

# UW School of Law

## Transcript - Harvard Professor Michael Sandel

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**Kellye Testy:** Well, good afternoon, everyone. I'm Kellye Testy, the Dean of the School of Law. It's my pleasure to welcome you today. We are so very pleased to welcome Professor Sandel to our law school and I want to let some of you who are standing know that if you care to be seated, we do have overflow seating in Room 127. I'm just thrilled to see such a big crowd out today.

This law school is known for being a center of ideas and also of action, and so to have an opportunity to explore the topic of justice in great depth with Professor Sandel is indeed a wonderful opportunity for us. And I'm just so pleased that all of you decided to take advantage of this and be here with us today.

My colleague, Professor Steve Calandrillo, who's also our Associate Dean for Faculty Development will now share a few words with you to introduce our program today as he joins me at the program, I want to thank him for his work.

He is in charge of the law school of our faculty development program of making sure this is a robust intellectual school which it certainly is. So Steve, thank you for your good work and let me turn the mic to you.

[applause]

**Steve Calandrillo:** Thank you, Dean Testy, and it is wonderful indeed to see so many folks out here today. This is an exciting time at the University of Washington School of Law and we are absolutely honored to have with us today a legendary Harvard professor, Michael Sandel.

He is the Anne and Robert Bast Professor of Government at Harvard University where he has taught political philosophy for over three decades now.

His writings have been translated into 11 foreign languages. They have appeared in "The Atlantic," "The New Republic," "The New York Times," and countless other venues, and it is not an overstatement to say that he is one of our generation's most important philosophers. This is a very exciting event.

I work his materials on justice into my own contract law course that I teach here at the UW School of Law. His work on liberalism and the limits of justice where we explore the ideals of contract law, the dual goals of freedom to contract, autonomy to contract, as well as reciprocity.

The idea that contracts should be vehicles of mutual benefit and we note that those two ideals of justice often run in conflict with each other.

His class on justice at Harvard is one of the most popular in the University's history, so over

14, 000 students have now attended that class. And now these days, it's 1, 000 students a year. There's only roughly 1, 000 undergraduates at Harvard, so he teaches roughly two-thirds of the entire student body by the time they graduate from that distinguished university.

Now his class is on TV as well. It's being brought to PBS and we will see a preview of it in just a couple of moments. But it is the first time for a regularly scheduled college course to be brought to television and this is no low-tech affair.

If any of you read the article last week in "The New York Times" you saw that there's three high-definition TV cameras, multiple microphones, interactive webcasts and podcasts. This is not your grandfather's version of PBS. This is the exciting version that we will see today.

And this class is for the first time being brought here to the University of Washington School of Law and we can take the same journey in moral reflection and on thinking about justice and what the right thing to do as his students at Harvard and as the readers of his book on justice.

The subject is really citizenship and political discourse and thinking about all the controversial moral issues of the day. His book covers areas such as affirmative action, the recent government bailouts, same-sex marriage, slavery reparations, surrogate pregnancies, immigration reform, all the hot button topics from the perspective of justice and what is the right thing to do.

Thinking about it in a critical way challenging our taken for granted assumptions about these areas and letting us view them in a new moral framework.

I am extraordinarily excited to have him here with us today. We're going to start quickly with a roughly four-minute preview of the PBS version of his course on justice and then I invite folks after the roughly hour-long lecture to hang around and talk to Professor Sandel and he will sign books of his - sign copies of his new book on justice for you.

So with that, I think we're going to transition to the video on the PBS version of justice and after that, Professor Sandel will come and I hope you will join me with giving him a grand welcome.

[applause]

[PBS video starts playing]

[music begins]

**Michael Sandel:** What's the right thing to do? That's the question I've asked thousands of students at Harvard University in my class on justice.

Would it be just to torture the suspect to get the information? Do you think that person with a bad parent owes them less? Is it all right to steal a drug that your child needs to survive?

My name is Michael Sandel and over the years, thousands of students have joined me for an ongoing debate about the moral decisions we face in our every day lives.

This is a course about justice and we begin with a story. Suppose you're the driver of the

trolley car.

Nikolai, if you didn't think you'd get caught, would you pay your taxes?

**Student 1:** I don't think so.

[video laughter]

**Student 2:** Do I think I should be able to bid for a baby? I'm not sure.

[video laughter]

**Student 2:** It's a market. I mean.

**Student 3:** In a situation that desperate, you have to do what you have to do to survive.

**Professor Sandel:** You have to do what you have to do?

**Student 3:** You got to do what you got to do.

**Professor Sandel:** What do you say to Marcus?

**Student 4:** I've never been in a class like this before where they ask you to really think and consider the moral dilemma. I've never had such a fun class in my life.

