

## REVIEWS

### Whose Republic?

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*Republic.com*. Cass Sunstein. Princeton, 2001. Pp 3, 224.

The printing press helped create modern nationalisms, as books and newspapers came to be written in the vernacular, encouraging a conception of a shared community among groups of people who would never actually meet.<sup>1</sup> It thus seems only natural to ask what today's innovation in mass communication, the Internet, will mean for political communities. In his important new book, *Republic.com*, University of Chicago Law Professor Cass Sunstein argues that, by increasing the possibility of community, cyberspace might paradoxically undermine our republic (pp 15–16).

Sunstein's concern is growing insularity, made possible by a technology that allows one to limit one's encounters to the familiar and the comfortable. Via the Web, gun owners will kibitz with other gun owners, Marxists with other Marxists, and environmentalists with other environmentalists. Gun owners will not have to face pacifists; Marxists will not have to face capitalists; environmentalists will not have to face developers.<sup>2</sup> The Internet, Sunstein warns, enables us to

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<sup>1</sup> See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 37–46 (Verso rev ed 1991) (detailing the effects of early print technology on capitalist communities).

<sup>2</sup> To use Sunstein's own examples from a companion e-book to *Republic.com*:

If Republicans are talking only with Republicans, if Democrats are talking primarily with Democrats, if members of the religious right speak mostly to each other, and if radical feminists talk largely to radical feminists, there is a potential for the development of different forms of extremism, and for profound mutual misunderstandings with individuals outside the group.

Cass Sunstein, *Echo Chambers* 5 (Princeton 2001), available online at <<http://www.pup.princeton.edu/sunstein/echo.pdf>> (visited Feb 19, 2002).

dispense with shared experience and unexpected encounters—parts of life that he believes are essential to a flourishing republic. Through the Internet, we may choose to find only “echo chambers” of our own opinions, magnifying and confirming our inclinations and resulting in a deeply polarized society. Our republic is in jeopardy, Sunstein warns.

The obvious (but important) critique of this vision is that cyberspace in fact also functions exactly the opposite way—it allows us to discover the new, to learn about the unfamiliar, to begin to understand one another.<sup>3</sup> Indeed, this is the theme of the early reviews of the book.<sup>4</sup> Which of these possible uses of the Internet—the Internet as a tool for discovery and education, or the Internet as an echo chamber—will find more adherents is an empirical question that we may not yet be able to answer.<sup>5</sup> Sunstein himself admits this in a response to his critics in the pages of the *Boston Review*.<sup>6</sup>

I will approach Sunstein’s claim from a different perspective. The problem with Sunstein’s claim is that the shared experiences of the republic he seeks to maintain are principally those by and for the majority. The shared experiences he champions tend to be assimilationist rather than multicultural. They elide the experiences and concerns of minority groups. Ultimately, then, Sunstein’s book falls short because it fails to address the question: Whose republic is it, anyway?<sup>7</sup>

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<sup>3</sup> The cacophony of results offered by search engines represents the obvious example of this phenomenon. In the weeks after the September 11 terrorist attacks on the United States, two of the most popular keywords searched on the Internet were “Afghanistan” and “Taliban.” See Google Zeitgeist Archive, available online at <<http://www.google.com/press/zeitgeist/weeks-sep01.html>> (visited Feb 19, 2002) (listing the “Top 10 Gaining Queries” during the weeks of September 10 and 17). The search results would inevitably represent a wide range of perspectives on these subjects.

<sup>4</sup> See, for example, Henry Jenkins, *Challenging the Consensus*, 26 *Boston Rev* 16, 17 (Summer 2001) (“Insofar as participating online broadens the range of people with whom we interact on a regular basis, it potentially diversifies our conversations about mass-media content.”); Thomas S. Ulen, *Democracy and the Internet*, 2 *J L Tech & Pol* 224 (2002) (arguing that the Internet and particularly Web-surfing result in frequent exposure to unexpected and unwanted views); Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 *Stan L Rev* 831, 857 (2001) (identifying strong citizen demand for general news presentations, which may be met by the use of the Internet).

<sup>5</sup> Early reports are quite encouraging about the use of the Internet to establish diverse relationships and to enhance learning. A Pew Internet study reports that half of those who participate in online groups say the Internet has helped them to become acquainted with people they would not otherwise have met, while a quarter say the Internet has helped them connect with people from racial, ethnic, or economic backgrounds different from their own. John B. Horrigan, *Online Communities: Networks That Nurture Long-Distance Relationships and Local Ties* 18 (Pew Internet 2001), available online at <[http://www.pewinternet.org/reports/pdfs/PIP\\_Communities\\_Report.pdf](http://www.pewinternet.org/reports/pdfs/PIP_Communities_Report.pdf)> (visited Feb 19, 2002).

<sup>6</sup> Cass Sunstein, *Is the Internet Bad for Democracy?: Cass Sunstein Replies*, 26 *Boston Rev* 19, 19 (Summer 2001). He also makes brief mention of this in his conclusion to *Republic.com*: “Of course many people will be sufficiently curious to use new technologies to see a wide range of topics and views” (p 192).

<sup>7</sup> Compare Homi Bhabha’s criticism of the Museum of Modern Art for its limited concep-

The Internet, I will argue, is crucial to the project of deepening democracy to include marginalized groups. I agree with Sunstein that the Internet may indeed revolutionize citizenship, but I suggest that it will do so in ways different from those he perceives. Cyberspace helps give members of minority groups a fuller sense of citizenship—a right to a practice of citizenship that better reflects who they are. It does so by helping to counter the assimilationist tendencies of mass culture, mass politics, and economics. In this way, cyberspace plays an important role in the multicultural project of including everyone in political and civic society.

At the same time, cyberspace is helping to create new types of republics. Through cyberspace we see the creation of new transnational communities and the strengthening of existing ones. It advances, for example, the creation of transnational environmental, feminist, libertarian, and even, ironically enough, antiglobalization movements.<sup>8</sup>

Cyberspace may also support the project of modern cosmopolitans by bringing people all over the world into daily contact with one another. This kind of interaction will bolster the cosmopolitan goal of diminishing the importance of national borders in favor of an enhanced sense of our common humanity. Cyberspace may ultimately help make us think of ourselves as first and foremost “citizens of the world.”

My vision of the Internet’s impact on citizenship leads to very different policy prescriptions than those offered by Sunstein. While Sunstein focuses on the creation of widely shared encounters on the Internet and exposure to differing views (through mechanisms such as mandated links to opposing viewpoints and public financing of educational programming) (pp 180–90), I would argue that the primary democratic concern should be with bringing the benefits of the Internet to all people. Specifically, because the Internet empowers citizens, a concern for equality of citizen empowerment should cause us to focus on the “Digital Divide.” The Digital Divide prevents most of the people of the world from obtaining the full benefits of participation in the Information Age, including the benefit of full citizenship (pp 20–22).

More than two centuries ago, Madison worried about how factionalism might divide the new country.<sup>9</sup> In *Republic.com*, Sunstein

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tion of modernity. Bhabha, until this year Sunstein’s colleague at the University of Chicago, labeled his lecture, given at the museum, *Whose Modernity Is It Anyway?*. See Homi Bhabha, *Whose Modernity Is It Anyway?*, Studies in Modern Art Sound Recording No 97.50, Museum of Modern Art Archives (Nov 19, 1997). Also compare Gerald L. Neuman, *Whose Constitution?*, 100 Yale L J 909, 923–25, 927–43 (1991) (inquiring into the scope of U.S. constitutional protections for aliens).

<sup>8</sup> See, for example, <<http://www.corpwatch.org>> (visited Jan 31, 2002) (offering anti-corporate-led globalization information).

