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DEMOCRACY AND THE INTERNET

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In *Republic.com* Professor Cass Sunstein argues that despite its many advantages the Internet may have a deleterious effect on deliberative democracy. This effect might arise through the increasing use of filtering software to select only that information that is consistent with the user's predispositions and beliefs. The great informational advantages of the Internet will not broaden users' horizons; they may narrow them. Moreover, users will begin to form groups on the Internet only with those who share their views, and this will lead to the fractionation known as group polarization. Professor Sunstein, in a companion e-book, *Echo Chambers*, cites the controversies over *Bush v. Gore* and the impeachment of President Clinton as examples of the polarization that have plagued our public life and that the Internet fosters. Professor Sunstein considers a range of regulations of Internet use that might ameliorate its adverse effects on democracy, such as requiring websites that advocate a particular point of view to provide hyperlinks to websites that tout an alternative view.

I take issue with Professor Sunstein on three grounds. First, I believe that, so far, the democracy-enhancing aspects of the new communications media are much, much greater than the democracy-threatening aspects. Interestingly, the empirical literature on who uses the Internet and what its effects on them have been suggests that far from narrowing their perspective, Internet use has fostered their civic engagement and broadened their views. Second, I find that the particular reforms that Professor Sunstein proposes are impracticable and unlikely to work effectively even if practicable. And third, I believe that, conceding for the sake of argument that Professor Sunstein's problems with the Internet are real, the best hope for correction consists of more speech on the Internet through encouraging vigorous competition and broad access.

DEMOCRACY AND THE INTERNET

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I. Introduction

Cass Sunstein, Karl Llewellyn Distinguished Service Professor at the University of Chicago Law School and Department of Political Science, is one of the most prolific and profound legal scholars of his generation. The range of colors on his palette is broad, and his canvas is large. Like any great artist, he returns to

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certain favorite themes while exploring new subjects and new media. He has never written a word that is not worth reading, and *Republic.com* is no exception.

Republic.com is a rumination on the Internet and its effects on deliberative democracy.² While he sees much that is socially desirable in the new technology, Professor Sunstein also sees much that troubles him. In particular, he fears that imminent innovations in computer technology will make it possible to filter the vast streams of information accessible on the World Wide Web, with the likely result that people applying these filters will not gather new information so as to broaden their views. Rather, they will likely use these filtering mechanisms to reinforce their prejudices and their isolation. These tendencies, Professor Sunstein believes, will cause group polarization, the isolation of citizens one from another, and the entrenchment of prejudices and hatreds—all of which will lead to the general degradation of democratic ideals.³

Professor Sunstein's work is part of a second generation of scholarship on the Internet. Where the first scholarly commentators saw the Internet as almost unqualifiedly praiseworthy, the second generation has begun to warn of some serious social costs to these innovations. And, relatedly, while the first-generation scholars lauded the anarchic and bottom-up style of the Internet and contended that regulation of that medium was impossible or imprudent,⁴ the second generation stresses that regulation of the Internet is possible and desirable—even essential. The first generation scholarship had a libertarian flavor; that of the second has a liberal (or possibly pragmatic) flavor.⁵

² In keeping with the subject matter of the book, there is an electronic version of *Republic.com* available from, among other sites, Amazon.com for \$10.95. Those who purchase the book in this manner will have to have the Microsoft Reader software installed. There is a link from the Amazon.com site to a site from which that software can be downloaded.

³ Professor Sunstein has collected previous reviews of *Republic.com* on the University of Chicago Law School website: see <http://www.law.uchicago.edu/faculty/sunstein-book.html>. He has also responded to some of those critics in a short “digital book” available from Princeton University Press. See text at n. 35 *infra*. See the review of *Republic.com* in *The Economist* 99 (March 24, 2001). See also Alexander Stolle, “Adding Up the Costs of Cyberdemocracy,” *New York Times* (June 2, 2001) A15 at col. 2.

⁴ See, e.g., David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

⁵ Two noted commentators of this second generation—LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) and ANDREW SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING PEOPLE IN CHARGE AND CHANGING OUR LIVES* (1999)—have devoted most of their attention to the discussion of two issues: (1) whether there might not be some previously unremarked but significantly adverse effects of the Internet on important social forces, and (2) whether the Internet is regulable, and, if so, how. Professor Sunstein's focus is almost exclusively on how the Internet might lead to some highly undesirable effects on our abilities to govern ourselves effectively and justly.

For a thoughtful review of Lessig and Shapiro, see Neil Netanel, *Cyberspace 2.0, Review of Lawrence Lessig, Code and Other Laws of Cyberspace (1999) and Andrew L. Shapiro, The Control*

In Part II I outline Professor Sunstein's hypothesis and describe the policy proposals he considers for correcting the Internet's possible ill effects on deliberative democracy. In Part III I criticize his hypothesis and his proposals.

Here is a summary of my view. While Professor Sunstein is certainly right to insist that there are benefits *and* costs of the Internet on our democratic (and other) institutions and that one must tote those up in order to determine the social desirability of regulation of the Internet, I am not at all persuaded that the net effect of the Internet on our democratic ideals is anywhere close to negative. Specifically, I have three differences with Professor Sunstein. First, I believe that, so far, the democracy-enhancing aspects of the new communications media are much, much greater than the democracy-threatening aspects. Second, even if we concede that Professor Sunstein's analysis is correct, I find that the particular reforms that he considers are impracticable and unlikely to work effectively. And third, I am also generally inclined to believe that, again conceding that Professor Sunstein's problems with the Internet are real, the best hope for correction consists of more speech on the Internet⁶ through encouraging vigorous competition and broad access.

But I am pragmatic and cautious enough to insert the words "so far" in my first point of the previous paragraph. We would be wise to be vigilant so as to make sure that the benefits of the Internet, with respect to democratic institutions, continue to be large and to take steps to minimize such costs as we can identify and regulate reasonably. An extremely important consideration in this regard is to stress the fact that things on the Internet are changing very, very rapidly. After all, ten years ago almost no one would have predicted the speed or breadth of the revolution that digital information technology has wrought. What prudent person can be confident of the changes that the next ten years will bring? And that being the case, what confidence can we have that the problems of today will be the problems of tomorrow or that the reforms we devise for what we take to be today's problems might not turn out to hobble the next rapidly evolving stage of the Internet?

Revolution: How the Internet is Putting People in Charge and Changing the World We Know (1999), 79 TEXAS L. REV. 447 (2000). Professor Netanel cites Lessig and Shapiro as raising some of the same issues about the unwanted and adverse effects of the Internet on deliberative democracy as does Professor Sunstein. *Id.* At 469. But Professor Netanel is almost as skeptical as am I about whether these fears are well grounded: "It is questionable whether digital technology will actually lead to the widespread excessive insularity [Lessig and Shapiro] portray." *Id.* at 470.

⁶ The phrase comes, of course, from Justice Brandeis' dissent in *Whitney v. California*, 274 U.S. 357, 376 (1925): unless there is an emergency requiring immediate action by the government, the only permissible governmental remedy for dangerous speech is "more speech, not enforced silence." See, on the issue of the practicality of more speech, Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213 (2001).

II. WHAT'S WRONG WITH THE INTERNET AND WHAT TO DO ABOUT IT

Professor Sunstein's central contention is that deliberative democracy may suffer irreparable harm because of the decline of public interaction and the resulting group polarization that the Internet may foster. In this section I shall elaborate on this contention, describe two examples from recent public affairs that may illustrate the contention, and explain Professor Sunstein's proposals for dealing with these threats to deliberative democracy.

A. The Internet and deliberative democracy

The Internet makes possible two phenomena that may threaten deliberative democracy. First, it significantly lowers the costs to individuals of finding and gathering information on almost any topic; but this ease also creates a strong demand for methods of filtering this information. If people use filtering methods that deliver to them only information that reinforces views they already hold and screen out novel and different information and points of view and if an increasing number of people get most of their political information from the Internet, this filtering may insulate more and more people from exposure to new ideas and to ideas that may question or conflict with their own. Second, this increasing filtering may foster the phenomenon of group polarization, in which the ideas of those in a self-defined group drift toward the ideas of the more extreme among the group. Taken together, these two tendencies, Professor Sunstein believes, may do great harm to deliberative democracy: they may isolate individuals one from another, reduce the give-and-take of contrary views in the public forum, induce more extreme views rather than moderation and compromise among competing claims, and diminish the scope of shared social experiences that serve to bind societies together.

1. Filtering

Professor Sunstein is well aware of the great virtues of the Internet and the other recent innovations of the new digital communications technology, and he makes frequent reference to those virtues. His aim in *Republic.com* is not, however, to repeat these well-known arguments but to draw attention to a possible dark side of the Internet: its potentially dire effects on our abilities to govern ourselves well and fairly. The driving force in the dark side of the Internet is the ease with which people can now filter out unwanted sources of information:

The market for news, entertainment, and information has finally been perfected. Consumers are able to see exactly what they want. When the power to filter is unlimited, people can decide, in advance and with perfect accuracy, what they will and will not encounter. They can design

something very much like a communications universe of their own choosing.⁷

This ability, taken to its extreme, may lead to what Professor Nicholas Negroponte of MIT has engagingly called *The Daily Me*.⁸

According to Professor Sunstein, the problem with these filters is that they wipe out the “street corners” and “commons” where “people are exposed to things quite involuntarily.”⁹ Filtering, Professor Sunstein argues, removes the digital equivalent of Speaker’s Corner in Hyde Park, London, or the terrace at the back of the Illini Union in Urbana—places where anyone with a point to make can mount a podium and give vent to her views before, to say the least, a skeptical audience.

