REPUBLIC.COM

By Cass R. Sunstein.
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It is hardly possible to overstate the value, in the present state of human improvement, of placing human beings in contact with other persons dissimilar to themselves, and with modes of thoughts.and action unlike those with which they are familiar. . . . Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.[1]

Republic.com is a curious book, a small book, barely more than 200 pages. Yet within it Cass Sunstein manages to weave an astonishing number of arguments involving technology, jurisprudence, democratic theory, and behavioral psychology into a mostly coherent whole. His central thesis, which he returns to again and again, is to warn us of the dangers the Internet holds in equipping individuals with filtering technologies so precise that they completely avoid, in a way not possible in real life, the chance encounters and shared experiences necessary to deliberative democracy.

I. A SHORT SUMMARY

Those familiar with Sunstein's previous work will recognize many of the arguments he makes here, although he charts new territory in his discussion of the Internet and its effect on democratic self-government. He begins with an Orwellian vision of a future fragmented, a society of nations and groups and individuals separating themselves by erecting fences of completely filtered information. It is a world defined by disunity, a paradoxical place in which an instrument of communication, the Internet, is also a cause of miscommunication, and one of democracy's greatest strengths, free expression, has become one of its greatest threats. It is a disturbing picture, partly because we see in it more present than future, but also because it raises questions largely

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*. J.D. 2001, Harvard Law School.
1. CASS R. SUNSTEIN, REPUBLIC.COM 191 (2001) [hereinafter SUNSTEIN, REPUBLIC.COM] (quoting JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (Jonathon Riley, ed., Oxford University Press 1994) (1848)).

ignored elsewhere about the social value of completely customized information.

In Chapter 1, Sunstein begins by asking whether the increasing trend toward personalization, toward a world in which everything fits almost too well, is necessarily good. What are the repercussions, for example, of filtering technologies that allow visitors to sites like Broadcast.com, Sonicnet.com, and Zatso.com to hear "Me Music," "a personal newscast," or "the one [program] that suits your fancy?" (p. 6). Sunstein doesn't immediately reject the benefits of filtering technologies such as these, but he expresses concern with "the growing power of consumers to filter what they see" (p. 8). His concern is rooted in the Internet's potentially transformative effects on the elements necessary to a "well-functioning system of free expression" (p. 8).[2] In this sense, his book is a continuation of his earlier work, especially *Democracy and the Problem of Speech.*[3]

To lay the foundation for his arguments, he begins by outlining two requirements necessary for a system of free expression to function well:

> First, people should be exposed to materials that they would not have chosen in advance. Unplanned, unanticipated encounters are central to democracy itself. . . . Second, many or most citizens should have a range of common experiences. Without shared experiences, a heterogenous society will have a much more difficult time in addressing social problems. People may even find it hard to understand one another (pp. 8–9).

These two requirements, chance encounters and shared experiences, become the lenses through which he views the Internet's influence on democratic organization throughout the remainder of the book. For example, Sunstein warns of the danger in super-substituting the particular for the general, or in other words, personalizing information to such an extent that what he terms "general interest intermediaries" are

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2. For additional discussions on the Internet's effects on political and social life, see LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); ANDREW L. SHAPIRO, THE CONTROL REVOLUTION (1999).

3. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) [hereinafter SUNSTEIN, DEMOCRACY]. In *Democracy and the Problem of Free Speech,* Sunstein expresses concern for our system of free speech and argues that the First Amendment should be adapted to "new controversies and technologies . . . ." *Id.* at xi. In particular, he suggests that the First Amendment is designed to buttress deliberative democracy and should not be invoked to prevent reforms having deliberative democracy as their goal. *Id.* at xix. This reasoning informs his entire approach to Internet regulation.

disposed of altogether (p. 11).[4] These intermediaries, such as widely-distributed newspapers, magazines, and news broadcasts, "expose people to a range of topics and views at the same time that they provide shared experiences for a heterogenous public" (p. 36). In essence, they provide a metalanguage for our social consciousness, equipping even the most diverse individuals with a common understanding that greases the skids of social interaction and provides exposure to views and information beyond the circle of our own personal interests. The displacement, whether partial or complete, of such intermediaries through the propagation of filtering technologies lies at the core of Sunstein's concerns.[5]

