

Judicial Review in an Age of Moral Pluralism Transcript

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Conversation Partner: Jude Egan (JE)

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Description: Transcript of a podcast of the discussion of the book, *Judicial Review in an Age of Moral Pluralism* between the author, Ron Den Otter of political science and Jude Egan of political science.

[Music]

Karen Lauritsen (Moderator): Welcome to the spring edition of Conversations with Cal Poly Authors, recorded on April 12, 2013 at the Robert E. Kennedy Library. Ron Den Otter is an associate professor in the Political Science Department at Cal Poly, San Luis Obispo. He wrote *Judicial Review in an Age of Moral Pluralism* which was published by Cambridge University Press in 2009. Ron sat down for a conversation with Jude Egan, who's also an associate professor in political science here at Cal Poly. The conversation started with Ron talking about his writing and publication process, and about how it was compounded by the pressures of tenure. Then, Jude joins in with insightful questions about the content of the book, including about how public opinion influences the Supreme Court.

[Music]

RDO: Well, I should begin by not only thanking Karen and the library and Cal Poly, but all of you for being here. It's truly nice to be able to not only talk about yourself, but talk about your book. In a way, a book is an extension of yourself, and who doesn't like to talk about himself or herself? But in all seriousness, I appreciate being invited. I don't take it for granted, especially if you become a really, really famous author, you're invited to so many places that you probably do take it for granted and you think of it as a chore, but I certainly don't feel that way. If I ever become really famous, then maybe I'll feel differently, you know, and I'll let you know. So the plan is I'm going to talk about the process of writing and the publication process, why I decided to write this book. And then in Jude's question and answer, I'm going to get into a little bit more of the substance of the book. And then you're going to have plenty of time to ask any questions that you would like to ask. So I believe that my book, *Judicial Review in an Age of Moral Pluralism*, is the most important book in the history of the world. If you didn't laugh, then I would have thought, they really do think I am that full of myself. I mean, even for an academic, saying something like that is probably beyond the pale. Well, of course, if people would actually read the book, then they might actually realize that it might be the most important book written in the history of the, in the history of the world. It's called *Judicial Review in an Age of Moral Pluralism*. And the cover here, I am not the most artistic person in the world and I really realize my limitations, so I was hesitant to make any recommendations about what to put on the cover. And I suggested it to my editor at Cambridge University Press. I don't know if you're familiar with this famous picture or not, but this is after Brown versus the Board of Education,

with this little girl in front of a Texas public school, you know, we believe, in the Supreme Court. And it's symbolic and I thought, in a way, captured my view which is at the end of the day, there is, there's some bad things to say about how judicial power is used, but there are also some good things to say about how judicial power is used as well. My editor responded that this is a Getty image and it's probably too expensive to actually purchase to use. But then when he, on his own, realized that this is a picture, a famous picture in response to Brown versus Board of Education, he said, "No worries, we have the budget. We can do it." So that's—I was actually responsible for this picture. Judicial review, for those of you who don't know, but if you've been one of my students, you should feel bad if you don't know what judicial review is because I, every quarter, I say something about judicial review. But for those of you who don't know, judicial review is simply the power of a court to examine the constitutionality of a legislative act, determine whether it conflicts with a particular part of the constitution or not. And if a court finds that law to be unconstitutional, it kind of invalidates that particular law. So I like to put it, the court has veto power when it exercises the power of judicial review. It can either exercise a veto power or decline to exercise that veto power by declaring the law in question constitutional or not. The moral pluralism part is a political theory term of art. And moral pluralism simply means there's sincere, reasonable, and deep disagreement about what is most important in human life. And if this fact didn't bleed into or effect constitutional law, then we wouldn't have to worry about it so much. But many political theorists in recent memory have had a lot to say about not only what moral pluralism is, but what to do about moral pluralism. To the best of my knowledge, I'm one of the first legal theorists to take some ideas in John Rawls' work, moral pluralism, public reason, public justification, and actually apply it to Supreme Court decisions and how to think about judicial review and what might actually justify a judicial decision, and more fundamentally, what kinds of reasons would justify certain kinds of laws. So this is not false modesty. I basically took a very interesting idea that I found in political theory literature and took it, and not my own idea, it's John Rawls' idea, and he deserves credit for that, but took it in a direction, in other words, towards understanding courts and judicial review that it hadn't been taken before. So I think that's why eventually, people who's read the book were able to see, it's like, oh, this is—there's someone interesting contributing to the literature because no one actually has written this particular kind of a book. The reason why I wrote this book in the first place, simply put it, you can't finish your PhD in a graduate program unless you write a dissertation. So I had to come up with something semi-original, and I emphasize the semi part. So I sometimes wonder how original many dissertations actually are. But in principle, you're supposed to contribute to some existing literature. And you should probably know, academic work is highly specialized. You're supposed to read just about everything that's ever been written about your topic, and then try to say something mildly interesting, which is your own scholarly contribution. Believe me, easier said than done. When you have lots of smart people who, for years, in fact probably smarter than you, for years have been working on some of these same problems, and then you, as a graduate student—it's a daunting task. You're supposed to contribute something to this literature. Your first few years at graduate school, I think, if you're honest with yourself, how in the world am I going to ever going to do something like this? But you know, you try to push through it. You stick to it. So eventually, I got this idea for a dissertation topic. So how do I connect this idea of public reason with judicial review? It ended up taking me, I guess, about three and a half years to write the

