

**Speech by Cass Sunstein at
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SUNSTEIN: Wow, you've gotten so quiet. This is a great honor. I was told by Tony [Doniger] and others that there are 1,400 people and 100 judges here. That's a lot of people and judges. [LAUGHTER] I was also told that the Celtics are starting at 8:30 and I should time the speech to correspond to the game, but Tony assured me that he called Paul Pierce half an hour ago and the Celtics are starting a little late so you don't have to worry. [LAUGHTER] In the conversation, Paul Pierce also asked Tony if he knew how many home games the Celtics lost in the playoffs thus far, and Tony said he thought zero. And Paul Pierce responded are you really

thinking that there is some suspense about the game? So we are not nervous about the Celtics.

Let me tell you three stories about academic work that I've been involved in over the past eight years or so. These involve questions about extremism. They're connected, I'm going to suggest, to questions about the Rule of Law. And they involve respectively American citizens, American judges and American jurors. The one involving citizens involved Boulder, Colorado and Boulder Springs, Colorado a few years ago in which we got the people of Boulder together to talk about three issues, same sex civil unions, climate change and affirmative action. We chose Boulder deliberately because Boulder is known as a left of center place. We wanted to get left of center people to talk to one another. And we screened our Boulder subjects, that's what we call the people in the experiment, subjects, we screened them by asking them a few questions such as what do you think of Vice President Cheney? If they responded with an enthusiastic smile, we excused them from the experiment. We did the same thing in Colorado Springs, which is Bush country, asking them to deliberate about our three issues, climate change, affirmative action and same sex civil unions. We asked them what they thought about the Vice President and if, as in a few cases, the citizens of Colorado Springs said, well, we don't think he's that great, they were excused them from the experiment. We wanted the Colorado Springs people to like him. We had them talk for about 15 minutes about these three issues, and we were interested in the following question.

If the people in Boulder talked to one another about these legally important questions, what will they think after they talk? We asked them to deliberate to a verdict as if they were a jury, but we weren't so interested in that. We asked them before they deliberated, as if they were a jury, to record privately and anonymously their views on the three issues. And we asked them, after they

deliberated as a jury, to record privately and anonymously their views on the three issues. We wanted to know what would happen to peoples private anonymous secret views after 15 minutes of talk with like-minded others. Here is what we got.

In Boulder, before they started to talk to one another, they thought the US should eventually sign a climate change agreement. They were worried about global warming. After 15 minutes of talk, they thought the United States should sign that agreement yesterday. They were terrified about global warming. The people in Colorado Spring began somewhat skeptical about same sex civil unions. There were conservatives that thought marriage was one man and one woman. After they talked to one another, they hated same sex civil unions and they thought this was the most horrible idea that leftwing extremists had ever generated.

This same pattern we found in every single one of our deliberating groups. After 15 minutes of talk the people in Boulder got far more extreme in their liberalness and the people in Colorado Springs got far more conservative. That's the first thing that happened. The second thing that happened is that the discussion among like-minded types, and I'm going to connect this to the only really original thing that the framers of the Constitution did, they did many great things, they did one original thing. What happened in Colorado Springs and Boulder was that the internal diversity of the citizens was squelched as a result of 15 minutes of discussion. Before they started to talk, some of the people in Colorado Springs felt, well, there are good reasons for affirmative action policies, in light of the history of discrimination, the value of diversity in institutions. Some of them thought that. Afterwards, almost none of them thought that in their private anonymous statements of view. Some of the people in Boulder thought, well, maybe an international agreement to control climate change isn't the best idea in the world. Maybe if we should relinquish a little bit of sovereignty maybe gas bills would increase. That's not so great. After they talked to one another, everyone in Boulder was in line with everybody else. 15 minutes of deliberation not only produced greater extremism, it also produced greater uniformity. OK. This is an experiment in a degree of artificiality.

Now I'm going to tell you something that has led many University of Chicago students, some in this room, to have dazed looks for years after. The United States has conducted a natural experiment, not subjects mind you, real judges for many decades. And here's how the natural experiment looks. Our three judge panels, I hope they are Courts of Appeals judges, federal ones in the room, I believe so. Our Courts of Appeals panels have three possible compositions, three republican appointees, three democratic appointees, two democratic and one republican appointee, two republican and one democratic. That's it. Those are the only possible compositions. By virtue of the fact that you have random assignments of panels, you can, if you're

willing to count, and hence the dazed look of the University of Chicago graduates. If you're willing to count, you can find how republican and democratic appointees differ from one another in cases involving, say, affirmative action, campaign finance, sex discrimination, disability, everything under the sun. And you can also find out how democratic and republican appointee's voting patterns shift depending on which other judges are on the panel. So, to get to the punch line very fast, you can construct, not by tricks, just by counting, something like our Colorado experiment. Boulder looks like a DDD panel, Clinton, Clinton, Carter, and Colorado Springs looks a little like an RRR panel, Regan, Bush, Bush. And there are plenty of both of these.