<sup>9</sup> See Federalist 10 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 77 (Mentor

brings the concerns of the Federalist Papers to the Information Age. How will our democracy deal with the heterogeneity fostered by the Internet? How will the greater, unmediated access to information affect civic debate? Will a republic characterized by a patchwork quilt of informational communities tear apart the national fabric? Sunstein has asked crucial questions that cyberlaw scholars have previously neglected.<sup>10</sup> What is more, Sunstein has brought to the subject his deep and wide-ranging intellect, drawing together insights and arguments from the work of Justice Brandeis (pp 46–48), John Dewey (p 109), James Madison (pp 154–55), and Amartya Sen (p 30). As we might expect from one of the most important legal thinkers of our time, Sunstein engages the subject powerfully and creatively. Yet, his argument falls short in some significant respects. It is these aspects of his argument that I will focus on here. Sunstein advises that we must test any communications system by its impact on democracy (p 195).<sup>11</sup> In this Review, I take up his challenge.

### I. THE DAILY THEM

Sunstein worries principally about the consequences of the ability of Web-surfers to create their own personal universes of information. Websites allow us to customize what information we want to see when we log on. When we flip on the computer, we face what MIT's Nicholas Negroponte referred to presciently as the "Daily Me."<sup>12</sup> Sunstein

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1961) (arguing that a well-constructed Union should control the violence of factions). Madison's essay has been called the "ur-text" of American constitutional theory. Larry Kramer, *Madison's Audience*, 112 Harv L Rev 611, 611 (1999).

<sup>10</sup> Sunstein himself raised some of these issues in an early article that still reads as fresh. See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 Yale L J 1757, 1785–87 (1995) (suggesting that new information technologies might reduce deliberation and increase social balkanization).

<sup>11</sup> Sunstein believes that this test should not consist principally in how well the democracy satisfies individual preferences (p 98). Kenneth Arrow has already demonstrated that such an approach will prove ultimately wanting, at least from the standpoint of consistency with some fundamental values of rationality. See Kenneth Arrow, *Social Choice and Individual Values* (Wiley 2d ed 1963). See also Amartya K. Sen, *Collective Choice and Social Welfare* (Holden-Day 1970) (examining multiple relationships between individual preferences and social choice). Sunstein's claim challenges some of the underlying assumptions of the public choice approach to the institutions of democracy, which tend to assume uncritically the imperative of individual preference satisfaction. See, for example, Robert D. Cooter, *The Strategic Constitution* 7 (Princeton 2000) (defining public choice theory and identifying relevant academic literature); Dennis C. Mueller, *Constitutional Democracy* 50 (Oxford 1996) ("As the underlying behavioral postulate for the purely positive analysis of all human behavior, the applicability of the rational self-interest assumption can be challenged. But as the foundation of a *normative* analysis of political institutions, the assumption seems unassailable."). Such simple preference satisfaction has a number of deficiencies, including the likelihood that it will, as Lani Guinier has reminded us, lead inexorably to the disregarding of minority concerns. Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 2–7 (Free Press 1994).

<sup>12</sup> Nicholas Negroponte, *Being Digital* 153 (Knopf 1995).

worries that the “Daily Me” will keep us from having to face opposing views or shared experiences (pp 89–103).

I begin with a technical note. Technology has not yet progressed far enough to enable us to command the computer to present us only with what we find comfortable. We cannot yet tell the computer to screen automatically for our politics. Even setting preferences to indicate interest in a particular subject—science, politics, or Middle Eastern affairs, for example—will not necessarily lead one only to see information that one will find comforting. This is because Web filters are not sufficiently developed to comprehend the political subtleties of a piece of writing or art.<sup>13</sup> Sarcasm, irony, and viewpoint remain beyond the apprehension of popular Web filters. Rather, filtering technology matches sought-after items based on keywords and popularity.<sup>14</sup> Human editors must intervene somewhere in the process if a particular political orientation is to be preferred. Of course, such editors are available: witness *The National Review*, *The Weekly Standard*, and *The Nation*, all of which offer online versions.<sup>15</sup> But the computer by itself will probably not provide such a filter, at least not until the next revolution in artificial intelligence applications.

An amusing example can be found on *Republic.com*'s dust jacket. After summarizing Sunstein's argument, the jacket jarringly invites readers to “receive e-mails about new books in your area of interest.” Didn't the publisher read the book? Isn't this exactly the kind of “Daily Me” activity about which Sunstein worries? Yes and no. Yes, in the sense that it reflects personalized Web-filtering, but no in the sense that it refers the reader to books that may not necessarily conform to his or her views. The e-mailed suggestions will be based on *subject*

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<sup>13</sup> Experimental programs exist that try to comprehend textual passages, but only within narrow, previously specified domains of knowledge. See, for example, Roger H.L. Chiang, Cecil Chua, and Veda C. Storey, *A Smart Web Query Engine for Semantic Retrieval of Web Data and Its Application to E-Trading*, 1959 Lecture Notes in Comp Sci 215 (2001); Teppo Kurki, Sami Jokela, and Reijo Sulonen, *Agents in Delivering Personalized Content Based on Semantic Metadata*, in San Murugesan and Daniel E. O'Leary, eds, *Intelligent Agents in Cyberspace: Papers from the 1999 AAAI Symposium 1, 2* (AAAI 1999).

<sup>14</sup> Karen R. Diaz and Nancy O'Hanlon, *Off the Shelf & onto the Web: Web Search Engines Evolve to Meet Challenges*, 38 Reference & User Serv Q 247, 248 (1999); Paul Greenfield, Peter Rickwood, and Huu Cuong Tran, *Effectiveness of Internet Filtering Software Products 8* (NetAlert and the Australian Broadcasting Authority 2001), available online at <<http://www.aba.gov.au/internet/research/filtering/filtereffectiveness.pdf>> (visited Mar 28, 2002); Karen G. Schneider, *A Practical Guide to Internet Filters* 3–12 (Neal Schuman 1997). The W3 Consortium has created a specification called Platform for Internet Content Selection (“PICS”) that enables content producers and third parties to rate websites according to particular criteria. See <<http://www.w3.org/PICS>> (visited Mar 29, 2002). This system depends on people to provide descriptive “metadata” information about websites. Id.

<sup>15</sup> See <<http://www.nationalreview.com/>> (visited Mar 29, 2002); <<http://www.weeklystandard.com/>> (visited Mar 29, 2002); <<http://www.thenation.com/>> (visited Mar 29, 2002).

matter, not on perspective. Unless the publisher reliably prints books only from a certain perspective, there is no guarantee that the reader will find the occasional book suggestion from Princeton University Press politically agreeable.<sup>16</sup>

But there is a more central problem with Sunstein's claim. He fails to explore the nature of the shared experiences that he champions. What he neglects is the fact that for many members of minority groups, the shared experiences provided in the traditional mass media consist largely in a portrayal of the majority group, and the occasional, usually grossly distorted portrayal of the minority. While Sunstein acknowledges the fact that certain voices are "squelched" in our society (p 76), his focus on enhancing shared experiences ignores the reality that such experiences tend in large part to represent the interests of the dominant members of society. For minorities, then, the mass media generally provides the "Daily Them"—a vision of society focused on its dominant members. For minorities, this ubiquitous vision of society confirms their status as marginal and their concerns as irrelevant. Thus, Sunstein's lament about the loss of shared experiences ignores the stilted nature of those experiences.<sup>17</sup> Those whose lives are elided by such shared experiences might not bemoan their loss.

Sunstein himself strongly prefers diversity of opinion, not a homogeneous set of shared experiences.<sup>18</sup> Dialogue is at the heart of Sunstein's republicanism.<sup>19</sup> He seeks to ensure a robust civic debate in

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<sup>16</sup> Take the story of a friend who bought some books on sex education for his teenage child on Amazon.com. To find these books, he had to type in "children's sex education." The next time he logged onto Amazon.com, the site declared that some new books had been published on a subject in which he was interested—"pedophilia"! In making the suggestion, the computer's filtering software had relied simplistically on the keywords "children" and "sex," not understanding the nuances of the words.

<sup>17</sup> Sunstein has shown sensitivity to minority concerns in much of his other writing, in which he has argued powerfully for legal protections against invidious discrimination. See, for example, Cass R. Sunstein, *The Anticaste Principle*, 92 Mich L Rev 2410, 2411-13 (1994) (defending a conception of equality that forbids social and legal practices from transforming visible and morally irrelevant differences, such as race and gender, into systematic social disadvantage); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind L J 1, 1-2 (1994) (concluding that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex and thus constitutionally illegitimate); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, in Ellen Frankel Paul, et al, eds, *Reassessing Civil Rights* 22, 22 (Blackwell 1991) (cautioning that an antidiscrimination policy should be wary of relying solely upon markets to eliminate discriminatory practices); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U Chi L Rev 1161, 1163 (1988) (suggesting that the Equal Protection Clause is a "natural route" for constitutional protection against discrimination on the basis of sexual orientation).