dissertation. By time I was finished, my hair was falling out. I'm not actually joking about that. I was so kind of stressed about the whole process. But then once I filed the dissertation, within about a week and a half, my hair stopped falling out. It's normally not a good sign if you're in your 30s and your hair is falling. Or there could be natural causes, but, in my case, it was stress. So I was greatly relieved and relieved is the right word, that I finally finished my dissertation. And if you don't know, your dissertation is probably the most important, easily the most important work you do as a graduate student. Why? Because you're either going to try to turn that dissertation into a book manuscript, or you're going to carve that baby up, as one of my friends from graduate school used to say, and try to produce independent articles and get them published. Not only to help your chances on the job market that someday you can secure a tenure track position, but also someday so you can get tenure and so on. Nothing is more important than what you decide to write about in your dissertation. So I had this sense of relief. And I actually filed my dissertation on June 6, 2003. June 6, 2000—sorry, June 6, 1944 is a pretty important date in American history. But now, rather than thinking of D-Day, I think that was the date that I actually filed my dissertation. I was actually finished as a graduate student at U.C.L.A. That door closes and then you have to worry about your success on the job market. Then the basis of your job talk, when you come to a place like Cal Poly, an interview for a position, it's all about your dissertation. So when I finally got the position at Cal Poly two years after I finished my dissertation at U.C.L.A., the tenure clock starts to tick. And I probably shouldn't say that in front of me—in front of you and worry you any more than you need to be worried at this point of your career at Cal Poly. And then I realized I really have to do an enormous amount of work to revise my dissertation and turn it into a book manuscript. And the people will give you advice on lots of books out there. But for me, by far, the hardest part of actually trying to translate that dissertation into a book manuscript was just trying to find the time to be able to do it. I know most of you, you students, you just think that instructors pop into the classroom and do your song and dance for about an hour and fifty minutes with no preparation or anything like that, and then you leave. You just kind of see us on stage, we just do teaching. But there's so much more to the job. I mean, teaching is really—in the classroom it's just the tip of the iceberg. So I can remember trying to get up to speed, very steep learning curve at Cal Poly. Getting up to speed about what was happening in our department, in the university, ahead all these new preps, administrative things that I didn't understand in Cal Poly. And then my reward was on Friday when I didn't have to come to campus because I was teaching, you know, three classes, Monday, Tuesday, Wednesday. Thursday was, now I get to think about writing my book and what I want to do on it. And then you end up working weekends. And because you didn't read the book before and you don't really know how to do it, you can get advice from lots of different people, but you're always like worried. Am I going down the right path and am I using my time efficiently? The good news is after, I guess, about four years, I finally had a book manuscript, or at least a rough draft of the book manuscript that I was pretty happy with. And the process of writing is reading, thinking about it, writing, reading some more, and thinking about it, writing. I'm hopefully getting some good feedback and good constructive criticism from friends and colleagues. So after four years, I finally had a book manuscript that I was pretty happy with. If I wasn't going up for tenure in the beginning of my sixth year, I probably would have spent the rest of my life working on this book. But you think I'm joking about that, but I'm serious, because it always could be a little bit better. There are

