
DIGITALLY DEMOCRATIZING CONGRESS? TECHNOLOGY AND POLITICAL ACCOUNTABILITY

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INTRODUCTION

The question before our panel – how to make Congress more democratic – is a big one. I would like to focus on one aspect of democratizing Congress: the idea of enhancing congressional accountability. Accountability has achieved rock star status in contemporary critiques of Congress, and it has multiple meanings. Pleas for greater congressional accountability sometimes concern budgetary issues like earmarks, with a rising chorus suggesting either the elimination of earmarks or ramped-up disclosures about the legislators who secure them.¹ Other times, accountability is used as a way to talk about cleaning up bad legislative behavior, from campaign finance and lobbying abuses to criminal acts of corruption.²

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¹ See, e.g., Change Congress, <http://change-congress.org> (last visited Feb. 2, 2009); Earmark Watch: Bringing Citizen Oversight to Congressional Spending, <http://earmarkwatch.org> (last visited Feb. 3, 2009) (inviting users to investigate thousands of earmarks and share the information with other users on the website); Sunlight Foundation, <http://www.sunlightfoundation.com> (last visited Feb. 3, 2009) (using the Internet to “shine a light on the interplay of money, lobbying, influence and government”).

² See, e.g., *Lobbying Reform: Accountability Through Transparency: Hearing Before the H. Comm. on Rules*, 109th Cong. 1 (2006) (statement of Norman Ornstein, Resident Scholar, The American Enterprise Institute); Change Congress, *supra* note 1.

I am using the term accountability in a different – though surely related – sense, one that trains its focus on democratic legitimacy. As a conceptual pillar for scholars like Alexander Bickel, accountability concisely captures the attribute said to make Congress democratic. Bickel characterized democracy as “function[ing] by electing certain men for certain periods of time, then passing judgment periodically on their conduct of public office,” and depicted the “exercise of the franchise” as a “process of holding to account.”³ In this framing, Congress’s accountability is axiomatic and assumed to flow inevitably from the fact of elections. Perhaps the uncritical equation of elections with accountability has arisen because, in the context of American public law, congressional accountability is most commonly asserted as a way to challenge controversial judicial decisions made by appointed judges. Yet, while the idea of political accountability figures centrally in standard debates about the countermajoritarian dilemma, its relevance is hardly limited to that context. Accountability is central to democratic theory as conventionally understood because it stands in for the consent of the governed. As such, it is a cousin to the terms *responsiveness* and *representativeness*, though not strictly synonymous with them.⁴ In this conceptual scheme, asking how Congress might be made more accountable is one way of asking the question how Congress might be made more democratic.

In my previous work, I have argued that, for all its canonical status, there is far less than meets the eye to the reality of political accountability in the American context.⁵ When Congress’s political accountability is subjected to critical empirical scrutiny, it is far from clear that it can support the strong normative claims made in its name. I have argued that the accountability axiom is plagued by two kinds of empirical problems: one arising from factors creating a deficit of meaningful accountability, the other from factors creating asymmetries in accountability.⁶ These problems – summarized below – are my

³ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 17 (1962).

⁴ These concepts are analytically distinct from accountability but, at the same time, vulnerable to similar problems of deficit and asymmetry as those discussed in this Article. See Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH* 43, 73-74 & 73 n.102 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Schacter, *Proxy*].

⁵ Jane S. Schacter, *Accounting for Accountability in Statutory Interpretation and Beyond*, in *ISSUES IN LEGAL SCHOLARSHIP: DYNAMIC STATUTORY INTERPRETATION*, Article 5, 5-16 (2002), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1024&context=ils> [hereinafter Schacter, *Accounting for Accountability*] (presenting an empirical analysis of political accountability in the context of statutory interpretation); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 *STAN. L. REV.* 737, 755-59 (2004) [hereinafter Schacter, *Ely*]; Schacter, *Proxy*, *supra* note 4, at 73 (“[L]egislative accountability is far too thin, sporadic, and unequal to do the fundamental normative work . . . [asked] of it.”).

⁶ See Schacter, *Accounting for Accountability*, *supra* note 5, at 11; Schacter, *Proxy*, *supra* note 4, at 73.

point of departure in this Article, where I consider the degree to which the Internet and associated technologies can be a force for improving congressional accountability.

There is no question that the Internet has risen rapidly to become a very substantial factor, and an important venue, in our collective political life. Nor is there question that the Internet has vastly expanded the availability and accessibility of political information. What is not yet clear, however, is to what extent the Internet has been, or is likely to become, an antidote to some of the forces that have undermined Congress's political accountability. I will suggest below that the Internet has the capacity to respond quite powerfully to some of these problems, less so to others, and, in any event, that it will take more time, evolution and experience to see to what extent the Internet might become an engine of accountability. My approach is empirically-oriented and seeks to identify what important things we know – and do not know – about this question. At the same time, this area is changing so rapidly that it becomes perilous to say too much about how things “are” because they do not tend to stay that way for long. Some speculation is inevitable, though I will do my best to ground it in available empirical evidence.

Part I of the Article summarizes some of the important empirical problems with congressional accountability. Part II identifies features of the Internet that make it a plausible candidate to ameliorate these problems, and then assesses the impact it seems to have had thus far. I should emphasize here that I am not undertaking to offer any comprehensive assessment of whether and how the rise of the Internet has affected politics, Congress or voters. I will focus much more specifically on the idea of accountability as the route to democratic consent and, within that universe, to the empirical problems with the accountability axiom that I have previously identified. The Article then offers some tentative conclusions about the Internet experience thus far, and suggests some questions that bear watching.

