The Voice

Volume 67
Issue 3 *Spring/Summer 2022*

Article 15

Digging Deeper into Constitutional Law

Sarah Moss
Dordt University, sarah.moss@dordt.edu

JAMIN VER VELDE ('99)

Donald Roth received his Juris Doctor degree and a Master of Laws degree from Georgetown University Law Center in Washington, D.C.

DIGGING DEEPER INTO CONSTITUTIONAL LAW

After teaching Constitutional Law for a couple semesters, Professor Donald Roth wasn't satisfied. The class was structured as a survey-oriented course, meaning that the course hit the highlights but didn't go into much depth.

"What I've learned as a teacher is that it's better to do more with less," says Roth ('07), who serves as associate professor of criminal justice and business administration. "Selective depth seems to serve better than comprehensive breadth. Just because I've said the term 'dormant commerce clause' to someone, doesn't mean they're going to remember what it means a year from now."

He also knew from his experience studying at Georgetown Law that, in law school, Constitutional Law is covered in at least two or three courses–not a single course.

So, what did he see as the best way to help students gain a strong understanding of the American Constitution as interpreted by the Supreme Court and of the structural workings of the U.S. government? For the first half of the semester, Roth provides an overview of the Constitution and the role of the U.S. government. In the second half, the class is transformed into a mock court, where students are randomly assigned one of three roles and debate seven cases on the Supreme Court docket.

Students are assigned to either be petitioners, respondents, or adjudicators. Petitioners are those who petition the Supreme Court to review a case, and respondents are those who won the most recent appeal; both must come to the proceeding with written and verbal arguments, and they must be ready to respond to questions and comments on the spot. The adjudicators preside over

the argument, and they must write an opinion document explaining whether they rule in favor of the respondents or petitioners, based on the argument at hand.

"This class will be one of the most challenging courses you take at Dordt," Roth writes in the course syllabus. In many ways, it is—and not just because students need to be ready to debate. The issues the Supreme Court tackles are complex and nuanced, and the October 2021 term is particularly newsworthy.

"This term has been one of the most significant Supreme Court terms in a generation," says Roth. "There are potentially major cases on abortion, Second Amendment rights, free exercise of religion, administrative law, vaccine mandates, and Affirmative Action."

AN INSIDE LOOK AT CONSTITUTIONAL LAW

Roth sits at the front of the classroom alongside three students, who serve as adjudicators. Across from them are two student groups: one pair acts as petitioners and the other as respondents. The students have been assigned these roles—regardless of their personal stance on a particular issue.

Today's topic: *Students for Fair Admissions v. Harvard*.

"Alright, we are ready to go," says Roth.

Logan Fanning clears his throat and looks around the room. "Well, good morning to everyone in the courtroom," he says. "We are the petitioners, and our question is, does Harvard University's admissions process violate Title VI of the Civil Rights Act of 1964? And, more broadly, what is the role of affirmative action, and should the court rework the framework it uses to consider the use of these programs?"

Daniel Moe, a fellow petitioner, steps in. "There are several rules to this case, including from *Grutter v. Bollinger* and then as well from *Regents of the University of California v. Bakke*. And these roles have established that these race-conscious admissions policies are highly suspect but acceptable if they survive strict scrutiny. Under strict scrutiny, the policies must be narrowly tailored for compelling interest. In the case of race-conscious admissions policies, the only purpose allowed stemming from those cases is achieving a diverse student body. Any other aim has been struck down as unconstitutional."

For the next 10 minutes, Moe explains the petitioners' points by asking and answering several questions: are Harvard's admissions policies adequately narrowly tailored? Are Harvard's admissions policies limited in nature? Has Harvard made a good faith consideration of possible race neutral options?

All the while, Nate Monillas and Trey Engen—the respondents—listen closely. They take notes and periodically whisper to one another.

"In closing," says Fanning, "Harvard's race-conscious admissions policies are not narrowly tailored. Instead, they quite obviously unduly burden Asian-American applicants. Additionally, Harvard's policies are not limited in nature but instead threaten a permanent system of discrimination that perpetuates racism in the name of diversity. Finally, Harvard has not demonstrated the adequate consideration of race-neutral alternatives and has thus failed to bear the burden of proof that the race-conscious policies are exclusively necessary. Therefore, for the precedent of the court to hold any bearing, Harvard's policies must be invalidated, and we encourage the adjudicators to sign with the petitioners."

There's a long pause. Engen glances over at Moe and Fanning with a smile. "I just heard a bunch of mumbling," he teases.

"Objection!" laughs Fanning.

"That was our entire response to the petitioners," jokes Engen. "We're done."