always sections that you could work and I don't mean simply the writing, but the content, and really the quality of what you're doing. But the tenure clock is ticking, and at some point, you just going to have to grind it out. And then when you get this in your reviews and part of the R.P.T. process, you know, you're not so settle. Your primary focus should be in getting something published. I wonder what that means. So then what to do once you have a rough draft of your book manuscript that you think is ready for a publisher to look at? That in itself is another process that it took me a while to become informed about. I must have wrote—you're going to think I'm exaggerating, I'm not. I must have wrote and rewrote my perspectives, which is about anywhere from two to five-page overview of your book where you're trying to pitch it to an editor. Because even in these days, academic editors care about the audience and how many books are actually going to sell. So you might have the best book in the world, but if you can't write a good perspective to convince an editor at an academic press to send it out for a review, my same friend who had said, you know, "Carve that baby up," referring to the dissertation, basically told me because he had success in publishing a book a few years earlier, "You're halfway there," his exact words, "if you can get the editor to send it out for external review." So I was thinking, nothing is more important in this process than writing the best perspectives I possibly can. So you spend all this time writing the actual manuscript, and then all those additional time figuring out, how can I condense everything that I'm trying to do to make it as interesting as possible and also ensure that this appeals to a wide interdisciplinary audience, you know? So not just a handful of constitutional theorists, but other people, and other departments, and other disciplines, and so on. So I spent a lot of time trying to figure out how to do this. I looked at something like 15 or 20 different perspecti [phonetic] that other people had sent me, and almost everyone did it a little bit differently, so I had to figure out what were the variables, what were the constants. Finally, as the clock is ticking, I need to send this out. The way it normally works is you'll send your book manuscript—oh, I'm sorry, the perspectives and maybe a chapter. You know, it's bad form. Don't send the whole book manuscript unless you're actually asked for it. So you send it to the best academic presses. And when they summarily reject it, it usually take about six months to summarily reject without any explanation at all. Then you move on to the second tier of academic presses, and then to the next tier, and so on. So this is why you really have to worry because you could have finished your book manuscript, but you don't know if it's, they're going to require revisions, which may take a substantial amount of time. But you're waiting, you finally get rejections, and then you go the next level, and then next level, and the next level. So I had heard all these horror stories. And I was so worried that I was going to run out of time because it could take two, three years, even after you finished your book manuscript for the book to finally be published by an academic press, you know. And that's not so good if that's seven years after I've been here because I would have been denied tenure. I sent it out to the six best academic presses when it comes to publishing public law. And again, this is not false modesty. I really thought that, O.K., they're going to reject it. I have to have a plan B and I have to have a plan C. So I was all ready to go as soon as those academic presses rejected the book manuscript to go to the next tier. I mean, that that's the way you have to think about this. You can't be just, "Well, you know, I'm optimistic. I'm sure this academic press is going to publish it and I won't have to worry about it after that." That's not the way the world normally works. So I sent it out to Harvard University Press, Yale, Chicago, Oxford, Cambridge, and I think I'm leaving one of the better academic

presses out. Anyway, a week later, I get an email from the editor at Cambridge. And I just assumed that I had left something out or, you know, what is your home address? I don't know. And I started to read the email and he says, "You know, we publish work like this." Just was based on the perspectives that I sent the editor. "Are you finished with the book manuscript?" "Yes, I'm finished with the book manuscript." Next day, "Please send it to us." I'm like, oh, this is just too good to be true. I mean, are the gods like toying with me? So I send the book manuscript and, you know, which by the way turns out to be, this is about 350 pages. It was even longer so they made me edit it down. I'm glad they made me edit it down a little. But one of the reasons why? Longer book, smaller readership. Longer book costs more to publish. Welcome to the academic world of publishing which is vulgarly commercialized. A few days later, he says, "I want to send out the book manuscript for external review." And the way this simply works is the book manuscript is sent to three other academics. And because I do work, it's more along the lines of what law professors do. I ultimately had three law professors do external reports on the book, and they make a recommendation to the editor as to whether they think it should be published or not, and they also make substantive suggestions as well, which may mean that you're going to have to revise your manuscript and then resubmit it. So then you have a waiting process of about another six months for all three reports to come in. I got them one at a time. Fortunately, the first one was positive. And then I was trying to figure out, because it's anonymous, who do I think this actually was? You know, you read in between the lines, and I'm pretty sure I know who the first person was based on the comment later that my editor made. And then I had to wait another few months, and another one came. And another few months, and another one came back. So all in all, I had to wait six months. One of the reviewers gave me great constructive criticism, but then it was going to take some time. And the editor said, "How much time do you need?" And I said, you know, "If you can give me probably another—maybe about three or four months, I think I can make the changes that were suggested." So I went back to working on the manuscript. Then the new manuscript went to that same reviewer again, waited another three months or so, probably even longer than that. And finally, he said, "Yes, I'm happy with these changes." And the editor said, "Well, we're good to go. You want to put the book into production?" And just like when I had finished my dissertation, thank you. It's not joy. It's not euphoria. It's relief. Oh, thank you. Because I knew that if the book was accepted by probably any academic press, that probably meant that I had done enough research to get tenure. So that's really what was on the line and not just simply my ego. There's probably more that you wanted to know about the writing process and the publication process, but believe me, it can be time consuming, yes, stressful, and I probably wouldn't wish it upon my worst enemy. But it's part of the job description and it's what it means to be in academic, trying to get tenure at a institution, higher learning and let's stop there.