I. THE FLAWED ACCOUNTABILITY AXIOM

In public law, Congress is often treated as democratically legitimate based on the simple fact that its members are elected and are, therefore, answerable to voters. This “accountability axiom” is most commonly invoked when Congress is compared to its sometime-institutional antagonist – the federal courts – but the axiom has much wider scope. There are, in fact, substantial reasons to question in a more general sense whether Congress is meaningfully accountable. In this Part, I briefly summarize arguments that I have drawn out more fully elsewhere.

A. *Accountability Deficit*

First, there is a deficit of accountability, born of factors that impair citizens' ability to hold elected representatives answerable for their policy choices at anything other than the most wholesale, generalized level. Principal factors include the lack of meaningful transparency, the electorate's rather deep and

historically stable lack of political knowledge, and the inability of periodic elections to serve as a robust accountability mechanism.

There is a lack of meaningful congressional transparency in at least three respects relevant to political accountability. First, there is a *literal* lack of transparency in some important things that Congress does because representatives act outside (or largely outside) public view. Examples include killing a bill or nomination, or pressing for significant changes in legislation in a way never captured on the public record.

Second, there is *compromised* transparency, in which information about what Congress is doing is literally available, but is, for one reason or other, not easily accessible. One example is the Freedom of Information Act ("FOIA"), a measure precisely dedicated to governmental transparency.⁷ Information made available through FOIA is in some respects more formally than functionally transparent. It is not shielded from public view, but it is difficult to obtain for those unschooled in FOIA's technical and arcane ways, or unwilling to endure its delays and costs.⁸ A different example of compromised transparency is the legislative history of a bill that was not subject to great public attention. In the absence of Internet resources, this, too, would literally be available, but would be cumbersome and costly for an ordinary citizen to acquire. Another kind of compromised transparency is reflected in federal legislation that enters a complex web of multi-institutional and multi-jurisdictional law that can make it formidably difficult to sort out which governmental entity is responsible for what policy choices. And, more pointedly, there are laws that are subject to deliberate obfuscation. For example, contending forces frequently characterize bills in ways that make it hard for the public to cut through the fog of spin and determine what a given bill would actually do. A classic example of this is the high profile public debate over the Civil Rights Act of 1991,⁹ a multi-faceted bill intended to overrule several Supreme Court decisions that had narrowed the protection available under federal employment discrimination statutes. The legislative battle devolved into charges and counter-charges about quotas, a

⁷ 5 U.S.C. § 552 (2006).

⁸ See Robert Ratish, Note, *Democracy's Backlog: The Electronic Freedom of Information Act Ten Years Later*, 34 RUTGERS COMPUTER & TECH. L.J. 211, 216 (2007) ("The process of review can be costly and time consuming for the average requester without the resources of a media outlet or well-organized watchdog organization."); Amy E. Rees, Note, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; or Perhaps Both,"* 44 DUKE L.J. 1183, 1223 (1995) (writing that despite lofty rhetoric, "FOIA rarely contributes to the awareness of the electorate"). Indeed, FOIA's limitations persist even after the "E-FOIA" amendments passed in the mid-1990s, designed to update FOIA in light of the Internet. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552 (2006)). The amendments have increased FOIA requests sufficiently to create large backlogs and have generated further legislative activity in a continuing effort to improve the efficiency of FOIA disclosure. See Ratish, *supra*, at 211.

⁹ Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-5(e) (2000)).

battle that captured none of the subtlety or legal complexity of the actual legal mechanisms proposed in the bill.¹⁰

Third, there is what we might call *wasted* transparency, where – unlike in the case of compromised transparency – there is abundant information about Congress that is relatively easily accessible, but is nevertheless simply not known by many citizens. In this category, consider a bill sufficiently high profile to draw substantial press coverage of such basic things as elected representatives’ roll call votes and the substance of major debates. Even where there are long, detailed newspaper and television news stories that expose information of this kind, however, it is of little value in boosting actual accountability if large swaths of the public do not choose to consume the information.¹¹ Transparency, while a predicate for accountability, is by no means a guarantee.

The phenomenon of what I am calling wasted transparency is connected in important ways to a fundamental source of the accountability deficit: the deep and abiding lack of political knowledge on the part of the American public. In the words of John Ferejohn: “Decades of behavioral research have shown that most people know little about their elected officeholders, less about their opponents, and virtually nothing about the public issues that occupy officials from Washington to city hall.”¹² The absence of familiarity with basic information about who is making policy choices, and what choices they have made, undermines what might reasonably be taken to be a predicate for meaningful accountability. This is especially so given that this lack of information does not come into play only at the margins or with respect to obscure or technical issues. Instead, the political science literature has shown time and again that the lack of knowledge is as broad as it is deep.¹³

It should be noted that, against this picture of a woefully under-informed electorate, various lines of research in political science have countered that voters in fact need very little information to make rational voting choices. Some say this is so because legislators, concerned about what might draw voters’ attention at the next election, will vigilantly try to do what they think voters would want them to do.¹⁴ Another approach emphasizes that efficient cues can act as informational shortcuts that obviate the need for voters to

¹⁰ I discuss this legislation and, more generally, the spin of law in Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 166 (1995).

