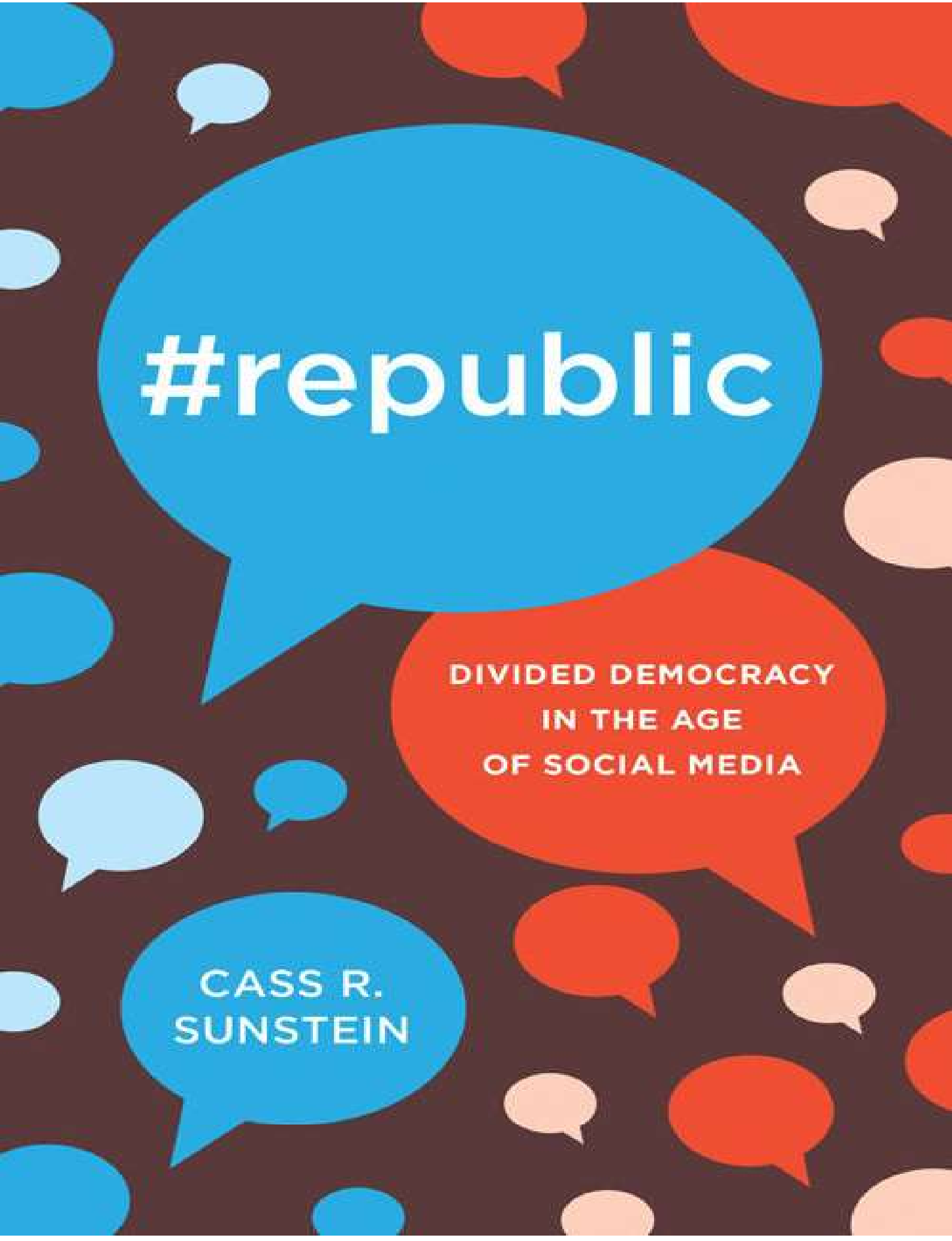
#republic
DIVIDED DEMOCRACY
IN THE AGE
OF SOCIAL MEDIA
CASS R.
SUNSTEIN


#republic

PRINCETON UNIVERSITY PRESS
Princeton and Oxford

Published by Princeton University Press,
41 William Street, Princeton, New Jersey 08540

In the United Kingdom: Princeton University Press,
6 Oxford Street, Woodstock, Oxfordshire OX20 1TR

press.princeton.edu

Jacket design by Amanda Weiss

Library of Congress Cataloging-in-Publication Data

Names: Sunstein, Cass R., author.
Title: #Republic : divided democracy in the age
of social media / Cass R. Sunstein.
Other titles: Hashtag republic
Description: Princeton : Princeton University Press, 2017. | Includes index.
Identifiers: LCCN 2016038668 | ISBN 9780691175515 (hardback)
Subjects: LCSH: Information society—Political aspects. | Internet—
Political aspects. | Social media—Political aspects. | Polarization
(Social sciences) | Political participation—Technological innovations.
| Democracy. | Political culture. | BISAC: POLITICAL SCIENCE /
Political Ideologies / Democracy. | POLITICAL SCIENCE /
Political Freedom & Security / General. | POLITICAL SCIENCE /
Censorship. | POLITICAL SCIENCE / Public Policy / General.
Classification: LCC HM851 .S869 2017 | DDC 303.48/33—dc23
LC record available at https://lccn.loc.gov/2016038668

British Library Cataloging-in-Publication Data is available

This book has been composed in Adobe Text Pro and Gotham

Printed on acid-free paper. ∞

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

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 on such acts as are for the general benefit of the whole community.