JE: Well, I wanted to—I'm going ask you some substantive questions and, sort of, give you an opportunity to talk about the nuts and bolts of the book, but something you said right at the beginning is probably more about the process of writing. You said right at the beginning, and I know you said it tongue in cheek that this is the most important book in the history of the world, but one person I have—

RDO: Probably the most important in the world.

JE: Oh, probably the most important. But one question I have about that is, did you—in order to write a book like this, do you have that sort of, believe that in some part of your mind in order to do it day in and day out, you said it took you three and a half years to come up with just the manuscript itself, is that one of the things that is part of the driving force to keep the writing process going when you're alone with your thoughts for the 700 day in a row that makes you get up and do it again?

RDO: Yeah. This is a good question. I think self-doubt can be a good thing or at least being not too much self-doubt, but really being critical. I had seen a younger faculty member at U.C.L.A. who told me during his first year at U.C.L.A., he actually is a tenure at U.C.L.A., that he was writing two books simultaneously. And even then I thought, wow, that's biting off more than probably any moral issue, two books at the same time? Why don't you just write one book and then maybe try to write another book? I mean, that really is almost foolishly ambitious. And I know when he sent his prospectus to Oxford University Press, which is a really good academic press, and the editor sent it out for review, apparently all three external reviews were so negative that the editor at Oxford said, "No," which is really one of the nightmares I think that academics have. In other words, he got kind of so close to hitting a home run and as it turns out, you know, he just swung and missed. I thought to myself, I can't let something like this happen to me. I have to get feedback sooner rather than later to make sure I'm not making some kind of fundamental mistake, so this isn't viable. So I really tried to send rough drafts of my introduction to—I have a lot of like good friends from graduate school and surprisingly, sometimes, you can send emails to, in some cases, very famous academics whom you would think would be very, very busy and sometimes they'll say, "Yeah, I'm happy to actually look over," as long as it's a reasonable amount of reading. "Can you look over my introduction and just actually see—tell me what you think of the projects?" So the more feedback you get like that, so it's not just kind of your eyes on the manuscript or the project, I think the better. And I was always doubting myself and the project, you know, do I really have a good idea here? Can I really make this work? Because I saw the kind of arrogance that I would say characterizes the person I was referring to at U.C.L.A., I mean, like so, at least in the surface, just so overly self-confident. I mean, you know, he would just—best book in the history of the world. Sometimes it almost sounded like that's what he thought. So I guess in a way, my, you know, my better characteristics. I really don't think that I'm not good and I'm not brilliant or anything like that. It always makes me think that, but I really got to be more careful here. I really have to try harder. Could I be wrong about this? Maybe this isn't as interesting as I actually think it is. So maybe if anything, I was, I don't know, too introspective and too self-critical? But that's really what kept me at it in pushing through it. And I have to admit, sometimes I really thought that, you know, I'm just never going to finish this. And the next morning, I'd say, "You know what?" Yeah, when I wasn't like tired and I had some caffeine. I'm like, O.K., well maybe I was tired last night, but what about—as you know, certain times of the day are much better times to work than work than others, maybe I'll be able to... What about doing this? What about doing that? And, you know, you just keep at it. It really is one step at a time. It's one day at a time. In fact, you can actually write one page of a book every single day. You know, in a year, you'd have about a 350-

page book. That was some other advice I got about writing dissertation. You can just write one page of your dissertation. In about a year, you would, you know, you would finish, but it's not, of course, just about writing one page.

JE: But that always sounds really good in theory and then— Well, let's get into a little bit of the substance of the book if you'd like. Can you just give us sort of a general overview, I mean, the title, *Judicial Review in an Age of Moral Pluralism*, and you sort of described what judicial review is, you described moral pluralism a little bit, maybe you can kind of give us a sense of what you're doing here, what your sort of overall project is.

