

Book Review

A Public Philosophy for the Professional-Managerial Class

Democracy's Discontent. By Michael Sandel. Cambridge: Harvard University Press, 1996. Pp. xi, 417. \$24.95.

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Michael Sandel's critique of the public philosophy of contemporary United States liberalism is almost enough to make me a liberal.¹ Sandel aims his criticisms at what he calls liberalism's procedural republic, but many miss their target. The procedural republic has more going for it than Sandel is willing to concede: A sensible and defensible liberal public philosophy covers nearly the whole terrain with which Sandel is concerned, and more. Sandel believes that he has described an alternative to such a philosophy, but much of what he recommends is entirely compatible with a sensible liberal public philosophy. Sometimes his prescriptions are so ill-defined that one might read into the project more than is there. Moreover, to the extent that some of his recommendations clearly differ from what a sensible liberal public philosophy would recommend, they are of questionable value. Nevertheless, the procedural republic is indeed inadequate. It lacks the resources, some of which Sandel identifies, to deal with one important source to contemporary discontent: the concentration of economic power in transnational corporations, which deprives United States citizens of important powers of self-governance.

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1. "Liberalism" is of course a contested term. For one definition, see Ronald Beiner, *What Liberalism Means*, 13 SOC. PHIL. & POL'Y 190, 198 (1996) ("A liberal is someone who celebrates modernity wholeheartedly as emancipatory. An antiliberal is someone who is at least somewhat anxious about the quality of this emancipation, and who worries about the price we have to pay for being culturally 'emancipated.'"). On this definition, I am an antiliberal.

After providing an introduction to Sandel's argument in Part I, I go on to raise three questions about some of its main components. Part II examines Sandel's effort to identify the public philosophy that reigns in the contemporary United States. Section II.A questions whether Sandel fairly educes such a public philosophy from legal sources; Section II.B suggests that Sandel's reading of United States history to discern our public philosophy oversimplifies that history's complex reality; and Section II.C argues that Sandel's criticisms of John Rawls's version of liberalism as a political philosophy are misplaced, but that Sandel's description of a *public* philosophy may nonetheless be accurate.

Part III stands back from the substantive details of Sandel's work and locates it socially. I argue that *Democracy's Discontent* offers us a version of what sociologist Charles Derber calls "the communitarianism of the professional middle class."² *Democracy's Discontent's* failure to offer an adequate account of how to achieve popular control of an economy characterized by transnational economic power coheres with the position of that class, which itself both hopes for such control and has few resources with which to achieve it. Part IV elaborates on an idea of federalism and local control that plays an important but vague role in Sandel's exposition. Section IV.A argues that federalism may provide an entry into developing an idea of complex cosmopolitanism as a public philosophy that might address the economic questions discussed in Part III, and Section IV.B applies that idea of complex cosmopolitanism to the issue of gay rights.

Democracy's Discontent is a rich and interesting work. It is particularly valuable in its emphasis on the way in which economic debates are not merely about economic growth and distributive justice but are also about the political conditions that flow from our economic arrangements. The criticisms I offer are serious and sometimes severe. They do not diminish the book's importance in helping us understand how we might go about achieving popular control over economic power in today's world. Sandel has identified, not *democracy's* discontent, but the discontent of—and the alternative public philosophy desired by—an important contemporary social class. His diagnosis may be sound, even if his prescription proves weak.

I. AN OVERVIEW

Democracy's Discontent identifies, criticizes, and offers an alternative to our "public philosophy." A public philosophy is not a form of systematic political philosophy. Rather, it is the philosophy "implicit in our practices and

2. Charles Derber, *Coming Glued: Communitarianism to the Rescue*, TIKKUN, July-Aug. 1993, at 27, 28.

institutions.”³ The nature of my criticisms makes it important that readers have a complete sense of his argument's overall form and content.

Sandel divides his analysis into two parts. The first examines a range of contemporary political and legal issues, primarily as they have been dealt with by the Supreme Court. Here Sandel finds that our practices express a commitment to what he calls the procedural republic, whose “central idea is that government should be neutral toward the moral and religious views its citizens espouse” and “should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends.”⁴ But, Sandel argues, government really “cannot be neutral toward the values and ends its citizens espouse.”⁵ Instead of constructing a procedural republic, government should pursue “a formative politics, a politics that cultivates in citizens the qualities of character self-government requires.”⁶ This “republican” politics may better promote liberty than the procedural republic, because the dominant public philosophy “cannot inspire the sense of community and civic engagement that liberty requires.”⁷

The longer, second part of *Democracy's Discontent* surveys United States history with a general and a more specific aim. The former is to establish that the nation's public philosophy pursued formative projects of various sorts until the public philosophy of the procedural republic recently attained dominance. The latter is to show that each of those formative projects recognized the impact of economic arrangements on citizenship and civic virtue.

Sandel begins with a quick survey of political theory. Liberalism, he says, rests on an appealing “image of the self as free and independent, unencumbered by aims and attachments it does not choose for itself” and on “the case it implies for equal respect.”⁸ “Despite its powerful appeal,” however, “the image of the unencumbered self is flawed” because “[i]t cannot make sense of our moral experience” of “moral ties that may claim us for reasons unrelated to a choice.”⁹ Rather, a public philosophy must acknowledge that “we think of ourselves as encumbered selves, already claimed by certain projects and commitments.”¹⁰

3. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* at ix (1996).

4. *Id.* at 4. For Sandel, the procedural republic is inadequate in part because “liberty depends on sharing self-government,” which “requires more than the capacity to choose one's ends and to respect others' right to do the same. . . . To share in self-rule . . . requires that citizens possess, or come to acquire, certain qualities of character, or civic virtues.” *Id.* at 5–6.

5. *Id.* at 6.

6. *Id.*

7. *Id.*

8. *Id.* at 12.

9. *Id.* at 13.

10. *Id.* at 14. I confine to this footnote the observation that one might reasonably question restricting the analysis of public philosophy to “citizens.” For a collection doing so with reference to political theory and economics, see *JUSTICE IN IMMIGRATION* (Warren Schwartz ed., 1995). Sandel does not discuss current controversies over immigration policy. He does reject criticisms of republican theories as necessarily

The next chapter provides an equally quick overview of our constitutional history, arguing that the modern “priority of individual rights, the ideal of neutrality, and the conception of persons as freely choosing, unencumbered selves”¹¹ is a relatively recent development in the United States. The *Lochner* era marked this change: “For the first time in American history, rights functioned as trumps. Liberty no longer depended on dispersed power alone, but found direct protection from the courts.”¹² “[L]ater courts,” drawing inspiration from dissents by Chief Justice Harlan Fiske Stone and Justices Oliver Wendell Holmes and Louis Brandeis, “install[ed] the priority of right in the further sense of the Constitution as a framework of rights that is neutral among ends.”¹³ Sandel concludes this survey by discussing the Supreme Court’s flag salute cases. In denying government the power to require school children to salute the flag, the Court committed itself to the view that “[p]atriotism would be a matter of choice, not of inculcation, a voluntary act by free and independent selves. . . . With *West Virginia v. Barnette*, the procedural republic had arrived.”¹⁴

The succeeding two chapters examine constitutional issues involving religious liberty, free speech, privacy, and policy issues such as divorce. Establishment Clause doctrine stressing the government’s duty of neutrality among religions and between religion and nonreligion naturally attracts Sandel’s attention. Even dissenters spoke “in the name of neutrality,”¹⁵ and when the Court has upheld religious practices like a municipal crèche, “it has taken pains to maintain that the religious aspect is only incidental.”¹⁶ The Court’s recent cases turn on “the right to choose [religious] beliefs themselves.”¹⁷ On this view, the Constitution commands not “respect for

exclusionary. See SANDEL, *supra* note 3, at 319 (“[T]he assumption that the capacity for virtue is incorrigible, tied to roles or identities fixed in advance, is not intrinsic to republican political theory.”). Yet I wonder whether this happy conclusion is entirely compatible with Sandel’s insistence that people have encumbered selves, constituted by “those loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of this family or city or *nation* or people.” *Id.* at 14 (emphasis added). I wonder whether corrigibility might not require some, either those presently citizens or those seeking to become citizens, to separate themselves from their identities as members of particular nations.

11. See SANDEL, *supra* note 3, at 28.

12. *Id.* at 42.

13. *Id.* at 43. Holmes insisted, for example, “not only that judges should refrain from imposing *their* morality on the Constitution, but also that the Constitution itself refuses to endorse any particular morality.” *Id.* at 45. Chief Justice Stone’s *Carolene Products* footnote, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), then “offered a basis for rights consistent with the idea of the Constitution as neutral among ends.” SANDEL, *supra* note 3, at 49. Within his framework, “arguments would not be about the intrinsic value of the interests the rights protect, but rather about the constraints appropriate to an open political process, free of prejudice, within which people can choose their values for themselves.” *Id.*

14. *Id.* at 54.

15. *Id.* at 59.

16. *Id.* at 60. As Sandel sees it, the Court’s more modern cases rest not so much on an older argument that “neutrality is best for both religion and the state,” but on a “voluntarist argument” stressing “individual choice in matters of religion.” *Id.* at 62–63 (quoting Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 806 (1978)).

17. *Id.* at 63.

religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one's religion freely."¹⁸ This, however, "is inadequate to the liberty it promises. . . . Not all religious beliefs can be redescribed without loss as 'the product of free and voluntary choice by the faithful.'"¹⁹

Sandel's discussion of free speech law again unsurprisingly focuses on the doctrine of content neutrality. That doctrine is "a recent development,"²⁰ which, according to Sandel, displaced an earlier "two-level" theory in which some speech was strongly protected and other speech was unprotected. "The erosion of the two-level theory relieves the Court of the task of assigning values to various categories of speech, and so signals the rise of neutrality as a principle of First Amendment jurisprudence."²¹ This development was accompanied by a shift in theoretical emphasis within free speech law: Theories treating speech as essential to self-government were displaced by theories treating speech as essential to self-expression.²²

The liberal theory of "personhood and speech," Sandel concludes, is "open to at least two objections": First, protecting racist speech or "violent pornographic depictions . . . may fail to respect persons as members of the particular communities to which they belong, and on whose status their social esteem may largely depend," and second, "enforcing the theory that speech . . . never constitutes social practices fails to acknowledge the injuries that speech can inflict independent of the physical harm it may cause."²³ To the liberal response that the point of constitutional restraints is to limit self-government, Sandel replies that sometimes attention to content may actually promote liberty. In support, he cites a decision by District Judge Frank Johnson allowing a protest march at least in part on the content-based ground that the marchers were seeking to promote civil rights.²⁴

18. *Id.* at 63–64.

19. *Id.* at 65 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985)) Sandel acknowledges that decisions requiring governments to accommodate religious practices do "accord[] greater respect to the claims of encumbered selves," *id.* at 68, but notes the Court's retreat from a doctrine of mandatory accommodation, which he explains by the procedural republic's difficulty in "distinguish[ing] between claims of conscience on the one hand and personal preferences and desires on the other," *id.* at 70. Sandel also notes statutory accommodations of religion, *see id.* at 70–71, but he does not use such accommodations, and the Supreme Court's decisions finding some of them constitutional, to identify a different public philosophy "implicit in our practices," *id.* at ix.

20. *Id.* at 72.

21. *Id.* at 73–74.

22. *See id.* at 79–80. Sandel uses controversies over group defamation and arguments against pornography made by some feminists to show that constitutional law cannot and should not ask "a community to 'bracket' its disapproval of the content of speech, however odious the speech may be" *Id.* at 81.