¹¹ See *infra* Part II.B for a discussion of this disparate use of information.

¹² John A. Ferejohn, *Information and the Electoral Process*, in INFORMATION AND DEMOCRATIC PROCESSES 3, 3 (John A. Ferejohn & James H. Kuklinski eds., 1990).

¹³ Schacter, *Proxy*, *supra* note 4, at 47 (quoting and collecting sources).

¹⁴ For an overview of such theories of “predictive accountability,” grounded in R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990), see Schacter, *Proxy*, *supra* note 4, at 50, 54-63 (assessing Arnold’s theory that legislators’ perceptions of electoral issues create a version of accountability).

educate themselves.¹⁵ A third line of work argues that the electorate can be saved by aggregation (the proverbial wisdom of crowds), disaggregation (the fact that some electoral sub-groups are knowledgeable), or both.¹⁶ I have argued at some length elsewhere that each of these arguments has serious limitations and, in any event, at best supports only a thin version of accountability.¹⁷ As we shall see in the discussion below, moreover, some of the same limitations appear likely to apply to the Internet as an accountability-enhancing force.¹⁸

A different source of the accountability deficit relates to the fact that elections are traditionally relied on as the essential mechanism of political accountability. There are various reasons why elections are not likely to enable citizens to exercise meaningful accountability for much of what Congress does. For example, House members typically make more than 1000 votes in a two-year term, and a single election will not – indeed, cannot – focus on more than a handful of these. Moreover, the vast majority of House seats are safe seats; the political composition of most congressional districts virtually guarantees that one party will hold the seat.¹⁹ This sort of political homogeneity in congressional districts works against the idea that robust accountability will be demanded, although it does leave open the prospect of primary challenges that press toward some kind of intra-party accountability. All in all, noncompetitive seats seem to be an entrenched reality. Even in the 2008 election, only fifty of 435 House seats were decided by fewer than ten percentage points,²⁰ and that number is itself higher than the average in most recent elections.²¹ The profusion of safe seats is also driven by a set of familiar incumbent advantages that further sabotage accountability, such as fundraising advantages, seniority, and the ability of incumbents to dole out pork and do casework.

¹⁵ For an overview of theories that emphasize contemporary work in political heuristics, see Schacter, *Proxy*, *supra* note 4, at 51-52, 63-68.

¹⁶ For an overview of the possibility of accountability through aggregation and disaggregation, see *id.* at 52-53, 68-72.

¹⁷ See generally *id.*

¹⁸ See *infra* Part II.A.2.

¹⁹ See Schacter, *Ely*, *supra* note 5, at 758 (citing Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002)).

²⁰ Posting of Eric Ostermeier to Smart Politics (Feb. 15, 2009 1:17), http://blog.lib.umn.edu/cspg/smartpolitics/2009/02/democrats_in_stronger_position.php.

For a breakdown by congressional district, see *Unofficial 2008 Election Results*, CONGRESSDAILY (last visited Apr. 3, 2009), http://www.nationaljournal.com/congressdaily/issues/images/graphics_2008/cd-electionResults-081218.pdf.

²¹ See Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 76 (2006); Ostermeier, *supra* note 20.

B. *Asymmetries in Accountability*

Notwithstanding the accountability deficit described above, it would be inaccurate to describe our system as wholly bereft of accountability. Indeed, there is meaningful accountability to some, but it is asymmetrical and, as such, normatively problematic. There are two distinct sources of asymmetry here: one arising from the stark stratification in political knowledge, and the other from collective action problems.

One important kind of asymmetry is attributable to the pronounced and enduring intergroup differences in political knowledge and engagement. In fact, in relation to politics and public policy, some citizens simply know much more than others, and the variation is not random. Nor are the fault lines hard to tease out, for they are starkly demographic. These lines track standard socio-economic factors and relate most saliently to education, income and race:

Inequality in citizen knowledge is not simply an idiosyncratic characteristic of individuals. Groups of citizens vary in knowledge in ways that mirror their standings in the social, political, and economic world, calling into question the fundamental democratic principle of equality among citizens. In particular, women, African Americans, the poor, and the young tend to be substantially less knowledgeable about politics than are men, whites, the affluent, and older citizens.²²

These patterns are long standing²³ and have disturbing political implications. As Delli Carpini and Keeter observe, the distribution of political knowledge maps onto the distribution of political goods.²⁴ Indeed, the groups of voters that know more about politics and policy overlap substantially with those that have also been best able to obtain preferred policy outcomes. Analysis by Martin Gilens, for example, has shown a wealth effect in democratic responsiveness: “[W]hen Americans with different income levels differ in their policy preferences, actual policy outcomes strongly reflect the preferences of the most affluent but bear virtually no relationship to the preferences of poor or middle-income Americans.”²⁵ It would be myopic to say that this sort of bias is attributable to knowledge gaps alone, for it is likely shaped, as well, by the

²² MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW AND WHY IT MATTERS* 271 (1989).

²³ See generally Kay Lehman Schlozman et al., *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY* (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (providing in-depth analysis of political inequality in the United States over time).

²⁴ Michael X. Delli Carpini & Scott Keeter, *The Internet and an Informed Citizenry*, in *THE CIVIC WEB* 129, 132-33, 139-45 (David M. Anderson & Michael Cornfield eds., 2003).