ROGER SHERMAN, 1789

It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar. . . . Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.

JOHN STUART MILL, 1848

Now even as we speak, there are those who are preparing to divide us—the spin masters, the negative ad peddlers who embrace the politics of "anything goes." Well, I say to them tonight, there is not a liberal America and a conservative America—there is the United States of America. There is not a Black America and a White America and Latino America and Asian America—there's the United States of America.

BARACK OBAMA, 2004

If you could look through thousands of stories every day and choose the 10 that were most important to you, which would they be? The answer should be your News Feed. It is subjective, personal, and unique—and defines the spirit of what we hope to achieve.

FACEBOOK, 2016

CONTENTS

8

FREEDOM OF SPEECH

Were those responsible for the ILOVEYOU virus protected by the free speech principle? It would be silly to say that they are. But if this form of speech may be regulated, what are the limits on the government's power?

Consider a case involving not e-mail but rather a website—a case that, in some ways, may turn out to be emblematic of the future. The site in question had a dramatic name: the Nuremberg Files. It began by stating, "A coalition of concerned citizens throughout the USA is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The site contained a long list of "Alleged Abortionists and Their Accomplices," with the explicit goal of recording "the name of every person working in the baby slaughter business in the United States of America." The list included the names, home addresses, and license plate numbers of many doctors who performed abortions, and also included the names of their spouses and children.

So far, so good—perhaps. But three of these doctors ended up being killed. Whenever a doctor was killed, the website showed a line drawn through his name. The site also included a set of "wanted posters," Old West style, with photographs of doctors with the word "Wanted" under each one. A group of doctors brought suit, contending the practices to which this site was a part amounted to "a hit list" with death threats and intimidation. The jury awarded them over $100 million in damages; the verdict was upheld on appeal, although the dollar award was reduced substantially (it remained in the millions).

Should the free speech principle have protected the Nuremberg Files? Maybe it should have. But if you think so, would you allow a website to post names and addresses of doctors who performed abortions, with explicit instructions about how and where to kill them? Would you allow a website to post bomb-making instructions? To post such instructions alongside advice about how and where to use the bombs? To show terrorists exactly where and how to strike?

There is nothing fanciful about these questions. Dozens of sites now contain instructions about how to make bombs—though to my knowledge, none of them tells people how and where to use them. If you have no problem with bomb-making instructions on websites, you might consider some other questions. Does your understanding of free speech allow people to work together at a site called pricefixing.com, through which competitors can agree to set prices and engage in other anticompetitive practices? (I made that one up.) Does your understanding of free speech allow people to make unauthorized copies of movies, music, and books, and give or sell those copies to dozens, thousands, or millions of others? (I didn't make that one up.) Does your understanding of free speech allow terrorists to recruit people to commit acts of murder? (As we will see, that's all too real.)

My basic argument here is that the free speech principle, properly understood, is not an absolute, and it allows government to undertake a wide range of restrictions on what people want to say on the Internet. However the hardest questions should be resolved, the government can regulate computer viruses, criminal conspiracy, and explicit incitement to engage in criminal acts, at least if the incitement is likely to be effective. As we will see, hard questions are raised by the use of the Internet to recruit people to commit terrorist acts; that issue takes us to the frontiers of the free speech principle.

This is not the place for a full discussion of constitutional doctrines relating to freedom of expression. But in the process of showing the democratic roots of the system of free expression, I attempt to provide an outline of the basic constitutional principles.

EMERGING WISDOM? (NOT)

An emerging view, with considerable support in the courts, is that the First Amendment to the Constitution requires government to respect an ideal of "consumer sovereignty," which means, very simply, that it must allow people

to choose however they like. Indeed, courts and commentators sometimes treat the First Amendment as if it is based on the view that consumer choice is what the system of communications is all about. Although it is foreign to the original conception of the free speech principle, this view can be found in many places in current law.

For one thing, it helps to explain the constitutional protection given to commercial advertising. This protection is exceedingly recent. Until 1976, the consensus within the Supreme Court and the legal culture in general was that the First Amendment did not protect commercial speech at all.[1] Since that time, commercial speech has come to be treated more and more like ordinary speech, to the point where Justice Clarence Thomas has even doubted whether the law should distinguish at all between commercial and political speech.[2] To date, Justice Thomas has not prevailed on this count; the Court gives commercial speech somewhat less protection. (For example, false and deceptive advertising can be regulated.) But the Court's commercial speech decisions often end up striking down restrictions on advertising, and for that reason, those decisions are best seen as a way of connecting the idea of consumer sovereignty with the First Amendment itself.

