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DISEASE AND CURE?

L. A. Powe, Jr.*

REPUBLIC.COM. By Cass Sunstein. Princeton: Princeton University Press. 2001. Pp. 224 (cloth); 235 (paper). Cloth, \$19.95; paper, \$12.95.

With the months of secrecy at the Constitutional Convention ended, as the delegates exited Convention Hall, someone in the gathered crowd asked Benjamin Franklin: "What have you given us?" Franklin famously replied: "A republic, if you can keep it." In *Republic.com*, Cass Sunstein¹ describes this episode twice (pp. 105, 200-01).

WHAT'S UP?

Sunstein uses Franklin's remark to make two related points. First, citizens bear the burden of maintaining the American republic as a healthy, vibrant place; being a citizen is decidedly different from being a consumer. The former has duties, the latter wants (pp. 113-23). Second, and this is the gist of the slender book, the republic is jeopardized by the possibilities of the Internet. Sunstein assumes the correctness of MIT technology specialist Nicholas Negroponte's conclusion that in the not-too-distant future we will be able to create a "Daily Me" on the Internet that will provide the personalized information (including news) that each person chooses for him or herself.² While some Internet enthusiasts have seen the "Daily Me" as a utopian vision, Sunstein sees instead a version of Huxley's *Brave New World*.³ He fears that users will isolate themselves from society at large by using the "Daily Me" as an "echo chamber[]" (p. 65) to preexisting views and wants, perfectly calibrated to filter out the new and different.

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1. Karl N. Llewellyn Professor of Jurisprudence, University of Chicago Law School and Department of Political Science.

2. P. 2 (citing NICHOLAS NEGROPONTE, BEING DIGITAL 153 (1995)).

3. ALDOUS HUXLEY, BRAVE NEW WORLD (1932). This distinguishes Sunstein from Larry Lessig, whose take on the Internet in CODE AND OTHER LAWS OF CYBERSPACE (1999) seems closer to George Orwell's 1984 (1949). Sunstein himself has drawn this comparison. Alexander Stille, *Adding Up the Costs of Democracy*, N.Y. TIMES, June 2, 2001, at B9. Yet Sunstein claims he was never saying this world would happen, only that it could. In a new Afterword to the paperback edition he acknowledges that the Internet "on balance, [is] good for democracy." P. 204.

Sunstein's healthy democracy has two requirements of its citizenry. First, they must have an appropriate amount of culturally shared experiences. Second, they must engage in a number of unanticipated encounters with unexpected and different people. The shared experiences help provide the culture's social glue. They allow citizens who do not know each other and would not otherwise be aware of alternatives to their own positions to become acquainted with differing views while nevertheless holding something in common to discuss. The great general-interest intermediaries — television networks, newspapers, *Time*, and *Newsweek* — provide this common information to all Americans without regard to geography or ideology. These general-interest intermediaries maintain sufficient commonality that the issues and problems they discuss will thus be readily available to all. This sets them apart from other common cultural institutions like the entertainment or advertising industries, which rarely focus on the public issues of the day.

The general-interest intermediaries also contain other news that many citizens might not seek out — a ferry sinking in Southeast Asia, the number of motels in the United States owned by native-born Americans, or the relationship between salmon runs and dams in the Pacific Northwest. These stories catch the eye (or ear), and although they might not be what we would choose or seek out, we nevertheless find ourselves reading them (or listening to them). This, Sunstein asserts, is important. His analogy, taken from his primary area of constitutional law, is the public forum.

The public forums of constitutional law — streets, sidewalks, and parks — are the places where speakers can say what they please “even if many citizens would prefer to have peace and quiet, and even if it seems irritating to come across protestors and dissidents when you are simply walking home or to the local grocery store” (p. 27). For those coming across the protestors and dissidents, there is no duty to stop or even to pay momentary attention, but there is the opportunity to do so.⁴ That, for Sunstein, is the key. The public forums provide the opportunity for all of us to encounter unexpected (and perhaps unwanted) experiences and — even better, should we pause — arguments. In supplementing our lives with these new developments, we are enriched by our greater awareness of the heterogeneous society in which we live.

