

2002

# Philippic.com

Cass R. Sunstein

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## Recommended Citation

Cass R. Sunstein, "Philippic.com," 90 California Law Review 611 (2002).

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# Review Essay

Philippic.com

REPUBLIC.COM

By Cass Sunstein

Princeton, New Jersey: Princeton University Press, 2001. Pp. 224. \$19.95 cloth.

*Reviewed by Dan Hunter†*

*A recent trend in so-called “second generation” legal commentary about the Internet suggests that, though it is an unparalleled communication medium and a means of engaging in global e-commerce, it is not an unmitigated force for good. Instead, the Net poses a fundamental danger to democracy. This trend takes shape in works by well-known cyberlaw theorists like Lawrence Lessig, Andrew Shapiro, and Neil Weinstock Netanel, but the most recent and most troubling criticism lies in Professor Cass Sunstein’s Republic.com.*

*In this book, Professor Sunstein argues that perfect filtering of information on the Internet will lead to a fractured communications environment. He suggests that this fracturing will lead to group polarization, cascades of false information, and a concomitant rise in extremism. Governmental regulation of the Internet to reduce these features is therefore warranted, and desirable. He suggests that the appropriate regulatory responses should include setting up or supporting public environments for deliberation and debate on the Net, along with a series of disclosure and “must-carry” rules.*

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† Robert F. Irwin IV Term Assistant Professor of Legal Studies, Wharton School, University of Pennsylvania. Email: hunterd@wharton.upenn.edu. Thanks to David Post, Ed Rubin, and Polk Wagner for comments on an earlier draft, and to Cass Sunstein for providing a prepublication manuscript of his “Afterword” to the forthcoming paperback edition of *Republic.com*. Opinions expressed, and mistakes made, are mine alone. Thanks also to Veronica Silva-Minin for wonderful research assistance. Support in part for this research was provided by the Wharton E-Business Initiative and the Wharton-Singapore Management University Research Center.

*This Review finds fault with almost every major feature of Sunstein's argument. First, it dismisses his assumptions that perfect filtering on the Net is either likely to occur, is possible in the sense that he suggests, or is significantly different from the media filtering that we already experience. Second, it argues that Sunstein misapplies the social psychology literature on group polarization toward more extreme positions. Contrary to the fundamental basis of Republic.com, the research on group polarization does not inevitably lead to the conclusion that the Internet creates extremist communications or behavior. Third, it suggests that Sunstein's theory of governance is controversial, and that important features of cyberlibertarian and historicist governance theories seriously undermine his position. And finally, this Review criticizes Sunstein's proposals for reform as utterly meritless. These proposals are either contradicted by his own earlier perfect filtering argument, or by his misunderstanding of the Net as a local broadcast medium.*

#### INTRODUCTION

*Philippic: (noun), a discourse or declamation full of bitter condemnation, a tirade.*<sup>1</sup>

Demosthenes was a pre-eminent Athenian statesman who rose to prominence as the greatest of the Ancient Greek orators.<sup>2</sup> A staunch advocate for democratic rule, he was once the leader of the democratic faction of the Athenian polity. He fought against antidemocratic tendencies, most notably opposing those who sought to rule Athens as an oligarchy.<sup>3</sup>

Aside from his central role in the development of democratic thinking, he was renowned for his orations urging strong responses to the military threats to the Athenian city state.<sup>4</sup> Demosthenes roused the conciliatory Athenians to oppose the mighty Philip II of Macedon, who had invaded Greece, captured land and cities, and threatened Athens.<sup>5</sup> Demosthenes's four great speeches against Philip came to be known as the "Philippics,"<sup>6</sup>

1. WEBSTER'S NEW COLLEGIATE DICTIONARY 861 (1977), available at Merriam-Webster Collegiate Dictionary, online edition, <http://www.m-w.com/cgi-bin/dictionary?philippic> (last visited Aug. 29, 2001).

2. 8 ENCYCLOPEDIA BRITANNICA 10, 14 (The Encyclopedia Britannica Company ed., 1910); see also Encyclopedia Britannica, online edition, at <http://www.britannica.com/eb/article?eu=30398&tocid=1783> (last visited Aug. 29, 2001). Demosthenes lived from 384 to 322 B.C. *Id.*

3. Encyclopedia Britannica, online edition, at <http://www.britannica.com/eb/article?eu=30398&tocid=1783> (last visited Aug. 29, 2001).

4. *Id.*

5. ENCYCLOPEDIA BRITANNICA, *supra* note 2, at 10, 12-13.

6. See DEMOSTHENES, DEMOSTHENES WITH AN ENGLISH TRANSLATION (J.H. Vince trans.) (1930); *First Philippic*, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=Dem.+4+1> (last visited Aug. 29, 2001); *Second Philippic*, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=Dem.+6+1> (last visited Aug. 29, 2001); *Third Philippic*, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=Dem.+9+1> (last visited Aug. 29, 2001); *Fourth*

and remain famous examples of rhetorical art in the service of the public interest.<sup>7</sup> And so it is that tirades against oppressors are now commonly called “philippics.”<sup>8</sup>

Professor Cass Sunstein is our present-day Demosthenes. Not only is he, like Demosthenes, a noted democracy theorist,<sup>9</sup> but his latest book, *Republic.com*, is an extended and impassioned philippic, a tirade against an oppressor. In Professor Sunstein’s philippic, Philip’s role is played by the Internet, or more accurately, by the antidemocratic possibilities of what the Internet might become. Professor Sunstein identifies the “perfect filtering” of the Internet as deeply troubling for the democratic process. Filtering in this context is not confined to censorware, like NetNanny and CyberPatrol, which blocks access to pornographic and other objectionable material, and which is the subject of much analysis on the U.S. regulatory response to Internet content concerns.<sup>10</sup> Instead, Professor Sunstein discusses perfect

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*Philippic*, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=Dem.+10+1> (last visited Aug. 29, 2001).

7. Three hundred years later, when Marcus Tullius Cicero railed against Marcus Antonius for seizing power in Rome his jeremiads were known as his Philippics. See MARCUS TULLIUS CICERO, THE ORATIONS OF MARCUS TULLIUS CICERO 194 (C.D. Yonge trans.) (George Bell & Sons ed., 1903), available at <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=cic.+phil.+1+1>; see also The Internet Encyclopedia of Philosophy, Cicero, at <http://www.utm.edu/research/iep/c/cicero.htm> (last visited Aug. 29, 2001).

8. WEBSTER’S, *supra* note 1, at 861; see also Merriam-Webster Collegiate Dictionary, online edition, *supra* note 1. (“Etymology: Middle French *philippique*, from Latin & Greek; Latin *philippica*, *orationes philippicae*, speeches of Cicero against Mark Antony, translation of Greek philippikoi logoi, speeches of Demosthenes against Philip II of Macedon, literally, speeches relating to Philip . . .”).

9. To cite all his publications would double the length of this Review. For a meaningful subset of his works in the last few years that deal with issues related to law and democratic theory, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, & CASES (4th ed. 1999); CASS R. SUNSTEIN & STEPHEN HOLMES, THE COST OF RIGHTS (1999); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (1997); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990); THE BILL OF RIGHTS AND THE MODERN STATE (Cass R. Sunstein et al. eds., 1992); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71 (2000) [hereinafter Sunstein, *Deliberative Trouble*]; Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499 (2000) [hereinafter Sunstein, *Television*]; Cass R. Sunstein, *The Privatization of Our Public Discourse*, 12 CARDOZO STUD. L. & LIT. 129 (2000) [hereinafter Sunstein, *Public Discourse*]; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) [hereinafter Kuran & Sunstein, *Cascades*]; David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000) [hereinafter Schkade et al., *Dollars*]; Cass R. Sunstein, *Informational Regulation and Informational Standing*, 147 U. PA. L. REV. 613 (1999).

10. See, e.g., R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755 (1999); Whitney A. Kaiser, *The Use of Internet Filters in Public Schools: Double Click on the Constitution*, 34 COLUM. J.L. & SOC. PROBS. 49 (2000); Jennifer Zwick, Comment,  *Casting a Net over the Net: Attempts to Protect Children in Cyberspace*, 10 SETON HALL CONST. L.J. 1133 (2000); Mark S. Nadel, *The First Amendment’s Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117 (2000); Christopher T. Furlow, *Erogenous Zoning on the Cyber-Frontier*, 5 VA. J.L. & TECH. 7 (2000); Junichi P. Semitsu,

filtering, a hypothetical technology enabling a person to receive only the media content that she or he desires, by filtering out all other material.

Professor Sunstein argues that once we have perfect filtering in place, we will see a rise in group polarization and a concomitant rise in extremist thought, dialog, and action. He supports this argument with studies from social psychology that show how groups reinforce prejudices and lead to more extreme conclusions than the average of that group held prior to the group interaction. From these studies, he concludes that perfect filtering and the Internet pose a danger to liberal democracy that the state must address. He posits a number of suggestions as to how the state should solve this problem.

I contest virtually every aspect of his analysis. Perfect filtering is technologically implausible, and so difficult as to be, essentially, science fiction. Even if the technology were feasible, however, its effect would differ little from the media filtering that we currently have, and that has not led to a terrifying rise in extremism. Further, assuming perfect filtering were to exist as Professor Sunstein posits, the social psychology research simply does not support the extreme conclusion he reaches. And finally, in the unlikely event that he is correct in his first two premises, a slew of problems undermine Professor Sunstein's regulatory reform proposals, rendering them utterly ineffective.

Few commentators have recognized these flaws. *Republic.com* is already an influential philippic, which respected academics take seriously.<sup>11</sup> Commentators have referred to it as "insightful and far-reaching,"<sup>12</sup> "eminently sensible,"<sup>13</sup> "timely" and "sophisticated,"<sup>14</sup> a "thoughtful book [that] deliberately raises more questions than it answers,"<sup>15</sup> and "[a] gripping, provocative argument . . . that the dot.com hurrah chorus will ignore at its (and our) peril."<sup>16</sup> *Republic.com* appears as the highpoint in a recent movement that paints a very bleak picture of the antidemocratic nature of the Internet. We see similar concerns in works by Lawrence

*Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. the First Amendment*, 52 STAN. L. REV. 509 (2000).

11. See Elizabeth Garrett, *Political Intermediaries and the Internet "Revolution,"* 34 LOY. L.A. L. REV. 1055, 1063 (2001) (adopting Sunstein's thesis that cyberspace leads to a decline in the richness of political discourse); see also Thomas E. Baker, *A Roundtable Discussion with Lawrence Lessig, David G. Post & Jeffrey Rosen*, 49 DRAKE L. REV. 441, 448 (2001) (comments of Jeffrey Rosen adopting Sunstein's account of group polarization and "worrying" about the consequences).

12. Senator Edward M. Kennedy, book jacket of REPUBLIC.COM.

13. Merle Rubin, *Create Your Own World on the Internet—and Democracy Crumbles*, CHRISTIAN SCIENCE MONITOR, Mar. 15, 2001, at 16.

14. Peter Aspden, FINANCIAL TIMES, quoted in Princeton University Press, <http://pup.princeton.edu/titles/7014.html> (last visited Aug. 31, 2001).

15. *Recent Publications*, 114 HARV. L. REV. 1827, 1832 (2001).

16. Stephen Holmes, book jacket of REPUBLIC.COM.

Lessig,<sup>17</sup> Andrew Shapiro,<sup>18</sup> Neil Weinstock Netanel,<sup>19</sup> and others.<sup>20</sup> Though most of these works are more nuanced, and less relentlessly pessimistic, than *Republic.com*, they collectively argue that the Internet leads to social dilemmas and a loss of control over public policy. According to this

17. See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) (arguing that software code is the most important Net regulatory mechanism and that policy analysis reflect this) [hereinafter LESSIG, *CODE*]; Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 505-06 (1999) (arguing, against Judge Easterbrook, that cyberspace regulation teaches us about law generally); Lawrence Lessig, *Constitution and Code*, 27 CUMB. L. REV. 1 (1996-97) [hereinafter Lessig, *Constitution*] (examining how constraints regulate cyberspace and the constitutional implications); Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759 (1999) (arguing in favor of open code and its effect on government regulation); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998) (examining speech regulation online, comparing filters to governmental regulation); Lawrence Lessig, *Commons and Code*, 9 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 405 (1999) (decrying the proprietization of cyberspace and the online tragedy of the commons); Lawrence Lessig, *Intellectual Property and Code*, 11 ST. JOHN'S J. LEGAL COMMENT. 635 (1996) [hereinafter Lessig, *Intellectual Property*] (warning against zoning online and its effect on intellectual property); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996) [hereinafter Lessig, *Reading*] (examining the dangers of reading the Constitution in cyberspace); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996) [hereinafter Lessig, *Zones*] (describing zoning online and the potential pernicious effect).

18. See generally ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING PEOPLE IN CHARGE AND CHANGING THE WORLD WE KNOW* (1999) (demonstrating that the Net generates issues in control, personalization, and so forth) (hereinafter SHAPIRO, *CONTROL REVOLUTION*); Andrew L. Shapiro, *The Disappearance of Cyberspace and the Rise of Code*, 8 SETON HALL CONST. L.J. 703 (1998) [hereinafter Shapiro, *Disappearance*] (arguing that cyberspace should not be regulated separately from the real world).

19. See generally Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 457, 469-90 (2000) (book review) [Hereinafter "Netanel, *Cyberspace 2.0*"] (reviewing LESSIG, *CODE supra* note 17, and SHAPIRO, *CONTROL REVOLUTION, supra* note 18, and adopting inter alia the view that individual control on the Internet leads to societal fragmentation, retarded personal development, and a balkanized public discourse); see also Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395 (2000) (attacking the cyberlibertarian model of Internet democratic involvement) [hereinafter Netanel, *Self-Governance*]; Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1902-03 (2000) (discussing the possibility of digital rights management and the control of content providers over each use of their material).

20. See generally Philip E. Agre, *Life After Cyberspace*, 18 EUR. ASS'N FOR THE STUDY OF SCI. & TECH. REV. (Sept. 1999), at <http://www.chem.uva.nl/easst/easst993.html> (last visited Aug. 29, 2001) (describing the concentration of power on the Internet and arguing against the naïve conception of the Internet's decentralized control structures); William W. Fisher III, *Property and Contract on the Internet*, 73 CHL.-KENT L. REV. 1203 (1998) (describing how contract is decentering copyright as the means of controlling digital works, and the danger this has for the public policy balance); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHL.-KENT L. REV. 1257 (1998) (showing the effect of norms in the private ordering of online mechanisms); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHL.-KENT L. REV. 1295 (1998) (demonstrating the connection between the public and private spheres in cyberspace regulation); Edward L. Rubin, *Computer Languages as Networks and Power Structures: Governing the Development of XML*, 53 S.M.U. L. REV. 1447 (2000) (arguing that computer standards and languages involve the exercise of legal and regulatory power structures); Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163 (1999) (arguing for a different classification of the Internet and demonstrating how this leads to different regulatory responses).

stream of scholarship, we are fast approaching the point where the accepted wisdom dictates that cyberspace is a nightmarish place.

Professor Sunstein has labeled these new works the “second generation” of scholarship about the Internet.<sup>21</sup> If it is a generation, then it is a generation that is becoming entrenched and is becoming more powerful. In a book review entitled *Code Comfort*, Professor Sunstein adumbrates much of the argument in *Republic.com*, and explains how the first generation of works was so wrong:

No longer breathless over the possibilities, these [second-generation] writers are sharply critical of cyberspace’s libertarian orthodoxy. The importance of their arguments lies in their shared concern about the lack of public discussion of the emerging problems, and the possible adverse effects not only of public power but also of private power over both consumption and citizenship—and particularly over the possible adverse effects of private manipulation, which is often invisible to consumers.<sup>22</sup>

This Review takes issue with the collective subtext of some of these second-generation works, and the specific thesis of Sunstein’s book.<sup>23</sup> He argues that the Internet inevitably generates social fragmentation and dislocation, which is inimical to democracy (pp. 51-88). Against this, I contend that the Internet is the greatest communications medium we have ever seen. Its benefits are great, and its risks to democracy slight. I do not believe the philippic. Instead, I play the role of Æschines, Demosthenes’s adversary in

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21. Cass R. Sunstein, *Code Comfort*, THE NEW REPUBLIC ONLINE, Jan. 10, 2000, available at <http://www.thenewrepublic.com/magazines/tmr/011000/sunstein011000.html> (last visited Aug. 29, 2001) (characterizing this work as the second generation) [hereinafter Sunstein, *Code Comfort*]; see also Netanel, *Cyberspace 2.0*, *supra* note 19, at 451; SHAPIRO, *CONTROL REVOLUTION*, *supra* note 18, at 280; Technorealism website, at <http://www.technorealism.org/> (last visited Aug. 29, 2001).

22. Sunstein, *Code Comfort*, *supra* note 21.

23. It does not, however, take issue with other “second-generation” concerns, such as the increasing private control over copyright material. See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996) [hereinafter Cohen, *Right*]; Julie E. Cohen, *Intellectual Privacy and Censorship of the Internet*, 8 SETON HALL CONST. L.J. 693 (1998) [hereinafter Cohen, *Intellectual Privacy*]; Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998) [hereinafter Bell, *Fair Use*]; Jonathan Weinberg, *Hardware-Based ID, Rights Management, and Trusted Systems*, 52 STAN. L. REV. 1251 (2000). It also does not contest second-generation arguments regarding the diminution of online free speech. See LESSIG, *CODE*, *supra* note 17, at 164-85; Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000). It also makes no opposition to second-generation scholars’ claims regarding the private control of personal information and the absence of data privacy. See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000) [hereinafter Froomkin, *Death of Privacy*]; Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125 (2000); Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 GEO. L.J. 2103 (2001).

the Athenian senate.<sup>24</sup> Æschines evidently did not have Demosthenes's oratorical skills,<sup>25</sup> and no word was ever coined in his honor. Nevertheless, he provided the Athenians with a counterpoint to Demosthenes's philippics, and Æschines's orations tempered the excesses of Demosthenes's rhetoric. To play the role of Æschines, I first examine the philippic at issue and explore the reasons why Sunstein launches himself on an extended "philippic.com" against the Internet.

## I

## REPUBLIC.COM

If the question before us were a new one, men of Athens, I should have waited until most of the regular speakers had delivered their opinions, and if satisfied with any of their proposals, I should have remained silent, but if not satisfied, I should then have tried to express my own views. Since, however, it is our fortune to be still debating a point on which they have often spoken before, I can safely claim your indulgence if I am the first to rise and address you. For if in the past their advice had been sound, there would be no need for deliberation today.

Demosthenes, *First Philippic*<sup>26</sup>

Professor Sunstein is not the first to rise and address us on the Internet's potential threat to democracy, nor is he the first to agonize over difficulties that the Internet poses to regulatory theory. Professor Lessig's *Code and Other Laws of Cyberspace*<sup>27</sup> probably marked the first point at which this thesis entered popular culture, though it had been a theme for some time prior to this.<sup>28</sup> Nonetheless, *Republic.com* stands as the first concerted effort to argue that democracy is under threat from filtering technologies of the Net, that social fracturing is consequently likely, and that the state should intervene to regulate this undesirable outcome.<sup>29</sup> *Republic.com* therefore marks quite a departure from earlier accounts of

24. Encyclopedia Britannica, *supra* note 3.

25. Though he was a well-known Athenian orator, see Æschines, Encyclopedia.com, at <http://www.encyclopedia.com/articles/00150.html> (last visited Jan. 30, 2002); see also Æschines, Columbia Encyclopedia, Sixth Edition, available at <http://www.bartleby.com/65/ae/Aeschine.html> (last visited Jan. 30, 2002).

26. DEMOSTHENES, *First Philippic*, *supra* note 6, para. 1.

27. LESSIG, CODE, *supra* note 17.

28. See, e.g., Cohen, *Right*, *supra* note 23, at 994-1020; Cohen, *Intellectual Privacy*, *supra* note 23; Bell, *Fair Use*, *supra* note 23; Lessig, *Constitution*, *supra* note 17, at 8-12; Lessig, *Intellectual Property*, *supra* note 17, at 637-39; Lessig, *Reading*, *supra* note 17, at 895-907; Lessig, *Zones*, *supra* note 17; Shapiro, *Disappearance*, *supra* note 18, at 715-23.