<sup>18</sup> Sunstein cites Alexander Hamilton: "[T]he jarring of parties . . . will promote deliberation" (p 40), quoting Federalist 81 (Hamilton), in Rossiter, ed, *Federalist Papers* at 481 (cited in note 9).

<sup>19</sup> See Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L J 1539, 1548-50 (1988) (reviewing the emphasis on deliberation in republican thought).

which citizens must deal with opposing viewpoints.<sup>20</sup> Indeed, that is the essence of his concern with the filtering technology offered by the Internet.<sup>21</sup> Sunstein argues that “people should be exposed to materials that they would not have chosen in advance” (p 8). He believes that traditional “general interest intermediaries”—newspapers, magazines, and television broadcasts—provide such exposure (pp 11, 34).

What Sunstein neglects is that the general interest intermediaries provide shared experiences that focus almost exclusively on the concerns and experiences of the dominant group. In this way, the “Daily Them” offered by the traditional mass media denies minorities a sense of full membership in the general polity. If these groups were forced to rely on traditional popular media—the kind of media that Sunstein might praise for its forced “shared experience”<sup>22</sup>—they would find little that would affirm their interests, their concerns, or their way of life. To the extent the media of the majority exposes individuals to a diversity of voices, that diversity is in fact quite limited in scope.<sup>23</sup>

The primary avenues for shared experiences today can be found in the entertainment industry, the educational system, economic life, and the political process. Thus, it seems appropriate to examine what sort of shared experiences these realms in fact offer.<sup>24</sup>

Even today, at the start of a new century,<sup>25</sup> primetime television fails to reflect the diversity of America.<sup>26</sup> The poor and working class

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<sup>20</sup> Consider, for example, Sunstein’s criticism of political websites for lack of links to opposition (pp 59–60).

<sup>21</sup> See, for example, his survey of personalization options available on the Internet (pp 5–7).

<sup>22</sup> For example, Sunstein cites Israel’s earlier one-channel television policy, which he suggests enhanced democracy because everyone talked about the same issues (though he admits that it is ultimately “troublesome”) (pp 92–93). One is left to wonder whether Muslim, Christian, and other minority Israelis would concur that the one-channel policy usefully set a discussion agenda that they all shared.

<sup>23</sup> Cable television has expanded the possibilities for depictions of minority lives, with a proliferation of Spanish-language channels and one channel called Black Entertainment Television. But the addition of this diversity only helps demonstrate my point: the traditional mass information intermediaries preferred by Sunstein—the kind that diverse pockets of our society might share—have failed by and large to carry Latino or African-American voices.

<sup>24</sup> I focus here principally on the entertainment industry, as Sunstein’s concern is principally with mass information intermediaries. I omit a discussion of education because of the difficulty in finding metrics of the diversity conveyed by our educational system. On education and diversity generally, see Amy Gutmann, *Challenges of Multiculturalism in Democratic Education*, *Phil Educ* 86 (1995) (arguing that democratic education can integrate both civic and multicultural aims in principled combination). See also William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton 1998) (detailing the historical and cultural impact of race upon the collegiate admissions process).

<sup>25</sup> The long history of the negative depiction of racial and sexual minorities in the media scarcely needs mention. See, for example, Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *Cornell L Rev* 1258, 1259 (1992) (suggesting that conventional First Amendment free speech

are almost invisible; Latinos are rare and Latinas are rarer;<sup>27</sup> Asian-American families do not exist; immigrants appear occasionally, but only to drive cabs. A comprehensive study by a children's advocacy group concludes that a youth watching primetime television would most likely see a "world overwhelmingly populated by able-bodied, single, heterosexual, white, male adults under 40."<sup>28</sup> When minority groups are depicted in the media, they are generally stereotyped, with Asian women, for example, cast as "China dolls" or "dragon ladies" and Asian men denied any positive sexuality.<sup>29</sup> Latinos are commonly depicted as "criminals, buffoons, Latin lovers, or law enforcers."<sup>30</sup> The paucity of examples to the contrary proves the basic point.<sup>31</sup>

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doctrine is less able to deal with systemic social ills such as racism and sexism); Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 Leg Stud Forum 243, 245-53 (1991) (documenting racial stereotypes in popular American films); Doobo Shim, *From Yellow Peril through Model Minority to Renewed Yellow Peril*, 22:4 J Comm Inq 385 (1998) (describing the history of negative depictions of Asians in American media). For historical reviews of African-American media images, see Donald Bogle, *Prime Time Blues: African Americans on Network Television* (Farrar 2001); Patricia A. Turner, *Ceramic Uncles and Celluloid Mammies: Black Images and Their Influence on Culture* (Anchor 1994).

<sup>26</sup> A review of *Entertainment Weekly's Fall TV Preview* issue is instructive on primetime television's recent failure to reflect diversity. With the exception of UPN, which has a healthy number of shows with African-American casts, there are very few minority faces in the photos of lead actors of new season shows. See *Fall TV Preview*, Ent Weekly 34, 34-131 (Sept 7, 2001).

<sup>27</sup> See *Latinowood and TV: Prime Time for a Reality Check 3* (Children Now 2000), available online at <<http://www.childrennow.org/media/fall-colors-2K/fc3-2k-latino.pdf>> (visited Feb 19, 2002) (reporting that Latino characters account for only 3 percent of the total prime time population). On the lack of positive public Latino identity, see Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 NYU L Rev 965, 966 (1995) (identifying several sources of "Latino invisibility," including American media and historical conceptions); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 Harv Latino L Rev 101, 101-02 (1997) (arguing for the development of Latino legal scholarship discussing issues that implicate Latino community interests).

<sup>28</sup> *Fall Colors 2000-01, Prime Time Diversity Report 2* (Children Now 2001), available online at <<http://www.childrennow.org/media/fc2001/fc-2001-report.pdf>> (visited Feb 19, 2002).

<sup>29</sup> See *A Memo from MANAA to Hollywood: Asian Stereotypes* (Media Action Network for Asian-Americans), available online at <[http://www.manaa.org/a\\_stereotypes.html](http://www.manaa.org/a_stereotypes.html)> (visited Feb 19, 2002). See also David L. Eng, *Racial Castration: Managing Masculinity in Asian America* 15-19 (Duke 2001) (describing the feminization of the Asian-American male in the U.S. cultural imagination); Gina Marchetti, *Romance and the "Yellow Peril"* 2 (California 1993) (noting that Asian men are depicted as either "rapists or asexual eunuch figures," while Asian females are depicted as "sexually available to the white hero"); Darrell Hamamoto, *Monitored Peril* 6-31 (Minnesota 1994) (discussing how racist images have been imposed upon Asian-Americans on television); Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman* in M. Butterfly, *The World of Suzie Wong, and The Adventures of Priscilla, Queen of the Desert*, 5 Asian L J 99 (1998); Frank H. Wu, *Yellow: Race in America beyond Black and White* 39-78 (Basic Books 2002) (describing cultural perceptions of Asian-Americans).

<sup>30</sup> Dana E. Mastro and Bradley S. Greenberg, *The Portrayal of Racial Minorities on Prime Time Television*, J Broadcasting & Electronic Media 690, 691 (Fall 2000).

<sup>31</sup> Exceptions are so few as to be noteworthy. Consider, for example, a recent PBS series called "American Family," which portrays an average Mexican-American family. It was picked up by PBS only after being rejected by CBS. See David Kronke, *All in Another Family*, Daily News



Moreover, the shared experiences available in traditional spaces tend to be ones that confirm the feelings of the dominant group. This is unsurprising because they tend to be the rituals and works created by and for this group. Consider mainstream movies, for example. Could James Bond be played by a black man? Could Superman be gay? The icons of culture promote the heroism and superiority of the heterosexual white male. Media corporations believe such favoritism to be economically profitable,<sup>32</sup> perhaps because the economically powerful part of society prefers it.<sup>33</sup> While there are specialized works created for niche groups (for example, magazines like *The Economist*, *The Nation*, *Ebony*, *Ms.*, and *The American Spectator*), these are not the mass information intermediaries that Sunstein champions.