**Professor Sandel:** We turn to the great philosophers of our past for answers. Do you think Bentham is wrong to add up the collective flabbiness?

**Student 5:** I don't think he's wrong, but I think Murphy's smarter than any page.

**Professor Sandel:** But then Bentham has to be wrong, if you're right, he's wrong.

**Student 5:** OK then, he's wrong.

**Professor Sandel:** All right.

**Student 5:** I'm right.

[video laughter]

**Professor Sandel:** Thank you. Well done. And we turn to the present to challenge the reasoning behind the moral choices we make every day.

**Student 6:** I think that what happened in the past has no bearing on what happens today. And I think that discriminating based on race should always be wrong.

**Student 7:** I just want to say that White people have their own affirmative action in this country for more than 400 years. It's called nepotism and quid pro quo. So there's nothing wrong with correcting the injustice in discrimination that's been done to Black people for 400 years.

[video cheering and applause]

**Professor Sandel:** Even effort depends a lot on fortunate family circumstances for which we can claim no credit. Raise your hand those of you here who are first in birth order.

[video laughter]

**Professor Sandel:** I am too, by the way.

[video laughter]

**Professor Sandel:** Mike, I noticed you raised your hand.

[video laughter]

**Student 8:** Taking justice was really an eye-opening experience for me. Everything that you've thought of up to that point comes questioned, challenged.

**Student 9:** The purpose of sex is one, for it's procreative uses and two, for a unifying purpose between a man and a woman.

**Student 10:** Your movies are your beliefs and that's fine, but similar union is not marriage within the Catholic church.

**Professor Sandel:** What is the right thing to do?

**Student 11:** People have been arguing for millennia really and there's still not one definite answer in ways that makes a lot of things possible, but it's beautiful at the same time we're still debating similar questions.

**Professor Sandel:** And the reason they're unimportant, the reason they're inescapable is that we lift some answer to these questions every day.

And now I have the chance to invite you to join us as Harvard opens its classroom to the world.

[music ends]

[PBS video stops playing]

**Professor Sandel:** All right, well thank you. Thank you very much.

[applause]

**Professor Sandel:** It's a great pleasure to be here. I want to begin by thanking Dean Testy and also Dean Calandrillo for that very warm welcome and also for the spirit of intellectual excitement brought to the law school and that it's so palpable here in this room and I know in the overflow room, so thank you all. Thanks to both of you and thank you all for coming, for this discussion.

In the course and in the series, a preview of which you've just seen and in the book on justice, I lay out three different ways that philosophers have thought about justice broadly speaking in the history of political thought. Here's what they are:

One conception of justice is the utilitarian one. It says the right thing to do in law and for that matter in personal morality is to do whatever will maximize welfare. Whatever will promote the greatest happiness for the greatest number of people. Maximize utility. Approach number one, it goes back to Jeremy Bentham and to John Stewart Mill.

A second approach disagrees with that. It says, no, justice isn't just about adding up people's preferences, trying to maximize the balance of happiness over suffering. What about respecting people's individual rights? What about respecting freedom, the dignity of the person?

Think back, if you need to see the defect in utilitarianism, says this second point of view. Think back to ancient Rome, where they threw Christians to the lions in the Colosseum for sport. How would the utilitarian calculus go? Yes, it's true, that question suffers excruciating pain while being devoured by the lion.

But think of the collective ecstasy of the Romans packing the Colosseum. If there are enough Romans, tens of thousands, and if they are happy enough, ecstatic enough at this gruesome spectacle, then so goes the challenge to utilitarianism. It's not obvious that there's anything wrong with it.

So, the tradition that challenges utilitarianism, at least one of the traditions, says justice must be more than numbers, more than adding up happiness and preferences. It must have something to do with fundamental principles of respect for individual rights and individual freedom, the ability to choose.

Now, the freedom approach, the second approach to justice, is a capacious school. In fact, many of our political arguments today, and arguments in law, involve contests between adherences of the freedom camp.

There are libertarians who say to respect individual rights and the freedom to choose, is to leave in place the results of market relations, provided they reflect voluntary agreements.

And then there are critics of the libertarian view, the laissez-faire pro market view, who also argue in the name of freedom, but they say that some results of market transactions may not really be free or reflect freedom of choice, if the background conditions of society are such that people, in effect, some people are coerced by economic necessity to take on certain jobs, let's say in sweat shop.

So, there is the libertarian strand of the freedom school, and the more egalitarian or the fairness strand of the freedom school, and many of our debates today, including debates between liberals and conservatives in the United States, share the idea that justice is about freedom and individual choice, but disagree about how to conceive, how to understand and apply the idea of freedom and consent and choice.