23. *Id.* at 89. In addition, "protecting speech by insisting that local communities bracket moral judgments carries costs for self-government" because "it . . . prevents political communities from acting democratically to realize" the good of "respect for persons as situated selves." *Id.*

24. *See id.* at 90 (citing *Williams v. Wallace*, 240 F. Supp. 100, 106, 108 (M.D. Ala. 1965))

Sandel's discussion of privacy rights and family sounds similar themes. Privacy rights have become "tied . . . to voluntarist assumptions,"²⁵ even though *Griswold v. Connecticut*,²⁶ the foundation of the modern law of constitutional privacy, was "based on a substantive moral judgment" about the sanctity of marriage.²⁷ The shift to autonomy, Sandel claims, came in *Eisenstadt v. Baird*,²⁸ which treated marriage and other forms of sexual congress as a mere association of individuals. The abortion cases show the failings of the procedural republic's attempt to bracket moral issues—for abortion, the question of when life begins—because the Court's decision actually "presupposed a particular answer to the question" it purported to bracket.²⁹ *Bowers v. Hardwick*³⁰ is, like the permissible accommodation cases, an embarrassment for Sandel's account, but Sandel turns it to his purposes by arguing that prior privacy law, by resting on voluntarist assumptions, deprived defenders of gay rights of the ability to make arguments that homosexual intimacy was a substantive good just as heterosexual marriage was.³¹

Sandel concludes the first part of *Democracy's Discontent* with a look at modern family law. No-fault divorce law exemplifies the elimination of substantive moral judgments in the procedural republic: "Instead of concerning themselves with guilt or innocence, the courts now employ such 'nonjudgmental' criteria as the economic needs and resources of the parties."³² Sandel's criticisms of this development, stressing the economic hardships now faced by divorced women and their children, are more pragmatic than his objections to the rise of the procedural republic elsewhere. He does point out that modern divorce law "fails to respect mothers and homemakers of traditional marriages whose identity is constituted by their roles," because "it penalizes women whose economic reliance on their husbands expressed the mutual dependence of traditional marital roles."³³ Returning to the economic theme, Sandel argues that liberal ideals of self-

25. *Id.* at 92.

26. 381 U.S. 479 (1965).

27. See SANDEL, *supra* note 3, at 96.

28. 405 U.S. 438 (1972).

29. See SANDEL, *supra* note 3, at 101. Sandel also observes that one could bracket the question by leaving the decision to individual women or to local governments: "Even given agreement to bracket an intractable moral or religious controversy for the sake of social cooperation, it may still be unclear what counts as bracketing." *Id.* at 102–03. Sandel does not here treat the "individual" woman making a decision as herself encumbered. On this view, insisting that the decision to have or not have an abortion belongs to the woman need not entail the view that women making that decision are unencumbered selves. To the extent that *Roe v. Wade* itself repeatedly referred to a decision jointly made by a woman and her physician, see 410 U.S. 113, 121, 164 (1973), it might be taken to conceptualize the choice as socially situated and at least to some degree encumbered.

30. 478 U.S. 186 (1986).

31. See SANDEL, *supra* note 3 at 104–08.

32. *Id.* at 109.

33. *Id.* at 113.

sufficiency “make some ways of life more difficult”³⁴ in part “[b]y making dependence a dangerous thing.”³⁵ The “unilateral” nature of divorce, “the rejection of marital roles tied to lifelong obligations, and the emphasis on self-sufficiency after divorce all reflect the liberal conception of persons as unencumbered selves independent of their roles and unbound by moral ties they choose to reject.”³⁶

Part II of *Democracy's Discontent* explores how “the civic strand of economic argument”³⁷ was expressed in United States history until recently. It is a story of decline: Today our discussions of economic policy “revolve around two considerations: prosperity and fairness,” but in the past, “the civic consequences of economic policy . . . often loomed large in American political discourse.”³⁸

Sandel's analysis of U.S. history starts with Jefferson, who “argued against developing large-scale domestic manufactures on the grounds that the agrarian way of life makes for virtuous citizens, well suited to self-government.”³⁹ The Founders pursued two programs, “one formative, the other procedural. The first sought, through education and other means, to inculcate virtue more strenuously. The second sought, through constitutional change, to render virtue less necessary.”⁴⁰ Sandel's account of the Founding era will be familiar to those who have followed the discussion of republicanism by contemporary constitutional theorists. Economic debate, including debate over domestic manufactures, dominated political discourse during the early republic, but this debate “was not only about national wealth and distributive justice; it was also about the civic consequences of economic arrangements—about the kind of society America should become and the kind of citizens it should cultivate.”⁴¹ Partisans on both sides argued that their programs would produce citizens with characters appropriate to self-governance.⁴² Jacksonian political and economic theory stressed the importance of artisan independence, and opposed the concentration of economic power because it made corruption more likely and “undermin[ed] the moral qualities republican citizenship requires.”⁴³ “[E]conomic growth and distributive justice” mattered, but primarily because they were “means to competing visions of a self-governing republic.”⁴⁴

34. *Id.* at 114.

35. *Id.* at 115.

36. *Id.* at 112. Sandel's argument would have been strengthened, I believe, had he incorporated the more subtle treatment of no-fault divorce laws in MILTON C. REGAN JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 137–52 (1993).

37. SANDEL, *supra* note 3, at 124.

38. *Id.*

39. *Id.* at 124–25.

40. *Id.* at 129. The Constitution itself was primarily part of the second program

41. *Id.* at 133.

42. *See, e.g., id.* at 142–47.

43. *Id.* at 157.

44. *Id.* Sandel uses debates over the recharter of the Bank of the United States and Henry Clay's proposals for internal economic development to convey this interpretation of the period. *See id.* at 157–63

Sandel's overview of the late nineteenth century notes that increasing industrialization led to new understandings of economics and civic virtue. Abolitionists, followed by advocates for the industrial working classes, promoted free labor partly because people should have the right to choose their own paths; they also stressed that labor, even in an industrial setting, was "a temporary stage on the way to independence" as an artisan, entrepreneur, or farmer.⁴⁵ In the end, however, industrial development induced a change in the terms of public discussion. The republican ideals were muted, and a voluntarist conception—that workers must be allowed to contract freely on their own terms as expressions of their autonomous selves—began to dominate. This change was exacerbated by judges in the *Lochner* era who articulated a strongly voluntarist vision of economic life. "With the acceptance of wage labor as a permanent condition came a shift in American legal and political discourse from the civic to the voluntarist conception of freedom."⁴⁶

Nevertheless, the procedural republic was not yet complete. The Progressive era, according to Sandel, saw a resurgence of interest in the relation between economic policy and self-government. During that period, Sandel believes, the discontent, frustration, and sense of disempowerment that characterize contemporary politics truly took hold. As bureaucracies and other large organizations came to dominate what became an urban landscape, Progressives attempted to revitalize the civic vision of economic policy: "[T]he lack of fit between the way people conceived their identities and the way economic life was actually organized gave rise to fears for the prospect of self-government."⁴⁷ Like the Founders, Progressives pursued a formative and a procedural program. The procedural program sought to enhance the power of professionals and thereby to make government "less dependent on virtue among the people."⁴⁸ But their proposals for urban reform, including the creation of urban parks to promote neighborliness, also were efforts "to elevate the moral and civic character of citizens."⁴⁹ Progressives sought to enhance national governmental power to combat concentrations of private wealth. At the same time, they also attempted to disperse power by preventing the incursion of concentrated economic strength into local communities, as when they opposed the growth of chain stores and hoped that antitrust law would preserve other small businesses.⁵⁰

Eventually, however, the civic ambition faded, and public debates about economic policy came to express the far more limited "consumerist vision,"

45. *Id.* at 169. For example, proponents of the eight-hour day argued that the time made available could be used for participation in government. *See id.* at 191–92.

46. *Id.* at 200.

47. *Id.* at 205.

48. *Id.* at 208.

49. *Id.* at 209.

50. *See id.* at 227–49.

in which public policy sought to promote the ability of each person to choose autonomously whatever she or he wished.⁵¹ The Keynesian revolution in economic policy confirmed the shift to the procedural republic with its exclusive emphasis on growth and distributive justice.⁵² Growth was an uncontroversial goal compared to restructuring the economy, and even concern for distributive justice came to rest on a desire to promote growth and ensure the ability of all to be autonomous consumers.

The procedural republic had its "moment of mastery"⁵³ in the years after World War II, when the United States experienced high levels of material prosperity and economic and political hegemony in the West. But President John F. Kennedy's New Frontier was "a monument to a fading vision of American power and will, a final expression of the mid-century moment when Americans viewed themselves as masters of their destiny."⁵⁴ The postwar welfare state grew, but it rested primarily on the view that "[c]ertain material conditions were prerequisites for the freedom of each person to choose his ends for himself,"⁵⁵ not on "an expansive sense of national community."⁵⁶

As a result, "Americans found to their frustration that they were losing control of the forces that governed their lives."⁵⁷ We came to fear "the loss of self-government and the erosion of community," and the "reigning political agenda, with its attenuated civic resources, was unable to answer or even address" them.⁵⁸ Sandel then surveys recent political history—from the unsuccessful candidacies of George Wallace and Robert Kennedy to the successful one of Ronald Reagan—to show how some politicians responded to the impoverishment of the civic discourse in the procedural republic by invoking republican themes and reasserting the hope that government could pursue a formative project. But, Sandel concludes, even Reagan "governed more as market conservative than as civic conservative. . . . Not surprisingly, Americans' frustration with politics continued to mount."⁵⁹

Sandel's final chapter mentions, but does not truly address, the concern that his analysis is "tinged with nostalgia."⁶⁰ He gives more attention to the argument that republicanism is unattractive because it is necessarily exclusive

51. *See id.* at 221–27.

52. *See id.* at 261–62. Keynesian policy allowed public officials "a way to 'bracket,' or set aside, controversial conceptions of the good life . . . [and] denied government a stake in the moral character of its citizens." *Id.*

53. *Id.* at 275.

54. *Id.* at 277.

55. *Id.* at 281.

56. *Id.* at 280. For example, welfare rights litigators objected to efforts to use public assistance "to regulate the moral character of welfare recipients," *id.* at 286, and reform proposals culminated in efforts to ensure a guaranteed income, which would have confirmed that public assistance had purely economic and not civic, moral, or other formative goals.

57. *Id.* at 294.

58. *Id.*

59. *Id.* at 315.

60. *Id.* at 317.

and coercive. Sandel denies the first charge, but acknowledges that “[a]s the tendency to exclusion recedes, . . . the danger of coercion looms larger.”⁶¹ Although “[r]epublican politics is risky politics, a politics without guarantees,”⁶² it is better than the alternatives offered by the procedural republic, which have led to our present state of discontent with politics. “A politics that brackets morality and religion too completely soon generates its own disenchantment,”⁶³ and its own serious pathologies, “creat[ing] a moral void that opens the way for intolerance and other misguided moralisms.”⁶⁴ Sandel takes some comfort in recent efforts by conservatives and some Democrats, including Bill Clinton, to reconstitute and reform public policy with a new formative project, which he calls “the recrudescence of virtue.”⁶⁵

Sandel’s final pages are surprisingly muted. The problem he identifies is serious: A contemporary political economy must address the fact that the economy is now organized on a global scale. “We cannot hope to govern the global economy without transnational political institutions, and we cannot expect to sustain such institutions without cultivating more expansive civic identities.”⁶⁶ But Sandel doubts that this can happen. In light of the difficulty Americans have in generating allegiance even to our own national institutions, Sandel thinks it unlikely that supranational institutions could generate loyalty: “If the nation cannot summon more than a minimal commonality, it is unlikely that the global community can do better . . .”⁶⁷ Rather, sovereignty must be dispersed, not “relocated” upward.⁶⁸ Without explication, Sandel invites us “to consider the unrealized possibilities implicit in American federalism.”⁶⁹

Democracy’s Discontent concludes with a sermon. After noting that “multiply-encumbered citizens are prone [to] the drift to formless, protean, storyless selves,”⁷⁰ Sandel writes:

Since human beings are storytelling beings, we are bound to rebel against the drift to storylessness. But there is no guarantee that the rebellions will take salutary form. Some, in their hunger for story, will be drawn to the vacant, vicarious fare of confessional talk shows, celebrity scandals, and sensational trials. Others will seek refuge in fundamentalism. The hope of our time rests instead with those who can summon the conviction and restraint to make sense of our condition and repair the civic life on which democracy depends.⁷¹

61. *Id.* at 319.

62. *Id.* at 321.

63. *Id.* at 322.

64. *Id.* at 323.

65. *Id.* at 324.

66. *Id.* at 345.

67. *Id.* at 346.

68. *See id.* at 345.

69. *Id.* at 347.

70. *Id.* at 350.

71. *Id.* at 351.

II. IDENTIFYING "OUR" PUBLIC PHILOSOPHY

Quick: Who is Wayne Dyer? If you do not know, you may not understand the public philosophy that prevailed in the 1970s. Sandel explicates the social thought of pop psychologist Dr. Dyer—"a best-selling author of the 1970s"⁷²—to show how "the liberating promise of the voluntarist conception of freedom assumed its most extravagant form."⁷³ On reading Sandel's analysis of Dr. Dyer's writings,⁷⁴ which seemed accurate enough to me, I wondered why Dr. Dyer exemplified the nation's public philosophy. Why not Billy Graham instead, a person who regularly appeared on lists of Americans' most admired figures,⁷⁵ or Marabel Morgan, author of the antifeminist book, *The Total Woman*?⁷⁶ Dr. Dyer's appearance in *Democracy's Discontent* raises questions about the methods Sandel uses to identify the nation's public philosophy. In the end, these questions do not invalidate his analysis, but they do, I believe, call for its reformulation.

