

Book Reviews

Justice Takes a Stand

JUSTICE: WHAT'S THE RIGHT THING TO DO? By Michael J. Sandel. New York: Farrar, Straus, and Giroux, 2009. 308 pages. \$15.00.

Reviewed by Jeffrey Abramson*

It is often thought, and taught, that fidelity to the Constitution requires judges to put aside or to bracket moral and religious values when deciding legal questions.¹ In this view, the Constitution does not rest on any one particular moral philosophy any more than it rests on any one particular economic theory, as the Supreme Court once mistakenly held during the so-called *Lochner* era.² We are, after all, a diverse people who reasonably disagree on intractable matters of ultimate spiritual concern. For this very reason, government treats persons as worthy of equal respect only when its laws do not take sides on whose values are right or good. Constitutional justice aspires to achieve *neutrality*, erecting and protecting procedures that leave persons free to choose among competing values for themselves. The merit of legal reasoning that remains neutral as to underlying moral or religious questions is that such legal reasoning is restrained in ways that all reasonable citizens are likely to accept.

* Professor of Law and Government and Fellow of the Frank C. Erwin, Jr., Centennial Chair in Government, University of Texas. I wish to thank the editors of the Texas Law Review for suggesting that Professor Michael Sandel and I review one another's recent books. It should be noted that Professor Sandel and I are longtime friends, but because our books have many overlapping themes, the editors proposed this arrangement to bring recent work in political theory to the attention of a legal audience. In this endeavor, we have been joined by our friend and former colleague, Professor Russell Muirhead, who has reviewed Professor Sandel's and my book together.

1. See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 236 (1993) ("The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views.").

2. In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court struck down a maximum-hour law that would have restricted bakers to working no more than ten hours a day. *Id.* at 64. The Court read the Due Process Clause of the Fourteenth Amendment as protecting an employee and employer's liberty of contract in ways that regulation of hours infringed. *Id.* at 53–54. The *Lochner* decision became a precedent relied on by the Court to strike down a series of New Deal economic regulations during the Depression. By 1937, however, the Court repudiated *Lochner* and has held fairly consistently ever since that the Constitution does not deprive the political branches of the power to adopt reasonable economic regulations. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) (declaring that the legislature has a "wide field of discretion" when dealing with employer–employee relations).

But is such neutrality possible? Is it always feasible to decide legal questions without taking a stance, implicitly or explicitly, on the underlying moral dispute that gives rise to controversy, say, about abortion, same-sex marriage, or stem-cell research? And even were it possible, is it desirable to interpret the Constitution according to a strict separation of legal questions from moral inquiry about the right result? In *Justice: What's the Right Thing to Do?*,³ the eminent political philosopher Michael J. Sandel answers both questions emphatically in the negative.

I. Morally Neutral Versus Morally Engaged Jurisprudence

Sandel is our leading internal critic of the liberal paradigm for constitutional law that prevailed approximately from *Brown v. Board of Education*⁴ in 1954 to *Roe v. Wade*⁵ in 1973. Conservatives, Sandel maintains, do not need encouragement to ground constitutional interpretation on moral answers about virtuous behavior.⁶ But historically, liberals feared the divisiveness of morality and religion in public life; they sensed a threat to freedom and privacy whenever the state endorsed a particular conception about the morally desirable way to act—sexually or religiously or artistically.

The liberal constitutional project, at its best, is about extending basic liberties and the equal protection of the law to all. Understandably, this project seems threatened by discrimination in favor of or against the first-order moral values held by any person or group. Some views end up either being preferred or disparaged in ways that undermine the ideal of equal respect to all. But it is Sandel's view, in some of the most compelling and persuasive chapters of his new book, that even the most rigorous application of discrimination law cannot resolve certain questions about "who deserves what."

To answer that question, courts must reach and judge the underlying moral question about how our society justly distributes desert and honor, public recognition and approval. Is the state discriminating against a physically handicapped high school student who wishes to join the cheerleading squad?⁷ This depends on what the "essence" or purpose of cheerleading is.

3. See MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 251 (2009) ("The attempt to detach arguments about justice and rights from arguments about the good life is mistaken for two reasons: First, it is not always possible to decide questions of justice and rights without resolving substantive moral questions; and second, even where it's possible, it may not be desirable.").

4. 347 U.S. 483 (1954).

5. 410 U.S. 113 (1973).

6. SANDEL, *supra* note 3, at 249–50; see also MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 217 (2d ed. 1998) ("Where political discourse lacks moral resonance, the yearning for a public life of larger meanings finds undesirable expressions. Groups like the 'moral majority' and the Christian right seek to clothe the naked public square with narrow, intolerant moralisms. Fundamentalists rush in where liberals fear to tread.").

7. See SANDEL, *supra* note 3, at 184–86.

If cheerleaders are athletes and we admire them for their flips and gymnastic talent, then good reasons abound to exclude persons in wheelchairs from joining the squad. But if we admire cheerleaders mostly for their school spirit and their capacity to feel and to spread enthusiasm, then a wheelchair is irrelevant to the talents we admire. Hence, what seems on the surface to be a merely legal issue about discrimination depends upon making an underlying moral judgment: What talents are most worthy of respect in a cheerleader? For Sandel, many legal cases take a form similar to the cheerleading example. There simply is no way to decide the legal issue without deciding an underlying moral question. This is why, for Sandel, constitutional interpretation is a form of moral philosophy. *Justice* is an elegant and powerful book that captures in print much of the excitement students must feel when taking the course upon which the book is based.