This trend on the Internet exacerbates a general trend that Professor Sunstein also decries—the decline of “general interest intermediaries.”¹⁰ I am not entirely sure what qualifies as a general interest intermediary, but, whatever they are, Professor Sunstein believes them to be in eclipse. Instead of those sources of information, people focus instead on those who are peddling the opinions that they already value.

These two trends—the trend toward filtering and the decline of general interest intermediaries—may cause an unraveling of important social bonds. If people formerly consulted the same general interest intermediaries and frequented a public forum and thereby shared the same sources of information and probed them collectively and publicly *and there are no plausible substitutes for those general interest intermediaries as general sources of information*, then the decline of the public forum and the general interest intermediary means that people may not be sharing a common understanding of public events. They do not have shared information and experiences that contribute to social cohesion.¹¹

⁷ SUNSTEIN, *REPUBLIC.COM* 5 (2001). In fact, the process is even worse because of what is called “collaborative filtering.” An example of that practice is Amazon.com’s book, music, and other recommendations to its customers. By keeping track of what each customer has bought, Amazon.com can recommend other purchases to each customer, based on what other people have bought. This same practice could be used in filtering news stories: “Others who read this story also read _____. Click [here](#) to be taken to that story.”

⁸ NICHOLAS NEGROPONTE, *BEING DIGITAL* 153 (1995). To a degree, one can already create a *Daily Me* by customizing a commercial portal’s homepage when one first logs onto the Internet. Many Internet Service Providers (ISPs)—such as Yahoo and Excite—provide customers with an easy-to-use method of customization that allows the homepage to show pre-selected items of information, such as the results of certain team sports games, news from certain locales, the weather in various places, and hyperlinks to other designated sites.

⁹ Sunstein, *supra* n. 7, at 15.

¹⁰ *Id.* at 11.

¹¹ *Id.* at 53. The italics are mine.

This is a tremendously important point. There has been a great deal of fascinating writing recently about the vital importance to a well-functioning democracy of shared social experiences.¹² If Professor Sunstein is correct in pointing out that filtering of information on the Internet is a factor contributing to the widely noted decline in shared social experiences, then he needs to be taken very seriously indeed. However, I shall argue below that Professor Sunstein has exaggerated the role of the Internet in the decline of shared social experiences. Indeed, I shall argue the contrary—namely, that the Internet may well *increase* shared social experiences.

2. *Group polarization*

There is a second aspect of filtering that makes matters even worse—group polarization. This phenomenon occurs when individuals in a group tend to gravitate towards the most extreme views of the members of the group.¹³ As a result, like-minded groups are driven closer together and farther from all other groups. This is a well-known psychological phenomenon about which Professor Sunstein has written importantly elsewhere.¹⁴ Thus, not only does the filtering on the Internet tend to isolate individuals from unwanted views of others, it also throws them into like-minded groups that then tend to drift towards extreme views and away from moderate views.¹⁵ Like galaxies and stars in the ever-expanding universe, groups are all moving away from one another, making social cohesion and deliberative democracy increasing difficult to maintain.

Professor Sunstein reports on some modest empirical work that he did to establish the existence of group polarization fostered by the Internet. First, he randomly looked at sixty political websites and found that only nine (15 percent of the total) provided links to websites with opposing views; thirty-five of the websites (almost 60 percent of the total) provided links to like-minded sites.¹⁶ Similarly, in a study of hate-group sites, Professor Sunstein found that almost all of them have links to like-minded sites and almost none of them (a notable exception being Islam Monitor) has links to opposition sites.¹⁷

¹² See my discussion of Robert Putnam's work in §III.A.3.

¹³ *Id.* at 65.

¹⁴ Sunstein, *Group Dynamics*, 12 CARDOZO STUD. L. & LIT. 129 (2000) and Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L. J. 71 (2000).

¹⁵ Sunstein, *supra* n. 7, at 57. See Stolle, *supra* n. 2, for what may be an example of group polarization that occurred in chat groups discussing *Republic.com*.

¹⁶ *Id.* at 59.

¹⁷ *Id.* at Table 3.2 on 64. I do not want to quibble about these statistics because Professor Sunstein offers them only as being rough and ready and merely suggestive. Nonetheless, I do not believe that they present any credible evidence on group polarization on the Internet. Others have produced empirical evidence on "cyberbalkanization" that I review in Part III.A.3 below.

3. *Free speech: regulation and the public forum*

The policy implication of Professor Sunstein's analysis is towards some method of regulating the Internet that minimizes or controls these socially and politically undesirable effects. He knows full well that there will be a strong presumption against this regulation on the ground that it might violate the Free Speech Clause of the First Amendment. And so, Professor Sunstein prepares the ground for regulation by making the case for more extensive regulation of speech on the Internet than many people might otherwise be prepared to accept.

Professor Sunstein begins Chapter 7 ("Freedom of Speech") with an account of a website called "The Nuremberg Files":

'A coalition of concerned citizens throughout the USA is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity.' The site contained a long list of 'Alleged Abortionists and Their Accomplices,' with the explicit goal of recording 'the name of every person working in the baby slaughter business in the United States of America.' The list included the names, home addresses, and license plate numbers of many doctors who performed abortions, and also included the names of their spouses and children.¹⁸

The site also contained "Wanted" posters with the photos of doctors on the posters, although those were removed before any litigation against the website.¹⁹ Professor Sunstein has no legal objection so far. But he does begin to have qualms when he notes that three of the doctors on the list have been murdered and that when they were, the website drew a line through the decedent's name.

In 1997 Planned Parenthood and several others brought an action in federal district court in Portland, Oregon, against the American Coalition of Life Activists, the originators of the Nuremberg Files website, for violation of the Freedom of Access to Clinic Entrances Act of 1994 and the Racketeer Influenced and Corrupt Organizations Act (RICO). In the trial court the plaintiffs won over \$100 million in damages. But in late March, 2001 (after the publication of *Republic.com*), a three-judge panel of the United States Court of Appeals for the Ninth Circuit vacated the judgment. Judge Alex Kozinski, writing for the court, voided the award on the ground that the Free Speech Clause of the First Amendment protects the website's speech, unless its threat is explicit and likely to cause "imminent lawless action." "If defendants threatened to commit violent acts, by work-

¹⁸ *Id.* at 141.

¹⁹ The Nuremberg Files website was taken down after a trial court entered an adverse judgment in an action against the site, but it is now up again in a modified form. See <http://www.christiangallery.com/atrocities/>. Among the innovations promised on the new website is a live camera feed from outside abortion clinics around the country.

ing alone or with others,” then their words could properly support the verdict. But if their words “merely encouraged unrelated terrorists, then their words are protected by the First Amendment.”²⁰

Sunstein makes two more general points about free speech and applies them specifically to issues having to do with the Internet. His central point is this: “[T]he free speech principle, properly understood, is not an absolute [;] it does not bar government from taking steps to ensure that communications markets serve democratic self-government and other important social values.”²¹ Professor Sunstein suggests that this view argues for giving government relatively wide latitude in regulating speech “in light of the commitment to democratic deliberation.”²² He contrasts this view with the more conventional one, which says that the First Amendment requires the government to give great weight to consumer sovereignty in free speech disputes.²³

To see the distinction, consider an example. Suppose that the government proposes to “require television broadcasters to provide a certain amount of free air time for candidates for public office, or a certain amount of time on coverage of elections.”²⁴ The prevailing orthodoxy, which sees consumer sovereignty as the first principle on which to evaluate this proposed regulation, would be very skeptical, almost certainly finding it to be a violation of the First Amendment. That view might further argue that there are now so many broadcasters and telecasters (and other outlets for candidates) and so much competition among those outlets

²⁰ See *Planned Parenthood Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (2001). It is worth adding a few brushstrokes to this sketch of the litigation. The “Wanted” posters on the Nuremberg Files website identified a “Deadly Dozen” doctors who performed abortions, declaring them guilty of “crimes against humanity” and offering \$5,000 for information leading to the “arrest, conviction, and revocation of license to practice medicine.” Importantly however, the website never explicitly mentioned or advocated violence. Indeed, the guidelines of the American Coalition of Life Advocates prohibited violence. Nonetheless, if the doctors whose names appeared on the website were murdered, the website struck a line through those doctors’ names. If the doctors were injured, the site grayed out their names.

The legal and policy issues presented by the Nuremberg Files website are fascinating, troubling, and challenging. But Professor Sunstein does not spend a great deal of time discussing them, for which I am truly sorry. My suspicion is that the Nuremberg Files website illustrates, for Professor Sunstein, precisely the sort of polarizing force that he dislikes about the Internet. If that is so, I am then doubly sorry that he did not return to the Nuremberg Files website for illustration throughout the remainder of *Republic.com*. For example, he might have used that website to elaborate on group polarization. And he might have used that website to illustrate how his suggested reforms might work.