29. Much of Sunstein's argument is drawn from Shapiro. See SHAPIRO, CONTROL REVOLUTION, *supra* note 18, at 105-23. However, unlike *Republic.com*, Shapiro's work is not a jeremiad against the Internet; it is a quite balanced account of the benefits and potential detriments of the Net. See, e.g., *id.* at 5-104.



cyberlaw and democracy, which, though sometimes strident about the problems we face, were not so relentlessly pessimistic about the Net.

### A. *Perfect Filtering's Threat to Democracy*

*Republic.com* begins with a short sketch of a future where technology has provided us with the ability to filter what we want to see, read, and hear (pp. 3-5). Sunstein argues that we will soon have perfect filtering, so that we will see, read, or hear only that which we desire. We will go through our lives cosseted in a warm technological blanket that will reinforce those voices that agree with us, and will shut out any opposing viewpoints (pp. 71-75).<sup>30</sup>

This prospect troubles Sunstein deeply. While he recognizes that filtering can provide some wonderful benefits (p. 26),<sup>31</sup> in general Sunstein sees the effects of perfect filtering as pernicious and inimical to democratic ideals. For a start, it eliminates the public forum, the space where we encounter others exchanging ideas (pp. 30-33). Since the Supreme Court ruling in *Hague v. Committee for Industrial Organization*,<sup>32</sup> Americans have been guaranteed the public forum of the streets and parks, to express unpopular views, to rail against the government, to complain about their taxes, and so forth.<sup>33</sup> This right to express views contrary to the mainstream is not confined to the United States; it is a cornerstone of democratic governance worldwide.<sup>34</sup> Deliberative democracy within these systems relies in part on a citizenry exposed to many viewpoints, and a polity which is characterized by reflection and debate (p. 38).<sup>35</sup> Perfect filtering courtesy of the Internet, argues Sunstein, challenges this hitherto-assumed feature of our democratic system (p. 50).

To support this argument, Sunstein begins with an examination of the proliferation of special-interest websites. It is obvious, of course, that millions of sites are tailored to particular interests, some facially unobjectionable and some problematic. The websites *titanicmovie.com* and

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30. The technical basis for these filtering technologies is set out in *infra* Part II.A.

31. For example, Amazon uses filtering technology to recommend new books based on what you have previously bought, and sometimes these recommendations are "miraculously good, even uncanny" (p. 26).

32. 307 U.S. 496, 515-16 (1939) (holding that the privilege of using streets and parks for the exchange of views may be regulated in the interest of all, but cannot be abridged under guise of regulation).

33. See generally GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* (1999).

34. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 34-50, 203 (1997).

35. Deliberative democracy is a component of Pettit's conception of republicanism. See *id.* at 34-50, 203. This can be seen in part as a response to an alternate democratic theory: that of direct democracy. A number of theories of Internet governance stress the benefits of some features of Internet direct democracy. See *infra* note 60. Others, most notably Neil Weinstock Netanel, suggest that this has significant theoretical problems. See Netanel, *Self-Governance*, *supra* note 19, at 410-51 (arguing against cyberspace self-governance from the position of democratic theory).

Eonline.com (p. 58) are narrow, but largely untroubling; the hate sites of the Ku Klux Klan, God Hates Fags, or All Men Must Die (pp. 62-65) are narrowly focused, and deeply worrying. One would think that, aside from the special case of hate sites, proliferation of special interest groups online would be a (perhaps qualified) good. It is not obvious that there is a problem with, say, *Jurist*, "The Law Professors' Site,"<sup>36</sup> or the Social Science Research Network,<sup>37</sup> where Cass Sunstein can obtain focused material that is relevant to his professional work as a legal academic. And even he notes the benefits of specialist sites on Rhodesian Ridgebacks where he was able to find his new puppy.<sup>38</sup> Sites that deliver content that is very relevant to a particular need are one of the more useful features of the web, often characterized as having a high signal-to-noise ratio.

Sunstein gives short shrift to the uncontroverted fact that the Net and the web allow those who previously had no voice to share common experiences, form communities, and air their frustrations (pp. 75-79). This "virtual world" discourse has significant importance in the physical world. The unprecedented confession and apology of Zhu Rongzhi, the Chinese Prime Minister, over an explosion that killed forty-two people, including thirty-eight children, is an excellent recent example.<sup>39</sup> The explosion was in a school where children were being forced to make fireworks. The official government news reported that the explosion was caused by a mad bomber.<sup>40</sup> However, participants in Internet chatrooms subsequently made clear the real reason.<sup>41</sup> Outrage spread in the real world of mainland China, and the Prime Minister apologized, though he did not refute the official story.<sup>42</sup> There are many other examples of the benefits of online discourse, from autistic children being able to communicate freely for the first time,<sup>43</sup> to Burmese and East Timorese activists being able to fight repressive military regimes.<sup>44</sup>

Though *Republic.com* recognizes that online fora may provide important outlets for self-expression for those who might otherwise be invisible or silenced (pp. 75-77), Sunstein outlines a terrifying danger. Special interest sites fracture the community into small pockets of special interest,

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36. <http://jurist.law.pitt.edu> (last visited Aug. 29, 2001).

37. <http://www.ssrn.com> (last visited Aug. 29, 2001). See Sunstein, *Code Comfort*, *supra* note 21.

38. See Sunstein, *Code Comfort*, *supra* note 21, at 37.

39. Joe Klein, Comment, *China.org*, THE NEW YORKER, Apr. 23 & 30, 2001, at 53.

40. *Id.*

41. *Id.*

42. *Id.* at 54.

43. Henry Blume, *On the Net*, NEW YORK TIMES, June 30, 1997, D6, cited in SHAPIRO, CONTROL REVOLUTION, *supra* note 18, at 49.

44. SHAPIRO, CONTROL REVOLUTION, *supra* note 18, at 50-51. There exist numerous other examples of socially desirable and prodemocratic features of the Internet. See, e.g., Thomas S. Ulen, *Democracy and the Internet*, 2 J. L. TECH. & POL'Y 24-29 (forthcoming), available at <http://papers.ssrn.com/abstract=286293>.

dividing along race, gender, political, or other lines. He notes that specialized sites for the African-American community (for example, afritech.com, Tony Brown online, melanet.com) will probably not attract Caucasian voices (pp. 57-58). Of the top sites for women over fifty, only hotmail.com is shared by men over fifty (p. 58). And while girls aged twelve to seventeen visit pathfinder.com or Eonline.com, boys of the same age visit ESPN.com or playboy.com (p. 58). Most troubling for Sunstein, sites typically provide no link to opposing viewpoints, and where they do provide such a link it is used to demonstrate how stupid, contemptible, or dangerous the other views are (p. 59-60).<sup>45</sup>

At first this seems unremarkable, and we might be tempted to shrug the observation away. Sunstein suggests that complacency would be a mistake for two reasons. The first relies on social psychological studies into "group polarization" (pp. 56-80), and the second involves behavioral economic theories of "information cascades" (pp. 80-84).

### B. *The Danger of Group Polarization*

"Group polarization" is the name given to the effect of group deliberation on people's viewpoints (p. 65). In numerous studies, it has been shown that after deliberation in a group, people's views generally become more extreme (p. 65). Sunstein provides examples of this phenomenon. In group deliberation settings, French students become more critical of the United States, moderately profeminist women become more critical of men, and Whites predisposed to racial prejudice express more racist sentiments (p. 66). The explanations for this effect are twofold. The first involves a recognition of the importance of persuasive argument. Group polarization occurs when the group, taken as a whole, has a particular orientation. In these settings there is likely to be a disproportionately large number of persuasive arguments in the direction the group is leaning (pp. 67-68).<sup>46</sup> The second explanation is that people wish to be liked. In a group that clearly holds a particular view, those who share a more moderate version of that view will be tempted to adjust their viewpoint in the direction of the group; and consequently the views they express become more extreme (pp. 67-68).<sup>47</sup>

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45. One wonders what is the "opposing viewpoint" to which playboy.com should provide a link. Perhaps the websites for "All Men Must Die," or Andrea Dworkin's, or Catherine MacKinnon's websites? What then would be the opposing view of ESPN.com? The website for the National Endowment for the Arts? But I digress. For a full discussion of the problems with Sunstein's regulatory responses, see *infra* Part V.

46. For a review and analysis of the persuasive argument theory of group polarization, see *infra* Part III.B.

47. For an examination of the social comparison theory of group polarization, see *infra* Part III.A.2.

Sunstein argues that this group polarization effect has tremendous importance to our conception of the benefits and detriments of the Internet as a communications medium (pp. 71-75). As interests are segmented into, and addressed by, individual websites, a segmented communications environment will emerge. As perfect filtering becomes a reality, people will only hear from a small group of like-minded people. Since they increasingly will talk only to each other, group polarization will occur, leading to more extreme viewpoints than that which any of the members of that group initially held. Extremism will feed on extremism in this balkanized environment, driving people further apart, fracturing our society, and diminishing community identity. In the end, this extremism threatens democracy and peace (pp. 66-67). According to Sunstein, these dangers are even more pronounced because of the manner in which the Net facilitates anonymity and the opportunity to identify with a group.<sup>48</sup> Sunstein recognizes that group polarization has some beneficial features: most notable is what he calls “enclave deliberation” (pp. 75-79), where disadvantaged groups can engage in what in other contexts has been called “consciousness-raising.”<sup>49</sup> However, his overwhelming emphasis is upon the negative features of group polarization.<sup>50</sup>

### C. *Perilous Information Cascades*

“Information cascades” are the second major basis of Sunstein’s concerns (pp. 80-84).<sup>51</sup> Social groups move rapidly towards a set of beliefs that may be unsupported by evidence, in a process that is like a chain reaction or cascade of disinformation, and which is self-reinforcing.<sup>52</sup> This effect is generated by a number of factors, including the difficulty of becoming fully apprised of all evidence, the difficulty of assessing this evidence, the emphasis placed upon recent information due to cognitive processing

48. In settings where the participant was anonymous and the group identity was emphasized, the group polarization effect was pronounced (p. 71).

49. Drucilla Cornell, *Just Cause: Freedom, Identity, and Rights* 11-15 (2000).

50. Sunstein devotes two and a half pages to the positive benefits that “enclave deliberation” might bring (pp. 75-77), and the remaining thirty-seven pages of the chapter to the negative impact of group polarization and cybercascades (pp. 51-74, 77-78).

51. For research within behavioral economics (and consumer psychology) on the cascade effect, see TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995); Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, J. ECON. PERSP. 151 (1998); Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797 (1992); Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Pervasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158 (1999); Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOCIOLOGY 1420 (1978); Lisa R. Anderson & Charles A. Holt, *Information Cascades in the Laboratory*, 87 AM. ECON. REV. 847 (1997).

52. Kuran & Sunstein, *Cascades*, *supra* note 9, at 685-86 (“An informational cascade occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others.”).

shortcuts such as the “availability heuristic,” deference to socially-dominant influential information arbiters, and concerns about reputation and social standing in the event of disagreement.<sup>53</sup>

As examples of the way information cascades function, consider the task of correctly determining the answer to the following questions. Is global warming a serious crisis (p. 81)? Is Alar, a pesticide used on apples, a serious health risk to children consuming apples?<sup>54</sup> Are toxic waste dumps hazardous (p. 81)?<sup>55</sup> Is AIDS being spread in the African-American community by white doctors (p. 81)? Was the crash of TWA flight 800 caused by navy friendly-fire (p. 82)?<sup>56</sup>

For each of these questions it is difficult to assess evidence one way or the other. We tend to be influenced by pundits and those who we believe are better informed than we are.<sup>57</sup> As a result, incorrect information can propagate wildly, cascading through the communication network. Sunstein argues that these “information cascades” are more problematic in cyberspace than in physical space. “Cybercascades” occur spontaneously and spread rapidly because of the prevalence and speed of email discussion lists, news postings, websites, and other Internet protocols (pp. 81-82). In a well-known example, the South African President, Thabo Mbeki, came to believe that HIV does not cause AIDS, after he surfed a series of conspiracy-theory websites (pp. 82-83).

Sunstein’s concern is that cyberspace serves as a “breeding ground” for information cascades, and that millions of people will, as a result, end up believing falsehoods and rumors (p. 84). Cybercascades, in conjunction with group polarization, may lead to political extremism and social fragmentation, and imperil the requirements for a democratic polity and society (p. 84).

#### D. *Consumer Sovereignty and Democracy*

With these lessons sharply in mind, *Republic.com* goes on to explain the social benefits of shared experience and especially shared information (pp. 89-103). The thesis here is that shared experiences lead to greater social cohesion, as well as improved understanding and acceptance of others (pp. 95-96). Sunstein defends this conception against the obvious charge that individual sovereignty and choice are fundamental to liberty, and indeed, that they are liberty itself. He further claims that any argument

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53. For a full account of the factors and their interactions, see *id.* at 703-40.

54. See *id.* at 698-701.

55. See *id.* at 691-98.

56. See *id.* at 702-03.

57. For a more complete articulation of Sunstein’s general theory of information cascades in law, not just in cyberspace, and how they tie to reputational cascades, see Kuran & Sunstein, *Cascades*, *supra* note 9.

in favor of a communications policy limiting choice is not necessarily an attack on fundamental freedoms.

He draws a distinction between consumer sovereignty and democracy (pp. 113-23). He is concerned that citizens of a democracy not confuse a reduction in consumption choices with a reduction in individual freedoms. Consumer sovereignty, he argues, is not the same as freedom. While a free society will generally respect people's choices, consumer choice is not an absolute and is determined in part by access.<sup>58</sup> Hence, Sunstein argues, considerations other than maximizing consumption choices should be taken into account in molding our response to communication infrastructure access (pp. 105-23).<sup>59</sup>

He contrasts his communitarian view with the specialization and individuality possible with the Net, and the libertarian political philosophy shared by many early Internet users.<sup>60</sup> Here *Republic.com* provides a positive argument in favor of information sharing, rather than the previous negative arguments against individuality and the Net. Sunstein here seeks to preempt the likely libertarian concerns with his arguments in favor of limiting access to information.<sup>61</sup>

An important aspect of these chapters on consumer sovereignty and freedom is the role given over to "general interest intermediaries" (pp. 34-37), that is, to magazines, newspapers, radio, and television broadcasters

58. Especially in broadcast communications, availability determines some preferences—access to sports channels, say, rather than international news. A deprivation of access to international news might be considered a deprivation of freedom, even though the majority of people have adapted to a diet exclusively of local sports and never perceive that they are being deprived of anything (pp. 107-09).

59. In this section of the book, he further argues that consumer sovereignty is leading to individual unhappiness (pp. 117-22). This aspect of his argument is so strangely disconnected from, and irrelevant to, the rest of his argument that any discussion of it need not detain us.

60. For examples of the cyberlibertarian argument, see David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) [hereinafter Johnson & Post, *Borders*] (arguing that cyberspace can and should be regulated as a separate, nongeographical place); David Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155 (1996); John Perry Barlow, *A Declaration of the Independence of Cyberspace*, at [http://www.eff.org/pub/Misc/Publications/John\\_Perry\\_Barlow/barlow\\_0296.declaration](http://www.eff.org/pub/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration) (last visited Aug. 31, 2001) (asserting the independence of cyberspace from real-space sovereigns); David R. Johnson & David Post, *The New "Civic Virtue" of the Internet* (1998), at <http://www.cli.org/paper4.htm> (last visited Aug. 31, 2001) (arguing in favor of allowing the Internet to evolve on its own, based on complexity theory); David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439, 1448 (2000) [hereinafter Post, *Larry*] (reviewing LESSIG, *CODE*, *supra* note 17, and arguing against his requirement of real-space government involvement in cyberspace governance); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475 (1997) (foreshadowing the closing of the "cyberspace frontier" and demonstrating the concomitant rise in private regulation); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994) (arguing that some cyberspace issues are novel and in need of new approaches to their regulation); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 419-20 (1997) (arguing in favor of cyberspace self-governance).

61. He undertakes a similar exercise in chapters six and seven. For a discussion of a cyberlibertarian view of his position see *infra* Part IV.

that reach a large number of people and provide the same information to all. Sunstein introduces this idea early in the book and suggests that they are “unacknowledged public fora” (pp. 34-37). They provide the social glue that Sunstein glorifies in the middle of *Republic.com*, and that is juxtaposed with the fragmentation that he believes the Internet will bring. These general interest intermediaries form part of his response to the problems he predicts, and his proposals form the third major part of the book (pp. 167-90). If he is right in his identification of perfect filtering and group polarization, he argues, then we must promote people’s exposure to topics that they would not have chosen themselves, encourage access to shared experience, and promote debate about policy and principle (p. 167).

### *E. Regulatory Proposals*

To meet these aims he makes six proposals. First, we should set up “deliberative domains” on the Net, where issues of public policy can be shared and debated (pp. 170-72). Second, we should require the producers of potentially harmful communications to disclose the harm to the public (pp. 172-77). Third, we must institute a code of conduct that encourages self-regulation by communications providers (pp. 177-80). Fourth, adopting a suggestion made by Andrew Shapiro,<sup>62</sup> we should provide government subsidies to websites that encourage public debate (pp. 180-82). Fifth, we should have “must-carry” rules for popular websites, so that they are forced to include links to sites that encourage debate over substantive questions of public interest (pp. 182-89). And finally, we should mandate “must-carry” rules for particularly partisan websites, so that they are forced to include links to sites that have opposing views (pp. 184-89).

Professor Sunstein writes beautifully and forcefully, and he has the gift of being able to make each point appear to be the next link in a compelling and unassailable chain of arguments. Upon a close analysis, however, each of these links has terrible cracks. In order to succeed, Professor Sunstein’s philippic must convince us that four main links can withstand the pressures of his overall thesis. The first link is his assumption that perfect filtering is possible and likely, and will operate as described. Second, he assumes that this perfect filtering will lead to group polarization, cybercascades, or other undesirable social features.<sup>63</sup> Third, he argues that as a result, governmental regulation of the Internet is warranted and desirable. And finally, he suggests that his proposals for regulation are appropriate and might plausibly succeed.

Unfortunately, each one of Sunstein’s arguments is deeply flawed. I first challenge his assumptions that perfect filtering is likely to occur, or that it is any more troubling than our current media filtering techniques.<sup>63</sup>

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62. SHAPIRO, CONTROL REVOLUTION, *supra* note 18, at 205-06, 215, 227.

63. See *infra* Part II.

Second, I argue that, contrary to the fundamental basis of *Republic.com*, the research on group polarization does not inevitably lead to the conclusion that the Internet will lead to extremist communications or behavior.<sup>64</sup> Third, I argue that aspects of cyberlibertarian and democratic historicist theory that address paternalism, Internet sovereignty, and the nature of democracy cause problems for *Republic.com*. Finally, I contend that he does not seem to recognize the differences between regulating the Internet and regulating other types of media. Most notable of the problems here is the risk of regulatory arbitrage that his governance theory fails to recognize.<sup>65</sup> Since his diagnosis is incorrect, his prescriptions for relief are unnecessary and probably dangerous to the patient. But even if his diagnosis were accurate, I will argue that his proposals turn out to be practically and theoretically incoherent. Amongst a host of problems, they are all either contradicted by his own earlier perfect filtering argument, or by the impossibility of regulating the Internet as though it were a local communications medium.<sup>66</sup>

## II

### THE PERFECT FILTERING MYTH

It is some time in the future. Technology has greatly increased people's ability to "filter" what they want to read, see, and hear. General interest newspapers and magazines are largely a thing of the past. The same is true of broadcasters. The idea of choosing "channel 4" or instead "channel 7" seems positively quaint. With the aid of a television or computer screen, and the Internet, you are able to design your own newspapers and magazines. Having dispensed with broadcasters, you can choose your own video programming, with movies, game shows, sports, shopping, and news of your choice. You mix and match.

You need not come across topics and views that you have not sought out. Without any difficulty, you are able to see exactly what you want to see, no more and no less (p. 3).

In the mid-1990s, the director of the Media Lab at the Massachusetts Institute of Technology, Nicholas Negroponte, described a future where media had converged with information technology, and where multiple media channels disseminated content in a seamless system of information.<sup>67</sup> Part of this vision of the near-future involved a highly personalized newspaper-cum-television-cum-radio-cum-any-media-at-all source, which he called *The Daily Me*.<sup>68</sup> *The Daily Me* is supposed to provide highly

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64. See *infra* Part III.