RDO: Certainly. You know, how I torture—I see a lot of familiar faces in the room—I torture my students by telling you, when you're writing a paper, if you can be clear on exactly the problem or question that you're addressing in the paper, why it's important or its significance, and then what you plan to say about it, you know, what I'd like to say is kind of what your answer, what your "solution" to the problem is, what your answer to the question is, and then that's the answer that you develop and defend in the rest of the paper, is always a way I thought about my book and also about selecting a dissertation topic. I left this out, but I should probably share this with you. Many graduate students don't actually ever finish their dissertations. And I asked a senior faculty member at U.C.L.A. about why this has happened because, you know, you don't want this to happen to you. And he basically said is that some graduate students don't really have dissertation topics. And they'll look for dissertation topics for years and never find a dissertation topic, and then they'll never finish. And that's why sometimes at U.C.L.A., there'll be people who have been graduate students, I'm not again making this up, 16 or 17 years. In fact, one of my friends who's a political theorist who started in a few years before me and finished a few years after me, was there 13 years. But he finally finished his dissertation. So I finally came up with this question, but how can judicial review in a democratic society like our own be justified? Now, this is one of these old, old, old questions of constitutional theory. I think we've been debating the place of judicial review in our society probably since about the founding of the country or certainly since the *Marbury versus Madison*, probably even earlier than that, but I don't know. I'm not historian. That's a recognizably important question in constitutional theory. So it wasn't too hard to sell really anyone on, this is why judicial review is important. What was harder to sell people on is, do we really need another book about judicial review? I mean, there's only been 7 million of them written. And that's where you need kind of different angle of going at it and, you know, as I was saying earlier, my quote on quote, solution to this problem of a judicial review, and quite frankly, I think judicial review invariably is antidemocratic to some degree. It only gets helpful for people with smoke and mirrors to try to make it look like it's more democratic than it really is. I mean, my basic view is there are antidemocratic institutions in a democracy that can actually help make a country, if not, more democratic can actually produce better, better results. You know, that's why I like *Brown versus Board of Education* so much. It wouldn't be such a good thing if we had left that question to the democratic process. And then I thought, but O.K., but what could justify judicial review? What would justify a judicial opinion? What kinds of reasons can judges actually use in their judicial opinions and what kinds of reasons should they hold lawmakers to? And that really is what the whole book is about. The first part tends to be more

theoretical, so I draw in a lot of the normative political theory literature. Second part, I tried to apply it to some real cases, for example, freedom of religion, affirmative action, abortion, same sex marriage. Because in our society, for better or for worse, we tend to turn to lots of questions of political morality and very important divisive questions of political morality into constitutional questions sooner rather than later, and this used to be uniquely American. I think actually it is changing. But in some ways, it's almost a defining characteristic of the United States. So how do we decide about the morality of capital punishment or gun control or campaign finance reform or affirmative action or same sex marriage or abortion? Well, sooner or later the court seem to have something to say about it, if not, as a practical matter of deciding the issue for us in a short of a constitution, a formal constitutional amendment, it's not like that happens very often. So I'll leave it there. And if anyone has more specific questions during the Q&A, I'll be happy to try to answer them.

JE: What do you make of arguments made by some members of the court, but also, you know, law professors and maybe politicians that, you know, moral questions or political questions should be resolved by the democratic process, you know, through legislatures or through, you know, people voting with their feet or voting in, you know, as opposed to having the court do it? I mean, *Brown* really gives us a really good example of the court doing something that the legislature couldn't do, but how do you respond to that that, you know, democracy requires democratic action?

RDO: So, I—when I defended judicial review, as I've said, I don't like to go down that road, but well, but in some ways it can be reconciled with democracy. I think there's a fundamental tension between judicial review and democracy. But I tend to personally like the constitutional part of democracy, the constitutional part much more than the democratic part. And the reason simply is—and that's what makes me a liberal and not some kind of more radical democrat, because I do think it's very important to have checks on legislative majority. Now, this is not to say that I'm often, especially these days, very happy with the decisions that the Supreme Court renders when it comes to, you know, campaign finance reform. I was, you know, I was holding my breath when it came to individual mandate of *ObamaCare*. I thought, you know, is the court really actually going to say that sections of the *ObamaCare Act* are unconstitutional? So I worry about these kinds of things, but I think at the end of the day, it is important that certain outcomes which you can't expect from the democratic process, there are certain kinds of outcomes I think in the name of social justice that at least hope at its best the court can kind of step in. You know, there are many people in our country who think it would have been better to leave the abortion question to state legislatures. In fact, there's a Supreme Court justice who goes on and on about how, well, if the court hadn't decided *Roe versus Wade* in 1973 the way it did, then it wouldn't have caused this backlash, it wouldn't have energized the antiabortion folk and so on. But, you know, the reality is—but if there hadn't been *Roe versus Wade* in 1973, then we'd still have states today where you can't get a legalized abortion. *Brown versus the Board of Education*—I mean I—if you really think we should leave all these important questions to our so imperfect democratic processes, I guess my response would be, should you really think that we should have left *Brown versus Board of Education* and school desegregation to state legislatures? To me, sometimes, there's sometimes such terrible

injustices that it would be a good thing to have to judicial review to correct what I would say or just kind of, you know, serious moral problems with the democratic process. And I—my whole last chapter is all about that, I have a lot more to say about it, but I think I'll just leave it there for now and if anyone wants to ask a follow-up question, which I hope you will, because but you realize it or not, I've said some very controversial things in the last two or three minutes. Yeah.