²⁵ Martin Gilens, *Inequality and Democratic Responsiveness*, 69 *PUB. OPINION Q.* 778, 788 (2005). For work pointing in a similar direction, see LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 257-82 (2008) (examining responsiveness of senators based upon their constituents’ income levels); Lawrence R. Jacobs & Theda Skocpol, *American Democracy in an Era of Rising Inequality*, in *INEQUALITY AND AMERICAN DEMOCRACY*, *supra* note 23, at 11.

fact that the citizens who know more are *also* those who tend to make more political contributions and participate more than others. Taken together, these superior political resources sustain a state of affairs in which some citizens are far better positioned than others to hold representatives accountable on matters deemed important.

The second kind of asymmetry flows from a familiar structural feature of American politics: the political advantages held by organized interest groups.²⁶ I have argued that the general political advantages enjoyed by small groups with high stakes in political outcomes, and the resources to pursue preferred policies, have particular implications for the question of accountability:

Organized groups frequently *do* have real and specific accountability, while unorganized citizens have little or none. Interest groups monitor legislators closely and specifically, and have an extended set of resources for securing accountability. Such groups do not just wield individual votes but have, as well, the ability to aggregate many votes and to deploy resources like lobbyist assistance, contributions, and the threat of independent spending.²⁷

The contrast with the information-poor mass electorate is not a subtle one. In terms of accountability, the informational advantage is particularly potent when combined with the ability that organized groups have traditionally enjoyed to mobilize members.

II. THE INTERNET AS A POTENTIAL ENGINE OF CONGRESSIONAL ACCOUNTABILITY

A. *Prospects for Reducing the Accountability Deficit*

Has the rise of the Internet begun to ameliorate this state of affairs, and how might it do so in the future? I begin by considering its effects on the particular accountability problems I have identified.

1. Promoting Transparency/Better Informing Citizens?

There are grounds for optimism about the effect of the Internet on the three transparency issues raised earlier – literal lack of transparency, compromised transparency and wasted transparency – but there is uncertainty as well.

As to the first category, the literal lack of transparency, there are reasons to believe the impact could be significant, though it depends on what kind of opacity we are talking about. On the one hand, the technology of the Internet alone is unlikely to make transparent that which takes place outside public

²⁶ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 6-7 (1965).

²⁷ Schacter, *Ely*, *supra* note 5, at 759; see also Schacter, *Proxy*, *supra* note 4, at 48. For a perspective on interest group dynamics and accountability in the realm of the federal budget, see Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 925-36 (1999).

view. If a legislator quietly kills a bill in a cloakroom deal, that action, in theory, will not be any more visible simply by virtue of the Internet. On the other hand, there are forces associated with, or unleashed by, the Internet that may exert pressure against secrecy. Among other forces, the sheer amount of political information and the speed of its availability may help to establish and fuel new expectations of transparency.

Let us take the hypothetical example of a legislator who quietly kills or dilutes a bill behind closed doors. There are reasons to believe that the Internet and associated technologies might work to reduce the ability of legislators to conceal such activity. Actions like these will not be wholly unknown to anyone else, and perhaps an enterprising blogger with a good legislative source might try to bring more publicity to a cloakroom deal that at least some staffers know about. An old-fashioned print or television reporter could do the same, but the possibilities of publicity are multiplied, enhanced and changed by the advent of high-traffic blogs; the rapid dissemination of information through e-mail, instant messaging, Twitter, and cell phone texting; and the YouTube-fed sensibility that more and more events will – and should – be captured on video. The web-driven decentralization and expansion of news-gathering and information-distribution through new channels has the potential to create new institutions with new norms, different incentives, fewer constraints, and – perhaps – greater agitation for change. Institutions created and shaped by bloggers and new Internet-driven activist groups might, in other words, help to reshape some of the architecture of a democratic culture.²⁸

A good example of this dynamic concerns the 2006 debate over the Obama-Coburn law that created a public, searchable website of all federal grants and contracts.²⁹ Two senators – Senator Ted Stevens and, for a time, Senator Robert Byrd – placed secret holds on the bill.³⁰ Such holds have traditionally been kept confidential.³¹ However, in this case, an ideologically diverse group of bloggers from websites such as Porkbusters and TPMmuckraker encouraged constituents to call their senators and ask them to go on record stating that they did not place the hold.³² The blogs then tracked the results by posting updates

²⁸ See generally Daniel W. Drezner & Henry Farrell, *Introduction: Blogs, Politics and Power*, 134 PUB. CHOICE 1 (2008) (examining the “empirical and normative consequences of blogs for politics”).

²⁹ Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186.

³⁰ See Stevens, *Byrd Held Up Transparency Bill*, FED. TIMES, Sept. 4, 2006, at 3.

³¹ See William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 147-48 (1996) (detailing how even the sponsor of the legislation is unable to learn who placed a hold on legislation); *Anonymous Holds Still Slowing Bills in Senate*, BULLETIN'S FRONTRUNNER, Nov. 16, 2001.

³² Andrea Koppel et al., *Sen. Stevens Is the “Secret Senator,”* CNN.COM, Aug. 30, 2006, <http://www.cnn.com/2006/POLITICS/08/30/secret.senators/>.

from readers around the country.³³ The response was so substantial that it led then-Senate Majority Leader Bill Frist to post a message to other senators on his own political action committee blog, asking them to answer the bloggers' request.³⁴ The process finally prompted Senator Stevens to reveal himself.