65. See *infra* Part IV.

66. See *infra* Part V.

67. NICHOLAS NEGROPONTE, BEING DIGITAL 152-54 (1995).

68. *Id.* at 153.



individualized content to various viewing or hearing mechanisms, based on the individual's preferences for both content and dissemination. Thus, in this utopian future, in the morning *The Daily Me* wakes me with an audio ensemble of mellow hits of the "seventies, eighties, and nineties" from what we would nowadays think of as a clock radio. It then feeds customized news reports—say a heady combination of international geopolitical news and college hoops—to an interactive tablet that takes the place of my current morning newspaper. During the day, *The Daily Me* uses my work computer to keep me informed, providing me with stock quotes and information about corporate takeovers, as well as, perhaps, some lunchtime Bach and the latest celebrity news from *People* magazine to aid my digestion. In the afternoon, as I drive home my in-car *The Daily Me* takes the form of audio streams of ambient trip-hop dance music sent direct from *The Ministry of Sound* club in London. In the evening it provides endless reruns of *Sports Night* and *Seinfeld* on what I now think of as my television. And at night it lulls me to sleep with David Foster Wallace's latest book—*Infinite Jest II*, perhaps—presented on a small "paperback" computer. It gives me all the media content I want, when I want it, independent of the transmission device. And more importantly, at least for Professor Sunstein, it never gives me anything I do not want.

Negroponte's *The Daily Me* represents the apogee of personalized media. It is a vision that stirs the grandest dreams of techno-moguls such as Bill Gates.<sup>69</sup> But it fuels the nightmares of Cass Sunstein and is the starting premise of *Republic.com* (pp. 3-5).<sup>70</sup> However, though it is a key assumption, Sunstein spends little time discussing whether, or how, *The Daily Me* might actually work. Of the book's 224 pages, only the introductory five pages talk at all about perfect filtering, and of those five the majority is spent describing a few basic examples. In fact, at no point does Sunstein analyze what it would take to build the perfect filtering technology of *The Daily Me*.<sup>71</sup> He accepts at face value the hype of technology-company CEOs, whose stock portfolio value is determined in part by gee-whiz prognostications of how cool and efficient the technology is going to be.

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69. Bill Gates imagined:

The "TV guide" will almost be like a search portal where you'll customize and say, "I'm never interested in this, but I am particularly interested in that." It's already getting a little unwieldy. When you turn on DirecTV and you step through every channel—well, there's three minutes of your life. When you walk into your living room six years from now, you'll be able to just say what you're interested in, and have the screen help you pick out a video that you care about. It's not going to be "Let's look at channels 4, 5, and 7." It's going to be something that has pretty incredible graphics and it's got an Internet connection to it.

Bill Gates, prelude to REPUBLIC.COM [hereinafter Gates, *TV Guide*].

70. The concept is also found in other "second-generation" works like Andrew Shapiro's *Control Revolution*. SHAPIRO, CONTROL REVOLUTION, *supra* note 18, at 105-14. It performs a similar function in Shapiro's work, though Shapiro recognizes some of the benefits of personalization before going on to scare-us-silly at the social dangers that filtering engenders.

71. Much the same criticism can be leveled at SHAPIRO, CONTROL REVOLUTION, *supra* note 18.

This naïve assumption of the efficacy of perfect filtering is fundamentally wrong. The section that follows examines the technical mechanisms by which filtering currently works and then discusses the current research into successor technologies. The purpose is to identify the difficulty in building anything resembling perfect filtering and to explain why the probability of its development is vanishingly small. This is not to argue that perfect filtering is impossible but rather that it is very hard, and very unlikely, using currently known technologies.

Anything is possible, of course, and so we must accommodate the idea that someone could someday build *The Daily Me*. However, even if perfect filtering were to work, we would face no greater danger than we do today from existing “imperfect” filtering. Thus, after discussing the implausibility of perfect filtering, this Review turns to current methods of filtering media without Internet technology and asks whether the Internet poses an increased danger beyond the filtering mechanisms that we currently possess.<sup>72</sup>

#### A. *The Implausibility of Perfect Filtering*

Computer filtering appears to be an uncanny, magical thing.<sup>73</sup> How on Earth can Amazon make such accurate recommendations about books, CDs, and DVDs that I might like? There are three different technologies that constitute current approaches to computer filtering: databases for “customer-relationship management,” collaborative filtering,<sup>74</sup> and machine learning.<sup>75</sup> These three mechanisms together provide the illusion that perfect filtering may be within our grasp. However, an understanding of the technologies shows how difficult, if not impossible, it will be to build perfect filtering systems. The sections that follow explain why these three approaches are unlikely to provide the kind of filtering that Sunstein assumes is just around the corner.

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72. I do not propose examining the reason why we might support filtering technologies, nor examine some of the beneficial reasons for using filters. An exhaustive summary is provided in Mark S. Nadel, *Customized Filtering and Extremist Enclaves in Republic.com*, 54 STAN. L. REV. (forthcoming 2001).

73. As Sunstein notes, “some of the recommendations from Amazon.com and analogous services are miraculously good, even uncanny.” (p. 26).

74. Collaborative filtering is the process of classifying individuals into groups and determining media (and other) preferences from the other collaborators falling within the same group. It emerged in the early 1990s. See David Goldberg et al., *Using Collaborative Filtering to Weave an Information Tapestry*, COMMS. OF THE ACM, Dec. 1992, at 61.

75. Machine learning is the generic name for a series of algorithms that can adapt their output based on feedback “learning” processes. See PATRICK HENRY WINSTON, *ARTIFICIAL INTELLIGENCE* 441-43 (3d ed. 1992).

### 1. *Customer Relationships and Databases*

For most sites that provide some type of recommendation or have a filtering mechanism, the technology is not magical; it is very simple. For example, a large database at Amazon tracks my purchases,<sup>76</sup> and it records that I have bought an Elvis Costello CD, a book on travel to Singapore, a DVD of *Notting Hill* starring Julia Roberts, and a cordless power saw. When I next log in—or more irritatingly, by an unsolicited email—Amazon recommends that I consider purchasing Elvis Costello’s new album with Anne Sofie von Otter, a book on travel to Singapore’s close neighbor Malaysia, the recent release of Julia Roberts’s new movie, *The Mexican*, on DVD, and a spare battery for the saw.<sup>77</sup> In order to do this, Amazon and other online retailers use database systems called Customer Relationship Management (“CRM”) systems.<sup>78</sup> CRM packages from Oracle,<sup>79</sup> Siebel,<sup>80</sup> Microsoft,<sup>81</sup> or SAP<sup>82</sup> easily build a user profile of my interests based on every single purchase, query, or viewing of a page that I have undertaken on their site. So, when Elvis Costello releases a new CD, or the newest Julia Roberts film is released on DVD, it is easy to structure a query asking for a list of all customers who have bought an Elvis Costello CD or a DVD starring Julia Roberts and send them an email informing them of the “wonderful new release that you simply must have!!!!”

Specifying a consumer’s interests may seem uncanny, but usually it is just a prosaic SQL query.<sup>83</sup> This means that, sitting in the Amazon database, there is a table with user purchases of CDs, which looks something

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76. The database backend is all I am concerned about. The Internet technology for identifying me as the purchaser of these products is not important for the purposes of this Review. It is a prosaic combination of IP address tracking, registration and access control, and cookies. The technology has been explained elsewhere. See Froomkin, *Death of Privacy*, *supra* note 23, at 1486-94.

77. All these recommendations are representative of the many recommendations that I have received from Amazon. See, e.g., Email from Amazon, to Dan Hunter (Sept. 26, 2001, & Oct. 31, 2001) (on file with author).

78. See CHRIS TODMAN, DESIGNING A DATA WAREHOUSE: SUPPORTING CUSTOMER RELATIONSHIP MANAGEMENT 28-30 (2001).

79. See <http://www.oracle.com/ip/index.html?content.html> (last visited Aug. 29, 2001).

80. See <http://www.siebel.com/products/marketing/index.shtm> (last visited Aug. 29, 2001).

81. See <http://www.greatplains.com/microsoft/> (last visited Aug. 29, 2001).

82. See <http://www.inysap.com/solutions/index.htm> (last visited Aug. 29, 2001).

83. SQL stands for “Structured Query Language.” SQL is the fundamental data definition and manipulation language for relational databases worldwide. Most proprietary database systems run SQL, either natively or through the Open Database Connectivity (“ODBC”) standard. See JAMES R. GROFF & PAUL N. WEINBERG, SQL: THE COMPLETE REFERENCE 30 (1999).

like the following:<sup>84</sup>

CD PURCHASES TABLE

Transaction No.	Purchaser	CD Title	CD Artist	Email
...	...	...	...	...
103403456	Dan Hunter	Painted From Memory	Elvis Costello and Burt Bacharach	hunterd@wharton.upenn.edu
103403457	Cass Sunstein	The Town Hall Sessions	Louis Armstrong	cass@republic.com
... and so on.				

When the new Elvis Costello album is released, Amazon merely queries the database to pull out the names of the purchasers who are in the CD Purchases table and who have an entry of "CD Artist" containing the words "Elvis Costello." Then an email is generated informing me, but not Cass Sunstein, of the new release.

The interesting issue here is the reason why my name was extracted from the database. As often as not the criterion for pulling my name from the database is just wrong. The database contains my name because I bought the CD, DVD, book, or tool. It does not contain my reason for buying it. It is assumed that the reason I bought the item is linked to the artist, the actor, and so on. Thus, Amazon's later retrieval of my name in their subsequent targeted-marketing campaigns proceeds on the basis of my presumed appreciation for Elvis Costello or of Julia Roberts, or my habit of traveling to South East Asia, or my power tool obsession.<sup>85</sup> It may not retrieve my name based on the actual reasons for my earlier purchases. I may have bought the Elvis Costello album because it was written and performed by my favorite songwriter, Burt Bacharach, not because I like Elvis Costello. I may have purchased *Notting Hill* because I admire the writing of screenwriter Richard Curtis and not because I like Julia Roberts. Maybe I bought the book on Singapore because I had to go there for work and may never return to the place. And I might have bought the power saw as a gift for someone else and have no interest in tools myself.

Thus the data that I purchased something bears no necessary relationship to the reason I purchased it. Negroponte's *The Daily Me* relies on

84. Actually, under an appropriately normalized SQL database, the table containing my information (name, email address) would be separated from the table containing the CD purchases. But this is a technical concern that is not relevant for the purposes of the example.

85. Amazon recently emailed me with the announcement of the DVD release of *America's Sweethearts*. The email noted that "[a]s someone who has purchased films starring Julia Roberts, you might like to know that *America's Sweethearts* will be released on November 13, 2001 on DVD." Email from Amazon, *supra* note 77 (Oct. 31, 2001).

similar database technology.<sup>86</sup> The same type of database that allows Amazon to keep track of my purchases of CDs, DVDs, books, and tools must be used by *The Daily Me* to track my media consumption of “international news stories,” “talk-radio hosts,” “reality TV shows,” “televised college hoops,” and so on. *The Daily Me* requires a serious commitment to database technology in order to record my preferences, select the communications I will enjoy, and track whether I have enjoyed today’s media serving. The problem with Amazon’s database is present also in this aspect of *The Daily Me*. I may have watched something in the past, but why did I watch it?

One way of becoming slightly more confident of the underlying reason for my wanting a media product, or at least becoming more confident that I will like a similar product, is relying on data that I bought, listened to, or watched multiple instances of a similar product. If I always watch *Survivor*, or have purchased all of Elvis Costello’s albums, or have elected to receive the Technology section of the *New York Times* by email, then chances are good that I have some interest in topics provided by these media. However, even this method of analysis is rife with errors. I have, in fact, bought DVDs of *Notting Hill* and *Four Weddings and a Funeral* from Amazon, and will, no doubt, soon buy *Bridget Jones’s Diary* from them. Amazon will probably be fully confident that I love movies with Hugh Grant in them, since he is the only actor connecting all three films.<sup>87</sup> Unfortunately they would be wrong again, since my interest in each is not Hugh Grant’s performance but Richard Curtis’s writing; he wrote or cowrote all three and, as I said, I like his work.

The problem here is just one of the intractable issues for the committed “data miner.”<sup>88</sup> What of the colleague of mine who has a couple of hundred DVDs, ranging across all categories of films? If Amazon checks each new Hollywood release it is bound to find one movie he has purchased which shares the same star, director, writer, or casting agent as the new film. Should they send him an email for every new release, recommending the purchase of “a fantastic new movie you absolutely must have!!!!”?

Thus, CRM database technology is simple but flawed. The basic problems involve extracting the underlying interest that is served by the

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86. NEGROPONTE, *supra* note 67, at 153.

87. Shortly after I wrote this, Amazon sent me an email touting the benefits of purchasing *Bridget Jones’s Diary* on DVD, on the basis of my having bought a movie with Hugh Grant in it. Email from Amazon, *supra* note 77 (Sept. 26, 2001).

88. The process of filtering and extracting information from database systems is often called “data mining.” See MICHAEL J. A. BERRY & GORDON LINOFF, *MASTERING DATA MINING: THE ART AND SCIENCE OF CUSTOMER RELATIONSHIP MANAGEMENT* 12 (2000). The particular mechanisms presented here are the filtering mechanisms used in data mining for purposes such as *The Daily Me* would require.

purchase (which might be a physical DVD, or the transmission of college hoops, or other) and providing some feedback mechanism to update and improve the information in the database. Databases alone cannot give us anything resembling perfect filtering because, in short, they do not filter. In order to do this, we need to look at two main technologies that provide some of the functionality missing from databases: collaborative filtering and machine learning.<sup>89</sup>

## 2. Collaborative Filtering: People Helping One Another Know Stuff

Collaborative filtering is perhaps best summarized by the name of one of the earliest systems: People Helping One Another Know Stuff, or PHOAKS.<sup>90</sup> The idea is to match a person whose exact information, tastes, and interests we do not yet know—let us call him Dan—with people who are similar in meaningful ways to Dan and whose tastes and interests we do know. We can therefore use the group to which Dan belongs to filter new information for Dan. If similar people in his group have found a piece of information fun or useful or meaningful, then the chances are high that Dan will also find it fun, useful, or meaningful.<sup>91</sup> Hence the term “collaborative filtering,” since all the group members collaborate to filter material for Dan.

The first stage therefore involves identifying me as similar to others within a particular group. The task will differ depending on that which is being filtered, but it will usually involve scrutinizing the records about me

89. We might also identify a third type of filtering technology, manual rule-based systems. These systems rely on the manual creation and identification of rules that filter out certain types of information that satisfy the rules applied. Think of so-called “bozo filters” in email systems: one can set a rule that indicates that every message from a certain individual, certain domain name, or specified IP number should be immediately trashed. See [http://webopedia.lycos.com/TERM/b/bozo\\_filter.html](http://webopedia.lycos.com/TERM/b/bozo_filter.html) (last visited Feb. 10, 2002). It is possible to extend this sort of filter to the situation of *The Daily Me*. However, this is not really a plausible solution to the perfect filtering problem because manual setting of rules does not give us anything resembling intelligent filtering. It just gives us a set of presets on the media system and does not automatically adapt to new media choices (which is necessary for perfect filtering to operate as imagined). See John Huntress, *Tool Box: Building a Bozo Filter*, AdBanker.com, at [http://www.adbanter.com/tool\\_box/tool\\_box\\_002.shtml](http://www.adbanter.com/tool_box/tool_box_002.shtml) (last visited Jan. 30, 2002). Manual rule-based systems will not be considered in the sections that follow.

90. See <http://www.phoaks.com/index.html> (last visited Aug. 31, 2001).

91. See *Summary of Proceedings: Collaborative Filtering Workshop*, University of California, Berkeley, Mar. 16, 1996, available at <http://www.sims.berkeley.edu/resources/collab/collab-report.html> (last visited Aug. 29, 2001) [hereinafter *Summary of Proceedings*]; Jack Breese et al., *Empirical Analysis of Predictive Algorithms for Collaborative Filtering*, Proceedings of the 14th Conference on Uncertainty in Artificial Intelligence, Madison, WI (1998) [hereinafter Breese et al., *Empirical Analysis*]; David M. Nichols, *Implicit Rating and Filtering*, Fifth DELOS Workshop on Filtering and Collaborative Filtering, Budapest, Hungary, Nov. 10-12, 1997, 31-36; Paul Resnick et al., *GroupLens: An Open Architecture for Collaborative Filtering of Netnews*, Proceedings of the Conference on Computer Supported Cooperative Work, Chapel Hill, NC, 175-86 (1994); Upendra Shardanand & Patti Maes, *Social Information Filtering: Algorithms for Automating "Word of Mouth,"* Proceedings of CHI'95—Human Factors in Computing Systems, 210-17 (1995).

and then comparing these records with other people's records.<sup>92</sup> I can then be identified as a member of a particular group. So, for example, Amazon checks my purchasing and browsing habits, as disclosed in the records of their CRM database. They conclude that I fall into the "Dangerously-Handsome-and-Witty-Law-Professor Group." So far so good. The next step is to identify what other people within the group liked and disliked. This is usually done on the basis of simple purchases ("Other people like you bought Richard Russo's *Empire Falls*") or by group members rating the purchase they made ("Other people like you rated *Empire Falls* five out of five stars"). Therefore, in assessing my media needs, the filter notes that the few other lucky members of the select "Dangerously-Handsome-and-Witty-Law-Professor Group" all bought copies of Cass Sunstein's latest book, *Republic.com*, and they rated it highly. Amazon's email to me gushes, "Dan, you're gonna love this book!!"

Unfortunately, this technology cannot help construct perfect filtering systems. Collaborative filtering began as a research field in the early 1990s.<sup>93</sup> It was, briefly, the scene of a commercial feeding frenzy and a white-hot IPO market, followed by a disastrous fall from grace.<sup>94</sup> The reason for this sudden attack of sanity on the part of investors was, essentially, that the techniques just did not deliver on the field's initial early promise. There are at least two obvious reasons for this failure.

First, it is very hard to work out the group to which anyone belongs. While I may belong to the "Dangerously-Handsome-and-Witty-Law-Professor Group" for the purposes of buying technical books, I actually did not love *Republic.com*. Perhaps for reasons having to do with my technical training I did not like it at all. So, for the purposes of this book, I am in a specialist subgroup, the "Dangerously-Handsome-and-Witty-Law-Professor-with-a-Computer-Science-and-Cognitive-Psychology-Degree Group." It is virtually impossible for Amazon to know this. It has yet to be shown that the feedback loop in collaborative filtering can ever control for this problem. It just does not work. Further, on the issue of group choice, the established mappings do not work very well once you move outside the particular area for which the group was established. For example, let us say that the law professor group was created based on records from book purchases. And let us further assume that this grouping is fairly good at filtering out useful book choices for me. There is little to suggest that it will be

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92. Many different similarity measures can be used to judge how I am similar to others. Indeed, how best to classify me into one group based on the appropriate similarity metric is, of course, the crucial question. See Breese et al., *Empirical Analysis*, *supra* note 91.

93. *Summary of Proceedings*, *supra* note 91.

94. See Janelle Brown, *Personalize Me*, SALON.COM, April 6, 2001, at <http://www.salon.com/tech/feature/2001/04/06/personalization/index2.html>; Alexei Oreskovic, *Flight of the Firefly*, THE INDUSTRY STANDARD, Nov. 6, 2000, at <http://www.thestandard.com/article/0,1902,19669,00.html>.

very accurate at choosing other types of products. I probably do not share interests in news, music, magazines, movies, or sports with other members of this group. I may love death metal music, *Tour de France* cycling, the early Hitchcock oeuvre (before he moved to America), and line dancing; but in relation to all these categories, I am probably in a minority of one within the “Law-Professor Group” that previously identified my book choices so accurately.