Belonging in the same category is the Supreme Court's intense constitutional hostility to campaign finance regulation. After the Court's highly controversial decision in the *Citizens United* case, corporations are basically allowed to spend what they want on political campaigns.[3] By the slim margin of five to four, the Court has made it clear that financial expenditures on behalf of political candidates are generally protected by the free speech principle—and in what seems to me an act of considerable hubris, the Court has also held that it is illegitimate for government to try to promote political equality by imposing ceilings on permissible expenditures.[4] The inequality that comes from divergences in wealth is not, in the Court's view, a proper subject for democratic control.

According to the Court, campaign finance restrictions cannot be justified by reference to equality at all. It is for this reason that candidate expenditures from candidates' personal funds may not be regulated. It is also for this reason that restrictions on campaign *contributions* from one person to a candidate can be regulated only as a way of preventing the reality or appearance of corruption.

The constitutional debate over campaign finance regulation is complex and contested, and the members of the Supreme Court are badly divided.[5] Some of the justices would further reduce the government's existing authority to regulate campaign contributions on the theory that such contributions are at the heart of what the free speech principle protects. Here too an idea of consumer sovereignty seems to be at work. In many of the debates over campaign expenditures and contributions, the political process itself is being treated as a kind of market in which citizens are seen as consumers, expressing their will not only through votes and statements but also through money. I do not mean to suggest that the government should be able to impose whatever restrictions it wishes. I mean only to notice and reject the idea that the political domain should be seen as a market, and the influential claim, which has obtained majority support on the Court, that government is entirely disabled from responding to the translation of economic inequality into political equality.

Even more relevant for present purposes is the widespread suggestion, with strong support in current constitutional law, that the free speech principle forbids government from interfering with the communications market by, for instance, attempting to draw people's attention to serious issues or regulating the content of what appears on television.[6] To be sure, everyone agrees that the government is permitted to create and protect property rights, even if this means that speech will be regulated as a result. We have seen that the government may give property rights to websites and broadcasters; there is no constitutional problem with that.

Everyone also agrees that the government is permitted to control monopolistic behavior and thus enforce antitrust law, which is designed to ensure genuinely free markets in communications. Structural regulation, not involving direct control of speech but instead intended to make sure that the market works well, is usually unobjectionable. Hence government can create copyright law, and, at least within limits, forbid unauthorized copying. (There is, however, an extremely important and active debate about how to reconcile copyright law and the free speech principle.)[7] But if government attempts to require television broadcasters to cover public issues, provide free airtime for candidates, or ensure a certain level of high-quality programming for children, many people will claim that the First Amendment is being violated.

What lies beneath the surface of these debates?

We might distinguish here between the free speech principle as it operates in courts and the free speech principle as it operates in public debate. As far as courts are concerned, there is as yet no clear answer to many of the constitutional questions that would be raised by government efforts to make the speech market work better. For example, we do not really know, as a matter of constitutional law, whether government can now require educational and public affairs programming on television. The Supreme Court allowed such regulation when three or four television stations dominated the scene, but it has left open the question of whether such regulation would be legitimate today.[8] As a matter of prediction, the most that can be said is that there is a reasonable chance that the Court would permit government to adopt modest initiatives, so long as it was promoting goals associated with deliberative democracy.

Indeed the Court has been cautious, and self-consciously so, about laying down firm rules governing the role of the free speech principle on new and emerging technologies. It is aware that things are changing rapidly and there is much that it does not know. Because issues of fact and value are in a state of flux, the Court has tended to offer narrow, case-specific rulings that supply little guidance and constraint for the future.[9]

But the free speech principle has an independent life outside the courtroom. It is often invoked, sometimes strategically but sometimes as a matter of principle, in such a way as to discourage government initiatives that might make the communications market serve democratic goals. Outside the law, and inside the offices of lobbyists, newspapers, radio stations, and recording studios as well as even in ordinary households, the First Amendment has a large *cultural* presence. This is no less important than its technical role in courts. Here the identification of the free speech principle with consumer sovereignty is becoming all the tighter. Worst of all, the emerging cultural understanding severs the link between the First Amendment and democratic self-rule.

Recall here Gates's words: "It's already getting a little unwieldy. 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.'" Taken to its logical extreme, the emerging wisdom would identify the First Amendment with the dream of unlimited consumer sovereignty with respect to speech. It would see the First Amendment in precisely Gates's terms. It would transform the First Amendment into a constitutional guarantee of consumer sovereignty in the domain of communications.

