

The Problems of Perfection

Review of Cass R. Sunstein, *Republic.com*, Princeton, Princeton University Press, 2001, 224 pages, ISBN 0-691-07025-3

I.

Over the last few years, US legal scholars have written extensively about the Internet's impact on society and the law. In addition to a myriad of law review articles, a few books in particular have shaped the discussion. They include Lawrence Lessig's groundbreaking analysis of the impact of the changing Internet architecture on personal liberties,¹ Lessig's recent book on the impact of this changing architecture on innovation,² and Andrew Shapiro's work on the shift in control over communication technologies, resources and information itself.³ Cass Sunstein, Karl Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago Law School and the Department of Political Science, has recently supplemented this collection by publishing *Republic.com*. Building on concerns similar to those expressed in Shapiro's book,⁴ Sunstein analyzes the threat Internet technologies may pose to democracy. Sunstein, one of the most profound US legal scholars of his generation, has previously written on a wide range of topics from constitutional law, freedom of speech, democracy, and jurisprudence to behavioral law and economics. Therefore, it is highly interesting to read how Sunstein applies his analytical framework to the emerging Internet and other communication technologies.

II.

Internet filtering technologies empower the individual user to decide precisely what information he reads, watches and hears. Technology enables the user to filter out information he is not interested in. Thereby, Internet users can design their own personalized newspapers and magazines. They can create their "Daily Me".⁵ Drawing on a wide array of arguments ranging from technology,

¹ Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York 1999).

² Lawrence Lessig, *The Future of Ideas – The Fate of the Commons in a Connected World* (New York 2001).

³ Andrew L. Shapiro, *The Control Revolution – How the Internet is Putting Individuals in Charge and Changing the World We Know* (New York 1999).

⁴ See *ibid.*, chapters 9-11, 19.

⁵ This term was coined by Nicholas Negroponte, Director of the Media Lab at the Massachusetts Institute of Technology; see Nicholas Negroponte, *Being Digital* (New York 1995) p. 153.

jurisprudence, and democratic theory to behavioral psychology, Sunstein expresses concerns about the impact that this increasing personalization of Internet communications may have on deliberative democracy. Sunstein provides a number of examples for this increasing personalization. The examples range from personalized entertainment websites and specialized political discussion sites to individualized shopping environments on the web. For example, Amazon.com has been employing for a long time a technology called “collaborative filtering”. Such technology allows Amazon.com to recommend books to consumers based on the choices of other consumers who have similar interests.⁶ Sunstein is concerned that, in the not so distant future, these and other technologies would lead to a “perfected” market for news, entertainment and information in which Internet users will receive information only on topics and views that they have sought rather than reach out to learn something new or experience something unexpected.

Having presented this claim about the increasing power of consumers to filter information at the very beginning of the book, Sunstein spends the first four chapters explaining and substantiating the claim as well as its impact on democracy and the system of free expression. Sunstein is concerned about the Internet’s possible transformative effect on two features he deems critically important to a democracy and a well-functioning system of free expression: the unplanned, unanticipated exposure to material by citizens, and common experience within a society.

First, while unanticipated encounters can be irritating, they expose the individual citizen to different viewpoints and topics. Thereby, they serve as a safeguard against fragmentation and extremism in a society (pp. 8-9). Secondly, common experiences among citizens, especially in a heterogeneous society, provide a kind of social glue and deter social fragmentation (pp. 9, 42-43). Sunstein claims that filtering technologies have the potential to decrease unanticipated encounters and common experiences. Therefore, Sunstein is concerned about the impacts these technologies have on democracy itself.

While Sunstein points out that fragmentation and individualization considerably predate the Internet, he is worried about the exacerbating effects of the new technological environment. In the traditional mass media system, important forces existed to counterbalance fragmentation trends. Sunstein stresses that newspapers, magazines, and broadcasting stations – “general interest intermediaries”, as he calls them – all offer ample opportunities for chance encounters and shared experiences. While reading a newspaper, one may read stories on crime or poverty in one’s own city or a foreign country. The TV evening news

⁶ This technology was originally developed at the Massachusetts Institute of Technology under the name “Firefly”.

enables large parts of a society to receive information together and share experiences and views afterwards (pp. 35-36). Sunstein claims that, conversely, the Internet leads to the diminishing in importance of general interest intermediaries, and thereby to less opportunities for common experiences among citizens.