A few years ago, I had a research assistant who had nothing to do, embarrassing but true. And I asked her, well, why don't you look at some environmental cases over the past few years and see what happens to the votes of republican and democratic appointees when they're sitting on panels consisting of solely democratic or republican appointees. Does anything funny happen there? She counted about 100 votes, and the pattern was very striking. Republican and democratic appointees differ. Republican appointees sitting with republican appointees are very, very conservative. Democratic appointees sitting with fellow democratic appointees are amazingly liberal. We've now counted over 30,000 votes, and the pattern we've discerned follows what she discovered in her first 100 counts. Basically, there is a 10 to 12 point split between the republican and democratic appointees on balance in ideologically controversial cases. Republicans show liberal voting rates about 40%, meaning they'll vote for women and sex discrimination cases, they'll vote to uphold the campaign finance law, they'll vote in favor of a disabled person who's claiming discrimination about 40%. Democratic appointees about 52%. That 12 point difference is significant. It jumps, more than doubles to 30% when we compare Ds on DDD panels to Rs on RRR panels. In many areas of the law, the difference is stark or still. In cases involving sex discrimination, disability discrimination, gay rights, very controversial cases the difference is about 50% between the liberal voting rates of the republican appointees and the liberal voting rates of the democratic appointees. Now, I want to puzzle for a moment on what connects these two sets of findings seemingly very disparate. But, before I do that, I'm going to introduce one more bit of empirical evidence, which is my favorite of the three because I really don't understand and I'd like to. Maybe you can help. It involves juries.

A few years ago I was involved in a project trying to understand why punitive damage awards are unpredictable. Why is it that some juries, and I'm seeing from recognition on some of your faces that some of you were on the receiving end or maybe on the other end with respect to punitive damages. Why is it that punitive damage awards sometimes come in the millions, even hundreds of millions of dollars and sometimes 10,000, 100,000? What we did was we got about a thousand American who, as President Clinton used to

say, look like America, they were diverse in the relevant respects, and we asked them to go over a bunch of personal injury cases and to evaluate them on a bounded scale of zero to eight in terms of how much punishment was appropriate where eight meant extremely severe punishment, zero meant no punishment at all, and each of the numbers on the scale was described. A case where the jurors reacted very negatively was one where a kid's pajamas went on fire and the child was badly burned. That came in around a five. A case which, to my amazement and dismay, the jurors came in not very upset which involved a failed baldness cure where some of you join me in my amazement, yes, that Americans generally don't consider that a seven on our zero to eight scale. They think that's around a two or one or a zero. OK.

What we found, with respect to punitive damage judgments, was a stunning agreement across demographic groups on whether it's a zero, a two, an eight, a six. If you ask a bunch of African Americans, you create an all African American jury, it will take that pajama case and give it a six, and whites will, too. If you ask men and women, they agree, rich and poor, lawyers and non-lawyers. We created millions of statistical juries with the magic of the computer and they all agreed. With the damage awards things went haywire. One jury's judgment, taking the jury's judgment to be median on a deliberating group of six or twelve doesn't predict what another jury is going to do. It's chaotic and messy. The dollar scale produces a large degree of unpredictability and noise. Notice I've described statistical juries, not deliberating juries. We asked a thousand juryological Americans to record their individual judgments. And then, with the computer, we created statistical juries. We published this paper in a law review which, like most law reviews, no one reads. But a friend of mine, I begged to read it, and he did. And he said what a stupid study. It doesn't involve deliberating juries. How realistic is that? That's not what juries do. So, responsive to my skeptical friend, we created the largest mock jury study in the history of mankind. I'm not proud of that. That's a shameful thing to have done. We had 300 deliberating, 3,000 deliberating juries consisting of 3,000 people, 500 juries. And we wanted to confirm our finding which was that the median member of a jury is a good predictor of the outcome of the jury so as to show that our study was correct.

Our study was not correct. Here's what happened. In the pajama case where the median juror was around six, the jury came in at seven. When people were outraged about misconduct as individuals, in groups they were more outraged still. There was a systematic severity shift in high outraged cases. In the baldness case, where people were amused, the predeliberation median was around two. The jury came in at a one. There was a systematic leniency shift when people weren't concerned. With dollars they went up systematically. They always went up when there was a dollar award in the sense that the jury came in higher than the median juror almost every case of our 500 deliberating juries. In fact, the severity shift of dollars was so extreme that in 27% of our cases, we did not anticipate this and we remained puzzled,

in 27% of our cases the jury's award was higher than or at least as high as that of the highest individual juror before they started to talk to one another. That was the severity shift. OK.