All the students chuckle. Roth smirks as he looks at Monillas and Engen. "Well, we're ready to hear from the respondents."

Engen glances at his notes. "There are two questions at play in this case: should the Supreme Court overturn the precedent established by *Grutter* and *Bakke* and to interpret Title VI of the Civil Rights Act to make the use of race as a factor in admissions unconstitutional? Secondly, the court is being asked to decide whether the district court and the court of appeals erred in their heavily researched conclusions which found that Harvard does not engage in racial balancing, does not overemphasize race in admissions proceedings, or discriminate against Asian-American applicants."

Engen explains the respondents' argument: how Harvard's admissions policies *are* adequately narrowly tailored, are limited in nature, and have

SARAH MOSS ('10)

Criminal justice and political science majors are required to take Constitutional Law.

considered race-neutral options.

"In a 7 to 1 ruling in *Fisher v. University of Texas*, it was decided that it is permissible to consider race in undergraduate admissions decisions," adds Monillas. "Each case must be reviewed under a standard of strict scrutiny. To meet strict scrutiny requirements, they must show that their consideration of race in the admissions process meets a comparing governmental interest and is narrowly tailored to fit that interest." He and Engen go on to argue that Harvard's process fits the standards set by the Supreme Court and that Harvard's admissions policies are fair.

"Upon these reasons, we request the petition be denied," concludes Engen.

"Petitioners would like to clarify a statement by respondents that we are seeking to overturn precedent, which is not true," says Moe. "We are arguing *under* the existing precedent that the law is invalid."

"Duly noted," says Roth.

Now it is time for questions from the bench. Roth poses a few questions before Lexi Schnaser asks about character admissions scores; Harvard scores applicants on academic, extracurricular, athletic, personal, and overall, and analyses indicate that Asian-Americans are given lower personal scores than any racial group. "With the character admission scores, what does that look like?" asks Schnaser. "Is that the sticking point for Asian-American applicants—is there a way for that to be altered so we don't have to alter the whole standard for Harvard, if that's a barrier?"

The respondents and petitioners look at one another.

"It's okay if you're not familiar with the specifics of this," says Roth.

"Harvard has created a very thorough process," begins Engen, "where these interests are balanced extremely well—"

"I thought you weren't balancing," interjects Moe.

"No, we balance all the interests of certain individuals," says Engen.

"But not racial interests?"

"We go through the process to get a holistic view of the person, and however that lands, that lands, and we're doing that thoroughly," says Engen.

"Do you see a problem with consistently, extraordinarily poor rankings for Asian-American students in their personality rankings, year over year, compared to every other race?" asks Moe.

"We have a great system. We are analyzing these from a holistic view. We feel that our process is neutral, and it's been proven to be neutral by the Department of Education," says Engen.

The conversation vacillates from admissions qualifications to quotas to the percentage of Asian-Americans within the Harvard student body. Soon, it is 10:50 a.m.—the end of the class period.

"Alright, we are at time now, where it will be upon the adjudicators to determine what they think should happen in this particular case," says Roth.

Later, Roth sends the *Students for Fair Admissions v. Harvard* opinion—a two-page document that Schnaser writes—out to the class.

"The question before us in this case is to determine if Harvard's admissions process violates Title VI of the Civil Rights Act of 1964, the role of affirmative action, and if the court should rework the framework it uses to consider the use of these programs in higher education," writes Schnaser.

She summarizes the proceedings and explains that "Harvard's admissions policies, as they stand, are not perfect. It is likely that no higher education institution's race-conscious policies are perfect."

She and her fellow adjudicators decide that they will rule in favor of Harvard but request an independent investigation of Harvard's admissions policies, "with special emphasis on the personal rating standards, and the development of plans to phase out the race-conscious policies."

SUMMER SCHOOL

Every summer once the Supreme Court opinions have been revealed, Roth takes time to write an In All Things article and give a Summer Seminar Series presentation to Dordt employees and students about what he makes of the cases. It helps him to keep abreast of what the Supreme Court is up to, which benefits the Constitutional Law class. To read Roth's latest thoughts on the Supreme Court opinions, visit inallthings.org.

SARAH MOSS ('10)

"Christians should be involved in politics and government," says Lexi Schnaser. "It's important for us to look at the Supreme Court opinions because these issues affect us all in some way."

READING, INTERPRETING, AND ANALYZING

It's clear that, to best prepare for the debates, Constitutional Law students must spend hours conducting research. Not only do the petitioners need to write a persuasive argument, but the respondents need to listen well so that they can respond adequately to the petitioners' arguments, and the adjudicators need to take in the entire proceeding well enough that they can write up a clear, concise opinion.