So, we have two broad traditions view, totalitarian and the rights based freedom approach. There is also a third that goes back to ancient philosophy that says justice isn't only about

maximizing utility, or even about respecting freedom.

It's also about honoring and recognizing and promoting certain virtues, certain civic virtues. Certain goods, certain common goods that may be implicit in social practices or in democratic life itself.

So, the virtue and common good tradition goes beyond the first two conceptions, the utilitarian and the freedom individual rights one. And this third tradition goes back to Aristotle. Now, the first two, maximizing utility and respecting freedom, these are the two most familiar these days in law, in political theory, and for that matter, in political argument.

The thesis of the book and the thesis that I would like to try out on you today, is that these two familiar traditions, the utilitarian and the freedom based traditions, are inadequate. They don't fully make sense of the understandings and practices of justice that not only the ancients tried to articulate, but that we play out today in politics and law.

So, I would like to defend, or at least give you some sense of my defense of this third tradition. Call it the civic virtue and common good tradition of justice. I'd like to defend the following claim, that we can't detach questions of justice and rights from debates about virtue and moral desert, and the nature of the good being distributed.

Another way of putting my claim is that justice is unavoidably judgmental. One appeal of the first two traditions, the utilitarian and the freedom based tradition, is that if they succeed, they can spare us the need, especially in pearl of societies fraught with disagreement.

They can spare us the need of trying to sort out highly contested conceptions, the nature of the good life, or of the proper understanding of social practices, or of goods.

And what I want to suggest to you is, though it might be tempting to try to avoid those disagreements when we're arguing about justice, we can't. Now, why can't we? Why is justice unavoidably judgmental? Why do debates about justice embroil us inescapably in arguments about the nature of the good?

Well, to try to answer that question, let's take a couple of concrete cases and see what you think about them. So let's set aside this abstract preamble that I've just given you, and consider one or two contemporary controversies.

The first one I would like to put to you, and we'll see what you think, and maybe Dean Callandrillo, he's already volunteered to go and help amplify people's voices.

**Dean Callandrillo:** I'm the Phil Donahue.

**Michael:** OK.

[laughter]

**Michael:** Let's first take up a law case that you may or may not have already studied in law school. It's about a fateful question. It's about whether a disabled golfer has a right to a golf cart in golf tournaments. Have they studied that already?

**Dean:** I can't speak for them, but I have.

**Michael:** Well, you have!

[laughter]

**Michael:** But you're a professor!

Here was the case. It was a few years ago. Casey Martin, do you remember him? He was a professional golfer, a very good golfer, played at Stanford, went on the professional tour.

He had a congenital circulatory disorder that resulted in him having a very bad leg, so walking the course for 18 holes was not only very painful, but it exposed him to serious risk of injury for his leg, given the condition.

But, he was otherwise a terrific golfer. He asked the PGA for permission to use a golf cart in the tournaments, they said no.

He went to court, because the Americans With Disabilities Act passed by Congress provides that in public accommodations, the organizers, the governing bodies, must make reasonable accommodations for those with disabilities, provided those accommodations would not fundamentally alter the nature of the activity in question.

So, he sued the PGA for the right to use a golf cart. And it went up to the Federal Courts, and it found its way to the U.S. Supreme Court, this case about a golf cart. Now, imagine you were a member of the U.S. Supreme Court, and you have to decide this case. And let's just assume for the sake of argument, that what you're deciding is what is fair, what is just.

How many here would rule in favor of Casey Martin and say that he does have a right to use a golf cart in the tournaments? Raise your hand. And how many would say no, he doesn't have a right to use a golf cart? So we have a pretty good division of opinion, a majority in favor of Casey Martin, but a sizable minority against.

I hope you voted in the overflow room, maybe the results were different.

[laughter]

**Michael:** Maybe they're more for the underdog in the overflow room than we have here. Well, let's hear from someone who can say why you think - let's take someone who rules for Casey Martin first. Why should he be given the right to use a golf cart? Who is willing to volunteer and answer? Yes. What do you think?

**Carolina:** In my opinion using a golf cart doesn't change the nature of the game.

**Michael:** And why not?

**Carolina:** Because the skill of golfing is not in the walking from hole to hole but rather in hitting the ball. [crosstalk] In an innocent manner.

