



## DAHLIA LITHWICK: AMERICAN JEWS' LOVE AFFAIR WITH THE LAW

(Begin audio)

**Joshua Holo:** Welcome to the college comments podcast, passionate perspectives, from Judaism's leading thinkers, brought to you by the Hebrew Union College, Jewish Institute of Religion, America's first Jewish institution of higher learning. My name is Joshua Holo of HUC's Jack-H Skirball campus in Los Angeles, and your host. You're listening to a special episode recorded at Symposium 2, a conference held in Los Angeles at Stephen Wise Temple in November of 2018.

**JH:** It's my great pleasure to welcome Dahlia Lithwick to the college comments podcast. Dahlia Lithwick is a senior editor at Slate, and has been writing their Supreme Court dispatches and jurisprudence columns since 1999. Her work has appeared in the New York Times, Harper's, The New Yorker, The Washington Post, The New Republic and Commentary. And she is the host of Amicus, Slate's award-winning bi-weekly podcast about the law and the Supreme Court. And I know that many of our listeners will have heard Dahlia Lithwick in some capacity or another, so it is really an honor and a pleasure to have you. Thank you for joining us.

**Dahlia Lithwick:** It's an honor and a pleasure to be here, thank you.

**JH:** So we're gonna start with the Jewish name game, you and I share something which is last names that no one would think are Jewish if they didn't know us. My family is Turkish, and changed its name, which in the Turkish-Jewish world is known as a Jewish name, but it was Americanized from Halio to Holo. Yours sounds Anglo.

**DL:** My family came through the Canadian Maritimes. They didn't get in through Ellis Island, and so they came in through Canada, and it was Litvak, and became very properly Lithwick.

**JH:** Nice.

**DL:** And what I didn't know until fairly recently, as I just assumed all Litvaks meant we were all from Lithuania, but apparently it had more to do with your Rabbi, than it did to do with geography. So I actually don't know...

**JH:** Interesting.

**DL:** Where they came from. My grandfather certainly came from Russia, but that's the story. And so whenever we meet somebody who's properly called Litvak we're a little jealous, 'cause we sound like we were in the British movie version of [laughter] whatever, there is...

**JH:** There are worse things to be.

**DL:** Wait, but I have to tell you one other thing.

**JH:** Yeah, yeah.

**DL:** I'm half Sephardic, my mother's half is Iraqi.

**JH:** Nice.

**DL:** And my grandfather who was born and raised in Baghdad, and at some point had, very late in his life, had somebody do the work of, where was he from. And they found out they may have come over to Baghdad not in the original, in the original migration but from Vienna.

**JH:** Yes.

**DL:** And my grandfather stopped speaking to the person who did that. [laughter] He was so mad to find out he might have been Ashkenaze at some point.

**JH:** So speaking of the American experience, you're Canadian?

**DL:** I am Canadian.

**JH:** And you were raised both, or here you came as an adult American?

**DL:** I was raised in Ottawa, Canada, and I came to America when I started college, and then I never left after college. So college and law school in the States, married an American, here on a green card.

**JH:** So I wanna ask you about an experience that I have as an American, which is that American Jews love to celebrate the law. Is this part of your story, is this something you've seen?

**DL:** It's certainly part of my story, it's interesting the first thing I thought when you asked that, is there's a brand new really dense intellectual biography of Ruth Bader Ginsburg that's coming out, and the sections that really grip me are exactly what you're speaking to, which is, the ways in which for her gravitating to the law was such a perfectly natural thing. And she talks about it and she says... There were two things going on, one was that Jews were locked out of other professions then, and the law accepted them, and so that Jews have always been drawn to the law. But then the deeper thing you're talking about, this is a tradition that precedes America, that is, if you are people of the book, people of text, people of language and immutable words, then the constitutional law is kind of a second nature. It feels like it's bred in the bone. And my version of that for me is, I grew up, I was a day school kid. I think about text constantly, then I was an English major. All I think about is words on paper. And at some point, I had written an article about something and one of my editors at Slate said, "Ah, Dahlia, sometimes you talk about the constitution like it's the Bible."