Decades ago, I had some personal experience with the conception of the First Amendment as an embodiment of consumer sovereignty, and it may be useful to offer a brief account. From 1997 to 1998, I served on the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters. Our task was to consider whether and how television broadcasters should be required to promote public interest goals—through, for example, closed captioning for the hearing impaired, emergency warnings, educational programming for children, and free airtime for candidates.

About half the committee's members were broadcasters, and most of them were entirely happy to challenge proposed government regulation as intrusive and indefensible. One of the two cochairs was the redoubtable Leslie Moonves, president of CBS. Moonves is an obviously intelligent, public-spirited man but also the furthest thing from a shrinking violet, and he is, to say the least, attuned to the economic interests of the television networks. Because of its composition, this group was not about to recommend anything dramatic. It was, on the contrary, bound to be highly respectful of the prerogatives of television broadcasters. In any case, the advisory committee was just that—an advisory committee—and we had power only to write a report and no authority to impose any duties on anyone at all.

Nonetheless, the committee was subject to a sustained, intense, high-profile, and evidently well-funded lobbying effort by economic interests, generally associated with the broadcasting industry, seeking to invoke the First Amendment to suggest that any and all public interest obligations should and would be found unconstitutional. An elegantly dressed and high-priced Washington, DC, lawyer testified before us for an endless hour, making outlandish claims about the meaning of the First Amendment. A long stream of legal documents was generated and sent to all of us—most of them arguing that (for example) a requirement of free airtime for candidates would offend the Constitution. Instead of offering careful empirical arguments about the possible effects of various approaches, we repeatedly heard a simple claim: "That

would violate the First Amendment!" It did not much matter whether the relevant approach would, in fact, violate the First Amendment. (Most of the people in our group were not lawyers.)

At our meetings, the most obvious (omni)presence was Jack Goodman, the lawyer for the National Association of Broadcasters, the lobbying and litigating arm of the broadcast industry, which wields the First Amendment as a kind of protectionist weapon against almost everything that government tries to do. To say that Goodman and the association would invoke the free speech principle at the drop of a hat or the faintest step of a Federal Communications Commission official in the distance is only a slight exaggeration.

Of course all this was itself an entirely legitimate exercise of free speech. But when the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters already consists, in large part, of broadcasters, and when that same committee is besieged with tendentious and implausible interpretations of the First Amendment, something does seem amiss.

There is a more general point. The National Association of Broadcasters and others with similar economic interests typically use the First Amendment in precisely the same way that the National Rifle Association uses the Second Amendment. We should think of the two camps as jurisprudential twins. The National Association of Broadcasters is prepared to make self-serving and outlandish claims about the First Amendment before the public and courts, and pay lawyers and publicists a lot of money to help establish those claims. The National Rifle Association does the same thing with the Second Amendment. In both cases, those whose social and economic interests are at stake are prepared to use the Constitution, however implausibly invoked, in order to give a veneer of principle and respectability to arguments that would otherwise seem hopelessly partisan and self-interested.

Our advisory committee heard a great deal about the First Amendment, marginally relevant Supreme Court decisions, and footnotes in lower-court opinions, but exceedingly little—in fact close to nothing—about the pragmatic and empirical issues on which many of our inquiries should have turned. If educational programming for children is required on CBS, NBC, and ABC, how many children will end up watching? What would they watch or do instead? Would educational programming help them? When educational programming is required, how much do the networks lose in dollars, and who

pays the tab—advertisers, consumers, network employees, or someone else? What would be the real-world effects on citizens and fund-raising alike of free airtime for candidates? Would such a requirement produce more substantial attention to serious issues? Would it reduce current pressures to raise money? What are the consequences of violence on television for both children and adults? Does television violence actually increase violence in the real world? Does it make children anxious in a way that creates genuine psychological harm? How, exactly, are the hard of hearing affected when captions are absent?

We can go further still. In the early part of the twentieth century, the due process clause of the Fourteenth Amendment was used to forbid government from regulating the labor market through, for example, legislation about minimum wages and maximum hours.[10] The Court thought that the Constitution allowed workers and employers to set wages and hours as they "chose," without regulatory constraints. This is one of the most notorious periods in the entire history of the Supreme Court. Judicial use of the Fourteenth Amendment for these purposes is generally agreed to have been a grotesque abuse of power. Most people now see that the underlying questions were democratic ones, not ones for the judiciary. The Court should not have forbidden democratic experimentation that would, plausibly at least, have done considerable good.

Indeed, a central animating idea in these now-discredited decisions was precisely that of consumer sovereignty—ensuring that government would not "interfere" with the terms produced by workers, employers, and consumers. (The word "interfere" has to be in quotation marks because the government was there already; the law of property, contract, and torts helps account for how much workers receive, how long they work, and how much consumers pay.) But in the twenty-first century, the First Amendment is serving a similar purpose in popular debate and sometimes in courts as well.