II. Two Case Studies: Abortion and Same-Sex Marriage

Consider two cases where Sandel argues for shifting the jurisprudential paradigm from moral neutrality to moral engagement. The first is the controversy over abortion.⁸ As a people, we disagree on the moral status of the fetus—on whether the fetus is already a person. In *Roe v. Wade*, Justice Blackmun's majority opinion purported to resolve the constitutional issue about abortion without resolving the moral dispute about its morality.⁹ The basic argument was that, whatever one's private moral views on abortion, law should set those views aside and defend a woman's right to abortion solely by arguing that the collective powers of the state should not be used to dictate a choice that is so intimate and fundamental to a woman's liberty.

Justice Blackmun defends his opinion as scrupulously neutral between pro- and anti-abortion arguments. The only thing he argues for is a *public* morality that leaves the ultimate choice to the *private* moralities of women. Some women will regard abortion as morally impermissible and the rule of law announced in *Roe* leaves them as free as ever to act on their moral views. Other women will understand abortion as morally defensible and *Roe* permits them, on equal terms, to act on the basis of their values. In this way, to put it in Sandel's terms, the underlying issue as to whether abortion is a choice *deserving* of social respect is never broached at all. For Blackmun, the equal liberty with which *Roe* treated both the pro- and anti-abortion choices was precisely its justification. For Sandel, it makes the legal reasoning in *Roe*

8. *Id.* at 251–52.

9. *See Roe*, 410 U.S. at 116 (acknowledging that “moral standards . . . are all likely to influence and color one's thinking and conclusions about abortion” but stating that the Court's task was “to resolve the issue by constitutional measurement, free of emotion and of predilection”).

problematic despite the fact that Sandel himself agrees with the liberal position “against banning abortion.”¹⁰

Sandel first faults *Roe* for failing to achieve the neutrality at which it aims. To allow the abortion choice is implicitly to devalue the religious position that regards the fetus as a person and hence abortion as murder. One has to be fairly certain that such a moral view about the fetus is wrong to place a higher value on a woman’s choice than on fetal rights.¹¹

But even assuming for argument that *Roe* did craft a morally neutral rule of law, Sandel’s larger point is that such neutrality comes with a political price. By not engaging the moral argument that abortion is equivalent to murder and not persuading people that this view is wrong, *Roe* left the defense of abortion shorn of the kind of mobilizing and transforming public argument that could have won strong and lasting support for a woman’s right to control her own body. Here we come to an important aspect of Sandel’s approach to constitutional issues. He wants people not merely to *tolerate* abortion, even in circumstances where they personally find it morally odious; he wants them to *respect* the abortion choice. But the question of whether the abortion choice is worthy of the stronger stance of respect is necessarily *judgmental*.¹² Sandel welcomes this moment of moral judgment. Of course, it may be that, once engaged with the arguments, people will find no reason to respect the abortion choice in this or that circumstance. This is a risk that Sandel is prepared to take. For him, it is a preferable risk to run than the contrary dangers created when we suppress public debate about moral issues such as abortion, driving the debate underground where it is more likely to “provoke backlash and resentment.”¹³

The difference between the nonjudgmental attitude promoted by an ethic of tolerance and the judgmentalism frankly avowed by an ethic of respect becomes clearer when Sandel turns to the current controversy over

10. See, e.g., Michael J. Sandel, Letter to the Editor, *The Case for Liberalism: An Exchange*, N.Y. REV. BOOKS, Oct. 5, 2006, <http://www.nybooks.com/articles/archives/2006/oct/05/the-case-for-liberalism-an-exchange/> (arguing that liberal support of the right to choose abortion rests on the correct, implicit assumption that a fetus is not a person).

11. See SANDEL, *supra* note 3, at 251. Sandel argues that if it’s true that the developing fetus is morally equivalent to a child, then abortion is morally equivalent to infanticide. And few would maintain that government should let parents decide for themselves whether to kill their children. So the “pro-choice” position in the abortion debate is not really neutral on the underlying moral and theological question; it implicitly rests on the assumption that the Catholic Church’s teaching on the moral status of the fetus . . . is false.

Id. For a contrary argument in defense of the neutrality of the liberal view on abortion, see Thomas Nagel, *Progressive but Not Liberal*, N.Y. REV. BOOKS, May 25, 2006, <http://www.nybooks.com/articles/19012> (explaining that liberals could remain neutral about the moral status of a fetus and still defend the right to choose based on the separate moral value of freeing individuals from collective control).

12. SANDEL, *supra* note 3, at 261.

13. *Id.* at 268.

same-sex marriage. One legal strategy favored by advocates for the gay community is precisely to leave aside the question of what people think, morally speaking, about homosexuality.¹⁴ Whatever one's attitude toward gay sexuality, one can be persuaded that the state has no business regulating anyone's sexual mores and, hence, that prohibition of same-sex marriage is a classic case of discrimination.