**DL:** And I think it was meant to be disparaging, but I thought that's really true that there is

something, if you are a people, and maybe this is your experience and maybe it isn't, where your parents come from one place, your grandparents came from a different place, your great grandparents came from a different place. Often leaving with the clothes on their back. What you had was words and text, and it becomes a guardrail of reality in a time and place where there aren't other guardrails. And for me, I think I'm very aware much later in my life, how much reliance on.

**DL:** Foundational text is a building block. Both of my Jewish identity, but also why it was just so seamless to become a person who lives in the constitutional legal space because I think just as Ginger keeps saying this is a tradition about words matter, text matter descent matters, argument matters, you can dispute respectfully, and still hold things to be fundamentally true. Those really millennia old Jewish precepts. I always thought those were universal but actually they're such a straight line between the Jewish experience, and the way it feels so natural in an American constitutional system. And I think just my little coda to that is just as Antonin Scalia talks that way about his Catholic background.

**JH:** Yeah.

**DL:** And talks about there's a reason there are five Catholics on the US Supreme Court because this is very much a Catholic tradition as well. And that is not to say greater than lesser then, but it's to say, he really took that same ferocious pride in text and text study. The Ginsburg took... I actually think it's one of the things that unites them.

**JH:** And they were known to be friends. Is that right?

**DL:** Beyond friends, they were friends of the heart and after he died, when I was doing the round of TV hits that was the number one question everyone asks, like, "Tell the truth. That was for show, right? They weren't really deep friends, how could they be? They were such ideological opponents." And it's true, it was true, they traveled together. There's a famous picture of the two of them on the back of a camel traveling in the east they adored each other. And even when they bickered they really thought... Each of them said of the other "This is one of the smartest people I know."

And just bringing it back to text, again later in analyzing that friendship I came to realize what they loved about each other was that they corrected each other's work, they would send back marked up draft. And each of them absolutely trusted that the other would make... Even when they were disagreeing for family, their work in their analysis better. And in some ways, I think would have beautiful again, statement about Jewish and Catholic values, about truth and text and for me, I think that united them, that they could disagree and make each other's work better at the same time. That's very profound in this moment.

**JH:** Before we returned to the podcast, we wanna let you know about digital learning on the College Commons platform. Beyond this podcast, which is available to the public at large check out the online courses at [collegecommons.huc.edu](http://collegecommons.huc.edu) for in-depth learning, digital syllabi, assignments, inspiration for teaching. And one of our most influential courses called "Making Prayer Real." Subscribe with your synagogue for all this and more. Just click sign up at

collegetcommons.huc.edu. Oh, and one more thing, help us out and rate us on iTunes. But whatever you do, do not give us five stars, unless we deserve it. Now back to our podcast.

**JH:** You gave a fascinating and passionate presentation to the Chautauqua Institution about religion in the Supreme Court in 2017. That's on YouTube. You spent on talking about both the problem and the reason for background in the religious affiliations of the justices themselves. And at the end you propose a way to understand it. You argued for of course, deep analysis, but also ideological self-awareness and empathy and you also, at the same time, cited some of the naughties KNO cases in recent American jurisprudence. The Hobby Lobby case where they didn't want to provide... Was it?

**DL:** Contraceptions, yeah. Under the Obama mandate, yeah.

**JH:** Contraceptions under Obama mandate. And you also cited on the other side of the same coin, Scalia's willingness to be in favor of the death penalty, despite the fact that his Catholicism would militate against that. In light of your desire for empathy and religious self-awareness and an attempt to get at these problems from a different angle, does it actually change the fact that sometimes it's a zero-sum game in an enlightenment society which claims to separate church and state, and thereby to protect church or at least freedom of conscience? That at times in these really difficult cases, it does just boil down to the neutral non-religious agenda of the enlightenment state coming at the expense of raw self-defined religious prerogative.

**DL:** I mean that is the question. I think it is... Especially as we look at... Let's pause and think about the moment we're in. As you and I are speaking the acting attorney general is somebody who's on record audibly saying "All judges should be Christian judges", and that he would have doubts about any judge who wasn't a Christian. So sub-text of this question is now Text.