All too often, it is being invoked on behalf of consumer sovereignty in a way that prevents the democratic process from resolving complex questions that turn on issues of fact and value that are ill suited to judicial resolution. To say this is not to claim that the First Amendment should play no role at all. On the contrary, it does impose serious limits on what might be done. In emphasizing the limits of the free speech principle, I should not be taken to downplay the central importance of that principle in protecting democratic

self-governance. But some imaginable initiatives, responding to the problems I have discussed thus far, are fully consistent with the free speech guarantee. They would promote its highest aspirations.

FREE SPEECH IS NOT AN ABSOLUTE

We can make some progress here by investigating the idea that the free speech guarantee is "an absolute" in the specific sense that government may not regulate speech at all. This view plays a large role in public debate, and in some ways it is a salutary myth. Certainly the idea that the First Amendment is an absolute helps to discourage government from doing things that it ought not to do. At the same time, it gives great rhetorical power to critics of illegitimate government censorship. That's good. But a myth, even if in some ways salutary, remains a myth, and any publicly influential myth is likely to create many problems.

There should be no ambiguity on the point: free speech is not an absolute. We have seen that the government is allowed to regulate speech by imposing neutral rules of property law, telling would-be speakers that they may not have access to certain speech outlets. But this is only the beginning. Government is permitted to regulate computer viruses, unlicensed medical advice, attempted bribery, perjury, criminal conspiracies ("let's fix prices!"), threats to assassinate the president, blackmail ("I'll tell everyone the truth about your private life unless you give me $100"), criminal solicitation ("might you help me rob this bank?"), child pornography, violations of the copyright law, false advertising, purely verbal fraud ("this stock is worth $100,000"), and much more.

Note that many of these forms of speech will not be especially harmful. A fruitless and doomed attempt to solicit someone to commit a crime, for example, is still criminal solicitation. A pitifully executed attempt at fraud is still fraud. Sending a computer virus that doesn't actually work is still against the law, and the same is true of computer hacks of personal information.

Perhaps you disagree with the view, settled as a matter of current US law (and so settled in most other nations as well), that *all* these forms of speech are unprotected by the free speech principle. There is certainly a good argument that some current uses of the copyright law impose unnecessary and unjustifiable restrictions on free speech—and that these restrictions are

especially troublesome in the Internet era.[11] But you are not a free speech absolutist unless you believe that *each* of these forms of speech should be protected by that principle. And if this is your belief, you are a most unusual person (and you will have a lot of explaining to do).

This is not the place for a full account of the reach of the First Amendment of the US Constitution.[12] But it is plain that some distinctions must be made among different kinds of speech. It is important, for example, to distinguish between speech that can be shown to be quite harmful and speech that is relatively harmless. As a general rule, the government should not be able to regulate the latter. We might also distinguish between speech that bears on democratic self-government and speech that does not; certainly an especially severe burden should be placed on any government efforts to regulate political speech. Less simply, we might want to distinguish among the *kinds of lines* that government is drawing in terms of the likelihood that government is acting on the basis of illegitimate reasons (a point to which I will return).

These ideas could be combined in various ways, and indeed the fabric of modern free speech law in the United States reflects one such combination. Despite the increasing prominence of the idea that the free speech principle requires unrestricted choices by individual consumers, the Supreme Court continues to say that political speech receives the highest protection, and that government may regulate (for example) commercial advertising, obscenity, and libel of ordinary people without meeting the especially stringent burden of justification required for political speech. But for present purposes, all that is necessary is to say that no one really believes that the free speech principle, or the First Amendment, is an absolute. We should be thankful for that.

THE FIRST AMENDMENT AND DEMOCRATIC DELIBERATION

The fundamental concern of this book is to see how unlimited consumer options might compromise the preconditions of a system of freedom of expression, which include unchosen exposures and shared experiences. To understand the nature of this concern, we will make most progress if we insist that the free speech principle should be read in light of the commitment to democratic deliberation. A central purpose of the free speech principle is to implement that commitment.

There are profound differences between those who emphasize consumer sovereignty and those who stress the democratic roots of the free speech principle. For the latter, government efforts to regulate commercial advertising are not necessarily objectionable. Certainly false and misleading commercial advertising is more readily subject to government control than false and misleading political speech. Democratic efforts to reduce the risks of smoking —as, say, through mandatory graphic warnings on the front of cigarette packs —are hardly off the table. If they would save lives, they might well be acceptable. For those who believe that the free speech principle has democratic foundations and is not fundamentally about consumer sovereignty, government regulation of television, radio, and the Internet is not *always* impermissible, at least so long as it is reasonably taken as an effort to promote democratic goals.