**Michael:** Great. It's about hitting the ball. Right. And what's your name?

**Carolina:** Carolina.

**Michael:** Carolina. OK. Carolina, are you by any chance a golfer?

**Carolina:** Not at all. So I can't say. Maybe the walking is more important than I give it credit for.

**Michael:** No. I think you make a pretty good point. All right, so Carolina says they should be required to make an accommodation for him because after all waking the course is not essential to the game. The essence of the game is hitting the ball.

**Carolina:** Yes.

**Michael:** Into a hole. That's what it's about. OK. Who disagrees with Carolina? Someone who would not grant him the right to use a golf cart. Yeah. Why not?

**Isham:** In this instance I guess I would say no because as a sporting event as opposed to something else. Sports are all about arbitrary sets of rules. I mean, the PGA says these are the rules we are going to have for golf, and those I would say don't necessarily have to be as accommodating.

Then also, I don't golf myself so I couldn't speak to this directly but I've heard that in at least professional term is the fatigue of all that walking actually does start affecting your concentration in your game play so it's not a completely trivial factor.

**Michael:** OK. And what's your name?

**Isham:** My name is Isham. Isham.

**Michael:** Isham.

**Isham:** Yes.

**Michael:** Isham. You're making two arguments here. First you say the rules of a game of a sport like golf are entirely arbitrary. And then you say, actually, the rule about walking the course is important because the game includes the element of fatigue.

**Isham:** Right.

**Michael:** Not quite sure that those two arguments hang together.

**Isham:** They are separate.

**Michael:** OK. They're separate. All right. Fair enough. Fair enough. [laughs]

**Isham:** So let's say there are two arguments I'd make to the point. Though....

**Michael:** It sounds like you're becoming a lawyer.

**Isham:** One weekend.

**Michael:** One weekend. Are you a first year?

**Isham:** Yes.

**Michael:** OK. You're well on your way, I can see. So who wants to... is there anyone here who is a golfer who would like to address Carolina's point that walking the course is not really essential to the game? There're no golfers in the entire law school? Being testy?

Testy: I think we found one.

**Michael:** You found one.

Man: You didn't say good golfer.

**Michael:** No.

Man: I would say that the walking in a golf tournament does have a minor effect. But fundamentally, I agree with Carolina, that it does not change the skill of the game. It's not material, I believe, to the outcome of the game. It has an immaterial or a somewhat insignificant effect.

**Michael:** It's peripheral to the game itself as you've played it.

Man: Yes. I've played a lot on my feet too because golf carts are expensive. I've played on carts as well though, so I speak to both.

**Michael:** Do you use a caddy by the way?

Man: Never used a caddy.

**Michael:** OK. Who wants to take, really take on Carolina about walking being essential to the game? Go ahead.

**David:** Yeah I'm just sort of wondering about the idea of letting the PGA be the experts and what's essential and not essential about golf? So to me....

**Michael:** You're for or against letting them being the judges of this?

**David:** I guess I'd probably come down and say I'm for it. I mean, let's say I'm a judge, I don't golf, I'd say well, we've got a professional golfing association, they've set themselves up as sort of, the people who know what goes into golfing. I think if they feel that the walking is really essential about it, I'd....

**Michael:** They ought to know. It's their game. It's their tournament.

**David:** Yeah, I'd say they ought to know. Yeah. I mean I'd probably go along with the idea that it's a sporting event that's going to have to draw some lines around what kind of aids you can have and whatnot, so I mean if....

**Michael:** OK. And tell us your name.

**David:** David.

**Michael:** In fact David, they had in the trial, at the trial level, they brought in as witnesses, the PGA did, some of the greats, the great golfers of the past. Arnold Palmer, Jack Nicklaus, Tom Kite to testify, and they all testified, Carolina's view notwithstanding.

The golfing greats all testified that walking the course is an essential part of the game, including the fatigue factor. Now is there anyone here who in the face of that testimony, and in the face of the expertise of the PGA, is willing to dispute it or who thinks there's a ground for disputing it? What do you think?

**David:** Well thinking about it, I can see that this man, he has a crippling disease, or he has a crippling thing that doesn't allow him to walk. Therefore, he maybe as or if not more tired or more fatigued, or more mentally drained, than in those who are actually walking. And so it could become moot in the sense of the significance of walking.

**Michael:** So if he were given a cart maybe that would just level the playing field with respect to fatigue and demand and distraction and concentration. Well maybe so. What do you say?

**Dan:** [off mike] There are plenty of golfers that are [inaudible 26:17] [on mike] but that doesn't mean that they should be allowed to take carts from one hole to another.

I mean that, again, with the fatigue factor and then you look at not only walking in that certain day but golf tournaments are over a period of a week, and golfing isn't, like if it was just a matter of hitting the ball and getting it into the hole, take them all to the driving range and put out targets and whoever hit the target would win.