**JH:** Yeah.

**DL:** We are overtly now saying we have... Imagine, even two years ago, an attorney general on the record saying. We should have no judge who isn't a Christian. He was expressly asked New Testament or Leviticus and the answer was New Testament and that means in his view, you are disqualified. And think back even two years ago, when Jeff Sessions had his confirmation hearing, I thought the most controversial thing he said, as somebody aspiring to be attorney general was that he couldn't bring himself to say that atheists could be as good workers in the Justice Department as non-atheist. So these are ideas that are in a sense they've been in the ether, but boy, they are on paper in front of us now, and I think we have to ground any conversation in that that we are in an incredibly fraught constitutional moment where a Christian Baker is allowed to deny service to a same-sex couple in Colorado because Anthony Kennedy writing in the majority doesn't like what he thinks his anti-religious sentiment, directed at that baker by one commissioner on the Colorado Civil Rights Commission. So we're in a moment where it has become absolutely blessed.

**DL:** I say that word ironically, but also not to say that one religion and one religion only has kind of a hegemonic control of constitutional truth and law and justice and that is not even the moment we were in when I gave that Chautauqua speech. We've really changed in a year and a

bit. And so I think that your underlying question is this question of, it's always going to be either or, it's always going one or the other.

**JH:** And I'm challenging you on your attempt, your admirable attempt that I wanted to sign on to in the Chautauqua talk which is you were arguing that there's a third way, there's a different approach to this problem and I'm asking is the problem not fundamentally irreducible no matter how you tackle it?

**DL:** I think at the time, I probably would have said my third way works, I think now when the stakes have gone up and it's become explicit, I'm more of your view. The threat I would pull through from that speech to this moment is that I can diagnose better than ever what doesn't work and what doesn't work is not talking about it.

**JH:** Fair enough.

**DL:** And so, what I was trying to say is the act of not discussing this in the public sphere is why it's toxic in zero some. And I think that we are about to confirm some day very soon to the US Supreme Court, I think, Amy Conny Barret who it was number two on the list that Donald Trump was looking at after he picked Brett Kavanaugh, and this is the woman who, is a very, very beloved professor at Notre Dame, she's now been elevated to the Seventh Circuit, she has written expressly, and explicitly in ways that nobody else has written about her religious faith and how it inflicts on her jurisprudence. And Diane Feinstein at her confirmation hearing to the Circuit Court so bungled questioning her about this. Tried really hard to say, "How can you possibly say what you've written?" And bless her heart Senator Feinstein at some point said "The dogma lives loudly with in you." And everybody in the chamber just went... This is how... First of all, you sound like Yoda.

**JH:** Yeah, right.

**DL:** And second of all, this isn't how we do this conversation. And so, what I am still imploring folks to do is instead of pretending it away instead of just accepting the sort of John Kennedy, like "I'm religious at home." But we can't accept that duality. And so, even though I agree with you completely, it has now become "You win, I lose." We have to foreground it in public discussion in a way that we are not doing at all.

**JH:** Agreed, we do have to talk about. I have to say, as a religious person, like you outed yourself, so to speak, in that talk. I feel that we have lost in the conversation, the civic conversation, we've lost the perspective that the defense of enlightenment, a religious, non-religious and even anti-religious ideals in the neutral civic sphere, actually protects the freedom of conscience component of religion on the individual plane. That to me is a value proposition that doesn't split the horns of the dilemma, but it does at least provide the zero some game, religion loses in the public sphere, but it can win in the private sphere. That to me is important because religion needs to get a win out of this if it is a zero some game and if we're to make any headway on behalf of the separation of church and state, which I support.

**DL:** Maybe the way to think about it is that more and more, I think we've lost sight of the

principle that in a lot of ways, the Bill of Rights is a perfectly transactional document. It's not just my rights, my rights, my rights, it's I imagine, the most loved individual in whatever class we're in, having the same rights as I do for some purpose, that you've just described. And I think that what we've let slide away and particularly in this political moment is the notion that if I don't protect the rights of the Muslim business owner who wants to impose his work... His religious values on third parties, then I can't protect the rights of the Green family, in the Hobby Lobby...