Sunstein is not myopic, and he knows that the previous paragraph describes an older era.⁵ Whether through changes in lifestyles or the

4. Were it not for the opportunity of chance encounters, sports fans would never have known the opinions of John Rucker, a rural Southerner (who could also throw a good fast-ball), on the riders of the Number 7 train to New York City's Shea Stadium.

5. P. 196. Sunstein's description of the era is nostalgic. It reminds me of Justice Black's soulful lament in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), concerning the continuing demise of the mom-and-pop grocery stores of Los Angeles which were

ossification of the public-forum doctrine itself,⁶ public forums just aren't that important. Sunstein thus quotes Justice Kennedy's apt observation: "Minds are not changed in the streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in the mass and electronic media."⁷ Enter the Internet with all its possibilities to operate as a super public forum.⁸

Sunstein worries, however, that the "Daily Me" will not only stifle this possibility, but will in fact make things worse. As to the former, the "Daily Me" will operate as a technological cocoon giving its master only the preselected views and information he wishes. Dissent, discord, and difference will be left suspended elsewhere as the "Daily Me" works its magic. While the opportunities for new experiences will be there, they can happen only if the user intentionally seeks them out, not by the necessary inadvertence that occurs naturally in a public forum. Democracy will suffer — but that is not the half of it.

Sunstein's primary fear of the "Daily Me" is that it will create group polarization and extremism (pp. 65-77). He relies upon various well-accepted studies that demonstrate that when like-minded individuals deliberate together their views shift to the extreme.⁹ Thus if many "Daily Me" filters place like-minded people in the same sites, Sunstein believes, and fears, that moderation will be abandoned in favor of extremism. "Indeed, the Internet creates a large risk of group polarization, simply because it makes it so easy for like-minded people to speak with one another — and ultimately to move toward extreme and sometimes even violent positions" (p. 199). Sunstein also fears "cybercascades" of information where members of various groups will

supposedly being done in by voracious chain stores. There was not a trace of understanding that freeways and cars contributed to the situation. I was similarly struck by the absence of cars in Sunstein's world of the public forum, right down to people "walking . . . to the local grocery store." P. 27. Not only has the United States that Sunstein hails passed into history, but it also seems to consist roughly of the triangle of the nation where Major League Baseball existed in 1953: no farther West than St. Louis and no farther South than Washington, D.C. In his Afterword, Sunstein acknowledges reliance on JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961), which confirms my view that he was describing a regional phenomenon. I will assume, nevertheless, that his description is more or less correct.

6. Nicely on display in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

7. P. 29 (quoting *Denver Area Educ. Consortium v. FCC*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., dissenting)).

8. "[T]he Internet is allowing many millions of people, all over the globe, to expand their horizons and to encounter new topics and ideas." P. 206.

9. ROGER BROWN, *SOCIAL PSYCHOLOGY* (2d ed. 1996); JOHN SABINI, *SOCIAL PSYCHOLOGY* (2d ed. 1995); see also p. 218 nn.9-19.

all acquire the same rumors and claims simultaneously and then reinforce them to each other.¹⁰

Having diagnosed a potential threat to our democracy, what does Sunstein believe should be done? We need links. Actually, Sunstein offers six different remedies (tracing their origins to broadcast regulation).¹¹ They are a truly mixed bag, which is why they can be summarized as links between websites. Two go beyond this. One is the creation of deliberative chat rooms that will allow everyone to access and participate in cyberspace public forums (subsidized by government, if necessary). The other is a voluntary disclosure — by broadcasters¹² — of the public issues they have discussed in the previous quarter. The key, however, is links from both partisan websites and those lucky websites that are popular. Links will allow the user the opportunity to go elsewhere and find different views at the click of a mouse. Sunstein hopes that the remedies would be

10. Pp. 80-84. The data, however, shows that most users access mainstream websites. Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEXAS L. REV. 447, 467-69 (2000) (book review).