In chapter 2, Sunstein analyzes how the current constitutional framework in the United States ensures chance encounters and common experiences. As the US Supreme Court has constantly stated, public streets and public parks have always been used for the purposes of assembly, communication of thoughts among citizens, and discussion of public questions. There is an inherent value to democracy in keeping such places public.⁷ In fact, the “public forum doctrine” ensures shared exposures to diverse speakers – exactly the kind of common experience Sunstein views as crucial for a democracy (p. 31). Although the Supreme Court has been reluctant to translate the public forum doctrine into the modern era by expanding its reach to airports, shopping malls, or TV stations, Sunstein views the “general interest intermediaries” – newspapers, magazines, television broadcasters – as a *de facto* equivalent of traditional public forums. Both general interest intermediaries and public forums ensure a common framework for social experience. When the influence of these institutions diminishes, society and its speech market become more fragmented (p. 53).

As Sunstein explains in chapter 3, such a “balkanization” of the speech market can lead to self-insulation of groups and individuals. The dramatic increase in options, and the greater power to customize, may make it increasingly difficult for a society to agree on some common ground, as people will often have strong opinions on particular topics, but will be ignorant of competing views (pp. 61-62). Sunstein cites empirical studies – some of which he himself conducted – according to which only 15 percent of partisan websites offered hyperlinks to opposing viewpoints (p. 59).

Speech market fragmentation is aggravated by several phenomena known from behavioral psychology. According to the well-known phenomenon of “group polarization”, following group discussion people tend to become more extreme in their thinking. If groups on the Internet increasingly engage in within-group discussions, group polarization will drive the different groups even farther apart. A vicious cycle of filtering, group polarization and fragmentation begins (pp. 65-69). However, group polarization is not necessarily a bad thing. If greater communication choices produce greater extremism society could be better off, as it will consequently hear a far wider range of views (p. 75). The real danger, Sunstein explains, is not group polarization as such, but the total or near-total self-insulation, which can result from group insulation (pp. 77-78).

⁷ See *Hague v. Committee for Industrial Organization*, 307 US 496, 515 (1939).

Sunstein also introduces the concept of “social cascades” into his analysis. This term describes the phenomenon of information becoming widespread and entrenched in a society even if it is entirely wrong. Quite often, large groups of people believe something simply because other people in the same community seem to believe that it is true. Sunstein cites numerous instances where rumors on the Internet became so publicized that many people believed them even though they were plainly wrong (pp. 80-84).

In chapter 4, Sunstein stresses the importance of shared experiences for a well-functioning democracy. They serve as a kind of “social glue”, promoting or easing interactions, trust and reciprocity within a society. Sunstein also stresses the public good characteristic of information. As knowledge of public affairs – crucial to a well-functioning democracy – is, in essence, a public good, reliance on an individual’s rational choices will produce too little knowledge. General interest intermediaries can correct this “market failure” by exposing individuals to material from which they may not benefit much themselves, but with which they may be able to help many others (pp. 99-102).

By now, it has become clear where Sunstein is heading: since technology changes social reality, thought must be given to the question of whether the law can remain neutral and passive. As filtering technologies endanger the basic premises of a well-functioning democracy, it has to be considered whether some regulation is needed to counterbalance this development. Before directly addressing this question, Sunstein turns to possible obstacles in his path in chapters 5 to 7.

One possible obstacle might be the claim that, as long as personalization of the information environment is a result of free choice, there is no need to worry about freedom and democracy. However, Sunstein retorts in chapter 5 that the notion of consumers and their free preferences is not equivalent to the notion of free citizens in a democracy. Sunstein worries that reasonable choices by individual consumers might produce both individual and social harm (see p. 22). It is not uncommon for people as citizens to seek policies and goals that diverge from choices they make as consumers (p. 106). In particular, consumer preferences are, to some extent, a product of social circumstances and institutions. Based on this institutionalist conception of freedom, Sunstein stresses the importance of public forums and general interest intermediaries since both induce the free formation of preferences (pp. 107-113).

Another obstacle in Sunstein’s path could be the well-known claim that the Internet is inherently unregulable or should at least stay free from regulation. Recounting the role government regulation played during the development of the Internet, and drawing on Friedrich Hayek’s thoughts, Sunstein rejects this claim in chapter 6.

Finally, one of the main current debates in US First Amendment law could prove to be another obstacle. The government’s role in facilitating a well-functioning speech market is a contested issue. Notions of consumer sovereignty

clash with conceptions of the free speech clause as a tool to enhance deliberative democracy. In chapter 7, Sunstein firmly adopts the latter viewpoint. He considers the free speech principle not an absolute prohibition of all speech regulation, but a tool for enhancing democratic deliberation which may, in some instances, even require speech to be regulated or subsidized by the government.