²¹ Sunstein, *supra* n. 7, at 142.

²² *Id.* at 153.

²³ *Id.* at 142.

²⁴ *Id.* at 154. See *Red Lion Broadcasting Co. v. FCC*, 89 S.Ct. 1794 (1969), and *Miami Herald Publishing Co. v. Tornillo*, 94 S.Ct. 2831 (1974).

that candidates can appear frequently before the voters, if voters desire to see them and the candidates can afford the appearance fees. But for those, like Professor Sunstein, who see the free speech principle as a means for furthering deliberative democratic goals, the regulations requiring candidate appearance or election coverage are fully consistent with the principle's highest aspirations.²⁵ Professor Sunstein recognizes that for regulation of this sort to clear the First Amendment hurdle the government in regulating must not be favoring any particular point of view and must truly be improving the operation of democratic processes.²⁶ The regulation gains legitimacy, on this view, from the alleged fact that the social benefit to citizens of being able to see and hear candidates on broadcast outlets greatly outweighs the social costs to the broadcast outlets of the alternatives foregone.²⁷

A tremendously important doctrine that informs Professor Sunstein's proposals for correctives is that of speech in a "public forum." The "public forum" doctrine holds, as in *Hague v. CIO*, 307 U.S. 496 (1939), that the streets, parks, and other public places must be kept open for expressive activity.²⁸ Government may still impose "time, place, and manner" restrictions within the public forum. But the distinctive feature of the doctrine is that it creates a "*right of speakers' access, both to places and to people*."²⁹ This affirmative right, according to Sunstein, might be taken to require the government to *subsidize* speakers in the public forum:

²⁵ *Id.* at 154. Professor Sunstein notes that many other developed countries, such as Germany and Italy, understand that "the mass media can be regulated in the interest of improving democratic self-government." *Id.*

²⁶ *Id.* at 157. I note in passing that establishing that the governmental regulation in question "truly [improved] the operation of democratic processes" is a formidable undertaking. There is, for example, no easy-to-measure, widely agreed-upon metric for assessing how well democracy is working. One can imagine several—e.g., general surveys of popular attitudes about governmental effectiveness (repeated periodically so that there is a dynamic sense of this measure, whatever its other flaws) and voter participation statistics. I discuss some of the evidence on measures of civic participation below. See text at notes 58-71.

²⁷ Perhaps, too, the argument suggests that the regulation requiring outlets to carry candidate appearances solves a collective action problem. That problem might arise if all the broadcast outlets desired to give up for-profit programming in favor of not-for-profit public service programming but only if every other broadcast outlet had to do the same thing. The economic theory of collusion suggests that a voluntary agreement among broadcasters to set aside a certain amount of time per week, say, to public service programming would not be stable. Having the government enforce the agreement may solve this collective action problem.

²⁸ *Id.* at 27. Professor Sunstein notes that the Supreme Court has been hesitant to extend the public forum doctrine beyond streets and parks. Airports, for example, might be taken to be public forums, but the Supreme Court has not seen them in that light.

²⁹ *Id.* at 28 (italics in original).

[W]e might build on the understandings that lie behind the notion that a free society creates a set of public forums, providing speakers' access to a diverse people, and ensuring in the process that each of us hears a wide range of speakers, spanning many topics and opinions.³⁰

How might all this apply to the particular issues raised about the health of deliberative democracy and the Internet? In two ways. First, Professor Sunstein notes that the phenomenon of group polarization raises questions about the time-honored point that more speech is the corrective to bad speech.³¹ If, by constructing their own *Daily Me*, people have isolated themselves from opposing voices, then more speech is not likely to reach them. They will have walled themselves off from novel views and unexpected encounters.³² Second, if we might consider cyberspace to be a public forum, then there might be a compelling case for governmental regulation of the Internet in order to keep that medium open to expressive activity.

4. Two examples

Late in Spring, 2001, Professor Sunstein published a short essay entitled *Echo Chambers: Bush v. Gore, Impeachment, and Beyond* as a digital book by Princeton University Press and available for downloading for use on Microsoft Reader or Adobe Acrobat Reader.³³ For the most part *Echo Chambers* is a reiteration of the themes of *Republic.com* and a reply to some early critical reviews. But *Echo Chambers* does extend that book by focusing on what Professor Sunstein believes are two strong and recent examples of the phenomena of which he complains—the highly partisan attitudes and positions surrounding *Bush v. Gore*³⁴ (the U.S. Supreme Court decision that, in essence, resolved the 2000 presidential election in George W. Bush's favor) and those surrounding the 1998-1999 investigation, impeachment, and trial of President Clinton.

³⁰ *Id.* at 26.

³¹ See n. 6 *supra*. See, also, Stake, *supra* n. 6.

³² Professor Sunstein says that a particular problem on the Internet is the presence of “cybercascades”—the rapid spread of information, whether true or false. Of course, the principal worry is that falsehoods having to do with some material matter of democratic life will spread more rapidly through the Internet and, therefore, cause greater harm than if it had to spread through more conventional means. But Professor Sunstein also recognizes that the Internet can be a great force to combat falsehoods. “The good news is that the Internet can operate to debunk false rumors as well as to start them. But at the same time, the opportunity to spread apparently credible information to so many people can induce fear, error, and confusion in a way that threatens many social goals, including democratic ones.” Sunstein at 84.

³³ The book is available at <http://www.pup.princeton.edu>. It is 17 text pages long.

³⁴ 110 S. Ct. 525 (2000).

Professor Sunstein believes that these two events illustrate the corrosive effects of group polarization on deliberative democracy. Take the contested Florida presidential results. The two major political parties on this matter had very different views on what was afoot in Florida:

Republicans generally believed that the Florida Supreme Court had not interpreted but instead changed Florida law, and that the U.S. Supreme Court had to do something about the situation. At the same time, Democrats generally believed that the Florida Supreme Court had merely interpreted Florida law, and that intervention by the U.S. Supreme Court was the height of partisanship.³⁵

Similarly with regard to the impeachment of President Clinton:

The overwhelming majority of Republicans—representatives and citizens alike—enthusiastically supported the impeachment of President Clinton. The overwhelming majority of Democrats, inside and outside of Congress, opposed impeachment. Republicans generally believed that the constitutional standards for impeachment had clearly been met, whereas Democrats mostly believed that President Clinton's misconduct did not come close to being a 'high crime or misdemeanor.'³⁶

Professor Sunstein is puzzled as to why the parties should have split so starkly on these matters, and he lays much of the blame on the phenomenon of group polarization. The argument proceeds as follows: Republicans and Democrats are groups; when a group consults among itself to the exclusion of outside influences, then the attitude of the group tends toward the extreme beliefs within the group; with regard to the events leading to *Bush v. Gore*, both parties did their best to isolate the members of their group from contact with members of the other party so that each group developed extreme positions that might not, under different circumstances, have represented the considered opinions of the members of the groups.

This is an intriguing argument, but it is only tangentially related to one of the arguments made in *Republic.com*—namely, that the Internet fosters group polarization. The best connection that Professor Sunstein can muster is to note that modern communications technologies, such as the Internet, “make [internal conversations] far easier, creating favorable conditions for group polarization.”³⁷ And he draws a lesson from these two examples:

about the need to create institutions, and a system of communications, that will ensure that deliberating groups will avoid the isolation and homogeneity that can lead them, by the laws of social interaction to unjusti-

³⁵ SUNSTEIN, ECHO CHAMBERS 3 (2001).

³⁶ *Id.* at 4.

³⁷ *Id.* at 16.

fiably extreme positions. The Internet is hardly the enemy here. It can easily be used to allow people to overcome isolation and homogeneity. But it can also serve to put people into echo chambers of their own devising.³⁸

B. Corrective policies

In Chapter 8 (“Policies and Proposals”) Professor Sunstein gets to the policy implications of his observations. He discusses six possible reforms to address the issues raised above:

1. “[the creation of] deliberative domains;
2. the disclosure of relevant conduct by producers of communications;
3. voluntary self-regulation;
4. economic subsidies, including publicly subsidized programming and Websites;
5. ‘must-carry’ rules, in the form of links, imposed on the most popular Websites, designed to produce exposure to substantive questions; and
6. ‘must-carry’ rules, also in the form of links, imposed on highly partisan Websites, designed to ensure that viewers learn about sites with opposing views, perhaps through linked sites and perhaps through hyperlinks.”³⁹

By “deliberative domains” Professor Sunstein means websites that would be the Internet equivalent of public fora—places where people can meet on the Internet to have general discussions about public matters—and that would substitute for the alleged loss of general interest intermediaries in other media. To a certain degree these forums already exist in the form of open-access chat rooms and bulletin boards. They certainly are a commonplace in academic specialties; many professors use a localized version of them for students to discuss class material. Professor Sunstein’s idea is to ratchet these localized websites up into much bigger forums for the discussion of topics of the day. Later in his list Sunstein proposes government subsidization of these deliberative sites. Additionally,

³⁸ *Id* at 16-17. I have taken some time to lay out Professor Sunstein’s argument about the relationship between these two prominent examples and his hypothesis about the Internet’s role in group polarization for a reason that will become more obvious in Part III. I think that he is correct in saying that the political events he describes may illustrate group polarization. But I believe that they also illustrate a decline in public civility that has been the subject of much commentary over the past 15 years or so. There may be group polarization going on, and it may irritate both Professor Sunstein and me, but the phenomenon did not begin with the Internet and has probably not been exacerbated by it. There are other forces at work in our public life that may be far more corrosive than the Internet. And, in fact, the Internet might offer hope of improvement, as the quote from *Echo Chambers* suggests.