A. A Lawyer's Quibbles

Sandel uses Supreme Court cases to illustrate the nation's public philosophy, whose principles he extracts from the cases. His interpretation of the cases might raise a lawyer's eyebrows occasionally, because Sandel sometimes disregards institutional or doctrinal reasons for adopting a rule.⁷⁷ Sandel instead uses the cases to illuminate a *public* philosophy. A lawyer's reservations need not impair the utility of the cases for Sandel's purposes: If the public takes the cases to mean what Sandel says, the fact that lawyers might see them differently is irrelevant. One might ask for survey evidence to support Sandel's claims. But Sandel's use of Dr. Dyer shows that he is as much a "culture critic" as a social scientist. He asks readers to ask themselves whether his description of our culture resonates with their experience. I argue in Part III that it resonates with an important segment of Sandel's readership.

For example, Sandel takes the free speech doctrine of content neutrality to show that "government must be neutral among competing conceptions of the good."⁷⁸ Free speech doctrine before "the last few decades"⁷⁹ distinguished

72. *Id.* at 292.

73. *Id.*

74. *See id.* at 292–93.

75. Cf. WILLIAM MARTIN, *PROPHET WITH HONOR: THE BILLY GRAHAM STORY* 266 (1991) (noting that by 1960, Graham was "one of the best known and most widely admired men in the world"), *id.* at 383 ("In the 1970 list of men most admired by Americans, Billy Graham placed second, right behind Richard Nixon and just ahead of Spiro Agnew.").

76. MARABEL MORGAN, *THE TOTAL WOMAN* (1973).

77. *See supra* notes 15–19 and accompanying text (describing Sandel's treatment of statutes and cases involving permissible accommodations of religion).

78. SANDEL, *supra* note 3, at 71.

79. *Id.* at 72.

between high and low value speech. "The erosion of the two-level theory relieves the Court of the task of assigning values to various categories of speech, and so signals the rise of neutrality as a principle of First Amendment jurisprudence."⁸⁰ For Sandel, even decisions allowing restrictions on speech, such as the Court's obscenity decisions since 1973, "display[] the powerful influence of neutrality assumptions on constitutional law."⁸¹ The Court's modern approach to obscenity refrains from allowing states to proscribe it on purely moral grounds, but instead insists, "sometimes implausibly,"⁸² on identifying "a purpose that [does] not involve a substantive moral judgment against obscenity as such,"⁸³ including such interests as preserving a neighborhood's character.

A lawyer would find these doctrines less significant than does Sandel. Although the Court has indeed eroded the sharp distinction between high value speech, which is strongly protected, and low value speech, which in earlier doctrine was completely unprotected, distinctions among types of speech continue to pervade First Amendment doctrine. Different tests apply to different kinds of speech, and the rationale for the differences continues to be that some speech is more valuable than other speech.

The Court has sometimes justified the erosion of the sharp distinction between well-protected high value speech and unprotected low value speech on the ground that "low" value speech—such as speech simply proposing a lawful commercial transaction—may be as valuable as, or more valuable than, classic political speech.⁸⁴ But the Court did not eliminate that distinction entirely because it believed it impermissible to distinguish among types of speech based on their content or, as the doctrinal jargon has it, their subject matter.⁸⁵ The Court's doctrinal change rested in part on its belief that a more varied series of tests was needed to capture the variety of considerations relevant to free speech doctrine. One of those considerations was that legislatures are particularly prone to err—to overestimate the costs of allowing speech—when they make judgments about the relative value of different forms of speech.⁸⁶ It is not that distinctions among forms of speech are senseless,

80. *Id.* at 73–74.

81. *Id.* at 73.

82. *Id.* at 76.

83. *Id.*

84. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763–64 (1976).

85. See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

86. As John Hart Ely writes:

Courts must police inhibitions on expression and other political activity because we cannot trust elected official to do so. . . . [O]ne whose continued authority depends on the silencing of other voices may well *in all good faith* be able to convince himself that a reason a more objective observer would label inadequate is in fact compelling.

JOHN HART ELY, *DEMOCRACY AND DISTRUST* 106–07 (1980).

but rather that we ought to be careful about licensing specific institutions to draw such distinctions.

An example is Sandel's discussion of the Supreme Court's adult theater zoning cases. Although Sandel assimilates them to the Court's obscenity cases, the zoning cases involve nonobscene sexually explicit material. One might believe that obscenity is "immoral as such,"⁸⁷ and that nonobscene sexually explicit material is not, or is not quite as, immoral. The result might be something like the Court's doctrine, which insists on some evidence, albeit modest, that the availability of nonobscene sexually explicit material in a particular location causes some "secondary" effects independent of the underlying moral judgment. Here too, the Court's doctrine is less driven by content neutrality than Sandel suggests.⁸⁸

Similarly, Sandel emphasizes the Supreme Court's notorious peyote case, *Employment Division v. Smith*,⁸⁹ according to which the Court "attempt[ed] to avoid substantive moral judgments" entailed by a test that balances "the moral weight of the governmental interest at stake and the nature of the burden that interest may impose on certain religious practices."⁹⁰ That argument, however, was not an argument about a general public philosophy. Rather, it was about the specific institutional incapacities of courts, particularly their inability to determine which religious practices were central to a person's or religion's belief system. Indeed, the Court could hardly have commended legislative accommodations as it did had it believed it improper to strike a balance that took competing moral interests into account. The Court's position, then, encourages legislatures to make the kinds of substantive moral judgments that Sandel argues are banished from the procedural republic.⁹¹

In an important sense, however, I have been offering parochial quibbles about Sandel's analysis. He is concerned with the nation's public philosophy, which is constituted in part by the public understanding of Supreme Court decisions rather than by the specialized intricacies of particular doctrines. So, if the public, or Sandel as its interpreter, takes the Supreme Court decisions to

87. SANDEL, *supra* note 3, at 76.

88. The real obscenity cases are even harder for Sandel to explain. He acknowledges that Chief Justice Burger's opinion in *Paris Adult Theatre v. Slaton I* appears to allow states to make some at least quasimoral judgment that obscene material "intrudes upon us all." *Id.* at 77 (quoting 413 U.S. 49, 59 (1973) (quoting Alexander Bickel, 22 PUB. INTEREST, Winter 1971, at 25, 25-26)). Sandel writes that Burger appeared "reluctant to admit that his argument allowed states to affirm a particular conception of the good." *Id.* But, as Sandel points out, this reluctance "undercuts the coherence of Burger's argument." *Id.* Burger made the moral argument anyway. See *Paris Adult Theatre I*, 413 U.S. at 63.

89. 494 U.S. 872 (1990).

90. SANDEL, *supra* note 3, at 70.

91. After mentioning the adoption of the Religious Freedom Restoration Act, Sandel writes: "But the way the constitutional law of religion has unfolded over the past half-century sheds light on the liberal political theory it came to express." *Id.* at 70-71. I would think that the Act has some bearing on identifying today's public philosophy (and even on contemporary constitutional law if one believes, as I do, that some statutes have some bearing on constitutional law), but Sandel does not assimilate the Act into his account.

mean what Sandel says they mean, his description of a public philosophy would be accurate even if his description of the Court's opinions might not satisfy a lawyer. Of course, professionalist criticisms like the ones I have offered, sometimes bolstered by forthright Supreme Court opinions, might displace the public understanding Sandel describes. That, however, would itself amount to a transformation of our public philosophy, although perhaps not the one Sandel desires.

B. *Public Philosophy and Political Culture in U.S. History*

Reading *Democracy's Discontent*, one gradually notices an interesting trope: U.S. history is replete with "decisive moments." "The shift to the voluntarist understanding of free labor [after the Civil War] . . . mark[ed] a decisive moment in America's journey . . ." ⁹² The late 1930s was "the moment when our economic questions displaced theirs." ⁹³ Sandel notes that "liberal assumptions displaced the civic strand of economic argument" after World War II. ⁹⁴ Yet these moments may not have been so decisive after all. In the early 1960s, for example, "even as Kennedy challenged Americans . . . the civic resources of American life were *becoming* attenuated; the political economy of citizenship was losing its hold." ⁹⁵ A few years later, Lyndon Johnson's "conception of citizenship" provided "[o]ne expression of the *drift* to the procedural republic." ⁹⁶ Decisive moments or drift: How did we get to where we are?

Sandel's survey of U.S. history resembles what Robert W. Gordon called, in a slightly different context, a "bus tour through the city in which [readers] have lived their adult lives," ⁹⁷ with the author as tour guide pointing out the major attractions: We get brief glimpses of famous figures in U.S. history, with thumbnail sketches of some portions of their views. These sketches capture something about Sandel's subjects, but he rarely offers an extended analysis of anyone's thought as a whole. Occasionally, he struggles to overcome the patent reductionism of his approach.

His treatment of Lyndon Johnson and the Great Society is probably the best example of this difficulty. Sandel could hardly deny that Johnson appealed to "the ideal of national community" in his Great Society rhetoric. ⁹⁸ As Sandel points out, Johnson regularly "described the nation as 'a family,'" a metaphor that Sandel accurately says "would recur in Democratic rhetoric for

92. *Id.* at 171.

93. *Id.* at 250.

94. *Id.* at 279.

95. *Id.* at 277 (emphasis added).

96. *Id.* at 283 (emphasis added).

97. Robert W. Gordon, Book Review, 94 HARV. L. REV. 903, 904 (1981) (reviewing G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980)).

98. SANDEL, *supra* note 3, at 282.

a generation.”⁹⁹ This “might seem . . . to set [Johnson] apart from the liberalism of the procedural republic.”¹⁰⁰ But not “[o]n closer inspection.”¹⁰¹ First, Johnson’s “call to national community was more abstract and hortatory” than earlier efforts, which “had sought to shape the character of citizens through concrete practices and institutions.”¹⁰² Second, Johnson’s vision was nationalist: “[P]erfecting the unity of the nation meant encouraging Americans to set aside or rise above identities tied to region, race, religion, or class.”¹⁰³ Finally, Johnson defended his programs against conservative attacks by arguing that the programs would liberate individuals to choose and that “economic security is a prerequisite for individual liberty.”¹⁰⁴

Sandel’s attempt to force the Great Society into the mold of the procedural republic seems to fail. Great Society programs were not *either* exemplars of the procedural republic *or* a revival of Progressive-era commitments to a formative project. They were a complicated blend of both. As Sandel notes, the War on Poverty “sought to enlarge the civic capacity of the poor by encouraging their participation in antipoverty programs at the local level.”¹⁰⁵ True, the program’s ability to accomplish that goal was limited by political circumstances and Johnson’s own ambivalence, but it *was* an institutional commitment, though a constrained one, to a formative project. In the circumstances of the 1960s, Johnson’s “vision of national community”¹⁰⁶ was specifically aimed at challenging the racism that he understood to be based in the very region he called home. Finally, the Great Society’s welfare programs resurrected the notion that economic security was a prerequisite not only to individual choice, but also to civic participation.

As Eric Foner notes, “[i]t is easy for a historian to raise questions about Sandel’s account of the past.”¹⁰⁷ Foner mentions Sandel’s “tendency to see republicanism and liberalism as ideologies that flourished sequentially, with one replacing the other, rather than outlooks coexisting throughout our history.”¹⁰⁸ Sandel’s treatment of the Great Society illustrates this difficulty. Foner’s observation raises a broader question about the nature of Sandel’s analysis. Suppose a more accurate account of U.S. history shows that at nearly every moment, some significant political figures were committed to one or another formative project while others believed that public policy should

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 283.

104. *Id.* at 283–84.

105. *Id.* at 283.

106. *Id.*

107. Eric Foner, *Liberalism's Discontents*, NATION, May 6, 1996, at 36.

108. *Id.*

express the values of the procedural republic. In what sense would we then have had a public philosophy? One possibility is quantitative: The nation's public philosophy would be whatever most of some relevant population—elite thinkers? political activists? the public?—adhered to most of the time. Sandel's way of identifying a public philosophy is obviously ill-suited to such a quantitative task.

