



# Republic.com 2.0

## Revenge of the Blogs

*In a democracy, people do not live in echo chambers or information cocoons. They see and hear a wide range of topics and ideas. They do so even if they did not, and would not, choose to see and to hear those topics and those ideas in advance. These claims raise serious questions about certain uses of new technologies, above all the Internet, and about the astonishing growth in the power to choose—to screen in and to screen out.*

*Louis Brandeis, one of America's greatest Supreme Court justices, insisted that the greatest threat to freedom is "an inert people." To avoid inertness, a democratic public must certainly be free from censorship. But the system of free expression must do far more than avoid censorship: it must ensure that people are exposed to competing perspectives. The idea of free speech has an affirmative side. It imposes constraints on what government may do, but it requires a certain kind of culture as well. (George Orwell's *Nineteen Eighty Four*, with its omnipresent, choice-denying Big Brother, is the most familiar vision of democracy's defeat; a more subtle vision is Aldous Huxley's *Brave New World*, with its pacified, choice-happy, formally free citizenry.) Members of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens, or if they see one another as enemies or adversaries in some kind of war.*

*I was greatly surprised by the reception of the original edition of this book. I certainly did not expect the argument to prove so controversial—that so many people would be so outraged by the effort to ask some questions about the consequences of the*



ABOUT ME

## Cass R. Sunstein

Cass Sunstein is the Karl N. Llewellyn Professor of Jurisprudence at the University of Chicago Law School and Department of Political Science and is the author of numerous books, including *Democracy and the Problem of Free Speech*, *The Partial Constitution*, *After the Rights Revolution*, *Free Markets and Social Justice*, *One Case at a Time: Judicial Minimalism on the Supreme Court*, and, with Stephen Holmes, *The Cost of Rights*.

## 2

---

### An Analogy and an Ideal

#### The Neighborhood Me

THE CHANGES now being produced by new communications technologies are understated, not overstated, by the thought experiment with which I began. What is happening goes far beyond the increasingly customized computer screen.

Many of us telecommute rather than going to work; this is a growing trend. Rather than visiting the local bookstore, where we are likely to see a number of diverse people, many of us shop for books on Amazon.com. Others avoid the local stores, because one or another company is entirely delighted to deliver *Citizen Kane* and a pizza. Thus media analyst Ken Auletta enthuses, "I can sample music on my computer, then click and order. I don't have to go to a store. I don't have to get in a car. I don't have to move. God, that's heaven."<sup>1</sup>

If you are interested in anything at all—from computers to linens to diamonds to cars to medical advice—an online company will be happy to assist you. Indeed, if you would like to attend college, or even to get a graduate degree, you may be able to avoid the campus. College education is available online.<sup>2</sup>

It would be foolish to claim that this is bad, or a loss, in general or on balance. On the contrary, the dramatic increase

## CHAPTER TWO

in convenience is a wonderful blessing for consumers. Driving around in search of gifts, for example, can be a real bother. (Can you remember what this used to be like? Is it still like that for you?) For many of us, the chance to point-and-click is an extraordinary improvement. And many people, both rich and poor, take advantage of new technologies to “go” to places that they could not in any sense have visited before—South Africa, Germany, Iran, France, Venice, Beijing, stores and more stores everywhere, an immense variety of specialized doctors’ offices. But it is far from foolish to worry that for millions of people, the consequence of this increased convenience is to decrease the set of chance encounters with diverse others—and also to be concerned about the consequence of the decrease for democracy and citizenship.

Or consider the concept of collaborative filtering—an intriguing feature on a number of sites, one that has now become routine and is rapidly becoming part of daily life online. Once you order a book from Amazon.com, for example, Amazon.com is in a position to tell you the choices of other people who like that particular book. Once you have ordered a number of books, Amazon.com knows, and will tell you, the other books—and music and movies—that you are likely to like, based on what people like you have liked. Other websites are prepared to tell you which new movies you’ll enjoy and which you won’t—simply by asking you to rate certain movies, then matching your ratings to those of other people, and then finding out what people like you think about movies that you haven’t seen. (Netflix is particularly happy to help you on this count.) For music, there are many possibilities: Musicmobs and Indy are examples, with the latter proclaiming, “Indy is a music discovery program that learns what you like, and plays more of it.” With wikilens, you can see

what people like you like in restaurants, books, and beers, as well as music and movies.