JAMIN VER VELDE ('99)

Donald Roth has developed the Master of Public Administration program, co-led Kuyper Honors Program, chaired the Criminal Justice Department, and more.

It's a lot of work, but Moe enjoys it. "I'm very interested in the institutions of our government and their history and traditions," he says. "That interest especially grew when I interned for U.S Senator John Thune of South Dakota for a summer."

In Constitutional Law, Moe and his classmates read through caselaw rather than a traditional textbook, which is something Moe appreciates about the course.

"It is a more unique way of learning content that requires you to carefully read, interpret, and analyze the text to find answers, and it challenges you to then apply the rules and conclusions of the text to other possible scenarios," he says.

Criminal justice and political science majors are required to take Constitutional Law. Since both programs are rather small, the students know each other well, which can make the debates less intimidating, says Engen.

"I'm willing to admit if I agree with their point more than I agree with mine because I can look at the respondents and say, that's just my friend Dan. It's not a matter of pride; it's debate and fleshing out ideas. It's fun. I enjoy it," he says.

Moe also enjoys the debates. "I very much enjoy having the opportunity to put myself in the shoes of a Supreme Court justice by looking back at decades of past law and precedent, and then applying it to contemporary cases that are a part of the court's current session," he says. "It also gives us the opportunity to formulate our own arguments and conclusions to contemporary legal challenges."

Schnaser is glad that she and her fellow students were able to pick the cases they could debate. At the beginning of the semester, Roth asked the students to choose seven of 10 cases from the latest Supreme Court docket. This year, students chose to discuss such cases as *NFIB v. OSHA* (application for stay of vaccine mandate rule), *U.S. v. Zubaydah* (whether the 9th circuit erred in making its own evaluation of the national security interests at issue in a suit against the CIA over its alleged clandestine

activities), and *Carson v. Makin* (whether a state can constitutionally prohibit voucher-style student aid from being used to attend schools that provide religious or "sectarian" instruction).

This term, the Supreme Court also reviewed *Dobbs v. Jackson Women's Health Organization*, which considered whether all pre-viability prohibitions on elective abortions are unconstitutional. Schnaser and Engen both found it especially interesting to discuss and debate this issue.

"Abortion is a really big topic that gets talked about a lot in Christian circles, so to be able to take a look at the case and see what the Supreme Court says and gain an understanding of why they made this decision was helpful. It's interesting to see how the Supreme Court lays out the topic from a constitutional and political perspective," Schnaser says.

"Looking at viability standards and constitutionality of the current law—abortion is very much a current topic, so it was interesting to adjudicate that on a small scale and get to know the intricacies of what's happening, to understand the debate that's happening at the Supreme Court level," adds Engen.

Roth assigns out the arguments, so students don't get a chance to "pick a side," which is a good thing, says Schnaser.

"You might be assigned an argument that you don't believe—maybe if you had chosen, you would have argued on the other side," she explains. "That's a good goal of the class; as you're forming an argument you might not agree with, you learn more about it, and maybe you'll see a different perspective than you would have if you'd just argued the perspective you already believed."

Being the respondent has been a nice challenge, adds Schnaser. "Not only do you need to prepare your own argument, but you need to have extra information in case because you don't know what points the petitioner will make. You can guess, but you're still flying by the seat of your pants a little bit."

Preparing for the debates has helped Moe to see that most contemporary political issues are not as black and white as the news or social media may portray them. "These issues are often quite nuanced, and the competing views often originate from fundamentally different worldviews and philosophies," says Moe.

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>
> **— Lexi Schnaser**

"Thus, it's only by putting oneself in the other's shoes that you can quickly start to see a more holistic view of these challenges and the numerous avenues for approaching them."

This fall, Moe will go to medical school at the University of Iowa. He's deeply passionate about public policy—particularly healthcare policy.

"I want to extend my patient care as a future physician into the policy arena to promote meaningful impacts for far more patients than I could ever reach directly in the clinic or hospital alone," he says. "I trust this class will prepare me for future work in healthcare policy by equipping me to participate in legislative forums and effectively inform laws and policies that have the intended benefits for patients."

Engen, a junior, plans to attend law school when he graduates. Last summer, he interned with U.S. Representative Randy Feenstra of Iowa; the internship affirmed that he should go to law school, and the Constitutional Law class has shown him what topics he's most interested in studying. "I'm more interested in criminal law, where I can advocate for an individual than systematic change," he says.