³⁹ Sunstein, *supra* n. 7, at 169.

he adds that the site might have an icon that would have a default position on one's desktop but that could be removed.⁴⁰

The second suggested reform—an explicit disclosure of what each website is up to—builds on a novel regulatory tool of the last several decades in which firms subject to regulatory review must disclose (to the regulators and anyone else who inquires) what the firms are doing vis-à-vis the regulation. An example is the toxics release inventory.⁴¹ Others might be requirements that law firms publicize all of their pro bono activities of the last six months or that broadcasters and telecasters disclose all their public service and public interest activities.⁴² Profes-

⁴⁰ Andrew Shapiro had suggested Public.Net (or PublicNet) in *The Control Revolution* as a corrective to the possibly isolating effect of the Internet. There is really no reason that this site has (or these sites have) to be publicly provided. The same effect could be had from private sponsorship.

⁴¹ The Toxics Release Inventory (TRI) was created in the Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986. The principal purpose of the Act was to “inform communities and citizens of chemical hazards in their areas.” See www.epa.gov/tri/general.htm. Section 313 of the Act requires industrial manufacturers to make an annual documentation of their releases into the air, water, and land and their off-site transfers of more than 600 designated chemicals. The EPA compiles this information and then publishes it as the Toxics Release Inventory on-line and elsewhere in a publicly acceptable form. (Third parties, such as the Environmental Defense Fund, also track these releases on their “Scorecard” website.) EPCRA does not cover non-industrial releases and transfers of toxic chemicals, such as those that might occur from dry cleaners and gasoline stations.

A central reason for the TRI is that making information of this sort widely available will have two socially desirable results. First, private citizens, the government, and others can easily learn which toxics the industries in their area are using and have been released. This can make it easier for those who may have been harmed to mount a tort action against the releasers, and it can also allow informed citizens and others to put pressure on manufacturers to use less toxic chemicals. For example, “a group of Minnesota residents used TRI data to pressure a local firm to reduce the use of a carcinogen by 90 percent.” See www.epa.gov/tri/triuse.htm (documenting this and other uses of TRI to reduce potential harm). Second, the publication of releases deters those manufacturing industries using toxic chemicals from using them carelessly. One study finds that industries have reduced overall toxics releases by 40 percent because of the TRI. See David W. Case, *The Law and Economics of Environmental Information as Regulation*, 30 ENVTL. L. REP. 10773 (2001).

For additional academic studies of the effects of TRI, see Dennis A. Rondinelli, *A New Generation of Environmental Policy: Government-Business Collaboration in Environmental Management*, 31 ENVTL. L. REP. 10891 (2001); Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61; Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENVTL. & RESOURCE ECON. 587 (1998); Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right-to-Know Law on Toxic Emissions*, 32 J. ENVTL. ECON. & MGMT. 109 (1997); Madhu Khanna et. al, *Toxics Release Information: A Policy Tool for Environmental Protection*, 35 J. ENVTL. ECON. & MGMT. 243 (1998); Mark A. Cohen, *Information as a Policy Instrument in Protecting the Environment: What Have We Learned?*, 31 ENVTL. L. REP. 10425 (2001); and Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking: Precursor to a New Paradigm*, 89 GEO. L.J. 25 (2001).

⁴² *Id.* at 174.

sunstein means this to apply to a limited number of Internet sites: “[those] engaging in a practice that might produce harm, or do less good than might be done, should be required to disclose that fact to the public.”⁴³ I take it that this means that, as applied to the Internet, websites that take a position on some public matters would be required to make periodic disclosure of what it is they are up to. Sunstein’s hope is that some third party, including but not limited to private parties, will then monitor these disclosures.

As to voluntary self-regulation, this suggested reform builds on what the first generation of commentators about the Internet predicted: that regulation would be “bottom up”—that is, largely voluntary—rather than “top down”—that is, imposed by the government. As Sunstein notes, the National Association of Broadcasters had, till 1979, a voluntary Code of Conduct, dealing principally with the decency of programming, with which members agreed to abide.⁴⁴ How might this work with regard to websites that purported to deal with public matters? “For example, signatories could agree to cover substantive issues in a serious way, to avoid sensationalistic treatment of politics, to give extended coverage to public issues, and to allow diverse voices to be heard.”⁴⁵ Presumably, signatories would be able to display some unique sign on their website to indicate compliance with this code, and if compliance proved valuable to consumers, they would tend to visit and rely upon those websites that were signatories. If it was of little value to viewers, it would either disappear or have no effect. This sort of thing has worked in other contexts on the Internet—e.g., the TRUSTe code on secured transaction—and so, there is a reasonable prospect of its working to further deliberative democratic goals.

The “must-carry” proposals get far too little explication. And the proposal requiring links to other sites is dangerously undercooked. I return to these proposals in Part III, where I suggest these are both undesirable and unworkable. In discussing the “must carry” proposals Sunstein goes even further in what I hope is a pixyish proposal: “those who choose to visit certain sites—say, especially popular ones or ones with distinctive political views—might automatically be connected, at certain times, to a site maintained by those seeking access.”⁴⁶ I’m not sure that this proposal is meant to be taken seriously, but if it were, I would raise several objections, to which I turn in Part III below.

⁴³ *Id.* Sunstein does not explain what he means by or how a court or other decisionmaker might measure “do[ing] less good than might be done.” The phrase sets off alarm bells for me because it could apply to my personal life with dire results: I have enough to answer for in my life without being judged for having done less good than I might have.

⁴⁴ *Id.* at 176. It is instructive to note that the Code of Conduct fell apart in 1979 and has not been revived. It may have worked till 1979 only because there were only three networks involved.

⁴⁵ *Id.* at 177.

⁴⁶ *Id.* at 189.

C. Other issues

There are several secondary issues that Professor Sunstein raises in *Republic.com*. While they do not rise to the level of importance of his central concerns, they are, nonetheless, interesting and worth a brief mention.

First, Sunstein notes that the commercial effect of the Internet may be socially deleterious. It is true, he notes, that the Web helps consumers in many ways: it makes it easier for them to do comparison shopping, to locate sellers, to find buyers, and to move things to their highest-valued use.⁴⁷ However, in doing all this the Web may exacerbate an arms race in consumption goods—a race that Robert Frank details in *Luxury Fever*.⁴⁸ When one's friends buy a bigger house and car or take an elaborate vacation, some people may be inclined to emulate them or do them one better by buying an even bigger house or car or taking an even more exotic vacation. The higher levels of spending will not necessarily make consumers feel happier.⁴⁹ If this hyper-consumerism is already afoot, the lower costs of finding consumer goods via the Internet may simply ratchet up the whole process. We would all be better off if we could collectively agree not to take a fraction of every increase in our income in the form of higher consumption. But finding a way to effectuate that collective action is difficult.⁵⁰

Second, Sunstein makes a case against the libertarian view, which, I said above, characterized the first generation of Internet scholarship, that the Internet must inevitably be a regulation-free medium. "The question is not whether we will have regulation; it is what kind of regulation we will have."⁵¹

III. A Critique

I now turn to the business of evaluating the claims in *Republic.com*. My concerns with the hypotheses advanced in the book fall into two general groups. First, I am not convinced that Professor Sunstein is correct in identifying filtering and group polarization and the consequent decline of shared social experiences as

⁴⁷ For example, as my friend Jeff Stake says, E-Bay auctions lower the cost of moving old and apparently valueless items out of one's attic, basement, and garage and into the storage places of others, making everyone better off.

⁴⁸ FRANK, *LUXURY FEVER* (1999).

⁴⁹ Sunstein, *supra* n. 7, at 195.

⁵⁰ *Id.* at 121-22. Professor Frank has argued for a consumption tax on the ground that it will ameliorate this consumption arms race. See *Luxury Fever* at _____. See also Richard McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

⁵¹ *Id.* at 128. I agree, but I wish that Professor Sunstein had developed his argument more thoroughly and eschewed the flip title of the relevant section of Chapter 6: "Regulation Everywhere, Thank Goodness."

a serious problem stemming from use of the Internet. I shall argue that the damage done to the social fabric by the Internet may be minimal and the social benefits, considerable. I'll confine my discussion to the social costs and benefits of the Internet as they relate to the health of our democracy because that is the realm in which Sunstein makes his case. But it is important to recognize that this may bias the case in Sunstein's favor. It could conceivably be the case that there are, as Sunstein believes, net social costs to our democracy from the Internet but that in other realms, such as the commercial, the artistic, and the purely personal, the social benefits greatly exceed the social costs, so that taken altogether there might be a great social benefit from the Internet even if it were not a good thing for our democracy. Nonetheless, I do not believe that I need to invoke benefits in these other realms to save the Internet from his criticism.