"Personalized shopping" is becoming readily available, and it is intended to match the interests and purchasing patterns of customers for a dazzling array of products, including radios, computers, fabrics, pens, room designs, and wish lists. (Put "personalized shopping" in Google, and watch what comes up.) Or consider the suggestion that before long we will "have virtual celebrities. . . . They'll look terrific. In fact, they'll look so terrific that their faces will be exactly what *you* think is beautiful and not necessarily what your neighbor thinks, because they'll be customized for each home."<sup>3</sup> (Is it surprising to hear that several websites provide personalized romance stories? That at least one asks you for information about "your fantasy lover," and then it designs a story to suit your tastes?)

In many ways what is happening is quite wonderful, and some of the recommendations from Amazon.com, Netflix, and analogous services are miraculously good, even uncanny. Countless people have discovered new favorite books, movies, and bands through this route. But it might well be disturbing if the consequence is to encourage people to narrow their horizons, or to cater to their existing tastes rather than to allow them to form new ones. The problem is a real one for movies and music, but it is probably most serious in the democratic domain. Suppose, for example, that people with a certain political conviction find themselves learning about more and more authors with the same view and thus strengthening their preexisting judgments, only because most of what they are encouraged to read says the same thing. In a democratic society, might this not be troubling?

The underlying issues here are best approached through two different routes. The first involves an unusual and some-

what exotic constitutional doctrine, based on the idea of the "public forum." The second involves a general constitutional ideal, indeed the most general constitutional ideal of all: that of deliberative democracy. As we will see, a decline in common experiences and a system of individualized filtering might compromise that ideal. As a corrective, we 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.

### **The Idea of the Public Forum**

In the common understanding, the free-speech principle is taken to forbid government from "censoring" speech of which it disapproves. In the standard cases, the government attempts to impose penalties, whether civil or criminal, on political dissent, libelous speech, commercial advertising, or sexually explicit speech. The question is whether the government has a legitimate, and sufficiently weighty, reason for restricting the speech that it seeks to control.

This is indeed what most of the law of free speech is about. In Germany, France, Russia, the United States, Mexico, and many other nations, constitutional debates focus on the limits of censorship. But in free countries, an important part of free-speech law takes a quite different form. In the United States, for example, the Supreme Court has ruled that streets and parks must be kept open to the public for expressive activity. In the leading case, from the early part of the twentieth century, the Court said, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the

use of the public and time out of mind, have been used for the purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”<sup>4</sup>

Hence governments are obliged to allow speech to occur freely on public streets and in public parks—even if many citizens would prefer to have peace and quiet, and even if it seems irritating to come across protesters and dissidents when you are simply walking home or to the local grocery store. If you see protestors on a local street, and you wonder why they are allowed to be there (and perhaps to bother you), the answer is that the Constitution gives them a right to do so.

To be sure, the government is allowed to impose restrictions on the “time, place, and manner” of speech in public places. No one has a right to set off fireworks or to use loudspeakers on the public streets at 3 a.m. in order to complain about crime, global warming, or the size of the defense budget. But time, place, and manner restrictions must be both reasonable and limited. Government is essentially obliged to allow speakers, whatever their views, to use public property to convey messages of their choosing.

A distinctive feature of the public-forum doctrine is that it creates a *right of speakers’ access, both to places and to people*. Another distinctive feature is that the public-forum doctrine creates a right, not to avoid governmentally imposed *penalties* on speech, but to ensure government *subsidies* of speech. There is no question that taxpayers are required to support the expressive activity that, under the public-forum doctrine, must be permitted on the streets and parks. Indeed, the costs that taxpayers devote to maintaining open streets and parks, from cleaning to maintenance, can be quite high.

Thus the public forum represents one area of law in which the right to free speech demands a public subsidy to speakers.

### Just Streets and Parks? Of Airports and the Internet

As a matter of principle, there seems to be good reason to expand the public forum well beyond streets and parks. In the modern era, other places have increasingly come to occupy the role of traditional public forums. The mass media and the Internet as well have become far more important than streets and parks as arenas in which expressive activity occurs.