The discrepancy pervades not only the media, but politics and business as well. To the extent that our elected officials offer subjects of a shared experience, there too we find that that experience excludes significant sections of society. The U.S. Senate has no member who is African-American or Latino. The only Asian-Americans ever to sit in this august body are from Hawaii. Despite two centuries of shared experiences, democracy has not yet produced an American president who is not a white man. There has never been a minority woman on the United States Supreme Court, nor a Latino or an Asian-American man. American business may be somewhat better, but still there are disproportionately few titans of industry who reflect the diversity of America. While subjective and certainly flawed, *Entertainment Weekly's* annual ranking of the most powerful people in American entertainment suggests the skewed distribution of power in that industry: of the 136 individuals ranked in the most recent list, only ten appear to be members of racial minorities.<sup>34</sup> Only one racial minority (Oprah Winfrey) appears in the top ten positions, and only two (Winfrey and Denzel Washington) appear in the top fifty.<sup>35</sup> The gender dis-

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of LA L3 (Jan 23, 2002).

<sup>32</sup> Take, for example, the difficulty that Wayne Wang (the director of *Chan Is Missing*, *Dim Sum*, and *Smoke*) experienced in finding Hollywood producers who would finance films with primarily Asian-American casts. See Shim, 22:4 J Comm Inquiry at 404 (cited in note 25). Similar difficulties faced the director of the movie *Driving Miss Daisy*, even though its depiction of a noble African-American chauffeur represented but a "small step" for African-American men. See Patricia A. Turner, *From Homer to Hoke: A Small Step for African American Mankind*, 60 J Negro Educ 342, 342 (1991) ("Hollywood insiders did not believe that audiences would support a film about the relationship between a dignified Black driver and an aging White woman.").

<sup>33</sup> Compare Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405, 1412-13 (1986) ("The market . . . does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.").

<sup>34</sup> See *The Powers That Be*, Ent Weekly 36, 36-84 (Oct 26, 2001). The number of people exceeds the 101 positions because multiple people occasionally share the same position.

<sup>35</sup> See *id.*

tribution is also skewed: of the 136 individuals, only twenty-eight are women (only three of whom are racial minorities).<sup>36</sup>

These facts should cause concern under Sunstein's own theory of "group polarization." Sunstein argues that the fact that others around you feel a certain way will likely move you further in that direction (pp 65–69). If this is the case, the fact that mass information intermediaries consistently present the views of the dominant group will reinforce those views among the dominant group. At the same time, it will tend to assimilate members of minority groups in the direction of the ubiquitous perspectives of the dominant group.<sup>37</sup> But Sunstein's concern seems to be with "extremist" views rather than the deepening entrenchment of the majority or the assimilation of minorities into the mainstream. The latter movements do not seem to disturb him.

But, for minorities, the failure of American mass media, business, and politics to recognize minorities adequately is indeed quite serious.<sup>38</sup> If we accept the claim that our identities are shaped dialogically—that is, in dialogue with others—the only way to develop authentically is if society accepts us for who we are.<sup>39</sup> The failure of American "shared experiences" to embrace minority lives adequately—in media, politics, or business—impedes the minority individual's effort to find a "way of being human that is *my way*."<sup>40</sup>

For groups marginalized by mainstream society, the Internet offers a way to find community. American indigenous peoples can discuss issues of interest to many tribes at NativeWeb.org.<sup>41</sup> A gay youth growing up in a small town can find support through the Internet, despite a hostile local setting.<sup>42</sup> Sikh Americans might find community in

<sup>36</sup> See *id.*

<sup>37</sup> Assimilation might take the form of "covering," where the person downplays her identity. See Kenji Yoshino, *Covering*, 111 Yale L J 769, 772 (2002). The media supplies the principal way we learn *how to cover*.

<sup>38</sup> Consider the quip from the movie *Smoke Signals*: "The only thing worse than Indians on TV is Indians watching Indians on TV."

<sup>39</sup> See Charles Taylor, *The Politics of Recognition*, in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* 25 (Princeton 1994) (asserting that identity is shaped by others' recognition and thus misrecognition can be harmful and oppressive).

<sup>40</sup> *Id.* at 30.

<sup>41</sup> See <<http://www.nativeweb.org>> (visited Feb 19, 2002).

<sup>42</sup> See Benjamin Hurvitz, *Jordan Carter Creates Web Site for Gay and Lesbian Youth*, Advocate 40 (Aug 14, 2001):

After a childhood surrounded by anti-gay rhetoric from religious private schools in his rural Texas hometown, Jordan Carter entertained "constant thoughts of suicide" by the time he was twelve. Now nineteen, Carter is on the forefront of making sure other gay youth understand a lifesaving fact: they are not alone.

See also Jennifer Egan, *Lonely Gay Teen Seeking Same*, NY Times Mag 110, 110–13 (Dec 10, 2000) (reporting about a gay teen):

He called a crisis line for gay teenagers, where a counselor suggested he attend a gay support group in a city an hour and a half away. But being fifteen, he was too young to drive

cyberspace.<sup>43</sup> Cyberspace offers a respite from the median consumer perspective of mainstream media. Here is the world's diversity, in its full glory (and, at times, disgrace). While cyberspace is no substitute for a society in which minorities are not required to cover,<sup>44</sup> at least it allows minorities to find each other and, through the Web, lend each other support. Minority groups can also build coalitions with other minority groups. Of course, all this is possible even without the Internet, but the Internet serves importantly to reduce the costs of social and political mobilization.<sup>45</sup>

But Sunstein is wary of group identity, concerned that such identification increases group polarization: "Group polarization will significantly increase if people think of themselves, antecedently or otherwise, as part of a group having a shared identity and a degree of solidarity" (p 69). Sunstein does not seek to eliminate groups. He acknowledges the role that group mobilization has played historically in protecting civil rights and promoting minority ideas.<sup>46</sup> Rather, he seeks to ensure that groups are exposed to "competing positions," so that they do not become increasingly polarized (pp 75-79). But given the relentless drumbeat of the mass media, the kind of media that Sunstein praises, one wonders how easy it is for minorities to insulate themselves from contrary opinions, on the Internet or otherwise.

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and afraid to enlist his parents' help in what would surely seem a bizarre and suspicious errand. It was around this time that Jeffrey first typed the words "gay" and "teen" into a search engine on the computer he'd gotten several months before and was staggered to find himself aswirl in a teeming online gay world, replete with resource centers, articles, advice columns, personals, chat rooms, message boards, porn sites and—most crucially—thousands of closeted and anxious kids like himself. That discovery changed his life.

See also Trip Gabriel, *Some On-Line Discoveries Give Gay Youths a Path to Themselves*, NY Times A1, A16 (July 2, 1995) (quoting one youth explaining why he started a website for other gay youths as follows: "I did not want to see anybody go through what I went through, basically four years of hell in high school, knowing I'm different and not having anywhere to go").

<sup>43</sup> See, for example, <<http://www.sikhnet.com>> (visited Feb 19, 2002).

<sup>44</sup> Consider the Sikh man who covers by removing his turban and cutting his hair, hoping thereby to avoid being racially profiled as a terrorist. See Michael Winerip, *The High Cost of Looking Like an All-American Guy*, NY Times § 1A, 33 (Oct 21, 2001); Yoshino, 111 Yale L J at 879-904 (cited in note 37) (describing covering by racial minorities). Cyberspace does not hold the full liberating possibility of permitting the Sikh man to grow his hair long and avoid being racially profiled.

<sup>45</sup> Sunstein tips his hat to this possibility at the end of his book:

Consider, for example, private conversations among African-Americans, political dissenters, poor tenants, and members of religious minorities. Insofar as new technologies make it easier to construct enclaves for communication among people with common experiences and complaints, they are a boon as well as a danger. Internet discussion groups, for example, can allow people to discuss shared difficulties when they would otherwise feel quite isolated and believe that their condition is unique or in any case hopeless (p 193).