**JH:** It's the Skoki argument.

**DL:** Yeah.

**JH:** It's the Skoki Nazis party argument.

**DL:** It is foundational and yet it is gone. And I think it's gone in part because of exactly what you've described here which is there is no longer a transactional view of the religious liberty clauses. There is a view that my religious liberty matters because I'm the majority. And because we all agree this is a Christian country and everything else doesn't matter. And the notion that... And that's what I was trying to think through and that Chautauqua speech was, "Here's a lean Kagan thinking about the Muslim woman in town of Greece who doesn't want to bow her head and pray to Jesus and by the way, this imports perfectly into the conversation we're having about speech, because speech is the same thing. Because to the Nazis if I'm not fighting to protect the speech of Milo Annapolis of Richard Spencer, because as contempt-able as it is, if their speech isn't protected my speech as a Jew is not protected. We've completely let that slide out of the discourse I think, and we've turned it into a victim culture, whoever suffers greatest gets the most reward. But also, I think we've completely lost the notion that this is not a majority rule's proposition and that what the...

**JH:** That's why it's enshrined as a right which is guaranteed regardless of majoritarian tendencies or preferences.

**DL:** Right. And the Constitution is meant to be a counter majoritarian check. And what we've lost absolutely, I think in both the religion and the speech concept is the idea that it is the court's job not to imagine that you are the Christian Baker. It's very easy for Anthony Kennedy to imagine himself the Christian Baker is much harder to imagine himself as the Muslim dissenter, and that's I think where we're seeing as... Alina Keegan's language for this is, weaponized speech. And the idea that we're weaponizing the religious speech only of the majority in case after case after case, I think, goes to this principle of we've forgotten that this is not a majoritarian bargain.

**JH:** I think that's extremely well said, thank you for putting it that way, I will say that what we've spoken about thus far has to do with individual rights in the shared presumably neutral civic sphere as protected by the Bill of Rights in the Constitution, however you cited some other cases which seem to me to raise other legal, cultural, constitutional issues. When you talked about the confirmation hearings, that to me seems to be more about the religious test provision in the constitution which surely draws on the same spirit, the same enlightenment spirit but it seems to be radically different in its implications. Am I missing or am I...

**DL:** No, I think you're right. I think the religion we never thought about the religious test provisions because for the longest time nobody would say out lot of the sentence. Jews can only be... Judges can only be Christian. It's now I think falling back into the discourse because we are really having again, people say out loud that which was probably assumed by a lot of folks, but nobody said it which is only Christians using natural law, and by the way, Matt Whittaker the new acting attorney general doesn't even believe in natural laws.

**JH:** Natural laws, right.

**DL:** He's one to the right of Clarence Thomas on this, he believes and he says Biblical law. So I think that part of the reason we're talking about religious tests again, is because it was very uncool to say those things out loud for the last few decades. But I also think it's important here to just pause and realize that the two religion clauses, even in the First Amendment are obviously intention, because the state there's meant to be a wall between church and state but the state also cannot interfere with free exercise. So even baked... That tension you're pulling out explicitly, is implicitly baked into just the two religion clauses, which in almost every instance, or somewhat intention.

**JH:** Intention.

**DL:** And so the zero summary that's baked in the framers were well aware that that was a problem.

**JH:** So I wanna move back to Jews, but mostly in the political sphere. I wanna hear your opinions and hear what you have to say. As you know it is still the case that American Jews still skew left. Our voting patterns are probably the most reliably and most preponderantly Democratic of any group in the country with a possible exception of African-Americans, but it is also true that conservatism is growing in the Jewish community. And I have had more conversations with Republicans and Conservatives of conscience in the Jewish world, than I ever had had in previous decades. In the past when you would encounter a Jewish Republican, they would most...

**JH:** Conveniently fall in the category of those who call themselves fiscal conservatives, but social liberals. Often the social liberal part that they preserved regardless of their fiscal conservatism, was the separation of church and state. Recently, meaning maybe the campaign season of 2016-ish, there about so quite recently, I have found more Jews who are willing or who are finding themselves again, from a position of conscience to be much more comfortable with the what I would consider far right positions on the separation of church and state such as you and I have been discussing for the last few minutes, I wanna ask you if you have seen this and if you have what do you make?

**DL:** I think one thing I would wanna press at is this whole thing is so confounded by Israel, which is a whole other conversation, and it is really hard to separate out as Jews drift right, how much of that is just because the question of Israel has become so utterly binary. And that is hard for me to think about because we're in the midst of the Jewish left is feeling deeply alienated

from Israel, so I don't even know where to put that bucket of confounding variables into this conversation...

