

S I X T E E N

r e s p o n s e s

We need a plan. I've told a dark story about the choices that a changing cyberspace will present, and about our inability to respond to these choices. I've linked this inability to three features of our present legal and political culture. In this short chapter, I consider three responses. Of necessity these responses are nothing more than sketches, but they should be enough to suggest the nature of the changes we need to make.

R E S P O N S E S O F A J U D I C I A R Y

I've said that we should understand the courts' hesitancy as grounded in prudence. When so much seems possible, and when a rule is not clearly set, it is hard for a court to look like a court as it decides what policies seem best.¹

Although I agree with this ideal of prudence in general, we need to move its counsel along—to place it in context and limit its reach. We should isolate the source of the judge's difficulty. Sometimes a certain hesitation before resolving the questions of the Constitution in cyberspace finally, or firmly, or with any pretense to permanence, is entirely appropriate. But in other cases, judges—especially lower court judges—should be stronger. Lower court judges, because there are many of them and because many are extraordinarily talented and creative. Their voices would teach us something here, even if their rulings were temporary or limited in scope.

In cases of simple translation (where there are no latent ambiguities and our tradition seems to speak clearly), judges should firmly advance arguments that seek to preserve original values of liberty in a new context. In these cases there is an important space for activism. Judges should identify our values and defend them, not necessarily because these values are right, but because if we are to ignore them, we should do so only because they have been rejected—not by a court but by the people.

In cases where translation is not so simple (cases that have latent ambiguities), judges, especially lower court judges, have a different role. In these cases, judges (especially lower court judges) should kvetch. They should talk about the questions these changes raise, and they should identify the competing values at stake. Even if the decision they must adopt in a particular case is deferential or passive, it should be deferential in protest. These cases may well be a place for prudence, but to justify their passivity and compensate for allowing rights claims to fail, judges should raise before the legal culture the conflict presented by them. Hard cases need not make bad law, but neither should they be treated as if they were easy.

That is the simplest response to the problem of latent ambiguity. But it is incomplete. It forces us to confront questions of constitutional value and to choose. A better solution would help resolve these questions. While it will never be the job of the courts to make final choices on questions of value, by raising these questions the courts may inspire others to decide them.

This is the idea behind the doctrine of a second look, outlined twenty years ago by Guido Calabresi, a professor at the time who is now a judge.² Brutally simplified, the idea is this: when the Supreme Court confronts questions that present open, yet fundamental questions of value, it should be open about the conflict and acknowledge that it is not plainly resolved by the Constitution. But the Court should nonetheless proceed to resolve it in the way most likely to induce democratic review of the resolution. If the resolution induces the proper review, the Court should let stand the results of that review. The most the Court should do in such cases is ensure that democracy has its say; its job is not to substitute its values for the views of democrats.

Many ridicule this solution.³ Many argue that the framers clearly had nothing like this in mind when they established a Supreme Court and permitted judicial review. Of course they did not have this in mind. The doctrine of a second look is not designed for the problems the framers had in mind. As a response to the problems of latent ambiguities, it itself reveals a latent ambiguity.

We might deny this ambiguity. We might argue that the framers envisioned that the Court would do nothing at all about latent ambiguities; that in such contexts the democratic process, through Article V, would step in to correct a misapplication or to respond to a changed circumstance. That may well have been their view. But I don't think this intent is clear enough to foreclose our consideration of how we might best confront the coming series of questions on the application of constitutional value to cyberspace. I would rather err on the side of harmless activism than on the side of debilitating passivity. It is a tiny role for courts to play in the much larger conversation we need to have—but to date have not started.

RESPONSES FOR CODE

A second challenge is confronting the law in code—resolving, that is, just how we think about the regulatory power of code. Here are a number of ideas that together

would push us toward a world where regulation imposed through code would have to satisfy constitutional norms.

Here again is the link to open code. In chapter 8, when I described a kind of check that open code would impose on government regulation, I argued that it was harder for government to hide its regulations in open code, and easier for adopters to disable any regulations the government imposed. The movement from closed to open code was a movement from regulable to less regulable. Unless you are simply committed to disabling government's power, this change cannot be unambiguously good.

But there are two parts to the constraint that open code might impose; one is certainly good, and the other is not necessarily terrible. The first part is transparency—the regulations would be known. The second part is resistance—that known regulations could be more easily resisted. The second part need not follow from the first, and it need not be debilitating. It may be easier to disable the regulations of code if the code is in the open. But if the regulation is legitimate, the state can require that it not be disabled. If it wants, it can punish those who disobey.