<sup>46</sup> "[G]roup polarization helped fuel many movements of great value—including, for example, the civil rights movement, the antislavery movement, and the movement for sex equality" (p 75).

Unless the Internet becomes the exclusive window on the world for many members of minority groups, it will be hard to escape exposure to the dominant discourse of American society.

Sunstein's focus on shared experience mandated by the state seems inconsistent with modern day multiculturalism.<sup>47</sup> While multiculturalists accept, and even embrace, the natural diversity of American society, Sunstein seems uneasy about it, and seeks to moderate "extreme" views through exposure to shared experiences. In this way, Sunstein departs from Madison's vision in Federalist 10: while Madison seeks a political structure that manages diversity,<sup>48</sup> Sunstein seeks one that changes the nature of groups themselves. While Sunstein's republicanism seems to favor assimilationist politics, in which members of various groups come to agree on a common conception of the good,<sup>49</sup> Madhavi Sunder has proposed an approach to groups that would cherish a diversity of conceptions of the good both between and within groups.<sup>50</sup>

A fundamental design principle of the Internet—"end-to-end design"—facilitates minority participation. The principle holds that the intelligence in the network lies principally at its endpoints.<sup>51</sup> Rather

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<sup>47</sup> Sunstein has distanced himself more explicitly from pluralism in earlier work, contrasting pluralism with his own civic republicanism. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan L Rev 29, 31–35 (1985) (defining and contrasting various forms of government and their disparate approaches to the problem of faction).

<sup>48</sup> Madison writes: "[T]he causes of faction cannot be removed and that relief is only to be sought in the means of controlling its effects." Federalist 10 (Madison), Rossiter, ed, in *Federalist Papers* at 80 (cited in note 9). Some scholars have gone so far as to characterize Madison as a pluralist. See Paul F. Bourke, *The Pluralist Reading of James Madison's Tenth Federalist*, 9 Perspectives in Am Hist 269, 272 (1975) ("Madison's discussion of faction and interest establishes the close fit of modern pluralist theory and the wider American political culture."); Alexandra Natapoff, *Madisonian Multiculturalism*, 45 Am U L Rev 751, 752–58 (1996) (applying Madisonian ideals to modern racial politics). Natapoff's positioning of Madison as a multiculturalist seems a little overstated. While Madison *accepts* the natural diversity of American society (especially in its economic classes), he does not seem to embrace it in the way of a true multiculturalist. The Founding Fathers were divided on whether the country should be characterized by pluralism or sameness; Madison's fellow Federalist John Jay celebrated not pluralism but unity—of religion, ancestry, and language: "Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manner and customs." Federalist 2 (Jay), in Rossiter, ed, *Federalist Papers* at 38 (cited in note 9).

<sup>49</sup> Compare Derrick Bell and Preeta Bansal, *The Republican Revival and Racial Politics*, 97 Yale L J 1609, 1610–11 (1988) ("For centuries in this country, however, blacks have served as the group whose experiences and private needs have been suppressed in order to promote the 'common good' of whites.").

<sup>50</sup> See Madhavi Sunder, *Cultural Dissent*, 54 Stan L Rev 495, 500–01 (2001) (describing how a "cultural dissent" approach to cultural conflict, which would recognize dissent with culture, would prevent law from suppressing internal cultural reform).

<sup>51</sup> See Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L Rev 925, 930–33 (2001) (outlining the architecture and consequences of end-to-end network design); Timothy Wu, *Application-*

than relying upon centralized authorities,<sup>52</sup> the Internet depends upon the contributions of its end users. The World Wide Web deepens this design principle: an important democratizing feature of the Web is that it enables anyone to become a content provider on the Internet even with little capital equipment or technical knowledge.<sup>53</sup> Tim Berners-Lee, the inventor of the Web, insisted that an editor be built into the Web browser, thereby allowing the user not only to view websites, but to create them.<sup>54</sup> Moreover, unlike a specialty newspaper or magazine, the content of a website becomes relatively widely accessible because of the increasing ubiquity of the Internet. In this way, even minority communities that are not well endowed with resources can use the Web to communicate widely.<sup>55</sup> The Internet and the Web thus allow an end user to make an end run around the mainstreaming of mass media intermediaries.<sup>56</sup> This is not to deny that much of the Web has come to follow a centralized, mass media content producer-consumer model,<sup>57</sup> with a few commercial websites receiving a large percentage of website visitors. Yet, minorities who desire to find (or create) their own communities on the Web can readily do so. The Web thus brings us closer to the ideal of a “semiotic democracy,” in which all individuals have the power to participate in the process of meaning-making.<sup>58</sup>

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*Centered Internet Analysis*, 85 Va L Rev 1163, 1192–93 (1999) (same).

<sup>52</sup> While standards-setting can be accomplished as a distributed, consensus-based project, the Internet does require a centralized root domain-name authority. See Joseph P. Liu, *Legitimacy and Authority in Internet Coordination: A Domain Name Case Study*, 74 Ind L J 587, 590–94 (1999) (introducing the domain name system and associated problems).

<sup>53</sup> See Tim Berners-Lee, *Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by Its Inventor* 38 (Harper 1999) (describing the Web as “much more than a tool for scientists”).

<sup>54</sup> See *id.* at 57. An “editor” is a term for a computer program that allows one to compose content, rather than merely to passively receive content produced by others.

<sup>55</sup> See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L J 1805, 1833 (1995) (arguing that new information technologies will “both democratize the information marketplace—make it more accessible to comparatively poor speakers as well as rich ones—and diversify it”).

<sup>56</sup> Even Congress and the Supreme Court have recognized the Internet’s role in fostering diversity in media. See Communications Act of 1996, 47 USC § 230(a)(3) (1994 & Supp 1999) (“The Internet and other interactive computer services offer a forum for a true diversity of political discourse.”); *Reno v American Civil Liberties Union*, 521 US 844, 870 (1997), quoting *American Civil Liberties Union v Reno*, 929 F Supp 824, 842 (E D Pa 1996):

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.”

<sup>57</sup> As Mark Lemley and Lawrence Lessig describe it, the architecture of cyberspace is pro-tenant; its end-to-end nature may be changing to a more centralized system controlled in large part by Microsoft and AOL Time Warner. See Lawrence Lessig, *The Future of Ideas* 172–73, 264–67 (Random House 2001); Lemley and Lessig, 48 UCLA L Rev at 939–40 (cited in note 51).

<sup>58</sup> John Fiske, *Television Culture* 236–39 (Methuen 1987) (defining “semiotic democracy” as a society in which all persons are free and able to participate in the generation and circulation of

Unfortunately, the price of pluralism is the existence of many points of view and communities that we may find personally distasteful. But if we are to allow for diversity, we cannot just limit diverse views to those that do not trouble mainstream sensibility. It is difficult to distinguish, as a matter of state policy, “extremist” enclaves from other heterodox ones. And further, it is unclear whether extremism is necessarily an evil that a healthy democracy should attempt to stamp out: is moderation a virtue when it comes to whether women should have the right to an abortion? Many people might feel strongly yes, but others, similarly certain, might feel no. In order to find a view “extreme,” one must have a metric for judging views, a metric which typically is defined according to the dominant understandings in society. *Republic.com* presumes, without defense, the virtue of Aristotelian moderation. Allowing for “extremism” does not mean that we must harbor violent people. Dangerous actions can, of course, be regulated, as can speech that incites such action.<sup>59</sup> But, in general, a free society will face the basic problem of the existence of groups that many would prefer to squelch.

Such pluralism may require a thin theory of citizenship, one that finds good citizenship in civic participation and debate rather than in substantial legal and social norms of behavior.<sup>60</sup> Sunstein’s republicanism is founded on civic participation and debate, but seems to demand more than these political activities: dialogue should lead to agreement on societal goals.<sup>61</sup> While societal agreement is certainly a worthy goal, in the multicultural societies in which we Americans (and, in fact, most of the world’s people) increasingly live, we should not expect such agreement to be extensive and wide-ranging. Perhaps American de-

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meanings and values); William W. Fisher III, *Property and Contract on the Internet*, 73 Chi Kent L Rev 1203, 1217–18 (1998) (arguing that all people should be able to participate in meaning-making). Compare Sunder, 54 Stan L Rev at 498 (cited in note 50) (stating that “more and more individuals are claiming a right to dissent from traditional cultural norms and to make new cultural meanings”).