Having rejected these arguments against regulation, *Republic.com* concludes with six possible policy proposals. While Sunstein describes them in some detail, they are only intended as a rough guideline. First, he proposes the creation of widely publicized “deliberative domains” on the Internet. Such websites could provide opportunities for discussion among people with diverse views on a wide variety of topics.

Another proposal would require websites that engage in a practice that might produce harm to disclose this fact to the public. This could put competitive and social pressure on these information providers to present viewpoints that are more balanced. Sunstein also considers industry self-regulation mechanisms and public subsidization of certain websites. Furthermore, he proposes to translate the idea of “must carry” rules from communications law to the realm of Internet law: popular websites could be required to provide randomly-changing hyperlinks to public-interest websites. Finally, highly partisan websites could be required to provide a hyperlink to sites supporting a very different viewpoint. All these proposals are aimed at addressing the dangers created by the increasing personalization of Internet communications.

III.

The concerns Sunstein raises in *Republic.com* are part of a fundamental problem Internet law has to deal with: problems created by perfection.⁸ Traditionally, control over information has always been limited by real-world constraints. In former times, it was virtually impossible, e.g., to monitor the reproduction of copyrighted material by private persons and corporations. This was one of the reasons for limiting copyright protection: why give creators control over something which is uncontrollable? Recently, however, the Internet and other digital technologies have changed the equation. As technology makes it possible to monitor every act of reproduction by anyone – or, in economic terms, as transaction costs fall dramatically – one could argue that certain copyright limitations become obsolete.

Similarly, existing constraints imposed by society, markets, and technology,

⁸ This idea was explored – among others – by Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York 1999) pp. 139-140.

have simply not allowed an entirely personalized information environment. However, as technology changes and perfect personalization and filtering become conceivable, one has to think about the problems this perfection creates. Sometimes, a technologically imperfect environment protects values that are lost as technology advances. Sunstein's claim in *Republic.com* is exactly this: filtering technologies enable a perfect personalization of each individual's information environment. This development may impede unplanned exposure to opposing viewpoints and shared experiences in a society, thereby damaging democracy itself. Sunstein's claim is ultimately a claim about values traditionally protected by technological imperfection. It is a claim about the importance of the "commons" in cyberspace, the equivalents of public parks and sidewalks on the Internet.⁹

However, there is a second "problem of perfection" common to many Internet law areas. It is quite often unclear whether such perfection will ever occur in the real world. Even if an analysis of the problems created by a perfected technological environment seems convincing, it is of limited value if such an environment is unlikely to occur in the first place. Unfortunately, *Republic.com* is not immune to this criticism. It may be true that the Internet creates increasingly personalized resources of information. However, it is not obvious, to say the least, that people will use this feature to receive *only* information and news favoring one particular viewpoint. Instead, they may be curious to encounter different viewpoints, experiences, and surprising facts. Sunstein acknowledges this objection, of course. "Many people like surprises", he writes (p. 15). However, he seems skeptical as to how widespread and intense the demand for the unexpected is. Therefore, he advocates public initiatives *to the extent* private choices fail to result in more exposure to new topics and viewpoints (p. 168). The problem with Sunstein's argument lies in the words "to the extent". Sunstein claims that it is a natural human tendency "to make choices, with respect to entertainment and news, that do not disturb our preexisting views of the world" (p. 57). To substantiate this claim, sound empirical evidence is needed. Although Sunstein cites, and has conducted, some empirical research on related questions, he acknowledges that no definitive information is available "about the extent to which people who consult partisan websites are restricting themselves to like-minded sources of information" (p. 60). Before the Internet existed as a mass phenomenon, a large demand for "general interest intermediaries" seemed to exist also because people wanted to be exposed to a wide variety of topics and viewpoints. As technology

⁹ The importance of the "commons" is also a recurring theme in current Internet law; see, e.g., the contributions to the Conference on the Public Domain at Duke Law School in November 2001, available at <<http://www.law.duke.edu/pd>>.

changes, it is far from clear why this demand would diminish. It may be true that there is a natural human tendency to turn towards information that reinforces one's existing viewpoint. However, this may also be false. Only sound empirical data could ascertain the validity of Sunstein's claim. Unfortunately, *Republic.com* does not provide this empirical foundation.

