

TODD RAKOFF: If you have a classroom where you only are considering what judges have written, you're never putting students in the position of thinking about the choices that judges or litigants had to make. One way to get students back earlier in the process is to put them in that process in a problem.

If the courts say, well, the agency gets to choose, then the agency gets to chose. But that doesn't mean the agency just picks it out of a hat. The agency has to think about it. And that's what I want you to do. All right?

So this problem put you in the role of being counsel to an agency-- general counsel to an agency-- trying to think about what you're going to do in the circumstances described. So discuss this with your neighbor, and then we'll get back together as a class.

Now I like to have students talk to their neighbors first before talking with the whole class about a problem like that. It gets everybody's mind thinking. It gets everybody in the class participating, and trying to be active.

That's a tremendous amount of education going on and students are getting from each other. And it is a way that you can bring the benefits of participating in class to people who are shy or otherwise don't participate very much in class. They spent 15 or 20 minutes actively participating, even though only two other people heard what they had to say.

TODD RAKOFF: I think the goal of the smaller group break outs is to encourage people to really talk through and engage with the material, even if they don't necessarily participate in the larger class discussion. I think it encourages us to kind of voice our thoughts to our classmates. And it's on a smaller scale that's not as intimidating.

SPEAKER 1: I think I agree that it's morally not right to have adjudication as opposed to a rule making process. I'm not entirely sure that there's a legal basis that it could be found illegal.

SPEAKER 2: I think for me it's not so much the moral issue. I think by focusing on the reliance it's seen that way.

TODD RAKOFF: I like best if I can then follow that up with a broad, general discussion where I can give some guidance as to the range of things that you ought to have thought about, and maybe the range

of some counter considerations you might not have thought of, even if you were thinking about basically the right trend.

Because I think otherwise to just have students discuss it, and then stop is not nothing, but it's not the full value of what you can get from it.

KATE FISCH: I think the small group discussions do change the energy in the class. We're really able to kind of get excited about sharing our ideas, learning our classmates' ideas and talking through them before we meet as a larger group to kind of have a debate. And I think it's livelier because of that.

TODD RAKOFF: All right, so that's have our discussion, and then I'll ask you to vote. So you can have the benefit of the discussion before you decide which way you want to go.

DAWSON: So when I was thinking about this, I first thought that-- hey, it sounds unfair to make this rule that's going to apply to everyone if we only hear from one company. We should get all these points of view out so we can have all the information. But then I realized we do this every day in our system. Because we have a common law system, judges make decisions all the time for one person that then apply to everyone else-- rules that are binding on other people.

TODD RAKOFF: Amber?

AMBER: So I think what Dawson said is true in the judicial context, but we have three different branches of government with three different-- very different-- processes for a reason. And here in an agency context when we're talking about the executive branch operating with powers that have been granted by the legislature, I don't think it makes sense to pick what works in our common law system and try to apply that here.

KATE FISCH: At the beginning of the year, Professor Rakoff told us that we might learn more from our classmates than we do from our professors, and I've really found that to be true in his classes.