<sup>59</sup> However, a troubling recent Ninth Circuit decision, currently scheduled to be reargued en banc, suggests that there is little room for regulating websites that many of us may find quite dangerous. In *Planned Parenthood of the Columbia/Willamette Inc v American Coalition of Life Activists*, 244 F3d 1007 (9th Cir 2000), reh’g en banc granted, 268 F3d 908 (2001), a panel of the Ninth Circuit vacated an injunction against an anti-abortion rights website that listed the names and addresses of doctors who performed abortions. Under the panel’s holding, before a website’s hate speech can be regulated, the site must not only identify targets, but also explicitly encourage violence against them. See *Planned Parenthood*, 244 F3d at 1019.

<sup>60</sup> Compare Rawls’s call for a society characterized by “reasonable pluralism,” which sustains a “diversity of comprehensive doctrines” held by its members. John Rawls, *The Law of Peoples* 31 (Harvard 1999). See also John Rawls, *A Theory of Justice* 347–50 (Belknap 2d ed 1999) (proposing a “thin theory of the good” as a teleological foundation for liberal society). But see Abner S. Greene, *The Government of the Good*, 53 Vand L Rev 1, 2 (2000) (arguing in favor of government endorsement of a particular substantive vision of the good life).

<sup>61</sup> See Sunstein, 97 Yale L J at 1554–56 (cited in note 19).

mocracy itself may prove the best check on minority factions. This at least was Madison's belief in Federalist 10, where he suggests that an extensive republic will tend to ameliorate the effects of factions by making it more difficult for purely self-interested factions to find the majority in the national legislative chambers requisite to accomplish their goals.<sup>62</sup> The democratic process itself may be a source of important shared experiences, bringing people out of their enclaves for the discussion and debate necessary to elect officials and support legislative agendas.

## II. NEW REPUBLICS.COM

On China.com, people of Chinese descent can find a community dedicated to their special concerns.<sup>63</sup> Tinig.com allows young Filipino netizens across the world to find each other, converse in Tagalog or English, and address the many issues of the Filipino diaspora.<sup>64</sup> Tsinoy.com focuses on Filipinos of Chinese descent.<sup>65</sup> People of Scottish descent might congregate online at ElectricScotland.com, which seeks to "bring[ ] Scots and Scots' descendants together from around the world."<sup>66</sup> The Irish diaspora might find information about "roots" and "traditions" at IrishAbroad.com.<sup>67</sup> Yahoo! lists more than a thousand websites devoted to "cultures" from Acadians to Zimbabweans.<sup>68</sup> Many of these sites allow chats among the participants, provide bulletin boards for discussion, and organize special community events.<sup>69</sup> People can read newspapers from their homelands on a daily basis and even listen to radio stations.<sup>70</sup> The Internet thus makes it easier for people living in diaspora to maintain ties to family and homeland.

At the same time, the Internet helps create a sense of community among people with shared interests,<sup>71</sup> even if they share no common homeland. E-mail makes it possible to communicate personally with people worldwide for free (on the significant assumption that one has access to the Internet<sup>72</sup>). The relationships of friendship and colleague-

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<sup>62</sup> Federalist 10 (Madison), in Rossiter, ed, *Federalist Papers* at 83 (cited in note 9).

<sup>63</sup> See <<http://china.com>> (visited Feb 19, 2002).

<sup>64</sup> See <<http://www.tinig.com>> (visited Feb 19, 2002).

<sup>65</sup> See <<http://www.tsinoy.com>> (visited Feb 19, 2002) (describing the website as "[t]he global village of Chinese and Filipinos").

<sup>66</sup> <<http://www.electricscotland.com>> (visited Feb 19, 2002).

<sup>67</sup> See <<http://www.irishabroad.com>> (visited February 19, 2002).

<sup>68</sup> See <[http://dir.yahoo.com/Society\\_and\\_Culture/Cultures\\_and\\_Groups/](http://dir.yahoo.com/Society_and_Culture/Cultures_and_Groups/)> (visited Feb 19, 2002); <[http://dir.yahoo.com/Society\\_and\\_Culture/Cultures\\_and\\_Groups/Cultures/](http://dir.yahoo.com/Society_and_Culture/Cultures_and_Groups/Cultures/)> (visited Feb 19, 2002).

<sup>69</sup> See, for example, <<http://www.ghanaforum.com>> (visited Jan 16, 2002).

<sup>70</sup> See, for example, <<http://www.radioofindia.com>> (visited Feb 19, 2002).

<sup>71</sup> See Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* 91-93 (Oxford 1999) (describing the rise of transnational communities in cyberspace).

<sup>72</sup> See note 101.

ship nurtured via e-mail form some of the essential foundations of community life. Individuals interested in a particular topic can register to participate in “listservs,” through which they can discuss issues via e-mails distributed to all participants. Often such listservs draw people from all over the world who share a common interest. Cyberlaw professors, for example, can participate in CyberProf, hosted at the University of California, Berkeley.<sup>73</sup> Listservs often serve as forums for lively debates, a characteristic that Sunstein believes is essential to a deliberative democracy (pp 27–37).

But the Internet fosters more than interpersonal relationships. Business and politics can be conducted through the Web. Economic and political ties are created, sustained, and strengthened through this medium. Via the Web, diasporas can learn about problems in the homeland and can channel aid as appropriate. The welcoming message at a website oriented towards the Nigerian diaspora reads: “Are you a Nigerian? Do you want to help Nigeria?”<sup>74</sup> Rediff.com encourages diaspora Indians (who are often much richer than their families in India) to purchase gifts for loved ones back “home,” even offering to send gifts to your “Valentine in India.”<sup>75</sup> It is not fanciful to think that some countries might offer Internet voting to their diasporas in order to enhance their diasporas’ sense of commitment to their homelands.

In a globalized world, we see the rise of nations<sup>76</sup> that transcend the geographic borders of their states—nations based not necessarily on formal ties of citizenship but on strong bonds of loyalty.<sup>77</sup> We also see the rise of new political communities that are not centered on a state, but that participate effectively in international discourse nonetheless. The Internet helps nurture such transnational bonds, whether of diasporas or of other interest-based communities.<sup>78</sup> As Web pioneer Tim Berners-Lee writes, “The Internet and the Web have pulled us out

<sup>73</sup> This is a listserv moderated by Professor Mark Lemley of Berkeley.

<sup>74</sup> See <<http://www.ananet.org>> (visited Jan 16, 2002).

<sup>75</sup> See <<http://rediff.com>> (visited Apr 2, 2002).

<sup>76</sup> International law scholars often distinguish between the social entity of the *nation* and the international political entity of the *state*. See, for example, Franck, *The Empowered Self* at 7–9, 14–15 (cited in note 71) (describing concepts of nation and state).

<sup>77</sup> See Anupam Chander, *Diaspora Bonds*, 76 NYU L Rev 1005, 1006–15 (2001) (introducing a “diaspora model” of citizenship in which individuals construct national and transnational communities of their own choosing).

<sup>78</sup> See Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* 194–96 (Minnesota 1996) (describing the role of “mass media, especially in its electronic forms, in creating new sorts of disjuncture between spatial and virtual neighborhoods”); Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J Intl Legal Stud 155, 163 (1997) (describing the Internet as a “technique for organizing those with shared interests. It permits members of relatively specialized diaspora to find each other anywhere in the world.”). India recently launched a website for its diaspora, seeking “to nurture [the] symbiotic relationship” between the diaspora and the people of India. See <<http://www.indiandiaspora.nic.in>> (visited Feb 20, 2002).



of two-dimensional space.”<sup>79</sup> In place of “a geographical sense of identity,”<sup>80</sup> we may create new transnational communities of people who share, not geography, but interests or loyalties.<sup>81</sup> We may even see the emergence of new “Republics.com.”