Another possibility is that Sandel is proposing an interpretive account of U.S. history, which he commends to us on grounds other than its historical accuracy. Sometimes authors propose interpretive accounts of a nation's history on the ground that they offer an attractive background against which we can place ourselves. Sandel appears to have a different aim in mind. The story he offers has its elements of grandeur, but mostly it is pervaded by a nostalgic yearning for a better time. The implicit appeal is this: We should accept his interpretive account because if we do, we will become better people by emulating those who promoted formative projects.

Hence, Sandel's history actually functions as a fervent exhortation. It succeeds when it gives its audience the resources to act as Sandel hopes they will. Professional-minded historians might criticize Sandel's historical account as I have criticized his legal account. Conceivably, they might demonstrate that Sandel's history is so tendentious that no responsible audience could find in it anything of value. But Sandel's historical account is not entirely devoid of value. It offers a narrative accurate enough to resonate with a reasonably well-informed audience, although perhaps not accurate enough to satisfy a professional historian. As I suggest regarding the difficulties with Sandel's legal and philosophical analyses, here too the inaccuracy of Sandel's history as history is largely irrelevant to his enterprise: The work succeeds if it gains acceptance among its intended audience. And that, I argue below, it has.

C. *Political Philosophy Versus Public Philosophy*

Sandel's discussion of John Rawls's recent work has the same characteristics as his discussions of Supreme Court cases and U.S. history: It seems inaccurate when taken as a criticism of Rawls's *political* philosophy but may well accurately represent a significant *public* philosophy. Sandel made his reputation through a book criticizing Rawls's *A Theory of Justice*¹⁰⁹ for developing a theory of justice predicated on the purportedly indefensible view that people have "unencumbered selves" from which they worked in the famous "original position" to develop liberalism's principles.¹¹⁰ Although Rawls responded that Sandel and like-minded critics misinterpreted *A Theory*

109. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

110. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

of *Justice*, his *Political Liberalism*¹¹¹ restated his views with an eye to showing how his theory did not require that people bracket their comprehensive moral or political theories to work out an account of political liberalism.

As I understand Rawls's present position,¹¹² political liberalism—or as Sandel calls it “minimalist liberalism”¹¹³—has three characteristics relevant here. First, it aims to develop an account of how stable political institutions are possible in societies characterized by an irreducible pluralism in their members' comprehensive moral views. Second, stability can be assured by specifying the characteristics of a handful of basic social institutions; with those institutions in place, contention over every other aspect of social life will not destroy stability. Third, we can construct those institutions by determining what political principles are compatible with *all* the reasonable comprehensive views in these pluralist societies.¹¹⁴ The principles of political liberalism are in the first instance derived from within each reasonable comprehensive view. Political liberalism is, or becomes, a freestanding political doctrine when people use its principles to revise their prior commitments, at least in part because they understand that some revision may be necessary to ensure social stability.

I have to say that it seems to me that Sandel simply misunderstands most of this argument.¹¹⁵ Minimalist liberals, in Sandel's version, “insist that we set [our moral or religious] obligations aside when we enter the public realm, that we bracket our moral and religious convictions when deliberating about politics and law.”¹¹⁶ If they do, Sandel has some cogent criticisms of minimalist liberals. For example, “[w]hy, in deliberating about justice and rights, must we set aside the moral judgments that inform the rest of our lives?”¹¹⁷

If, however, minimalist liberalism generates its principles from within the plurality of reasonable comprehensive moral views, the criticism must be different. Sandel discusses slavery and abortion, two issues where, he says,

[a] moral or religious doctrine . . . generate[s] interests sufficiently compelling to burst the brackets . . . and morally outweigh the

111. JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

112. Except to note that Sandel's interpretation of *A Theory of Justice* was widely shared, I have no position on whether Sandel or Rawls better understood that book's premises.

113. SANDEL, *supra* note 3, at 17.

114. Rawls has been criticized for constructing his principles of political liberalism out of reasonable comprehensive views only. Sandel, however, appears to accept that limitation in referring to “reasonable pluralism.” *Id.* at 18. For a brief discussion of the implications of the limitation, see *infra* note 121.

115. As I read the emerging literature on *Political Liberalism*, Sandel's misunderstanding is reasonably widely shared. I am frankly puzzled by this. My best guess is that the misunderstanding occurs because it provides the basis for positions like Sandel's, which some readers find congenial for reasons I sketch in Part III.

116. SANDEL, *supra* note 3, at 18.

117. *Id.*

practical interest in social cooperation[.]

. . . .

. . . At least where grave moral questions are concerned, whether it is reasonable to bracket moral and religious controversies for the sake of political agreement partly depends on which of the contending moral or religious doctrines is true.¹¹⁸

Restricted to grave moral questions, this observation may be correct.¹¹⁹ Whether it asserts more than the proposition that social cooperation, while valuable, is not so valuable as always to dominate all other considerations, and whether Rawls would disagree, are separate questions.

Rawls offers an account of how—or when—stability is possible in a liberal political system. Showing that stability is sometimes impossible or undesirable does not impair Rawls's account. To understand how deep Sandel's criticism of minimalist liberalism goes we need a specification of the criteria for determining when a moral question is grave. The examples of slavery and abortion suggest something along these lines: A moral question is grave with respect to a comprehensive view when those who hold that view could not revise their view on that question without understanding themselves to have become different people.¹²⁰ It may be that when a sufficiently large number of people hold such views, minimalist liberalism cannot ensure social stability. After all, slavery was ended in the United States by a large-scale military conflict. That shows only that the conditions for social stability did not exist in the United States in 1860–61, not that minimalist liberalism is inadequate for the contemporary United States.¹²¹

Further, Sandel deals with much more than a limited list of questions that in my view could fairly be described as grave in this sense for a substantial number of people in the contemporary United States: divorce law, public assistance programs, the availability of sexually explicit materials, and much more. The abortion issue may be different from these, and it may be an issue on which the minimalist liberal construction cannot ensure social stability.¹²²

118. *Id.* at 19.

119. It seems to me worth noting, however, that the controversy over slavery was not resolved by developing a public philosophy that allowed for its peaceable resolution, but by a war.

120. Note that the criteria for identifying issues that are grave with respect to reasonable comprehensive views must be different from the criteria for identifying fundamentalist comprehensive views. The latter are unrevisable in principle: Their internal logical structure rules out revision.

121. Again, as I understand it, the qualifier "reasonable" identifies precisely those views, which Rawls calls "fundamentalist," that are not revisable even in principle. I have suggested elsewhere that Rawlsian stability is possible in societies some of whose members hold fundamentalist views, as long as there are not too many of them. See Mark Tushnet, *Federalism and Liberalism*, 5 *CARDOZO J. INT'L & COMP. L.* (forthcoming 1997). To that extent, the Rawlsian scheme need not be understood to be hostile to those who hold fundamentalist views, and it may account for the fact that the Rawlsian construction cannot deal with the issue of slavery in the American South and perhaps with the issue of abortion.

122. I regard Rawls's footnote on abortion as a mistake on his part. See RAWLS, *supra* note 111, at 243 n.32. There, Rawls asserts that "any reasonable balance" of values he names "due respect for human life," "ordered reproduction of political society over time," and "the equality of women as equal citizens," will lead to a result that will "give a woman a duly qualified right to decide whether or not to end her

But Sandel's dismissal of minimalist liberalism sweeps more broadly.

Sandel's initial critique of Rawls made a valuable contribution in bringing to the surface important issues about Rawls's presentation in *A Theory of Justice*. My personal view is that it no longer has much bite in light of *Political Liberalism*. Even if so, that failure to engage only confirms that there are real differences between philosophy and public philosophy. According to Sandel's description of our public philosophy, the American public does not accept Rawls's account of the conditions for stability in a morally pluralist society. Even if true, Sandel's argument would not undermine Rawls's philosophical contributions, which would remain valid so long as his conclusions follow from his analysis, regardless of whether anyone else drew them. Sandel offers another criticism of minimalist liberalism that also establishes the difference. "[E]ven in cases where it is possible to conduct political debate without reference to our moral and religious convictions," Sandel writes, "it may not always be desirable" because the effort "may end by impoverishing political discourse and eroding the moral and civic resources necessary to self-government."¹²³ To the extent that cases where doing so is possible involve the day-to-day stuff of our politics, a minimalist liberal could readily agree.

Sandel's concern, however, is not with political philosophy but with public discourse. Even if Rawls neither assumes nor insists that people "bracket" their deepest commitments in the ordinary affairs of a liberal polity, Sandel's description of the procedural republic and its insistence that people are autonomous, unencumbered choosers nonetheless resonates with *something* in the nation's political culture in recent decades. As he writes,

we are beginning to find that a politics that brackets morality and religion too completely soon generates its own disenchantment. A procedural republic . . . creates a moral void that opens the way for narrow, intolerant moralisms. And it fails to cultivate the qualities of character that equip citizens to share in self-rule.¹²⁴

That seems right, and Sandel expresses it with his customary eloquence. Note, however, that it is *politics* that Sandel finds inadequate, not *political philosophy*.

pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding." *Id.* As Rawls recognizes, this assertion is not well defended. See *id.* ("I do not discuss the question in general here."). The issue deserves more extended consideration. The fact that Rawls relegated his discussion to a footnote suggests that his treatment need not be taken as definitive even within his own framework.

123. SANDEL, *supra* note 3, at 23 (emphasis added).

124. *Id.* at 24.

III. THE PUBLIC PHILOSOPHY OF THE PROFESSIONAL-MANAGERIAL CLASS

Any work praised, as *Democracy's Discontent* has been, by Social Democrat Eric Foner,¹²⁵ Christian Democrat Mary Ann Glendon,¹²⁶ and Tory George Will¹²⁷ must be extremely wise, quite confused, or so abstract that each reader can find in it what she or he wants.¹²⁸ *Democracy's Discontent* has been so well received, I believe, more because it expresses a mood than because it makes an argument.¹²⁹

I suggested earlier that Sandel should be taken as a "culture critic," basing his interpretation of our culture more on his participation in it than on social-scientific survey evidence and the like. With some diffidence, I take the same stance toward Sandel's work, and suggest that it responds to the discontent of today's professional-managerial class faced with reduced autonomy as corporate capitalism increasingly limits the domain in which professionals can

125. See Foner, *supra* note 107, at 34.

126. See Mary Ann Glendon, *Civil Service*, NEW REPUBLIC, Apr. 1, 1996, at 39.

127. Will is quoted on the book's dust-jacket: "This splendid tour of America's political arguments . . . is the thinking person's guide to the current rethinking of the role of government in America." I use political descriptions drawn from the discourse of Western European politics, which provide a more nuanced vocabulary than the discourse of American politics in large measure, I believe, because the United States did not undergo an extended interaction between a socialist movement and the Roman Catholic Church. See MICHAEL FOGARTY, *CHRISTIAN DEMOCRACY IN WESTERN EUROPE, 1820-1953* (1957); JAMES HENNESEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* (1981); CUSHING STROUT, *THE NEW HEAVENS AND THE NEW EARTH: POLITICAL RELIGION IN AMERICA* (1973); ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* (Olive Wyon trans., 1931) (on Europe). (I thank Norman Birnbaum for a decade of gentle instruction on these questions.) I believe that Foner and Glendon, at least, would acknowledge the accuracy of the descriptions in broad outlines.

128. As Adam Crawford notes:

The book comes with a very short, four-page preface to the British edition, which identifies a host of prominent people, from across the political spectrum, who claim to have been inspired by it. This should immediately alert the wary or cynical reader as to how an agenda can appeal simultaneously to such diverse interests.

Adam Crawford, Book Review, 23 J.L. & SOC. 247, 247 (1996) (reviewing AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993)). In mentioning Etzioni's work, I do not mean that criticisms of Etzioni can be directly transferred to Sandel. I believe that I present a fair critique of Sandel's work considered on its own. But that work is also located politically and socially, and the space it occupies is in the neighborhood of Etzioni's—sufficiently close that, as a political and social event, we are dealing with a single location. I note as well that an early version of a portion of *Democracy's Discontent* appears as a chapter in a work Etzioni edited and offered as an introduction to communitarian thinking. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 71 (Amitai Etzioni ed., 1995) (substantially reproduced in SANDEL, *supra* note 3, at 91-108).

129. Cf. Kenneth Anderson, *Heartless World Revisited: Christopher Lasch's Parting Polemic Against the New Class*, 6 GOOD SOC'Y, Winter 1996, at 37, 37 (originally appearing in the TIMES LITERARY SUPP. (London), Sept. 22, 1995, at 3, 4) (describing communitarianism as "an intellectual movement possessing no organic base except its own sociological analysis and a desire to translate this analysis into feelings, and then into social practices to reproduce those feelings").