JE: Well to you—so let's imagine then that we have a court who's made a moral decision that maybe goes against the grain or maybe it follows that sort of majority, but thin majority as we have now, do courts—you talk about public justification for a law, did the courts have, or when they write, justices, when they write their opinions, do they have a duty to justify, but in certain types of language, why they've reasoned to the conclusion they've reasoned to?

RDO: So if I'm understanding the question and I think I am. If judges in the Supreme Court justices are supposed to aspire to an ideal of public justification or to spend probably too much time laying out in the first half of the book, can you expect this of real court? I actually think whether they do it well or even competently is a separate question real courts, real judges or real justices. But I actually do think something like an ideal of public justification is implicit in Supreme Court decisions, that courts really are trying to give us reasons that all reasonable people can accept even if we're talking about some of the most divisive issues. And I do call them issues of political morality because that's what a lot of constitution, not all constitution, it's just that a lot of constitutional issues are. I mean, for instance, affirmative action is not just a legal or a constitutional issue, it's a question of public morality as well. Same thing with abortion, same thing with same sex marriage. And given that we're not going to abolish judicial review, I mean, let's face it. Academics, especially these days people who are really on the far left, right, used to be people on the right conservatives, would oh, you know, liberal judicial activist, they're making law, this is illegitimate, this is obverting the democratic process and blah, blah, oh, all this stuff in the wake of Warren Court decisions that conservatives don't like, but this also too is a Warren Court decision as well. You know, my personal feeling is the Warren Court did some of the best things that any Supreme Court has ever done in the United States. Don't feel that way about the Rehnquist Court, don't feel that way about the Roberts Court.

JE: Yeah.

RDO: Of course the Roberts Court probably could be a—it could have been worse for the Rehnquist Court, it could have been worse for the Roberts Court. But I've only thought that, that is the function of the judiciary. As long as we're going to have the institution of judicial review, you know, so you can write books about, well, let's just abolish it, but as a practical matter, we're not getting rid of judicial review. We're not going to amend Article 3 of the Constitution and get rid of the United States Supreme Court. So that is the case and like it or not, the Supreme Court is going to make these kinds of decisions. Then you really need, I think kind of a widely accepted way of, but how are they going to decide these cases. I mean, no one thinks it would be O.K. to write a judicial opinion saying well, these are my personal deepest

moral convictions. Therefore, this is the result in the constitutional controversies. So to me fundamentally, it comes down to—but if we're going to give courts including the United States Supreme Court at this kind of power, how can it be exercised in a way that renders Supreme Court decisions legitimate as it possibly can be? Given that, you'll always have people who would be very unhappy with the results. I mean, however, the court decides that Fisher versus Texas right, the affirmative action case or, yeah, Windsor or the DOMA case. Or, now what is it called? It's Hollingsworth, right? It was Perry versus Schwarzenegger, Perry versus Brown. Now it's Hollingsworth. However the court decides those cases, there are going to be people on both sides. Some of them probably going to be very happy, some of them going to be probably very unhappy. What kinds of reasons would be good enough reasons that in principle, even people who disagree with that result could actually accept? Otherwise, you're going to probably polarize the electorate even more than it's polarized right now. I mean, I've often thought, again, this isn't I suppose, particularly controversial, but I've often thought that the whole point of the exercise to just review is it takes some of the sting of the controversy out of these kinds of issues. We were able to handle them so well democratically. We probably wouldn't have developed the institution of judicial review in the first place. I mean initially, 18th century judicial review is not at all like the kind of judicial review we have today. And again, there's I'm sure a historical story that can be told about that.

JE: But what would you make this question, same-sex marriage and DOMA and Proposition 8 coming at the front of the court now, I mean, sort of makes me think of this like, what do you make of shifting cultural landscape? So that say, 45 years ago, we may have had a fully different conception of, you know, the concept of gay marriage or same-sex marriage wasn't even on the table 45 years ago. Then we get, you know Bowers versus Hardwick which is, you know, and we've moved from there. Now, culturally speaking, I haven't—I don't know that empirical data but I'm guessing if you took a—I saw somewhere that said something like 60% of the country now is in favor of allowing same-sex marriage. I don't know if that's the right number, but we've seen a—certainly seen, from 45 years ago, you probably, I don't know, if the numbers would have been very low. So, as cultural shifts happen, because like, courts have an obligation or this public justification require that the court change with the cultural landscape of the country as well.