Compare the regulation of seatbelts. For a time the federal government required that new cars have automatic seatbelts. This was the regulation of code—the car would be made safer by regulating the code to force people to use seatbelts. Many people hated seatbelts, and some disabled them. But the virtue of the automatic seatbelt was that its regulation was transparent. No one doubted who was responsible for the rule the seatbelt imposed. If the state didn't like it when people disabled their seatbelts, it was free to pass laws to punish them. In the end the government did not press the issue—not because it couldn't, but because the political costs would have been too high. Politics checked the government's regulation, just as it should.

This is the most we can expect of the regulation of code in cyberspace. There is a trade-off between transparency and effectiveness. Code regulation in the context of open code is more transparent but also less binding. Government's power to achieve regulatory ends would be constrained by open code.

But there is a benefit as well. Closed code would make it easier for the government to hide its regulation and thus achieve an illicit regulatory end. Thus, there is no simple defeat of government's ends but instead a trade-off—between publicity and power, between the rules' transparency and people's obedience. It is an important check on government power to say that the only rules it should impose are those that would be obeyed if imposed transparently.

Does this mean that we should push for open rather than closed code? Does it mean that we should ban closed code?

No. It does not follow from these observations that we should ban closed code or that we must have a world with only open code. But they do point to the values we should insist on for any code that regulates. If code is a lawmaker, then it should embrace the values of a particular kind of lawmaking.

The core of these values is transparency. What a code regulation does should be at least as apparent as what a legal regulation does. Open code would provide that

transparency—not for everyone (not everyone reads code), and not perfectly (badly written code hides its functions well), but more completely than closed code would.

Some closed code would provide this transparency. If code were more modular—if a code writer simply pulled parts off the shelf to plug into her system, as if she were buying spark plugs for a car—then even if the code for these components was closed, the functions and regulation of the end product would be open.⁴ Componentized architecture could be as transparent as an open code architecture, and transparency could thus be achieved without opening the code.

The best code (from the perspective of constitutional values) is both modular and open. Modularity ensures that better components could be substituted for worse. And from a competitive perspective, modularity permits greater competition in the development of improvements in a particular coding project.

It is plausible, however, that particular bits of code could not be produced if it were produced as open code, that closed code may sometimes be necessary for competitive survival. If so, then the compromise of a component system would permit something of the best of both worlds—some competitive advantage along with transparency of function.

I've argued for transparent code because of the constitutional values it embeds. I have not argued against code as a regulator or against regulation. But I have argued that we insist on transparency in regulation and that we push code structures to enhance that transparency.

The law presently does not do this. Indeed, as Mark Lemley and David O'Brien argue, the existing structure of copyright protection for software tends to push the development of software away from a modular structure.⁵ The law prefers opaque to transparent code; it constructs incentives to hide code rather than to make its functionality obvious.

Many have argued that the law's present incentives are inefficient—that they tend to reduce competition in the production of software.⁶ This may well be right. But the greater perversity is again constitutional. Our law creates an incentive to enclose as much of an intellectual commons as possible. It works against publicity and transparency, and helps to produce, in effect, a massive secret government.

Here is a place for concrete legal change. Without resolving the question of whether closed or open code is best, we could at least push closed code in a direction that would facilitate greater transparency. Yet the inertia of existing law—which gives software manufacturers effectively unlimited terms of protection—works against change. The politics is just not there.

RESPONSES OF A DEMOCRACY

In his rightly famous book *Profiles in Courage*, then-Senator John F. Kennedy tells the story of Daniel Webster, who, in the midst of a fight over a pact that he thought would divide the nation, said on the floor of the Senate, "Mr. President, I wish to

speak today, not as a Massachusetts man, nor as a Northern man, but as an American. . . .”⁷

When Webster said this—in 1850—the words “not as a Massachusetts man” had a significance that we are likely to miss today. To us, Webster’s statement seems perfectly ordinary. What else would he be but an American? How else would he speak?

But these words came on the cusp of a new time in the United States. They came just at the moment when the attention of American citizens was shifting from their citizenship in a state to their citizenship in the nation. Webster spoke just as it was becoming possible to identify yourself, apart from your state, as a member of a nation.

As I’ve said, at the founding citizens of the United States (a contested concept itself) were citizens of particular states first. They were loyal to their own states because their lives were determined by where they lived. Other states were as remote to them as Tibet is to us—indeed, today it is easier for us to go to Tibet than it was then for a citizen of South Carolina to visit Maine.