In Chapter 2, Sunstein argues that these concerns are best addressed through the public forum doctrine.[6] After touching on issues such as a speaker's right of access to both places and people and the government's resultant subsidy of public speech (p. 28), he moves to the Supreme Court's general unwillingness to expand public forum doctrine to places beyond streets and parks (p. 29).[7] In light of this reluctance, Sunstein argues that Congress, state governments, and even privately owned websites might "take steps to ensure that people are exposed to a diversity of views" (p. 30), including experiences and arguments which are both unplanned and unwanted (p.32).[8] He carefully distinguishes

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4. *See* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998).

5. Views differ as to whether the Internet helps or hinders shared community experiences. *See* Kent Walker, *Where Everybody Knows Your Name*, 2000 STAN. TECH. L. REV. 2, 59 (2000) (suggesting that the Internet, unlike traditional broadcast communication technologies which cater to sex, shopping, and violence as society's lowest common denominators, enriches community by "creat[ing] a much richer and more varied interchange, and facilitat[ing] offline interchange as well"); *see also* David Coursey, *The Net Brings Back a Shared Experience*, ZDNET News, *at* http://www.zdnet.com/zdnn/stories/comment/0,5859,2137294,00.html. *But see* Gregory S. Alexander, *Dilemmas of Group Autonomy*, 75 CORNELL L. REV. 1, 23 (1989) (arguing that voluntary alignments with discrete groups frustrates community by substituting groups for individuals), *cited in Developments in the Law — The Law of Cyberspace II: Communities Virtual and Real*, 112 HARV. L. REV. 1586, 1589 n. 21 (1999).

6. For a historical overview of the public forum doctrine, see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987). For a discussion of the doctrine's continuing vitality and its application to the Internet, see Noah D. Zatz, *Sidewalks in Cyberspace*, 12 HARV. J.L. & TECH. 149 (1998).

7. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (holding that public forum doctrine was rooted in historical practices and did not extend to airports). *But see* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that areas functionally similar to public squares may be required to open for expressive activities).

8. It is interesting to note that some websites already employ hidden lines of software code to involuntarily direct a user to another site when that user clicks on the browser's "back" button, creating "unplanned and unwanted" encounters even on the

among these elements, arguing quite persuasively at one point the value of unwanted arguments (which usually are also unplanned) in shaping and re-shaping our individual notions. For Sunstein, the public forum doctrine "increases the likelihood that people will generally be exposed to a wide variety of people and views," encouraging deliberative democracy by discouraging the formation of extreme, intractable positions (p. 32).

In Chapter 3, Sunstein considers fragmentation, arguing that the Internet's ability to reinforce narrow interests encourages self-insulation which, in turn, leads to group polarization and cultural balkanization.[9] He begins with a discussion of filtering. Because of the magnitude of information available from newspapers, television, and the Internet, consumers require filters to screen out items they find uninteresting or irrelevant. By pre-selecting items that interest them, consumers tend to reinforce their own world views and opinions. Republicans might choose to read newspapers with a conservative slant; Democrats might chat in chat rooms dominated by other Democrats. The Internet, with its unique ability to connect geographically distant individuals with similar views, exacerbates this tendency toward world view reinforcement. Sunstein's concern is not with isolation; indeed he admits that "many of the emerging technologies are extraordinarily social, increasing people's capacity to form bonds with individuals and groups that would otherwise have been entirely inaccessible" (p. 57), but with insulation. He worries that "people of certain interests and political convictions tend to choose sites and discussion groups that support their convictions" (p. 58), thus short-circuiting the general interest intermediaries he sees as necessary to providing individuals with chance encounters and shared experiences.[10]

He also discusses group polarization, a phenomenon by which individuals, after deliberation with like-minded individuals, are likely to adopt a more extreme position than the one which they originally held.[11]

Internet. *See* Rebecca L. Covell, *Problems with Government Regulation of the Internet,* 42 ARIZ. L. REV. 777, 777–78 (2000). This, of course, begs the question of whether the user's right of privacy has been invaded. For a discussion of the right not to be spoken to, see Franklyn S. Haiman, *Speech v. Privacy,* 67 NW. U. L. REV. 153 (1972) *reprinted in* FRANKLYN S. HAIMAN, FREEDOM, DEMOCRACY, AND RESPONSIBILITY (Franklyn S. Haiman, ed., 2000).