Even if we could solve this problem, which so far has eluded all attempts, there is a second snag for collaborative filtering: people change. When I was young I loved Agatha Christie novels. I am pleased to say that I no longer do. I moved on to other mystery writers, like Elmore Leonard, Peter Temple, Michael Connelly, and James Lee Burke. However, with the exception of Peter Temple, I find that I enjoy mystery writers less than I used to enjoy them. Collaborative filtering assumes a degree of fixity in the preferences of the group members: you were once a lover of Star Trek, you are now a lover of Star Trek, you will always be a lover of Star Trek. Unless all other members of the group mysteriously also tire of being trekkers, then the suggestions from this filtering will somehow always involve Captain Kirk, Mr. Spock, Captain Picard, and Commander Data.<sup>95</sup>

These two problems identified above, group specification and changing preferences, lead to the most important reason why collaborative filtering cannot ever become perfect filtering. Collaborative filtering was never intended to be perfect filtering. It is always assumed that, in any collaborative filtering implementation, the user will have access to other sources of material.<sup>96</sup> Developers have realized that if the user was not able to break outside the strictures of the collaborative filter then the filters would become useless. As we become bored with Agatha Christie novels or Star Trek reruns, we will search for other material. And my membership in certain groups is correspondingly altered, I am removed from the Agatha Christie group altogether and now included in a new grouping of people who like HBO’s *Six Feet Under*. Collaborative filtering can, therefore, remove some of the media choices that plague us, but it cannot be perfect filtering as Sunstein envisions.

### 3. *Machine Learning*

The other main type of potentially-applicable technology is a subdiscipline of artificial intelligence called machine learning.<sup>97</sup> We need not

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95. Or whatever their appropriate titles may be. (Email flames from trekkers can be directed to the email address noted in the dagger footnote above.)

96. *Summary of Proceedings*, *supra* note 91.

97. For an introduction to artificial intelligence, see WINSTON, *supra* note 75, at 441-503; MARK STEFIK, INTRODUCTION TO KNOWLEDGE SYSTEMS 19-145 (1995); *see also* JOHN ZELEZNIKOW & DAN HUNTER, BUILDING INTELLIGENT LEGAL INFORMATION SYSTEMS: REPRESENTATION AND REASONING IN LAW (1994) (discussing artificial intelligence in law); Dan Hunter, *Near Knowledge: Inductive*



examine each type of machine learning, as the general features of neural networks provide us with enough information to assess machine-learning approaches to the area.<sup>98</sup>

Neural networks are not “neural” in any sense, except metaphorically. They operate on computers like other computational algorithms.<sup>99</sup> They are tagged “neural” because they operate in a way that seems to be similar to the way the brain works. They typically involve a set of input pathways and a set of output pathways. Between the input and output there are a series of connections that have a weight attached to them and a series of nodes that have an activation level attached to them.<sup>100</sup> The inputs are activated, and this activation is propagated to the intermediate nodes via the connections. Each one of these intermediate nodes sums the strength of the signal entering it from these connections, and if it is greater than the activation level of the node then it “fires,” passing its signal on to the next one in the chain.<sup>101</sup> Through this series of activations, some of the output nodes are activated and a “result” ensues.

The interesting point is how the system “learns,” since this is the way that a perfect filtering system can decide whether I will enjoy a new movie, video-game, TV series, and so on. Say we have a neural network that is supposed to learn whether I will like a newly released movie. We start with a series of inputs individually describing any number of movie attributes. These might include, at the highest level, the genre of the movie, for example, “romantic-comedy,” “martial-arts-adventure,” “actioner,” “splatter-flick,” and so forth. Then we might include inputs for the actors, “Julia Roberts,” “Jackie Chan,” “Keanu Reeves,” as well as for the director, screenwriter, and casting agent. We can include inputs for plotline features: “twist ending,” “obvious, three-act structure,” and so on. We also have all of our internal nodes that initially are set with random weights and activation strengths. And finally, we have some output nodes that represent how much I will like the movie: from “Dan will love this” and “Dan will find this wryly amusing” to “Dan is gonna hate everything about this movie.”

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*Learning Systems in Law*, 5 VA. J.L. & TECH. 9, 1522-1687 (2000) (analyzing the applicability of inductive learning algorithm within law), available at <http://www.vjolt.net/vol5/issue3/v5i3a09-Hunter.html>; Dan Hunter, *Out of Their Minds: Legal Theory in Neural Networks*, 7 ARTIFICIAL INTELLIGENCE AND LAW 129-51 (1999) (discussing the applicability of neural networks in law) [hereinafter Hunter, *Minds*]; Dan Hunter, *Commercialising Legal Neural Networks*, 2 J. INFO. LAW & TECH. (1996), at <http://elj.warwick.ac.uk/jilt/ArtifInt/2hunter/default.htm> [hereinafter Hunter, *Commercialising*].

98. The most important consideration here is how the system learns. This is broadly the same process (though the mechanics differ) for all machine learning systems. WINSTON, *supra* note 75, at 445.

99. Hunter, *Minds*, *supra* note 97, at 129-31; Hunter, *Commercialising*, *supra* note 97.

100. Hunter, *Minds*, *supra* note 97, at 130-32.

101. There are many variants, but this is representative of all neural networks. See WINSTON, *supra* note 75, at 443-44.

We then classify a given movie using all these inputs. If it is *Rush Hour*, the inputs for “martial-arts-adventure,” “Jackie Chan,” “comedy,” and so forth are activated. An output is generated, based on the internal random weightings and activation levels. It generates an output of “dislike.”<sup>102</sup> However, I vaguely enjoyed *Rush Hour*, and so this information is provided to the system in a process called “back-propagation.”<sup>103</sup> This means that the internal weights and activations are changed until the inputs for *Rush Hour* lead to an output of “Dan liked this movie in a kinda take-it-or-leave-it way.” We perform this operation for every movie ever released, cycling over and over again, until we have a set of weightings and activations that accurately encodes all of the data. When *Rush Hour 2* is released, the system should accurately predict that “Dan will like this movie a bit less than the original.”<sup>104</sup> In theory it should also be able to tell me how I will feel about movies as varied as *Memento*, *Moulin Rouge*, *Pearl Harbor*, and *A Beautiful Mind*.

The various different types of machine learning are all reliant on this sort of identification of relevant input criteria followed by some sort of learning through a feedback loop.<sup>105</sup> It is here that the myth of machine-based perfect filtering starts to unravel. First, the learning is only as good as the initial input criteria, and these criteria can only code for those features that have previously been identified.<sup>106</sup> As new genres and actors emerge, the system does not accurately reflect my preferences. For example, until I saw *The Matrix* I had a strong dislike for Keanu Reeves, and I had never heard of Carrie-Anne Moss. Any system rating this movie probably would have considered both my dislike for Keanu and my enjoyment of martial arts movies and split the difference, concluding that I would like it a little. After all, I had never seen a movie that fits into the

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102. Because the initial settings are random, the output could be any one of the possible outcomes, for example, “hate,” “really dislike,” “dislike,” “indifferent,” “like,” “really like,” “love,” etc.

103. WINSTON, *supra* note 75, at 443.

104. Sequels are not much of a stretch for this sort of system. Hollywood makes sequels so that they are as close as possible to the successful originals. I was bored out of my mind by *Jurassic Park II*, and so it is going to come as little surprise that I slept through *Jurassic Park III*. (Of course, this does not explain how *Alien* and *Aliens* can be so compelling, while *Alien 3* and *Alien 4* were tedious.) A more difficult task is assessing whether, based on my enjoyment of *Rush Hour*, I will enjoy a somewhat similar film with different actors (*Kiss of the Dragon*, with Jet Li), a different type of film (*Memento*) or even a new genre (science-fiction romantic comedy, perhaps?). We do not need to complicate the issue here.

105. WINSTON, *supra* note 75, at 443.

106. There is another practical technique for getting sufficient feedback for learning, a feature that Amazon’s machine learning system demonstrates. Amazon allows me to rate a recommendation it has provided, which is then fed back into its recommendation system. I doubt that I am the only person who has never told them how I feel about their recommendations, which are almost uniformly wrong. I do not consider this to be a theoretical problem with any “machine-learning-as-perfect-filtering” thesis. It is, however, a serious practical consideration that has no obvious solution, and which casts further doubt on the thesis.

“dystopian, science-fiction, reality-as-Plato’s-cave-thesis, martial arts” genre.

This is not a problem that can be solved by saying someone misidentified the correct inputs: the correct inputs simply did not exist until that movie. Furthermore, just as with the collaborative filtering approach, the machine learning approach cannot deal with my becoming bored with a series, genre, or actor. Machine learning is, by necessity, based on a past history. It cannot account for the fact that I no longer like a genre, or that I will love a brand-new genre. Genre is not the only criterion that changes: what of the new actress of whom I had previously never heard, but who I now think is the best thing since the invention of espresso? The hitherto wonderful actor who has become tedious? The hack director who suddenly gets it right?

Machine-based mechanisms for filtering, like the human-based mechanisms in collaborative filtering, can provide some basis for suggesting that I will enjoy a particular type of media content. But, like the human systems, they simply will not lead to perfect filtering. Perfect filtering assumes that the system gets it right all the time. I am never tempted to turn off the media I am experiencing right now because there is nothing better out there. Unfortunately, or perhaps fortunately, none of the technologies that we have at our disposal presently can come close to perfect filtering.

#### 4. *Imperfect Filtering*

Perfect filtering is not completely impossible. Who knows what may happen in the future? The problem with Sunstein’s argument however is that his facile assumption of perfect filtering is based on very shaky science. It is based on a conceit that was convenient for Negroponte to peddle to the potential funders of Media Lab activities, but which has proved very hard to develop. Examining the filtering technology, we see little evidence that Sunstein’s dystopian vision of perfect filtering is likely. Since Sunstein simply assumes that perfect filtering is going to occur, he does not even bother to try to persuade the reader that this eventuality will come to pass. In the end, there is nothing in *Republic.com* that gives the reader reason to conclude that Sunstein is right.

A riposte to the previous analysis would be to say that *Republic.com* does not rely on perfect filtering; imperfect filtering and a reduction in our access to media content would lead to the same result. At a few points in his narrative, Sunstein makes such a claim (p. 98). He suggests that shared experiences will not completely disappear, and that the Internet can promote sharing and community (pp. 15-16, 98-99). Nonetheless, he concludes that this does not invalidate his fundamental concern (pp. 16, 99).

Unfortunately for his argument, a small number of “lawyerly” qualifications do not change the fact that his entire work is built on the uncertain

foundation of perfect filtering. If perfect filtering can provide nothing other than slightly fewer choices on cable television,<sup>107</sup> then it is not going to lead to any of the terrible social ills that Sunstein foretells. If perfect filtering is really just slightly-better-than-we-have-now filtering, then his whole tale unravels.

The obvious rejoinder then is that I have only described current technologies and not what might be possible in the future. And of course this is true. Anything is possible. In a hundred years there may be quantum-level computers that can read my thoughts, build a cognitive model of me, accurately assess all media content, and provide me with exactly what I want.<sup>108</sup> But by then we will probably be living as brains-in-vats, and the problems we face will be more serious than the ones foretold by Professor Sunstein. For all that we might engage in science fiction about man-machine mind melds and other ridiculously implausible possibilities, the fact remains that there is no technology that we currently know of that can even remotely approach the type of perfect filtering that *Republic.com* assumes. Sunstein's conclusions fail as a result of his mistaken initial premise.

Some skeptics may still believe that some slight variation of perfect filtering is possible. Or perhaps they would just wish to engage in a *Gedankenexperiment*: "What if," they say, "perfect filtering were possible? Would your view of *Republic.com* differ then?"<sup>109</sup> My answer is that we already have essentially the same degree of media sifting that perfect filtering would give us. And we have yet to see the kind of apocalyptic extremism that Sunstein envisages.

### B. *The Reality of Today's Daily Me*

The year is 2001 A.D. My clock radio awakens me in the morning. It is set to a radio station that I like. I eat breakfast while reading a magazine or newspaper to which I subscribe. I travel to work listening to MP3s I downloaded after I heard the songs on my favorite radio station in the morning.<sup>110</sup> At work I read professional journals that are relevant to my job and listen to a streaming-media radio station that plays the same sort of music that I listen to in the morning. At night I watch the network news and movies from a cable movie channel, based on my preference for

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107. See Gates, *TV Guide*, *supra* note 69.

108. If this happens, let me say right now that I retract everything that I have argued in this section.

109. Sunstein has said as much, both in a personal email to the author and in the Afterword to the paperback edition of *Republic.com*. See *infra* Part VI.A; Email from Cass Sunstein, to Dan Hunter (Sept. 10, 2001) (on file with author).

110. Some of which I have even purchased.

certain types of movies.<sup>111</sup> I go to sleep reading books recommended from the radio, from friends, or from the magazines to which I subscribe.

At first blush, it is hard to see how this state of affairs differs from the completely illusory perfect filtering hypothesis that Sunstein fears so greatly. In the year 2001, I filter out a huge range of media. I have never seen more than five (agonizingly long) minutes of a musical. To the best of my knowledge, I have never listened to a country-and-western radio station. I do not subscribe to right-wing political journals and do not have to work hard not to find them in my dentist's office. Yet, according to Sunstein, somehow what I do now is so qualitatively different from what would occur under the (fictional) *The Daily Me* that we must act immediately to regulate away the terrifying prospect of extremism and social balkanization.<sup>112</sup> How can this be so?

The difference, urges *Republic.com*, is that we will no longer have shared media spaces. We will not be exposed to other ideas. Specifically, we will no longer have access to the public fora which are General Interest Intermediaries such as newspapers, current affairs magazines, TV news, and so on. It is not enough that some people will still be curious and seek out these types of intermediaries in a perfect-filtering world; rather, everyone must have access to them (pp. 15-16), otherwise we have murderous group extremism and the collapse of democracy.

This is just silly. If we already have effective media filtering for most people, then surely it is an empirical question as to whether additional filtering is going to lead to extremism. However, Sunstein does not see it is as an empirical question: access to these General Interest Intermediaries appears as a fundamental requirement of civil society and to reduce access to them is untenable. For someone committed to empirical answers to other types of questions,<sup>113</sup> this is an odd position for Sunstein to take.

At the heart of this concern is the idea that the Internet will remove the public park and sidewalk. Sunstein talks about the importance of these places. They are vital in order that we be forced to confront alternate views, that we be allowed to demonstrate in front of City Hall, and so on (pp. 31-32). The "public-park-and-sidewalk" trope is, of course, a favorite of First Amendment jurisprudence and holds a place dear to the heart of

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111. And with the purchase of my new TiVo recorder, not only will I never miss the programs I want, but I will also be able to skip those pesky public interest announcements and newsflashes about the war in Afghanistan.

112. Sunstein recognizes that we already filter media content, but suggests that what we will see with perfect filtering is somehow conceptually different from this (pp. 10-12).

113. See, e.g., Schkade et al., *Dollars*, *supra* note 9, at 1160-71 (applying empirical techniques in examining jury deliberations and concluding that empirical studies call into question our assumptions of the merits of jury deliberation); Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000) (examining compensatory and punitive damages awards in jury decision making).

U.S. constitutional lawyers.<sup>114</sup> Thus, we see the analogy uncomfortably transported into cyberspace, with Sunstein and others arguing that we must protect these constitutional values in the online world (pp. 27-37, 189).<sup>115</sup>

Though it is unobjectionable to argue in favor of public fora within cyberspace, Sunstein's use of it here is very odd. Cyberspace is the most public of communications fora. For the cost of a cup of coffee you can participate in online chatrooms, email discussions, Usenet newsgroups, and other online discussion environments. For the cost of a pizza, you can have a website which everyone in the world can see. Want the world to see your grievance against the government, politicians, companies, or individuals? You got it. Unlike the tightly controlled commercial media with which we are currently "blessed," the Internet provides cheap, easy, international proliferation of information. It is an unparalleled virtual sidewalk. We do not have public access like this to newspapers, cable television, radio, or any other of the media sources that we currently enjoy. Yet Sunstein suggests that commercial operators of General Interest Intermediaries, vast media conglomerates like NewsCorp and AOL-Time Warner, are somehow more important "sidewalks" than the completely open Internet that we currently have.<sup>116</sup>

The response of Sunstein (and Andrew Shapiro, from whom this argument is largely derived)<sup>117</sup> is that perfect filtering of information means that even if it is easy to build a website, no one will see it. It will not matter if the dissident website proprietor emails people, because that will be filtered out too. The same holds for instant messaging, chatrooms, and other Internet communications.<sup>118</sup>

114. See J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 399 (1990) (tracing the origin of the public forum doctrine).

115. See also LESSIG, *CODE*, *supra* note 17, at 69-71; SHAPIRO, *CONTROL REVOLUTION*, *supra* note 18, at 124-32; Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 200-19 (1998) (arguing for the application of the public forum doctrine in cyberspace).

116. I am not arguing here that the Net is a perfectly accessible medium. The national and international digital divide is real, and the poor typically do not have access to the Net. However, the Net's accessibility is orders of magnitude greater than television. Though network television ad rates vary dramatically, the costs of airtime for a thirty-second commercial (aired once) are between \$60,000 and \$250,000 during normal programming. See Ronald Goettler, *Advertising Rates, Audience Composition, and Competition in the Network Television Industry 20* (unpublished manuscript, on file with author), available at <http://www.gsia.cnu.edu/andrew/goettler/papers/ad-GSIA-1999-E28.pdf> (last visited Feb. 21, 2002).

117. SHAPIRO, *CONTROL REVOLUTION*, *supra* note 18, at 124-27.

118. *Id.* As Shapiro argues:

What may be most distressing about total filtering, then, is the way it could solidify a trend toward the elimination of spaces where citizens can confront and engage one another. Of course, it's always been the case that some speakers have a hard time getting noticed, and this is not always a lamentable fact. The difference, though, is one of opportunity.

*Id.* at 127.

As my discussion of perfect filtering demonstrates, this is a fear that is solidly grounded in the bedrock of bad science fiction. Perfect filtering just cannot filter in the way that Sunstein and Shapiro fear. Moreover, we might ask why is it that the Net is singled out for such approbation? We do not see either Sunstein or Shapiro campaigning against the much less open media environments of television, radios, or newspapers. Why is it that the Internet is so different from other media sources? Finally, and I think most tellingly, it is useful to remember that no matter what happens online we still have the “real world.” Even if everything that these second-generation scholars suggest actually did come to pass, Thomas Paine can still take up a placard outside the physical object of his unhappiness,<sup>119</sup> whether this be the unfair employer, the unrepresentative city hall, or whatever. The Net, even the perfectly filtered Net, does not remove us from the real, physical world, where all of our usual freedoms exist without reference to cyberspace.<sup>120</sup>

For all his discussion of sidewalks, airports, and parks, when discussing why we should fear perfect filtering, Sunstein forgets about the influence of external sources on our filtering of media. These external sources have a fundamental effect on our media choices. I learn about good films, books, and magazines from colleagues, billboards, free city papers, overheard discussions on the bus, and so on. The same is true of the real subject of Sunstein’s worries: extreme political concerns. Political debate does not usually occur when I read *The New Republic*, and, disagreeing with an author, start shouting at the magazine. Politics happens when a friend, colleague, political rival, or chance-passerby says something with which I agree or disagree, and the argument rages from there.

Sunstein forgets, or simply ignores, the real world, which will always impinge on media choices and will always provide the public sidewalks that he fears will disappear in cyberspace. Whether or not in the future we end up with a perfectly-filtered Net, we will face exactly the same situation that we face today. We already have the effective equivalent of *The Daily Me*. Most people do not read all books. Most people may not read outside the relatively narrow scope they know they like. Most people do not read the *New York Times*, *Le Monde*, *The Australian*, or any other “balanced” General Interest Intermediaries. Perhaps this is to be regretted. But we

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119. Shapiro uses an example of a man called Paine who builds a website [www.paine.com](http://www.paine.com). *Id.* at 124-27.

120. As Polk Wagner has noted to me, this is correct only to the extent that we spend a measurable part of our lives in realspace. Email from Polk Wagner to Dan Hunter (October 10, 2001). As we spend more time online, this answer is weakened. This counterargument is absolutely correct, but I am suspicious (as Polk is) of suggestions that we are living a significant fraction of our lives online. Though true for a very small number of people, I doubt that the life online versus life offline ratio is very troubling for most people. And I doubt that this ratio is likely to increase significantly for many, many years.

should not assume that the Internet, or the illusory phantom of perfect filtering, is going to change the real world at all.