Over time, of course, this changed. In the struggle leading up to the Civil War, in the battles over Reconstruction, and in the revolution of industry that followed, individual citizens’ sense of themselves as Americans grew. In those national exchanges and struggles, a national identity was born. Only when citizens were engaged with citizens from other states was a nation created.

It is easy to forget these moments of transformation, and even easier to imagine that they have happened only in the past. Yet no one can deny that the sense of being “an American” shifted in the nineteenth century, just as no one can deny that the sense of being “a European” is shifting in Europe today. Nations are built as people experience themselves inside a common political culture. This change continues for us today.

We stand today just a few years before where Webster stood in 1850. We stand on the brink of being able to say, “I speak as a citizen of the world,” without the ordinary person thinking, “What a nut.” We stand just on the cusp of a time when ordinary citizens will begin to feel the effects of the regulations of other governments, just as the citizens of Massachusetts came to feel the effects of slavery and the citizens of Virginia came to feel the effects of a drive for freedom. As Nicholas Negroponte puts it, “Nations today are the wrong size. They are not small enough to be local and they are not large enough to be global.”⁸ This misfit will matter.

As we, citizens of the United States, spend more of our time and money in this space that is not part of any particular jurisdiction but subject to the regulations of all jurisdictions, we will increasingly ask questions about our status there. We will begin to feel the entitlement Webster felt, as an American, to speak about life in another part of the United States. For us, it will be the entitlement to speak about life in another part of the world, grounded in the feeling that there is a community of interests that reaches beyond diplomatic ties into the hearts of ordinary citizens.

What will we do then? When we feel we are part of a world, and that the world regulates us? What will we do when we need to make choices about how that world regulates us, and how we regulate it?

The weariness with government that I described at the end of the last chapter is not a condition without cause. But its cause is not the death of any ideal of democracy. We are all still democrats; we simply do not like what our democracy has produced. And we cannot imagine extending what we have to new domains like cyberspace. If there were just more of the same there—more of the excesses and betrayals of government as we have come to know it—then better that there should be less.

There are two problems here, though only one that is really tied to the argument of this book, and so only one that I will discuss in any depth. The other is much deeper—a sense of a basic corruption in any system that would allow so much political influence to be peddled by those who hand out money. This is the corruption of campaign financing, a corruption not of people but of process. Even good souls in Congress have no choice but to spend an ever-increasing amount of their time raising an ever-increasing amount of money to compete in elections. This is an arms race, and our Supreme Court has effectively said that the Constitution requires it.⁹

But there is a second, oddly counterintuitive reason for this increasing failure of democracy. This is not that government listens too little to the views of the public. It is that government listens too much. Every fancy of the population gets echoed in polls, and these polls in turn pulse the democracy. Yet the message the polls transmit is not the message of democracy; their frequency and influence is not the product of increased significance. The president makes policy on the basis of overnight polling only because overnight polling is so easy.

This is partly a technology problem. Polls mark an interaction of technology and democracy that we are just beginning to understand. As the cost of monitoring the current view of the population drops, and as the machines for permanent monitoring of the population are built, we are producing a perpetual stream of data about what “the people” think about every issue that government might consider.

A certain kind of code perfects the machine of monitoring—code that automates perfect sample selection, that facilitates databases of results, and that simplifies the process of connecting. We rarely ask, however, whether perfect monitoring is a good.

It has never been our ideal—constitutionally at least—that democracy be a perfect reflection of the present temperature of the people. Our framers were keen to design structures that would mediate the views of the people. Democracy was to be more than a string of excited utterances of the people. It was to be deliberative, reflective, and balanced by limitations imposed by a constitution.

But maybe, to be consistent with the arguments from part 3, I should say that at least there was a latent ambiguity about this question. In a world where elections were extremely costly and communication was complicated, democracy had to get by with infrequent elections. Nevertheless, we cannot really know how the framers would have reacted to a technology that allows perfect and perpetual polling.

There is an important reason to be skeptical of the flash pulse of the people. The flash pulse is questionable not because the people are uneducated or incapable of good judgment, and not because democracy needs to fail, but because it is often the

product of ignorance. People often have ill-informed or partially informed views that they simply repeat as judgments when they know that their judgments are not being particularly noticed or considered.