Nonetheless, the Supreme Court has been wary of expanding the public-forum doctrine beyond streets and parks. Perhaps the Court's wariness stems from a belief that once the historical touchstone is abandoned, lines will be extremely hard to draw, and judges will be besieged with requests for rights of access to private and public property. Thus the Court has rejected the seemingly plausible argument that many other places should be seen as public forums too. In particular, it has been urged that airports, more than streets and parks, are crucial to reaching a heterogeneous public; airports are places where diverse people congregate and where it is important to have access if you want to speak to large numbers of people. The Court was not convinced, responding that the public-forum idea should be understood by reference to historical practices. Airports certainly have not been treated as public forums from "ancient times."<sup>5</sup>

But at the same time, some members of the Court have shown considerable uneasiness with a purely historical test. In the most vivid passage on the point, Supreme Court Justice Anthony Kennedy wrote: "Minds are not changed in streets

and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change."<sup>6</sup> What Justice Kennedy is recognizing here is the serious problem of how to "translate" the public-forum idea into the modern technological environment. And if the Supreme Court is unwilling to do any such translating, it remains open for Congress, state governments, and ordinary citizens to consider doing exactly that. In other words, the Court may not be prepared to say, as a matter of constitutional law, that the public-forum idea extends beyond streets and parks. But even if the Court is unprepared to act, Congress and state governments are permitted to conclude that a free society requires a right of access to areas where many people meet.

Indeed, private and public institutions might reach such conclusions on their own, and take steps to ensure that people are exposed to a diversity of views. Airports and train stations might decide to remain open for expressive activity—as many now are. Broadcasters might attempt, on their own, to create the functional equivalent of public forums, allowing people with a wide range of views to participate—as many now do. An important question is how to carry forward the goals of old law in the modern era.

### ***Why Public Forums? Of Access, Unplanned Encounters, and Irritations***

The Supreme Court has given little sense of why, exactly, it is important to ensure that the streets and parks remain open to speakers. This is the question that must be answered if we



## CHAPTER TWO

are to know whether, and how, to understand the relationship of the public-forum doctrine to contemporary problems.

We can make some progress here by noticing that the public-forum doctrine promotes three important goals.<sup>7</sup> *First*, it ensures that speakers can have access to a wide array of people. If you want to claim that taxes are too high, that religious diversity is not being respected, or that police brutality is widespread, you are able to press this argument on many people who might otherwise fail to hear the message. The diverse people who walk the streets and use the parks are likely to hear speakers' arguments about taxes, religious plurality, or the police; they might also learn about the nature and intensity of views held by their fellow citizens. Perhaps some people's views change because of what they learn; perhaps they will become curious, enough so to investigate the question on their own. It does not much matter if this happens a little or a lot. What is important is that speakers are allowed to press concerns that might otherwise be ignored by their fellow citizens.

On the speakers' side, the public-forum doctrine thus *creates a right of general access to heterogeneous citizens*. On the listeners' side, the public forum creates not exactly a right, but an opportunity, if perhaps an unwelcome one: *shared exposure to diverse speakers with diverse views and complaints*. It is important to emphasize that the exposure is shared. Many people will be simultaneously exposed to the same views and complaints, and they will encounter views and complaints that some of them might have refused to seek out in the first instance. Indeed, the exposure might well be considered, much of the time, irritating or worse.

*Second*, the public-forum doctrine allows speakers not only to have general access to heterogeneous people, but also to specific people and specific institutions with whom they have

a complaint. Suppose, for example, that you believe that the state legislature has behaved irresponsibly with respect to crime or health care for children. The public forum ensures that you can make your views heard by legislators, simply by protesting in front of the state legislature itself.

The point applies to private as well as public institutions. If a clothing store is believed to have cheated customers, or to have acted in a racist manner, protestors are allowed a form of access to the store itself. This is not because they have a right to trespass on private property—no one has that right—but because a public street is highly likely to be close by, and a strategically located protest will undoubtedly catch the attention of the store and its customers. Under the public-forum doctrine, speakers are thus permitted to have access to particular audiences, and particular listeners cannot easily avoid hearing complaints that are directed against them. In other words, listeners have a sharply limited power of self-insulation. If they want to live in gated communities, they might be able to do so, but the public forum will impose a strain on their efforts.

*Third*, the public-forum doctrine increases the likelihood that people generally will be exposed to a wide variety of people and views. When you go to work or visit a park, it is possible that you will have a range of unexpected encounters, however fleeting or seemingly inconsequential. On your way to the office or when eating lunch in the park, you cannot easily wall yourself off from contentions or conditions that you would not have sought out in advance, or that you would avoided if you could. Here too the public-forum doctrine tends to ensure a range of experiences that are widely shared—streets and parks are public property—and also a set of exposures to diverse views and conditions. What I mean to suggest is that these exposures help promote understanding

## CHAPTER TWO

and perhaps in that sense freedom. As we will soon see, all of these points can be closely connected to democratic ideals.