Moving beyond this one episode, it is worth noting some particular attributes of the blogging phenomenon that may effectively encourage more transparency. One is that bloggers frequently link to primary documents in ways that give the public ready access to such materials. This blogging convention seems to have been picked up by many newspapers, which now also link to such materials in their online editions. As their audiences grow, or at least change, bloggers also undermine the singular gatekeeping function of the traditional media and set loose on Congress many new, scrutinizing eyes that are not constrained by the traditional norms and practices of journalism.³⁵ Bloggers can publish promptly on the Web without the entry and operating costs of newspapers. Blogs have the freedom to develop focused niches of interest and press in ways that the mainstream media frequently do not. For example, blogger Joshua Micah Marshall of TalkingPointsMemorandum.com is often credited with publicizing Senator Trent Lott's comment praising Strom Thurmond's presidential campaign – a comment that led Lott to resign his Senate leadership position – as well as with pressuring House members not to support an ambitious (and ultimately unsuccessful) 2005 attempt by President Bush to reform Social Security.³⁶ Moreover, studies suggest that blogs are read by many congressional offices and by traditional media reporters.³⁷ Indeed, specialized blogs increasingly serve as a valuable resource for

³³ Porkbusters, Who Is the Secret Holder?, <http://porkbusters.org/secrethold.php> (last visited Feb. 12, 2009); TPMmuckraker, TPMmuckraker's "Secret Hold" Tally, http://tpmmuckraker.talkingpointsmemo.com/secret_hold.php (last visited Feb. 12, 2009).

³⁴ Posting of Senator Bill Frist to VOLPAC, http://www.volpac.org/index.cfm?FuseAction=Blogs.View&Blog_id=435 (Aug. 29, 2006, 3:47 PM) ("[T]o get this bill passed, I am calling on all members, when asked by the blog community, to instruct their staff to answer whether or not they have a hold, honestly, and transparently, so I can pass the bill.").

³⁵ For a good overview, see Drezner & Farrell, *supra* note 28, at 3 (writing that bloggers "nail the scalps of politicians and media figures to the wall" by investigating and relentlessly pursuing stories). See also ROBERT J. KLOTZ, *THE POLITICS OF INTERNET COMMUNICATION* 120-32 (2004); cf. Jane B. Singer, *The Political J-Blogger: "Normalizing" a New Media Form to Fit Old Norms and Practices*, 6 *JOURNALISM* 173, 192 (2005) (discussing movement in journalism "away from the neutral stance of the traditional journalist").

³⁶ Drezner & Farrell, *supra* note 28, at 3-4.

³⁷ On media use of blogs, see *id.* at 2; Singer, *supra* note 35, at 183-93. On the frequent reading of blogs by congressional staffers, see T. NEIL SROKA, *THE INST. FOR POLITICS, DEMOCRACY & THE INTERNET, UNDERSTANDING THE POLITICAL INFLUENCE OF BLOGS* 15 (2007), <http://www.ipdi.org/UploadedFiles/PoliticalInfluenceofBlogs.pdf> (finding that 90.7% of respondents in a survey of congressional staffers said that they or another in their office read blogs).

traditional media reporters.³⁸ Thus, blogs have the ability to capture congressional attention and help to shape Congress's agenda and its practices.

There are larger developments, beyond the realm of blogging, suggesting that the Web may help reshape democratic culture in some ways that promote accountability. Over the last several years, reform groups have begun to self-consciously address various dimensions of the transparency problem in sophisticated ways. By trying to subject more information to public disclosure in the first instance, and by trying to make that which is available to the public more accessible and more separable from spin, organizations like the Sunlight Foundation ("Sunlight") have created intriguing new possibilities. Sunlight, for example, has assembled an array of user-friendly, creative, and powerful databases that make information about Congress available to citizens in innovative ways. Its OpenCongress.org site allows users to track bills, interact with other users interested in the same bill, and follow relevant blogs and newsfeeds about the bill. Users can access information not only by bill, but by member and by issue.³⁹ Other Sunlight projects allow the merger of data so that users can trace earmarks from the individual legislators who procured them to the campaign contributors supporting those legislators.⁴⁰

Similarly, Project Vote Smart collects extensive information about legislators online, billing itself as "The Voter's Self-Defense System."⁴¹ Their website includes biographies, policy positions reported on issue-specific questionnaires called "political courage tests," roll-call votes, interest-group ratings, public statements, and specific information about campaign contributions and donors. The site also has a blog that allows comments by users. Other organizations pursuing greater transparency include the Center for Responsive Politics, which makes available voluminous information about campaign donors on its OpenSecrets website,⁴² and Change Congress, which has identified several policy priorities for cleaning up Congress and urges members and candidates to take a public pledge on these issues.⁴³

The case of roll call voting is a good illustration of how the Internet addresses the issue of compromised transparency. Voting information has always been available – in theory – but has become increasingly accessible

³⁸ Henry Farrell & Daniel W. Drezner, *The Power and Politics of Blogs*, 134 PUB. CHOICE 15, 23 (2008) (reporting that "media elites" such as Paul Krugman, Fareed Zakaria, and David Brooks "have indicated that blogs form a part of their information-gathering activities").

³⁹ OpenCongress, <http://www.opencongress.org/> (last visited Mar. 10, 2009).

⁴⁰ Sunlight also pursues congressional transparency in other ways, including through projects that make information readily accessible about foreign lobbyists, financial disclosures by legislators, and revolving-door-type arrangements with respect to congressional staff. Sunlight Foundation, *supra* note 1.