What Sunstein's fear of filtering ignores is that we do not live in the environment of the early-nineteenth century. Our problem lies not in a reduction in the amount of data we receive. A reduction in information is our only possible salvation. I receive about fifty emails a day. If I go away on vacation for a week, I spend the next three weeks clearing out my in-box. It seems that I have to read hundreds of journals, books, and articles each week. I am constantly bombarded with ads, teasers for films, political commentary, stock quotes, gossip, and weather information. David Shenk calls this "data smog." He notes that vast reams of information are making us more stressed, less informed, and less effective.<sup>121</sup> The amount of information I have to process in the early twenty-first century is so vast and multifarious that if I do not filter it my brain will fry. Despite this, Sunstein offers me a paean to the virtues of more information, not less. And to make things worse, he wraps up this unhelpful advice in the flag of democracy.

### III

#### FEAR OF GROUPS

When, Athenians, will you take the necessary action? What are you waiting for? Until you are compelled, I presume. But what are we to think of what is happening now? For my own part I think that for a free people there can be no greater compulsion than shame for their position. Or tell me, are you content to run round and ask one another, "Is there any news today?" Could there be any news more startling than that a Macedonian is triumphing over Athenians and settling the destiny of . . . [Greece]?

Demosthenes, *First Philippic*<sup>122</sup>

If there is any news more startling than that a Macedonian was triumphing over Athens, then it is surely that a leading democratic theorist should argue that group discussion and deliberation are bad things. Startling though this may be, it is nonetheless true.

The central fear of *Republic.com* is a fear of groups. More particularly, Sunstein fears the polarizing effect of groups upon the decision making and thinking of their members. Sunstein has explained that he decided to study the Net after discussions with Lawrence Lessig, but noted that his concerns solidified when he connected his work on jury decision making<sup>123</sup>

121. DAVID SHENK, *DATA SMOG: SURVIVING THE INFORMATION GLUT* 33-50 (1997) (explaining that the generation and dissemination of data is overwhelming our ability to process it).

122. DEMOSTHENES, *First Philippic*, *supra* note 6, para. 10.

123. Sunstein, *Deliberative Trouble*, *supra* note 9. *See also* Schkade et al., *Dollars*, *supra* note 9.



with the Internet.<sup>124</sup> Sunstein's work on jury decision making looked at the social psychology research about group polarization. The effect occurs when people deliberate in groups. It has been shown that after deliberation, group members generally move towards more extreme viewpoints than those that they initially held.<sup>125</sup> This effect is now well documented and uncontroversial.<sup>126</sup> What is controversial and problematic is Sunstein's use of this research. Sunstein says, in essence, that group deliberation causes extremism (pp. 62-75). If Sunstein's thesis were true, then not only would a philippic against the Internet be warranted, but we would justifiably be suspicious of the results of any group decision making. In fact, if Sunstein's thesis were true then, frankly, we would not let more than two people congregate in one place at one time, First Amendment or no First Amendment. And we would do away with juries altogether.<sup>127</sup>

Luckily, this interpretation of group polarization is not particularly well supported by the social psychology research. Sunstein is not wrong in identifying the group polarization effect, but his use of it is problematic. He fails to give due regard to the fact that, at times, groups actually depolarize and move to less extreme positions, or they move to "extreme" positions that are actually moderate. Further, he fails to establish that the conditions for group polarization are actually present in the Net entities that he identifies as so worrying. And finally, he draws a series of conclusions that may or may not be correct about Internet polarization, but for which he has no evidence. The sections that follow explain each of these problems, but first, it is important to understand how the group polarization effect comes about, and what the research into it actually says.

### A. *The "Risky Shift"*

In 1961, James Stoner, a graduate student undertaking a master's degree in industrial management at MIT, undertook some unusual experiments,<sup>128</sup> which surely rank as some of the most surprisingly influential master's research of all time.<sup>129</sup> The conventional wisdom of the time

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124. Carl S. Kaplan, *Law Professor Sees Hazard in Personalized News*, *New York Times* on the web (Apr. 13, 2001), at <http://www.nytimes.com/2001/04/13/technology/13CYBERLAW.html> (last visited Aug. 29, 2001).

125. JOHN SABINI, *SOCIAL PSYCHOLOGY* 35 (2d ed. 1995); ROGER BROWN, *SOCIAL PSYCHOLOGY, THE SECOND EDITION* 200-12 (1986).

126. SABINI, *supra* note 125, at 35.

127. Sunstein's recent work on mistakes in jury deliberations and awards might actually provide some basis for such an argument. See generally Schkade et al., *Dollars*, *supra* note 9.

128. James A. F. Stoner, *A Comparison of Individual and Group Decisions Involving Risk* (1961) (unpublished master's thesis, Massachusetts Institute of Technology). Stoner was not looking for the shift in groups, and the seminal analysis of the risky shift is found in another work. See BROWN, *supra* note 125, at 202-03.

129. It is hard to think of another masters thesis that invented a field of study and led to literally hundreds of experiments and articles. See SABINI, *supra* note 125, at 35.

within industrial management was that group decisions tended to be more conservative than the decisions of the individuals of the group.<sup>130</sup> His fairly unremarkable starting point was thus to demonstrate this empirically. What he discovered was the exact opposite: group decisions were riskier than those of the group members as individuals. Participants in the study were asked, for example, to advise an engineer whether he should quit a secure job for a riskier, but better paying, one. The participants were asked at what risk level should the engineer take the offer (10% chance of the risky job continuing, 20%, 30%, and so on). The mean of the individual risk assessments of group members prior to group deliberation was significantly lower than the eventual group assessment of the same risk after deliberation. Hundreds of studies subsequently established this as a persistent phenomenon,<sup>131</sup> and it came to be known as the “risky shift.”<sup>132</sup>

In many subsequent studies the concept of risky shifts within groups was shown to operate in contexts outside risk assessments.<sup>133</sup> For example, moderately profeminist women became more feminist postdiscussion,<sup>134</sup> and moderately anti-American French students became more anti-American.<sup>135</sup> It has been shown to operate in domains ranging from moral decisions about the appropriateness of the death penalty,<sup>136</sup> to preferences over which sport is better, football or basketball.<sup>137</sup> The standard formulation of the effect is that group polarization occurs when an initial tendency of individual group members towards a given direction is enhanced following group discussion.<sup>138</sup>

Sunstein does not mention the risky shift because group polarization is a more general characterization of the phenomenon.<sup>139</sup> However, there is one aspect of group polarization that undermines Sunstein’s conclusions, which can be seen best by using the risky shift as an example. It is called the “cautious shift.”<sup>140</sup> Though the majority of questions in the early studies

130. *Id.* at 33.

131. Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141, 1142-44 (1986) [hereinafter Isenberg, *Group Polarization*] (critically reviewing all the group polarization literature, and proposing social comparison and persuasive argumentation mechanisms operate together to create the effect).

132. *Id.* at 1142.

133. For the first explication of group polarization outside the “risky shift,” see Serge Moscovici & Marisa Zavalloni, *The Group as a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125 (1969). See also Isenberg, *Group Polarization*, *supra* note 131, at 1142-43 (reviewing the literature on group polarization); BROWN, *supra* note 125, at 222-29.

134. David G. Myers, *Discussion-Induced Attitude Polarization*, 28 HUM. REL. 699, 703, 711 (1975).

135. Moscovici & Zavalloni, *supra* note 133, at 125, 131.

136. Amiram Vinokur & Eugene Burnstein, *Depolarization of Attitudes in Groups*, 36 J. PERSONALITY & SOC. PSYCHOL. 872, 884-85 (1978) [hereinafter Vinokur & Burnstein, *Depolarization*].

137. *Id.* at 880, 884.

138. Isenberg, *Group Polarization*, *supra* note 131, at 1141-43.

139. BROWN, *supra* note 125, at 200-26.

140. *Id.* at 208-12.

produced a risky shift, there were a number of questions that produced much more cautious answers upon group deliberation.<sup>141</sup> These questions were characterized by a very large stake (happiness in marriage, life, and death of an individual) where other people's interests were also in issue.<sup>142</sup> Here polarization occurred, but in the opposite direction from the expected risky outcome. The group was more cautious than the individuals comprising the group. The salient point here is that polarization need not involve the "extremism" that Sunstein characterizes all polarization to involve. It may be that a cautious shift is a shift to the extreme of "caution"; however, this extreme is one that, in many cases, we would see as desirable, and not "extreme" at all.

We must be careful then not to see all shifts as inevitably towards an undesirable extreme. This is, however, just the first of many issues that we might have with Sunstein's use of group polarization. To understand other problems with his application of the research, we need to examine why group polarization works in the first place. There are two fundamental, and often complementary, theories of why group polarization occurs: Social Comparison Theory<sup>143</sup> and Persuasive Argument Theory.<sup>144</sup> Sunstein mentions these theories (pp. 67-71), but he does not clutter his narrative with detailed analyses of them. However, the specifics of these theories are important because the details of each of them causes serious problems for *Republic.com*.

### 1. Social Comparison Theory

Social Comparison Theory ("SCT"), first proposed by Leon Festinger, posits that group polarization occurs because people wish to be perceived in a socially desirable way, and so they process how others behave and adjust their self-presentation to maximize their social desirability.<sup>145</sup> Hence, this leads to the risky shift, as people try to present themselves as holding a position more socially desirable than that which they originally held.<sup>146</sup>

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141. Questions five and twelve of Stoner's initial study fell into this category. See Stoner, *supra* note 128; see also Allan I. Teger & Dean G. Pruitt, *Components of Group Risk Taking*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 189, 200-05 (1967) (identifying a number of other questions that produced the same effect and classified the criteria that lead to the cautious shift); Isenberg, *Group Polarization*, *supra* note 131, at 1141 (concluding that the novel argument pool available to the group influences whether a shift is risky or cautious).

142. BROWN, *supra* note 125, at 209-11.

143. Isenberg, *Group Polarization*, *supra* note 131, at 1141.

144. *Id.* The complementary aspect is controversial; against this Brown suggests that both operate together. See BROWN, *supra* note 125, at 212-13. This is not important for our purposes.

145. Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954) (recounting the development and evidence of SCT).

146. See Isenberg, *Group Polarization*, *supra* note 131, at 1142 (noting that stronger versions of the SCT suggest that people wish to portray themselves as more favorable than the average tendency in the group). This is not necessary for SCT to operate and the specific metes and bounds of SCT are beyond the scope of this Review.

Sunstein, of course, recognizes the SCT and uses it as the basis for much of his discussion about group polarization on the Internet (pp. 68-69). Imagine an Internet-based group that clearly holds an objectionable view: it is homophobic, anti-Semitic, neo-Nazi, or whatever. Members of this group correspond via chatroom, web, and email. Those who hold slightly less extreme views adjust their viewpoint in the direction of the group and gain social standing as a result. Others follow, and so extremism breeds even greater extremism.

At face value, SCT seems to suggest that Sunstein is correct, and that group deliberation online leads to extremism. However, both the theory and the data supporting it are more nuanced than this reading indicates. Even after accepting the SCT, one has to ask how the process of risky shifting operates. Here there are two competing hypotheses: the “bandwagon-effect hypothesis” and the “pluralistic-ignorance hypothesis.”<sup>147</sup> The bandwagon effect suggests that people desire to be seen by group members to be more extreme (“better”) than others in the direction favored by the group.<sup>148</sup> The individual determines the group norm and the preferred position, and she shifts her position to be “better” than the mean on this issue. By doing so, she improves her standing within the group. If extreme is “good” then more extreme is “better.” This hypothesis focuses on the shift in position, assuming that the subject’s initial declaration of position—that is, the predeliberation position—is an accurate reflection of the person’s thinking on the issue.

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147. These two hypotheses are comingled in a number of other approaches, such as the cultural value approach. Lawrence K. Hong, *Risky Shift and Cautious Shift: Some Direct Evidence on the Cultural-Value Theory*, 41 SOC. PSYCHOL. 342, 342, 345 (1978). See also Dean G. Pruitt, *Choice Shifts in Group Discussion: An Introductory Review*, 20 J. PERSONALITY & SOC. PSYCHOL. 339, 340, 349 (1971) (comingling with release mechanisms); Dean G. Pruitt, *Conclusions: Toward an Understanding of Choice Shifts in Group Discussion*, 20 J. PERSONALITY & SOC. PSYCHOL. 495, 502 (1971); Jerald M. Jellison, *Social Comparison of Abilities: A Self-Presentation Approach to Decision-Making in Groups*, in SOCIAL COMPARISON PROCESSES: THEORETICAL AND EMPIRICAL PERSPECTIVES 235-58 (J. Suls & R. Miller eds., 1977) (comingling with self-presentation processes); James A. F. Stoner, *Risky and Cautious Shifts in Group Decisions: The Influence of Widely Held Views*, 4 J. EXPERIMENTAL SOC. PSYCHOL. 442 (1968) (comingling with specific values approaches); Festinger, *supra* note 145 (comingling with self-anchoring); Roger Brown, *Further Comment on the Risky Shift*, 29 AM. PSYCHOLOGIST 468, 469 (1974) (examining nonrisky shift situations) [hereinafter Brown, *Further Comment*]; Isenberg, *Group Polarization*, *supra* note 131, at 1142.

148. “To be virtuous . . . is to be different from the mean—in the right direction and to the right degree.” Brown, *Further Comment*, *supra* note 147, at 469. See also Howard L. Fromkin, *Effects of Experimentally Aroused Feelings of Undistinctiveness upon Valuation of Scarce and Novel Experiences*, 16 J. PERSONALITY & SOC. PSYCHOL. 521, 529 (1970) (discussing underlying social factors on preferences for scarce experiences); David G. Myers, *Polarizing Effects of Social Comparison*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 554, 556 (1978) (defending SCT as the basis for group polarization); David G. Myers et al., *Does Learning Others’ Opinions Change One’s Opinions?*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 253, 253-56 (1980) (discussing evidence of knowledge of others’ opinions as good evidence of SCT rather than PAT); David G. Myers et al., *Attitude Comparison: Is There Ever a Bandwagon Effect?*, 7 J. APP. SOC. PSYCHOL. 341, 346-47 (1977) (explaining studies on the bandwagon effect upon merely learning others’ attitudes).

Sunstein implicitly subscribes to the bandwagon hypothesis when he writes about the group “causing” the shift (pp. 65-69). However, the second explanation for SCT suggests that the group does not cause the shift at all. The “pluralistic-ignorance hypothesis” focuses not on the postdeliberation shift, but rather on the subject’s initial declaration of position.<sup>149</sup> Faced with having to declare a position in a situation of potential group deliberation, the subject is faced with a difficult path to tread. Here there are two competing tendencies: a desire to state one’s true position, and a desire not to deviate from the (unknown) group norm. Operating within these constraints, and in a state of ignorance, the individual initially underestimates the group norm and declares a position less extreme than her actual position. During group deliberation, the individual is exposed to the group norm, which is actually more extreme than her initial guess. So the subject becomes free to declare her initially-held, more extreme position. Thus, group deliberation does not actually alter the individual’s position, which remains constant throughout. Rather, group deliberation frees her to declare her true position, which she initially withheld. When each member of the group undertakes this process, the overall group tendency will be towards the more “extreme” position.<sup>150</sup>

The major difference in these explanations of the SCT is that the bandwagon effect and the pluralistic-ignorance hypotheses do not ascribe the same causal connection between the group and the shift. In the bandwagon effect hypothesis, the group causes the shift in the subject. In the pluralistic-ignorance hypothesis, the shift was always there but was only exposed and validated by the group deliberation. These two explanations of SCT are important to any assessment of the merits of Sunstein’s argument. If the bandwagon-effect hypothesis is correct, then we might agree with Sunstein that the group deliberation causes extremism. However, if the ignorance hypothesis is correct, then the group does not cause any extremism. It merely provides the means by which the existing views of individuals can be expressed.

It would be helpful if we could determine which of these two hypotheses were correct, but unfortunately there appears to be no way of

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149. George Levinger & David J. Schneider, *Test of the “Risk Is a Value” Hypothesis*, 11 J. PERSONALITY & SOC. PSYCHOL. 165, 168-69 (1969) (explaining evidence of the existence of a more general phenomenon than risky shift, labeled “choice shift”); Pruitt, *supra*, note 147, 340 (discussing evidence of both PAT and SCT in risky shift); Harold E. Schroeder, *The Risky Shift as a General Choice Shift*, 27 J. PERSONALITY & SOC. PSYCHOL. 297, 298-99 (1973) (discussing risky shift as an instance of a general phenomenon involving conflict and compromise with values); Daniel J. Isenberg, *Levels of Analysis of Pluralistic Ignorance Phenomena: The Case of Receptiveness to Interpersonal Feedback*, 10 J. APP. SOC. PSYCHOL. 457, 467 (1980) (analyzing pluralistic ignorance hypothesis).

150. Isenberg, *Group Polarization*, *supra* note 131, at 1142.

determining this experimentally.<sup>151</sup> The result is that we do not know whether Sunstein is right and probably can never know. While this does not suggest that he is wrong in his use of group polarization, it does suggest that the application of the theory is more complex than his account indicates. He may turn out to be right in assuming that the bandwagon effect hypothesis will rule in cyberspace, but it is just as likely that the pluralistic-ignorance effect will apply.

Furthermore, there is a second concern with Sunstein's reliance on the SCT. For SCT to produce group polarization, group members must identify with other members of the group who hold more extreme views.<sup>152</sup> This requirement was first identified in relation to the risky shift where studies identified that subjects considered that risk taking was an admirable quality, and those who were riskier held higher status within the group. It is not clear from Sunstein's account whether this precondition will ever be found in the groups that he suggests will form online. It may be that the particular form of extremism that Sunstein fears will be considered admirable within the groups created by the Internet. However, it is an open question, and one for which Sunstein presents no evidence.

Sunstein's account, while not actually wrong, fails to consider all of the criteria necessary for the conclusions he argues are inevitable. There are reasons, therefore, to doubt the generalizations that Sunstein makes from the SCT literature. We see the same issue emerging when examining the other theory explaining group polarization.

## 2. *Persuasive Argument Theory*

The second major theory of group polarization is the Persuasive Argument Theory ("PAT").<sup>153</sup> Unlike the SCT, this theory does not focus on the individual's response to social dynamics but instead looks to informational influences as generating polarization. The fundamental question it asks is: what is the number and persuasiveness of pro and con

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151. These two hypotheses are not easily capable of empirical falsification. Isenberg, *Group Polarization*, *supra* note 131, at 1143-44 (noting a number of attempts at determining which of the hypotheses is valid, but concluding that the experiments have been largely inconclusive).

152. George R. Goethals & Mark P. Zanna, *The Role of Social Comparison in Choice Shifts*, 37 J. PERSONALITY & SOCIAL PSYCHOL. 1469, 1476 (1979) (discussing studies on information sharing as part of the risky shift); see also Jerald M. Jellison & John Riskind, *A Social Comparison of Abilities Interpretation of Risk-Taking Behavior*, 15 J. PERSONALITY & SOCIAL PSYCHOL. 375, 380-90 (1970) (explaining a series of studies on the importance of social comparison of abilities in the risky shift); Jerald M. Jellison & John Riskind, *Attribution of Risk to Others as a Function of Their Ability*, 20 J. PERSONALITY & SOCIAL PSYCHOL. 413, 415 (1971) (noting the attribution of riskiness to others as a function of their ability); Jerald M. Jellison et al., *Attribution of Ability to Others on Skill and Chance Tasks as a Function of Level of Risk*, 22 J. PERSONALITY & SOCIAL PSYCHOL. 135, 139 (1972) (noting the attribution of riskiness to others as a function of their ability, but applied to skill and chance tasks); Isenberg, *Group Polarization*, *supra* note 131, at 1144.

153. PAT is a variant on the more general "informational processing" explanation for choice shifts, but is now widely regarded as the best theory of informational influences. See Isenberg, *Group Polarization*, *supra* note 131, at 1145.

asks is: what is the number and persuasiveness of pro and con arguments available to the group members? Thus, individuals come to predeliberation decisions based on a limited set of arguments. During group deliberation they are exposed to a larger pool of persuasive arguments, favoring the direction of the group mean. Group members shift their opinions accordingly.<sup>154</sup>

Sunstein is aware of the PAT and mentions it in *Republic.com* (pp. 67-68). But like his discussion of the SCT, his account of the PAT ignores features that cast doubt upon his conclusions. For example, PAT accounts in part for the influence that a lone holdout can have upon a group. The example that is often used is Henry Fonda's character in the movie *Twelve Angry Men*.<sup>155</sup> There, Henry Fonda played a person who was, initially, the single juror who believed a defendant to be not guilty of the murder with which he was charged. Through a series of persuasive arguments generated in the course of the movie, he convinced all the other jurors to reverse their positions, from guilty to not guilty. As this example demonstrates, not all group deliberations lead to "extreme" positions in the sense that Sunstein uses it (that is, "extreme" equals "wrong"). Further, applying the PAT, there are circumstances where group deliberation does not lead to further polarization. This typically occurs where the arguments are well known, and any amount of discussion does not lead to changes in the views of the group members because they have heard it all before.<sup>156</sup>

Sunstein is not necessarily wrong, but the research he relies on does not inevitably point to the conclusions he reaches. The issue is much more complex than he makes it out to be. In short, he extrapolates too far. The next section takes up that subject.

