

## AN ANALOGY AND AN IDEAL

The changes now being produced by contemporary communications technologies are understated, not overstated, by the idea of the Daily Me. What is happening goes far beyond the increasingly customized computer screen.

Many of us telecommute instead of going to a workplace; this is a growing trend. Rather than visiting the local bookstore, where we might well end up seeing a number of diverse people, we shop for books on [Amazon.com](http://Amazon.com). Others increasingly avoid local restaurants, because [seamless.com](http://seamless.com), or something like it, is entirely delighted to deliver sushi or a pizza to us. Near the dawn of the modern era, media analyst Ken Auletta enthused, "I can sample music on my computer, then click and order. I don't have to go to a store. I don't have to get in a car. I don't have to move. God, that's heaven."<sup>2</sup>

Really? Heaven? True, if you are interested in anything at all—from computers to linens to diamonds to cars to medical advice—an online company will be happy to assist you. Indeed, if you would like to attend college or even get a graduate degree, you may be able to avoid the campus. College education is available online, and if you'd like to perform marriage ceremonies, you can get licensed to do that too.<sup>3</sup>

It would be foolish to claim that this is bad, or a loss, in general or on balance. On the contrary, the dramatic increase in convenience is a wonderful blessing for people. Driving around in search of gifts can be a real bother. (Can you remember what this used to be like? Is it still like that for you?) For many of us, the chance to point and click is an extraordinary improvement. And many people, both rich and poor, take advantage of current technologies to "go" to places that they could not in any sense have visited before—South Africa, Germany, Iran, France, Venice, Beijing, as well as stores everywhere, and an immense variety of specialized doctors' offices. But it is far from foolish to worry that for millions of people, the consequence of this increased convenience is to decrease the set of chance encounters with diverse others—and also to be concerned about the consequence of the decrease for democracy and citizenship.

Or consider the concept of collaborative filtering—a familiar part of daily life online. We take it for granted, but it is worth pausing over how remarkable this is, and how remarkable it is that we no longer find it remarkable. Once you order a book from Amazon, for example, it is in an excellent position to tell you the choices of other people who like that particular book. Once you have ordered a number of books, [Amazon.com](http://Amazon.com) knows and will tell you the other books—or music and movies—that you are likely to like, based on what people like you have liked. And of course other websites, such as Netflix, are prepared to tell you which new movies you'll enjoy and which you won't—simply by asking you to rate certain movies, then matching your ratings to those of other people, and then finding out what people like you think about movies that you haven't seen. The algorithms are excellent, and they're getting better.

For music and food, there are countless possibilities, and they are becoming more plentiful and more amazing every day. For example, Pandora asks you for your favorite song, and once you disclose it, it will create a channel all for you, based on that song.

Pandora doesn't depend mostly on collaborative filtering; it finds songs that *sound* like the ones you like. After it makes an initial cut, it asks you to say whether you do, in fact, like the songs it has chosen for you, and in that way, it can get more and more precise. Its basic goal is to promote personalization—to appeal to your preferences and tastes, and get rid of the “junk.” Few of us like “junk,” but note well: what first seems to you to fall in that category (Bob Dylan, Bach, Mozart, Taylor Swift), might turn out, after serendipitous exposure, to be among your favorites.

Once Pandora knows what music you like, it probably knows a lot more about you, at least with a high probability. If you like Aimee Mann and Liz Phair, it will know something about your probable demographic, and so too if you like Selena Gomez, Haim, or the Dave Clark 5. Do musical preferences predict political inclinations? Not long ago, an official with Pandora said that its predictions about those inclinations, based on zip code as well as musical choices, are between 75 and 80 percent accurate. And with that level of accuracy, it developed an advertising service “that would enable candidates and political organizations to target the majority of its 73 million active monthly Pandora listeners based on its sense of their political leanings.”<sup>73</sup>

Personalized shopping is becoming readily available, and it is intended to match the interests and purchasing patterns of customers with a dazzling array of products, including radios, computers, fabrics, pens, and room designs. Here as well, information about one set of patterns can provide predictions about others. It's not quite Samantha from *Her*, but if you know what socks people like, you might be able to make some extrapolations, and if you know about radio and cell phones as well, the extrapolations might start to become highly accurate. Or consider the suggestion that before long we will “have virtual celebrities.... They'll look terrific. In fact, they'll look so terrific that their faces will be exactly what you think is beautiful and not necessarily what your neighbor thinks, because they'll be customized for each home.”<sup>74</sup> (Is it surprising to hear that several websites provide personalized romance stories? That at least one asks you for information about “your fantasy lover,” and that it designs a story to suit your tastes?)