**JH:** We agree that it belongs there, let's bracket it for the sake of the conversation, but by all means.

**DL:** And then I think that you are absolutely identifying a sense that... And by the way, this goes back to, there's Supreme Court litigation around... Curious, yellow, the famous...

**JH:** Is it in Munsey? No, Monroe. Monroe, New York?

**DL:** Yeah, it's in New York.

**JH:** Which is overwhelmingly populated by a sacmar hasidics.

**DL:** I think they're sacmar.

**JH:** Sacmar hasidics where they have been able to take control of municipal and school district bodies by virtue of the preponderance of their vote, and have tested vigorously the boundary between church and state.

**DL:** Right and that's not a new case, this is landmark religious doctrine. And so I think there is a feeling that it is long been the case in very Orthodox Jewish circles that if we can grab the lever of power and get all the stuff that accrues to people who have the levers of power that's awesome, that's way better than religious neutrality. And so I don't wanna suggest this is within the last two years, but I think you are absolutely right that if you are mystified by supporters of even Donald Trump, who don't care that much about abortion. So, this is Halachically not as nearly as problematic as who don't care nearly as much about things like affirmative action. I suspect Obergefell, the gay marriage case is a triggering mechanism although I don't know, but if you look at the reasons that a lot of non-Jewish conservatives hold their nose, Evangelicals, and vote for Donald Trump, and it's the court, we know that all of the studies show that the court is, they're trying to block Merrick Garland they want the gorse they get that. There's not a lot of space in that conversation for Jewish values, it doesn't feel as though abortion and gay marriage and guns, which are the levers or the things that are getting...

**JH:** Jews riled up.

**DL:** Jews exciting. I need more second amendment rates. I wanna send me automatic weapon. So I think it is a very, very confusing question. What then is the sort of Jewish legal win in controlling the Federal bench? And I think it does go to this idea that if we're gonna open the spinet, and have government funding sectarian religion, then maybe that could be down to our benefit in ways that we haven't thought about. And some of the cases that are bubbling up now that will have to do with, whittling away at the wall between church and state are coming from Jewish groups who are saying, If the Lutherans, like one in the case involving the rubber tires and the playground two years ago, then maybe all kinds of secular rules that deny us benefits should go away. So I suspect that's a part of it, it's certainly not the hot-button issues that



evangelicals vote around. But I guess I think that maybe in a deeper way there is this valance of anxiety about the liberals have gone too far and...

**JH:** I agree.

**DL:** It's the bathroom bill.

**JH:** I agree.

**DL:** I think that it's not an affirmative. We hate the idea of gay marriage but I think it's a feeling that Obama represented again, you have to bracket Israel, which is hard.

**JH:** Fair enough.

**DL:** But the Obama represented the triumph of some form of hyper-permissive liberal flagrant violation of all norms and all rules that makes.

**JH:** Almost nihilism.

**DL:** Yeah, that makes a conservative Jews, not conservative, makes Jewish conservatives very anxious. I think you've identified the Fisher. I can't say, I've poked at it enough to know what animates it. I certainly think these last mid-terms we saw 70 high 70s of Jews voting against Trump-ism. But I do think that to the extent that it's not tethered to abortion.

**JH:** Right, right, and I have another theory which is.

**DL:** Hit me.

**JH:** And I will having asked you to bracket Israel, now gonna bring Israel into it only slightly though. I think that what happened was beginning with Reagan more or less when a new generation of evangelical Christians developed a philoSemitic discourse, both visa vis Israel but also as an expression of their Christian self-understanding, a segment of the Jewish population... And I say segment advisedly because it was only a segment. I don't know how big bought it that they said, "Wow these Christians who are so different from us, and whose ideology seems to be so on the surface, inimical to ours are now reversing course 180 degrees. And they "like us". Here's what I think is happening, I think that what the Jews who bought that discourse bought was an ideological realignment when in fact what it really was was a sociological realignment.