I mean it is walking in the fatigue in the overall....

**Michael:** It's essential.

**Dan:** Yeah. It's the, being consistent through not only 18 holes, but multiple days of 18 holes.

**Michael:** All right. And what's your name?

**Dan:** Dan.

**Michael:** Dan. So Dan and Carolina seated next to one another hold different views about what really is essential to the game of golf. Do you know how the Supreme Court decided this case? They ruled in favor of Casey Martin. They said he did have a right under the act, to a cart. It was a seven to two opinion. Justice Stevens wrote for the majority.

And what's intriguing about the opinion, is that he analyzed the history of golf and concluded that walking the course is not fundamental of the nature of the game of golf.

Quote, "From early on, the essence of the game....," this is Justice Stevens, "...has been shot making. Using clubs to cause a ball to progress from the teeing ground to a hole some distance away, with as few strokes as possible, that's the essence of golf," said Justice Stevens in his opinion.

And among the two dissenters? Was guess who? Justice Scalia. He wrote a spirited dissent. He rejected the notion first of all that the court could determine the essential nature of golf. But his point was not simply that judges lack the competence to decide this grave question. He challenged the premise underlying the court's opinion.

He disputed that it's possible to reason about the purpose or the essential nature of the game. So in a way, he challenged, going back to the three theories of justice I began with, he challenged the Aristotelian idea that it is possible to reason about the essential nature or purpose of a game.

Here's how he put it, quote: "To say that something is essential, is ordinarily to say that it is necessary to be achievement of a certain object. But since it is the very nature of a game to have no object except amusement, that is what distinguishes games from productive activity, it is quite impossible to say that any of the games arbitrary rules is essential."

That's what Scalia said. And since the rules of golf are as in all games entirely arbitrary, there's no basis for critically assessing the rules laid on by the PGA.

Now, what's interesting about Scalia's dissent, and about the discussion we just had, is that taken together they illustrate a big question about political philosophy, and in particular about Aristotle's theory of justice, because remember the third approach to justice says justice is unavoidably judgmental.

To determine people's rights, we have to inquire into the purpose-Aristotle called it the telos-the essential nature of the good in question or the activity, in this case the game of golf.

And we had an argument just now where people had different conceptions about what's essential to the nature of the activity. And depending on how you answered that question, you would have a different view on whether Casey Martin had a right to a golf cart.

And so what Scalia is saying in effect is, that's the wrong way to reason about justice, at least with respect to games. Now, I think Scalia's argument is questionable on two grounds. First, no real sports fan would talk that way...

[laughter]

About games being purely arbitrary in their rules. If you really believed that, that the rules of a sport were entirely arbitrary, you'd have no reason to care about the outcome of the game, no reason to celebrate the great heroes of the sport.

There's another reason he's wrong, I think. And that is that he misses an important Aristotelean insight. Aristotle didn't write about golf, but I mean about the question of deciding rights. What was this dispute about the golf cart really about? What was at stake?

On the surface it seems that only fairness was at stake. Would it or would it not give Casey Martin an unfair advantage? If it's only about fairness, there was an easy and obvious solution. What would it have been? Yes, let everyone use a golf cart if he or she wants to. Then there would be no question of giving Casey Martin an unfair advantage.

But no one on either side wanted that. From the standpoint of the PGA and the golfing greats,

that solution would have been more anathema than making an exception for Casey Martin. Why?

Because what was really at stake in this dispute, and what I think animated the passion of the golfing greats about the physical fatigue factor, what was really at stake was a question of honor and recognition, mostly connected to the question of whether walking the course and exertion and fatigue is essential to the game.

What was at stake was the desire of the PGA and the top golfers I think that their sport be recognized, honored and respected not just as a game, but as an athletic event.

Let me put the point as delicately as possible. Golfers are somewhat sensitive about the status of their game. It involves no running or jumping, and the ball stands still.

[laughter]

No one doubts that the game of golf is a demanding game of skill. But the honor and recognition accorded great golfers depends on their sport as being seen as a physically demanding athletic event. So if the game at which they excel can be played while riding in a cart, well then their recognition as athletes could be diminished or undermined.

This I think explains the vehemence with which the professional golfers insisted that physical fatigue, walking the course, is essential to the game. And if that's right, then the whole argument about whether justice requires that Casey Martin have a golf cart brings out the moral force of the third approach to justice.

That it's not only about utility and the pleasure of the fans and the ratings, and it's not only about fairness and leveling the playing field, it's also about figuring out the essential purpose of the activity of the good being distributed-

Where that purpose is closely connected with the allocation of honor and recognition, what virtues do we celebrate when we admire great golfers, an Aristotelean reading of the Casey Martin golf cart case.