11. Sunstein's remedies:

1. deliberative domains; 2. 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.

P. 169.

12. Disclosure requirements of various sorts might, for example, be imposed on:

television broadcasters, radio broadcasters, cable television, and Website providers. . . . The disclosure might include an accounting of any free airtime provided to candidates, opportunities to speak for those addressing public issues, rights of reply, educational programming, charitable activities, programming designed for traditionally underserved communities, closed captioning for the hearing impaired, local programming, and public service announcements.

P. 174. Sunstein wraps his proposal in Justice Brandeis's idea that "sunlight is the best of disinfectants," p. 174 (internal quotation marks omitted), although it is not clear that there is any infection. Still, the proposal initially seems somewhere between helpful and innocuous. Then the older among us remember the FCC's Ascertainment Policy, which turned the simple requirement that a broadcaster know its community into a procedural maze followed by litigation over trivia. See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 79-81 (1994). For a pithy summation, see *id.* at 365 (index item immediately following "I Love Lucy"). Sunstein's disclosure file would seem ripe for similar complaints that the broadcaster did not spend enough time doing X or spent too much time doing Y. Beyond that, just what does a new regulation for broadcasters have to do with a book on the dangers the Internet may pose for our democracy? One is tempted to answer that Sunstein has some of the qualities of Pavlov's dog: when he thinks regulation, he thinks of another duty that could be attached to broadcasters.

voluntarily adopted,¹³ but given their television pedigree, he would not hesitate to have the federal government impose them if necessary.¹⁴

WHAT??

Something, perhaps a lot, is just plain wrong with the argument in *Republic.com*. The mistake is not logical, for the book proceeds in a nice linear fashion. If there is error, it is in the data. The Internet seems to be quite a boon; yet Sunstein sees it as posing a threat to our democracy.¹⁵ What's the evidence? Now suppose he is right: Will "links" really save us? It seems such a trivial remedy for such a serious problem. Again, where's the evidence it will work? At some basic level it seems that Sunstein is wrong about either the disease or the cure. Or both.

So many different things pose a threat to our democracy: lack of real campaign-finance reform, voter apathy, corporate control over government, the liberal media, the imperial judiciary, Rush Limbaugh and Fox News, racism, globalization and the WTO, the failures of public education, lack of true deliberative opinion polls. Now the Internet. A couple of decades ago it was the paucity of available information sources (and their blandness); now it is their abundance (with their ideological edge). Maybe American democracy can never get it right; maybe democracy is inherently at risk. I don't know, and I don't think Sunstein does either. To the extent he does, he views the problem as the threat of group polarization.

His book is permeated by the fear that members of groups on both the right and the left¹⁶ will use the opportunities of the Internet to meet, chat, and thus have their preexisting ideological views reinforced so that they move toward the extreme. Indeed, Sunstein asserts that this is already occurring (p. 71). Should this continue, we

13. He reports that of his random study of sixty political websites only nine offered links to opposing sites while thirty-five offered them to like-minded sites. P. 59.

14. "Ideally, such links would be provided voluntarily. It might also be worthwhile to consider legislation designed to ensure more in the way of links and hyperlinks, on a view-point-neutral basis." P. 186. "If [voluntary efforts] do not work, it would be worthwhile considering content-neutral regulation, designed to ensure more in the way of both links and hyperlinks." P. 188.

15. Again, it is worth noting that he backs away from this position in the Afterword, first acknowledging the Internet is "a fantastic boon," p. 203, and then offering: "Instead of asking whether the Internet is good for democracy on balance, we should be trying to identify the ways that it is good and the ways that it might be bad." P. 204. Thus reconceived, *Republic.com* is a warning about a potentially harmful effect that has yet to occur.