Suppose, for example, that government proposes to require television broadcasters (as indeed it now does) to provide three hours per week of educational programming for children. Or suppose that government decides to require television broadcasters to provide a certain amount of free airtime for candidates for public office or a certain amount of time on coverage of elections. For those who believe in consumer sovereignty, these requirements are quite troublesome, and they seem like a core violation of the free speech guarantee. For those who associate the free speech principle with democratic goals, these requirements are fully consistent with its highest aspirations. In many democracies—including, for instance, Germany and Italy—it is well understood that the mass media can be regulated in the interest of improving democratic self-government.[13]

There is nothing novel or iconoclastic in the democratic conception of free speech. On the contrary, this conception lies at the heart of the original understanding of freedom of speech in the United States. In attacking the Alien and Sedition Acts, for example, Madison claimed that they were inconsistent with the free speech principle, which he linked explicitly to the American transformation of the concept of political sovereignty. In England, Madison noted, sovereignty was vested in the king. But "in the United States, the case is altogether different. The People, not the Government, possess the absolute sovereignty."[14]

It was on this foundation that any "Sedition Act" must be judged illegitimate. "The right of electing the members of the Government constitutes . . . the essence of a free and responsible government," and "the value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for the public trust." It was for this reason that the power represented by a Sedition Act ought, "more than any other, to produce universal alarm; because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[15]

In this way, Madison saw "free communication among the people" not as an exercise in consumer sovereignty, in which speech was treated as a kind of commodity, but instead as a central part of self-government, the "only effectual guardian of every other right."[16] Here Madison's conception of free speech was a close cousin of that of Justice Brandeis, who, as we saw in chapter 2, viewed public discussion as a "political duty" and believed that the greatest menace to liberty would be "an inert people."

A central part of the US constitutional tradition, then, places a high premium on speech that is critical to democratic processes, and centers the First Amendment on the goal of self-government. If history is our guide, it follows that efforts by government to promote a well-functioning system of free expression, as through extensions of the public forum idea, may well be acceptable. It also follows that government faces special burdens when it attempts to regulate political speech—burdens that are more severe than those it confronts when it attempts to regulate other forms of speech.

American history is not the only basis for seeing the First Amendment in light of the commitment to democratic deliberation. The argument can be justified by basic principle as well.[17] Consider the question whether the free speech principle should be taken to forbid efforts to make communications markets work a bit better from the democratic point of view. Let's return to our standard examples: educational programming for children, free airtime for candidates for public office, and closed captioning for the hearing impaired. (I am putting the Internet and social media to one side for now, because they raise distinctive questions.) Perhaps some of these proposals would do little or no

good, or even harm, but from what standpoint should they be judged inconsistent with the free speech guarantee?

If we believe that the Constitution gives all owners of speech outlets an unbridgeable right to decide what appears on "their" outlets, the answer is clear: government could require none of these things. But why should we believe that? If government is not favoring any point of view, and if it is really improving the operation of democratic processes, it is hard to find a legitimate basis for complaint. Indeed, the Supreme Court has expressly held that the owners of shopping centers—areas where a great deal of speech occurs—may be required to keep their property open for expressive activity.[18] Shopping centers are not television broadcasters, but if a democratic government is attempting to build on the idea of a public forum so as to increase the likelihood of exposure to and debate about diverse views, is there really a reasonable objection from the standpoint of free speech itself?

In a similar vein, it makes sense to say that speech that is political in character, in the sense that it relates to democratic self-government, cannot be regulated without an especially strong showing of government justification—and that commercial advertising, obscenity, and other speech that is not political in that sense can be regulated on the basis of a weaker government justification. I will not attempt here to offer a full defense of this idea, which of course raises some tough questions. But in light of the importance of the question to imaginable government regulation of new technologies, there are three points that deserve brief mention.

First, an insistence that government's burden is greatest when it is regulating political speech emerges from a sensible understanding of government's own incentives. It is here that government is most likely to be acting on the basis of illegitimate considerations, such as self-protection or giving assistance to powerful private groups. Government is least trustworthy when it is attempting to control speech that might harm its own interests, and when speech is political, government's own interests are almost certainly at stake. This is not to deny that government is often untrustworthy when it is regulating commercial speech, art, or other speech that does not relate to democratic self-government. But we have the strongest reasons to distrust government regulation when political issues are involved.

Second, an emphasis on democratic deliberation protects speech not only when regulation is most likely to be biased but also when regulation is most likely to be harmful. If government regulates child pornography on the Internet or requires educational programming for children on television, it remains possible to invoke the normal democratic channels to protest these forms of regulation as ineffectual, intrusive, or worse. But when government forbids criticism of an ongoing war effort, the normal channels are in an important sense foreclosed by the very regulation at issue. Controls on public debate are uniquely damaging because they impair the process of deliberation that is a precondition for political legitimacy.