9.   For an extended discussion of fragmentation and the Internet, see Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes,* 110 YALE L. J. 71 (2000) [hereinafter Sunstein, *Deliberative Trouble*]. *But see* MIKE GODWIN, CYBERRIGHTS 15 (1998), *quoted in* LESSIG, *supra* note 3, at 63.

10.   This is a design-based concern about the Internet's architecture. The Internet, by design, prevents the imposition of traditional intermediaries as gatekeepers to information. *See generally* Sullivan, *supra* note 5.

11.   *See* Sunstein, *Deliberative Trouble, supra* note 10, at 97–105 (exploring in

The reason is twofold: first, individuals respond to arguments they already find convincing, which, in discussions among like-minded individuals, greatly outnumber opposing arguments that seem relatively unconvincing; and, second, individuals often adjust their opinions in the direction of the dominant position so as to be favorably perceived by those with whom they interact. Group polarization, then, turns on the "existence of a *limited argument pool*" (p. 68), the absence of unwanted and unplanned ideas. Sunstein is not suggesting that the Internet as a whole offers a limited argument pool, but rather that, through technologies that allow unwanted information to be perfectly filtered, individuals may voluntarily limit the range of arguments to which they are exposed. The result is a tendency toward extremism and balkanization.[12] The Internet, of course, is central to his entire discussion precisely because of its capability to facilitate the sharing of like-minded views through websites, newsgroups, chat rooms, and e-mail lists, providing individuals with "louder echoes of their own voices" (p. 16).

To this point, Sunstein's primary purpose has been to show us that a danger exists — the Internet allows individuals to bypass forums in which they would be exposed to alternative viewpoints. In Chapter 4, he also argues that the Internet, because of the increasing number of information options it offers individuals, contributes along with cable television and other communication sources to the decreasing number of shared experiences that bind individuals and society together. For Sunstein, shared experiences like holidays, sporting events, and news stories are social glue.[13] They provide a common point of reference that allows people to communicate with each other, easing social interaction among unlike individuals and serving as "solidarity goods" that increase in value as information is passed from one person to another. General interest intermediaries distribute these shared experiences and, in the process of doing so, inadvertently rectify the negative externalities

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detail group polarization and its implications for deliberative democracy).

12. In *Democracy and the Problem of Free Speech*, Sunstein discusses the legitimacy of reforms designed to introduce individuals to a diversity of opinions. Admitting that his views might be taken as "unacceptably paternalistic," he argues for an interpretation of the First Amendment that seeks "to create the preconditions for a well-functioning democratic process" rather than to "implement[] existing choices." SUNSTEIN, DEMOCRACY, *supra* note 4, at 21. For a similar analysis, see Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 601 (1990).

13. The influence of John Dewey's conception of community and education is seen throughout the book. *See, e.g.,* SUNSTEIN, REPUBLIC.COM, *supra* note 2, at 192 ("No man and no mind was ever emancipated alone." (quoting JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (Swallow Press 1991) (1927))). For an enlightening discussion of the competing approaches of Dewey and Justice Holmes to free speech and democratic self-government, see Robert W. Gray, *Public and Private Speech*, 1 TEX. WESLEYAN L. REV. 1, 9–11 (1994).

caused by individual choices limiting information consumption. For example, an individual acting on his own may not seek out information about the treatment of asthma, but if exposed to an article about asthma through a general interest intermediary, that individual may share that information with friends who have children with asthma. Thus, general interest intermediaries benefit society in ways in which filtered information does not.[14]