Sandel argues persuasively that we cannot sensibly answer the doctrinal legal questions about discrimination against same-sex couples in marriage (Is the sex of a couple relevant to marriage classifications? Are same-sex and opposite-sex couples similarly situated when it comes to the state's interest in marriage?) without confronting the underlying substantive question about the purposes of marriage. Marriage is an institution that distributes not just material benefits; it crucially distributes the status that comes from public recognition of one's relationship *as* a marriage, rather than as, say, a civil union or domestic partnership. But this is to say that "[t]he debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers. So the underlying moral question is unavoidable."¹⁵

To flesh out his case for reaching the moral question of whether gay relationships are deserving of the same honor and recognition as straight relationships, Sandel has recourse at this point in the book to the philosophy of Aristotle. Even to mention Aristotle in a book review runs the risk of creating the misimpression that *Justice* is a book aimed only at political philosophers. Nothing could be further from the case. *Justice* grew out of a popular course by the same name that Sandel has taught to a generation of undergraduates; the book captures the teaching brilliance with which Sandel shows students how a detour into something as removed from practical politics as the study of Aristotle is not so distant from contemporary debates at all.

For Sandel, the lasting contribution of Aristotle is to show two allied aspects of justice. First, justice is "teleological," meaning that the definition of "rights requires us to figure out the *telos* (the purpose, end, or essential nature) of the social practice in question."¹⁶ Secondly, justice is "honorific" because to "reason about the *telos* of a practice—or to argue about it—is, at least in part, to reason or argue about what virtues it should honor and reward."¹⁷

14. See, e.g., Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 HARV. WOMEN'S L.J. 345, 346 (2004) (arguing that the right to same-sex marriage should be based not on morality but on the constitutional rights of privacy and equal protection).

15. SANDEL, *supra* note 3, at 254.

16. *Id.* at 186.

17. *Id.*

In Aristotelian terms, the debate over same-sex marriage is fundamentally a debate about the telos or purposes of marriage and whether same-sex couples are worthy of equal recognition and honor when it comes to meeting those purposes.¹⁸ If the purpose of marriage were to honor only couples capable of procreating children, then perhaps there would be a rational basis for treating same-sex couples differently than opposite-sex couples. But we know this is not an apt description of marriage in our society because even infertile opposite-sex couples, couples on their deathbeds, or opposite-sex couples who have no intention of having children are deemed worthy of marriage. So the argument that the ability to biologically procreate is essential to the moral meaning of marriage as we currently practice it is mistaken.

If biological procreation is not the “virtue” (so to speak) marriage honors, then what is the relevant virtue we honor with the title of marriage? Sandel turns to the landmark Massachusetts Supreme Judicial Court decision recognizing same-sex marriage to answer that question.¹⁹ What is crucial for him is that the court’s decision is decidedly *not* neutral about the honorific features of marriage. The court rejects the procreation argument as an inade-

18. Sandel’s reliance on Aristotle may lead him to overstate the honorific features of marriage in our society. If the state distributes honor in distributing marriage licenses, it is a low-level honor because even prisoners and ex-felons can marry. In a private conversation with Sandel, he once sketched out for me, partly in jest, a system that would resolve the same-sex marriage debate in more Aristotelian terms. Every couple, straight or gay, would start out with a civil union as a kind of probationary period; they would be awarded the higher honor of “marriage” only after proving the worth of their relationship over time. Of course, even in such a system, Sandel acknowledged the criteria for meriting the marriage title would have to be fairly easy to meet, such as staying together for a few years. If marriage is a badge of honor for opposite-sex couples, it is a fairly minimal one. Only when same-sex couples ask to marry does the issue of moral approval come to the fore. This may not be quite right because the state does reject polygamous marriages as unworthy of state recognition. But no state seriously inquires into the moral character of a man and a woman seeking a marriage license. The honorific dimensions of marriage seem less than Sandel’s Aristotelianism assumes. Of course, Sandel could respond with a telling question: then *why* is it that gays and lesbians consider the difference between marriage and civil union so important, even if the material benefits are equal in both arrangements? One possible response to Sandel, suggested to me by Professor Mitchell Berman of The University of Texas School of Law, is that “a discriminatory provision all by itself can and often does send a demeaning message even when the benefit being provided . . . is trivial.” E-mail from Mitchell N. Berman, Richard Dale Endowed Chair in Law, The University of Texas School of Law (Sept. 3, 2010) (on file with author). Berman’s point is not that marriage lacks significant expressive or honorific value; it is just that we have prima facie grounds to challenge the inherent stigma in discrimination *without* making a full-blown inquiry into the underlying issue of marriage’s moral meaning. E-mail from Mitchell N. Berman, Richard Dale Endowed Chair in Law, The University of Texas School of Law (Nov. 1, 2010) (on file with author). Berman does go on to note that the prima facie case of discrimination could be rebutted if opponents of same-sex marriage managed to specify some meaning, purpose, or honor of marriage that justified the state’s refusal to sanction same-sex marriages. *Id.* But he doubts that any serious inquiry into the honorific dimensions of marriage would yield such a justification. *Id.*

19. SANDEL, *supra* note 3, at 256–60 (explaining the opinion of Chief Justice Margaret Marshall in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

quate description of marriage as it currently exists. And it puts forward, both as a better description of existing marital practices and as a better moral ideal when it comes to expressing what virtues are worth honoring, the claim that we distribute the honorific title of marriage in recognition of the virtue of a couple entering into an exclusive, loving commitment.²⁰ To see the commitment to enter into such a love relationship as what we honor in marriage is already to see why the sexual orientation of the partners is irrelevant from any rational point of view.