RDO: So, um, I was going to say, I think there are least two questions there. And that's a good thing, I like it—

JE: You can object its contents.

RDO: I like something to work with. So unquestionably, public opinion with respect to same-sex marriage is changing. And if, I think public opinion hadn't changed, the Supreme Court never would have taken the two same-sex marriage cases. We know this, there's a generational divide, so people who are under the age of 25 for example, compared with their elders are much more inclined to be O.K. with same-sex marriage. So, the writing is on the wall. I guess the only issue is how this change comes about, you know? The United States Supreme Court makes a sweeping decision in one or both of the same-sex marriage cases or that they simply

let State legislatures work it out on their own over time. I mean, one way or the other, it's highly likely we're going to have same-sex marriage in California. Even if the case is dismissed, Hollingsworth is dismissed on standard or procedural grounds. So, one of the questions I think was, but how does a Supreme Court respond to public opinion? And there's no question that the justices even though they will often say otherwise. There's no question that the justices do respond to public opinion it's in the back of their minds, in when the cultural or social context changes, constitutional positions that were unthinkable at one point in time all of a sudden become thinkable. And although my field is not American constitutional development, I am at least somewhat familiar with some of the literature which is actually really, really good. And one of the positions that they take is, it's not just the Supreme Court that decides what the Constitution means. It's different kinds of political act or social movements. So in other words, constitution meaning ultimately is a function of different kinds of political forces that are in operation at particular times. You know, there was a time where you could sincerely argue, think of Plessy versus Ferguson, separate but equal. This is a reasonable interpretation of the Equal Protection Clause. Now, I probably couldn't—even the most racist and white supremacist, is you probably couldn't find anyone to take that position anymore. Constitutional positions do change over time. I mean, client actually think the court is, rather than getting out in front on these kinds of issues is often, in some sense, confirming or ratifying what most people already think. So in some ways, the court is somewhat reactionary, somewhat, I think, kind of following what's already happening politically on the ground. But you know, this idea that the just—it's a runaway, order runaway justices. Sure, to just review, courts can cause a lot of harm. I'm not denying that. I think it has been a number of times in American history would have caused serious harm. But most of the time, they're not too out of touch with American public opinion. There's certainly not, I think, kind of driving public opinion, you know, their extra legal forces that are doing that. But this is one of my reasons to believe that we shouldn't sometimes be so worried about the abuse of judicial power. So preoccupied with it like, you know, you would think that somehow the Supreme Court is formulating our budget in declaring war in Iraq and Afghanistan. It's really easy to overstate just how powerful courts are. And also the reality is, if the people on the other branches of government think that the court has gotten too out of line, remember Hamilton and Federalist number 78 refers to the judiciaries, the least dangerous branch. I've often thought it's clearly true, the judiciary it's the least dangerous branch. Congress can pull a funding from the judiciary, you couldn't, in principle, impeach and remove Supreme Court justices from the bench. All kinds of weapons at their disposal. You could take away appellate court jurisdiction. When people all went upset with Supreme Court decisions, always builds like this, introduced in Congress but they almost always now never go anywhere because there's a political cause given the threat to judicial independence. So, people would be really upset. No prayer in public schools, let's introduce a bill and let's take jurisdiction-- appellate jurisdiction away from the Supreme Court or flag-burning, really, really dislike that decision. So let's do something about it, but it never goes anywhere. It's just for, you know, it's for political public consumption constituencies.

JE: Well, you were, as you were talking about that, you kind of reminded of something that an old law professor of mine that said in this context, he referred to that, it keeps us belief in the court or talking about legitimacy of the court, as a tinker bell that it only exist so long—

RDO: Then you're going to have to explain that.

JE: It only exists so long as you believe in it. So long as that legitimacy of the court requires that people take judicial opinions seriously and live by them. And so, just in this context, does that mean the court has to respond to public opinion then or can the courts still do a certain thing and people will kind of follow along because that's the way we do business here?