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

The underlying issues here are best approached through two different routes. The first involves an unusual and somewhat exotic constitutional doctrine, based on the idea of the “public forum.” The second involves a general constitutional ideal, indeed the most general constitutional ideal of all: deliberative democracy. As we will see, a decline in common experiences and a system of individualized filtering might compromise that ideal. As a corrective, we might build on the understandings that lie behind the notion

that a free society creates a set of public forums, providing speakers' access to a diverse people, and ensuring in the process that each of us hears a wide range of speakers, spanning many topics and opinions.

## THE IDEA OF THE PUBLIC FORUM

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

This is indeed what most of the law of free speech is about. In Germany, France, the United States, Mexico, and many other nations, constitutional debates focus on the limits of censorship. But in free countries, an important part of free speech law takes a different form. In the United States, for example, the Supreme Court has ruled that *streets and parks must be kept open to the public for expressive activity*. In the leading case, from the early part of the twentieth century, the Court stated, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for the purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."<sup>5</sup>

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

To be sure, the government is allowed to impose restrictions on the "time, place, and manner" of speech in public places. No one has a right to set off fireworks or use loudspeakers on the public streets at 3:00 a.m. in order to complain about crime, racism, climate change, or the size of the defense budget. But time, place, and manner restrictions must be both reasonable and limited. Government is essentially obliged to allow speakers, whatever their views, to use public property to convey messages of their choosing.

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

## JUST STREETS AND PARKS? OF AIRPORTS AND THE INTERNET

Simply as a matter of principle, there seems to be good reason to expand the public forum well beyond streets and parks. In the modern era, other places have increasingly come to occupy the role of traditional public forums. The mass media and the Internet have become far more important than streets and parks as arenas in which expressive activity occurs. If you want to reach your friends, you'd do well to use Facebook, not the park around the block. If you want to get to a lot of people, you would probably do best to use Twitter or Instagram, not your local street corner.

Nonetheless, the Supreme Court has been wary of expanding the public forum doctrine beyond streets and parks. One reason is that any serious expansion might involve private institutions, which are not covered by the First Amendment at all. (If Facebook flatly refuses to post certain writings or takes down some accounts, there is no constitutional problem.) And perhaps the Court's wariness stems from a belief that once the historical touchstone is abandoned, lines will be extremely hard to draw, and judges will be besieged with requests for rights of access to both private and public property. Hence the Court has rejected the seemingly plausible argument that many other places—including those owned or overseen by the government—should be seen as public forums too. In particular, it has been urged that airports, more than streets and parks, are crucial to reaching a heterogeneous public; airports are places where diverse people congregate and where it is important to have access if you want to speak to large numbers of people. The Court was not convinced, responding that the public forum idea should be understood by reference to historical practices. Airports certainly have not been treated as public forums from “ancient times.”<sup>92</sup>

Nonetheless, some members of the Court have shown considerable uneasiness about a purely historical test. In the most vivid passage on the point, Supreme Court Justice Anthony Kennedy wrote, “Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.”<sup>93</sup> What Justice Kennedy recognizes here is the serious problem of how to “translate” the public forum idea into the modern technological environment. And if the Supreme Court is unwilling to do any such translating, it remains open for Congress, state governments, private institutions, and ordinary citizens to consider doing exactly that. In other words, the Court may not be prepared to say that the public forum idea extends beyond streets and parks as a matter of constitutional law. But even if the Court is unprepared to act, Congress and state governments are permitted to conclude that a free society requires a right of access to areas where many people meet.