For an argument reconstructing communitarian thought more generally as a political philosophy and criticizing it from a conservative perspective, see BRUCE FROHNNEN, *THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM* (1996). The reconstruction is quite interesting, as are those parts of the critique that do not degenerate into standard Republican rhetoric against the Clinton administration. (The book's jacket identifies the author as a speechwriter for Republican Senator Spencer Abraham of Michigan.)

exercise professional judgment and discretion.¹³⁰ Today's professional-managerial middle class is discontented with the procedural republic that it served well, and that served it well, during the period of sustained economic growth in the United States after 1945. The procedural republic was at least compatible with the self-conception of professionals and managers as social engineers, experts who designed the machinery that then operated to produce economic growth and social stability. As growth slowed, the economic position of professionals and managers changed. They were no longer experts offering professional and autonomous advice on how best to steer the economy. They became employees subject to the market forces they had believed they controlled. No wonder they are discontented, and thrashing around for a public philosophy for their class to replace the procedural republic that no longer satisfies them. Sandel offers an alternative with some elements that respond to the new position of the professional-managerial class. But his prescriptions do not in the end satisfactorily address the real source of their discontent: the apparently uncontrollable power of transnational corporations.

Sandel's proposed public philosophy evokes the Progressive era even as it departs from some of its prescriptions.¹³¹ The Progressive movement, historians have argued, was basically a movement of middle-class professionals who sought to define public policy by combining an emphasis on efficiency with efforts to achieve moral uplift.¹³² Efficiency was to be achieved by following the prescriptions of experts drawn from the movement's base of independent professionals. Moral progress was defined with reference to the standards of the professional class, and would be achieved sometimes by coercion and sometimes by creating institutions that would induce their participants to act morally.

Sandel's vision is striking because it restates the Progressive emphasis on moral uplift while eliminating the Progressive interest in efficiency and expertise.¹³³ By dropping deference to expert judgment Sandel shows himself

130. For a recent work by a sociologist describing and accounting for shifts in the power of professionals in similar terms, see ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS. PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* (1996). See *id.* at 22 ("[G]uild power is declining as state power and capitalist power encroach upon it."); *id.* at 280 ("[F]ormerly self-run professional groups have slowly been losing the ability to control their own associations, to control the workplace, to control the market for their services, and to control their relation to the state.") (emphasis added).

131. The chapter in which Sandel discusses the Progressive era opens with a more extended evocation of today's discontents than the other chapters in Part II, and contains phrases like "[t]hen as now" SANDEL, *supra* note 3, at 205.

132. See generally ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967), Daniel Rodgers, *The Search for Progressivism*, 10 *REVS. AM. HIST.* 113 (1982).

133. Some analysts suggest that contemporary communitarianism reproduces the Progressive emphasis on expertise. See, e.g., Derber, *supra* note 2, at 27 (finding communitarians "predisposed toward consensual management by experts"); Kenneth Anderson, Review Essay, *A New Class of Lawyers The Therapeutic as Rights Talk*, 96 *COLUM. L. REV.* 1062, 1089 (1996) ("[T]he unhappiness of lawyers looks rather less like professionals experiencing the loss of fulfillment . . . and rather more like the unhappiness of experts who, having established to their own satisfaction the certainty of ends not open for argument by non-

to be a more committed democrat than were the Progressives.¹³⁴ His stance may also reflect the understanding of contemporary professionals that the bureaucracies within which they work do not actually value their expertise as professionals.

Subordinating efficiency is more problematic. Sandel describes the contemporary "anti-sprawl" movement as a revisitation of the anti-chain store movement.¹³⁵ As Thomas McCraw has argued in detail, the Brandeisian program was not an obviously sensible one.¹³⁶ It sacrificed real economic benefits—lower prices for goods—in exchange for speculative benefits in the form of greater civic participation by people of the type caricatured in Sinclair Lewis's novels.¹³⁷ Sandel's contemporary example is an activist opposing the location of a Wal-Mart, who declared, "'I'd rather have a viable community than a cheap pair of underwear.'"¹³⁸

I do not know anything about that particular activist, but that is the sort of thing that can be said, or at least admired, only by people who do not have to worry that higher priced underwear means sending their children to school in worn-out underwear or having less food on the table for dinner. So, one characteristic of the class to which Sandel's vision appeals is reasonable material security: Its members are less concerned with efficiency than were the Progressives because the marginal gains from more efficient operation would not significantly affect the material dimensions of their lives.

The procedural republic triumphed when "the performance of the domestic economy gave Americans a sense of command over their individual

experts, wonder why they are not also loved."). These criticisms, except for the more modest claim that there are substantive arguments for political positions, properly apply to communitarians who are less committed democrats than Sandel. Sandel does not claim much for experts on these matters because he does not specify what the winning substantive arguments might be, although his discussion of gay rights does hint at the answers he would give.

134. Sandel's disparagement of popular culture, however, in his concluding reference to "the vacant, vicarious fare of confessional talk shows," SANDEL, *supra* note 3, at 351, is dismaying, albeit typical of intellectuals speaking for and to the professional-managerial class. For a discussion of the popular culture issue, see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (book review).

135. See SANDEL, *supra* note 3, at 334–35.

136. See THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 101–09, 135–41 (1984). McCraw summarizes his analysis of Brandeis's position:

Brandeis' fixation on bigness as the essence of the problem doomed to superficiality both his diagnosis and his prescription. . . . It meant that he must argue against vertical integration and other innovations that enhanced productive efficiency and consumer welfare. . . . It meant that he must promote retail price fixing as a means of protecting individual wholesalers and retailers, even though consumers again suffered. It meant, finally, that he must become in significant measure not the "people's lawyer" but the spokesman of retail druggists, small shoe manufacturers, and other members of the petite bourgeoisie.

Id. at 141.

137. See, e.g., SINCLAIR LEWIS, *BABBITT* (1922).

138. Andrew Friedman, *Citizens Fight Wal-Mart Sprawl*, NEIGHBORHOOD WORKS, Oct.-Nov. 1994, at 10, cited in SANDEL, *supra* note 3, at 335.

destinies."¹³⁹ Prosperity made credible the "consumerist vision" of a people united only in "the experience of consumption."¹⁴⁰ Contemporary professionals have lost the sense of control and mastery. "America's moment of mastery expired" in 1968,¹⁴¹ after which "[a]t home and abroad, events spun out of control, and government seemed helpless to respond."¹⁴² Despite this, middle-class professionals have not experienced substantial reductions in material well-being. Unsurprisingly, they might be interested in recapturing some control at the expense of some slight reduction in *their* material well-being, even if the effects on the material well-being of less privileged groups might be more substantial.

Why might such a class fail to develop a vision in which expertise plays the role it did in the Progressive vision? Perhaps because today's professional class is not truly independent.¹⁴³ Engineers and doctors are increasingly employees rather than independent contractors. Perhaps too it is this lack of independence that makes Sandel's interest in developing a political economy of citizenship appealing. Until today's professionals become independent they know that they cannot impose policies in the name of their expertise; they would instead simply be acting on behalf of their employers. Like many jeremiads, Sandel's evokes images of a romanticized past that we have lost but might recreate.¹⁴⁴ He tells today's professionals that they once were independent and ought to be so again.

What is left is moral uplift. Sandel criticizes modern no-fault divorce law because it "bracket[s] the moral considerations that had traditionally governed the law of divorce."¹⁴⁵ Given the prevalence of divorce among today's professionals, however, he does not urge a return to a fault-based divorce regime. Instead, he seeks only "reforms giving greater attention to the economic conditions of women and children after divorce," reforms that he acknowledges might in some cases "be defended in terms consistent with procedural liberalism."¹⁴⁶ He is a bit more aggressive about using systems

139. SANDEL, *supra* note 3, at 275.

140. *Id.* at 221.

141. *Id.* at 294–95.

142. *Id.* at 294.

143. In the late 1970s and early 1980s, sociologists influenced by Marxist theory engaged in an extended discussion of the characteristics of the professional-managerial class. See, e.g., BETWEEN LABOR AND CAPITAL (Pat Walker ed., 1979); ERIK OLIN WRIGHT, CLASSES (1985). For a recent application, see Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996).

144. See Foner, *supra* note 107, at 34 (referring to Sandel's "tendency to romanticize the past as a golden age of community responsibility").

145. SANDEL, *supra* note 3, at 109.

146. *Id.* at 111. Sandel relies in part on research reported by Lenore Weitzman, finding that "[f]or men, divorce brings a 42 percent increase in standard of living, while divorced women and their children suffer a 73 percent decline." *Id.* (citing LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 186, 265, 338–39, 362 (1985)). Professor Weitzman now agrees that these figures are inaccurate; her data actually showed a 10% increase for divorced men, and a 27% decline for divorced women. See Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 528 (1996), Lenore

of public assistance to “form moral character or shape behavior or cultivate virtue,” criticizing proposals made during the 1960s and 1970s for a guaranteed income on the ground that they would merely “enable recipients to choose their values and ends for themselves.”¹⁴⁷

Sandel nonetheless emphasizes “the civic case against inequality,”¹⁴⁸ because economic inequality “erodes civic virtue”¹⁴⁹ as the affluent secede from the public sphere. Sandel endorses a description of that secession appearing in a celebrated book by President Clinton’s former Secretary of Labor Robert Reich.¹⁵⁰ Reich describes the proliferation of “private health clubs, golf clubs, tennis clubs, skating clubs,”¹⁵¹ private schools, private garbage collection services, and private security guards.¹⁵² This secession is real, but Sandel and Reich perhaps overestimate it. I suspect that it describes more what middle-class professionals fear that they need but will be unable to afford than the lived experiences of the bulk of that class.

Sandel discusses public policies committed to formative projects “aimed at cultivating citizens of a certain kind.”¹⁵³ He occasionally hints at what seems obvious, that each formative project was connected to a particular social class.¹⁵⁴ Some of his historical actors are Jeffersonian agrarians,¹⁵⁵ Jacksonian artisans seeking secure property holdings,¹⁵⁶ wage laborers hoping “to rise to own productive property and to work for [themselves],”¹⁵⁷ and workers seeking an eight-hour day in part to give them time to participate in civic affairs.¹⁵⁸ When we reach the procedural republic, however, the material basis disappears from view. Sandel offers no direct account of the material basis for the procedural republic, nor of the material basis for the rather vague formative project he urges as an alternative public philosophy.¹⁵⁹

J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537, 538 (1996).

147. SANDEL, *supra* note 3, at 289.

148. *Id.* at 330.

149. *Id.* at 332.

150. *See id.* at 330–32 (citing ROBERT B. REICH, *THE WORK OF NATION*, 268–77 (1991)).

151. *See id.* at 331 (quoting REICH, *supra* note 150, at 268).

152. *See id.* (citing REICH, *supra* note 150, at 269–70).

153. *Id.* at 127.

154. Nor does he describe the class basis of the procedural republic, although *corporate capitalism* seems to be the natural candidate.

155. *See* SANDEL, *supra* note 3, at 142–50.

156. *See id.* at 155–60.

157. *Id.* at 181.

158. *See id.* at 189–92.

159. *Cf.* Anderson, *supra* note 133, at 1087. According to Anderson:

Populism is—or was—rooted in a form of material production associated with the petty bourgeoisie. . . . [I]t really *is* a sensibility rooted in a social class, produced and reproduced by a material mode of production that no longer exists. . . . [T]his class had been dispossessed of the material basis of its traditions by changes in capitalism itself.

Id. (describing argument of CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* (1995)).