RDO: Yeah. So the—again, there's so many like different issues wrapped up there and all related to one another. I think the court historically often doesn't do its own thing and it has to be very careful about doing its own thing. I think its legitimacy comes from the extent to which, I think, falsely, people believe that it's somehow above politics. Every American, you know, they love their congress, their representative in congress, but they don't like the other bastards that are in office. But you know this, the most spawning over the United States Supreme Court, not realizing what a political institution it actually is. I don't know, maybe it's a noble lie. I remember a friend of mine in graduate school thought like this was O.K. and I actually think more transparency would be better. But this is much I think is for certain. If one of the functions, so just a review in the court is to try to legitimize invariably controversial constitutional decisions. And people are always going to disagree about it right? Part of what I've been trying to show is that should also be concerned about the constitutional arguments and the reasons that are offered on behalf. So in this way, kind of see it as a way of—but if the court tries to aspire to ideal or public justification, it doesn't write what I would call kind of overly partisan opinions in some ways, were public justification, public reason, is about. Then these decisions are more likely to be legitimate and are also more likely to be widely accepted by people that will—the American people who always disagree over these kinds of issues. You know, let's face it, we're never going to have a consensus over abortion in this country. Racially segregated schools, we have a clear consensus in this country. But you know, I'd be very surprised in my lifetime if all of a sudden, a certain issue, constitutional issues that have divided us for such a long time, public opinion. I mean, maybe same-sex marriage is more like the desegregation of a racially, racial desegregation of public schools, but tend to think most of these constitutional issues are long-standing, will always be divisive. But I think, there's a way in which the court can write its opinions and hold lawmakers to a certain reason that can make these decisions about as legitimate as they possibly could be. Again, given what I like to call conditions in moral pluralism.

JE: Were you—this kind of brings up another thing. We were talking about, in our conversation before we got started here, that you said that some people sort of complain, are you—there was at least one review of the book that kind of complained that your position to use public reason as well as the notion of public reason, you'll reason to outcomes that support progressive causes that you said that you think weren't quite very progressive or it was the best court, you know, you like their opinion as the best. Obviously, a progressive court, is that a fair assessment?

RDO: Yeah. So, so no, not a fair assessment and this is the objection, what I referred to in my book but I borrowed this from an article that someone had written. It's public reason or public justification is rigged because at the end of the day, it leads to results that all liberals or progressives will like. And someone then, I was talking to Jude about this before the talk, someone not in review but in article had written that, well, the author and public reason and it leads to abortion on demand and Eve is a professor to a small catholic university. I mean, the first thought was just read my book, not a tribute view to me that I don't hold. I mean, just read the 15 pages or so in that chapter when I talk about abortion. If I thought public reason was really rigged so the court would reach the results that I would, that I personally would hope the court would reach. Right, because we all have mused about these kinds of things. You know for example, I think affirmative action normally is justified, I think legal abortion should be permitted. I think capital punishment is immoral, you know, I could go and on and on and on about these kinds of things. But you know, I talk about how the court should approach these kinds of cases. And actually what I said with respect to abortion is I think they're kind of equally good public reasons on both sides. And I don't think that necessarily Roe versus Wade is justified. As a personal matter, I actually think it is, I think it could be a disaster if we went back to the kind of pre Roe versus Wade world that we live in. And in fact, one of the reviewers of— I'm sorry, one of the—and I mean, external reviewers, I mean, when people write book reviews after the book has come out, had basically said, well this is a problem with public reason. Look, you know, Den Otter admitted here that he doesn't actually support the outcome in Roe versus Wade. I also describe affirmative action as a hard case because I think they were equally good public reasons on both sides. I mean, ultimately, I think they're good enough public reasons to support affirmative action plans and therefore, they're not unconstitutional. And then I included some easy cases, and I did in my book refer to same-sex marriage as an easy case because I think clearly, the balance of public reasons is in favor of what I'd like to call marriage equality. But that's because of the kinds of reasons that are normally offered on behalf of the position against same-sex marriage are not public reasons and not the kinds of reasons that lawmaking bodies should be able to act on. And Supreme Court justices should recognize this as such. But I mean. I do hope that public reason or public justification is something that a morally divided society like our own can live with. I don't know what the alternative is other than to kind of continue what's been happening recently. I mean, if this isn't—you know, we're getting close to running out of time. But I had to really drive this point home. If we really do need to reach a consensus on certain questions of public morality because we're all going to be governed by or live under the laws, we could just keep our moral differences to ourselves. So if we didn't have to deal with abortion or affirmative action or same-sex marriage, if there was no public heart of public morality or political morality, we wouldn't even have to be having this kind of conversation. You could just lead everyone on their own. But we live together and we need rules and laws that we're all going to live together. You know, highly partisan substantial moral argument, not only antagonize these people but I think it makes it harder to live together. It polarizes our politics. I mean, I think, an ideal public reason, I think, is vitally important just given how deep and intractable moral disagreement is in our country. You're not going to—I mean, just think of it this way, I mean it's so hard to say somewhat a very religious person who opposes same-sex marriage to have a conversation with someone who say, not religious at all and believes that actually same-sex marriage is a positive good. I mean, how are

they ever going to communicate with each other and reach a mutually acceptable decision?
And the answer is, they won't if they continue to talk about those issues in that particular way.

[Music]

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