Indeed, private and public institutions might reach such conclusions without judicial compulsion, and take steps on their own to ensure that people are exposed to a diversity of views. Airports and train stations might decide to remain open for expressive activity—as many now are. Broadcasters might attempt, on their own, to create the functional equivalent of public forums, allowing people with a wide range of views to participate—as many now do. Google, Facebook, Instagram, Twitter, and their successors might think creatively about creating spontaneous, unchosen encounters. An important question, for private institutions at least as much as government, is how to carry forward the goals of old law in the modern era.

## WHY PUBLIC FORUMS? OF ACCESS, UNPLANNED ENCOUNTERS, AND IRRITATIONS

The Supreme Court has given little sense of why, exactly, it is important to ensure that the streets and parks remain open to speakers. This is the question that must be answered if we are to know how to understand the relevance of the public forum doctrine to contemporary problems.

We can make some progress here by noticing that the public forum doctrine promotes three important goals.<sup>2</sup> First, it ensures that speakers can have access to a wide array of people. If you want to claim that taxes are too high, religious diversity is not being respected, or police brutality is widespread, you are able to press this argument on many people who might otherwise fail to hear the message. The diverse people who walk the streets and use the parks are likely to hear speakers' arguments about taxes, religious plurality, or the police; they might also learn about the nature and intensity of views held by their fellow citizens. Perhaps some people's views change because of what they learn; perhaps they will become curious enough so as to investigate the question on their own. It does not much matter if this happens a little or a lot. What is important is that speakers are allowed to press concerns that might otherwise be ignored by their fellow citizens.

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

In nations that are struggling against authoritarian rule, the shared exposure can make a massive difference. People might think that their own objections and fears are merely their own, and there is no sense that real change is possible. They might feel isolated in their discontent or rage. Once they see that dozens, hundreds, or millions of people are unhappy, and prepared to do something about it, major reforms might occur; potentially, a government might be overthrown. The Arab Spring occurred in large part as a result of processes of this kind, and public forums were crucial.<sup>3</sup> (Social media can of course play a major role here; they serve many of the functions of old-style public forums. They can be used for or against rebellions, in large part by giving people a sense of what other people are thinking and doing.)

Second, the public forum doctrine allows speakers not only to have general access to heterogeneous people but also to specific people and specific institutions against which they have a complaint. Suppose, for example, that you believe that the state legislature has behaved irresponsibly with respect to crime or immigration. The public forum ensures that you can make your views heard by legislators, simply by protesting in front of the state legislature itself. It often promotes access to the truth.

The point applies to private as well as public institutions. If a clothing store is believed to have cheated customers or acted in a racist manner, protesters are allowed a form of access to the store itself. This is not because they have a right to trespass on private property—no one has that right—but because a public street is highly likely to be

close by, and a strategically located protest will undoubtedly catch the attention of the store and its customers. Under the public forum doctrine, speakers are thus permitted to have access to particular audiences, and particular listeners cannot easily avoid hearing complaints that are directed against them. In other words, listeners have a sharply limited power of self-insulation. If they want to live in gated communities, they might be able to do so, but the public forum will impose a strain on their efforts.

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

What I mean to suggest is that these exposures help promote understanding and in that sense freedom. As we will soon see, all these points can be closely connected to democratic ideals.

### UNPLANNED AND UNWANTED

We should also distinguish here between exposures that are *unplanned* and exposures that are *unwanted*. In a park, for example, you might encounter a baseball game or a group of people protesting the conduct of the police. These might be unplanned experiences; you did not choose them and you did not foresee them. But once you encounter the game or the protest, you are hardly irritated; you may even be glad to have stumbled across them. The baseball game might be fun to watch. The protest might be interesting or disturbing; you might agree with it or not, but it could get under your skin. You might be glad that you saw it.

By contrast, you might also encounter homeless people or beggars asking you for money, or perhaps trying to sell you something that you really don't want. (The latter is daily life in New York City.) If you could have filtered out these experiences, you would have chosen to do so. For many people, the category of unwanted—as opposed to unplanned—exposures includes a great many political activities. You might be bored by those activities and wish that they were not disturbing your stroll through the street. You might be irritated or angered by such activities, perhaps because they are disturbing your stroll, perhaps because of the content of what is being said, or perhaps because of who is saying it.