16. Especially on the right. To find a left extremist group in *Republic.com* requires going back in time to either "the civil rights movement, the antislavery movement, or the movement for sex equality. Each of these movements was extreme in its time, and within-group discussion certainly bred greater extremism; but extremism should not be a word of opprobrium." P. 75. He does not say that about any group on the right, past or present.

will have more citizens on the extremes and the distance between left and right will become greater.

If the public is balkanized and if different groups are designing their own preferred communications packages, the consequence will be not merely the same but still more balkanization, as group members move one another toward more extreme points in line with their initial tendencies. At the same time, different deliberating groups, each consisting of like-minded people, will be driven increasingly far apart, simply because most of their discussions are with one another. (p. 66)

The problem consists of group polarization combined with social fragmentation.

The keys to group polarization are the emphasis on group identity and the ability of group members to maintain relative anonymity. As Sunstein notes: "These are of course characteristic features of deliberation via the Internet" (p. 72). A necessary conclusion is that the findings of the literature on group polarization apply similarly to the Internet, even though everything on the Internet happens on a computer screen. Sunstein has been writing within this social-science literature for some time now, and I have no reason to doubt his conclusion.¹⁷

Sunstein tells us that group polarization is occurring on the Internet, and he offers links as the key remedy. For those who use them, links make alternatives available. In a pre-Internet world, newspapers or television networks did the same. And yet group polarization still occurred (or could occur). How are links going to hinder group polarization in an Internet world?¹⁸ Will a sufficient number of people (who meet the criteria for potential polarization) access them? Will they take the time to read them? Will reading the alternatives then move them back toward the center (or halt their movement to the extreme)? Sunstein offers no evidence on this score.¹⁹

In a book concerned with a problem premised on the existence of a body of social-science evidence, one would expect the remedy also to be grounded in social-science evidence. Sunstein's remedy is wonderfully Brandeisian: more speech, speech rebutting speech. But the concept of group polarization is premised on the fact that

17. Indeed, I was unaware of this literature until an earlier paper by Sunstein brought it to my attention. With the exception of Dan Hunter, *Philippic.com*, 90 CAL. L. REV. 611 (2002) (reviewing *Republic.com*) my knowledge of it is limited to Sunstein's writings. Hunter doubts Sunstein's analysis of the literature's application to the Internet. *Id.* at 641-52. It would be presumptuous (not to mention preposterous) for me to read the literature and pretend I could offer an answer as to who is correct.

18. Links to alternatives that currently exist are largely designed "to show how dangerous, or dumb, or contemptible the views of the adversary really are." Pp. 59-60. To work, Sunstein's remedy will have to deal in some way with this problem (if it is a problem).

19. "[W]e need to have a much fuller sense of the extent to which people are using the Internet to engage in deliberation only or mostly with those who are like-minded." P. 208.

counterspeech is not accessed or else doesn't get through. The Internet may make acquisition of alternative information easier, but this doesn't guarantee that the information will be accessed even if there is an offered link on the page.

If our democracy is threatened by group polarization via the Internet, then I doubt links will save us: The solution seems incommensurately weak compared to the problem — and this assumes there is evidence that links would work. If having alternatives available at the click of a mouse will keep our democracy vibrant, then it must be in pretty good shape already.

Much the same can be said for Sunstein's secondary idea of deliberative domains on the Internet where one can go for discussions of public issues by people with differing viewpoints. Who is going to go there? How many of these will be individuals who would otherwise be in an ideological chatroom gaining reinforcement of preexisting views? I'm all for democratic deliberation, and having some websites available is probably a good thing,²⁰ but I don't see how it relates to group polarization, and I wonder if those who would use it are those who need it most.²¹

The fit between disease and prescription is so bad that one searches for explanations. Perhaps it is preventive medicine. Possibly it is a regulator's desire for regulation for regulation's sake. Both possibilities make sense, and both are suggested in the Afterword (pp. 204, 210).

If large numbers of people take advantage of Sunstein's links and the incredible opportunities the Internet provides, then maybe group polarization will not occur. Or, even if it does, its incidence might be so minimal that it would not matter.