We should also distinguish here between exposures that are *unplanned* and exposures that are *unwanted*. In a park, for example, you might encounter a baseball game or a group of people protesting the conduct of the police. These might be unplanned experiences; you did not choose them and you did not foresee them. But once you encounter the game or the protest, you are hardly irritated; you may even be glad to have stumbled across them. By contrast, you might also encounter homeless people or beggars asking you for money and perhaps trying to sell you something that you really don't want. If you could have "filtered out" these experiences, you would have chosen to do so. For many people, the category of unwanted—as opposed to unplanned—exposures includes a great many political activities. You might be bored by those activities and wish that they were not disturbing your stroll through the street. You might be irritated or angered by such activities, perhaps because they are disturbing your stroll, perhaps because of the content of what is being said, perhaps because of who is saying it.

It is also important to distinguish between exposures to *experiences* and exposures to *arguments*. Public forums make it more likely that people will not be able to wall themselves off from their fellow citizens. People will get a glimpse, at least, of the lives of others, as for example through encountering people from different social classes. Some of the time, however, the public-forum doctrine makes it more likely that people will have a sense, however brief, not simply of the experiences but also of the arguments being made by people with a particular point of view. You might encounter written materials, for example, that draw attention to the problem of domestic violence. The most ambitious uses of public forums are

designed to alert people to arguments as well as experiences—though the latter sometimes serves as a kind of shorthand reference for the former, as when a picture or a brief encounter has the effect of thousands of words.

In referring to the goals of the public-forum doctrine, I aim to approve of encounters that are unwanted as well as unplanned, and also of exposure to experiences as well as arguments. But those who disapprove of unwanted encounters might also agree that unplanned ones are desirable, and those who believe that exposure to arguments is too demanding or too intrusive might also appreciate the value, in a heterogeneous society, of exposure to new experiences.

### General-Interest Intermediaries as Unacknowledged Public Forums (of the World)

Of course there is a limit to how much can be done on streets and in parks. Even in the largest cities, streets and parks are insistently *local*. But many of the social functions of streets and parks, as public forums, are performed by other institutions too. In fact society's general-interest intermediaries—newspapers, magazines, television broadcasters—can be understood as public forums of an especially important sort.

The reasons are straightforward. When you read a city newspaper or a national magazine, your eyes will come across a number of articles that you would not have selected in advance. If you are like most people, you will read some of those articles. Perhaps you did not know that you might have an interest in the latest legislative proposal involving national security, or Social Security reform, or Somalia, or recent developments in the Middle East; but a story might catch your attention. What is true for topics is also true for points of view.

## CHAPTER TWO

You might think that you have nothing to learn from someone whose view you abhor. But once you come across the editorial pages, you might well read what they have to say, and you might well benefit from the experience. Perhaps you will be persuaded on one point or another, or informed whether or not you are persuaded. At the same time, the front-page headline, or the cover story in a weekly magazine, is likely to have a high degree of salience for a wide range of people. While shopping at the local grocery store, you might see the cover of *Time* or *Newsweek*, and the story—about a promising politician, a new risk, a surprising development in Europe—might catch your attention, so you might pick up the issue and learn something even if you had no interest in advance.

Unplanned and unchosen encounters often turn out to do a great deal of good, for individuals and society at large. In some cases, they even change people's lives. The same is true, though in a different way, for unwanted encounters. In some cases, you might be irritated by seeing an editorial from your least favorite writer. You might wish that the editorial weren't there. But despite yourself, your curiosity might be piqued, and you might read it. Perhaps this isn't a lot of fun. But it might prompt you to reassess your own view and even to revise it. At the very least, you will have learned what many of your fellow citizens think and why they think it. What is true for arguments is also true for topics, as when you encounter, with some displeasure, a series of stories on crime or global warming or Iraq or same-sex marriage or alcohol abuse, but find yourself learning a bit, or more than a bit, from what those stories have to say.

Television broadcasters have similar functions. Maybe the best example is what has become an institution in many nations: the evening news. If you tune into the evening news, you will learn about a number of topics that you would not

have chosen in advance. Because of the speed and immediacy of television, broadcasters perform these public-forum-type functions even more than general-interest intermediaries in the print media. The "lead story" on the networks is likely to have a great deal of public salience, helping to define central issues and creating a kind of shared focus of attention for many millions of people. And what happens after the lead story—the coverage of a menu of topics both domestic and international—creates something like a speakers' corner beyond anything ever imagined in Hyde Park.

None of these claims depends on a judgment that general-interest intermediaries always do an excellent—or even a good—job. Sometimes such intermediaries fail to provide even a minimal understanding of topics or opinions. Sometimes they offer a watered-down version of what most people already think. Sometimes they suffer from prejudices and biases of their own. Sometimes they deal little with substance and veer toward sound bites and sensationalism, properly deplored trends in the last decades.