In Chapters 5 and 6, Sunstein transitions to the next phase of his argument: the remedy. Chapter 5 establishes that individuals, acting in their capacities as citizens, may in fact make choices that seem counter to choices they might make in their capacities as consumers (p. 114). For example, they might choose to ban smoking in public places even if they smoke because they believe it is generally a good policy for society. In Chapter 6, Sunstein responds to the widespread notion, often summarized by John Perry Barlow's *Declaration of Independence of Cyberspace*,[15] that the Internet has been and must remain a regulation-free arena. By intertwining a theory of government-created (or at least enforced) property rights with government-sponsorship of the early Internet, Sunstein insists that the central question involved in any government action affecting the Internet is "what kind of regulation, not whether to have regulation" (p. 134). To support his argument, he analogizes to spectrum rights granted by the government to ABC, CBS, NBC, and PBS, noting the irony of broadcasters recoiling at the thought of government interference with their programming, such as requiring a limited number of hours of educational programming for children or free air time for candidates for political office, when it was government action that enabled them to exist and make money in the first place. Sunstein's purpose is to move past objections regarding the presence of government regulation to a discussion of the proper nature of government regulation. He succeeds, but only because he expands the meaning of regulation to encompass government power in general, including redress for viruses like the Love Bug and protection against cyber-terrorism. In this view, every law, whether prescriptive or proscriptive, is regulatory because laws grant rights and rights confer

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14. While Sunstein cautions about the disappearance of information intermediaries on the Internet, Sullivan argues that these intermediaries will simply evolve. *See* Sullivan, *supra* note 5, at 1676.

15. John Perry Barlow, *Declaration of Independence of Cyberspace, available at* http://www.eff.org/pub/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration. (Feb. 9, 1996). "Governments of the Industrial World . . . I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." *Id.*

power and responsibility, governing the actions and reactions of citizens no less than rules more commonly accepted as regulatory in nature.[16]

In Chapter 7, Sunstein begins by arguing that free speech is not and should not be absolute, again moving past the question of "whether" to the question of "what kind" and "how much" regulation is needed. He expresses concern, as he does throughout the book, with the idea that the First Amendment is increasingly identified with the protection of consumer sovereignty rather than democratic self-government.[17] He is particularly distressed with a comment made by Bill Gates and includes it, by direct and indirect reference, throughout the book:

> It's already getting a little unwieldy. When you turn on DirectTV and you step through every channel — well, there's three minutes of your life. When you walk into your living room six years from now, you'll be able to just say what you're interested in, and have the screen help you pick out a video that you care about. It's not going to be 'Let's look at channels 4, 5, and 7.' (p. 146).

The ability of consumers to perfectly narrow their choices concerns Sunstein on many levels, but his primary worry here is about the "emerging cultural understanding" that equates consumer choices with the First Amendment and "severs the link between the First Amendment and democratic self-rule" (p. 146).[18] He draws an insightful connection between calls for consumer sovereignty on the Internet and the now-

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16. For a conception of regulation similar to Sunstein's, see Thomas B. Nachbar, *Paradox and Structure*, 85 MINN. L. REV. 215, 216-17 (2000) (arguing that impulses "for government to take a hands-off approach to the Internet . . . are born of an incomplete view of what it means for the government to 'regulate' an activity.").

17. *See supra* note 13 and accompanying text.

18. Others have sought to resituate the Constitution within a political rather than economic context. For example, in *Democracy on Trial*, Jean Bethke Elshtain writes in reference to electronic town halls:

> [Preference theory] holds that in a free-market society, the sum total of individual consumer choices results in the greatest benefit to society as a whole even as these choices meet individual needs. . . . According to preference maximizers, there is no such thing as a social good — there are only aggregates of private goods. . . . Under the banner of perfected democratic choice, we become complicit in eroding even further those elements of deliberation, reason, judgment, and shared goodwill that alone make genuine choice, and hence democracy, possible.