Admittedly, citizenship has often been thought of as a geographically-bound concept. But in today’s globalized world, the diaspora can make significant contributions to its far-off homeland. The migrant Filipino who works abroad, for example, is now valorized as an “economic hero” of the nation.<sup>82</sup>

We should not be afraid that such transnational relationships will devalue domestic citizenship and make people poorer citizens at “home.” Elsewhere I have argued that we are capable of membership in more than one nation, that citizenship should not be seen as a zero-sum game.<sup>83</sup> Moreover, if we begin to understand jurisdiction as invented<sup>84</sup> and therefore subject to reinvention, we can try to engineer new forms of jurisdiction, loosened perhaps from territorial bounds. We should welcome a world in which individuals have the freedom and capability to participate meaningfully in real and virtual communities simultaneously—in territorial Republics, as well as new Republics.com.

### III. .COM(MON) HUMANITY

While the Internet might encourage community based on insularity, it encourages its polar opposite as well—cosmopolitanism. Cosmopolitans<sup>85</sup> seek a world in which common humanity takes precedence over national attachments. In many ways, cyberspace reflects the cosmopolitan ideal.

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<sup>79</sup> Berners-Lee, *Weaving the Web* at 200 (cited in note 53).

<sup>80</sup> Id.

<sup>81</sup> Compare a recent suggestion, formulated for a domestic context, that the Internet might allow for voting by “virtual districts” rather than by territorially-defined ones. See Eben Moglen and Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 Loyola LA L Rev 1089, 1092–1105 (2001). See also Franck, *The Empowered Self* at 91–93 (cited in note 71).

<sup>82</sup> See Rhacel Salazar Parreñas, *Transgressing the Nation-State: The Partial Citizenship and “Imagined (Global) Community” of Migrant Filipina Domestic Workers*, 26 Signs 1129, 1142 (2001).

<sup>83</sup> See Chander, 76 NYU L Rev at 1014 (cited in note 77).

<sup>84</sup> For a historical review of territorial jurisdiction and its influence upon political and social identities, see Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 Mich L Rev 843 (1999).

<sup>85</sup> For a general discussion of “cosmopolitan” approaches, see generally Jeremy Waldron, *What Is Cosmopolitan?*, in Tetsuji Yamamoto, ed, *Philosophical Designs for a Socio-Cultural Transformation* 841 (Rowman & Littlefield 1998).

Much of cyberspace remains unmarked by national borders.<sup>86</sup> This lack of borders makes cyberspace a medium through which people of all nationalities interact. This is the international analog of the principally domestic phenomenon of interracial interaction facilitated through cyberspace.<sup>87</sup> Such transnational experiences may lead many to adopt a more cosmopolitan outlook on the world, where they come to value common humanity over parochial nationality.<sup>88</sup> The description of our world as a “global village,” with its transnational circuits of travel and exchange, rings even truer through the Internet, which permits an intimacy usually unavailable without face-to-face encounters (“F2F” in the terse language of the Internet). This awareness of other people may help us understand and respect each other, despite the distance created by state borders. In this way, the Internet might further the project of cosmopolitan education, which seeks to instill a vision of oneself as first and foremost a “citizen of the world.”<sup>89</sup>

Examples of cosmopolitan possibilities abound. Students in Washington, D.C. are finding e-mail pen pals in Bahrain (and vice versa).<sup>90</sup> Elsewhere, more than two thousand students from a dozen countries are enrolled in a “Virtual High School,” helping students to become “more aware of themselves as members of a global community.”<sup>91</sup> Aficionados of the Argentine dance form of tango (who are known as *tangueros*) can learn about the next tango events worldwide at [BridgeToTheTango.com](http://BridgeToTheTango.com).<sup>92</sup> Scholars in all fields are discussing issues and sharing ideas and drafts with people from other parts of the

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<sup>86</sup> The “generic top level domain” spaces of .com, .net, and .org are designed for worldwide use, such that a .com website, for example, might be owned and hosted by anyone in the world. Elsewhere I have argued that such spaces should be considered a new form of global commons, alongside such non-national resources as Antarctica, the deep oceans, and outer space. See Anupam Chander, *Dominion in Cyberspace* (2002) (unpublished manuscript on file with author). Even some “country code” spaces such as .tv, .md, and .ws (assigned to Tuvalu, Moldova, and Samoa, respectively) are now treated as global spaces. All websites connected to the Internet are, of course, accessible to every surfer across the world, regardless of whether the website has a “generic” domain name ending or a country code ending such as Mexico’s .mx.

<sup>87</sup> See Jerry Kang, *Cyber-Race*, 113 Harv L Rev 1130, 1160–61 (2000) (noting that cyberspace “partially lifts residential segregation’s choke-hold on interracial social contact”). Kang replies to the objection that people will resegregate themselves in cyberspace by pointing out that people’s “interests, experiences, and fates” will likely cross racial lines. Id at 1164–66.

<sup>88</sup> On cosmopolitanism versus nationalism, see generally Chander, 76 NYU L Rev 1005 (cited in note 77).

<sup>89</sup> See Martha Nussbaum, *Patriotism and Cosmopolitanism*, in Joshua Cohen, ed, *For Love of Country: Debating the Limits of Patriotism* 1, 6 (Beacon 1996).

<sup>90</sup> See White House Press Release, *Friendship through Education Fact Sheet* (Oct 25, 2001), available online at <<http://www.whitehouse.gov/news/releases/2001/10/20011025.html>> (visited Feb 19, 2002) (describing the U.S. government’s “Friendship Through Education” program for U.S. students and students in countries with Muslim populations).

<sup>91</sup> Scott J. Croteau, *Hudson School System Honored for Creating Virtual High School*, *Telegram & Gazette* B3 (Oct 10, 2001).

<sup>92</sup> See <<http://www.bridgetothetango.com>> (visited Feb 19, 2002).

world.<sup>93</sup> Judges across the world discuss legal issues through a judges-only listserv, perhaps anticipating the development of a more global jurisprudence.<sup>94</sup>

The non-national nature of many Internet interactions makes possible an increasing sense of common membership in the world. The very nature of the “World Wide” Web, with its focus on interconnectivity and its disrespect for political borders or geographical distance, promotes this.<sup>95</sup> The Web is the servant of globalization.

Of course, cyberspace remains provincial in one crucial respect—robust access to it is limited to narrow segments of humankind. Most of the world’s people are too poor to afford a connection to the Internet. The transnational relations formed via the Internet tend to be between members of the middle or upper classes of their respective nations. Any emerging cosmopolitan consciousness thus remains less available to the world’s poor, at least to the extent that it is fostered by cyberspace. But perhaps this is not a fatal flaw when examined from the cosmopolitan perspective. Because a principal aim of contemporary cosmopolitans is to promote distributive justice,<sup>96</sup> if the richer parts of the world alone felt a commitment to their poorer human brethren, the redistributive goal might yet be achieved.

Cyberspace assists in the cosmopolitan project of creating a brother- and sisterhood of humankind. This may be part of the Web’s engineering: Berners-Lee writes, “Hope in life comes from the interconnections among all the people of the world.”<sup>97</sup> Rather than being forced by geography to associate only with our physical neighbors, the Internet frees us, to some extent, of physical constraints in the friendships and personal relationships we maintain. Through such transnational interactions, the Internet might help to break down the differences between us and the Other. Through cyberspace, individuals might gain an increasing sense of common membership in the world and a respect for the common humanity of people all over the globe.

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<sup>93</sup> Consider, for example, one Web archive that allows math, physics, and computer science scholars from all over the world to post papers and review papers posted by others. See James Glanz, *The World of Science Becomes a Global Village: Archive Opens a New Realm of Research*, NY Times F1 (May 1, 2001) (quoting the founder of the Web archive [www.arxiv.org](http://www.arxiv.org) as saying that “[g]eopolitical boundaries are invisible on the Internet”).

<sup>94</sup> See Anne-Marie Slaughter, *Speech at New York Law School Symposium in Honor of Judge Jon O. Newman* (Jan 20, 2002). On the emergence of a global jurisprudence, see Anne-Marie Slaughter, *Constructing a Global Legal System in the New World Order* (unpublished manuscript on file with author).