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

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

In referring to the goals of the public forum doctrine, I aim to approve of encounters that are unwanted as well as unplanned, and also of exposure to experiences as well as arguments. But those who disapprove of unwanted encounters (who wants them?), and welcome people's ability to fence them off, might also agree that unplanned ones are desirable, not least because they can change people's lives. And those who believe that exposure to arguments is too demanding or too intrusive might also appreciate the value, in a heterogeneous society, of exposure to new experiences.

### **GENERAL-INTEREST INTERMEDIARIES AS UNACKNOWLEDGED PUBLIC FORUMS**

Of course there is a limit to how much can be done on streets and in parks. Even in the largest cities, streets and parks are insistently *local*. But other institutions perform many of the same functions as streets and parks do. In fact, society's general-interest intermediaries—newspapers, magazines, and television broadcasters, whether online or not—can be understood as public forums of an especially important sort. The same is not quite true of social media. Your Facebook News Feed might be a public forum of a kind, but it is not public in the same sense.

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

You might think that you have nothing to learn from someone whose view you abhor. But once you come across the editorial pages, you might well read what they have to say, and you might well benefit from the experience. Perhaps you will be persuaded on one point or another, or informed whether or not you are persuaded. Or perhaps you might clarify and improve your own arguments. Perhaps you will learn the truth.

At the same time, the front-page headline on the daily newspaper or the cover story in a weekly magazine is likely to have a high degree of salience for a wide range of people. While shopping at the local grocery store, you might see the cover of *Time* or *Newsweek*, and the story—about a promising politician, a new risk, a surprising development in Europe—might catch your attention, so you might pick up the issue and learn something even if you had no interest in advance.

Unplanned and unchosen encounters often turn out to do a great deal of good, for individuals and society at large. In some cases, they change people's lives. The same is true, though in a different way, for unwanted encounters. In some cases, an editorial from your least favorite writer might irritate you. You might wish that the editorial weren't there. But despite yourself, your curiosity might be piqued, and you might read it. Perhaps this isn't a lot of fun. But it might prompt you to reassess your own view and even revise it. At the very least, you will have learned what many of your fellow citizens

think, and why they think it—as when you encounter, with some displeasure, a series of stories on crime, climate change, Iraq, racism, or alcohol abuse, but find yourself learning a bit, or more than a bit, from what those stories have to say.

Television broadcasters have similar functions. Perhaps the best example is what has long been an institution in many nations: the evening news. If you tune into the evening news, you will learn about a number of topics that you would not have chosen in advance. Because of the speed and immediacy of television, broadcasters performed the functions of public forums even more than general-interest intermediaries in the print media. In some times and places, the lead story on the networks has had a great deal of public salience, helping to define central issues and creating a kind of shared focus of attention for many millions of people. And what happens after the lead story—the coverage of a menu of topics both domestic and international—creates something like a speakers' corner beyond anything ever imagined in Hyde Park.

None of these claims depends on a judgment that general-interest intermediaries always do an excellent job, or even a good one. Sometimes such intermediaries fail to provide even a minimal understanding of topics or opinions. Sometimes they offer a watered-down version of what most people already think. Often they suffer from prejudices and biases of their own. Sometimes they deal little with substance, and veer toward sound bites, supposed scandals, and sensationalism—properly deplored trends in the last decades. At other times they present froth. In any era, and perhaps especially today, they face severe market pressures to do one thing: attract eyeballs. That imperative often leads to coverage that does not (to put it lightly) serve democratic ideals.

What matters for present purposes is that in their best forms, general-interest intermediaries expose people to a range of topics and views at the same time that they provide shared experiences for a heterogeneous public. There are no hashtags, and that's fortunate. Indeed, general-interest intermediaries of this sort have large advantages over streets and parks precisely because most of them tend to be so much less local and so much more national or even international. Typically they expose people to questions and problems in other areas or even other nations. They even offer a form of modest, backdoor cosmopolitanism, ensuring that many people will learn something about diverse areas of the planet, regardless of whether they are much interested, initially or ever, in doing so.