**DL:** Oh, that's interesting.

**JH:** And now the sociology is shifting and Christianity's love affair with Judaism evangelical I'll say, Evangelical Christianity at the risk of over-simplification, that shifting a new generation of evangelicals is not going to be as knee-jerk supportive of Israel. They may be liberal and open-minded to fellow Jewish citizens who knows where it's gonna go. But I think there was a mistaken interpretation. And it may end up neutral or no worse for wear, when it shifts again in terms of net positivity versus negativity, but I don't think it's gonna look the same at all.

**DL:** That's so interesting, 'cause as you're talking, I'm thinking, the materialization of that proposition is Mike pence's.

**JH:** Yes.

**DL:** The Christian rabbi.

**JH:** Exactly.

**DL:** Because that is a moment at which...

**JH:** Exactly.

**DL:** I've been trying to understand what broke in that moment, and I think you're so correct, that when Jews, universally said, whatever, this is...

**JH:** This is not us.

**DL:** This is not what we are and the push back, the sense that we thought we were perfectly aligned and that the only thing better than a Zionist Jewish rabbi would be a Christian Zionist Jewish rabbi who believes in Christ. And I think that, that... I've been trying to turn over and over my head what that moment represented and I think it's exactly what you're describing is that there was this notion that Ted Cruz loves us qua us, but Ted Cruz would love us with a side of...

**JH:** To be more like him.

**DL:** Him.

**JH:** Absolutely. I could... And that's why there was push back after the fact, that to me, is tremendous in other words a politic... Pence is a politically... He's an operator. He knows the score, he's not... And we know his ideology is market but he's also, he's not Donald Trump. He's not an amateur. And so, when the Jewish population about whom merely electorally, speaking, he has to at least pay attention to, gives this coherent wall of objection rather than say, "Wow I misread that." Or even back out as gracefully, he's like "No actually more so the disconnect. The ideological Fisher to use your words, is remarkable.

**DL:** Yeah, yeah, it's interesting. I hadn't identified it until you said it, but I think that that both sides in this dance both the Evangelicals and the Jews had agreed to alight that problem.

**JH:** That's right, that's right.

**DL:** And suddenly. We were like, "Oh we're not alighting this very well because we don't agree to this. And I think that that so much of what, when I write my hair on fire pieces week after week after week about text and truth and law. So much of it is about things we agreed to alight.

**JH:** That's right.

**32:35 DL:** That have become explicit. And now we have to figure it out.

**JH:** I couldn't agree more. And it's not merely an allusion with respect to Christian ideology, it's a deferral rather than an allusion because they're deferring the conflict to the end of days, theologically speaking, but the deferral can work, because when you defer something until a later date between now and that later date, you can get a lot done and it's understandable, but it does have a price to be paid.

**DL:** Yeah. I mean it's funny because if you think about it, all of the interesting stuff in this moment is happening, where we all just agreed that we would never have to have this conversation and it's really like... In what iteration after another, the having of this conversation is what's cracking us a part.

**JH:** That's right. And that's why tone is so central because it's the conversation that you're talking about it, and when it's colored with this complicated tone, it highlights the fact that the conversation itself is... We don't know how to handle it.

**DL:** Well, and I would circle back to... This is exactly my anxiety around judicial confirmations is that we have just agreed as a nation that it is improper to question somebody's religion, or their level of religious zeal that we haven't since Justice Brennan I think, had over explicit conversations about how can you be X and still be a neutral justice. The only person brave enough to wade into that was Antonin Scalia, always pulling back a bloody stump when he tried. And now here we are, it's 2018, we're now getting people who are coming before the Senate Judiciary Committee with really extreme religious views. They are saying them out loud and we have no discourse for this, we have no language, we have no civil frame to ask the questions you opened with, and instead of having... Agreeing that we better figure this out, we have these explosions.

**JH:** Well here's to better solutions than explosions. And here's to my warm, warm thanks for the absolutely fastening and enjoyable conversation. Thank you for taking the time and sharing your wisdom.

**DL:** Thank you very much for having me. I feel like I learned and grew. [chuckle] That's not a bad thing.

**JH:** That's not a bad thing. We don't want too much of it. Such a pleasure, thank you very much. We hope you've enjoyed this episode of The College Commons Podcast available wherever you listen to your podcast or at the College Commons website, [collegecommons.huc.edu](http://collegecommons.huc.edu) where you can also stay tuned for future episodes.

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