Regulation for regulation's sake is an answer to Justice Stevens's opinion in *Reno v. ACLU*,²² striking down the Communications Decency Act. In an effort to distinguish its decision in *FCC v. Pacifica Foundation*²³ from the problems associated with the Internet, the Court distinguished broadcasting from the Internet. Within the same paragraph the Court noted the "history of extensive Government regulation" of broadcasting and the "type of government supervision and regulation" that has not been attempted with the Internet.²⁴ To some extent the Court was saying that broadcasting could be regulated because it always had been whereas the Internet can't because

20. A subsidy for goodies that appeal to academics has a nice democratic ring to it.

21. My colleague Neil Netanel called my attention to the miserably low levels of discussion, tolerance, and exchange on discussion sites of the *New York Times* and CNN.

22. 521 U.S. 844, 849-85 (1997).

23. 438 U.S. 726 (1978).

24. *Reno*, 521 U.S. at 868-69.

government hasn't. The message is that if Congress wants to regulate later, it must regulate now.²⁵ Sunstein has an interesting sentence in the Afterword implying that one of his purposes in writing *Republic.com*, albeit not the prime one, was to get some regulation going.²⁶ Easy and innocuous regulations at first; more extensive ones, if necessary, later.

WHAT'S DOWN?

The First Amendment.²⁷ In seven separate places (eight including the Afterword (p. 210)), Sunstein states that the First Amendment is not absolute (pp. 14, 142, 151 (twice), 153, 166, 198). Why so often? Wouldn't the quick examples of President Clinton's perjury or someone's stock fraud be sufficient to show anyone that the First Amendment could not absolutely protect all speech? Seven times seems at least five too many.

Sunstein might respond that he is writing for an (Internet) culture that has so imbedded the idea of an absolute First Amendment that the obvious truth must be asserted and reasserted as frequently as possible, just to break through the intellectual barriers to receiving the message.²⁸ Seven should do it and thereafter the readers will accept his very accurate synthesis of the relevant First Amendment doctrine.

Still, seven is a lot, especially in a short book. That leads me to an alternative hypothesis. Sunstein is letting the sentence "the First Amendment is not absolute" do some intellectual lifting. For over a decade Sunstein has promoted a New Deal²⁹/Madisonian³⁰/vision of the democratic³¹ vision of the First Amendment³² — one where the idea that the First Amendment would preclude governmental action is

25. L.A. Powe, Jr., *Program Content Regulation Revisited*, in COMMUNICATIONS DEREGULATION AND FCC REFORM 145, 169-70 (Jeffrey A. Eisenach & Randolph J. May eds., 2001) (suggesting that the Court is no longer enamoured with its broadcast jurisprudence).

26. "[T]he *principal* goal of this book is not to argue for more government regulation of the Internet." P. 210 (emphasis added).

27. Or, with more honesty, the liberal interpretation of the First Amendment.

28. This could be yet another example of group polarization. Internet aficionados go to the extreme view on the meaning of free speech, and the most extreme available for their general view is that anything goes all the time.

29. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) [hereinafter Sunstein, *Free Speech Now*]; Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137 (1994) [hereinafter Sunstein, *A New Deal for Speech*].

30. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

31. While he never uses the phrase "democratic First Amendment," *Republic.com* fairly rings with the idea — "promoting the values associated with a system of free expression, emphatically including democratic self-government." P. 198; *see also* pp. 146, 154.