Second, accepting Professor Sunstein's criticisms for the sake of argument, I believe that most of the reforms that he suggests would be ineffectual at best and might even make matters considerably worse.⁵² I am not contending that regulation of the Internet is *per se* a bad thing, merely that the particular regulations that Sunstein proposes to resolve the problems he has identified will not work or that they will work only under draconian implementation regimes that no one would want to see.

A. Does the Internet lead to group polarization and fewer shared social experiences?

Recall that Professor Sunstein contends that filtering of information available on the Internet will lead to the degradation of democratic ideals as citizens become isolated one from another, as they avoid the unwanted and unexpected meeting in public forums with those with different views, as the phenomenon of group polarization takes hold, and as the range of common social experiences declines.

1. Filtering or more information?

One problem with this vision is that there is more to life than the Internet. It is a very rare person who spends all of his days connected to the Internet and not interacting with other people. People work outside the home; they attend movies, art shows, their children's sporting events; they shop; they go out to dinner with friends and family; they attend religious services; they travel to other parts of the country on business or for relaxation; they talk with friends and family and co-workers by phone. Even someone who has filtered every bit of unwanted information from his web browsing and has constructed the most egotistically satisfying *Daily Me* still interacts with other people in myriad ways. The filtering of which Sunstein complains would have to apply to every other social

⁵² I have already hinted at this conclusion with respect to several proposals in §II.D.

interaction, not just to actions on the Internet, in order to have the debilitating effects Sunstein predicts. In my reading, the only instances of all-consuming, total experiences of that sort of which I am aware are slavery and concentration camps before and during World War II.⁵³ And even in those “total institutions,” as my colleague Bruce Smith pointed out to me, people still managed to develop markets, daily routines that included irreverences and minor rebellions, theatricals, some norms and institutions of the outside world, and personal identities.⁵⁴

Professor Sunstein speculates that the isolation that results from the filtering of information on the Internet may lead to the weakening of shared experiences that contribute to social glue. I suppose that this is possible, but it seems to me highly unlikely. People have shared social experiences in all sorts of ways well beyond the Internet: they read best sellers and discuss them with friends and co-workers, they form book groups, they go to sporting events together or gather at watering holes to watch their favorite teams on television, they adopt catchwords from popular television ads (“Where’s the beef?” in the early 1980s; “Whazzup?” and “How ya doin’?” from the recent delightful beer commercials⁵⁵); they march in huge annual events to raise money for cancer research; they watch the same television shows, movies, and videos, and characters and situations from those media become part of people’s shared experiences.

A second problem with Sunstein’s vision of the Internet is that it flies in the face of a common complaint about the use of the Web. The most common complaint one hears about people who have access to the Internet is that they spend a great deal of time “surfing,” jumping from site to site, meandering about the Web. Indeed, “Web surfing” or “Net surfing” has become a problem for some people and for some businesses—so much so that vendors have developed software that limits the ability of those on-line to surf the Web. My dear friend Ian Ayres, whose life otherwise exhibits discipline, kindness to all, and extreme good sense, has installed software on his office and home computers so as to make it difficult for him to waste time, as he believes it to be, surfing the Net.

My point is that for most people the Internet is much more like a walk through the public forum than it is a laser-like homing in on isolated and isolating stores of information. I do not know the empirical evidence on this matter, but I would take seriously the hypothesis that says that the Internet accomplishes the exact opposite of what Sunstein claims—namely, that there is far more exposure

⁵³ STANLEY ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1976).

⁵⁴ See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1972) (showing how slaves through, for example, their religion made a world separate from that the slave-owners tried to impose on them) and PRIMO LEVI, *SURVIVAL IN AUSCHWITZ* (1961) (showing how the prisoners in concentration camps developed an internal economy of their own). I am very grateful to Bruce Smith for these references.

⁵⁵ The spellchecker on my e-mail software already contains “whazzup.”

to unexpected and unwanted views from those who are surfing the Net than there is from those who are not.⁵⁶ Perhaps people value surprises and the stimulation of new experiences far more than Professor Sunstein implicitly assumes.⁵⁷ The implication of my observation is that, granting Professor Sunstein's premises about a positive correlation between random meetings in public forums and the vitality of democracy, he may have it exactly backwards: deliberative democracy may be *strengthened* by the Internet. Only careful empirical work can sort out which view is more correct.

I said above that one reason that Professor Sunstein fears filtering is that he believes that "general interest intermediaries" have declined in importance. I also said that I wasn't entirely sure what those were. He might mean *Time* and *Newsweek*, CNN Headline News, *The New York Times*, *The Wall Street Journal*, or the local print and broadcast media. But I am not so sure that there has been such a decline. If one counts across media to include cable television stations, websites, print media, newspapers, radio stations, and magazines,⁵⁸ that offer general coverage of news, I find it difficult to believe that there are fewer information and general news outlets today than there were, say, twenty years ago. Quite to the contrary, I would think that there are many more than there used to be—even if, for example, the number of general interest *newspapers* may have declined—and, importantly, that the real cost of becoming informed about public affairs has dropped significantly. This is true just if one confines attention to the Internet.⁵⁹

⁵⁶ There is, it happens, information on this point. See ROBERT PUTNAM, *BOWLING ALONE* 169-80 (2000). See the further discussion in III.A.3 below.

⁵⁷ My thanks to Bruce Smith for making this point to me.

⁵⁸ As another example of casual empiricism about cross-media effects, I offer the number of special-interest magazines that are available today. One might have predicted that the appearance of special-interest websites would have reduced the demand for special-interest newsprint and magazines. If anything, that appears to be exactly the opposite of what has occurred: not only are there websites for every conceivable and some inconceivable interests, but there are also now magazines for every conceivable interest.

⁵⁹ This burgeoning of information on the Internet is, of course, what generates the desire for filtering methods. Where Professor Sunstein and I apparently differ is in our beliefs about how people will filter: he believes that most people will filter out information from the Internet that is not consistent with their prior beliefs; I am skeptical about what they will do, believing that sometimes that kind of filtering will occur but that at other times people will seek to be amused and surprised by randomly surfing to new and, to them, interesting sites. I suggest at the end of this section and in III.A.3 that the empirical evidence is more consistent with my belief than with Professor Sunstein's.

2. *Group polarization*

The literature on group polarization is extensive, and I am not in a position to question it.⁶⁰ However, I would raise several questions about its application in the context of Internet communication and politics. First, I wonder whether polarization is something that lasts or is something that fades and must be renewed. The point is critical for Sunstein's criticism of the Internet. Suppose that the group polarization that occurs is ephemeral—that is, it lasts only during the period of group interaction. The group comes together to interact, and in the course of the interaction the most extreme views of the group begin to command an increasing degree of support within the group and more moderate views command less support. But then suppose that as soon as the group disbands, the polarization begins to fade so that the individuals who had constituted the group begin to drift back toward their pre-interaction views, which, by assumption, were less extreme than during the group interaction. If this is the way the phenomenon works, then a discovery of group polarization during, say, Internet communication sessions would not necessarily demonstrate that there had been a polarization of the individuals who participated.

A contrary view, which, without knowing for certain, I would take to be closer to what Professor Sunstein has in mind, would hold that the polarization is a phenomenon that takes hold during the group interaction and remains in force after the group disbands. If that is, in fact, the way the process works, then someone who strays into an Internet chatroom and finds himself being persuaded of the validity of the most extreme members of the chatroom will have been changed forever. In that case, Sunstein's fears of polarization and deliberative democracy would be genuine and worth worrying about.

These thoughts suggest some additional queries about group polarization. Each of us is, as I have already suggested, a member of many different groups—family, friends, work, religion, hobby, and so on. Is it necessarily the case that each of those groups pushes us toward the same extreme political pole? I suppose so, sometimes, but I doubt that that is a common phenomenon. Rather, I would guess that our lives consist of these multiple groups—some of them intersecting, many of them not—and that each of these groups may push us toward a slightly different pole. Perhaps we strive for consistency in this regard, arranging our lives so as to be in groups whose political center of gravity is always about the same.

I also have the troubling intuition that group polarization may be, in part, a function of age, education, and other independent factors. For example, I would

⁶⁰ It is also worth noting that polarization is a phenomenon antedates the Internet and is, in many examples of group polarization, completely independent of the Internet. Bruce Smith has recommended to me two excellent studies of polarization: MICHAEL PATRICK MACDONALD, *ALL SOULS: A FAMILY STORY FROM SOUTHWEST* (1999) and JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* (1985).

predict that groups of young people exhibit a faster and, perhaps, more complete convergence towards a group pole than do groups of older people, all other things held equal. I would suspect that diverse groups exhibit a slower and less complete convergence than do homogeneous groups. Experience, too, may certainly count for something as a protection against being stampeded by group sentiment. My seemingly endless experience on high-level university committees has suggested to me that the more experienced a member of any given committee is, the less likely she is to be swept up by majority or strong views and the more likely she is to present a forcefully independent view. In fact, it is precisely this independent, thoughtful reflective ability that makes someone a valuable committee member.