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154. Eugene Burnstein & Amiram Vinokur, *What a Person Thinks upon Learning He Has Chosen Differently from Others: Nice Evidence for the Persuasive-Arguments Explanation of Choice Shifts*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 412, 422-24 (1975) (discussing shifts in choice upon knowledge of others' preferences, independent of discussion); Eugene Burnstein & Amiram Vinokur, *Persuasive Argumentation and Social Comparison as Determinants of Attitude Polarization*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 315, 320 (1977) (providing a defense of persuasive argument theory by itself as sufficient for polarization); Eugene Burnstein et al., *Interpersonal Comparison Versus Persuasive Argumentation: A More Direct Test of Alternative Explanations for Group-Induced Shifts in Individual Choice*, 9 J. EXPERIMENTAL SOC. PSYCHOL. 236, 240-45 (1973) (discussing evidence of shift on the basis of number of persuasive arguments); Amiram Vinokur & Eugene Burnstein, *Effects of Partially Shared Persuasive Arguments on Group-Induced Shifts: A Group-Problem-Solving Approach*, 29 J. PERSONALITY & SOC. PSYCHOL. 305, 310-15 (1974) (noting evidence of polarization as a result of information influence); Vinokur & Burnstein, *Depolarization*, *supra* note 136, 884-85 (noting evidence of PAT alone is sufficient for group polarization); George D. Bishop & David G. Myers, *Informational Influence in Group Discussion*, 12 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 92, 100 (1974) (discussing evidence of informational influences being sufficient of themselves to generate polarization); Daniel B. Madsden, *Issue Importance and Choice Shifts: A Persuasive Arguments Approach*, 36 J. PERSONALITY & SOC. PSYCHOL. 1118, 1125-27 (1978) (discussing evidence of PAT confirmed in direction, strength, and magnitude of shift).

155. See BROWN, *supra* note 125, at 226-39.

156. *Id.* at 225-26.

### B. *Extrapolations in Social Psychology*

Social Psychologist Stanley Milgram demonstrated that good people will do terrible things when obeying a malevolent authority.<sup>157</sup> His research teaches us a great deal about human nature, but it also demonstrates the danger of extrapolating from the results of social psychology experiments.

In Milgram's famous social psychology experiments, he took ordinary people and placed them in an extraordinary situation. Subjects became "assistants" to a "scientist" in an experiment purportedly about the effect of shock stimuli on learning.<sup>158</sup> His researcher strapped a "student" into an apparatus that could deliver electric shocks, and then gave the subject control over the apparatus.<sup>159</sup> When the learning exercise commenced, whenever the student got an answer wrong, which was distressingly often, the scientist instructed the assistant to shock the student.<sup>160</sup> The shocks began at a mild fifteen volts, and increased in severity in fifteen-volt increments each time the student got an answer wrong. The levels of shock were marked on the apparatus as starting in the safe range, but they moved quickly into the serious, very dangerous, and potentially lethal range.<sup>161</sup> Upon the initial shock, the student strapped into the apparatus indicated surprise, and then as the shocks became worse he cried out, withdrew consent from the experiment, pled to be released, screamed, and was eventually silent.<sup>162</sup> The assistants administering the shocks were, of course, troubled by what was happening, but were reassured by the scientist that it was necessary to take this study to its conclusion in order to come to understand the effect of shock on learning.<sup>163</sup> Even though the students were screaming and pleading to be released, the scientist urged the assistants to continue, and most did.<sup>164</sup>

In the duplicitous manner of social psychology, the experiment had nothing to do with learning under stress and everything to do with investigating obedience to authority.<sup>165</sup> Unbeknownst to the subjects, the "scientist" and the "student" were in cahoots. The student never received any shock at all, and simply followed a script pretending to be increasingly hurt by the imaginary shocks administered.<sup>166</sup> The real question was at what point between fifteen volts and four hundred fifty volts would people refuse to go along with the authority figure and stop administering

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157. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 13-26 (1st ed. 1974).

158. *Id.* at 13-19.

159. *Id.* at 19-20.

160. *Id.* at 20-21.

161. *Id.* at 20.

162. *Id.* at 22-23.

163. *Id.* at 21-23.

164. *Id.* at 22-23.

165. *See id.* at 13-16.

166. *Id.* at 13-15.



shocks.<sup>167</sup> The anticipated rebellion point was when the victim begged to be released—around one hundred forty volts.<sup>168</sup> The results were otherwise: 63% of subjects obeyed the authority figure to the maximum, and potentially lethal, four hundred fifty volts; and the average point of disobedience was three hundred sixty volts.<sup>169</sup>

The research leads to the rather unpalatable conclusion that most people will obey authority figures, even to the point of hurting, maiming, or potentially killing another person. This seems like a simple, albeit horrible, result and one that we could assume would apply in other situations. We might extrapolate from this and suggest that we would see the same result in other types of authority situations. We might even suggest that we would find this occurring on the Internet. But this type of extrapolation is very dangerous and often wrong.

While Milgram's results were true within the specific context of the experiments, they do not apply in other situations. A different experiment by Gamson and others posing as the fictitious "Manufacturer's Human Relations Consultants" ("MHRC") examined obedience to malevolent authority in a slightly different manner.<sup>170</sup> Researchers placed participants in a small team and told them that they were acting as a focus group for an oil company engaged in a wrongful dismissal action brought by an employee. Researchers gave them the facts of the case, which involved a franchisee of a gas station who was terminated from his franchise because he was living with a woman who was not his wife. They asked the participants to present arguments in favor of the company, to pretend to be offended by the gas station franchisee's behavior, and to argue that he should lose his franchise.<sup>171</sup> They videotaped the participants doing this. It quickly became clear to the participants that the "company" was using them to manufacture evidence against the franchisee, and this realization was reinforced when researchers asked them to swear affidavits and provide releases for the "company" to use the videotapes in court.<sup>172</sup> The MHRC participants responded differently than Milgram's participants. Almost immediately there was significant rebellion.<sup>173</sup> At times violence threatened to break out. The responses were so powerful that the

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167. *Id.* at 27-31.

168. Stanley Milgram, *Ethical Issues in the Study of Disobedience*, in STANLEY MILGRAM, *THE INDIVIDUAL IN A SOCIAL WORLD* 139-46 (1977) [hereinafter MILGRAM, *SOCIAL WORLD*].

169. The results of Milgram's experiments have been replicated in a vast number of experiments in many countries, showing a remarkable absence of sensitivity to country or culture. For a review of the literature, see BROWN, *SOCIAL PSYCHOLOGY*, *supra* note 125, at 3-10.

170. WILLIAM A. GAMSON ET AL., *ENCOUNTERS WITH UNJUST AUTHORITY* 3-11 (1982); see also Stanley Milgram, *Liberating Effects of Group Pressure*, in MILGRAM, *SOCIAL WORLD*, *supra* note 168, at 139-46.

171. GAMSON, *supra* note 170, at 4.

172. *Id.* at 3, 6.

173. *Id.* at 10.

researchers called off the experiments before they were half completed in the interests of the safety of the participants.<sup>174</sup>

The crucial point here is not to examine the similarities and differences between the studies and determine what factors lead to obedience to unjust authority and what factors lead to rebellion.<sup>175</sup> Rather, it is that relying upon Milgram's findings about obedience to authority gives us exactly the wrong conclusion when certain features of the experiment are changed. The conclusions about Milgram's experiment are limited to the circumstances surrounding that experiment. Extrapolating to a wholly different environment, such as the one found in the MHRC experiment, leads to predictions of behavior that are the exact opposite of what is actually observed in experiments.

Similar concerns arise regarding Sunstein's extrapolation from the group polarization work to cyberspace. Apart from the complications identified above,<sup>176</sup> Sunstein assumes that exactly the same group environment exists in cyberspace as that found in the experimental settings that produced group polarization. The truth is that no empirical work has established that group polarization exists within cyberspace settings. In fact, the opposite is true. Recent studies have shown that Internet users are more tolerant of diverse viewpoints than those who do not use the Internet.<sup>177</sup> These studies did not control for the sort of filtering that concerns Sunstein, so they are anything but conclusive. However, they provide some empirical evidence against Sunstein's argument, whereas he gives us none in his favor.

In fact, the absence of empirical evidence supporting Sunstein's argument is more dangerous than it first appears. For three years we have known the basic elements of Sunstein's argument. It is really just a popularization of arguments that were presented earlier by psychologist Patricia

174. BROWN, SOCIAL PSYCHOLOGY, *supra* note 125, at 14.

175. Brown suggests that the salient differences leading to the different outcomes include the dates of the studies (Milgram took place in 1963; MHRC took place in 1981), the authority of the institutions (Milgram took place at Yale University; MHRC took place at a market research company), and, most important of all, the effect of collective action (Milgram tested individuals; MHRC tested a group). *See id.* at 15-18.

176. *See supra* Part III.A.

177. The 2000 General Social Survey, conducted by the University of Chicago's National Opinion Research Center, found statistically significant differences in tolerance between those who use the Internet often and those who do not. Of those who use the Internet more than ten hours per week, 82% would permit their local library to access a book on communism. Of those who use the Internet less than this, 56% would permit this. Furthermore, 71% of the heavy Internet users would allow racists to conduct meetings, as against 56% of nonheavy Internet users. *See* Jeffrey R. Young, *A Study Finds That Web Users Are More Tolerant than Non-Users*, Chron. of Higher Educ. Online, June 15, 2001, available at <http://chronicle.com/free/2001/06/2001061501t.htm> (last visited Aug. 29, 2001). Further, the vast Pew Internet and American Life Project study on online communities concludes that there is a vibrant connection between Internet usage and engagement in local and far-flung communities. Pew Internet & American Life, at <http://www.pewinternet.org/reports/toc.asp?Report=47>.

Wallace,<sup>178</sup> and which were taken up at about the same time by Andrew Shapiro, a lawyer and policy analyst.<sup>179</sup> In 1999, Shapiro argued that perfect filtering would lead to a fraying of social ties, though he did not identify group polarization as the cause of this.<sup>180</sup> At the same time, Wallace identified group polarization as leading to issues with online communications as a result of fragmentation of media environments.<sup>181</sup> While the argument has been around for a while, we have yet to see a rise in extremism in that time. We have yet to see any empirical research validating his claim that group polarization maps onto the Internet, but we are starting to see empirical research that negates his argument.

We will probably never see the sorts of problems that he prophesies, and we definitely should wait until appropriate evidence emerges that group polarization is a problem in cyberspace before making such disturbing claims. It is dangerous and irresponsible to use the kind of scare tactics that Sunstein uses, when there is absolutely no evidence of the fears that he creates. In short, his book is a very good example of an influential pundit seeking to create an informational cascade toward a particular conclusion. Which leads on to the subject of the next section.

### C. *Cyber-Gossip and Information Cascades*

In addition to its fear of groups, *Republic.com* expresses a concern about a particular form of online gossip. Sunstein worries that information cascades occurring online create “cybercascades” of disinformation (pp. 80-84). There is something intuitively right about one aspect of his observation. The Net provides people with vastly greater access to information at unparalleled speed. Moreover, unlike other media sources, the Net thrives on nonauthoritative sources and unmediated, unedited information, whether this be Matt Drudge’s online scuttlebutt, weblogs, email discussion lists, Usenet newsgroups, or any other form of cyberspace data. Because information that may be wrong bounces around cyberspace at extraordinary speeds, we are likely to see the kinds of cybercascades that Sunstein foretells.

Though these cascades may occur, their effect is far from clear. *Republic.com* lumps this problem together with group polarization and

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178. PATRICIA WALLACE, *THE PSYCHOLOGY OF THE INTERNET* 73-87 (1999).

179. See SHAPIRO, *CONTROL REVOLUTION*, *supra* note 18. Some aspects of these observations were made as early as 1997. See Marshall van Alstyne & Erik Brynjolfsson, *Electronic Communities: Global Village or Cyberbalkans?* (1996), available at <http://web.mit.edu/marshall/www/Abstracts.html> (last visited Jan. 23, 2002).

180. SHAPIRO, *CONTROL REVOLUTION*, *supra* note 18, at 105-23. He called it “total filtering” rather than “perfect filtering.” *Id.* at 105-14.

181. WALLACE, *supra* note 178, at 73-87 (noting group polarization was one of a host of other psychological issues like the robbers’ cave problem, intergroup conflict, and so on.). She was less pessimistic about the dangers faced since she recognized some of the limitations on the psychological literature and seemed less keen on extrapolating from the literature. *Id.* at 78-80.

concludes that social fragmentation will result. However, Sunstein seems justifiably hesitant in ascribing earth-shaking dangers to cybercascades. Though he indicates that cybercascades will become more problematic, the strongest claim he makes against them is that they will cause “thousands or even millions of people . . . [to] believe something that is quite false” (p. 84). His concern seems to be that cybercascades will exacerbate the dangers of online group polarization, not that they are nightmares in and of themselves (p. 84).

Though Sunstein’s other academic writings on informational and reputational cascades have merit, the same cannot be said of *Republic.com*. For example, in his other work, Sunstein and his coauthor, Timur Kuran, focus on how cascades lead to errors in regulation.<sup>182</sup> Here, a concern with cascades has intellectual purchase, for if we are concerned about the efficient allocation of regulatory resources, then it is a mistake to regulate things that appear serious because of cascades of disinformation. We should therefore consider how to limit these cascades. However, this approach is not what Sunstein is talking about in *Republic.com*. Here he is concerned about how cascades cause fragmentation in society (pp. 80-84), and he does not establish that cascades will do this. Falsehoods, though quickly propagated by the Internet, are typically remedied by contrary information spreading as speedily through the same channels. And even if this were not the case, Sunstein fails to establish that cybercascades lead to any sort of social fragmentation at all. He provides no evidence that fragmentation is occurring from the existing informational cascades that he has previously documented. His main concern here seems to be that cybercascades increase group polarization. However, given the significant problems with Sunstein’s theory of online group polarization,<sup>183</sup> cybercascades add little to the overall concern we might have about online communications.

With so little to fear either from groups or gossip, we must ask whether it is appropriate to regulate speech and communications in the way that Sunstein wishes. This type of question is one of political philosophy, and leads us to an examination of a cyberlibertarian response to *Republic.com*.

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182. Kuran & Sunstein, *Cascades*, *supra* note 9, at 711-44.

183. See *supra* Part III.A-B.

## IV

“WHAT CASS DOESN’T GET”<sup>184</sup>

But there is one common bulwark which the instinct of sensible men possesses within itself, a good and safe one for all, but invaluable for democracies against tyrants. And what is that bulwark? It is mistrust. Guard that; hold fast to that. If you preserve it, no harm can touch you. [“]What is your object?” I said. “Freedom. Then do you not see that Philip’s very titles are utterly irreconcilable with that? For every king, every despot is the sworn foe of freedom and of law. Beware,” said I, “lest, seeking to be rid of war, you find a master.”

Demosthenes, *Second Philippic*<sup>185</sup>

Mistrust of rulers and a love of freedom are characteristics Demosthenes and libertarians share.<sup>186</sup> This mistrust is, however, not an aspect of Sunstein’s political philosophy.<sup>187</sup> In chapters four and five, Sunstein preemptively defends the benefits of shared experience and social cohesion against the charge that individual sovereignty and choice is fundamental to liberty. He argues that a communications policy limiting choice is not necessarily an attack on fundamental freedoms. It depends on how you view freedom, he says—is liberty merely consumer sovereignty or is it more than this (pp. 89-124)?<sup>188</sup>

This sort of talk is a red-rag-to-a-bull for libertarians. The only way to enrage them more would be to argue that too much freedom is a bad thing, which is precisely what Sunstein does when he insists that “[a] system of limitless individual choices, with respect to communications, is not

184. It seems there is now a convention within debates on cyberspace regulation that any attack by a liberal on a libertarian, or vice versa, will be entitled “What *X* Doesn’t Get.” This can be traced back to a debate between the liberal Lawrence Lessig and the libertarian Declan McCullagh, where Lessig entitled a chapter of his book, “What Declan Doesn’t Get.” LESSIG, *CODE*, *supra* note 17, at 231-34 (arguing that a decentralized mechanism of Internet governance was dangerous and simplistic). So, when libertarian David Post sought to criticize Lessig, he called his article, “What Larry Doesn’t Get.” Post, *Larry*, *supra* note 60, at 1439 (suggesting that, contrary to Lessig’s approach, code regulation might appropriately be undertaken as a decentralized, bottom-up process). It seems that the convention now extends to any criticism within cyberlaw, even those where a liberal criticizes a liberal. *See, e.g.*, Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy: (What Larry Doesn’t Get)*, 2001 STAN. TECH. L. REV. 1 (2001) (criticizing Lessig’s conception of the effectiveness of privacy regulation).

185. DEMOSTHENES, *Second Philippic*, *supra* note 6, paras. 24-25.

186. In truth, of course, Demosthenes was not distrustful of governments. He was a senator and head of the democratic faction. *Encyclopedia Britannica*, *supra* note 3. He was railing against Philip, so any argument that might sway his audience was useful ammunition.

187. Nor is it an aspect of mine. I am not a libertarian, “cyber” or otherwise. I therefore do not wish to pass myself off as one, and only take up some features of the cyber-liberal challenge thrown down by Sunstein in chapters four and five of *Republic.com*.

188. *See supra* Part I.D (summarizing his argument).

necessarily in the interest of citizenship . . . .” (p. 123). Cyberlibertarians have already taken issue with this.<sup>189</sup>

In this Part, I discuss two challenges to Sunstein’s conception of online democracy. The first is the obvious concern that cyberlibertarians have with his approach. The second is the less obvious, but no less important, challenge to deliberative democracy recently mounted by figures such as Edward Rubin.<sup>190</sup>

### A. *Paternalism and Cyberliberties*

Cyberlibertarianism reveals two particular problems with Sunstein’s reform proposals. First, in arguing against consumer empowerment and in favor of a reduction in choice (pp. 113-23), Sunstein seeks to protect us against ourselves. Reared on rugged individualism and the invocation of personal liberties, an American audience is unlikely to appreciate this paternalism. Liberal democratic theory, and cyberspace liberal democratic theory, is on its safest ground when it seeks to protect individuals from majoritarian excesses.<sup>191</sup> However, Sunstein is not suggesting that government act within this safe realm. Rather, he implies that individuals cannot be trusted with their own media choices. “You want to watch baseball? Tough. It’s not in your best interest. You can watch PBS, where we have a fascinating program on the geopolitical basis for the Middle East dispute. Don’t complain! You’ll be better off.” This is of course an exaggeration, and Sunstein’s argument is much more subtle. But it is hard to come away from this part of the book without the feeling that somehow you have done something wrong by watching *Oprah*, or *Buffy the Vampire Slayer*, instead of a worthy PBS documentary entitled “Canada: Our Good Neighbor of the North.” This guilty feeling is unlikely to sit well with the American public, who naturally eschews such paternalism. The sheer unpopularity of such regulation makes it inconceivable.

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189. See, e.g., Matthew Gaylor, *Slashdot*, Apr. 5, 2001, at <http://slashdot.org/books/01/03/25/1617212.shtml> (last visited Aug. 29, 2001). The final paragraph of his review summarizes the view:

The celebrated civil libertarian, John Stuart Mill, contended that enlightened judgment is possible only if one considers all facts and ideas, from whatever source, and tests one’s own conclusions against opposing views. Therefore, all points of view—even those that are “bad” or socially harmful—should be represented in the “marketplace of ideas.” And the Internet is an incredibly free and eclectic smorgasbord of ideas. And just as we have freedom to choose which sites we visit or what print magazines or books we read, it would be the end of freedom as we know it if the government forced us to read or watch what they want, even if it were only a link. Thanks, but no thanks to Republic.Com.