⁴¹ Project Vote Smart, <http://www.votesmart.org/> (last visited Feb. 4, 2009).

⁴² OpenSecrets.org, <http://www.opensecrets.org/> (last visited Feb. 4, 2009).

⁴³ Change Congress, *supra* note 1 (calling for a "donor strike" on campaign contributions to federal candidates until election reforms are passed).

over time. Before the Internet, information about roll call votes was either spotty (because newspapers reported votes only on major bills) or costly to obtain (because available mainly through relatively inaccessible sources like the Congressional Record).⁴⁴ The advent of the Internet and websites like THOMAS, available from the Library of Congress since the mid-1990s, made that information more readily accessible.⁴⁵ THOMAS, in fact, makes voluminous records available. These include not only roll call voting, but bill-tracking, archives of the Congressional Record, legislative history, and other primary source documents. Whereas THOMAS is fairly dry, technical and non-interactive, however, sites with roll call data like the ones run by OpenCongress and Project Vote Smart are inviting, intuitive, and steeped in the Web 2.0 sensibility that emphasizes interactivity and innovative participation by users.⁴⁶ Nevertheless, there are reasons to question whether sites like these are likely to have significant appeal beyond those citizens intensely interested in Congress, and I address these questions below in connection with the mass electorate's knowledge base, and again in the next Section, in connection with considering the stratification of political knowledge. Still, it is fair to say that Web resources like these are positioned to change expectations about the extent and form of congressional transparency.

The bailout legislation enacted in the fall of 2008 sheds interesting light on the dynamics of compromised transparency. Bloggers and organizations like Sunlight played a significant role. Granted, this legislation was far more salient and highly-publicized than most, and came at a critical time in a high-profile presidential election. Still, it reveals how the Internet can shape public debates and increase the prospects for meaningful accountability for at least some pieces of legislation. The text of the 451-page Senate version of the bill was circulated only shortly before the Senate was scheduled to vote.⁴⁷ That combination of length, complexity and speed is a toxic one for the aspiration to meaningful transparency. Advocacy groups like Sunlight had argued that the bill should be posted online at least a few days before the vote. Indeed, Sunlight has pushed broader measures like the Transparency in Government

⁴⁴ Even as Congress made the transition to the Internet, many of the resources remained unmanageable. See Eve Gerber, *How Congress Resists the Web*, SLATE, Dec. 1, 1999, <http://www.slate.com/id/56807/>.

⁴⁵ Library of Congress THOMAS, <http://thomas.loc.gov/> (last visited Feb. 4, 2009).

⁴⁶ See Tim O'Reilly, *What Is Web 2.0?*, O'REILLY.COM, Sept. 30, 2005, <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>.

⁴⁷ Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. (2008). For the final version, see Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765. The bill was made available by the Senate as a PDF document on the morning of October 1, 2008. PublicMarkup.org – Senate Emergency Economic Stabilization Act of 2008 (Oct. 1, 2008), <http://publicmarkup.org/bill/senate-emergency-economic-stabilization-act-2008/>. It passed the Senate with seventy-four votes at 9:22 p.m. the same day. 154 CONG. REC. S10,294 (daily ed. Oct. 1, 2008).

Act of 2008,⁴⁸ which proposes reforms of this sort on a larger and more systematic level. Though that aspiration was not honored with the Senate's October 1 vote on the bailout, a PDF of the bill was posted on several websites and blogs on the day of the vote. That posting created a modicum of transparency – albeit too brief – that conventional media like newspapers and television could not have delivered. Websites that posted the bill included the Senate Banking Committee's site, as well as several non-governmental sites. In light of Congress's technological fallibilities, posting of the bill by groups outside Congress was significant. For one thing, when the House posted a PDF of its initial version of the bill, congressional servers crashed.⁴⁹ For another, several of those outside Congress supplied commentary, critiques and pointers to particularly controversial nuggets within the behemoth bill,⁵⁰ such as the controversial tax breaks buried in it.⁵¹

Let us distinguish two kinds of transparency-promoting efforts: one by Congress itself (as in the routine posting of proposed or enacted legislation) and the other by decentralized forces like bloggers and advocacy websites of various sorts. The latter, in particular, may help to reduce ossification in the flow of information about Congress. Yet, with decentralization and dispersal come certain risks. The multiplication of channels, and relaxation of traditional filters, may not always promote transparency or accountability because some of what is published on the web and circulated widely by e-mail is not true. The viral e-mails about Barack Obama being a Muslim may be the best-known example of this phenomenon,⁵² but there are plenty of examples that concern Congress as well. For example, in the fall of 2004, rumors that

⁴⁸ PublicMarkup.org – Transparency in Government Act 2008, <http://publicmarkup.org/bill/transparency-government-act-2008/> (last visited Mar. 2, 2009) (drafting model legislation to increase transparency). For more information on Sunlight's model for collaborative legislative drafting, PublicMarkup.org, see Posting of Ellen Miller to The Sunlight Foundation Blog, <http://blog.sunlightfoundation.com/2008/03/31/publicmarkuporg/> (Mar. 31, 2008, 2:07 PM).

⁴⁹ *House of Representatives' Web Site Overwhelmed*, CNN.COM, Sept. 30, 2008, <http://www.cnn.com/2008/POLITICS/09/30/congress.website/index.html>.