Of course, *if* there were some basis in fact for thinking that same-sex couples were deficient when it comes to the virtues of love, exclusivity, or stability of relationships, then perhaps there would be a rational basis for disparaging same-sex relationships—for withholding the public recognition and honor that marriage as a title delivers. But this is an inquiry that Sandel believes progressives should welcome, not shun. Public engagement with the underlying moral issue—whether gay relationships are worthy of respect—is more likely (than the feint toward neutrality) to promote the moral transformations and mobilizations that protection of gay rights will ultimately need.

Is Sandel right that resolving the legal question about bans on same-sex marriage (are they discriminatory) waits on answering a moral question about marriage (whose relationships deserve state sanction and why)? Consider the 2010 federal court decision on the issue decided over a year after the publication of *Justice*. In *Perry v. Schwarzenegger*,²¹ Judge Vaughn Walker of the U.S. District Court held, after lengthy evidentiary hearings, that Proposition 8, the California ballot initiative amending the state constitution to prohibit same-sex marriages, was an unconstitutional violation of the Fourteenth Amendment's due process and equal protection guarantees.²² On the face of it, the judge presented his decision as grounded on facts rather than morality. Indeed, Judge Walker openly adopted the posture of neutrality Sandel eschews. The judge stressed that the state's interest in excluding same-sex couples must be "secular" and "[t]he state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose."²³ He specifically excluded as no argument at all any bald

20. *See id.* at 259 ("The essence of marriage, she maintains, is not procreation but an exclusive, loving commitment between two partners—be they straight or gay.")

21. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

22. *Id.* at 997. In November 2008, California voters approved an amendment to the California Constitution that provided that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. That amendment, popularly known as Proposition 8, superseded the California Supreme Court's decision earlier that year recognizing same-sex marriages under the existing state constitution. *Strauss v. Horton*, 207 P.3d 48, 66–68 (Cal. 2009) (discussing the passage of Proposition 8 in the wake of *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), superseded by constitutional amendment, CAL. CONST. art. I, § 7.5).

23. *Perry*, 704 F. Supp. 2d at 930–31.

religious assertion that homosexuality is a sin.²⁴ Instead, the judge based his decision on testimony taken during the weeks-long trial on three crucial factual issues: (1) whether there is any difference between same-sex couples and opposite-sex couples “in the characteristics relevant to the ability to form successful marital unions,” such as love, deep emotional bonds, and strong commitments to their partners;²⁵ (2) whether same-sex parenting is “of equal quality” to opposite-sex parenting;²⁶ and (3) whether there was any basis in fact for thinking that allowing same-sex couples to marry would harm opposite-sex couples.²⁷ On these crucial issues, the judge found that there was no evidence at all for treating same-sex couples differently from opposite-sex couples or as a threat to opposite-sex marriage.²⁸ The judge then ruled, as a matter of law, that even the most minimal level of judicial scrutiny required him to strike down a classification that had no “rational basis” in fact.²⁹

In line with the liberal paradigm, Judge Walker certainly understood himself as making no substantive judgment about the moral purpose of marriage but simply concluding that *whatever* one takes the purpose of marriage to be, the supporters of Proposition 8 failed to provide any factual evidence as to why the ban on same-sex marriage served the State’s asserted interests.³⁰

Readers of *Justice* will find that Sandel gives them reasons to question whether the fact/value distinction holds up in *Perry*. During trial, proponents of Proposition 8 repeatedly returned to the claim that “responsible procreation is really at the heart of society’s interest in regulating marriage,” and hence same-sex couples cannot achieve the state’s purposes in distributing marriage licenses.³¹ But the judge noted, in terms of history and current practice, that “California, like every other state, has never required that individuals entering a marriage be willing or able to procreate.”³²

Crucially, Judge Walker rejected the procreation argument not just as a bad description of current practice but also as morally insulting. Quoting the Supreme Court, Judge Walker noted that “[i]t would *demean* a married

24. *Id.*; see also *id.* at 938 (noting that “moral disapprobation” of same-sex couples does not justify Proposition 8, “no matter how large the majority that shares that view”); *id.* at 985–86 (listing a finding of fact by the court that “[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians”).

25. *Id.* at 967.

26. *Id.* at 999.

27. *Id.* at 972.

28. *Id.* at 998–1002.

29. *Id.* at 991–97.

30. I owe this way of framing the liberal argument driving Judge Walker’s approach in *Perry* to my colleague, Gary Jacobsohn, Malcolm Macdonald Professor in Constitutional and Comparative Law, Department of Government, University of Texas.

31. *Perry*, 704 F. Supp. 2d at 931.

32. *Id.* at 956.

couple were it to be said marriage is simply about the right to have sexual intercourse.”³³ Instead, the judge deeply inquired into the history of marriage and found that the evolving essence of marriage is “the state recognition and *approval* of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.”³⁴ Married couples are “honored and respected” for “making a public commitment to the world and to your spouse, to your family, parents, society and community.”³⁵ Here, in the very attention the judge gave to the importance our society attaches to having one’s relationship publicly recognized and approved, the moral and honorific aspects of marriage break through as Sandel would have predicted.