Third, a stress on democratic deliberation is likely to fit, far better than any alternative, with the most reasonable judgments about particular free speech problems. However much we disagree about the most difficult speech problems, we are likely to believe that at a minimum, the free speech principle protects political expression unless government has exceedingly strong grounds for regulating it. On the other hand, forms of speech such as perjury, attempted bribery, threats, unlicensed medical advice, and criminal solicitation are not likely to seem to be at the heart of the free speech guarantee. An understanding of this kind certainly does not answer all constitutional questions. It does not provide a clear test for distinguishing between political and nonpolitical speech—a predictably vexing question.[19] (To those who believe that the absence of a clear test is decisive against the distinction itself, the best response is that any alternative test will lead to line-drawing problems of its own. Because everyone agrees that some forms of speech are regulable, line drawing is literally inevitable. If you're skeptical, try to think of a test that eliminates problems of this kind.) It does not say whether and when government may regulate art or literature, sexually explicit speech, or libelous speech. In all cases, government is required to have a strong justification for regulating speech, political or not.

But the approach I am defending does help to orient inquiry. When government is regulating false or fraudulent commercial advertising, libel of private persons, or child pornography, it is likely to be on firm ground. When government is attempting to control criminal conspiracy or speech that contains direct threats of violence aimed at particular people, it need not meet the stringent standards required for regulation of political dissent. What I have

suggested here, without fully defending the point, is that a conception of the First Amendment that is rooted in democratic deliberation is an exceedingly good place to start.

FORMS OF NEUTRALITY

None of this means that the government is permitted to regulate the communications market however it wishes. To know whether to object to what government is doing, it is important to know what *kind* of line it is drawing.[20]

There are three possibilities here.

- The government might be regulating speech in a way that is *neutral with respect to the content of the speech at issue*. This is the least objectionable way of regulating speech. For example, government is permitted to say that people may not use loudspeakers on the public streets after midnight or that speakers cannot have access to the front lawn immediately in front of the White House. A regulation of this kind imposes no controls on speech of any particular content. Here's an Internet example: if government says that no one may use the website of CNN unless CNN gives permission, it is acting in a way that is entirely neutral with respect to speech content; so too with restrictions on sending computer viruses. The government bans the ILOVEYOU virus, but it also bans the IHATEYOU virus and the IAMINDIFFERENTTOYOU virus. What is against the law is sending viruses; their content is irrelevant.
- The government might regulate speech in a way that depends on the content of what is said, but without discriminating against any particular point of view. Suppose, for example, that government bans commercial speech on the subways but allows all other forms of speech on the subways. In the technical language of First Amendment law, this form of regulation is "content based" but "viewpoint neutral." Consider the old fairness doctrine, which required broadcasters to cover public issues and allow speech by those with opposing views. Here the content of speech is highly relevant to what government is requiring, but no specific point of view is benefited or punished.

The same can be said for the damages award against the Nuremburg Trials website; the content of the speech definitely mattered, but no particular point of view was being punished. The same award would be given against a website that treated antiabortion people in the same way that the Nuremburg Trials treated doctors. In the same category would be a regulation saying that in certain areas, sexually explicit speech must be made inaccessible to children. In these cases, no lines are being drawn directly on the basis of point of view.

- The government might regulate a point of view that it fears or dislikes. This form of regulation is often called "viewpoint discrimination." Government might say, for instance, that no one may criticize a decision to go to war, no one may claim that one racial group is inferior to another, or no one may advocate violent overthrow of government. Here the government is singling out a point of view that it wants to ban, perhaps because it believes that the particular point of view is especially dangerous.

It makes sense to say that these three kinds of regulations should be treated differently, on the Internet as elsewhere. Viewpoint discrimination is the most objectionable. Content-neutral regulation is the least objectionable. If officials are regulating speech because of the point of view that it contains, their action is almost certainly unconstitutional. Government should not be allowed to censor arguments and positions merely because it fears or disapproves of them. If officials are banning a disfavored viewpoint, they ought to be required to show, at the very least, that the viewpoint really creates serious risks that cannot be adequately combated with more speech. Officials ought also be required to explain, in convincing terms, why they are punishing one point of view and not its opposite.

Content-neutral regulations are at the opposite extreme, and such regulations are often legitimate. If the government has acted in a content-neutral way, courts usually do not and should not intervene, at least if the basic channels of communications remain open, and if government has a solid reason for the regulation. Of course a gratuitous or purposeless regulation must be struck down even if it is content neutral. Suppose that government says that the

public streets—or for that matter the Internet—may be used for expressive activity, but only between 8:00 p.m. and 8:30 p.m. If so, the neutrality of the regulation is no defense. But content-neutral regulations are frequently easier to justify; their very neutrality and hence breadth ensures that there is a good reason for them. The government is unlikely to ban expressive activity from 8:30 p.m. until 7:59 a.m. because so many people would resist the ban. The more likely regulation prohibits noisy demonstrations when people are trying to sleep, and there is nothing wrong with such prohibitions.