Sandel points out that the "sense of disempowerment" he attributes to Americans "arises from the fact that the liberal self-image and the actual organization of modern social and economic life are sharply at odds."¹⁶⁰ "Self-government . . . requires political communities that control their destinies," but "[i]n a world of global interdependence, even the most powerful nation-states are no longer the masters of their destiny."¹⁶¹ Thus, "[i]f American politics is to revitalize the civic strand of freedom, it must find a way to ask what economic arrangements are hospitable to self-government."¹⁶²

When Sandel sketches his way out, however, the suggestions seem ill-suited to the task. He admires community development corporations, the "New Urbanism," and community organizing.¹⁶³ He acknowledges, though, that "[i]n a world where capital and goods . . . flow across national boundaries with unprecedented ease, politics must assume transnational, even global forms, if only to keep up. Otherwise, economic power will go unchecked by democratically sanctioned political power."¹⁶⁴ But how can we "cultivate the civic identities necessary to sustain those institutions, to supply them with the moral authority they require"?¹⁶⁵

The problem is one Progressives confronted early in the twentieth century.¹⁶⁶ Sandel describes two dimensions of the Progressive project. The more familiar involves the expansion of national political power to control the expanded power of corporations.¹⁶⁷ Less familiar is the Brandeisian vision. As an example, Sandel describes anti-chain store legislation following World War I as an expression of a public philosophy seeking to preserve small businesses whose owners made important contributions to their communities' public life—at added expense to consumers, of course.¹⁶⁸ The chain stores won:

While local grocers and druggists had presented themselves, not wholly convincingly, as the yeomen of their day, the last bearers of republican virtue, the chains stood instead for good products at low

160. SANDEL, *supra* note 3, at 202.

161. *Id.* For an argument that capital mobility has a smaller causal impact on disintegration of communities and neighborhoods than expansion of government, see David Conway, *Capitalism and Community*, 13 SOC. PHIL. & POL'Y 137, 152–53, 159 (1996). I find the argument unpersuasive on its own terms, but in any event, it does not establish that making government smaller would overcome whatever effects capital mobility *does* have.

162. SANDEL, *supra* note 3, at 203.

163. *See id.* at 333–37.

164. *Id.* at 338–39.

165. *Id.* at 338.

166. *See id.* at 339–41.

167. *See id.* at 216–17.

168. *See id.* at 227–31.

prices. In the face of these alternatives, the political economy of citizenship was losing its capacity to inspire.¹⁶⁹

Similar alternatives present themselves today. We might seek to expand the capacity of supranational institutions to control supranational corporations, while simultaneously remedying the democratic deficit that notoriously afflicts such institutions today.¹⁷⁰ But, Sandel suggests, creating transnational institutions that “can inspire the identification and allegiance—the moral and civic culture—on which democratic authority ultimately depends” may be impossible.¹⁷¹ Historical experience is discouraging, for “even nation-states find it difficult to inspire the sense of community and civic engagement self-government requires. Political associations more expansive than nations, and with fewer cultural traditions and historical memories to draw upon, may find the task of cultivating commonality more difficult still.”¹⁷²

Sandel notes that some “commentators of the 1990s saw in international environmental, human rights, and women’s movements the emergence of a ‘global civil society’ that might serve as a counterweight to the power of global markets and media,”¹⁷³ but he finds the cosmopolitan ideal that animates this suggestion “flawed, both as a moral ideal and as a public philosophy for self-government in our time.”¹⁷⁴ As Sandel sees it, advocates of the global civic society urge that “universal identities must always take precedence over particular ones”;¹⁷⁵ but this position implausibly requires that we subordinate our friends and neighbors to humanity in general. On the political level, even national sovereignty is “challenged . . . by the resurgent aspirations of subnational groups for autonomy and self-rule.”¹⁷⁶ Thus, “[g]iven the limits of cosmopolitan politics, the attempt to save democracy by globalizing citizenship . . . is unlikely to succeed.”¹⁷⁷

The alternative, reminiscent of Sandel’s interest in federalism and the anti-chain store movement, is to “disperse” sovereignty by ensuring that there is “a multiplicity of communities and political bodies—some more, some less extensive than nations—among which sovereignty is diffused.”¹⁷⁸ In some settings, “dispersing sovereignty may entail according greater cultural and political autonomy to subnational communities—such as Catalans and Kurds,

169. *Id.* at 231.

170. For a discussion of the democratic deficit in the institutions of the European Community, see Shirley Williams, *Sovereignty and Accountability in the European Community*, in *THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE* 155, 158–59 (Robert O. Keohane & Stanley Hoffmann eds., 1991).

171. SANDEL, *supra* note 3, at 339.

172. *Id.*

173. *Id.* at 341.

174. *Id.* at 342.

175. *Id.*

176. *Id.* at 344.

177. *Id.* at 345.

178. *Id.*

Scots and Québécois—even while strengthening and democratizing transnational structures, such as the European Union.”¹⁷⁹

Again, this is a rich but puzzling account of the possibilities for a better public philosophy. It suggests a path by which the now inadequate procedural republic might come to embody a public philosophy that would better serve the interests of the professional managerial class.¹⁸⁰ Dispersing sovereignty may create communities whose local commitments allow them to resist economic transformations that global capitalism describes as mere interregional capital flows. With such a base, the professional-managerial class might turn its attention to the real source of its discontent, the transnational corporation. But how can that resistance succeed?

Begin with the vision of a “global civil society.”¹⁸¹ As Sandel notes, its advocates have welcomed the development of transnational social movements—the so-called New Social Movements—encompassing the environmental movements typified by Greens in many countries; women's movements exemplified by the nongovernmental organizations associated with the United Nations conferences on women; and the international human rights movement. Except for the last, it does not seem to me that these movements demand that “universal identities . . . always take precedence over particular ones.”¹⁸² True, the human rights movement seeks minimal human decencies, universal in their application but rather restricted in their scope. It allows a substantial range of particular practices within a framework of minimal human rights.¹⁸³ The transnational women's movement rather evidently asks at most that one particular identity—womanhood—take precedence over another—nationality. Even Greens can be understood to be asking that our identities as consumers be subordinated to our identities as citizens or, more narrowly, as citizens of particular nations, states, or even neighborhoods.¹⁸⁴

Further, Sandel acknowledges that some aspects of the cosmopolitan ideal are “attractive.”¹⁸⁵ I am puzzled by his insistence that cosmopolitanism is an all-or-nothing identity. Why cannot our political identities, and therefore our

179. *Id.*

180. The class's public philosophy has to get from here to there, which means that we should not be surprised to find false starts or residues of the inadequate prior public philosophy, as in division within the class over support for the North American Free Trade Agreement.

181. SANDEL, *supra* note 3, at 341. As my colleague Mitt Regan put it in his comments on a draft of this Review, Sandel “advises us to ‘Act Locally,’ but doesn't tell us how to ‘Think Globally.’”

182. *Id.* at 342. For a discussion of political and legal strategies to address problems created by transnational employment of workers under conditions often regarded as below minimal standards, see Laura Ho et al., (*Dis*)Assembling Rights of Women Workers Along the Global Assembly Line *Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 394–413 (1996).

183. For an argument that the international human rights movement involves appeals to rights that are minimal in one sense but maximal in another, see MICHAEL WALZER, THICK AND THIN MORAL ARGUMENT AT HOME AND ABROAD 6–11 (1994).

184. Consider in this connection the widespread, and not entirely admirable, “Not In My Back Yard” (NIMBY) phenomenon associated with environmental politics.

185. SANDEL, *supra* note 3, at 342.

public philosophy, be fluid, sometimes expressing the valuable aspects of cosmopolitanism and sometimes expressing our more particular commitments to family, friends, neighbors, nations, ethnic groups, and religious confreres? I admit that these different identities might sometimes conflict, but I do not see why a public philosophy that acknowledges the possibility of internal conflicts, and treats such conflicts as an occasion for political deliberation and struggle, could not inspire the allegiance that Sandel requires. In particular, Sandel's own account suggests that some *economic* dimension of identity—as farmer, as artisan, as professional—may be essential to the construction of an overall public philosophy adequate to deal with the global economy. It seems clear that the identity “consumer” will not do, but it is not clear to me that no alternative identity is possible. Indeed, economic identities in a world of transnational economic arrangements may themselves transcend national boundaries: Farmers in the European Union may have more in common with farmers in the United States than they do with professionals in Germany, for example.¹⁸⁶

On the penultimate page of *Democracy's Discontent*, Sandel writes that, “[t]he civic virtue distinctive to our time is the capacity to negotiate our way among the sometimes overlapping, sometimes conflicting obligations that claim us, and to live with the tension to which multiple loyalties give rise.”¹⁸⁷ The New Social Movements in their transnational forms may satisfy Sandel's description. He can dismiss cosmopolitanism only because he treats it as insisting on the primacy of a universal personhood in all circumstances.

A complex cosmopolitanism, it seems to me, is necessary to eliminate what otherwise seems to be a dramatic mismatch between Sandel's desire to diffuse sovereignty and his acknowledgment of transnational economic power.¹⁸⁸ Simply put, we need an explanation of how diffusing sovereignty downward, for example, to the Kurds and Québécois, will generate allegiance to transnational institutions, such as the European Union and its equivalents, with enough power to control transnational economic actors. Sandel writes, “In the age of NAFTA, the politics of neighborhood matters more, not less. People will not pledge allegiance to vast and distant entities . . . unless those institutions are somehow connected to political arrangements that reflect the identity of the participants.”¹⁸⁹ It remains unclear to me, however, how people are “connected to” transnational institutions except through aspects of the cosmopolitanism that Sandel thinks inadequate. Perhaps the experience of

186. It used to be that “member of the international proletariat” was thought to be such an identity, but it is no longer (or at least not widely) thought to be so.

187. SANDEL, *supra* note 3, at 350.

188. See John B. Judis, *Public Freedoms, Personal Liberties*, WASH. POST BOOK WORLD, May 5, 1996, at 6 (expressing disappointment with Sandel's “saccharine conclusion” and arguing that “[a]s economic power has become increasingly concentrated in transnational corporations, only collective efforts that can match the power of these behemoths will restore the basis of popular liberty”).

189. SANDEL, *supra* note 3, at 346.

politics in a neighborhood will help shape political character in a way that will make people better participants in the politics of supranational institutions that have become both more democratic and more powerful. But to exercise effective control over transnational corporate power, I would think, people must participate in such institutions as *democrats*, not as Kurds or Québécois—and to that extent, as cosmopolitans.

No one should be surprised that *Democracy's Discontent* has been as well-received as it has been. After all, book reviews in elite newspapers and journals of opinion are written by and for members of the professional-managerial class to which Sandel's analysis would naturally appeal. As a member of that class, I am hardly in a position to say that the anxieties Sandel describes have no foundation whatsoever. If any institutions will ever be able to take control of supranational corporate power, they will need to have the support of the professional-managerial class. Sandel's vision of "multiply-encumbered citizens" may allow members of that class to become political allies of the New Social Movements or other more cosmopolitan efforts. His interest in federalism provides an opportunity to examine how that might occur.

IV. SANDEL ON FEDERALISM

For the most part, *Democracy's Discontent* is a diagnosis, not a prescription.¹⁹⁰ The most interesting suggestion Sandel proffers is that our public philosophy ought to "consider the unrealized possibilities implicit in American federalism."¹⁹¹ According to Sandel, "proliferating sites of civic

190. Sometimes Sandel offers policy prescriptions that he asserts flow from his diagnosis, as when he suggests, without saying so directly, that we ought to have greater regulation of hate speech and sexually explicit material than current law allows. *See id.* at 83–90. Current law, Sandel writes, rests on the premises of the procedural republic which "bracket disapproval of speech." *Id.* at 89. Instead, Sandel asserts, judges should "reluctant[ly] . . . make substantive moral distinctions" between speech that promotes genocide and hate, and speech seeking civil rights. *Id.* at 90. His example is an opinion by District Judge Frank Johnson permitting a civil rights march along a public highway that, in Johnson's view, "reached to the outer limits of what is constitutionally allowed," because, as Johnson saw it, "'the extent of the right to . . . demonstrate . . . should be commensurate with the enormity of the wrongs that are being protested.'" *Id.* (quoting *Williams v. Wallace*, 240 F. Supp. 100, 108, 106 (M.D. Ala. 1965)). This decision, Sandel writes, "was not content neutral" and "would not have helped the Nazis in Skokie." *Id.* At least as quoted, Johnson's opinion, although content-based, is not necessarily inconsistent with allowing the Nazis to march in Skokie. Reaching the outer limits is not extending beyond them, which implies that the content-based elements in Johnson's analysis may not have been necessary. The march, described by Sandel as "a mass march along a public highway," appears to have been more disruptive of traffic than the Nazis' march would have been, which implies that the case against the civil rights march on ordinary public safety grounds (rather than "hostile audience" or "intentional infliction of emotional distress" grounds) was stronger than the case against the Nazi march on similar grounds. *See id.*

191. *Id.* at 347. Andrew Sullivan's review of *Democracy's Discontent* notes that Sandel "tiptoe[s] up to notions that might truly startle, only to pull back at the brink." Andrew Sullivan, *Alternative Politics*, N.Y. TIMES, May 19, 1996, § 7 (Book Review), at 6. That is a fair description of Sandel's treatment of federalism. In what follows I believe that I have fairly teased out the implications and some possible defenses of Sandel's treatment, but his discussion is, in general, fragmented and fragmentary. Mary Ann Glendon praises Sandel for dealing with federalism, but regrets his failure to discuss "the nitty-gritty of

activity and political power can serve self-government by cultivating virtue, equipping citizens for self-rule, and generating loyalties to larger political wholes."¹⁹²

Well, yes, it *can* do that, in the sense that federalism makes those possibilities available.¹⁹³ The attractions of federalism are a submerged theme throughout *Democracy's Discontent*,¹⁹⁴ but its downside is never mentioned. More generally, Sandel gives little content to his idea of federalism, allowing readers to fill it in with whatever they think attractive about federalism while leaving out whatever they find unattractive.