Finally, in the case of other social psychological effects, such as over-optimism and the hindsight bias,⁶¹ there are de-biasing techniques that may work. I wonder if there are techniques that one can invoke to minimize the possibility of group polarization. If we knew that the phenomenon was likely (and had a lasting, if not permanent, effect) on those who participate in, say, Internet chatrooms, then surely we ought to consider applying those techniques in such a manner as to protect those about to form into groups from being too greatly polarized.

There is some new evidence that also suggests that Professor Sunstein is mistaken to fear that the Internet will lead to group polarization. The 2000 General Social Survey, conducted every two years since 1974 by the University of Chicago National Opinion Research Center, found that "Internet users are more tolerant of diverse viewpoints than those who do not venture into cyberspace."⁶² As an example of how the investigators reached this result, consider what happened when they inquired of the 2,817 people whom they questioned whether they would allow their local public library to stock a book about communism. Of those who use the Internet 10 hours per week or more, 82 percent said, "Yes." Of those who use the Internet less than that, 56 percent said, "Yes." When the investigators asked whether they would allow racists to hold meetings, 71 percent of the heavy Internet users (10 hours per week or more) said, "Yes," and 56 percent of the light or non-users said, "Yes." Professor John Robinson, a sociologist at the University of Chicago who supervised the survey, said that there was no evidence that increased Internet usage increased tolerance. Instead, it appeared to be the case that those who decided to use the Internet more heavily were simply more tolerant, independent of the amount of usage.⁶³

⁶¹ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, -- CAL. L. REV. 1251 (2001).

⁶² Jeffrey R. Young, "A Study Finds That Web Users Are More Tolerant Than Non-Users," *The Chronicle of Higher Education* (June 15, 2001), downloaded from <http://www.chronicle.com/free/2001/06/2001061501t.htm>.

⁶³ The article says, "The findings challenge the notion that the Internet could lead users to become more narrow-minded in their beliefs because they can easily filter what they see in cyberspace and

3. *The decline in public civility and in social capital*

Republic.com and *Echo Chambers* evidence an unhappiness with the state of public civility, with the general level of citizen knowledge and engagement in public affairs, and an unease with an apparent rise in partisanship and political fanaticism. Others have also decried these developments.⁶⁴ What sets Professor Sunstein apart from them is his contention that the Internet is at least a contributing cause in all this. In questioning this contention, I want to enlist one of the most thoughtful recent commentators on U.S. public life.

Robert Putnam, a political scientist at Harvard, has written eloquently about the decline of social capital in the modern United States.⁶⁵ His work deserves careful study, but for my present purposes I shall focus on his explanation of the idea of social capital and his report on the relationship between the Internet and the decline of social capital in the United States. "Social capital" refers to the collective value of all "social networks [who people know] and the inclinations that arise from these networks to do things for each other ['norms of reciprocity']".⁶⁶ Putnam says that a "society of many virtuous but isolated individuals is not necessarily rich in social capital."⁶⁷ The health of a democracy depends crucially on the extent of social capital; specifically, when social capital is in decline, then deliberative democracy does not work well.⁶⁸ Putnam's *Bowling Alone* argues eloquently that the current United States has entered a period in which social capital is in decline. As a result, government does not work well: citizens are

block out views with which they disagree. That argument was made, for instance, in the recent book *Republic.com* (Princeton University Press), by Cass R. Sunstein, a professor of jurisprudence at the University of Chicago Law School."

⁶⁴ See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000) for a very thoughtful comparison of German, French, and United States' conceptions and legal attitudes towards civility and personal honor. See also, for a general discussion of civility, STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* (199-).

⁶⁵ See PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). See also THEDA SKOCPOL & MORRIS FIORINA, EDS., *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* (1999). But see Nicholas Lemann, "Kicking in Groups," *The Atlantic Monthly* (April, 1996), available at <http://www.theatlantic.com/issues/96apr/kicking/kicking.htm>.

⁶⁶ See <http://www.bowlingalone.com/socialcapital.php3>.

⁶⁷ Putnam, *supra* n. 54, at 19.

⁶⁸ In his study of democracy in Italian hill towns, Professor Putnam found that the governments in those towns that had choral societies worked better than those that did not have choral societies. The reason for the vital importance of choral societies was that they provided an intermediate civic institution—intermediate, that is, between the family and the government—in which people could interact and thereby develop the extra-familial social bonds, or capital, upon which they could draw in governmental affairs. Where there were no intermediate institutions providing that social capital, government did not work well. See PUTNAM, *MAKING DEMOCRACY WORK* (1992).

suspicious of government, and the extra-familial relationships upon which public life might build are gone or crumbling.

It is eye-opening to take note of some of the evidence of a decline in civic engagement. To begin, Putnam documents an almost uniform recent decrease in the membership in civic and professional associations. The American Bowling Congress, founded in 1895, had a 434 percent increase in its membership between 1940-45 and its peak membership year (1964) and a 72 percent decline in membership between that peak year and 1997. The NAACP, founded in 1909, had a 69 percent increase in membership between World War II and its peak membership year (1969) and a 46 percent decrease from then to 1997. Membership in the Parent-Teacher Association, founded in 1897, rose 111 percent from 1940-45 to its peak membership year in 1966 and then declined by 60 percent from 1966 to 1997.⁶⁹ Similarly, membership in organized religious worship services is probably lower today than it was 25 years ago and is much lower than it was 40 years ago.⁷⁰ Since the time that union membership peaked at almost one-third of the labor force in the mid-1950s, there has been a well-documented decline in the percentage of workers who belong to labor unions, even though there has been a 4 percent increase in the number of labor unions between 1980 and 1997.⁷¹ Participation in political activities has also declined. For instance, in 1960 62.8 percent of the voting-age population participated in national elections. There was a steady decline from then until 1996, when 48.9 percent of the voting-age population participated in the presidential election.⁷² Putnam summarizes the decline as follows:

[S]ince the mid-1960s, the weight of the evidence suggests, despite the rapid rise in levels of education Americans have become perhaps 10-15 percent less likely to voice our views publicly by running for office or writing Congress or the local newspaper, 15-20 percent less interested in politics and public affairs, roughly 25 percent less likely to vote, roughly 35 percent less likely to attend public meetings, both partisan and non-partisan, and roughly 40 percent less engaged in party politics and indeed in political and civic organizations of all sorts.⁷³

Even within the family there has been a marked decrease in the amount of time that family members spend together. “Between 1976 and 1998, according to Roper polls of families with children aged eight to seventeen, vacationing together fell from 53 percent to 38 percent, watching TV together from 54 percent

⁶⁹ Putnam, *supra* n. 54, at 438-39.

⁷⁰ *Id.* at 71.

⁷¹ *Id.* at 52-53 and 81.

⁷² *Id.* at 31-32.

⁷³ *Id.* at 46.

to 41 percent, attending religious services together from 38 percent to 31 percent, and ‘just sitting and talking’ together from 53 percent to 43 percent. It is hard not to read these figures as evidence of rapidly loosening family bonds.”⁷⁴

In an important part of Professor Putnam’s work he ruminates on the relationship between the Internet and social capital. I think that it is a fair characterization of his views to say that he does not believe that the Internet caused the decline in social capital, that he finds the evidence uncertain regarding whether the Internet has, in the very recent past, contributed to or reversed the decline in social capital, but that he is hopeful that in the future the Internet will serve as a force for restoring social capital in the United States. He begins his discussion with this summary statement:

Very few things can yet be said with any confidence about the connection between social capital and Internet technology. One truism, however, is this: The timing of the Internet explosion means that it cannot possibly be causally linked to the crumbling of social connectedness described [earlier in *Bowling Alone*]. Voting, giving, trusting, meeting, visiting, and so on had all begun to decline while Bill Gates was still in grade school. By the time that the Internet reached 10 percent of American adults in 1996, the nationwide decline in social connectedness and civic engagement had been under way for at least a quarter of a century.⁷⁵

An important suggestion in Professor Sunstein’s book is that use of the Internet will lead to isolation and disengagement from political affairs. But Putnam reports that, on the basis of three careful studies, including one of his own, there is no clear correlation between Internet usage and civic engagement. This could be because the “Internet attracts reclusive nerds and energizes them [or] attracts civic dynamos and sedates them.”⁷⁶

With respect to the Internet and the formation of social capital, Putnam is cautiously optimistic. While there is some evidence of what he calls “cyberbalkanization,” there is also some evidence of increasing social cohesion and contact through Internet usage. “Both the history of the telephone and the early evidence on Internet usage strongly suggest that computer-mediated communication will turn out to *complement*, not *replace*, face-to-face communities.”⁷⁷

Finally, when he discusses what steps might be taken to increase social capital in the United States, Putnam recommends using the Internet to foster face-to-face interactions.⁷⁸

⁷⁴ *Id.* at 101.