The liberal approach insists that giving gays legal permission to marry need not be construed as the state’s moral approval or endorsement of such marriages. But Judge Walker’s decision continually returns to the root question, as identified by a witness at the trial, of what “society most values, most esteems” in a marriage³⁶ and whether there is any reason to regard same-sex relationships as less worthy than opposite-sex relationships. Judge Walker is not neutral on the question of whether same-sex couples are entitled to the same public respect as opposite-sex couples. His entire factual inquiry is devoted to showing why, when it comes to what we honor in a marriage, same-sex couples are identical in virtue to opposite-sex couples.³⁷ To withhold the marriage title from same-sex couples and label their relationships as domestic partnerships is to deny same-sex couples “due respect,”³⁸ to “reduce the value of same-sex relationships,”³⁹ to relegate them to “second-class citizenship,”⁴⁰ to withhold the “symbolic”⁴¹ and “social meaning”⁴² of marriage as the “definitive expression of love and commitment,”⁴³ and to deliver a message that “gays and lesbians are not as good as heterosexuals.”⁴⁴

33. *Id.* at 992 (emphasis added) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

34. *Id.* at 961 (emphasis added).

35. *Id.* at 971–72.

36. *Id.* at 970.

37. *See Perry*, 704 F. Supp. 2d at 967 (“Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners. Standardized measures of relationship satisfaction, relationship adjustment and love do not differ depending on whether a couple is same-sex or opposite-sex.”).

38. *Id.* at 972.

39. *Id.* at 971.

40. *Id.* at 974.

41. *Id.* at 971.

42. *Id.* at 970.

43. *Id.*

44. *Id.* at 973.

The *Perry* findings of fact may turn out to be a decisive moment of civic education in the debate over same-sex marriage. If the decision proves capable of changing persons' minds, it will be because the trial judge did not set aside as irrelevant the moral question of whether gay and lesbian relationships are worthy of equal respect but made that inquiry central to the decision. The fact-finding takes on significance and persuasion only when framed against *what* it is we are trying to find out, which is what the value of state-sanctioned marriage is in the first place.

III. Sandel's Civic Republicanism

Throughout *Justice* and his previous writings, Sandel emphasizes that the Constitution is best interpreted in light of the civic-republican tradition that animated the founding generation and that continues to instill moral value in democracy.⁴⁵ Collective self-government is morally preferable to other forms of government only when it collects more than self-interests—only when it transforms us from isolated seekers of our own good into engaged citizens pursuing a common good. But the creation of a common good among diverse people is no easy task; it requires inspiring in persons the solidarities of citizenship and “the qualities of character that self-government requires.”⁴⁶ It is Sandel's basic point that the pursuit of liberal neutrality cannot awaken in citizens the civic virtues, sacrifices, and service that are indispensable to a common good. By avoiding and shunning public discourse about the moral meaning of our communal lives, liberalism leaves the public square denuded, empty of engagement with the crucial questions about the good life that citizens must debate if they are to become a community with a common good of any sort.⁴⁷

Sandel repeatedly turns to the necessary connection between democracy and civic virtue as justification for shifting our jurisprudential paradigm from the ideal of moral neutrality to the ideal of moral engagement and public discourse about the common good. Democracy is decidedly *not* neutral about the good life; it is founded precisely on the ethical elevation of character that comes when individuals share a good in common with others. To put it in

45. See SANDEL, *supra* note 3, at 265–69 (“A politics of moral engagement is not only a more inspiring ideal than a politics of avoidance. It is also a more promising basis for a just society.”); see also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 128–33 (1998) (discussing how the framers of the Constitution “adhered to republican ideals” because “they continued to believe that the virtuous should govern and that government should aim at a public good beyond the sum of private interest”).

46. SANDEL, *supra* note 3, at 266; see also Sandel, *America's Search for a New Public Philosophy*, *ATLANTIC MONTHLY*, Mar. 1996, at 57, 58 (“The republican conception of freedom, unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character that self-government requires.”).

47. See SANDEL, *supra* note 3, at 260–69 (advocating a politics of the common good); SANDEL, *supra* note 6, at 217 (“[P]ublic reason is too spare to contain the moral energies of a vital democratic life.”).

Aristotelian terms, sharing a good in common with others—being responsible for creating and maintaining a community that gives moral meaning to our lives—is our human telos, the highest good we can achieve on this earth. *Justice* is at its inspirational best in contrasting the allegiances of a self anchored to a particular community with a rootless self whose identity is detached from community and portable from place to place.

But an important question arises about Sandel's project as it relates to constitutional law. After all, it is one thing to argue that the people at large are best educated into the virtues of self-government when they engage one another in open political debate about the moral meaning of their lives. It is another matter to argue that judges should likewise ground constitutional interpretation on substantive moral judgments about the good life. It is one thing to praise President Obama, as Sandel does, for openly appealing to his Christian faith as a source of values and inspiration for his political arguments.⁴⁸ It would be another matter entirely to propose that a judge's religion is a relevant source for his or her constitutional interpretations. Every time a court "constitutionalizes" a particular result, as *Roe* did with abortion, the fear is that this ends deliberation rather than starts it and excludes the people from debating the moral choice in the way Sandel's praise of civic republicanism requires. Consider, for instance, this crucial passage in *Justice* and how the reasoning depends on inviting popular, and not judicial, discourse on moral questions:

[T]he life of the citizen enables us to exercise capacities for deliberation and practical wisdom that would otherwise lie dormant. This is not the kind of thing we can do at home. We can sit on the sidelines and wonder what policies we would favor if we had to decide. But this is not the same as sharing in significant action and bearing responsibility for the fate of the community as a whole.⁴⁹

It is not readily apparent how *judicial* resolution of fundamental moral controversies would answer to a model of citizens "sharing in significant action" or "bearing responsibility for the fate of the community as a whole."⁵⁰ Nonetheless, in previous writings Sandel has urged judges, not just the president and the people, to engage underlying moral issues when resolving matters of constitutional law. Take, for instance, the famous dispute

48. SANDEL, *supra* note 3, at 245.

49. *Id.* at 199.