When federalism is understood, as it should be, as an institutional form that protects genuine value pluralism, we can also understand the full scope of Sandel's proposal and its associated difficulties. We can also see how something like federalism allows us to develop the idea of a complex cosmopolitanism that seems necessary if we are to have a public philosophy adequate to the economic questions of the day.¹⁹⁵ A federalist theory rooted in complex cosmopolitanism would offer the possibility of understanding how conflicts among the different commitments implicit in complex cosmopolitanism might be negotiated.¹⁹⁶

A. *Defending Federalism as a Form of Complex Cosmopolitanism*

You have to admire anyone who, like Sandel, has a bad word to say about one of the icons of contemporary constitutional law. *West Virginia Board of Education v. Barnette*'s¹⁹⁷ invalidation of a state-imposed requirement that all students, even those with religious objections, salute the flag is typically celebrated for its ringing statement that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹⁹⁸ Sandel, in contrast, sees in *Barnette* the arrival of the procedural republic.¹⁹⁹ The state could not "cultivate a common citizenship," which could occur only through "a voluntary act by free and independent selves."²⁰⁰

federalism." Glendon, *supra* note 126, at 40-41.

192. SANDEL, *supra* note 3, at 348.

193. A range of other institutional designs do the same.

194. See, e.g., SANDEL, *supra* note 3, at 28, 36-37, 77, 89, 116.

195. Even sketching the kinds of political projects that such a public philosophy might generate is beyond my ability. To the extent that such projects emerge out of real engagement with concrete problems of controlling transnational corporate power, it is not clear to me that this sort of Review is the right place to attempt such a sketch.

196. *Negotiated*, not *resolved*: The complexity of complex cosmopolitanism means that there never will be an algorithm for resolving conflicts.

197. 319 U.S. 624 (1943).

198. *Id.* at 642. For a recent celebration of the opinion, see Charles Alan Wright, *My Favorite Opinion—The Second Flag-Salute Case*, 74 TEX. L. REV. 1297 (1996).

199. See SANDEL, *supra* note 3, at 54.

200. *Id.*

Sandel's brief comments on *Barnette* open wide vistas on "the unrealized possibilities implicit in American federalism."²⁰¹ In one dimension the issues are purely conceptual. Sandel wants our public philosophy to acknowledge, as federalism can, that we are embedded rather than "free and independent selves."²⁰² But in what community or communities are we embedded? And when the selves these communities attempt to shape conflict, how is our public philosophy to resolve such conflicts?

Barnette raises these questions in two quite dramatic ways. The school children who refused to salute the flag did so because they felt the pull of another, higher authority: their religion. Less obviously, it seems to me that Sandel might have noted the apparent anomaly that a *local* school board and *state* legislature were insisting that children affirm their allegiance to the *nation*. This is an odd federalism and an equally odd ground on which to defend our embeddedness in communities.

Elsewhere, Sandel notes a similar oddity. Discussing and criticizing President Johnson's "politics of unity," Sandel refers to Johnson's description of a meeting at the White House during the Cuban missile crisis: "You couldn't tell from anyone's comment what their religion was or what their party was, and you could not even observe from their accent where they were from."²⁰³ For Sandel, this shows that to Johnson, "[t]he ideal American citizen would think and act as a kind of universal person, unencumbered by particular identities and attachments."²⁰⁴ Again, there is much to ponder in this brief passage. One might wonder, for example, whether Cubans and Russians—or at least Fidel Castro and Nikita Khrushchev—would have described the "high government and military officials at the White House"²⁰⁵ as acting as "universal persons." One might wonder as well what exactly was wrong in so acting, given the nature of the Soviet and Cuban regimes.²⁰⁶ Finally, one might think that Sandel provides a ground here for defending *Barnette*'s result: West Virginia's legislature was promoting exactly the sort of nationalism that Sandel finds defective in Johnson's vision of American citizenship.

Perhaps Sandel objects only to *Barnette*'s rhetoric, not its result. Perhaps in his view the opinion should have made a contribution to a public philosophy that reconciled the competing demands of identities as religious citizens, as state citizens, and as United States citizens. Sandel's analysis, however, so

201. *Id.* at 347.

202. *Id.* at 54.

203. *Id.* at 283 (citation omitted).

204. *Id.*

205. *Id.*

206. I have no strong views on whether the U.S. actions during the Cuban missile crisis were justified, but I would think it reasonably uncontroversial that one of the things to be considered in arriving at some bottom-line assessment ought to be what course of action was more likely to promote "universal" human rights.

strongly counterposes “universal” personhood with an undifferentiated embeddedness that he does not give readers the resources to figure out what *that* public philosophy would be.

Perhaps focusing on rhetoric rather than results gives up the defense of federalism too easily. Here it helps to return to *Barnette*'s background. Three years earlier, the Supreme Court had upheld a state's compulsory flag-salute statute as, in Sandel's words, “a legitimate way of cultivating the communal identity of its citizens.”²⁰⁷ The results on the ground were not attractive. Eight days after the decision, a Jehovah's Witnesses' hall in Maine was burned; elsewhere mobs attacked Witnesses and, in one case, castrated a Witness.²⁰⁸ How can this be turned into a story *supporting* federalism?

The answer, I believe, is that one might locate resources *within* each state or community to counter the underside of federalism. Michael Walzer describes this as the best and perhaps the only form of effective social criticism.²⁰⁹ The social critic, for Walzer, gives “expression to his [sic] people's deepest sense of how they ought to live.”²¹⁰ For example, a state judge in West Virginia published a pamphlet explaining why he acquitted parents of charges they violated the state's truancy laws when their children were expelled for refusing to salute the flag; another state judge held that West Virginia's compulsory flag-salute statute violated the state constitution; some teachers and principals also resisted efforts to force children to salute the flag; a federal jury—composed of West Virginians—convicted two state officials for helping a mob attack Jehovah's Witnesses.²¹¹

One might suggest, then, that outside intervention against repressive forces within a community might not have been absolutely necessary. Some opponents of those forces might invoke *local* identities and *local* commitments as grounds for their opposition. One must concede that in circumstances like *Barnette*, where national elites were willing to intervene to override local decisions, it was easier to seek such intervention than to take the path of entirely local resistance, which was more costly both financially and, as the violence indicates, in human terms. But, a defender of federalism might suggest, in the long run preserving local identities contributes more to human

207. SANDEL, *supra* note 3, at 53 (discussing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

208. See DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 164–65 (1962). Manwaring emphasizes that violence did not begin only after *Gobitis* but says that “the outburst that followed [*Gobitis*] was impressive.” *Id.* at 164. According to one calculation, nearly 1500 Witnesses were victimized after *Gobitis*. See LEONARD A. STEVENS, *SALUTE!: THE CASE OF THE BIBLE VS. THE FLAG* 113 (1973) (describing without precise citation Department of Justice “tabulation”); cf. MANWARING, *supra*, at 167–68 (describing difficulties in arriving at precise figure).

209. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 33–66 (1987).

210. MICHAEL WALZER, *THE COMPANY OF CRITICS: SOCIAL CRITICISM AND POLITICAL COMMITMENT IN THE TWENTIETH CENTURY* 232 (1988).

211. The events are described in Robert J. O'Brien, *Persecution and Resistance: Jehovah's Witnesses and the Defense of Religious Liberty in West Virginia* 7–8, 11–12, 20–21 (June 20, 1996) (unpublished manuscript, on file with author).

well-being than the procedural republic does. By confining the location of the debate to West Virginia, federalism's defender might say, we would enhance the possibility of civic deliberation and engagement.

The difficulty with this line of argument, however, is that while there may have been local *people* willing to resist, the grounds for their resistance were not truly local, despite the invocation of the West Virginia Constitution in one case. The provision the state judge invoked was West Virginia's religious liberty guarantee: "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief . . ." ²¹² This is a classic statement of universal principle, different in some details from the parallel provision in the national Constitution but no less universal in its premises. The physical location of the debate, that is, would have been West Virginia, but its conceptual location would have been the world. This example suggests what a complex cosmopolitanism might look like. ²¹³

Although Sandel does not develop this defense of federalism in connection with *Barnette*, he does pursue a related line in his discussion of the civil rights movement. He acknowledges that the civil rights movement was, in part, a liberal movement "about respecting persons as persons, regardless of their race, religion, or other particular characteristics." ²¹⁴ But, Sandel writes, "this is not the whole story." ²¹⁵ More important, the civil rights movement was "a moment of empowerment" in which people "act[ed] collectively to shape the public world." ²¹⁶ And the movement took shape in the "public spaces . . . provided by the black churches of the South." ²¹⁷ For Sandel, then, the civil rights movement must be understood in light of the specifically Christian identities of its leading participants. It is no accident, as the classic phrase has it, that Martin Luther King, Jr., headed the Southern *Christian* Leadership Conference.

Sandel's account, however, appears to omit some important dimensions of the civil rights movement, particularly with reference to the federalism whose "unrealized possibilities" Sandel hopes to engender. In substantial part, the movement appealed to the national government's power to displace local practices, and it invoked the Equal Protection Clause understood in universalist terms to justify that appeal. Even the movement's Christian roots had a

212. W. VA. CONST. art. III, § 15.

213. In my view it is also consistent with Walzer's description of the social critic, although I am not sure that Walzer would agree. For a recent statement, see Michael Walzer, *Spheres of Affection*, in MARTHA C. NUSSBAUM ET AL., *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 125 (Joshua Cohen ed., 1996).

214. SANDEL, *supra* note 3, at 348.

215. *Id.*

216. *Id.*

217. *Id.* at 349.

universalist element in the Christian view that all people are brothers and sisters in Christ.²¹⁸

King's *Letter from Birmingham City Jail*, for example, is shot through with Christian references, in part because the letter responded to an *Appeal for Law and Order and Common Sense* published by eight white ministers.²¹⁹ The letter has the rhythm of the African-American pulpit, but King's argument for disobedience of unjust laws was not specifically Christian. The letter is a classic document of American constitutionalism because it seamlessly weaves together religious and constitutional appeals.

Responding to charges that the civil rights movement was "extremist," King "gained a bit of satisfaction from being considered an extremist," and listed those he considered his predecessors: Jesus, Amos, Paul, Martin Luther, and John Bunyan to be sure, but also Abraham Lincoln and Thomas Jefferson.²²⁰ Segregation laws were unjust because "segregation distorts the soul and damages the personality."²²¹ The letter defined *unjust laws* in religious and universal terms:

A just law is a man-made code that squares with the moral law or the law of God. . . . Any law that uplifts human personality is just. Any law that degrades human personality is unjust. . . .

. . . .
 . . . An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. . . .

. . . An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote.²²²

King's litany of segregation's injuries appeals to a universal sense of outrage.²²³

218. Mitt Regan has suggested to me that Christian commitments are "still local and particular in the sense that they are rooted in a psychological and emotional experience that includes awareness of their distinctiveness from the beliefs or commitments of others," and that "coming to understand the force of universal principles would seem a far more profound process when one begins with these commitments and begins to discern their universalistic dimension, than when one absorbs universal principles as part of a more abstract doctrine or the unity of humanity." Letter from Mitt Regan to Mark Tushnet 5 (Aug. 28, 1996) (on file with author). I agree with the first observation, but find the psychological claim in the second unconvincing as a general proposition, however true it might be in specific cases.

219. See Martin L. King, Jr., *Letter from Birmingham City Jail*, in *CIVIL DISOBEDIENCE* 72 (Hugo Adam Bedau ed., 1969).

220. See *id.* at 82-83.

221. *Id.* at 77.

222. *Id.* at 77-78.