⁷⁵ *Id.* at 170.

⁷⁶ *Id.* at 171.

⁷⁷ *Id.* at 179 (italics in original).

⁷⁸ *Id.* at 410-11.

B. The net benefits of the Internet to democracy

Where Professor Sunstein believes that the Internet imposes significantly greater costs than benefits on democratic society, I believe the opposite to be true—namely, that there are significant net benefits to democratic society from the Internet.

1. The Internet and citizen-government information flows

A point that Sunstein does not make but that bears stressing is that the Internet appears to have greatly increased the flow of information between citizen and government. And this must certainly be said to *foster* deliberative democracy.⁷⁹ For example, federal government departments and agencies have been extremely good about putting information on their websites. The IRS, the Department of Commerce, the Census Bureau, and the Social Security Administration all have very informative websites that make citizens far more aware of what their federal government is up to than was ever the case before. Similarly, the Library of Congress maintain a website called “Thomas,” where one can examine the text of legislation and check its progress through the national legislature. Testimony before Congressional committees is also readily available through websites. State and municipal governments are just beginning to establish websites and to allow for feedback from citizen to government.

These actions by governments are a tremendous potential advance for citizen-government interaction. I am not aware of any palpable betterment in the efficiency of government or the interactions between citizens and their government that has come from these governmental websites. But in the absence of that empirical information, I speculate that the potential for this improved communication is substantial and worth study.

2. The Internet and political group organization

The Internet has also made it much, much easier for people to organize so as to have their voices heard. This has been true within and across national borders:

The Internet has also facilitated political organizational activity that has crossed national borders. The campaign against land mines was organized by e-mail. So was the opposition to the Multilateral Agreement on Investment (MAI), a proposal by countries belonging to the Organization for Economic Cooperation and Development (OECD) to relax restrictions on cross-border investment. The opposition from environmental and labor organizations in various developed countries was so intense

⁷⁹ Shapiro, *supra*, n. 5, stresses this point.

that OECD member governments were forced to withdraw the proposal.⁸⁰

Similarly, the groups that disrupted the World Trade Organization meeting in Seattle in late 1999 organized, in part, through the Internet. One does not have to agree with the political goals of any of these efforts in order to subscribe to the belief that it is a plus for democracy when groups can organize more easily so as to have an effective political voice. To the extent that the Internet has lowered the costs of so organizing, then the Net must be counted as having had a beneficial effect on democracy.

During the Winter and Spring, 2000, presidential primaries, the candidates for the two major parties' presidential nomination and independent Ralph Nader used the Internet as an important political tool. All of them put their candidates' views on their website; in some cases opponents put up criticisms of their rivals. A few candidates—Steve Forbes and John McCain on the Republican side and Bill Bradley on the Democratic side—raised more money through their Internet sites than through any other means. For example, Forbes hosted a very expensive fund-raising dinner in New York City—on the order of \$1,000 per plate—but allowed people to view the event through a webcast on his website for a much more modest donation.

It is only fair to note, however, that there is a dark side of these same matters. The low cost of organizing political groups on the Internet not only gives those with a sensible view a louder voice; it also gives those with loopy and distasteful views a louder voice in public affairs. We are unlikely to find a constitutionally acceptable method of excluding the bad voices, and so, we must simply put up with the fact that the low costs of organizing via the Internet will attract the legitimate and the sensible but also the outrageous and hurtful.

Although it is slightly off the point of Professor Sunstein's main focus, it is worth noting that this same point (about the lower costs of organizing over the Internet) also applies to non-political groups. One of the things that the Internet does is to make it much cheaper or easier to discover those of like interest and views. If you are a collector of curios or someone who loves golden retrievers or someone who is housebound and unable to get out to meet with those who read the same kind of books that you do, this is a great advantage and should count as a social benefit.⁸¹

3. *The Internet and tyranny*

Professor Sunstein may place a great deal of weight on the possibly bad effects of the Internet, but he is well aware of the positive effects that it may have on personal liberty, choice, and meaningful citizen-government interaction:

⁸⁰ Robert Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L. J. 1045, 1048-49 (2001).

⁸¹ See PETER LUDLOW, ED., *CRYPTO ANARCHY, CYBERSTATES, AND PRIVATE UTOPIAS* (2001).

It is no accident that tyrannical governments have tried to control access to the Internet, partly in order to wall citizens off from knowledge of other systems, partly to insulate their leaders from scrutiny and criticism. Knowledge is the great ally of both freedom and welfare.⁸²

I think that this a point that deserves more celebration than *Republic.com* awards it. As I have tried to stress heretofore, the Internet has benefits as well as costs, and any sensible governmental policy should seek to maximize the net benefits of this new medium. In counting the benefits one ought to give due weight to the potentially liberating aspects of the Internet.

There is a related point—one about political participation. I have already suggested that the ease of organizing disparate interests via the Internet will increase the number of groups that form to voice their views. There may be a similar increase in the participation of individuals in the political process, if the innovation of on-line voting comes to pass. One of the recurrent complaints about the state of our current public life is the very low voter participation rates. Attempts to make voter registration easier and to get out the vote have had no discernible success in inducing more citizens to exercise their franchise.⁸³ But in the 2000 presidential primaries we saw, in the State of Arizona, the possibility of Internet voting, a practice that is clearly not without problems but that holds some promise of reducing the costs of voting to such low levels that it may have a significant impact on citizen participation in elections. That possibility should certainly be counted as a plus for the Internet and deliberative democracy.

C. The practicability of the proposed reforms

Even if we concede the socially undesirable aspects of the Internet and, therefore, cross the threshold in favor of some corrective public policy so as to reduce these aspects, one should adopt those regulatory policies that accomplish their goals at least cost to society. Those should be policies that are minimally disruptive to other aspects of the Internet, that have a good chance of achieving their stated goals, and that can be implemented in a relatively easy manner. Most of the policies that Professor Sunstein proposes in Chapter 8 of *Republic.com* do not pass muster on these criteria. And I think that Professor Sunstein, to his great credit, recognizes this point. He does not push hard for his reforms. His arguments for many of them are sketchy, and he often identifies problems with each of the reforms.

Recall that Professor Sunstein proposes that those websites that might be taking action or advocating positions that “might produce harm, or do less good

⁸² Sunstein, *supra* n. 7, at 90-91.

⁸³ Naturally, I am aware of the theory that explains low voter turnout as rational: when one vote is likely to count for so little, it is rational not to incur the costs of informing oneself about the candidates and issues and going to the polls.

than might be done” be required to disclose these facts to the public. Although this seems to constitute a very light regulatory hand, I am deeply skeptical of its being effectual. There is, first, the internal contradiction between the earlier filtering point and the cleansing effect of disclosure. The filtering problem was that websites with special views to promote would be of interest only to those who favored those special views. If so, it would be extremely unlikely that others, not inclined to the views of the website, would stumble across these websites. Or if they did chance upon them, it would be unlikely that they would linger. If that is so, then where is the cleansing aspect of the statement of intent to come from? It seems farfetched to imagine that if the Nuremberg Files website had to make a statement on its site about what its intent was, that compliance with this requirement would in any way deter them from their mission. Indeed, they already comply with this requirement gladly, stating their purpose boldly.

There is a second problem with the suggested reform: who is supposed to police these websites to make sure that the site has published its statement of goals appropriately? No hate group is going to advertise illegal activity in its mandated Sunsteinian purpose statement. A site that instructs viewers in how to assemble powerful bombs from readily available items will surely say that its mission is “educational and freedom-enhancing” and will insert some formulaic statement to the effect that “no one should try this at home.”

I want to consider, at some length, another proposal—that self-identified political point-of-view websites be required to insert links to other websites that take an opposing point of view.⁸⁴ I want to leave to one side all strictly legal questions that this may raise so as to focus just on the administrability of that proposal.⁸⁵ I shall also not overly torture the proposal with analogous hypotheticals designed to discredit the proposal.⁸⁶

I take it that the proposal has two elements. First, a website must identify itself as a political point-of-view website, and second, the website must then carry hyperlinks to other sites that state a contrasting point of view. As a matter of administrability, there must be some mechanisms by which third parties can make complaint to the regulator on both elements of the regulation. That is, some third party may want to bring to the regulator’s attention the fact that a particular website has, in the complainant’s opinion, a political point of view and yet is not apparently so registered. And some other third party may want to appeal to a regulator that the hyperlinks to other websites from a registered political point-of-

⁸⁴ This is my distillation of the “must carry” proposals contained in suggestions 5 and 6 of Chapter 8 of *Republic.com*, quoted in §II.B above.

⁸⁵ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁸⁶ In that view one could suggest that anyone who has attended a political rally organized for one candidate or point of view should be required to attend one by the other candidate or point of view; or that someone who has read campaign literature for one candidate or point of view should have to read literature for opponents or alternative points of view; and so on. I do consider one hypothetical below.

lator that the hyperlinks to other websites from a registered political point-of-view website are inappropriate in that the links are inoperative (e.g., the website of the opposing point of view may have shut down) or inapposite (e.g., there are better statements of opposition available at other websites).