What matters for present purposes is that in their best forms, general-interest intermediaries expose people to a range of topics and views at the same time that they provide shared experiences for a heterogeneous public. Indeed, general-interest intermediaries of this sort have large advantages over streets and parks precisely because most of them tend to be so much less local and so much more national, even international. Typically they expose people to questions and problems in other areas, even other nations. They even provide a form of modest, backdoor cosmopolitanism, ensuring that many people will learn something about diverse areas of the planet, regardless of whether they are much interested, initially or ever, in doing so.

## CHAPTER TWO

Of course general-interest intermediaries are not public forums in the technical sense that the law recognizes. These are private rather than public institutions. Most important, members of the public do not have a legal right of access to them. Individual citizens are not allowed to override the editorial and economic judgments and choices of private owners. In the 1970s, a sharp constitutional debate on precisely this issue resulted in a resounding defeat for those who claimed a constitutionally guaranteed access right.<sup>8</sup> But the question of legal compulsion is really incidental to my central claim here. Society's general-interest intermediaries, even without legal compulsion, serve many of the functions of public forums. They promote shared experiences; they expose people to information and views that would not have been selected in advance.

### **Republicanism, Deliberative Democracy, and Two Kinds of Filtering**

The public-forum doctrine is an odd and unusual one, especially insofar as it creates a kind of speakers' access right to people and places, subsidized by taxpayers. But the doctrine is closely associated with a longstanding constitutional ideal, one that is very far from odd: that of republican self-government.

From the beginning, the American constitutional order was designed to create a republic, as distinguished from a monarchy or a direct democracy. We cannot understand the system of freedom of expression, and the effects of new communications technologies and filtering, without reference to this ideal. It will therefore be worthwhile to spend some space on the concept of a republic, and on the way the American

## AN ANALOGY AND AN IDEAL

Constitution understands this concept, in terms of a deliberative approach to democracy. And the general ideal is hardly limited to America; it plays a role in many nations committed to self-government.

In a republic, government is not managed by any king or queen; there is no sovereign operating independently of the people.<sup>9</sup> The American Constitution represents a firm rejection of the monarchical heritage, and the framers self-consciously transferred sovereignty from any monarchy (with the explicit constitutional ban on "titles of nobility") to "We the People." This represents, in Gordon Wood's illuminating phrase, the "radicalism of the American revolution."<sup>10</sup> At the same time, the founders were extremely fearful of popular passions and prejudices, and they did not want government to translate popular desires directly into law. Indeed, they were sympathetic to a form of filtering, though one very different from what I have emphasized thus far. Rather than seeking to allow people to filter what they would see and hear, they attempted to create institutions that would "filter" popular desires so as to ensure policies that would promote the public good. Thus the structure of political representation and the system of checks and balances were designed to create a kind of filter between people and law, so as to ensure that what would emerge would be both reflective and well-informed. At the same time, the founders placed a high premium on the idea of "civic virtue," which required participants in politics to act as citizens dedicated to something other than their own self-interest, narrowly conceived.

This form of republicanism involved an attempt to create a "deliberative democracy." In this system, representatives would be accountable to the public at large. But there was also supposed to be a large degree of reflection and debate, both within the citizenry and within government itself.<sup>11</sup> The



aspiration to deliberative democracy can be seen in many places in the constitutional design. The system of bicameralism, for example, was intended as a check on insufficiently deliberative action from one or another legislative chamber; the Senate in particular was supposed to have a "cooling" effect on popular passions. The long length of service for senators was designed to make deliberation more likely; so too for large election districts, which would reduce the power of small groups over the decisions of representatives. The Electoral College was originally a deliberative body, ensuring that the choice of the president would result from some combination of popular will and reflection and exchange on the part of representatives. Most generally, the system of checks and balances had, as its central purpose, the creation of a mechanism for promoting deliberation within the government as a whole.