223. King's appeal depended upon universal outrage to particular experiences:

[W]hen you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an air-tight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement

The letter's powerful conclusion invokes religious and American traditions as if they were different but linked:

One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judeo-Christian heritage, and thusly, carrying our whole nation back to those great wells of democracy which were dug deep by the founding fathers in the formulation of the Constitution and the Declaration of Independence.²²⁴

Again, however, one might reconstruct federalism by suggesting that resources to transform Southern race relations were available within the Southern white community. Justice Felix Frankfurter hoped even in the midst of the Little Rock school crisis that Southerners of good will—he rarely added the word “white”—could “further the acceptance in action” of “the inevitability of desegregation.”²²⁵ Robert Burt's more recent argument that Supreme Court decisions ought to ensure that neither side gain absolute victory can be understood in similar terms by those who, like Burt, desire the effective transformation of race relations.²²⁶

I doubt, however, that even relying on resources within the South invokes federalism in any significant sense. It treats federalism as an effective instrument of social transformation to achieve the universal goals of the civil rights movement, not as a vindication of fundamental value pluralism, which are its “unrealized possibilities.” The movement's roots in a specifically Christian setting are not irrelevant, but precisely because the Christian commitments were simultaneously universal ones, they look a great deal like elements of the Rawlsian overlapping consensus against which Sandel argues

park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky, and see her begin to distort her little personality by unconsciously developing a bitterness toward white people; when you have to concoct an answer for a five-year-old son asking in agonizing pathos: “Daddy, why do white people treat colored people so mean?”; when you take a cross country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading “white” and “colored”; when your first name becomes “nigger” and your middle name becomes “boy” (however old you are) and your last name becomes “John,” and when your wife and mother are never given the respected title “Mrs.”; when you are harmed by day and haunted at night by the fact that you are a Negro, living constantly at tip-toe stance never quite knowing what to expect next, and plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of “nobodiness”; then you will understand why we find it difficult to wait.

Id. at 76–77.

224. *Id.* at 88.

225. MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 260 (1994). King, in contrast, was “greatly disappointed with the white church and its leadership.” King, *supra* note 219, at 83.

226. See ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 354–55, 372–73 (1992)

so strenuously. In short, as in the federalist defense of *Barnette* in light of the violence that occurred after *Gobitis*, here local identities provide resources for social transformation to the extent that those identities draw *some* meaning from universal commitments.²²⁷ That, I believe, comes close to describing the right kind of complex cosmopolitanism.

B. *Complex Cosmopolitanism and Gay Rights*

Sandel's discussion of gay rights illustrates the tension between his interest in federalism as a location for value pluralism and his conventionally liberal views on many specific issues. Sandel criticizes the dissenters in *Bowers v. Hardwick*²²⁸ for appealing to a "voluntarist" argument that "heterosexual intimacies" resemble "homosexual intimacies" because of "the autonomy the practices reflect."²²⁹ The voluntarist approach "holds that people should be free to choose their intimate associations for themselves."²³⁰ The voluntarist approach is defective, Sandel argues, for two reasons. First, "as a practical matter, it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone, absent some measure of agreement on the moral permissibility of the practices at issue."²³¹ In addition, the voluntarist case secures toleration for gays, but at the cost of analogizing it to other "base" activities that take place in private: The analogy "tolerates homosexuality at the price of demeaning it."²³² Whatever gains gays obtain through voluntarist arguments are "thin and fragile."²³³

In contrast, a substantive approach "claims that much that is valuable in conventional marriage is also present in homosexual unions."²³⁴ The difficulty, of course, lies in securing agreement with those claims. "Much," after all, is not "all." Catholic natural lawyers are familiar with the move Sandel commends: Citing the lower court's opinion in *Bowers*, Sandel notes that "[t]he marital relationship is significant . . . not only because of its procreative purpose but also 'because of the unsurpassed opportunity for mutual support and self-expression that it provides.'"²³⁵ Catholic natural lawyers would raise their eyebrows at that use of "unsurpassed," arguing

227. I would be entering waters beyond my depth to suggest how local identities support universal commitments. I note only that Rawls's construction, in which principles of political liberalism arise in the first instance from within each comprehensive view only to be transformed by the experience of stability, seems suggestive.

228. 478 U.S. 186 (1986).

229. SANDEL, *supra* note 3, at 104.

230. *Id.*

231. *Id.* at 106.

232. *Id.* at 107.

233. *Id.*

234. *Id.* at 104.

235. *Id.* at 105 (quoting *Hardwick v. Bowers*, 760 F.2d 1202, 1211-12 (11th Cir. 1985), *aff'd*, 478 U.S. 186 (1986)).

instead that the procreative potential of marital intimacy is an essential characteristic of the human goods instantiated by *sexual* friendship.²³⁶

What can we make of substantive arguments like these? One problem case for Catholic natural lawyers is the marriage between two sixty-year-olds, whose sexual intimacy has no procreative potential. These natural lawyers do have answers to the problem case,²³⁷ but a detached observer might justifiably believe that what she or he is reading is a simulacrum of a reasoned argument.²³⁸ Unless one had a prior commitment to the proposition that homosexual intimacy is worse than heterosexual intimacy, one would be unlikely to find the arguments persuasive.

There are, however, two sides to this observation. First, it relies on universal standards to determine what human goods homosexual intimacy embodies, expresses, or instantiates. To the extent that Sandel believes that we should make substantive arguments that he expects to have persuasive force, he is committed to a form of universalism; perhaps not the universalism of the procedural republic and its exclusive commitment to autonomy-based arguments, but a universalism of some sort nonetheless. Once again, we see how complex cosmopolitanism may be needed to support Sandel's conclusions.

Second, if Sandel believes that controversies over gay rights can be resolved by substantive arguments, he cannot really be committed to the "unrealized possibilities implicit in American federalism."²³⁹ For federalism is defensible, and interesting, only to the extent that it entails a genuine value pluralism.²⁴⁰ In a truly federal system, the people of Georgia and New York would be allowed to say, "We understand—but simply disagree with—the substantive arguments you have made about the human goods of homosexual and heterosexual intimacy," and bar or allow homosexual sodomy accordingly. From within *their* forms of reasoning, the arguments are fully reasoned; only an observer applying some universal standard can question whether they have offered *reasons* for their public policy.²⁴¹

236. For a recent presentation, see Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995) (responding to Stephen Macedo's critique against their view that "sodomy . . . is intrinsically nonmarital and immoral").

237. The answers require specification of marriage (and sexual intimacy) as a "type." The general characteristics of participants in marriage must be such that participants of that type have the potential for procreation, even if particular participants may not.

238. Louis Michael Seidman forcefully urged this point on me.

239. SANDEL, *supra* note 3, at 347.

240. For me, the most powerful recent presentation of the point can be found in Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994), although I acknowledge that my reading of the article is not widely shared.

241. The Tennessee Court of Appeals invalidated the state's Homosexual Practices Act as a violation of state constitutional guarantees of privacy, describing the challenger's arguments, which the court accepted, as follows: "[M]ajoritarian morality is not a valid basis for curtailing the actions of an unpopular minority in the absence of any evidence that the actions of the minority harm other members of society." *Campbell v. Sundquist*, 926 S.W.2d 250, 264 (Tenn. Ct. App. 1996). It would be interesting to try to figure out whether, based on Sandel's analysis, this is an appropriate use of the pluralism that federalism allows or whether it is inappropriate because it relies on autonomy arguments. I simply do not know.

More generally, reasons for or against a practice can be offered from outside or from within a community. If they come from outside, they will invoke standards that are universal relative to that community. If they come from inside, there are two possibilities. The critical standards might be available from within every community's commitments. Then, however, it really does look as if we are dealing with a Rawlsian overlapping consensus. If, in contrast, communities are truly locations of value pluralism, some communities will reject some reasons offered against their practices.

Sandel's description of republican politics as "risky" indicates his awareness of this difficulty.²⁴² The risk Sandel addresses is coercion. I doubt, however, that he thinks coercion as such is problematic. All political outcomes are either coercive or consensual, and if the latter, we are again in Rawlsian territory.²⁴³ The risk of republican politics, then, is that it will produce coercion into wrong practices. But it is unclear to me where Sandel can get his criteria for assessing practices except from some principles that are, once again, universal relative to the communities that reject them. They are, in short, the cosmopolitan dimensions of an adequate public philosophy.

VI. CONCLUSION

Sandel's interest in federalism calls to mind two songs entitled "Small Town." For John Cougar Mellencamp, "I can be myself here in this small town. And people let me be just what I want to be."²⁴⁴ For Lou Reed and John Cale, recollecting Andy Warhol's life, "When you're growing up in a small town, bad skin, bad eyes—gay and fatty, people look at you funny when you're in a small town. . . . There's only one good thing about a small town, you know that you want to get out."²⁴⁵ Alas, both songs are accurate. Small towns have many attractive characteristics; they also have many unattractive ones. In that, they do not differ from our public life more generally.

Small towns and indeed all the institutions of civil society are complicated locations for the development of public philosophies. Had Sandel examined the "public philosophy" of United States churches by looking at religious doctrine and historical practice, he would have found parallels to his procedural republic in modernist and liberation theology. Novels like *Barchester Towers*,²⁴⁶ *Go Tell It on the Mountain*,²⁴⁷ and, on a less exalted level,

242. See SANDEL, *supra* note 3, at 321.

243. Cf. *id.* at 320 ("Unlike Rousseau's unitary vision, the republican politics Tocqueville describes is more clamorous than consensual.").

244. JOHN COUGAR MELLENCAMP, *Small Town*, on SCARECROW (Polygram Records 1985). The lyrics are also available at <http://sprice.evansville.edu/~tb8/mellencamp/small_town.html>.

245. LOU REED & JOHN CALE, *Small Town*, on SONGS FOR DRELLA (Sire Records 1990).

246. ANTHONY TROLLOPE, *Barchester Towers* (Trollope Soc'y 1995) (1857).

247. JAMES BALDWIN, *GO TELL IT ON THE MOUNTAIN* (1953).

Harry Kemelman's *Rabbi Small mysteries*²⁴⁸ show how churches reproduce within themselves the complex relations that characterize the societies in which they are located.²⁴⁹ How could they not? People bring to the institutions of civil society their thick personalities, not "thin" ones associated solely with each institution's mission. That mission influences the way people interact, which is why a person may behave one way in the local Wal-Mart, another way in the polling booth, and yet another way as a volunteer in his or her church's soup kitchen. The philosophies that result from those interactions will therefore differ. But I suspect that in any society the philosophies will bear a family resemblance to each other. If so, revitalizing the institutions of civil society may only reproduce the dilemmas with which Sandel is concerned.

What public philosophy would be compatible with the multiple identities we all have? It seems to me that here Rawls has the advantage over Sandel. As I understand the Rawlsian argument, the overlapping consensus results from a complex process arising in the first instance from within each person's thick identity. Each person can adhere to it and give it the sort of allegiance that Sandel believes a public philosophy must have for it to motivate public action, precisely because it is compatible with every thick identity.

The professional-managerial class will almost certainly play a large part in any political effort to secure public regulation of transnational corporate power. Sandel's diagnosis of that class's discontent is valuable. I believe that a complex cosmopolitanism may be more effective than Sandel's more restrained approach in providing it with a public philosophy to justify controlling corporate power. And, precisely because complex cosmopolitanism is a form of universalism, it holds out the possibility of appealing to other classes as well.²⁵⁰

As we have seen, an important element in Sandel's account of a decent public philosophy is that it generate and support the conditions for its reproduction. That, however, is not quite right. Rather, a decent public philosophy must generate and support the conditions for its reproduction or transformation into a social order at least as good as the one in which the public philosophy is located.²⁵¹ A decent public philosophy should have the resources to correct itself, and the social order it describes and supports, when the social order appears to be on a bad course.²⁵² The plural and complex

248. See, e.g., HARRY KEMELMAN, *THAT DAY THE RABBI LEFT TOWN* (1996) Kemelman has written 11 other novels in this series.

249. In citing these works, I exploit serious and less serious literature for a didactic purpose far more limited than the ways in which the serious works can contribute to enlightenment and edification.

250. I hope that my formulation is appropriately cautious in light of the experience of the imaginary international proletarian class.

251. This formulation allows for the possibilities that a good social order may evolve into a better one, and that the social order may oscillate from one good form to another.

252. The ability to correct deviations need not create a completely homeostatic system because there is at least a theoretical possibility that the corrections will set the social order in the direction of a beneficial—or at least a nonharmful—transformation.

public philosophy in the United States, which Sandel's account reveals despite his effort to simplify in a way that captures the interests of the professional-managerial class, may be precisely that.