Now that may seem to you maybe interesting but relatively trivial, a golf cart. Consider another debate that is a fought debate and a live one today. The debate over same-sex marriage. Now, there...

[microphone feedback]

There are some who say...

**Man 1:** [chuckles] Got to stay away.

**Michael:** There are some who say that the argument for same-sex marriage can be decided without being judgmental one way or the other. It's possible to make an argument, some would say, for same-sex marriage simply on grounds of non-discrimination, or equal rights, or freedom of choice.

Within, that is, the second approach, the freedom, individual rights, consent approach to

justice. But I wonder if that's true.

In order to test that idea let's take another survey, see what the opinion is in the room and have another discussion, this one about same-sex marriage. Now, consider two positions. Position one, the state should recognize only traditional marriage, marriage between one man and one woman.

Position two; the state should accord recognition to marriage between couples, partners of the same sex. So as between those two positions, let's take a poll. How many are in favor of position two, the one that would have the state recognize same-sex marriage? Not civil unions, but marriage, full-fledged marriage.

All right, and how many would favor position one, the traditional position that state should recognize only marriage between one man and one woman? How many hold that position? OK, a handful of people. The majority in favor of same-sex marriage.

So let's venture unflinchingly into this discussion, and let's see how it unfolds. So, let me hear first from a defender of same-sex marriage. On what grounds would you, well, let's do it the other way around. Those of you who oppose, are you willing to get us going?

Be very brave, someone, and give us the reasons why you favor traditional marriage only for state recognition. Who's willing to take it on?

**Man 2:** All right, I'm really excited about taking on the classroom on this one.

[laughter]

**Michael:** All right. But you're very brave and I'm very grateful. Go ahead.

**Man 2:** All right. I think that in traditional marriage, the emphasis is on the husband, the wife and the children. And in that environment, that's the most proven environment for children to thrive.

And so, when we start looking at other alternative forms of family relationships in which children are being raised, they're not being raised with their original mother, their natural mother and their natural father.

And that's something that throughout the world and throughout history has been proven to be something that will develop children into good, positive members of society, and that when we start taking away from that, then we're at risk for what will happen because for one, it's never been done on a large, countrywide scale.

And the second point being that we have seen in a lot of divorced homes and in single parent homes, we see a lot of real problems for the children.

**Michael:** OK, good, thank you. And what's your name?

**Man 2:** Gavin.

**Michael:** Gavin. Would anyone else up there with Gavin like to add to that?

**Man 3:** I concur.

[laughter]

**Michael:** [laughs] No? OK. So, Gavin favors state recognition only of marriage between one man and one woman by pointing to the importance of children.

Child rearing and supporting children as central to what marriage is all about. Now let's hear from someone who has a response to that argument, someone who favors same sex marriage and can address the argument about children. Who is willing to offer a reason?

**Allison:** I think that when you look at child development, what it actually really comes down to is consistency. There is some research that would even support that so-so parenting that is consistent would be better than a parent who is really excited to be around their kids sometimes but absent some of the time and . . .

**Michael:** What is your name?

**Allison:** Allison.

**Michael:** So, Allison, what would be the affirmative argument for state recognition of same sex marriage?

**Allison:** If you are looking for the benefit of the children, it wouldn't really matter if it is a husband and wife. It would just that the people raising the children are consistently together in that relationship for the children. So, any formulation of marriage would be fine under that.

**Michael:** Would you restrict marriage, Allison, to two partners?

**Allison:** By that logic, no, you wouldn't have to.

**Michael:** Polygamy should be recognized by the state, polygamous unions, do you think?

**Allison:** If you are looking for the benefit of the children, if it is possible that a marriage with multiple partners like that is consistent and good for the children then you could do that.

**Michael:** It is interesting; you seem to share Gavin's premise that the test of marriage, what makes for marriage worth encouraging, is caring for and raising children. You agree with that?

**Allison:** I don't agree with that but I was responding to his premise.

**Michael:** OK, well tell us why you don't agree with that. Not about children primarily, why not, what is it about?

**Allison:** It is about the union. It is about love between two people and the state recognition of that.

**Michael:** So the state recognition is fundamentally about a loving union between two (maybe more) people.

**Allison:** Yes.

Michael. Yes? OK. Who hasn't gotten into the discussion so far? Who would like to address either of those reasons?

**Man 1:** I think that the function of laws and government is to create ways of creating great societies and communities. I think there is little disagreement that marriage isn't good for communities, that connection creates stable relationships and ways of raising children and societies, but what doesn't seem to matter very much is whether it is between a man and a woman.