Of course, general-interest intermediaries are not public forums in the technical sense that the law recognizes. These are private rather than public institutions. Most important, members of the public do not have a legal right of access to them. Individual citizens are not allowed to override the editorial and economic choices of private owners. In the 1970s, a sharp constitutional debate on precisely this issue resulted in a resounding defeat for those who claimed a constitutionally guaranteed access right.<sup>48</sup> But the question of legal compulsion is really incidental to my central claim here. Society's general-interest intermediaries, even without legal compulsion, serve many of the functions of public forums. They promote shared experiences; they expose people to information and views that would not have been selected in advance.

## TWO KINDS OF FILTERING



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

From the beginning, the US constitutional order was designed to create a republic, as distinguished from a monarchy, an empire, or a direct democracy. We cannot understand the system of freedom of expression, and the effects of modern communications technologies and filtering, without reference to this ideal. It will therefore be worthwhile to spend some space on the concept of a republic, and on the way the US Constitution embodies it, in terms of a deliberative approach to democracy. And the general ideal is hardly limited to the United States; it plays a role in many nations committed to self-government.

In a republic, the government is not managed by any king or queen; there is no sovereign operating independently of the people.<sup>42</sup> The US Constitution represents a firm rejection of the monarchical heritage, and its framers self-consciously transferred sovereignty from any monarchy (with the explicit constitutional ban on "titles of nobility") to "We the People." This decision represents, in Gordon Wood's illuminating phrase, the "radicalism of the American revolution."<sup>43</sup> At the same time, the founders were extremely fearful of popular passions and prejudices, and they did not want government to translate popular desires directly into law. Indeed, they embraced a form of filtering, though one very different from what I have emphasized thus far. Rather than seeking to allow people to filter what they would see and hear, they attempted to create institutions that would "filter" popular desires so as to ensure policies that would promote the public good.

In that sense, the framers of the Constitution were not simple democrats. They were republicans. And they were republicans of a particular sort. They rejected the long-standing view—pressed by their antifederalist opponents—that a republic could exist only in a small territory of like-minded people. As James Madison put it in the "Federalist No. 10," one salutary effect of size would be

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country; and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

That refinement and enlargement was crucial. It offers a cautionary note for all those who celebrate social media in particular and the Internet in general as means for injecting public convictions into public policy. Those convictions may reflect insufficient understanding of complex questions, perhaps above all of fact; many questions in public policy require engagement with technical matters. In the founding period, the structure of political representation and the system of checks and balances were designed to create a kind of filter between people and law, so as to ensure that what would emerge would be both reflective and well informed. At the same time, the founders placed a high premium

on the idea of “civic virtue,” which required participants in politics to act as citizens dedicated to something other than their own self-interest, narrowly conceived.

This form of republicanism involved an attempt to create a deliberative democracy. In this system, representatives would be accountable to the public at large. But there was also supposed to be a large degree of reflection and debate, within both the citizenry and government itself.<sup>13</sup> In the history of political thought, the idea of deliberative democracy has had many defenders. Consider Aristotle’s suggestion that when diverse groups “all come together ... they may surpass—collectively and as a body, although not individually—the quality of the few best.... When there are many who contribute to the process of deliberation, each can bring his [*sic*] share of goodness and moral prudence; ... some appreciate one part, some another, and all together appreciate all.”<sup>14</sup> Here, then, is a clear suggestion that many minds, deliberating together, may improve on “the quality of the few best.” Centuries later, John Rawls wrote of the same possibility: “The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.”<sup>15</sup>

Jürgen Habermas, elaborating these themes, stresses norms and practices designed to allow victory by “the better argument”:

Rational discourse is supposed to be public and inclusive, to grant equal communication rights for participants, to require sincerity and to diffuse any kind of force other than the forceless force of the better argument. This communicative structure is expected to create a deliberative space for the mobilization of the best available contributions for the most relevant topics.<sup>16</sup>