After spending the fall semester at Oxford University, Schnaser will graduate in December. She isn't planning to go to law school; at an internship with the non-partisan policy think tank Center for Public Justice in Washington, D.C., she realized she would rather do work in the non-profit sector for now. Still, she's grateful for the opportunity to take Constitutional Law.

"It's been a different kind of reading,

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"I am thankful to Professor Roth for all the thoughtful work he has put into designing and teaching this unique course," says Daniel Moe.

studying, and analyzing than I've ever done before. You can name important cases, but to read them and gain an understanding of what they include to formulate your own arguments is eye-opening."

WHY IS THIS SUPREME COURT TERM SO SIGNIFICANT?

Second Amendment, vaccine mandates, state secrets, Affirmative Action, abortion: these are hard-hitting issues.

"They are society-defining issues that are locked into our contemporary moment," says Roth.

How is it that so many hot-button issues were discussed this Supreme Court term?

"It's because of actions of history, interests of judges, and the work of advocates that's welling up in both directions," explains Roth.

As Chief Justice of the United States, Justice John Roberts is in charge of "looking out for the reputation of the court and, as he sees it, not take on too much too fast." The Supreme Court doesn't have power beyond their reputation.

"While Congress has the 'power of the purse,' and the President has the 'power of the sword,' the Supreme Court is given no inherent authority by the Constitution," explains Roth. "Their power to be the last word on constitutional interpretation is self-appointed and dependent on everyone else respecting them."

So Justice Roberts's approach has been to maintain a moderated rhythm when selecting from the thousands of appeals they receive each year.

"To hear a case, all you need from the Supreme Court is four justices saying they want to hear the case," says Roth. "With Justice Amy Coney Barrett being appointed, things have changed. Whereas Justice Roberts was once more in the swing vote, there are now enough justices who can say, 'It's time to pick up this issue,' and Justice Roberts doesn't really have control of whether or not that particular issue makes it on the docket."

It's not just the Supreme Court that makes these decisions. There are advocacy groups that are, as Roth says, "trying to find vehicles that will take an issue all the way to the Supreme Court."

LEAH HERMAN

Trey Engen spent a summer interning for Randy Feenstra ('91), who serves Iowa's Fourth Congressional District in the U.S. House of Representatives.

"There are, for example, people and states saying, 'We want to challenge *Roe v. Wade*. Is there a makeup in the Supreme Court that will make it worthwhile to challenge *Roe v. Wade*?' And as soon as they think that's the case, there are heartbeat bills ready to challenge it."

And, as was seen in late June when the Supreme Court's ruling on *Dobbs v. Jackson Women's Health Organization* determined that the Constitution does not confer a right to abortion and *Roe v. Wade* was overturned, the makeup in the Supreme Court favored those pro-life advocacy groups.

The leak involving a ruling about *Dobbs v. Jackson Women's Health Organization* was big news earlier this spring. Roth says leaks are not unprecedented, but they're extremely rare. In fact, the original *Roe v. Wade* decision was leaked to the press as a final draft.

"Someone trying to bring in external pressures to affect the deliberations is a violation of trust that's concerning, and when you have people who are as ideologically different as some of the justices are—there can be camaraderie and mutual respect, but that takes trust. And if that trust is broken, then all you have is people who wildly disagree with each other."

It's part of the reason why the Supreme Court has been resistant to having even a C-SPAN camera setup in their court room.

"It's not grandstanding or playing to the cheap seats. The real deliberative work that happens is behind closed doors. When people want to think out loud and air ideas that they aren't even sure they agree with yet, you need to have some trust to do that well—to be genuinely open to compromise, and not to have something used against you prematurely."

And what of the attempted assassination of Justice Brett Kavanaugh in June?

"If a Supreme Court justice had been assassinated, which has never happened before, especially in this context, where an opinion was also leaked, America would not be unmade the next day, but we'd be going into a dark period. Things would be up in the air even more than they are now, but in a different way."

The leak and the attempted assassination, Roth says, are signs of the questionable health of the republic right now.

"The Supreme Court can be a mirror of society," adds Roth. "When it feels like society is under pressure and polarized, and there seems to be change in the air in some ways, then it can boil up in the Supreme Court as well."

With this year's bombshell cases, how should Christians react or respond to the Supreme Court decisions?

"We tend to push to extremes," he says. "It's either liberation from long oppression or it's the iron fist of the government closing down around you. For example, the *Dobbs* decision has been cast in life-or-death terms, because it literally deals with life or death."

Rarely is a Supreme Court decision going to unmake the world, says Roth. The big case is never the last word.

"You can't disengage. Whether you win or lose, it's never the end of the story, and you can't disengage. There's still work to be done," says Roth.

SARAH MOSS ('10)