Technology encourages this sort of judgment. As a consequence of the massive increase in reporting on news, we are exposed to a greater range of information about the world today than ever before. This exposure, in turn, gives us confidence in our judgment. Never having heard of East Timor, people when asked might well have said, "I don't know." But having seen ten seconds on TV, or thirty lines on a web portal news page, gives them a spin they didn't have before. And they repeat this spin, with very little value added.

The solution to this problem is not less news, or a ban on polling. The solution is a better kind of polling. The government reacts to bad poll data because that is the only data we have. But these polls are not the only possible kinds of polls. There are techniques for polling that compensate for the errors of the flash poll and produce judgments that are both more considered and more stable.

An example is the "deliberative" poll devised by Professor James Fishkin.¹⁰ Rather than a pulse, Fishkin's polls seek an equilibrium. They bring a cross-section of people together for a weekend at a time. These people, who represent all segments of a society, are given information before the poll that helps ensure that they know something about the subject matter. After being introduced to the topic of the poll, they are then divided into small juries and over the course of a couple of days argue about the topic at issue and exchange views about how best to resolve it. At the end they are asked about their views, and their responses at this point form the "results" of the poll.

The great advantage of this system is not only that information is provided but that the process is deliberative. The results emerge out of the reasoning of citizens debating with other citizens. People are not encouraged to just cast a ballot. They give reasons for their ballot, and those reasons will or will not persuade.

We could imagine (we could dream) of this process extending generally. We could imagine it becoming a staple of our political life. And if it did, it might well do good, as a counterweight to the flash pulse and the perpetually interested process that ordinary government is. It would be a corrective to the process we now have, and one that might bring hope.

Cyberspace might make this process where reasons count more possible; it certainly makes it even more necessary. It is possible to imagine using the architecture of the space to design deliberative forums, which could be used to implement Fishkin's polling. But my message throughout is that cyberspace makes the need all the more urgent.¹¹

There is a magic in a process where reasons count—not where experts rule or where only smart people have the vote, but where power gets set in the face of reason. The magic is in a process where citizens give reasons, and citizens understand that power is constrained by these reasons.

This was the magic that Tocqueville wrote of when he told the world of the amazing system of juries in the United States. Citizens serving on juries must make reasoned, persuasive arguments in coming to decisions that often have extraordinary consequences for social and political life. Writing in 1835, Tocqueville said of juries:

The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. . . . The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.¹²

It wasn't Tocqueville, however, or any other theorist, who sold me on this ideal. It was a lawyer who first let me see the power of this idea—a lawyer from Madison, Wisconsin, my uncle, Richard Cates.

We live in a time when the sane vilify lawyers. No doubt lawyers are in part responsible for this. But I can't accept it, and not only because I train lawyers for a living. I can't accept it because etched into my memory is a picture my uncle sketched, explaining why he was a lawyer. In 1974 he had just returned from Washington, where he worked for the House Committee on Impeachment—of Nixon, not Clinton, though Hillary Rodham was working with him. I pressed him to tell me everything; I wanted to hear about the battles. It was not a topic that we discussed much at home. My parents were Republicans. My uncle was not.

My uncle's job was to teach the congressmen about the facts in the case—to first learn everything that was known, and then to teach this to the members of the committee. Although there was much about his story that I will never forget, the most compelling part was not really related to the impeachment. My uncle was describing for me the essence of his job—both for the House and for his clients:

It is what a lawyer does, what a good lawyer does, that makes this system work. It is not the bluffing, or the outrage, or the strategies and tactics. It is something much simpler than that. What a good lawyer does is tell a story that persuades. Not by hiding the truth or exciting the emotion, but using reason, through a story, to persuade.

When it works, it does something to the people who experience this persuasion. Some, for the first time in their lives, see power constrained by reason. Not

by votes, not by wealth, not by who someone knows—but by an argument that persuades. This is the magic of our system, however rare the miracles may be.

This picture stuck—not in its elitist version, of experts deciding what’s best, nor in its Rikki Lake version, of excited crowds yelling opponents down. But in its simple version that juries know. And it is this simple picture that our current democracy misses. Where through deliberation, and understanding, and a process of building community, judgments get made about how to go on.

We could build some of this back into our democracy. The more we do, the less significant the flash pulses will be. And the less significant these flash pulses are, the more we might have faith again in that part of our tradition that made us revolutionaries in 1791—the commitment to a form of government that respects deliberation, and the people, and that stands opposed to corruption dressed in aristocratic baubles.