⁵⁰ See, e.g., Michelle Malkin, McCain Will Support Earmark-Stuffed Senate Crap Sandwich; Obama: Me Too!, <http://michellemalkin.com/2008/10/01/mccain-will-support-earmark-stuffed-senate-crap-sandwich> (Oct. 1, 2008, 11:15); Posting of Ed Morrissey to Hot Air, <http://hotair.com/archives/2008/10/01/senate-bailout-bill-hits-the-internet> (Oct. 1, 2008, 10:24); Senate Conservatives Fund, Using Panic to Pass Pork, <http://senateconservatives.com/2008/10/01/using-panic-to-pass-pork/> (Oct. 1, 2008).

⁵¹ See, e.g., Carl Hulse, *Pressure Builds on House After Senate Backs Bailout*, N.Y. TIMES, Oct. 2, 2008, at A1; Posting of Sarah Lai Stirland to Wired's Threat Level Blog, <http://blog.wired.com/27bstroke6/2008/10/senate-passes-b.html> (Oct. 1, 2008, 9:41:55 PM).

⁵² Darrel Rowland, *Belief in Election Lies Persist, Poll Finds*, COLUMBUS DISPATCH, Dec. 13, 2008, http://www.dispatch.com/live/content/local_news/stories/2008/12/13/electionlies.html? (reporting a post-election poll that nearly a fifth of Americans believed the Internet rumors that Barack Obama is a Muslim).

Congress was going to reinstate the military draft were broadly disseminated through e-mail and published online.⁵³ Bill numbers were provided, creating an aura of surface plausibility. Other examples abound, such as Nancy Pelosi's supposed plan to impose a 100% windfall profits tax on stock market gains, with the proceeds going to assist undocumented aliens – a story that came complete with quotes falsely attributed to Pelosi.⁵⁴ The proliferation of these false stories illustrates that, by reducing the cost and promoting the dissemination of political information, technologies like e-mail and texting also facilitate the rapid and broad circulation of bogus political information of this sort. And, while websites like Snopes.com and the University of Pennsylvania Annenberg Public Policy Center's FactCheck.org debunked the draft and windfall profit stories,⁵⁵ the sheer volume of other lies those sites regularly disprove suggests that the problem is not a small one.

How does the unique capacity of new technologies to spread misinformation figure into the accountability calculus? It is worth noting the fact that the Internet contains untrue information is familiar to many of its users. In a June 2008 survey, the Pew Foundation found that forty-six percent of Americans have used the Internet or text messaging to acquire political information or share their political thoughts.⁵⁶ The number of Americans using the Internet for political purposes has been steadily rising over the years.⁵⁷ Nevertheless, fully sixty percent of Internet users in the United States agree with the statement that the "internet is full of misinformation . . . that too many voters believe is accurate."⁵⁸ Perhaps that awareness suggests that users do approach Web-driven information with some healthy skepticism, although questions can be raised about whether better-educated users are more likely to be skeptical than others. Moreover, the very fact that websites like FactCheck.org and Snopes.com are refuting Internet-based rumors offers some solace, although – as is true offline – not everyone exposed to the cyber-lie is also exposed to its cyber-correction. Still, it is important to see the issue in a comparative perspective. The truth-defeating effects of Internet rumors and lies must be balanced against the truth-defeating effects of non-web-based lies, rumors and political spin, along with the truth-*promoting* effects of those bloggers and

⁵³ About.com, Urban Legends: Congress Planning to Reinstate Military Draft, http://urbanlegends.about.com/library/bl_draft.htm (last visited Feb. 9, 2009).

⁵⁴ Snopes.com, Nancy Pelosi Tax on Windfall Profits, <http://snopes.com/politics/pelosi/windfall.asp> (last visited Mar. 9, 2009).

⁵⁵ FactCheck.org, Draft Fears Fueled by Inaccurate E-mails (Sept. 29, 2004), http://www.factcheck.org/draft_fears_fueled_by_inaccurate_e-mails.html; Snopes.com, Draft Fear, <http://www.snopes.com/politics/military/draft.asp> (last visited Mar. 10, 2009); Snopes.com, Nancy Pelosi Tax on Windfall Profits, *supra* note 54.

⁵⁶ AARON SMITH & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND THE 2008 ELECTION, at i (2008), http://www.pewinternet.org/pdfs/PIP_2008_election.pdf.

⁵⁷ *Id.* at ii.

⁵⁸ *Id.* at iv.

web-based organizations that usefully cut through the fog of spin that can, itself, undermine transparency and accountability.

That brings us to the issue of wasted transparency – that is, the phenomenon of reasonably accessible information about Congress simply remaining untapped by most citizens. This issue straddles the line between two aspects of the accountability deficit, one relating to transparency problems and the other to the lack of a knowledgeable electorate. In other words, the fact that there is much information about Congress that most citizens simply choose not to consume is part – but by no means all – of what explains how “jaw-droppingly little” most citizens know about politics and policy.⁵⁹

The problem of wasted transparency is long-standing. Newspapers, magazines, television news and other conventional media have traditionally covered Congress, particularly in relation to major legislation. Since 1979, C-SPAN has provided extensive coverage of congressional proceedings on cable television.⁶⁰ The electorate’s deficient political knowledge has, thus, long coexisted with the ready availability of information that would fill at least some of the gaps. Undoubtedly, as the earlier discussion showed, more information about Congress is now considerably easier for citizens to obtain because of the Internet. But the fact that much of the public has long eschewed even the most basic information about Congress routinely covered in newspapers raises the question, in the context of the Internet, of the proverbial horse who can be taken to water but not made to drink. And on this question, the available evidence is mixed.