JEAN BETHKE ELSHTAIN, DEMOCRACY ON TRIAL 30 (1995); *see also* Jon Elster, *The Market and the Forum, in* DEMOCRACY: THEORY AND PRACTICE (John Arthur, ed., 1992).

discredited Lochner Era jurisprudence, arguing that the First Amendment is being incorrectly invoked "to prevent the democratic process from resolving complex questions that turn on issues of fact and value that are ill-suited to judicial resolutions" (p. 151). According to Sunstein, the First Amendment is historically grounded in the preservation of deliberative democracy, a political rather than commercial right intended to further democracy by protecting other rights. The distinction is important because it allows Sunstein, in Chapter 8, to offer a number of policy proposals for the regulation of Internet speech that remain faithful to his conception of the First Amendment but, under notions of consumer sovereignty, would be highly problematic.

In Chapter 8, the final chapter in the book before the conclusion, Sunstein outlines his policy proposals for averting the dangers of fragmentation he sees as inherent to the disappearance of chance encounters and shared experiences. After having drifted to First Amendment jurisprudence in the first chapter, he returns to the Internet here and offers "six reform possibilities" (p. 169):

1. Deliberative domains. These are sites[19] intended to serve as public forums for deliberation, discussion, and disagreement over a wide range of policy issues. While focusing on private control, Sunstein suggests that government could provide start-up funding.

2. Disclosure of relevant conduct by producers of communications. Sunstein emphasizes the consumer benefits generated by voluntary and mandatory disclosure policies in radio and television programming, touching briefly on applying rating requirements to websites to assist people in "blocking" pages with sexually explicit material.

3. Voluntary self-regulation. Websites might agree on certain codes of conduct "designed to protect children, ensure privacy, and to promote attention to diverse views" (p. 180).

4. Economic subsidies. Just as Public Broadcasting Service ("PBS") was designed to provide programming unable to attract sufficient private funding, the government could create, in conjunction with the private sector, a public interest website supported by public and private subsidies.

5. "Must Carry" rules for popular websites. Just as television broadcasters have been required to carry certain programming aimed at

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19. He proposes deliberativedemocracy.org, available at the time Sunstein's book was published but recently registered, interestingly enough, by Lawrence Lessig.

ensuring a diversity of views, popular websites serving as something akin to general interest intermediaries could be required to provide randomly-changing links to public interest websites.

6. **"Must Carry" rules for highly partisan websites.** Partisan websites like the conservative metasite Townhall.com could agree, if not be required, to provide visitors with links to websites with opposing views, "alert[ing] people to the existence of materials other than those they read" (p. 186).

While Sunstein admits the relative modesty of some of these proposals and the difficulty of enacting others, he closes by insisting that the real danger lies not in reform but in the status quo.[20] "To those skeptical of the proposals outlined here," he asks, "what reforms would be better?" (p. 190).

II. HIGHLIGHTS, STUMBLES, AND AN OVERSIGHT

To this point, I have summarized the major ideas Sunstein addresses in his book, reserving in the main my analysis about their relative merit. I now turn to a brief discussion of some highlights of the book, its shortcomings, and what I believe is an unfortunate omission.

In *Republic.com*, Cass Sunstein sets out to prove that the Internet, as a contributor to the rising fragmentation occurring in society, threatens deliberative democracy. Like other republican revivalists, he is concerned with elements that may interrupt the civic dialogue necessary to the deliberative process.[21] In this, he succeeds. The book is not pessimistic; indeed he admits that the Internet can be a boon as well as a stumbling block to the exchange of competing ideas. But he does raise a voice of warning. His central concern lies with the potential of emerging filtering technologies to cater to consumer sovereignty by offering perfectly individualized information — focusing on particular subjects, linking only to like-minded websites, and bypassing those general interest intermediaries central to exposing citizens to chance encounters and shared experiences. By challenging the assumption implicit in filtered information — that personalization is beneficial — he forces us to ask, "Beneficial to whom?" To the individual? Or to

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20. *See* Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1084 (2000) (calling for a mixture of market and regulatory reforms to address various Internet issues).

21. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1531 (1988) (arguing that transformative civic dialogue often occurs through informal channels such as clubs, schools, streets, and workshops).

society? By the end of the book, it seems clear that the rush to customized information poses a hazard for social fragmentation and ought not to occur without at least a thought to its societal consequences.

Another strength of the book is its accessibility. To his credit, Sunstein generally avoids unnecessary jargon or prolonged tangential discussions, making his arguments and moving on without sacrificing their overall substance. The book moves quickly, aided in part by the breadth of subject matter covered in its nine chapters, and the reader is reminded at crucial points what has been covered and what lies ahead.

Other highlights of *Republic.com* include a succinct discussion of republicanism and a wonderful quote from Senator Roger Sherman of the first Congress about the duties of legislators in a deliberative democracy (p. 41), a critique of the trend toward consumerism in political activity (p. 46), a rebuttal of the common notion that maximum freedom is consonant with the maximization of private preferences (p. 50), a delightful reference to First Amendment and Second Amendment advocates as "jurisprudential twins" (p. 148), and an overall willingness on Sunstein's part to advance what is generally an unpopular view — that the Internet, like other communication mediums, is not and should not be regulation-free (p. 139).

Of course, the book is not without its weaknesses, and Sunstein stumbles unnecessarily in a few key places. First, while his efforts toward accessibility are noteworthy, Sunstein's arguments are occasionally rhetorical when they should be empirical. There is a place for rhetoric, of course, especially if an author's purpose is limited to conceptual persuasion, but in places Sunstein attempts to prove a point by relying on what amount to factual assertions. For example, in Chapter 2, Sunstein writes: "For countless people, the Internet is producing a substantial decrease in unanticipated, unchosen interactions with others" (p. 23). This is an assertion central to Sunstein's thesis that online filtering technologies decrease rather than increase chance encounters with unwanted information. Yet on what basis does he make this point? Sunstein is apparently arguing that an increase in online activity leads to a decrease in offline encounters. He attempts to provide support in the form of anecdotal evidence, referencing Amazon.com, Buy.com, MySimon.com, and others, but even these are hazy at best. What Sunstein's argument requires is empirical data, not anecdotes. There are a number of firms providing online companies with the statistical metrics to measure customer click-through patterns.[22] It may be that the evidence suggests that customers broaden rather than narrow their

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22. *See, e.g.*, BPA International, *at* http://www.bpai.com (last visited Apr. 16, 2001); Media Metrix, *at* http://www.mediametrix.com (last visited Apr. 16, 2001); NetValue, *at* http://www.netvalue.com (last visited Apr. 16, 2001).

exposure to unwanted information by randomly clicking on news items, products, and media which they had not pre-selected at all. Of course, it may also be that Sunstein is right. We don't know, and, unfortunately, Sunstein doesn't tell us.

To be fair, Sunstein does utilize some empirical data, most notably in Chapters 3 and 5, and at one point he acknowledges that there is no "definitive information yet available about the extent to which people who consult sites with one point of view are restricting themselves to like-minded sources of information" (p. 60). His point here, that through specialized websites "many people are mostly hearing more and louder echoes of their voices" (p. 60), is more conceptual than factual, but his nod to empirical evidence is helpful. Additional statements about the availability or lack thereof of supporting documentation would be welcomed throughout the book.