50. In this regard, it is of interest that even as some groups adopted a litigation strategy for overturning Proposition 8, other groups were politically organizing to overturn the same-sex marriage ban through a new initiative campaign. That campaign was apparently having success. See Lou Cannon, *For Politicians, a Marriage of Inconvenience*, N.Y. TIMES, Aug. 8, 2010, at WK8 (quoting a Democratic consultant's statement that the *Perry* ruling was "a short-term plus for [California gubernatorial candidate] Jerry Brown and another long-term nail in the demographic coffin of the Republican party"); Andrew Gelman et al., *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3 (observing that 45% or more of Americans now support same-sex marriage, up significantly from 25% when the Defense of Marriage Act was passed in 1996).

in the late 1970s about whether the First Amendment Free Speech Clause gave Nazis a right to march in Skokie, Illinois, a community with a significant number of concentration camp survivors.⁵¹ Sandel thought that the case would have been relatively easy to decide had judges put aside the spurious search for neutrality when it comes to speech and simply judged the moral worth of hate speech to democracy.⁵²

Had judges been willing to confront this underlying question of whether a Nazi march is worthy of respect in a democracy, they would have seen the difference between protecting Martin Luther King Jr.'s march across the Edmund Pettus bridge in Selma, Alabama, despite traffic problems, and protecting a Nazi, despite trauma to concentration camp survivors. The difference is not rooted in any idiosyncratic or subjective moral judgment peculiar to one judge; it is inherent in the core democratic values of equal respect. King's march was in pursuit of equality; the Nazi march was under banners about racial and religious hatred.

Is there risk—democratic risk—when government is empowered through its courts to disparage some speech as morally unworthy of legal protection?⁵³ Even if we assume Nazis are an easy case, what about government attempts to censor Communist speech during the fascistic Stalin era and afterwards?⁵⁴ What about the preaching of jihadi doctrines today? I take it that Sandel is well aware of the risks. Throughout *Justice*, he readily acknowledges that moral judgment is—well, judgmental. There is no a priori guarantee that public discourse about a particular work of art—say, a graphic sexual movie—or a particular religious doctrine—say, Christian Science belief that children should not be taken to medical doctors—is worthy of public respect.⁵⁵ When it comes to *political* deliberation about such topics, Sandel

51. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

52. See SANDEL, *supra* note 45, at 81–90 (discussing the court's refusal to bracket some speech as inherently injurious).

53. See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 112–13 (2003) (voicing concern that isolating groups from societal interaction tends to make them more extreme). One danger, explored by Cass Sunstein and others, is that groups will be polarized and insulated into their own enclaves if members hear only their own views echoed in private. Thus, for example, persons with racist tendencies are likely to become more extreme in those views if they are locked out of public debate with opponents and have their own views continually reinforced by like-minded others. *Id.* For an excellent summary of the phenomenon of group polarization, see Robert B. Talisse, *Dilemmas of Public Reason: Pluralism, Polarization, and Instability*, in THE LEGACY OF JOHN RAWLS 107, 113–16 (Thom Brooks & Fabian Freyenhagen eds., 2005).

54. Cf. EDWARD ALWOOD, DARK DAYS IN THE NEWSROOM: MCCARTHYISM AIMED AT THE PRESS 61–62 (2007) (chronicling the blacklisting and firing of newspaper and broadcast employees during the early 1950s for their alleged Communist ties and including statements from a newspaper employee's dismissal letter that “Communism is the antithesis of democracy” and from the president of Warner Studios that he would not tolerate any employee “who belongs to any Communist, Fascist or other un-American organization”).

55. SANDEL, *supra* note 3, at 268 (“There is no guarantee that public deliberation about hard moral questions will lead in any given situation to agreement—or even to appreciation for the moral and religious views of others.”).

is clear that the risks are worth running. For unless we are willing to risk our politics and our views about other people's religions and moral views, we will never engage other people in the first place in the ways that democracy requires. We will never "connect with the moral and spiritual yearning abroad in the land, or answer the aspiration for a public life of larger meaning."⁵⁶

But can—does—Sandel make the same argument about why we should bear the risks involved when judges, not the people at large or their representatives, resolve hard questions of constitutional law in favor of a particular substantive vision of the good life? It is, to repeat, not entirely clear how Sandel answers this question. One way to answer is to follow John Ely in limiting constitutional judges to removing procedural obstacles to the proper working of democracy—obstacles that occur when prejudice restricts a group's right to vote or orthodoxies deny equal freedom of expression to certain points of view.⁵⁷ But Ely was clear that, once a court has purified democratic procedures of prejudice and roadblocks, courts should live with the substantive moral result arrived at through fair democratic procedures.⁵⁸ This is precisely where Sandel differs from Ely; Sandel is emphatic that "procedural justice" is not enough, that progressive causes are best served by substantive decision making about the common good.