Habermas has explored the idea of an “ideal speech situation,” in which all participants attempt to seek the truth, do not behave strategically, and accept a norm of equality.<sup>17</sup> The framers of the US Constitution did not speak of an ideal speech situation, but the aspiration to deliberative democracy can be seen in many places in their design. The system of bicameralism, for example, was intended as a check on insufficiently deliberative action from one or another legislative chamber; the Senate in particular was supposed to have a “cooling” effect on popular passions. The long length of service for senators was designed to make deliberation more likely; so too for large election districts, which would reduce the power of small groups over the decisions of representatives. The electoral college was originally a deliberative body, ensuring that the choice of the president would result from some combination of popular will and reflection and exchange on the part of representatives. Most generally, the system of checks and balances had, as its central purpose, the creation of a mechanism for promoting deliberation within the government as a whole.

From these points it should be clear that the Constitution was not rooted in the assumption that direct democracy was the ideal, to be replaced by republican institutions only because direct democracy was impractical in light of what were, by modern standards, extremely primitive technologies for communication. Many recent observers have suggested that for the first time in the history of the world, something

like direct democracy has become feasible. It is now possible for citizens to tell their government, every week and even every day, what they would like it to do. Indeed, some websites have been designed to enable citizens to do precisely that.<sup>48</sup> We should expect many more experiments in this direction. Social media are easily enlisted to figure what large numbers of people want the government to do.

But from the standpoint of constitutional ideals, direct democracy via Twitter or Facebook or imaginable alternatives would be nothing to celebrate; indeed it would be a grotesque distortion of founding aspirations. It would undermine the deliberative goals of the original design. The American system has never been a direct democracy, and a good democratic order attempts to ensure informed and reflective decisions, not simply snapshots of individual opinions, suitably aggregated.<sup>49</sup>

### HOMOGENEITY, HETEROGENEITY, AND A TALE OF THE FIRST CONGRESS

There were articulate opponents of the original constitutional plan, and their voices have echoed throughout American history; they spoke in terms that bear directly on modern technologies. The antifederalists believed that the Constitution was doomed to failure on the ground that deliberation would not be possible in a large, heterogeneous republic. Following the great political theorist Baron de Montesquieu, a revered authority for antifederalists and federalists alike, they urged that public deliberation would be possible only where there was fundamental agreement. Consider Montesquieu's own words:

It is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and, of course, are less protected.<sup>50</sup>

The antifederalist who signed himself "Brutus" (probably Robert Yates, a New York judge) much admired Montesquieu, and he was explicit on the importance of homogeneity:

In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other. This will retard the operations of government, and prevent such conclusions as will promote the public good.<sup>51</sup>

The founders rejected this time-honored view; the result was a fundamental revision of republican thought. As they saw it, a large republic would be better, not worse, precisely because of the “constant clashing of opinions,” from which learning would be possible. In *The Federalist* No. 70, Alexander Hamilton put it most clearly. He turned Montesquieu on his head, arguing that “the differences of opinion, and the jarring of parties in [the legislative] department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.” This is a point about the epistemic value of diversity, at least when people are listening to one another. That is filtering of a distinctive sort—the kind of filter that is created when institutions require people to discuss questions with one another and subject themselves to “the jarring of parties.”

It was here that the Constitution’s framers made a substantial break with conventional republican thought, focusing on the potential *benefits* of diversity for democratic debate. Indeed, it is here that we can find the framers’ greatest and most original contribution to political theory. For them, heterogeneity, far from being an obstacle, would be a creative force, improving deliberation and producing better outcomes. If everyone agreed, what would people need to talk about? Why would they want to talk at all?