Another weakness is that Sunstein too often fights hyperbole with hyperbole, balancing the flummery of Internet proponents with fictionalized tales of individuals and groups pursuing their narrow interests in frightening isolation. It may be mere conceptual puffery, a purposeful overstatement of case because this is the only way the case can be made, but at times his forays carry him near the edge of intellectual sensationalism. For example, he writes: "The digital divides that I will emphasize may or may not be a nightmare. . . . The imagined world of innumerable, diverse editions of the 'Daily Me' is the furthest thing from a utopian dream, and it would create serious problems from the democratic point of view" (p. 22). Later he discusses a radical, imaginary militant group called the Boston Tea Party: "No violence has occurred yet. But things are unquestionably heading in that direction" (p. 52). When warning that social enclaves do not always move society in desirable directions, he writes: "It is easy to think of examples to the contrary, as, for example, in the rise of Nazism, hate groups, and cults of various sorts" (p. 77). Perhaps he cites these "extreme cases" (p. 53) to draw attention to his thesis, a technique which certainly rescues the book from any charge of pedantic drudgery. And fortunately, he usually scares without sounding like a scare-monger by tempering the book with an overall tone of moderation: "Nor should anything here be taken as a reason for 'optimism' or 'pessimism,' two great obstacles to clear thinking about technological developments" (p. 10), and, "[e]merging technologies . . . hold out far more promise than risk" (p. 201). Nevertheless, his use of extreme examples is distracting and ultimately undermines the reasonableness of his own view.

A third weakness is that Sunstein occasionally covers ground that he, in his earlier book *Democracy and the Problem of Free Speech*,[23] has

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23. SUNSTEIN, DEMOCRACY, *supra* note 4.

covered before. Generally this is not a problem. Authors often write about the same topic, advancing new arguments and revising old ones. But in portions of *Republic.com*, Sunstein draws too heavily on his earlier work. For example, in *Republic.com*, Sunstein refers to an exchange between Brutus, an ardent anti-federalist, and Alexander Hamilton. The dispute was about the relative merits of a homogenous versus a heterogeneous republic, Brutus cautioning that heterogeneity would produce "a constant clashing of opinions" and Hamilton responding that the "jarring of parties . . . will promote deliberation" (p. 40). In *Democracy and the Problem of Free Speech*, Sunstein uses the same quotation.[24] Similarly, Sunstein refers to a comment made during the First Congress by Senator Sherman in *Republic.com*, a comment I noted among the book's highlights (p. 41). Sunstein includes it as well in *Democracy and the Problem of Free Speech*.[25] Other similarities include a reference in both works to competing conceptions of civic duty by Justices Holmes and Brandeis,[26] a discussion of "information as a public good,"[27] a development of the notion of consumer sovereignty, [28] and an overall emphasis on free speech and communication technologies. Because it restates much that has already been stated before, *Republic.com* is more of an extension of Sunstein's earlier work than an entirely new venture. It remains worthwhile because of its emphasis on the Internet, but less reliance on previous material would have made it, at least for readers of *Democracy and the Problem of Free Speech*, more interesting.

A final criticism is that Sunstein places too much weight in the Internet basket. While his main argument is persuasive, his general concern is larger than the Internet, both theoretically and practically, and should account more fully for the filtering that occurs offline in the form of special-interest books, magazines, newsletters, and conferences.[29]

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24. *See id.* at 242.
25. *See id.*

27. SUNSTEIN, REPUBLIC.COM, *supra* note 2, at 99; SUNSTEIN, DEMOCRACY, *supra* note 4, at 68.
28. *See* SUNSTEIN, REPUBLIC.COM, *supra* note 2, at 113; SUNSTEIN, DEMOCRACY, *supra* note 4, at 71.
29. In support of his main thesis, he offers a quote from Justice Brandeis' concurring opinion in *Whitney v. California* that summarizes many of his concerns: "[The Founders] believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." SUNSTEIN, REPUBLIC.COM, *supra* note 2, at 47 (quoting *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)). Sunstein worries that filtering technologies will aggravate this inertness by hampering public discussion, a "political duty[.]" *Id.* My disagreement is not theoretical but practical. I, too, believe that a well-functioning republic requires an engaged citizenry, but I am less sure about

Also implicit in his argument is the questionable notion that the Internet changes preferences as well as beliefs. Will individuals seeking a balanced diet of information in their pre-Internet life really limit themselves to websites promoting special-interest agendas once they venture online? By insisting that the dangers posed by the Internet are somehow different than those posed offline, Sunstein raises an artificial barrier between our real and virtual worlds. Individuals already seek out information they find persuasive. Extremists already associate with other extremists. No doubt the Internet exacerbates these behaviors, but it does so because of other, equally polarizing societal trends.