From these points it should be clear that the Constitution was not rooted in the assumption that direct democracy was the ideal, to be replaced by republican institutions only because direct democracy was impractical in light of what were, by modern standards, extremely primitive technologies for communication. Many recent observers have suggested that for the first time in the history of the world, something like direct democracy has become feasible. It is now possible for citizens to tell their government, every week and even every day, what they would like it to do. Indeed, some websites have been designed to enable citizens to do precisely that. We should expect many more experiments in this direction. But from the standpoint of constitutional ideals, this is nothing to celebrate; indeed it is a grotesque distortion of founding aspirations. It would undermine the deliberative goals of the original design. Ours has never been a direct democracy, and a good democratic system attempts to ensure informed and

reflective decisions, not simply snapshots of individual opinions suitably aggregated.<sup>12</sup>

### Homogeneity, Heterogeneity, and a Tale of the First Congress

There were articulate opponents of the original constitutional plan, whose voices have echoed throughout American history; and they spoke in terms that bear directly on the communications revolution. The anti-federalists believed that the Constitution was doomed to failure, on the ground that deliberation would not be possible in a large, heterogeneous republic. Following the great political theorist Montesquieu, they urged that public deliberation would be possible only where there was fundamental agreement. Thus Brutus, an eloquent anti-federalist critic of the Constitution, insisted: "In a republic, the manners, sentiments, and interests of the people should be similar, if this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other."<sup>13</sup>

It was here that the Constitution's framers made a substantial break with conventional republican thought, focusing on the potential uses of diversity for democratic debate. Indeed, it is here that we can find the framers' greatest and most original contribution to political theory. For them, heterogeneity, far from being an obstacle, would be a creative force, improving deliberation and producing better outcomes. If everyone agreed, what would people need to talk about? Why would they want to talk at all? Alexander Hamilton invoked this point to defend discussion among diverse people within a bicameral legislature, urging, in what could be taken as a direct response to Brutus, that "the jarring of parties . . . will promote delibera-

## CHAPTER TWO

tion.”<sup>14</sup> And in an often forgotten episode in the very first Congress, the nation rejected a proposed part of the original Bill of Rights, a “right” on the part of citizens “to instruct” their representative on how to vote. The proposed right was justified on republican (what we would call democratic) grounds. To many people, it seemed a good way of ensuring accountability on the part of public officials. But the early Congress decided that such a “right” would be a betrayal of republican principles. Senator Roger Sherman’s voice was the clearest and most firm: “[T]he words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them on such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation.”<sup>15</sup>

Sherman’s words reflect the founders’ general receptivity to deliberation among people who are quite diverse and who disagree on issues both large and small. Indeed, it was through deliberation among such persons that “such acts as are for the general benefit of the whole community” would emerge. Of course the framers were not naïve. Sometimes some regions, and some groups, would gain while others would lose. What was and remains important is that the resulting pattern of gains and losses would themselves have to be defended by reference to reasons. Indeed, the Constitution might well be seen as intended to create a “republic of reasons,” in which the use of governmental power would have to be justified, not simply supported, by those who asked for it.

We can even take Sherman’s understanding of the task of the representative to have a corresponding understanding of

the task of the idealized citizen in a well-functioning republic. Citizens are not supposed merely to press their own self-interest, narrowly conceived, nor are they to insulate themselves from the judgments of others. Even if they are concerned with the public good, they might make errors of fact or of value, errors that can be reduced or corrected through the exchange of ideas. Insofar as people are acting in their capacity as citizens, their duty is to "meet others" and "consult," sometimes through face-to-face discussions, and if not, through other routes, as, for example, by making sure to consider the views of those who think differently.

This is not to say that most people should be devoting most of their time to politics. In a free society, people have a range of things to do. But to the extent that both citizens and representatives are acting on the basis of diverse encounters and experiences and benefiting from heterogeneity, they are behaving in accordance with the highest ideals of the constitutional design.

### *E Pluribus Unum* and Jefferson vs. Madison

Any heterogeneous society faces a risk of fragmentation. This risk has been serious in many periods in American history, most notably during the Civil War, but often in the twentieth century as well. The institutions of the Constitution were intended to diminish the danger, partly by producing a good mix of local and national rule, partly through the system of checks and balances, and partly through the symbol of the Constitution itself. Thus the slogan *e pluribus unum*, "from many, one," can be found on ordinary currency, in a brief, frequent reminder of a central constitutional goal.

## CHAPTER TWO

Consider in this regard the instructive debate between Thomas Jefferson and James Madison about the value of a bill of rights. In the founding era, Madison, the most important force behind the Constitution itself, sharply opposed such a bill, on the ground that it was unnecessary and was likely to sow confusion. Jefferson thought otherwise, and insisted that a bill of rights, enforced by courts, could be a bulwark of liberty. Madison was eventually convinced of this point, but he emphasized a very different consideration: the unifying and educative functions of a bill of rights.