What's going on in these three studies, what links them? These are all studies of social interactions and extremism involving like-minded types. What we've hit upon here is a social phenomenon which I'm starting to think helps explain many of the contests and divisions and fights that are afflicting the United States today, and have for the last decades, and that are also producing some of the international conflicts that sometimes erupt into violence. And the name of what we've uncovered is group polarization. What group polarization means is that deliberating groups typically end up in a more extreme point in line with their predeliberation tendencies. That's what we've observed for citizens in Colorado Springs, in Boulder, that's what we saw in our outraged juries and that's what we saw among federal judges. Why, it must be asked, does group polarization occur? Why is this generalization so robust? It's now being found, incidentally, in over 12 countries, including not uninterestingly France and Afghanistan. OK.

There seem to be two explanations, and I've seen the tapes in Colorado Springs and of our juries so there's some real-world kind of detail to what I'm about to tell you. The first point is if you get a group of people who tend to be upset about corporate misconduct, say, or who tend to think same sex marriage is about idea, the number of arguments that support their antecedent tendency will be pretty high because that's their antecedent tendency. The number of arguments that go the other way will be few. As a result, if people are listening to one another, they're going to shift. Informally, I've been told by federal judges not to be named, none in this room, that if you get a group of appointees who are all democratic, say, in a case involving disability discrimination, the pool of arguments are going to favor the plaintiff. They're going to be skewed. You're not going to get many the other way. And so, if there's going to be a shift, it's going to be a pro-plaintiff shift. That's the first point about how information travels among deliberating groups. There's a paper involving not juries or judges or citizens but extremists with a fancy name. It's called the epistemological poverty of extremism. And the thesis behind the paper is that extremists are really like the rest of it, it's just that they know only one set of things and those things go in a particular direction. OK. That's the informational account.

When we were doing our Colorado Springs study, I talked to an animal rights philosopher who is kind of well-known but we won't mention his name. And he said, you know, this information account isn't what we observe in animal rights organizations. He said when we get together on a Friday, we animal rights advocates, we make a lot of sense. By Sunday, he said, we've lost our minds. On Sunday we've concluded no scientific experiment on animals has ever produced any benefit for human beings. On Sunday we believe you

cannot eat an animal, even if it's lived an unusually long and pain-free and healthy life and died well in excess of the normal age range. He said the reason that happens isn't really about information. It's about people's desire to present themselves and understand themselves in a certain way. Animal rights types have gone all through their lives thinking they are animal rights types. In a group of other animal rights types, if they just agree with everybody else they seem kind of pathetic, yes? It doesn't fit with their self-understanding and their preferred self-presentation. That's exactly what we saw in Colorado Springs and Boulder when the citizens shift. OK.

I'm about to shift myself to talk to you a little bit about what seems to me an insufficiently appreciated aspect of our constitutional heritage. In many respects, the framers of the Constitution were channeling ideas that were prominent in England that had come from Montesquieu or others. They were developing and operationalizing ideas that had a long legacy. But there was one respect in which they deviated in which they were thoroughly original and did something that had never done before. You can get a clue by looking at what the anti-federalists, the appointments of the Constitution were so exercised about. They thought this new regime that was being created was bound to fail. Brutus, a brilliant anti-federalist wrote, repeating, by the way, Montesquieu often thought to be the framer's principal source. The anti-federalists were closer readers of Montesquieu. They said, Brutus said, in the public the public's sentiments of the people should be similar. It should be like Boulder or Colorado Springs. If this be not the case, if it's like a DRR panel or an RDD panel, if this is not the case, there will be constant clashing of opinions and the representatives of one part will be continually striving against those of the other. This was the standard republican understanding of what Constitutional government and, in a way, the Rule of Law mandated.

The federalists thought that the anti-federalists had it exactly backward. They thought the constant clashing of opinions, the mixing of Boulder and Colorado Springs was essential. They urged what we need is a situation in which the representatives of one part will be continually striving against those of the other. Alexander Hamilton, not the most celebrated of the framers these days, was right on the point saying the differences of opinion, this is a quotation, and the jarring of parties in the legislative department of the government often promote deliberating and circumspection and serve to check the excesses of the majority. Does this have contemporary relevance? For the first time since World War II, the United States is in the midst, really, of rethinking of the system of separation of powers and checks and balances. The last eight years have involved a large contest. The system the framer's created of checks and balances was, on the institutional side, a straightforward response to an intuitive understanding of the risk of group polarization, of the dangers created by those RRR and DDD panels.