One surprising and, in my view, unfortunate omission from *Republic.com* is a sustained discussion about the substantive characteristics separating the Internet from other communication technologies and how these characteristics affect traditional efforts to squeeze speech-related doctrines into any Internet analysis. For example, Sunstein surveys various justifications for government regulation of the broadcast industry and applies these to the Internet (pp. 173–83). Yet nowhere does he undertake an analysis of the distinctions that the Supreme Court has drawn between broadcast and the Internet. In *Reno v. American Civil Liberties Union,*[30] the Supreme Court noted three justifications for regulation of the broadcast industry: the history of extensive government regulation, the scarcity of airwaves, and broadcast's "invasive" nature.[31] The Court also observed that "[t]hese factors are not present in cyberspace."[32] In light of Sunstein's policy proposals applying "must carry" rules to the Internet, the design features differentiating broadcast from the Internet seem particularly relevant, not the least because broadcast suffered from scarcity of viewpoint and the Internet suffers, according to Sunstein, from diversity of viewpoint. Of course, Sunstein argues that such diversity actually increases viewpoint scarcity through self-insulation, but it is still at least questionable whether diseases with such diametric symptomology require the same remedy.

Equally important to any discussion of the government's obligation to ensure the consonance of Internet communication with deliberative democracy is an analysis of the architectural features which frustrate that obligation. The design of the Internet — its size, its free-flowing,

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the Internet's singular potential to endanger this process.

30. Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) [hereinafter *Reno I*].

31. *Id.* at 868; *see* Covell, *supra* note 9, at 783 (observing that *Reno I* distinguished the Internet from radio and TV "in that receipt of information on the Internet requires the user to take deliberate, affirmative steps, unlike the mere turning of a dial required for TV and radio").

32. *Reno I,* 521 U.S. at 868.

borderless architecture, its detachment from geographical proximity — continues to provide practical impediments to regulation. This is well-worn ground, of course, but that is hardly an excuse for its omission.[33] In my view, Sunstein's argument would have been more convincing had he accounted for the practical differences that distinguish the Internet from other mediums of government-regulated communication.

III. CONCLUSION

I conclude with a word about Sunstein's policy proposals. He moves through them rapidly, devoting little more than a page or two to each. And with the possible exception of his "must carry" proposals, they are fairly underwhelming in their originality and scope. However, *Republic.com* is a book about problems, not solutions, and Sunstein's ideas are meant to be a beginning rather than an end. He understands his proposals' limitations and urges that the important thing is to "retain a sense of the grounds on which we can evaluate them" (p. 190). What are these grounds? As Sunstein notes in *Democracy and the Problem of Free Speech*, "a large point of the system is to ensure discussion and debate among people who are genuinely different in their perspectives and position, in the interest of creating a process through which reflection will encourage the emergence of general truths."[34] Sunstein's hope is that the Internet advances rather than impedes our continuing obligation to a republican form of government.

In *Republic.com*, Cass Sunstein situates the Internet within the larger context of republican revivalism, arguing that Internet filtering technologies have the capacity to do great damage to our democracy by "increas[ing] people's ability to wall themselves off from topics and opinions that they would prefer to avoid" (p. 202). Although he occasionally stumbles, his discussion about the Internet's influence on chance encounters and shared experiences is ultimately persuasive. *Republic.com* is a challenge, similar to that extended by Benjamin Franklin shortly after the drafting of the Constitution, to remain vigilant in our civic dialogue. When asked by a large crowd gathered outside of Convention Hall what the authors of the Constitution had given them, Franklin replied: "A republic, if you can keep it" (pp. 200–01).

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33. Although Sunstein never addresses the issue squarely, he drops a helpful footnote about the technical challenges of Internet regulation. *See* SUNSTEIN, REPUBLIC.COM, *supra* note 2, at 187 n. 10 (citing Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (responding to both descriptive and normative claims of Internet regulation skeptics)).

34. SUNSTEIN, DEMOCRACY, *supra* note 4, at 241.