32. The First Amendment is apparently not so sweet with just its plain old name.

understood to be misguided and backward (and perhaps antidemocratic as well). One may start thinking about the First Amendment in Sunstein's world by noting that: the First Amendment is not absolute; therefore, government may take some necessary actions — to wit, the ones he advocates — which, of course, will improve³³ the quality of our democracy.³⁴

Links will do that.³⁵ Therefore his “must carry” proposal must be constitutional. But is it? After quickly mentioning the *Red Lion Broadcasting v. FCC*³⁶-*Miami Herald v. Tornillo*³⁷ split, Sunstein introduces *Turner Broadcasting System v. FCC* (“*Turner II*”)³⁸ by noting that “the Court has nonetheless upheld legislation that imposes ‘must carry’ rules on cable television providers” (p. 183). The cable must-carry rules require cable systems to provide channels for local commercial and educational stations when (and if) those stations demand that their signal be carried on the cable system. Sunstein explains the Court's 5-4 ruling³⁹ in two different ways. First, the must-carry rules assure “that the public has access to a multiplicity of information sources.”⁴⁰ Second, the rules operate to prevent the “potential for abuse of . . . private power over a central avenue of communication.”⁴¹ The latter is the bottleneck monopoly theory. The former sounds just like Sunstein's democracy-enhancing theory. But it must be tied back into Congress's conclusion that must carry was necessary to preserve an unknown number of over-the-air stations that would go dark if not given cable access.⁴² Sunstein alludes to this in a prior sentence,⁴³ but it is about Congress rather than the Court.

33. Or, to put a little rational basis jargon in, may be thought to improve.

34. Sunstein writes: “A central part of the U.S. constitutional tradition, then, places a high premium on speech that is critical to democratic processes, and is hardly hostile to government efforts to promote such speech.” Pp. 155-56.

35. So Sunstein asserts.

36. 395 U.S. 367 (1969) (sustaining the Fairness Doctrine).

37. 418 U.S. 241 (1974) (holding unconstitutional a right of reply statute).

38. 520 U.S. 180 (1997) [hereinafter *Turner II*].

39. Actually, and sensibly given the book's target audience, he never mentions the vote.

40. P. 183 (quoting *Turner II*, *supra* note 38, 520 U.S. at 227 (Breyer, J., concurring) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) [hereinafter *Turner I*] (internal quotation marks omitted))).

41. *Id.*

42. Justice Breyer agreed that the must-carry rules extracted a First Amendment price, but he found the price balanced out: “The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public.” *Turner II*, *supra* note 38, 520 U.S. at 226 (Breyer, J., concurring).

43. “Congress defended these requirements as a way of ensuring the economic viability of broadcasters, on whom many millions of Americans continue to rely (about 30% as of 2000).” P. 183.

Cable must-carry rules, like both the Fairness Doctrine and the right-of-reply statute in *Tornillo*, do not add any information to the system. People often attempt to claim that they do, but that cannot be accurate unless one assumes that the channel (or airtime) would be left idle. What must-carry rules do is substitute one piece of (preferred) information for another piece (or type) of information that would otherwise occupy that time slot or channel. It is different information, not more information.

Turner II, as Sunstein fully recognizes (p. 184), does not answer the question of whether his must-carry links would pass constitutional muster. It is too Orwellian to claim that the Internet is a bottleneck monopoly. Nor are various websites likely to fold unless they are linked to other websites. If the links proposal is constitutional, it has to be because “it seeks to facilitate . . . public discussion and informed deliberation”⁴⁴ and therefore is designed “to promote goals associated with deliberative democracy” (p. 184). A plus for Sunstein is that his proposal does not require any substituting of information; it really does seem like something that simply adds. The minus is that rhetoric about deliberative democracy alone is not enough to save a statute that requires a speaker to say either more or less than the speaker wishes to say. High-sounding phrases did not convince the Court in *Tornillo*,⁴⁵ *Buckley v. Valeo*,⁴⁶ or *First National Bank of Boston v. Bellotti*.⁴⁷ When they did work, in cases like *Austin v. Michigan Chamber of Commerce*,⁴⁸ *Nixon v. Shrink Missouri Government PAC*,⁴⁹ and *FEC v. Colorado Republican Federal Campaign Committee*⁵⁰ it was because, as in *Turner II*, they were attached to something else — in those cases, the appearance of corruption. The reason the Court requires something more than good intentions is simple. Promoting democratic deliberation is a game that anyone can play — Sunstein has done it a lot. To separate the good from the bad, the Court has wisely demanded more than a good heart before accepting speech-limiting proposals.