But Sandel may be overconfident here or insufficiently risk averse to the dangers of inviting judges to make substantive moral decisions. As of this writing, an eventual appeal of Judge Walker's decision in *Perry v. Schwarzenegger* to the Supreme Court remains possible, even likely.⁵⁹ Suppose the Court were to reverse the trial court and hold that Proposition 8 permissibly expressed, in part, the voters' deeply held religious equation of homosexuality with sin. Or suppose the Court were to find that domestic partnership laws already answer to the moral meaning of the Equal Protection Clause, and the whole furor over the "M" word is much ado about nothing. Such a decision would be as grounded on substantive moral judgment as was Judge Walker's defense of the integrity of gay relationships. Little in Sandel's model of substantive moral engagement tells us why Aristotelianism, rather than Catholicism, gives us a better reading of the Equal Protection Clause.⁶⁰ Liberals can say that we should not leave a

56. *Id.* at 250.

57. See JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980) (concluding that judicial review "can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack").

58. *Id.*

59. See Jesse McKinley, *Both Sides in California's Gay Marriage Fight See a Long Court Battle Ahead*, N.Y. TIMES, June 27, 2010, at A12 (noting that "both sides expect" the case to eventually be taken "all the way to the Supreme Court").

60. In *Perry*, Judge Walker refused to give any weight at all to testimony from persons who claimed God dictated their equation of homosexuality with sin. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010) (noting with approval that even Proposition 8's proponents

group's rights at the mercy of a majority's moral views, but this is precisely the argument Sandel's model forecloses.

Here is another issue. As Sandel is well aware, the civic-republican tradition he invokes always viewed democratic politics as necessarily local and hostile to distance and bigness. The kind of attachment to community that breeds civic virtue was always thought to be "rooted in a particular place, carried out by citizens loyal to that place and the way of life it embodies."⁶¹ But if the civic virtues can be intensely practiced only in relation to a particular place, then one of the most settled aspects of modern constitutional law—the nationalization of most of the provisions in the Bill of Rights—is problematic for Sandel. The nationalization of rights removed from local communities the right to shape a *particular* way of life when it came to religion,⁶² speech,⁶³ or, most recently, guns.⁶⁴ There became instead only one unitary and uncontested answer to the meaning of "ordered

abandoned in court "previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples"). In line with liberal demands for neutrality and public reason, the judge deemed bald religious assertions to be no rational argument at all because they sprung from faith, not fact. But Sandel presumably would oppose this exiling of substantive moral views anchored in religion. Throughout *Justice* and previous writings, he dissents from the Rawlsian argument that values rooted in ultimate religious worldviews (what Rawls calls "comprehensive doctrines") are held so intractably that they cannot be debated at all and hence have no place in public deliberations. RAWLS, *supra* note 1, at 10. For Sandel, allegiance to religious faith is admirably "constitutive" of many persons' identities; they would not be the persons they were without loyalty to their religion. Respect for such attachments should carry *some* weight in our moral debates. Thus, unlike Judge Walker, Sandel would at least have to count the traditional religious condemnations of homosexuality as a permissible moral argument in favor of Proposition 8. It does seem possible that the Supreme Court would take precisely this approach and find a "rational basis" for the distinction between same-sex and opposite-sex couples from the very existence of a centuries-old religious tradition limiting marriage to a man and a woman. Sandel might find such a conclusion morally odious, but his jurisprudential model seems to invite such substantive moral stances into the law. Can Sandel argue, consistently with his call for explicitly engaging the issue of what respect is due to gay couples, that the religious rejection of homosexuality is one of those views to which we should give a hearing but which we should then reject as wrong or at least as inconsistent with the way the Court understands the moral ideal of equality when applied to other groups, or even to gays and lesbians, apart from the marriage issue? I think this might very well be his approach, but *Justice* does not fully flesh out this argument.

61. Sandel, *supra* note 46, at 74.

62. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (characterizing the City's ordinances that had targeted Santeria as "impermissible attempt[s] to target petitioners and their religious practices," while noting as significant a related city resolution that had stated that "residents and citizens . . . have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety").

63. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (holding that burning of the American flag constituted speech protected under the First Amendment, thereby invalidating dozens of state statutes that prohibited burning the American flag).

64. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is fully applicable to the states); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (upholding the lower court's rejection of a District of Columbia law banning handguns).

liberty” in ways that Sandel might consider to be undermining of the civic republicanism he sets out to defend.⁶⁵

IV. The Moral Inspiration Within Liberalism

In the end, much of Sandel’s case depends on accepting his description of liberal societies as morally arid. Sandel certainly gives the liberal paradigm its due: it oversaw a remarkable expansion of liberty and equality in the United States. But there is no mistaking Sandel’s mapping of the limits of liberal justice: it leaves us with a thin and precarious respect for one another—Sandel at one point calls it “spurious respect”—and without the sense of belonging that makes for a common good.⁶⁶

But is the liberal ideal of neutrality as vapid and uninspiring as Sandel would have it? Sandel signals out candidate John F. Kennedy’s famous speech in 1960 meant to quiet voters’ fear of electing a Catholic as President of the United States.⁶⁷ To defuse any sense that as President he would be bound to obey papal dictates, Kennedy argued that his religion was a matter of interest only to himself and his family and that as President, he would make decisions concerning the national interest without regard to religious dictates.⁶⁸ Sandel concedes that the speech was “a political success,” but he views it as an example of the exile of religion and morality from public life that he criticizes.⁶⁹