In a letter to Jefferson on October 17, 1788, Madison asked, "What use, then, it may be asked, can a bill of rights serve in popular Government?" His basic answer was that the "political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion."<sup>16</sup> In Madison's view, the Bill of Rights, along with the Constitution itself, would eventually become a source of shared understandings and commitments among extremely diverse people. The example illustrates the founders' belief that for a diverse people to be self-governing, it was essential to provide a range of common values and commitments.

### Two Conceptions of Sovereignty and Holmes vs. Brandeis

We are now in a position to distinguish between two conceptions of sovereignty. The first involves consumer sovereignty—the idea behind free markets. The second involves political sovereignty—the idea behind free nations. The notion of consumer sovereignty underlies enthusiasm for the Daily Me; it

is the underpinning of any utopian vision of the unlimited power to filter. Writing as early as 1995, Bill Gates cheerfully predicted, "Customized information is a natural extension. . . . For your own daily dose of news, you might subscribe to several review services and let a software agent or a human one pick and choose from them to compile your completely customized 'newspaper.' These subscription services, whether human or electronic, will gather information that conforms to a particular philosophy and set of interests."<sup>17</sup>

Gates's prediction has now become a reality. With RSS, and many other services, you can gather information that fits your interests and your preexisting views. Or consider Gates's celebratory words in 1999: "When you turn on DirectTV and you step through every channel—well, there's three minutes of your life. When you walk into your living room six years from now, you'll be able to just say what you're interested in, and have the screen help you pick out a video that you care about. It's not going to be 'Let's look at channels 4, 5, and 7.'"<sup>18</sup>

This is the principle of consumer sovereignty in action. The notion of political sovereignty underlies the democratic alternative, which poses a challenge to this vision on the ground that it might undermine both self-government and freedom, properly conceived. Recall here John Dewey's words: "Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . The important consideration is that opportunity be given ideas to speak and to become the possession of the multitude. The essential need is the improvement of the methods and constitution of debate, discussion and persuasion. That is *the* problem of the public."<sup>19</sup>

Consumer sovereignty means that individual consumers are permitted to choose exactly as they wish, subject to any constraints provided by the price system, and also by their

## CHAPTER TWO

current holdings and requirements. This idea plays a significant role in thinking not only about economic markets, but also about both politics and communications as well. When we talk as if politicians are "selling" a message, and even themselves, we are treating the political domain as a kind of market, subject to the forces of supply and demand. And when we act as if the purpose of a system of communications is to ensure that people can see exactly what they "want," the notion of consumer sovereignty is very much at work. The idea of political sovereignty stands on different foundations. It does not take individual tastes as fixed or given; it does not see people as simply "having" tastes and preferences. For those who value political sovereignty, "We the People" reflect on what we want by exchanging diverse information and perspectives. The idea of political sovereignty embodies democratic self-government, understood as a requirement of "government by discussion," accompanied by reason giving in the public domain. Political sovereignty comes with its own distinctive preconditions, and these are violated if government power is not backed by justifications and represents instead the product of force or simple majority will.

Of course the two conceptions of sovereignty are in potential tension. If laws and policies are "bought," in the same way that soap and cereal are bought, the idea of political sovereignty is badly compromised. The commitment to consumer sovereignty will also undermine political sovereignty if free consumer choices result in insufficient understanding of public problems, or if they make it difficult to have anything like a shared or deliberative culture. We will disserve our own aspirations if we confound consumer sovereignty with political sovereignty. If the latter is our governing ideal, we will evaluate the system of free expression at least partly by seeing whether it promotes democratic goals. If we care only about

consumer sovereignty, the only question is whether consumers are getting what they want—a question that seems, unfortunately, to be dominating discussions of the Internet and other new technologies.

The distinction matters for law and policy as well. If the government takes steps to increase the level of substantive debate on television or in public culture, it might well be undermining consumer sovereignty at the same time that it is promoting democratic self-government. And if citizens themselves urge that we ought to try to evaluate the system of communications by reference to democratic ideals, they ought not to be silenced on the ground that consumer sovereignty is all that matters.