*Id.* Sunstein can dispatch this argument by noting that Gaylor unintentionally restates the fundamental fear of *Republic.com*: perfect filtering removes alternate points of view, which is a terrible thing. So should not a dyed-in-the-wool cyberlibertarian drop his arms and join with the cyberliberal to defend against this terrible outcome?

190. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

191. See Netanel, *Cyberspace Self Governance*, *supra* note 19, at 421-27, 444-46.

The second feature of the cyberlibertarian critique emerges from the underlying justifications for its political philosophy. This is the pragmatic observation, first expressed by Johnson and Post,<sup>192</sup> that cyberspace challenges the nation-state as the presumptively legitimate regulatory sovereign. The relevant inquiry here involves determining precisely which national government should have the right to regulate activities in cyberspace, given that activities in cyberspace are not tied to geographical borders and easily slip between them. Sunstein's book, like many of the second generation before him,<sup>193</sup> assumes that American political and legal philosophy can be applied to cyberspace, in the same way that we regulate TV networks (pp. 172-80).

When Sunstein talks of decision making by "us" and of making choices collectively, he is not talking about the Italian goatherd, the Singaporean banker, or the South African fisherman. Rather, he is talking to, for, and about the Beltway insider who has the ear of U.S. Representatives and Senators in Washington, D.C. His is a very "second-generation" view of the world that assumes the peculiarly American conception that rights-based analysis must have universal application to cyberspace. This approach blithely ignores legal philosophies and systems based on Shyaria (Muslim) law, Confucianism, or other non-Western systems. And even within Western countries, the American emphasis on rights-based discourse is often seen as irrelevant to the majority of legal systems that are not based on a Bill of Rights or even a written constitution.

Sunstein may seek to rely on Jack Goldsmith's response to the concerns raised by Johnson and Post.<sup>194</sup> Goldsmith posits a pragmatic reliance on private international law, suggesting that the nation-state is both able and justified in regulating activities that occur within its borders, whether that happens online or offline.<sup>195</sup> Cyberspace is only separate from physical space in the abstract. There is always someone sitting in front of a computer whom the state can collar if he or she transgresses the law.<sup>196</sup> The general problem with this response is that it answers the concern that a

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192. See Johnson & Post, *Borders*, *supra* note 60, at 1370-76.

193. David Post's review of Lessig's Code, *supra* note 17, unsurprisingly makes a similar point. See Post, *Larry*, *supra* note 60, at 1455-56.

194. There are a number of other responses to other parts of the Johnson and Post thesis. See, e.g., Netanel, *Self-Governance*, *supra* note 19, at 421-46 (arguing against the normative component of Johnson and Post, where they argue that cyberspace can generate democratic perfection). Netanel shows that cyberspace self-governance, and specifically online direct democracy, causes significant problems from the perspective of democratic theory. See *id.* This is not important to Sunstein's work, except in the sense that both Sunstein and Netanel are dealing with concerns about cyberspace democracy.

195. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1203-30 (1998); Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 475-80 (1998); Jack L. Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119, 1125-26 (1998).

196. Goldsmith, *Against Cyberanarchy*, *supra* note 195, at 1200-02.

party in cyberspace is beyond the reach of any law, but it does not handle the problem that the same party is subject to every law of every state.<sup>197</sup>

Goldsmith's response is helpful to Sunstein's position in that it is descriptively plausible for the United States to regulate as Sunstein suggests.<sup>198</sup> But it does not address the question of whether Sunstein's media labeling requirements will apply to French, Australian, and Malaysian sites. Since media content is the most mobile of cyberspace ventures,<sup>199</sup> we are already seeing regulatory arbitrage occurring for media. The United States now has the dubious distinction of hosting most if not all of the German neo-Nazi sites, which are written in German, by Germans, for Germans. Hosting this material is illegal in Germany, but protected speech in the United States.<sup>200</sup> Sunstein may perhaps say, "That's exactly what I'm suggesting we need to regulate!" In that case, what is he to make of the world's largest child pornography sites that operate out of Russia and Indonesia, but have a large U.S. subscriber base?<sup>201</sup> The Indonesian authorities have promised to crack down on these rings, but are somewhat hampered by the problem that online kiddie porn is not illegal in Indonesia.<sup>202</sup> Sunstein may dismiss this as a trivial implementation problem, but it is anything but trivial. Content is incredibly mobile, and Sunstein does not even stop to consider how regulatory arbitrage affects his argument.<sup>203</sup>

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197. We might call this the "Yahoo! problem" after the arguably extraterritorial application of French law on the U.S. portal. The Tribunaux de Grand Instance held that the American company Yahoo! was liable under French anti-Nazi laws, on the basis that French citizens could view Yahoo! Auctions of Nazi and neo-Nazi materials. See *Union Des Etudiants Juifs de France/Ligue Contre le Racisme et L'Antisemitisme-LICRA v. Yahoo! Inc./Yahoo France*, Tribunaux de Grand Instance (Gomez J.), Paris, May 22, 2000 [unpublished], N&RG: 00/05308; see also Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 661 PRACTICING L. INST./PAT 561 (2001), available at 16 BERKELEY TECH. L.J. 1345 (2001); Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 961-72 (1998) (predicting that by providing virtual hosting, the Internet will affect regulation in nation states to offer more desirable hosting locations).

198. The specific regulatory proposals are explained and critiqued in the next section. See *infra* Part V.

199. Unlike, say, transactional e-commerce systems that require local, physical infrastructure, online content can be hosted anywhere without affecting the consumer's enjoyment or usage.

200. See, e.g., Ned Stafford, *U.S. Web Hosts Close Neo-Nazi Sites at German Urging*, NEWSBYTES, Aug. 30, 2001, available at <http://www.newsbytes.com/news/01/169588.html> (last visited Jan. 23, 2002).

201. See *Futile Quest for Kid Porn Traders*, WIRED NEWS ONLINE, Aug. 9, 2001, available at <http://www.wired.com/news/politics/0,1283,45965,00.html> (last visited Aug. 29, 2001).

202. *Id.*

203. Polk Wager reminded me that it is possible for a nation-state to avoid the regulatory arbitrage dilemma by mandating content controls on backbone providers or on Internet service providers. While this is, of course, correct, it has two problems within the particular context of Sunstein's suggestions. First, these sorts of controls are likely to be reasonably effective when targeted at a range of objectionable content, the paradigmatic example being kiddie porn. They are unlikely to be effective when, as here, the controls extend to virtually any site, and where significant editorial expertise is necessary to meet the requirements of the controls. It is easy to identify and control kiddie porn. It is much harder to identify which sites fit Sunstein's criteria and what is an effective



Sunstein's is a peculiarly America-centered view of the Internet, replete with U.S. policy arguments, rights-based analysis, a concern with applying the Bill of Rights in cyberspace, and the assumption that we, that is, Americans, can regulate content effectively without worrying about regulatory arbitrage. America is a big place, but it does not contain the majority of the world's populace. Cyberlibertarians justifiably disagree with the assumption that nation-states map cleanly to cyberspace.

### B. *The Historicist Critique*

One of the unstated premises of *Republic.com* is that Sunstein's vision of the democratic process is the best, or most plausible, account available. His account relies on recent "deliberative democracy" theory, in common with notables such as Ackerman, Rawls, and others,<sup>204</sup> and which he has articulated elsewhere.<sup>205</sup> This theory's central claim is that democracy is defined by the existence of a "free, inclusive, rational debate by citizens that determines the basic thrust of public policy."<sup>206</sup> On this view, democracy therefore requires an open exchange of views and informed debate so that political and social consensus can emerge.<sup>207</sup>

*Republic.com* is not intended to be a serious analysis of democracy, though it is dependent on the deliberative democratic account (pp. 37-39),<sup>208</sup> and Sunstein has suggested that his intention in the book was to "get

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countervoice. Second, even if this sort of regulation were possible, all that it means is that U.S. content providers (who would now be forced out of the United States) would be free to provide information to all the world free of Sunsteinian restrictions. U.S. backbone providers would block the content, meaning that U.S. citizens could not see this material. But this simply leads to reduced information for Americans and no measurable effect on the content providers who now reside beyond U.S. jurisdictional reach.

204. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994); JOHN S. DRYZEK, *DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE* (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995); AMY GUTMANN & DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67 (James Bohman & William Rehg eds., 1997).

205. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

206. Rubin, *Getting Past Democracy*, *supra* note 190, at 747.

207. *Id.* at 747-48.

208. See, e.g., "This form of republicanism [of the Constitutional Founders] involved an attempt to create a 'deliberative democracy'" (p. 38). "In this system, representatives would be accountable to the public at large. But there was also supposed to be a large degree of reflection and debate, both within the citizenry and within government itself" (p. 38) (citation omitted). "The aspiration to deliberative democracy can be seen in many places in the constitutional design" (p. 38).

hold of some neglected prerequisites of democratic self-government.”<sup>209</sup> It is not therefore hard to see the importance of deliberative democracy to *Republic.com*’s specific thesis that we need more and better forms of Internet communication so that our democracy is meaningful. The fear of group polarization and fragmentation of the communications infrastructure poses a huge danger for anyone committed to deliberation as the core of democratic engagement.

This Review is hardly the place to mount a concerted campaign against deliberative democracy. However, the recent development of historicist-microanalytical arguments against Sunstein’s deliberative democracy ideal do challenge the central political conception that Sunstein proposes. As a result, it is instructive to examine why Sunstein’s political theory may not be an acceptable account of our government and political process, and see how the historicist critique of deliberative democracy affects the claims in *Republic.com*.

The historicist attack on this conception of democracy is best articulated by Edward Rubin.<sup>210</sup> Rubin notes that the term “democracy” is an “essentially contested concept”<sup>211</sup> that has a series of embedded implications about the ideal role of the citizen in public life, the nature of government’s interaction with the people, the requirements of deliberation within society, and so forth.<sup>212</sup> These implications are drawn both from initial meanings of the term,<sup>213</sup> as well as the usage of the term by political theorists who had particular agendas for adopting the term and who grafted meaning onto the word.<sup>214</sup> Rubin demonstrates that the term is a dangerous one, because the embedded implications give rise to a series of arguments against the nature of modern politics and the rise of the administrative state.<sup>215</sup> The obvious example is the extended attack on judicial review by the Legal Process School.<sup>216</sup> This school of thought characterized judicial review, specifically the role of the Supreme Court during its opposition to

209. Cass Sunstein, *Afterword* to *REPUBLIC.COM* (unpublished manuscript, on file with author) [hereinafter Sunstein, *Afterword*].

210. Rubin, *Getting Past Democracy*, *supra* note 190, at 747-55.

211. WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (3d ed. 1993).

212. Rubin, *Getting Past Democracy*, *supra* note 190, at 715-55.

213. *Id.* at 715-25.

214. *Id.* at 725-55.

215. *Id.* at 711-15.

216. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 19 (1962) (suggesting that the electoral process is the supreme embodiment of democracy and that judicial review undermines this process); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 10 (1980) (characterizing judicial review as contrary to majority rule and contrary to the fundamental principle of democracy); JOHN HART ELY, *DEMOCRACY AND DISTRICT: A THEORY OF JUDICIAL REVIEW* 4-5 (1980) (arguing that the unelected and politically nonresponsible judiciary should not be free to stop the elected representatives from governing as they like).

the New Deal legislation, as “antidemocratic.” Subsequently, the same charges have been leveled at the administrative state, with its reliance on a nonelected bureaucracy.<sup>217</sup> Rubín argues that this focus on the concept of democracy is dangerous, because it distorts the account of the way that modern governments relate to their citizens.<sup>218</sup> He recommends that we bracket the term, and instead undertake a careful description of the way that governments operate.<sup>219</sup> Only in this way can we meaningfully decide whether our government actually meets the political commitments that we actually consider important.<sup>220</sup> These political commitments—securing liberty, avoiding oppression, reducing civil strife, and so on—are meaningful in a way that the loaded term “democracy” is not.

This approach poses serious difficulties for Sunstein’s assumption that democracy is the primary value in the modern political process. Moreover, Rubín’s critique of democracy includes a withering attack on deliberative democratic theory, and presents two problems with the general theory that also infect *Republic.com*.<sup>221</sup> First is Rubín’s observation about the nature of deliberation in a modern society. Deliberation assumes an intensive interchange of ideas in a context where the speakers are in direct contact and can accept or reject the other’s arguments.<sup>222</sup> With a small number of people involved, such as in the ancient Greek assembly,<sup>223</sup> the concept of deliberation within the political process is an accurate description. In the modern state with hundreds of institutional agencies, and where citizens are engaged with these agencies rather than each other, the notion of deliberation is empirically implausible.<sup>224</sup> Under these conditions, “deliberation” is not an accurate description; it is a metaphor. And it is a metaphor that masks the reality of the political process: “the cost of indulging in this

217. Rubín, *Getting Past Democracy*, *supra* note 190, at 711-13.

218. *Id.* at 711-15, 755.

219. *Id.* at 711-15, 755-69.

220. *Id.* at 755, 770-92.

221. *Id.* at 749-54. The two problems identified here are with the position of deliberative democracy as a descriptive theory of modern political systems. There is another problem which Rubín identifies with deliberative democracy as a normative theory. *Id.* at 754-55. Because *Republic.com* is not a defense of deliberative democracy in normative terms, and is about the pragmatic reality of Internet communications and its role in the political process, I need only focus on the descriptive difficulties with deliberative democracy.

222. *Id.* at 749.

223. *Id.* (citation omitted) (“The metaphor of deliberation among the members of civil society in general seems inspired by an ancient Greek assembly, where all the citizens meet to debate and decide ‘all causes, or at any rate . . . the most important.’”).

224. *Id.* Rubín commented:

In a modern state, particularly an administrative state with its hundreds of operational agencies, citizens and citizen groups are more likely to be engaged in intensive interactions with a particular agency than they are with each other. Bankers, factory managers, and large-scale farmers do not interact with members of the other groups very much, but they may talk to their own regulatory agencies more often than they talk to anyone outside their immediate families and colleagues.

*Id.*

enticing metaphor . . . is that one underemphasizes or ignores the more subtle gradations of contemporary politics.”<sup>225</sup> The relevance of this observation to *Republic.com* is hard to overstate. Sunstein’s worry over the effects of group polarization and cybercascades is a worry that deliberation cannot operate as idealized in the deliberative democratic account. His delight at the somewhat artificial results of the deliberative polls of Fishkin<sup>226</sup> is a delight at the centerpiece of deliberative democracy being demonstrated. However, both the worry and delight evaporate if, as Rubin suggests, these features of deliberation are simply not found in the modern state. If deliberation is not central to our political process, then there is little to fear even if we accept Sunstein’s charge that the Internet reduces deliberation.

The second problem is deliberative democracy’s assumption that the deliberation must be rational.<sup>227</sup> This particular assumption is at the core of *Republic.com*’s concern with effects on people’s thoughts, most notably group polarization and informational cybercascades, which lead to irrational deliberation. As Rubin demonstrates, contemporary political and social debate are characterized by widespread irrationality.<sup>228</sup> Within our political process, appeals to emotion or personal interest are the norm. Measured, reflective analysis of the merits and demerits of the argument are atypical. Unlike Sunstein,<sup>229</sup> Rubin does not decry this as a failing of our polity. Instead he suggests that it is a feature of our modern political system.<sup>230</sup> People’s lives are affected by politics: their salary is reduced or increased by political choices, their liberty is threatened, their children’s opportunity is reduced or improved, and so on. We should not be surprised that the modern arena of political debate is shot through with emotionalism, and calls for rational deliberation within our democracy are likely to lead nowhere.<sup>231</sup> If this is so, then we should not be troubled even if we accept Sunstein’s argument that the Internet creates cybercascades of disinformation that appeal to people’s emotional, rather than rational, side. Equally we need not be too concerned if group polarization equally plays to this side of our nature. Our modern state will not fall apart if emotions

225. *Id.*

226. See *infra* Part V; FISHKIN, THE VOICE OF THE PEOPLE, *supra* note 204, at 200-07; James F. Fishkin & Robert C. Luskin, *Bringing Deliberation to the Democratic Dialogue*, in THE POLL WITH A HUMAN FACE 23 (Maxwell McCombs & May Reynolds eds., 1999).

227. Rubin, *Getting Past Democracy*, *supra* note 190, at 750.

228. *Id.* (“Contemporary political debate obviously fails to achieve this standard, something one can readily confirm by spending a few minutes listening to political talk radio.”)

229. *Republic.com* can be seen as an attempt to explain how certain irrational communication features of the Internet pose problems for democracy.

230. Rubin, *Getting Past Democracy*, *supra* note 190, at 751.

231. Rubin explains that this is not a concern because the political process does manage to serve our needs perfectly well. See *id.* at 751-53. Focusing on the requirement of rational deliberation is to focus on the wrong thing.

are tweaked. Our modern state is already characterized by nonrational argument.

Rubin's account is valuable here for a number of reasons. First, it removes our fear that somehow the Internet is fundamentally antidemocratic. It allows us to recognize that tagging something as "undemocratic" means little when the word "democratic" is not a good descriptor of the modern political system with which we are currently quite happy. Even if we accept Sunstein's implicit claim that the Net is a danger to our democracy, little follows from it. Second, the specific challenges to deliberative democracy have serious purchase in any analysis of *Republic.com*. These challenges demonstrate that the fears of group polarization and cybercascades, even if real, do not threaten our central political commitments.

## V

### FIFTY WAR GALLEYS AND HALF THE CAVALRY: SUNSTEIN'S PROPOSALS FOR REFORM

First then, men of Athens, I propose to equip fifty war-galleys; next you must make up your minds to embark and sail in them yourselves, if necessary. Further I recommend the provision of transports and other vessels, sufficient for the conveyance of half our cavalry.

Demosthenes, *First Philippic*<sup>232</sup>

Rather than fifty war-galleys and half a cavalry, Sunstein presents six regulatory options to defeat the scourge that he has outlined. His first suggestion is to set up website-cum-chatrooms called "deliberative domains" (pp. 170-72). In these fora, users would share and debate issues of public policy. The idea of deliberative discussion comes from the work of James Fishkin, a political scientist.<sup>233</sup> Fishkin compared typical polling results and compared them to "deliberative opinion polls" where the people were provided with issue papers, and given an opportunity to discuss the issues with others from diverse backgrounds and air their concerns and questions. Contrary to the typical group dynamic, these discussions tended to depolarize the group.<sup>234</sup> Sunstein suggests that a place in cyberspace set aside as a "deliberative domain" would lead to the same desirable result (pp. 170-72). His second proposal is that producers of potentially harmful communications must disclose the harm to the public (pp. 172-77). This proposal follows Justice Brandeis's famous dictum that "[s]unlight is said to be the

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232. DEMOSTHENES, *First Philippic*, *supra* note 6, para. 16.

233. See FISHKIN, THE VOICE OF THE PEOPLE, *supra* note 204, at 200-07; Fishkin & Luskin, *Bring Deliberation to the Democratic Dialogue*, *supra* note 226.

234. Sunstein discusses Fishkin's work in *Republic.com* (pp. 84-87), noting that deliberative domains have been shown to depolarize groups, form discussions amongst participants, and lead to tolerance and informed debate.

best of disinfectants . . . .”<sup>235</sup> His third proposal is that we institute a code of conduct encouraging self-regulation by communications providers (pp. 177-80). Fourth, he argues that we should provide government subsidies to websites that encourage public debate (pp. 180-82). This is a suggestion previously made by Andrew Shapiro, who argued in favor of a space called PublicNet.<sup>236</sup> Sunstein’s fifth suggestion is to provide “must-carry” rules for popular websites that forces them to include links to sites that encourage debate over substantive questions of public interest (pp. 182-89). Finally, his sixth proposal is that we provide “must-carry” rules for particularly partisan websites, so that they too are forced to include links to sites that have opposing views (pp. 182-89).

With the possible exception of the first suggestion, all of these proposals attempt to take regulatory mechanisms from broadcast media, especially television, and map them onto the Internet. Sunstein scarcely hides this. The examples of success that he uses (pp. 172-84), from disclosure laws through ratings schemas to “must-carry” rules, seem to be almost exclusively drawn from his experience on a committee investigating public interest requirements for broadcast media (pp. 147-59).<sup>237</sup> Though he admits that it may be slightly harder to regulate the Internet than broadcast television (p. 174),<sup>238</sup> he never really recognizes that the Internet is so fundamentally different from broadcast media that none of his regulatory strategies are likely to be successful. The problems may be usefully divided into the general, which apply to all of his proposals, and the specific, which apply to each proposal individually.