What Sandel may undervalue is that Kennedy’s separation of a president’s religion from a president’s duty was not just politically successful; it was morally successful as well, inspiring in us an understanding that we are one as citizens even if we are different by religion, that the Presidency is open to all without regard to religion, and that the neutral secular state provides safe haven for religions to flourish equally. As a result of Kennedy’s speech, American Catholics won a public respect that had

65. From the civic-republican point of view, turning to federal courts to resolve the same-sex marriage debate would seem especially problematic. Historically, marriage has been a locally situated and defined institution. *But cf.* *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (declaring unconstitutional a state law that prohibited interracial marriages). I owe to Professor Daniel Rodriguez the observation that much of the current debate over same-sex marriage taking place at the state level would seem to meet “Sandellian criteria for dialogic deliberation, engagement with moral disagreement, and the choice of (comparatively) representative institutions—even sometimes direct democracy—to make ultimate judgments.” E-mail from Daniel Rodriguez, Minerva House Drysdale Regents Chair in Law, The University of Texas School of Law (Oct. 29, 2010) (on file with author). Sandel might decry results reached in some states while applauding contrary results in others. But, consistently with his civic-republican defense of self-government, he should not wish to remove the debate into federal court.

66. SANDEL, *supra* note 3, at 268.

67. *Id.* at 244–45 (citing Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960)).

68. *Id.* at 245.

69. *Id.* at 245, 249.

often been denied them previously.⁷⁰ Liberalism did not avoid the issue of what respect we owe Catholics; it confronted it head on and exposed the prejudices behind the fear of a first Catholic president.⁷¹

Liberal neutrality is its own moral compass, guiding us to cherish a common good forged precisely by the capacious capacity of a people to share their lives with other persons *without* resolving their moral differences and certainly without sitting in judgment of other persons' basic aims, ends, or values in life.⁷² Sharing a *public* morality that does not judge the private moralities of straights or gays, or Jehovah's Witnesses or Catholics, is inspiring in its own right. If this is so, then liberalism already is a "morally engaged" politics of the sort Sandel seeks.

V. Conclusion

For anyone interested in the intersection of constitutional law and political philosophy, Michael Sandel's latest book on justice is indispensable. Sandel's considerable achievement is to take political philosophy from its sometimes lofty and distant perches and bring it to bear on enduring political and legal disputes. Sandel shows persuasively that it is impossible to read the Constitution without having *some* political theory in mind, whether it is the liberal ideal of the neutral state he disputes or the republican ideal of

70. See Brian T. Kaylor, Editorial, *Kennedy Speech Eloquenty Balanced Religion, Politics*, HOUS. CHRON., Sept. 10, 2010, <http://www.chron.com/disp/story.mpl/editorial/outlook/7195602.html> ("Kennedy's speech and subsequent victory on Election Day opened the door for Catholics to take full advantage as citizens in the American political process. Today, our nation has its first Catholic vice president, a Catholic majority on the U.S. Supreme Court for the first time in history, and numerous Catholic governors and members of Congress.").

71. Professor Sanford Levinson has noted, in an e-mail exchange, that Kennedy's speech is best understood as that of a "non-serious" Catholic that can have little appeal to a believer in a "'divine sovereign' whose commands are knowable." E-mail from Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, The University of Texas School of Law (Aug. 17, 2010) (on file with author). But consider the career of Father Robert Drinan in the House of Representatives. An ordained priest, Drinan held a House seat in the Massachusetts delegation from 1970 to 1980. His views were decidedly liberal on issues such as abortion and birth control. He resigned in 1980 when a papal edict prohibited priests from holding political office, making a choice that showed just how seriously he took his Catholicism. Nevertheless, during his decade in the House, Father Drinan could hardly have been seen as legislating according to papal dictates. See Colman McCarthy, *Father Drinan, Model of Moral Tenacity*, WASH. POST, Jan. 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012902015.html> (chronicling Drinan's resignation from Congress in 1980 at the behest of the Pope, who felt his views, particularly with respect to abortion, were too liberal).

72. As one commentator has noted,

Rightly conceived, [liberalism] does not thwart the uninhibited political discussions which are the mark of a vigorous democracy. We can argue with one another about political issues in the name of our different visions of the human good while also recognizing that, when the moment comes for a legally binding decision, we must take our bearings from a common point of view.

Charles Larmore, *Public Reason*, in THE CAMBRIDGE COMPANION TO RAWLS 368, 383 (Samuel Freeman ed., 2003).

civic virtue he promotes. Sandel is at his most elegant in showing us that political debates can and often do achieve coherence and consistency: there is not an endless variety of political positions to try on but a considered choice between two basic positions that have been debated at least since Plato's time. In one position, we cannot possibly answer questions about what rights are due a person without first inquiring into what is good for people—what fulfills or perfects our human nature. In the competing position, we can never resolve, through reason alone, questions about the good life, and for that very reason, we start from the fundamental premise that individuals have the right and freedom to choose their own good in their own way. *Justice* is a sustained rumination on the difference between these two views and how the tension between them plays out in contemporary legal cases.

Every once in a while, a book comes along of such grace, power, and wit that it entralls us with a yearning to know what justice is. This is such a book. Michael Sandel does not make it easier to know “what the right thing to do” is. But he makes the inquiry unavoidable.