The way you know that is true or you know this logic makes sense is it wasn't very long ago in this country when it was illegal for different minorities to be married. Where it was illegal for a black man to marry a white woman, vice versa, and the same exact logic was used. This mixing of races was somehow destructive to the community and society.

**Michael:** Well actually though, Gavin's reasoning had to do with caring for children which is a different reason from the race based . . . .

**Man 1:** And, I reject that reasoning.

**Michael:** So, what do you think is the legitimate purpose and rationale for state recognition of marriage?

**Man 1:** Of marriage or same sex marriage?

**Michael:** Of marriage.

**Man 1:** Of marriage, in general?

**Michael:** Yes.

**Man 1:** It is because it builds great communities.

**Michael:** Whether or not it has to do with child raising?

**Man 1:** Correct.

**Michael:** OK. In the back, maybe you can just speak up; it might be hard to reach you with the microphone. Just stand up and speak. Oh, there's . . . .

**Man 2:** It came anyway. I would say that if you are arguing Gavin's point, I guess, is that you should instead of prohibiting same sex marriage you should condemn people who are getting divorced, heterosexual people who are getting divorced. I mean, if there is a crisis that that creates, why is nobody speaking to that?

**Michael:** Gavin, do you want to address that? You can just stand and speak loudly.

**Gavin:** [off-mike comment] . . . and when we look around the room and we say, "Well, my parents were divorced and I'm fine. And my parents were divorced and I'm fine." I mean, sure,

we are in a law school. I mean we have all done well for ourselves that is why we are here.

But I think, generally across the board, divorce has been a big problem because having no fault divorce is making divorce very easy so we slip in and out of relationships. It is just one more way of discouraging stability in a home and I think that is a problem also that we need to address.

**Michael:** OK, let me see if we can step back from these reasons that people have offered, very powerful reasons, and connect them to the early part of our discussion and maybe even to the golf case.

What we have in the debate about same sex marriage, and it emerged even in this brief discussion but it doesn't always emerge in the public debate, is that the argument for and against state recognition of same sex marriage depends heavily on what you think the purpose or the essential nature of marriage is. What is marriage for?

In that respect, the structure of the argument is very similar to the debate over the golf cart. There the issue is: What is essential to the nature of the game of golf? What qualities, virtues, golf trophies are meant to honor and recognize and reward? The ability to surmount physical fatigue and to walk the course or the ability to hit the ball into the hole at a distance?

In the debate about same sex marriage we have at least, as between Gavin and Allison, two rival accounts of what marriage essentially is about, what it is for. Two rival teleologies of the social institution of marriage. One answer to the question, "What is marriage for, what qualities should it honor and recognize?" has to do with bearing and raising children.

It is fundamentally, Gavin says, about children and about procreation, some people would say. Allison says, no, marriage is fundamentally about something else. It is about recognizing and honoring and encouraging and promoting a loving commitment extended through time maybe with associated mutual responsibilities between the partners.

Depending on which view of the purpose or the telos of marriage you accept, you are likely to come to a different conclusion about whether the state should recognize same sex marriage or not-

Which bears out Aristotle's point: that to decide rights and to determine justice, we have take on the substantive moral question about the nature of the goods that are being distributed, in the case marriage, access to marriage.

Here we see an example of how, in the same sex marriage debate, justice is judgmental. What would it mean to try to decide the question without coming to grips and trying to resolve the debate between these two accounts of what marriage is for? Well, there is a possible view.

There is a third position in the marriage debate. That would be to say the state should not confer recognition on any kind of marriage. That was what you were going to say. Say a little about that.

**Eric:** I was going to say, that if the state is going to recognize heterosexual marriages they should also recognize homosexual marriages, you know. But personally, I don't see any reason why the state should necessary get involved in romantic relationships at all.

**Michael:** Or conferring honor on them?

**Eric:** Yes.

**Michael:** What does that mean? That the state should not be in the marriage business, is that what you would say?

**Eric:** Yes.

**Michael:** What is your name?

**Eric:** My name is Eric.

**Michael:** So, does that mean that there would be no marriage at all? How would marriage happen?

**Eric:** Well, I think marriage represents, if you will, a bundle of rights and responsibilities and I think those could be divided up some other way.

**Michael:** So you would have civil unions, you would deal with tax consequences and inheritance, universal civil unions, maybe, but no marriages.

**Eric:** Well, if you wanted to have a religious ceremony, if you believed in that kind of thing, but I don't necessarily. . . .