### A. General Problems

The most serious problem with Sunstein’s reforms is that they are all inconsistent with his starting assumption. The very notion of perfect filtering undercuts each one. Consider any one of the proposals listed above and accept Sunstein’s assumption of perfect filtering. Which one of these reform proposals will be able to bypass the filtering and lead to Sunstein’s desired pluralistic public fora outcome? Surely any “perfect filtering” mechanism worth the name would be able to extract any alternative viewpoints that have been bolted on to websites, as a result of easily identifiable disclosure laws or “must-carry” rules. This is one of the things that even rudimentary filtering can do. If laws are put in place to force placement of certain types of information on websites, on newsgroups, or in emails, then

235. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1914).

236. SHAPIRO, *CONTROL REVOLUTION*, *supra* note 18, at 205-06.

237. See also Sunstein, *Television*, *supra* note 9, at 508-09 (arguing in favor of public interest obligations on television broadcasters).

238. He says, for example, of his disclosure proposal, that it “is obviously easier to impose disclosure requirements on radio and television broadcasters, relatively few in number and publicly licensed in any case, than on websites.” (p. 174).

modern-day, imperfect filtering technologies already can sift this out.<sup>239</sup> None of his other suggestions—deliberative domains, government subsidies, and industry self-regulations—appear capable of producing an environment that would avoid the filtering that Sunstein fears.

One way Sunstein may respond to the above criticism is to add a new regulation that mandates the removal of filtering against deliberative domains or “must-carry” material. Unfortunately for Sunstein, this new regulation would suffer from a second, fatal flaw: the regulatory responses of a local broadcast environment do not map to the global cyberspace environment. As discussed above,<sup>240</sup> participants will engage in regulatory arbitrage and will virtually “move” to the regulatory environment that is most congenial to the type of material that they disseminate. The level of content regulation that Sunstein presents is surely sufficient to spur a wholesale migration of content outside the regulatory ambit of the United States.<sup>241</sup> This problem, along with the fact that any reforms will be filtered out, is fatal for any of the regulatory suggestions that Sunstein provides. There are, however, a number of other obvious problems that plague each one of his specific suggestions.

### B. *Specific Problems*

His first suggestion that we establish deliberative domains is essentially identical to his fourth suggestion of government sponsorship of a discussion area like Shapiro’s PublicNet.<sup>242</sup> Both suggestions are strange. First, these sorts of discussion areas already exist.<sup>243</sup> In chatrooms, in discussion groups, in newsgroups, and on websites, these “accept-all-comers” discussions are occurring right now. His proposal seems to boil down to the anodyne idea that “government could provide a funding mechanism to subsidize the development of some such sites without having a managerial role” (pp. 171-72). This argument fails to establish a pressing need to

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239. It is trivially easy to filter material identified with a tag such as “Mandatory Government Warning: This Website Causes Extremism.”

240. See *supra* Part IV.

241. Clearly the more partisan sites like the ones at issue in his second and sixth proposal will move (for example, the German neo-Nazi or Indonesian kiddie porn sites). See *supra* notes 200-02 and accompanying text. It also seems likely that popular sites, those mentioned in the fifth proposal, will weigh the costs and will find it easier to relocate than hire attorneys to vet every single page of their content to conform with these new rules.

242. See SHAPIRO, CONTROL REVOLUTION, *supra* note 18, at 205-06. The main difference is that, under Shapiro’s model, the government would mandate the inclusion of an icon for PublicNet on users’ desktops. See *id.*

243. Consider the discussion environment that the usenet newsgroups comprise. If you can imagine a topic—sex, politics, IBM-computer-hating, dog-fancying, window dressing—then you will find it here. Lest Sunstein argue that these are all narrowly focused, note that many of these discussions are broadly conceived and provide for broadly divergent opinions. Sunstein recognizes this but nonetheless presses on with the suggestion (p. 171), and with an obduracy that would be admirable if it were not so wrong-headed.

provide state funding for commercial operators to do exactly what they are doing now. Perhaps there are some particularly worthy website operators who have not been able to access the government trough sufficiently. We could reward them with a hypothetical "deliberative-domain grant" so that they can continue doing what they do now, and have their shareholders enjoy the pleasure of artificially inflated returns as well as knowledge that they are doing good.

The other strange aspect of this suggestion is that there is little to suggest that this will depolarize groups and counter the extremism problem. This is Cass as Kevin Costner: "If you build it, they will come."<sup>244</sup> The sad truth is that they will not come. They will not even know it exists. And even if they did, the people about whom we should be concerned will filter it out. We should be mindful of Singapore's efforts to encourage debate and alternate views. The Singaporean government chose to create a Speakers' Corner in a public park in downtown Singapore, modeled after the famous place of the same name in London's Hyde Park.<sup>245</sup> I walked past this park every day for two weeks during a recent stay there, and I never saw a single speaker.<sup>246</sup>

His second and third proposals would require Internet content providers causing harm to disclose this fact, and institute a self-regulatory regime to somehow create and enforce industry Codes of Conduct (pp. 172-80). Actually, this is not quite accurate as his second proposal is that broadcast television and radio providers disclose their harmful programming and provide details about their public service activities (pp. 174-75). Like his second proposal, his third proposal is also not about the Net. Instead, he suggests that television and radio providers follow a Code of Conduct. He is so caught up in his Internet-as-broadcasting fallacy that he actually forgets about the Internet in these sections of the book. Instead, he provides some guidelines to the FCC regarding what to do about bad television and radio programming.<sup>247</sup>

To the extent that this response is about the Net at all, the Internet-as-broadcasting fallacy hamstrings it. As an example of a useful regulatory response, Sunstein trots out that tired, old workhorse, the V-chip (p. 173),

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244. FIELD OF DREAMS (Universal Pictures 1989).

245. Ruth Youngblood, *Speaker's Corner Anniversary Lures Government Critics*, DEUTSCHE PRESSE-AGENTUR, August 29, 2001; Barry Porter, *Economics Professor Gives Singapore Something to Chew Over*, SOUTH CHINA MORNING POST, March 31, 2000, at 12; *Degrees of Freedom in Lion City*, SOUTH CHINA MORNING POST, April 17, 1999, at 15.

246. David Post reminded me that the same observation can be made about "public access" channels on cable. The degree to which the public makes use of this access is very slight indeed. See Monroe Price & Charles Morris, *Public Access Channels: The New York City Experience*, in ON THE CABLE: THE TELEVISION OF ABUNDANCE 229 (1971).

247. Perhaps while the FCC is doing this, it might also institute a truth-in-writing requirement for authors writing about the Internet: do not say that you are proposing regulatory responses for the Net when you are really talking about reform of television networks.



the chip that is required to be in every U.S. television above thirteen inches in size that can be set to stop children viewing inappropriate material.<sup>248</sup> Though the V-chip is an expensive part of the regulatory structure of U.S. television programming,<sup>249</sup> it is rarely used by parents,<sup>250</sup> and typically is not even mentioned in the manual of the TVs that contain it.<sup>251</sup> Introducing mandatory rating schemas and V-chip-like blocking systems to the Net creates a host of new problems: Who does the rating? What rating schema is used? Who mandates and enforces the rating of content? Does the rating apply to everything on the Net, or just to websites, or newsgroups, or chatrooms, or email content? Does it apply to foreign content that is viewable in the United States (which is to say, all Net content)?

The same forgetfulness is evident in Sunstein's third proposal. He waxes lyrical about the effect that Codes of Conduct might have on the television and radio industry and forgets that the Net just might be a little different (pp. 177-80). He suggests, for example, that industry members (by which he means television networks) could "agree to cover substantive issues in a serious way, to avoid sensationalistic treatment of politics, to give extended coverage to public issues, and to allow diverse voices to be heard" (p. 179). This just does not make any sense when applied to the Net. Unlike television, one does not need to be a billionaire to disseminate Internet content, so there is no need to create a Code of Conduct to ensure diverse voices, or serious treatment of politics. There already exists a hugely diverse online populace and a centralized "Internet Code of Conduct" is not likely to make it more diverse. This apart, how are you going to be able to draft an industry Code of Conduct to accommodate every single person who publishes on the Net in some way? Recall that, for example, posts to newsgroups or emails sent to discussion lists are often archived. Does this mean that everyone who has ever emailed should have a say in the Code of Conduct? Or is it only restricted to those whom Sunstein worries about at night—portals with a large user base, and neo-Nazi groups? Sunstein's failure to recognize the difference between the Internet and other media confuses his reform proposals as much as his

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248. Telecommunications Act of 1996, 47 U.S.C.A. § 303(x) (1991 & Supp. 1 2000); see also Andrea K. Rodgers, *United States v. Playboy Entertainment Group, Inc. and Television Channel Blocking Technology*, 40 JURIMETRICS J. 499, 514 (2000) (explaining FCC regulation for V-chip enabled television and transmission of rating schemas in television signals' vertical blanking interval).

249. J. M. Balkin, Comment, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1133-40, 1153-55 (1996) (discussing First Amendment issues with the V-chip, including cost features).

250. SENATE COMM. ON SCI. & TRANSP., *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries*, FED. NEWS SERV., Sept. 13, 2000, at 119, available at <http://www.ftc.gov/os/2000/09/violencepptest.htm> (discussing Kaiser Foundation study concluding a majority of Americans do not use the resources of the V-chip).

251. *Id.*

original theory confuses the meaning of perfect filtering and group polarization.

His final suggestions involve “must-carry” rules for partisan and popular websites, requiring links to other sites that either encourage debate in the political process in the case of popular sites, or disclose the other side of the other argument in the case of partisan sites (pp. 182-89). Of all of the proposals, these are, on one level, the least stupid. They are relatively easy to implement.<sup>252</sup> But like the earlier suggestions, this one begins looking a little foolish in the details: Who determines what website is the opposite of the partisan sites? How is this enforced? Of course, of all of the suggestions, these are the ones most affected by perfect filtering and regulatory arbitrage, and are the most likely to be circumvented.

In the end analysis, the most damaging problem to Sunstein’s proposals is that he fails to indicate how his regulatory proposals will minimize the damage that he asserts will result from group polarization on the Internet. In fact, none of these suggestions appear likely to reduce group polarization at all. If we look back at the theories of group polarization,<sup>253</sup> we see that polarization occurs where social standing is at stake,<sup>254</sup> or where a group member presents persuasive arguments toward one side.<sup>255</sup> Does Sunstein really believe that putting a link at the bottom of a page is going to fulfill either of these prerequisites? Perhaps I am the only person who reads a page of material on the web and does not bother to click on the links at the bottom of the page. But even if the links are accessed, how is this going to influence the group dynamic at the heart of the risky shift? Even if we have these expensive government-run PublicNets, where is the evidence that this will stop the rise in extremism? *Republic.com* simply fails to convince us that standard media regulation mechanisms will be remotely useful in combating Sunstein’s Internet fears.

## VI

### BOOK OF THE YEAR

In one sense *Republic.com* is the Book of the Year. It is just that the year is circa 1954. At the heart of *Republic.com* lies not so much a fear of the Internet as a fear of broadcast television and radio. Perhaps we can chalk this up to Sunstein’s time spent as a member of the Presidential Advisory Committee on Public Interest Obligations of Digital Television

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252. These proposals are so easy to implement that Sunstein himself placed links in the Princeton University Press website publicizing *Republic.com*, citing other legal theorists who disagree with him, after Matthew Gaylor pointed out that he had failed to heed his own counsel. See Gaylor, *supra* note 189; see also *Unusual Bollini’s Welcome Message*, Princeton University Press website, at [http://pup.princeton.edu/sunstein/sun\\_forum.txt](http://pup.princeton.edu/sunstein/sun_forum.txt) (last visited Jan. 25, 2002).

253. See *supra* Part III.

254. See *supra* Part II.A.1.

255. See *supra* Part III.A.2.

Broadcasters, and the battles he fought against the National Association of Broadcasters (pp. 147-50).<sup>256</sup> Though Sunstein claims that this is a book about the new medium of the Internet, he in fact seems more interested in newspapers (pp. 13, 61, 130-31, 138-39, 145), television (pp. 35-6, 114, 172-77, 92-93, 144-46, 182, 127-30, 147-50, 154, 155-57), radio (pp. 174, 176-77, 182), and traditional media. Every now and again, he seems to remember that the title of his book has “.com” tacked on the end, and so he tacks on a discussion of the Internet. We might forgive this lapse if broadcast media and the Internet were so similar that we could map problems and solutions from the first onto the second. However, they are such different communications media that conceiving one in terms of the other leads to the sorts of problems discussed in Part V above.

In another more important sense, *Republic.com* really is this year's Book of the Year. The year 2001 A.D. marks the highpoint to date of “second-generation” concerns about the antidemocratic Internet, and *Republic.com* takes this fear to silly and unjustified new heights. It is perhaps representative of a misunderstanding of the Internet and an overdeveloped concern with its antidemocratic possibilities. This is not to say that the other works in the second generation are all, or even mostly, wrong. Much of this generation is absolutely correct in identifying worrying trends about concentrations of private power, the role of technology as an unrecognized regulatory force, and so on. But when these concerns revolve around *The Daily Me*, group polarization, and an America-centered conception of democracy and regulation, they become ludicrous.

#### A. *Of Echo Chambers and Afterwords: Sunstein's Failed Attempt at Reformulation*

Sunstein has subsequently sought to alter the reception of his book. In two works, a short digital monograph called *Echo Chambers*,<sup>257</sup> and in the *Afterword* that will appear in the paperback edition of *Republic.com*,<sup>258</sup> he modifies a number of the claims put forth in the original text. These works deal with different features of his original claims, but both are revealing as they appear to have been born as defenses to early criticisms of *Republic.com*.<sup>259</sup>

*Echo Chambers* does not fundamentally change *Republic.com*'s thesis, but seeks to demonstrate that group polarization is real. Moving away from *Republic.com*'s theoretical and abstract discussion, Sunstein seeks to demonstrate that two recent political events are excellent demonstrations of

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256. See also Sunstein, *Television*, *supra* note 9, at 508-09.

257. CASS SUNSTEIN, *ECHO CHAMBERS* (2001), at <http://pup.princeton.edu/sunstein/echo.pdf> (last visited Sept. 17, 2001) (hereinafter SUNSTEIN, *ECHO CHAMBERS*).

258. Sunstein, *Afterword*, *supra* note 209.

259. See Sunstein, *Afterword*, *supra* note 209, at para. 1; *ECHO CHAMBERS*, *supra* note 257, at 3-4.

group polarization at work.<sup>260</sup> These two incidents are the battle for the U.S. presidency in late 2000 and the impeachment hearings of President Clinton. In each, Sunstein notes the division between perceptions of the incidents between Republican and Democrat politicians. For example, he gushes that an “astonishing” 98% of House Republicans voted for impeachment, while only 2% of House Democrats voted similarly.<sup>261</sup> After rehearsing the basic theory discussed above,<sup>262</sup> Sunstein concludes that these events are “case studies in group polarization.”<sup>263</sup> His entire evidence for this appears to be the regularity of the outcome. He explains, “It simply defies belief to suggest that the observed pattern of judgments is what you would expect if each person, whether ordinary citizen or legislator, had consulted his or her own conscience . . . .”<sup>264</sup>

Of all the arguments made in *Republic.com*, none compares to the foolishness of this conclusion. We cannot assume, simply from a consistent outcome, that group polarization must be working here. What of the more obvious explanation that the Republicans might be politically motivated towards favoring Clinton’s impeachment? Or that Democrats might consider, from years of indoctrination, that the *Bush v. Gore* ruling<sup>265</sup> was politically motivated by conservative Supreme Court justices? Or, even more simply, that the political parties enforced an incredibly strong party line on all their members, and that a huge number of the politicians felt the opposite of the way they voted?

In making these arguments in *Echo Chambers*, Sunstein presents: (1) no evidence that deliberations ever took place, in the way that studies on group polarization assume; (2) no evidence of the starting position of any of the politicians on any of the questions; and (3) no evidence of their actual final thinking, as opposed to the party line enforced on them. He nevertheless suggests that these examples are a fundamental proof of his overall view in *Republic.com*, and of the application of group polarization to political and legal decision making. Surely he cannot be so ill-versed in the empirical basis of group polarization as truly to believe this?

His *Afterword to Republic.com* defends a number of different aspects of the original work. Most notably he makes two related propositions: that

260. “In this essay I leave the world of thought experiments and enter that of real-world events. My goal here is to illuminate the problem of fragmentation and the phenomenon of group polarization, not by observing their manifestation on the Internet, but by considering their influence on two recent puzzles that involved a wide range of social forces, including the systems of communications . . . .” SUNSTEIN, *ECHO CHAMBERS*, *supra* note 257, at 3-4.

261. *Id.* at 4.

262. *See supra* Part I.B.

263. SUNSTEIN, *ECHO CHAMBERS*, *supra* note 257, at 15.

264. *Id.* at 6.

265. *Bush v. Gore*, 531 U.S. 98 (2000).

*The Daily Me* is really just a thought experiment or metaphor,<sup>266</sup> and that his main concern was “to get hold of some neglected prerequisites of democratic self-government.”<sup>267</sup> He suggests that his was never an attack on the Internet, but rather a clarion call against potential social fragmentation caused by personalized media.<sup>268</sup>

This defense is disingenuous. As discussed above,<sup>269</sup> *Republic.com* is only meaningful if its basic premises are true. Without a realistic prospect of *The Daily Me*, group polarization does not happen.<sup>270</sup> Without group polarization, there is no social fragmentation. Without social fragmentation, there is no need for a regulatory response.<sup>271</sup> With the wrong regulatory response, the evil cannot be averted.<sup>272</sup> For Sunstein to suggest that *The Daily Me* is just a metaphor is essentially to relegate his own book to the filtering category of “Irrelevant Indulgences.”

Sunstein may have intended only to examine some prerequisites of democracy, and may have only added the “.com” to the title of his book to increase sales. But this is not the impression that the book conveys. He writes about dangerous websites, evil newsgroups, and so forth. He shows how websites personalize and “fragment.” He argues that we should introduce public spaces on the Net. His work is a philippic against the Internet, and no amount of ex post explanations serve to dispel this impression.

### B. *Alexander the Great, Cass the Prophet*

I hope I may prove a false prophet, but I fear the catastrophe is even now only too near.

Demosthenes, *Second Philippic*<sup>273</sup>

Once again, we can turn to Demosthenes for insight into more modern philippics. Demosthenes continued to rail against Philip until an uneasy peace was established between Athens and Macedonia. Demosthenes was, in fact, one of the delegates to the conference that established the peace. The Philippics stood as masterpieces of oratory, but they never achieved the effect intended by Demosthenes. Athens appeased Philip and prospered with him. Demosthenes’s words came true. He was a false prophet.

Philip went on to produce a son, a man whom we now know as Alexander the Great. Alexander followed his father’s legacy and extended

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266. See Sunstein, *Afterword*, *supra* note 209, at para. 18; SUNSTEIN, ECHO CHAMBERS, *supra* note 257, at 3-4.

267. Sunstein, *Afterword*, *supra* note 209, at para. 4.

268. *Id.* at paras. 8-12.

269. See *supra* Part II.

270. See *supra* Part III.

271. See *supra* Part IV.

272. See *supra* Part V.

273. DEMOSTHENES, *Second Philippic*, *supra* note 6, para. 33.

the reach of Macedonia.<sup>274</sup> He marched on to conquer Asia Minor. He ruled from Macedonia in the West to India in the East. He established the greatest empire the Earth at that time had ever seen.<sup>275</sup> In this sense, his role in his age is a little like the Internet in ours.

No doubt Alexander was aware of the Philippics. But he ignored them and conquered the world anyway. It is impossible to say that the Internet can be said to be aware of *Republic.com*, but Professor Sunstein's philippic, like Demosthenes's before him, will have little effect on the world-conquering empire that he warns against. The difference is that, unlike the original Philippics, we are unlikely to be talking about *Republic.com* long after it was written.

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274. 1 ENCYCLOPEDIA BRITANNICA 545 (1910).

275. *Id.* at 546.