<sup>95</sup> See Berners-Lee, *Weaving the Web* at 200 (cited in note 53) (“The Web breaks the boundaries we have relied on to define us and protect us”).

<sup>96</sup> See Charles Jones, *Global Justice: Defending Cosmopolitanism* 15–16 (Oxford 1999) (defining the cosmopolitanism perspective); Brian Barry, *Statism and Nationalism*, in Ian Shapiro and Lea Brilmayer, eds, *Global Justice* 12, 36 (NYU 1999) (discussing cosmopolitanism).

<sup>97</sup> Berners-Lee, *Weaving the Web* at 209 (cited in note 53).

## CONCLUSION

Athenian democracy used coercive tactics to ensure citizen participation in the assembly, which convened at the Pnyx:

Before a session was opened, . . . a row of Scythian archers crossed the Agora holding a red-dyed rope and chased the people in the Agora towards the Pnyx. A man who had his cloak stained with red dye incurred a fine.<sup>98</sup>

Sunstein's republicanism does not call for Scythian archers, but it does involve a degree of state coercion. Sunstein's prescriptions for the infirmities he identifies center on mandated links on websites to opposition viewpoints, state support for public discourse websites, and voluntary codes for providing opposing views (pp 167-90).

The problem is not in his relatively mild proposals but in his misidentification of the problem faced by our republic. Like in Athenian democracy, some members of society remain insufficiently recognized and empowered, though the democratic deficit is certainly not as grave as the Athenian disempowerment of women and slaves.<sup>99</sup> Deepening democracy requires enhancing opportunities for each individual member of society.<sup>100</sup> By providing an accessible medium for interchange, the Internet empowers those disenfranchised in the partial democracy of the mass media.

Given my starkly different vision of the Internet's possible impact on citizenship, my prescription is quite different from Sunstein's. Because the Internet can empower persons who are marginalized by other mass information intermediaries, it provides an important mechanism for enhancing the ability of marginalized people to have their voices heard, and even indeed to find a voice. Ironically, it is these very people who are least likely to have robust access to the Internet, as minorities are typically the ones most affected by the Digital Divide.<sup>101</sup>

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<sup>98</sup> Mogens Herman Hansen, *The Athenian Assembly: In the Age of Demosthenes* 47 (Basil Blackwell 1987). Aristophanes renders a less flattering scene of citizens dodging the vermilion-dyed rope to avoid their civic obligations:

But never yet . . . have I so smarted from the soapsuds in my eyes, as now; here we have the stated meeting of the Assembly at daybreak, and yet the Pnyx is deserted as you see; while they are chattering in the square, and up and down they scamper from the ruddled rope.

Aristophanes, *The Acharnians of Aristophanes* 13-15 (Macmillan 1909) (W.J.M. Starkie, trans).

<sup>99</sup> See Rawls, *The Law of Peoples* at 28 n 27 (cited in note 60) ("Athens was not a liberal democracy, though it may have thought of itself as such. It was an autocracy of the 35,000 male members of the assembly over the total population of about 300,000.").

<sup>100</sup> Compare Amartya Sen's claim that economic and social development should be understood as consisting in enhanced individual freedom. See Amartya K. Sen, *Development as Freedom* xi-xii (Knopf 1999).

<sup>101</sup> I understand the Digital Divide as going beyond simple "access" to the Internet, which is

It must be recognized that the World Wide Web presents a tumble of contradictory forces, some unifying and others dividing, some edifying and others darkening. This is, of course, the nature of most innovations in communications, from the printing press to the telephone. Sunstein rightly points out that our work is to try to enhance the likelihood that this new innovation will be put towards socially useful ends,<sup>102</sup> and that government must be involved in that endeavor.

A society may well need shared experiences to serve as its “social glue” (p 103). Indeed, a common heritage, principles, or history serve as the central organizing conceits of the nation-state.<sup>103</sup> But we must pay attention to the content of those shared experiences, to their unstated description of who the paradigmatic citizen is.<sup>104</sup> From the perspective of subaltern communities, the shared experiences supplied by the mainstream media consist in a “Daily Them.”<sup>105</sup> Perhaps a “Daily Them” poses a greater threat to the vibrancy of a republic than does a “Daily Me.”

How one views the Internet’s effect on citizenship depends on where one stands in the hierarchy of societal membership. Compare Arundhati Roy’s response to the question of whether globalization alleviates poverty or reinscribes colonialism: “The answers vary depending on whether they come from the villages and fields of rural India, from the slums and shantytowns of urban India, from the living rooms of the burgeoning middle class or from the boardrooms of the big

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widely available, at least through public libraries. The Divide encompasses differential technical knowledge and ownership of computers, Web servers, and mnemonic domain names—and all other factors that determine how readily one can actually create and maintain a community on the Web. Statistics are available only for certain aspects of the divide, but they show significant disparities in people actually going online. See U.S. Department of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet* 21 (2002), available online at <<http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf>> (visited Mar 11, 2002) (reporting, based on a study conducted in September 2001, that white and Asian-American Internet usage was around 60 percent, while that of Blacks and Hispanics was only 39.8 percent and 31.6 percent, respectively); *Who’s Not Online* 3 (Pew Internet 2000), available online at <[http://www.pewinternet.org/reports/pdfs/Pew\\_Those\\_Not\\_Online\\_Report.pdf](http://www.pewinternet.org/reports/pdfs/Pew_Those_Not_Online_Report.pdf)> (visited Feb 19, 2002) (reporting survey results suggesting that “50% of whites have access; 36% of blacks have access; 44% of Hispanics have access”).

<sup>102</sup> This, of course, requires some vision of the good, but it need not be a comprehensive conception. See Rawls, *The Law of Peoples* at 34 (cited in note 60).

<sup>103</sup> See generally Anderson, *Imagined Communities* (cited in note 1). We must not mistake this conceit for reality. As Rawls writes, if the common sympathies required of a people were “entirely dependent upon a common language, history, and political culture, with a shared historical consciousness, this feature would rarely, if ever, be fully satisfied. Historical conquests and immigration have caused the intermingling of groups with different cultures and historical memories who now reside within the territory of most contemporary democratic governments.” Rawls, *The Law of Peoples* at 24 (cited in note 60).

<sup>104</sup> Consider, for example, national cenotaphs to the Unknown Soldier. See Anderson, *Imagined Communities* at 9–10 (cited in note 1). What is the presumptive race, gender, and sexual orientation of that soldier, however unknown the soldier is?

<sup>105</sup> See Part I.

business houses.”<sup>106</sup> While Sunstein has a deep commitment to the lot of all people, *Republic.com* fails to appreciate fully how traditional mass information intermediaries operate to exclude women and certain racial, sexual, and other minority groups in our society. The Internet offers the possibility of helping reimagine our nation to be more inclusive.<sup>107</sup>

If we are to enhance citizenship, we must endeavor to make the tools of citizenship more widely available.<sup>108</sup> In this information age, the Internet is a primary tool of citizenship. But at the same time, it is more than a mere tool. It promises to revolutionize citizenship itself.

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<sup>106</sup> Arundhati Roy, *Shall We Leave It to the Experts?*, *Nation* 16, 16 (Feb 18, 2002).

<sup>107</sup> Compare Bill Ong Hing, *To Be an American* 177 (NYU 1997):

This modern vision recognizes that the Navajo’s respect for the earth and its natural resources is an American value; that the African-American-led civil rights movement of the 1960s represents a powerful moment in our American history; that the continuing nightmares of torture, death, and heartache endured by Cambodian refugees is a component of the American psyche; that the folklore and labor of Mexican farmworkers is an American experience.

See also Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 3 (Yale 1989) (focusing on the history of the efforts of various groups to achieve a “fuller” sense of citizenship).

<sup>108</sup> This recalls the suggestion by Owen Fiss for an earlier communications era that the state should provide “subsidies and other benefits” to ensure a diversity of voices in the media. See Fiss, 71 *Iowa L Rev* at 1415 (cited in note 33).