In an often-forgotten episode in the first Congress, the nation rejected a proposed part of the original Bill of Rights, a “right” on the part of citizens “to instruct” their representative on how to vote. The proposed right was justified on republican (what we would call democratic) grounds. To many people, it seemed a good way of ensuring accountability on the part of public officials. But the early Congress decided that such a “right” would be a betrayal of republican principles. Senator Roger Sherman’s voice was the sharpest and most forceful:

The words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation.<sup>22</sup>

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

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

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

This is hardly to say that most people should be devoting most of their time to politics. In a free society, people have a range of things to do. But to the extent that both citizens and representatives are acting on the basis of diverse encounters and experiences, and benefiting from heterogeneity, they are behaving in accordance with the highest ideals of the constitutional design.

### **E PLURIBUS UNUM, AND JEFFERSON VERSUS MADISON**

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

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

In a letter to Jefferson on October 17, 1788, Madison asked, “What use, then, ... can a bill of rights serve in popular Government?” His basic answer was that the “political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion.”<sup>23</sup> He spoke of culture, not courts. In Madison’s view, the Bill of Rights, along with the Constitution itself, would eventually become a source of shared understandings and commitments among extremely diverse people. The example illustrates the founders’ belief that for a diverse people to be self-governing, it was essential to provide them a range of common values and commitments.

### **TWO CONCEPTIONS OF SOVEREIGNTY, AND HOLMES VERSUS BRANDEIS**

We are now in a position to distinguish between two conceptions of sovereignty, bearing directly on debates about the Internet and social media. The first involves consumer sovereignty—the idea behind free markets. The second involves political sovereignty—the idea behind free nations. The two conceptions cut in radically different directions.

The notion of consumer sovereignty underlies enthusiasm for the Daily Me. It is the underpinning of any utopian vision of the unlimited power to filter. Writing as early as 1995, Bill Gates cheerfully predicted,

Customized information is a natural extension.... For your own daily dose of news, you might subscribe to several review services and let a software agent or a human one pick and choose from them to compile your completely customized "newspaper." These subscription services, whether human or electronic, will gather information that conforms to a particular philosophy and set of interests.<sup>24</sup>

Gates's prediction is a reality. With social media, it is easy to gather information that precisely fits your interests and preexisting views. Or consider Gates's celebratory and prescient words in 1999: "When you turn on DirectTV and you step through every channel—well, there's three minutes of your life. When you walk into your living room six years from now, you'll be able to just say what you're interested in, and have the screen help you pick out a video that you care about. It's not going to be 'Let's look at channels 4, 5, and 7.'"<sup>25</sup>

That is true, more or less, and it is the principle of consumer sovereignty in action. With its focus on "what interests you," Facebook is picking up on the same idea. In a way, that is the political philosophy or even theology of Silicon Valley. Consider these more recent words from Google's brilliant Eric Schmidt: "It will be very hard for people to watch or consume something that has not in some sense been tailored for them."<sup>26</sup> What is perhaps most interesting is that Gates, Facebook, Schmidt, and others seem unself-conscious about such ideas. They appear not to see that it takes a kind of stand, and that there are other ways of evaluating the communications market.

The notion of political sovereignty underlies the democratic alternative, which poses a challenge to Gates's vision on the ground that it might undermine both self-government and freedom, properly conceived. Recall here philosopher John Dewey's words:

Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule.... The important consideration is that opportunity be given that idea to spread and to become the possession of the multitude.... The essential need, in other words, is the improvement of the methods and conditions of debate, discussion, and persuasion. That is *the* problem of the public.<sup>27</sup>

Consumer sovereignty means that individual consumers are permitted to choose exactly as they wish, subject to any constraints provided by the price system as well as their current holdings and requirements. This idea plays a significant role in thinking about not only economic markets but also both politics and communications. When we talk as if politicians are "selling" a message and even themselves, we are treating the

political domain as a kind of market, subject to the forces of supply and demand. And when we act as if the purpose of a system of communications is to ensure that people can see exactly what they “want,” the notion of consumer sovereignty is very much at work. The idea of political sovereignty stands on different foundations. It does not take individual tastes as fixed or given; it does not see people as simply “having” tastes and preferences.