Now consider the intermediate case. When government is regulating in a way that is based on content but neutral with respect to point of view, there are two issues. The first is *whether the particular line being drawn suggests lurking viewpoint discrimination*—a hidden but detectable desire to ban a certain point of view. When it does, the law should probably be struck down. If government says that the most recent war, or abortion, may not be discussed on television, it is, as a technical matter, discriminating against a whole topic, not against any particular point of view, but there is pretty good reason to suspect government's motivations. A ban on discussion of the most recent war is probably an effort to protect the government from criticism.

The second and perhaps more fundamental issue is *whether government is able to invoke strong, content-neutral grounds for engaging in this form of regulation*. A ban on televised discussion of the most recent war should be struck down for this reason. The ban seems to have no real point, aside from forbidding certain perspectives from being expressed. But the government has a stronger argument if, for example, it is requiring broadcasters to offer three hours of educational programming for children. In that case, it is trying to ensure that television serves children—an entirely legitimate interest.

Of course, some cases may test the line between discrimination on the basis of content and discrimination on the basis of viewpoint. If government is regulating sexually explicit speech when that speech offends contemporary community standards, is it regulating on the basis of viewpoint or merely content? This is not an easy question, and many people have argued over the right answer. But an understanding of the three categories discussed here should be sufficient to make sense out of the bulk of imaginable free speech challenges—and should provide some help in approaching the rest of them as well.

However we resolve that question, it remains true that government can do a lot of things to improve the system of free speech. Here it is important to make a further distinction, between "subsidies," on the one hand, and "penalties," on the other. In general, government is likely to have a great deal of trouble when it is imposing penalties on speech. Such penalties are the model of what a system of free expression avoids. Government will have more room to maneuver if it is giving out selective subsidies. Public officials are not required to give money out to all speakers, and if they are giving money to some people but not to others, they may well be on firm ground. But the distinction between the penalties and subsidies is not always obvious.

The most conspicuous penalties are criminal and civil punishments. If government makes it a crime to libel people over the Internet or imposes civil fines on television broadcasters who do not provide free airtime for candidates for office, it is punishing speech. The analysis of these penalties should depend on the considerations discussed thus far—whether political speech is involved, what kind of line the government is drawing, and so forth.

Somewhat trickier, but belonging in the same category, are cases in which government is *withdrawing a benefit to which people would otherwise be entitled*, when the reason for the withdrawal is the government's view about the appropriate content of speech. Suppose, for example, that government gives an annual cash subsidy to all speakers of a certain kind—say, those networks that agree to provide educational programming for children. But suppose that government withdraws the subsidy from those networks that provide speech of which the government disapproves. Imagine, for example, that the government withdraws the subsidy from networks whose news shows are critical of the president. For the most part, these sorts of penalties should be analyzed in exactly the same way as criminal or civil punishment. When benefits are being withdrawn, just as when ordinary punishment is being imposed, government is depriving people of goods to which they would otherwise be entitled, and we probably have excellent reason to distrust its motives. If government responds to dissenters by taking away benefits that they would otherwise receive, it is violating the free speech principle.

But a different issue is posed when government gives out selective subsidies to speakers. It often does this by, for example, funding some

museums and artists but not others, and generally through the National Endowment for the Arts and the Public Broadcasting System. Imagine a situation in which government is willing to fund educational programming for children, and pays a station to air that programming on Saturday morning—without also funding situation comedies or game shows. Or imagine that government funds a series of historical exhibits on the Civil War without also funding exhibits on the Vietnam War, World War II, or the history of sex equality in America. What is most important here can be stated simply: *under current law in the United States (and generally elsewhere), government is permitted to subsidize speech however it wishes*.[21]

Government often is a speaker, and as such, it is permitted to say whatever it likes. No one thinks that there is a problem if officials endorse one view and reject another. And if government seeks to use taxpayer funds to subsidize certain projects and enterprises, there is usually no basis for constitutional complaint. The only exception to this principle is that if government is allocating funds to private speakers in a way that discriminates on the basis of viewpoint, there might be a First Amendment problem.[22] The precise nature of this exception remains unclear. But it would certainly be possible to challenge, on constitutional grounds, a decision by government to fund the Republican Party website without also funding the Democratic Party website.

Of course, this kind of discrimination goes far beyond anything that I will be suggesting here. What is important is that government has a great deal of room to maneuver insofar as it is not penalizing speech but instead subsidizing it.

A POWERFUL, PRUDENT FIRST AMENDMENT

This chapter has dealt with a wide range of free speech issues, some of them briskly, and it is important not to lose the forest for the trees. My basic claims are that the First Amendment in large part embodies a democratic ideal, that it should not be identified with the notion of consumer sovereignty, and that it is not an absolute. Some questions are hard; the use of social media to recruit terrorists is one of them. But the core requirement of the free speech principle is that with respect to politics, government must remain neutral among points of view. Content regulation is disfavored; viewpoint discrimination is almost always out of bounds.

These are enduring principles. A key task is to ensure that government complies with them, whatever the direction of the technologies over which communication occurs.