With respect to the system of freedom of speech, the conflict between consumer sovereignty and political sovereignty can be found in an unexpected place: the great constitutional dissents of Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis. In the early part of the twentieth century, Holmes and Brandeis were the twin heroes of freedom of speech, dissenting, usually together, from Supreme Court decisions allowing the government to restrict political dissent. Sometimes Holmes wrote for the two dissenters; sometimes the author was Brandeis. But the two spoke in quite different terms. Holmes wrote of “free trade in ideas,” and treated speech as part of a great political market, with which government could not legitimately interfere. Consider a passage from Holmes’s greatest free-speech opinion:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in



## CHAPTER TWO

the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>20</sup>

Brandeis's language, in his greatest free-speech opinion, was altogether different:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that . . . without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>21</sup>

Note Brandeis's suggestion that the greatest threat to freedom is an "inert people," and his insistence, altogether foreign to Holmes, that public discussion is not only a right but "a political duty." Brandeis sees self-government as something dramatically different from an exercise in consumer sovereignty. Brandeis's conception of free speech is self-consciously republican, with its emphasis on the obligation to engage in public discussion. On the republican conception, unrestricted consumer choice is not an appropriate foundation for policy in a context where the very formation of preferences and the organizing processes of the democratic order are at stake.

In fact Brandeis can be taken to have offered a conception of the social role of the idealized citizen. For such a citizen, active engagement in politics, at least some of the time, is a responsibility, not just an entitlement. If citizens are "inert," freedom itself is at risk. If people are constructing a Daily Me that is restricted to sports or to the personal lives of celebri-

ties, they are not operating in the way that citizenship requires. This does not mean that people have to be thinking about public affairs all, most, or even much of the time. But it does mean that each of us has rights and duties as citizens, not simply as consumers. As we will see, active citizen engagement is necessary to promote not only democracy but social well-being too. And in the modern era, one of the most pressing obligations of a citizenry that is not inert is to ensure that "deliberative forces should prevail over the arbitrary." For this to happen, it is indispensable to ensure that the system of communications promotes democratic goals. Those goals emphatically require both unchosen exposures and shared experiences.

Brandeis was speaking of the republican tradition. It is therefore noteworthy, and not a little comical, that republic.com is actually a website. Republic.com has nothing to do with republicanism as a political ideal. Instead it offers to sell you essentially whatever you want, as signaled by its distinctive motto: "What you need, when you need it." Its main offerings include women's clothing, airline tickets, T-shirts, designer clothes, houses for sale, hotels, and leather jackets. Republic.com offers an important service, to be sure, but it is not exactly following in the footsteps of its republican forbears.

### Republicanism without Nostalgia

These are abstractions; it is time to be more concrete. I will identify three problems in the hypothesized world of perfect filtering. These difficulties might well beset any system in which individuals had complete control over their communi-

## CHAPTER TWO

cations universe and exercised that control so as to create echo chambers or information cocoons.

The first difficulty involves *fragmentation*. The problem here comes from the creation of diverse speech communities whose members talk and listen mostly to one another. A possible consequence is considerable difficulty in mutual understanding. When society is fragmented in this way, diverse groups will tend to *polarize* in a way that can breed extremism and even hatred and violence. New technologies, emphatically including the Internet, are dramatically increasing people's ability to hear echoes of their own voices and to wall themselves off from others. An important result is the existence of *cybercascades*—processes of information exchange in which a certain fact or point of view becomes widespread, simply because so many people seem to believe it.

The second difficulty involves a distinctive characteristic of information. Information is a public good in the technical sense that once one person knows something, other people are likely to benefit as well. If you learn about crime in the neighborhood or about the problem of climate change, you might well tell other people too, and they will benefit from what you have learned. In a system in which each person can "customize" his own communications universe, there is a risk that people will make choices that generate too little information. An advantage of a system with general-interest intermediaries and with public forums—with broad access by speakers to diverse publics—is that it ensures a kind of social spreading of information. At the same time, an individually filtered speech universe is likely to produce too few of what I will call *solidarity goods*—goods whose value increases with the number of people who are consuming them.<sup>22</sup> A presidential debate is a classic example of a solidarity good.

T  
ders  
sum  
and  
that  
enc  
This  
that  
it is  
But  
satis  
the  
dece  
afte  
to a  
can  
the

## AN ANALOGY AND AN IDEAL

The third and final difficulty has to do with the proper understanding of freedom and the relationship between consumers and citizens. If we believe in consumer sovereignty, and if we celebrate the power to filter, we are likely to think that freedom consists in the satisfaction of private preferences—in an absence of restrictions on individual choices. This is a widely held view about freedom. Indeed, it is a view that underlies much current thinking about free speech. But it is badly misconceived. Of course free choice is important. But freedom properly understood consists not simply in the satisfaction of whatever preferences people have, but also in the chance to have preferences and beliefs formed under decent conditions—in the ability to have preferences formed after exposure to a sufficient amount of information and also to an appropriately wide and diverse range of options. There can be no assurance of freedom in a system committed to the Daily Me.