The last time national security was threatened, of course, was World War II in which my dad, I have a cousin in the room who knew my dad in which my dad fought so I speak of this with some emotion. The last time the US fought a war in which national security was threatened there was, in the aftermath of the victory, a slim volume published by someone whose name has been lost to history called Luther Gulick who was there in the Roosevelt administration heavily involved in the war effort and in deliberation. He wrote in 1948, after the allied victory, a really boring book with the thrilling title Administrative Reflections from World War II, which is all about bureaucracy and administrative reform. But Gulick took the occasion to write an epilogue. In the epilogue he discusses the war-making capacities of the fascists and the war-making capacities of the allies. His puzzle was this. They have an idea about us which was that we couldn't fight a war. Their idea was we couldn't act effectively and quickly because, under our system of checks and balances, the framers' institutional innovation, we were too divided and deadlocked by conflicting private interests. They thought we couldn't fight, they believed what they said and they thought dictatorships had huge advantages.

For our part, we thought something. It's hard to recover this but maybe it's a little bit in the atmosphere now. We thought they wouldn't fight because they had to hate their governments. Many Americans believed that in the end the Japanese and the Germans would not fight aggressively because they had an undemocratic government and, in the end, when the going got tough they'd give up. In Gulick's account, we were really mistaken. They fought like tigers. An extreme version, right, a big-time version of groups of like-minded types, they were in it to the hilt. We got that one way off. But they were wrong, too, equally wrong. The decisive advantage, as Gulick has it, of the allied powers in World War II wasn't about economic capacity, wasn't about superior intelligence, it was about information in institutions. By virtue of the fact that we had private rights protected by free speech and institutions that checked and balanced, truth and error would come to the attention of those in the position to fix it. Hitler, by contrast, didn't know what was true on the ground. He had a little polarization machine, an echo-chamber which was, in the end, devastating to the military prospects of Germany. Roosevelt, by contrast, had a lot of information bubbling up. If things were going wrong, the United States government would hear about it because of the institutions that the country had been bequeathed for many decades. OK. I'm basically done. I have a story for you by which to conclude. And then, in law professor style, I want to tell you the main thesis. That is at my contract at the University of Chicago and Dean Keegan has insisted that it be carried forward in Cambridge. OK.

Here's the story. There is a political scientist in California named Fischkin who has been very much interested in public opinion and its development, why do people think certain things, what happens in Boulder really, what

happens in Colorado Springs? And so he's created something called the Deliberative Opinion Poll in which he brings people together who are diverse, different and asks them to talk to one another. A few years ago, he had a group of people in Texas talking about welfare reform in which there was an African American woman from Harlem speaking about her family and its needs. She was a single mother and she had two children. She was urging, in terms of food and shelter and medical care, welfare policy should look like this. And she spoke with some feeling and passion about her family's requirements. In the little group there was a farmer from Oklahoma, a large, generally affable guy who was getting exercised as she was speaking. And his exercise, his agitation boiled over at a certain point and he exploded at her. And he said in the United States a family consists of a father, a mother and at least one child. Don't you dare speak to me, speak in my presence about your family. You have no family. Tough talk, yes?

For the next day and a half the group was constituted, as it had been, they were, the Oklahoma farmer and the New York welfare mother were in the same deliberating group but they didn't exchange a single word. They were, you know, it was like a fifth grade class where one says tell John I said this, no direct communication between them, very cold chill. As they left on Sunday after deliberating about various issues and exchanging now words, she started leaving, as they all were for the airplane, leaving the room to get to the buses. She felt a tap on her shoulder. She turned around and looming up at her, she looked up and looming over here was the Oklahoma farmer. And she looked at him with trepidation, maybe a slight edge of anger, definitely fear and say yes? And he said somewhat sternly but with some emotion, what are the three most important words in the English language? She said I don't know. And he responded I was wrong.

Thesis time. My claim, illustrated by these endless empirical studies, all these thousands of federal judicial votes, judges here we're counting, we are continuing to count, is that extremisms, as a legal phenomenon, as a daily problem for democracies, a terrible issue that divides nations, sometimes causes wars, has a mechanism behind it. And the core mechanism is group polarization. Like-minded people typically end up in a more extreme position in line with their predeliberation tendencies not because they're irrational or nuts but because they are listening to the information and concerned about their reputation and self-presentation. The greatest invention of the American Constitution, the only original one was to turn standard republican thought on its head, to turn it upside and is to see heterogeneity and diversity as a creative force indispensable to stability to discovery to mutual understanding to mutual respect to good decision-making. That institutional innovation shows a keen intuitive understanding, Madison, Hamilton, Jefferson were all on top at this point, a keen intuitive understanding of group polarization.

The basic idea is not to deny the value of spaces in which like-minded people can speak only to one another, deliberating enclaves of that kind have a place, too, federalism and freedom of association recognize them and give them a kind of legal protection, but the institutions that we have, and that when things go well we benefit from, insure that when people move it's because of good reasons, because of the force of the argument and not because of the sometimes destructive logic of social interactions. Thank you.
[APPLAUSE]

[END]

Thank you.

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