For those who value political sovereignty, “We the People” reflect on what we want by exchanging diverse information and perspectives. (Recall Hamilton’s plea for the “jarring of parties” as a way of promoting circumspection and deliberation.) The political process shapes what we want, as individuals and a community. The idea of political sovereignty embodies democratic self-government, understood as a requirement of “government by discussion,” accompanied by reason-giving in the public domain, where different people speak with one another and listen respectfully, even when in intense conflict. Political sovereignty comes with its own distinctive preconditions, and these are violated if government power is not backed by justifications, and instead represents the product of force or simple majority will.

It should be clear that the two conceptions of sovereignty are in potential tension. If laws and policies are “bought,” in the same way that soap and cereal are bought, the idea of political sovereignty is badly compromised. The commitment to consumer sovereignty will also undermine political sovereignty if free consumer choices result in insufficient understanding of public problems, or if they make it difficult to have anything like a shared or deliberative culture. We will disserve our own aspirations if we confound consumer sovereignty with political sovereignty. If the latter is our governing ideal, we will evaluate the system of free expression at least partly by seeing whether it promotes democratic goals. If we care only about consumer sovereignty, the only question is whether consumers are getting what they want—a question that seems, unfortunately, to be dominating discussions of the Internet and other new technologies.

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

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>28</sup>

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

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary.... They believed that ... without free speech and assembly discussion would be futile; ... that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>23</sup>

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

In fact, Brandeis can be taken to have offered a conception of the social role of the idealized citizen. For such a citizen, active engagement in politics, at least some of the time, is a responsibility, not just an entitlement. If citizens are "inert," freedom itself is at risk. If people are constructing a Daily Me that is restricted to sports or the personal lives of celebrities, they are not operating in the way that citizenship requires. This does not mean that people have to be thinking about public affairs all, most, or even much of the time. But it does mean that each of us has rights and duties as citizens, not simply as consumers.

As we will see, active citizen engagement is necessary to promote not only democracy but social well-being too. And in the modern era, one of the most pressing obligations of a citizenry that is not inert is to ensure that "deliberative forces should prevail over the arbitrary." For this to happen, it is indispensable to ensure that the system of communications promotes democratic goals. Achievement of those goals emphatically requires both unchosen exposures and shared experiences.

## REPUBLICANISM WITHOUT NOSTALGIA

These are abstractions; it is time to be more concrete. I will identify three problems in the hypothetical world of perfect filtering. These difficulties would beset any system in which individuals have complete control over their communications universe, and exercised that control so as to create echo chambers or information cocoons.

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



becomes widespread, simply because so many people seem to believe it. Cybercascades often promote fragmentation, because they occur with some groups and not others. Indeed, cybercascades are frequently a prime source of fragmentation—and of belief in falsehoods.

The second difficulty involves a distinctive characteristic of information. Information is a public good in the technical sense that once one person knows something, other people are likely to benefit as well. If you learn about crime in the neighborhood or the problem of climate change, you might well tell other people too, and they will benefit from what you have learned. In a system in which each person can customize their own communications universe, or in which that universe is customized for them, there is a risk that people will make choices that generate too little information. An advantage of a system with general-interest intermediaries and public forums—with broad access by speakers to diverse publics—is that it ensures a kind of social spreading of information. At the same time, an individually filtered speech universe is likely to produce too few of what the philosopher Edna Ullmann-Margalit has called *solidarity goods*—goods whose value increases with the number of people who are consuming them.<sup>32</sup> A presidential debate is a classic example of a solidarity good.

The third and final difficulty has to do with the proper understanding of freedom and the relationship between consumers and citizens. If we believe in consumer sovereignty, and if we celebrate the power to filter, we are likely to think that freedom consists in the satisfaction of private preferences—in an absence of restrictions on individual choices. This is a widely held view about freedom. Indeed, it is a view that underlies much current thinking about free speech. It is mostly right. But it is also inadequate—a big part of the picture, true, but hardly the whole thing.

Of course free choice is important. But freedom, properly understood, consists not simply in the satisfaction of whatever preferences people have, but also in the chance to have preferences and beliefs formed under decent conditions—in the ability to have preferences formed after exposure to a sufficient amount of information as well as an appropriately wide and diverse range of options. There can be no assurance of freedom in a system committed to the Daily Me.