44. P. 183 (quoting *Turner II*, *supra* note 38, 520 U.S. at 227 (Breyer, J., concurring)).

45. 418 U.S. 241 (1974).

46. 424 U.S. 1 (1976) (striking down expenditure limitation provisions of campaign-finance reform).

47. 435 U.S. 765 (1978) (striking down a limit on corporate expenditures on a ballot initiative).

48. 494 U.S. 692 (1990) (upholding limit on corporate expenditures in candidate election).

49. 528 U.S. 377 (2000) (upholding contribution limitations in candidate election).

50. 533 U.S. 431 (2001) (upholding the prohibition of party expenditures coordinated with those of the candidate because otherwise contribution limits could be too easily circumvented).

There is one notable exception — broadcasting's Fairness Doctrine.⁵¹ For decades it was the regulator's dream, a policy that (its supporters believed) added views, promoted debate, and helped create an informed citizenry. The Fairness Doctrine required a broadcaster to determine if it had presented one side of a controversial issue of public importance and then, if so, to select how the other side would be presented and who would present it. A decade ago Sunstein announced that *Red Lion*, in sustaining the Fairness Doctrine by almost suggesting that it was constitutionally compelled, was *the New Deal First Amendment interpretation*. *Red Lion* recognizes and sustains the government's essential role in promoting deliberative democracy (and the importance of not leaving this to the workings of the marketplace).⁵²

Yet the Fairness Doctrine is becoming a distant memory.⁵³ The debates that led to its demise never quite joined issue. The supporters of the doctrine cited its rhetoric of fairness, balance,⁵⁴ and an informed citizenry. They claimed that it operated in accordance with its lofty rhetoric; therefore it was terrific. To the extent it did not operate to achieve its objectives the fault was the broadcasters' breach of their fiduciary duty to their viewers and listeners (and the failure of the FCC to do its job).⁵⁵ Opponents of the Fairness Doctrine charged that it operated as a tax on controversy and therefore necessarily chilled debate; when debate did occur, it was limited to the two establishment viewpoints.⁵⁶

Even as he embraced *Red Lion*, Sunstein understood that the case against the Fairness Doctrine was compelling.⁵⁷ In *Republic.com* he offers a novel way of turning the Fairness Doctrine's defeat into victory. Still holding to the now-proven⁵⁸ view that the Fairness

51. Even this may not be an exception if one believes that "scarcity" (no matter how absurd) was the something else to which the court was attached.

52. See Sunstein, *Free Speech Now*, *supra* note 29, at 275-78; Sunstein, *A New Deal for Speech*, *supra* note 29, at 146-48.

53. See Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985) (finding the Fairness Doctrine unconstitutional); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (upholding FCC's conclusion that Fairness Doctrine is unconstitutional).

54. This was before Fox News.

55. I spent two years on a national ACLU committee considering the ACLU's position on the Fairness Doctrine, and the text faithfully describes its supporters' position (which in turn mirrors the public debate). A truly vigorous defense of the Fairness Doctrine, made by a former FCC Chairman on the eve of its demise, is Charles D. Ferris & James A. Kirkland, *Fairness — The Broadcaster's Hippocratic Oath*, 34 CATH. U. L. REV. 605 (1985).