Consider some problems that may arise in the application of this proposal. First, what is to count as a political point-of-view website? I begin with some thoughts on what ought not to count. I cannot imagine that the web-posted editorial page of a news outlet should count as subject to the regulation. Nor should a professor's webpage on which she posts her scholarly output, even if it takes a political point of view. But what about such well-established think tanks as the Brookings Institution and the American Enterprise Institute? Each has many written studies or announcements of talks posted, and most of these studies and talks take a particular political point of view or reach a policy-relevant conclusion. Should Brookings and the AEI fall under the "must carry" proposal? I think not, and let me explain why all these examples might be comfortably exempt. There are two reasons that apply to all the examples I've given. First, in each instance the writer generally feels a duty to explain why his or her point of view is better than the alternatives. That duty necessitates the writer's explaining what those alternatives are, who champions them and why, and why the writer's view is superior. The reader is then left to consult the alternatives himself, if he feels so moved. Responsible news outlets, scholars, and think tanks do not simply assert the correctness of their points of view; they have to persuade the reader that the view is correct.⁸⁷ Second, there are plenty of outlets available for those with an alternative point of view to state them. Taken together, these two points imply that there is enough protection in the general necessity to persuade readers or an audience and that there are enough competing outlets that, at least for the universe of political point-of-view websites I suggested, there is no crying need for "must carry" regulations.

The question is whether these two general factors also apply to the other political point-of-view websites. I am inclined to think that they do, a point on which I elaborate in §III.D below. My larger point here is that designating something as a website devoted to a political point of view is going to be a tremendously contentious issue. And although we might want to allow third-party intercession in order to catch those websites that the regulator has missed, those third parties may well have an agenda to further by characterizing a particular website as political and thus subject to regulation.

Let me turn to the second element of the proposal—the designation of a hyperlink to a website that takes an opposing point of view. What criteria is the regulator to use in order to determine that the linked-to website serves the appropriate palliative purpose? How would the government police publishers to make sure that they have included the appropriate list? Any answers to these questions

⁸⁷ That is true even if they never name the opponents or state the alternatives.

are going to be either overbroad or underinclusive. If they are overbroad, then they are going to impose potentially significant costs on both regulators to measure compliance and on those to be regulated to ensure compliance. If they are underinclusive, then the regulation will not achieve its goal. Additionally, the regulation may be challenged as being discriminatorily applied, thus beginning a drift toward becoming overbroad. None of these outcomes is socially desirable.

Consider, by analogy, the implication of these “must carry” proposals for non-website points of view. Suppose that as a condition of purchasing *Mein Kampf* by Adolf Hitler, one had also to purchase (or give later evidence of having read or seen) *The Sunflower* by Simon Wiesenthal or *The Rise and Fall of the Third Reich* by William Shirer or watch the movie, “It’s a Beautiful Life.”⁸⁸ (Of course, the same would apply in reverse—anyone who watched “It’s a Beautiful Life” would be obliged to read *Mein Kampf*.)⁸⁹ Of course, the idea is self-evidently silly, but let me elaborate a bit on why it is silly. First, someone would have to determine which books, movies, videos, and so forth take a political point of view and, therefore, require an antidote. Second, someone would then have to police this system. At a bookstore, the clerk would have to make known to customers the antidote books to the ones being purchased and make sure, at the check-out, that the customer is at least aware of, if not also purchasing, the antidote books. Amazon.com could, of course, do all this very efficiently because, I am almost certain, this could be computerized very easily. But real-world (as opposed to “virtual”) booksellers and librarians would have to alert patrons to antidote books for each thing they were buying or checking out, so long as the book or magazine had been deemed to have a political point of view.

D. *That old-time religion*

I have argued throughout this section that I am skeptical of the premises of Professor Sunstein’s critique of the Internet’s adverse effects on deliberative democracy and that I have strong doubts about the practicability of the proposed reforms. But assume that there are problems. What should be done? The most sensible alternative—one tested repeatedly and found successful—is to leave it to individuals to inform themselves and to encourage them in doing so through vigorous competition and broad access. For example, the government might subsidize broadband access so that more people could access the information on the Internet and do so more rapidly and conveniently. Sunstein is reluctant to rely on private correctives, at least with respect to the Internet, because of his fears that people will not take up the challenge to inform themselves and that, even if they

⁸⁸ I am grateful to Deborah Weiss for making this analogy to me.

⁸⁹ One can imagine that each copy of *Mein Kampf* or of *The Sunflower* would have bound into it a list of things that the reader should consult.

do, they will only inform themselves in conformity with their pre-existing views.⁹⁰ I have a different hope—namely, that over the course of time individuals will talk with their neighbors, co-workers, family, and friends; that they will listen to television and radio; that they will read newspapers and magazines; that they will travel to other parts of the country and to other countries; that they will attend lectures and political events and continuing education courses and professional conventions; that they may run for public office; and that through all of these interactions they will grow and think and inform themselves, probe their positions and those of their interlocutors, and become better citizens. I put my faith—informed, I believe, by ample evidence—in the old-time religion of a vigorous and competitive marketplace of ideas and of the ameliorating influence of more speech. There is an important role for governmental regulation to play—in the role of oversight of competition and fair dealing, encouragement of civic engagement, subsidizing broadband access, and so on. Those correctives will better serve our democracy than will the regulations proposed by Professor Sunstein or the prospect of less speech.

I do not suggest with Doctor Pangloss that we live in the best of all possible worlds, but I am fairly confident that it is a reasonably good world, that we are making progress, and that the future is brighter than the present. I do not see the Internet as an unalloyed blessing, but almost so. I think that Sunstein might better have written a paean to the Internet as an enabler of deliberative democracy and have raised his concerns about filtering as a minor and remote possible shortcoming of the new technology.

First, trying to decide which sites should have this automatic switching and which would be exempt is a line-drawing exercise that I do not want anyone I know to have to engage in. Second, and relatedly, I can't imagine what defensible decision mechanism would suggest the sites to which one would be transported. Where would you, for example, send one after he had visited the Nuremberg Files website?⁹¹ And third, the practice, if implemented, might discourage people from visiting certain sites in the first place, and that would be an undesirable outcome.

⁹⁰ I am not certain how Professor Sunstein feels about wider broadband access. The logic of his criticisms might seem to argue in favor of *less* and *slower* access to the Internet, on the ground that the less use of the Internet might lead to less of the unattractive consequences for deliberative democracy on which Professor Sunstein focuses. But I can also imagine that he would be strongly in favor of wider broadband access so long as his proposed reforms were in place.

⁹¹ One possibility is that once a site such as the Nuremberg Files appears, private parties might then bid to some Internet governance authority to be the site to which visitors to the new site—say, the Nuremberg Files—would automatically be shuttled after a certain time at the new site. That—and other alternatives of which I could think—seem to me unworkable.

IV. Conclusion

In January, 2000, there were almost 25 million commercial sites on the Internet, 6 million educational sites, slightly fewer than 1 million non-profit sites, and about three-quarters of a million governmental sites. Five years previously most people had never heard of the Internet or the World Wide Web; only 10 percent of the population had access to the Internet; and the number of sites on the Web was a fraction of those reported in January, 2000. It is difficult to call to mind another important recent social development that has appeared and grown so rapidly.

Although early commentators on the Internet contended that its benefits to society are large and increasing, Professor Sunstein contends in *Republic.com* that the Internet may have deleterious effects on deliberative democracy. Specifically, Sunstein believes that imminent software will allow users to filter information on the Internet so as to confine their attention only to those things in which they are already interested—to create *The Daily Me*. This filtering will isolate individuals from unwanted and unexpected contact with others and lead to the entrenchment of views through the process of group polarization. In addition, increasing reliance on the Internet for information may lead to the decline of shared social experiences. The sum of all these effects may be that people are less engaged in deliberating about public affairs and less open to discussion of public affairs with those of opposing or different views. Deliberative democracy will suffer. To prevent these outcomes, Sunstein proposes a series of reforms designed to prevent these adverse consequences.

I have questioned whether the effects that Sunstein identifies will really come to pass. This is not to say that there are not pressing social issues arising from the rapid growth and spread of the Internet.⁹² There are. But with respect to public life and democracy I believe that the Internet has a significantly beneficial effect on the health of democracy through its ability to foster citizen-government interaction and information flows, in lowering the cost of organizing for political effect, and through the promise of Internet voting.

Finally, I leave with two cautionary notes against regulation of the Internet. First, recall how very rapidly the Internet has developed. Ten years, even five years ago, very few could have foreseen what the Internet was about to become. This suggests that we should be very cautious about interfering with the development of the Internet in the next five to ten years. Second, unless the case for regulation is overwhelmingly persuasive, “policymakers’ first instinct should be to rely on markets and technology to address troublesome issues and to act

⁹² The four policy issues that seem most pressing are the existence of a “digital divide,” the invasion of privacy, intellectual property issues (such as the uncompensated copying of music, text, and video), and broadband access. See Litan, *supra* n. 79, at 1045.

only if there are identifiable market failures that can be corrected usefully by some type of government intervention.”⁹³

⁹³ *Id.* at 1045.