**Michael:** You could go there. You could go to a church, or a synagogue or a mosque to get married.

**Eric:** But I don't think that the government should necessarily on account of that give you tax breaks or . . . .

**Michael:** So the state should have nothing to do with recognizing it.

**Eric:** And the other point that I was going to make is if marriage is all about children, shouldn't people who can't have children not be able to get married?

**Michael:** OK, that is a powerful argument. In fact it is interesting, so there is a third. . . . What is your name again?

**Eric:** Eric.

**Michael:** Eric raises a third possible policy about marriage. Well I raised it and Eric elaborated it, which would be essentially not to abolish marriage but to relegate it to private associations, religious, communities, they could set whatever rules they wanted to.

There is an opinion writer Michael Kinsley who offered up a version of this who said: Let churches and synagogues confer marriages, but let people decide what private associations they want to bless their marriages.

Let department stores and casinos get into the act, if they want to, and if people want to go

there an get married they can but the state should not take sides in trying to decide whose marriages are worthy of civic blessing so to speak.

Now if you take Eric's position essentially what that amounts to would be the disestablishment, not the abolition, but the disestablishment of marriage as a state function.

You would have a consistent position there that would not perhaps, require you to enter into the teleological arguments about what marriage is essentially for, at least from the standpoint of the state.

What is striking though about Eric's disestablishmentarian position about marriage is that in the public debate for and against same sex marriage very few of the advocates on either side want that. In a way, Eric's nonjudgmental solution is like giving everybody access to a golf cart in the Casey Martin case. So it tries to recede from the judgmental character of the question.

Neither side is keen, for the most part in the same sex marriage debate, to have the state recognize anybody's marriage. Why? Because both sides want the honor and recognition by the political community for the union that they believe is worthy of it.

So, unless you are prepared to embrace the disestablishment position, Eric's position, on marriage, we are drawn unavoidably into some judgment, some substantive moral argument about what sorts of unions are worthy of honor and recognition by the state in the name of marriage.

If you look at the Supreme Court argument by the Massachusetts State Supreme Court, which was the first to require, within a state, recognition of same sex marriage. Justice Margaret Marshall wrote that opinion, and her opinion includes some reasons drawn from the freedom school: autonomy, freedom of choice, the consent of individual partners.

But she recognized that that argument was not enough to get her all the way to same sex marriage. So she took up the claim made by the opponents that essential to marriage is procreation.

One of the arguments she made was that we don't require fertility as a condition of marriage between a man and a woman; we do permit a man and a woman who are beyond the age of reproduction to marry.

So she took on and argued about the claim that procreation and child bearing and child rearing for that matter are necessary to marriage. So even in this State Supreme Court opinion that defended a right to same sex marriage, the court was drawn into a discussion, to an argument, about what Aristotle would call the telos of the good in question.

So how does the case of Casey Martin's golf cart and the current debate in the courts and in politics, shed light on the thesis of the book.

The thesis that I would try to defend here in the following way: even though Aristotelian-type arguments about the nature of the good in question, seem ancient and old fashioned even though those arguments embroil us in controversial moral and even sometimes religious questions, the arguments we have about justice and rights, implicate us in arguments about the

nature of the good.

So the most remote of the three conceptions of justice, this teleological argument from the nature of the good, the essential nature of the practice, is more present rumbling around just beneath the surface in the debates about law and politics that we have even today.

So what is the conclusion of all of this? Well, it seems to me that the conclusion is this: despite the temptation to set aside, for purposes of justice and rights, fundamental disagreements about morality and even sometimes about religion, it is often unavoidable that we engage, in law and in politics, with questions of the nature of good.

Justice is inescapably judgmental, whether we are arguing about golf carts, or about same sex marriage, or about affirmative action or any number of the issues that divide us these days.

Questions of justice and rights are bound up with competing notions of honor and virtue of pride and recognition. Another way of putting the point is that justice is not only about the right way to distribute things; it is also about the right way to value things.

Now, you might say what I have offered is a recipe for contention and disagreement. Here is what I would say about that: If you look at our politics today and if you listen to talk radio or watch cable television so much of it seems bedeviled by shouting matches and ideological food fights.

I think that one of the reasons for that is not that we have too much debate about fundamental moral questions and questions of values in our politics but that we have too little.

We would find our way to a better and richer democratic deliberation, not agreement, but a better democratic life if we engaged more directly and explicitly with the moral convictions that men and women bring to public life.

So while the subject of the course, and of the book, and of the series is "Justice" in another way the subject is ultimately about democratic citizenship and my suggestion is that ours would be a richer democratic citizenship if we had a politics that engaged more directly with the big questions of values and mortality and justice that animate our public life. Thank you very much.