56. See Krattenmaker & Powe, *supra* note 12, at 237-75.

57. Cass Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 525-26 (2000).

58. Prior to the demise of the Fairness Doctrine there was no way to prove — rather than assert based on pretty good premises — what the world would look like were there no

Doctrine minimized opportunities to hear controversial views, he implies this was a plus. Undoubtedly thinking of Rush Limbaugh (and would-be imitators even farther to the right), he notes that the “growth of a wide variety of issues-oriented programming [made possible by the demise of the Fairness Doctrine] — expressing strong, often extreme views, and appealing to dramatically different groups of listeners and viewers — is likely to create group polarization” (p. 74). Sunstein’s links proposal is nowhere near as likely to be effective in toning down controversy, although it will have some of the implementation problems of the Fairness Doctrine.⁵⁹

Just as defining the controversial issue was the key to choosing the other side under the Fairness Doctrine, so, too, with Sunstein’s must carry. Assuming that a website is covered by the must-carry links requirement, to whom should it offer links? Start with the two political parties. Obviously they should link each other. But should the Republicans also link the Reform site and the Democrats link the Greens? Perhaps everyone should link everyone!

What about nonpolitical ideological websites? Let’s use the Brookings Institute, which might consider itself so mainstream that it has no ideology. But if it must have links, then to whom? Suppose it selects the Institute of Policy Studies (“IPS”) on the left and the Cato Institute on the right. Both are ideological opposites, and accessing their websites would offer plenty of diversity. But what about the American Enterprise Institute (“AEI”)? Wouldn’t it be a more logical link? If Brookings avoids AEI and just links to IPS and Cato, what will someone who visits each website conclude except that Brookings is sweet reasonableness incarnate?⁶⁰ This is something that might not be so readily inferable if the range of offered links included AEI.

I am not sure what lessons can be drawn from this. One is that for many websites the selection of links will offer the possibility of successful market positioning.⁶¹ A second and more likely response is

such doctrine. Once it was repealed, a before and after could be studied, and the proof was overwhelming that there was more controversy on radio (the medium studied) without the Doctrine. Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”?* *Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (answering the title question with a resounding yes).

59. I will leave the sanctions problem to Sunstein or others later and just note in passing that the characteristics of a partisan or popular website that needs to provide links may be contestable. Sunstein, for instance, was surprised by an email from a reader of *Republic.com* suggesting that Sunstein was a hypocrite because his own website lacked links to others. Sunstein has remedied the defect (if any). Lisa Guernsey, *Evolving E-Books Let Authors Answer Critics*, N.Y. TIMES, May 10, 2001, at G4, available at <http://www.nytimes.com/2001/05/10/technology/10CASS.html>.

60. I offer this example based on Sunstein’s own websites, <http://www.FreeRepublic.com> and <http://www.law.uchicago.edu/faculty/sunstein/>. When he created links they were to Catherine MacKinnon and Richard Epstein. Who wouldn’t believe Sunstein is the reasonable party in that grouping?

61. As discussed in the current efforts to use links to demonize. *See supra* note 18.

that anyone who takes the initiative of jumping from one website to another is likely to learn of AEI (or the relevant choice) in some way or another. In all likelihood, this heads right back to the earlier question. Who is likely to use the links and do these individuals really need a regulatory requirement that they be provided? Before advocating legislation, we need some data acquisition.

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Looking back, we can see the effects of Gutenberg's invention on European Christendom. The printing press was indeed revolutionary.

In the past century, virtually every new communications technology has been charged with upsetting existing morality and societal harmony.⁶² It began with silent movies. By the 1930s, it was the "talking pictures." Then, following World War II, it was comic books quickly shifting to television.⁶³ Then all the best sex and violence migrated to cable. Now it's the Internet. Maybe democracy — that worst form of government apart from all the alternatives — is inherently at risk. Or maybe we always fear the unknown.

Cass Sunstein has a wonderful corpus of scholarship. But *Republic.com* does not add to it even though the initial reviews (helpfully gathered on the back of the paperback edition) were highly positive. They are best understood as the analogue of the dot-com bubble of the late 1990s when virtually everything with ".com" at the end of its name was wildly overvalued. Just as it would have been better had many final holders of dot-com stock not invested, it would have been better if Sunstein had not published *Republic.com*. The Afterword suggests that Sunstein knows this as well.

62. Radio was the exception, perhaps because it was so hard to take it seriously. See LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 22-30 (1987).

63. These are described in more detail in Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1288-92 (1978).