In addition, it is questionable whether Sunstein gives a balanced view of the Internet's opportunities and dangers. After all, search engines, chat rooms and other technologies have made it easier than ever before to retrieve diverse information and engage in communication. Thereby, the Internet may actually promote exposure to differing viewpoints and common experiences. Sunstein recognizes that the Internet has great potential for enhancing democracy (see, e.g., pp. 15, 102, 168). His aim is not to demonize the Internet, but to point out some Internet dangers constantly overlooked by current debate. While this is a laudable goal, it runs the risk of giving a distorted image of the impact the Internet has on democracy and society. After all, it may well be that the democracy-enhancing features of the Internet far outweigh any dangers the Internet may pose to democracy.

However, even if it is true that the personalization of Internet communications leads to a balkanization of the Internet speech market, one has to take into account that people do not only roam the Internet. Outside the electronic world, there are many opportunities for unwanted encounters and common experiences, be it while shopping, gathering, dining or walking. All these opportunities might counterbalance the possible fragmentation occurring on the Internet. However, Sunstein argues that the balkanization of the speech market is not a unique feature of the Internet. It occurs in mass media and other parts of contemporary social life as well. This leads to another important insight about *Republic.com*. Ultimately, this is not a book about the Internet. It is a book about diverse forces in contemporary society shifting towards greater personalization and individualization. What concerns Sunstein is not the Internet *per se*, but the overall "dramatic increase in available options, a simultaneous increase in individual control over content, and a corresponding decrease in the power of general interest intermediaries" (p. 11). Sunstein reinforces this particular concern in his short electronic follow-up, *Echo Chambers*, published a few months later.

In *Echo Chambers*,¹⁰ Sunstein applies his *Republic.com* arguments to the quarrels over the 2000 US presidential election as well as the impeachment charges against President Clinton. While his application of the concepts of group polarization and information cascades seems to be convincing in this

¹⁰ Cass R. Sunstein, *Echo Chambers: Bush v. Gore, Impeachment, and Beyond* (Princeton 2001). Available at <<http://www.pupress.princeton.edu/sunstein>>.

context, the connection to the technologies of the Internet is only remote.

Furthermore, Sunstein has to grapple with a fundamental tension that he never really resolves. On the one side, he stresses that his suggestions do not involve a requirement for anybody to read or watch specific information or viewpoints (p. 97). “People who want to avoid general interest intermediaries are certainly permitted to do so” (p. 196). “Any system that allows for freedom of choice”, he writes, “will create some balkanization of opinion” (pp. 60-61). On the other hand, Sunstein contends that “fragmentation, and group polarization, are significant risks, even if only a relatively small proportion of people chooses to listen and speak with those who are like minded” (p. 192). Therefore, while Sunstein acknowledges that some fragmentation is unavoidable, he still seems to be concerned even about this degree of fragmentation.

Finally, the policy proposals Sunstein promotes have their weaknesses. How would a “deliberative domain” aimed at open discussions among citizens work effectively in practice?¹¹ Who should determine, and according to what principles, whether a website expresses partisan viewpoints and therefore should provide hyperlinks to opposing viewpoints? What exactly are opposing viewpoints?¹² However, Sunstein presents his proposals not as a policy manual, but as a starting point for future discussions. In this regard, *Republic.com* shares a feature common to many important current books on Internet law – that of raising concerns and pointing out problems, not providing complete solutions.

IV.

Sunstein wrote an important book on how changes in a society and its media landscape can endanger deliberative democracy. However, the greatest virtue of *Republic.com* does not lie in warning of the Internet’s dangers to democracy, but in unfolding some of the preconditions for a democracy and a well-functioning speech market – issues that Sunstein has explored in his previous writings as well. Paradoxically, the Internet may be the most important ally in preserving the values Sunstein deems important to a democracy. That Sunstein is aware of most of these objections is apparent. Sunstein writes: “What I am offering is not a complaint about the Internet, but an account of the frequently overlooked importance, for a system of free expression, of shared experiences

¹¹ The model of Slashdot (<<http://www.slashdot.org>>) may provide some guidance, but a system for a much larger and more diverse audience may pose totally different problems. Another example may be <<http://www.elektronische-demokratie.de>>, a discussion site about German privacy laws sponsored by the German Parliament.

¹² After readers had complained that Sunstein was not practicing what he had taught in his book, he added links from his own website to prominent libertarian and radical feminist law professors.

and the provision of information to people who would not have chosen it in advance” (p. 103). Ultimately, Sunstein wrote a book not about the *Republic.com*, but, rather, about the *Republic*.

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