctuation, etc.), typed, double-spaced, and in an appropriate twelve-point font; it should have one-inch margins on all sides, pages numbered, and with appropriate headings. It should be stapled or appropriately bound, and well-organized.
8. The printed memo should be no longer than thirty pages (not counting the cover page, table of contents, and any appendix with copies of any additional sources used). [then the specific fact pattern or other assignment follows]

47. I followed, to some degree, the steps from an exercise I had created for an individual student. See Angela Mae Kupenda, *Doing the Hokey Pokey: Essay and Rubric Drafting as a Key to Student Success*, THE LAW TEACHER 4-6 (Spring 2017), <http://lawteaching.org/wp-content/uploads/2016/06/lawteacher2017spring.pdf>.

as groups had completed shorter versions of this process in in-class exercises. This structure allowed students to collaborate on the structure and the grading on the exam, but to additionally illustrate their individual ability to their team members.

In a take-home collaborative examination from constitutional law, each group created a case-annotated constitution, with cross-references, and using only the cases we had covered from the casebook and a few others I had emphasized. This structure had been hinted at during the semester, with groups having an opportunity to work together on a similar process. Requiring cross-references helped them to appreciate different insights on the connectivity of cases and constitutional provisions. Also, it gave them a work product to have as they prepare later for the Bar exam.

Recently in my First Amendment course, the groups collaboratively answered a forty-question multiple-choice exam, giving short explanations with case citations of answer options and why they were correct or incorrect. Earlier in the semester, groups had worked together to create multiple-choice questions, answer options, and explanations. Part of the exam also had groups select a limited number of questions from other groups (that had been shared during the course) and tweak them to make them better.

I try to afford an opportunity for the group response to benefit from the inevitable disagreement. While the group is preparing the response over usually a two-week period, we meet during class times for me to openly take questions on both substance and process. This is a time when some group disagreement can be addressed, as long as it is done so openly in the class. Also, groups work to consider how to frame their questions to avoid giving too many clues to other groups.

Even when students try to avoid it, they learn the value of inevitable disagreement. Once a group of white males came to me after the exam to explain that they had purposefully selected a group with all white males to avoid racial and gender dynamics. They explained that was the worst decision they could have made, as their group still had disagreement but also lacked the diverse viewpoints needed.<sup>48</sup>

### **VIII. Conclusion in Step 7: Be a Model of Collaboration and Empathy During Inevitable Disagreement for Your Students and for Your Colleagues.**

We have greater empathy for those we see as like ourselves. So when we see our students as professionals like ourselves, facing inevitable disagreements in our work and seeking ways to work collaboratively with others, we will have more empathy for the law students and better assure that they have a good

48. See Kupenda, *Risking Collaborative Learning*, in HESS ET AL., *supra* note 1, at 145.

learning process. For students to learn and grow is our goal. So spreading the idea of collaboration through inevitable agreement will make us more effective in our own classes.<sup>49</sup>

Throughout this process, be willing to share with your students your successes and failures at collaborative processes, especially those with inevitable disagreement. I share with students my own struggles with collaborating on writing articles and working on faculty committees. My students find my adventures humorous and wonder why I still tout collaborating with inevitable disagreement as a great thing. I always take them back to the appellate practice of writing collaboratively with others and shaping a result that is greater than our individual parts, even in the midst of inevitable disagreement.

49. I encourage my colleagues to fashion exercises for their classes too. For example, I met with one professor about collaborative work in his law office management course. In the course, he administers personality tests to the students to help them better understand themselves. We constructed an exercise in which students could share those results with their team members and develop strategies for working better together based on the different personality types and relational styles. Perhaps one day he will write an article too about his experiences.