It is clear enough that an increasing percentage of citizens now use the Internet as a source of political information, at least in the context of elections. In the 2008 election, for example, a Pew study in late October 2008 found that the percentage of respondents who got political information from the web had tripled from 2004, from 10% to 33%.⁶¹ A March 2008 study by the National Annenberg Election Study found even higher rates of usage, with 42% having seen or heard political information on the Internet.⁶² Some 14% had viewed political video material online, with younger voters reporting higher rates of video viewing and higher rates of Internet usage overall. The conclusions of this study emphasized that, before 2004, “many of the activities associated

⁵⁹ Robert C. Luskin, *From Denial to Extenuation (and Finally Beyond): Political Sophistication and Citizen Performance*, in THINKING ABOUT POLITICAL PSYCHOLOGY 281, 282 (James H. Kuklinski ed., 2002).

⁶⁰ The role and activities of C-SPAN are described in About C-SPAN, <http://www.cspan.org/About/Default.aspx> (last visited Feb. 9, 2009) (describing its mission “to provide public access to the political process”).

⁶¹ *Internet Now a Major Source of Campaign News*, PEW RES. CTR. (Oct. 31, 2008), <http://pewresearch.org/pubs/1017/internet-now-major-source-of-campaign-news> (finding that the Internet “now rivals newspapers as a main source for campaign news”).

⁶² Press Release, Nat’l Annenberg Election Survey, Internet as Political Information Tool Popular, but Television Still Dominates, Annenberg Study Finds 1 (Mar. 28, 2008), available at <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=272>.

with participation – such as discussing politics, persuading other people to support a candidate, watching political advertising and learning about the candidates – predominantly occurred offline. Now these activities can be done online.”⁶³ Both the Annenberg and Pew studies did show that television continues to be the leading source of campaign information, but Pew found that Internet sources had narrowly passed newspapers in 2008, with 33% using the Internet and 29% using newspapers for election news. The surveys on this point tend to depict something of a race between television and newspapers (the old guard) and the Internet (the insurgent medium). It is worth remembering, however, that these modes co-exist and we are likely to learn more by focusing on their interaction than on the autonomous effects of any of them individually.

Consider one instructive example of the interaction between the old and new media from a recent congressional election. The example involves Representative Michele Bachmann of Minnesota and shows how television-based video circulated widely on the Internet may shape a representative’s political accountability. In October 2008, Bachmann made highly controversial comments on the national cable news show *Hardball*, hosted by Chris Mathews on MSNBC.⁶⁴ Her comments seemed to suggest that journalists should investigate progressive members of Congress for being “anti-American.”⁶⁵ The video appeared on a high traffic, progressive political blog, Daily Kos,⁶⁶ as well as other websites, and within a few days her opponent had raised nearly \$1 million from people outraged by Bachmann’s comments.⁶⁷ After this development and Bachmann’s drop in the polls, the National Republican Campaign Committee decided to divert its funding away from Bachmann’s race.⁶⁸

The Bachmann episode suggests a way in which the Internet may change not only the dissemination of political information, but the nature of political

⁶³ *Id.* (quoting Ken Winneg, Managing Dir. of the Nat’l Annenberg Election Survey).

⁶⁴ *Hardball* (MSNBC television broadcast Oct. 17, 2008).

⁶⁵ “Anti-American” Comments Hurt Minnesota Rep. Michele Bachmann’s Campaign, N.Y. DAILY NEWS, Oct. 21, 2008, http://www.nydailynews.com/news/politics/2008/10/21/2008-10-21_antiamerican_comments_hurt_minnesota_rep.html; Sam Stein, *Michele Bachmann Channels McCarthy: Obama “Very Anti-American,” Congressional Witch Hunt Needed*, HUFFINGTON POST, Oct. 17, 2008, http://www.huffingtonpost.com/2008/10/17/gop-rep-channels-mccarthy_n_135735.html.

⁶⁶ Posting of Jed Lewison to Daily Kos, <http://www.dailykos.com/storyonly/2008/10/17/181519/90> (Oct. 17, 2008 17:15 PDT).

⁶⁷ P.J. Huffstutter, *Michele Bachmann’s Rival Reaps Benefits of Her ‘Hardball’ Comments*, L.A. TIMES, Oct. 23, 2008, at A1.

⁶⁸ Pat Doyle, *GOP Fundraising Committee Pulls Plug on Bachmann*, MINNEAPOLIS STAR TRIB., Oct. 23, 2008, at 5B, available at http://www.startribune.com/politics/national/house/32668654.html?elr=KArksD:aDyaEP:kD:aUnc5PDiUiD3aPc:_Yyc:aUU.

accountability itself. The effect of this episode was that Bachmann, a conservative Republican, became in some sense answerable – though not formally accountable – to a national constituency of activist Democrats enraged by her comments. This dynamic of national accountability is not entirely new; for many years, several members of Congress have received more donations from outside their states or districts than from inside.⁶⁹ The rise of online fundraising, however, can facilitate a significant expansion of this phenomenon, especially when coupled with the force of viral video transmission, as in the Bachmann case. In the end, Bachmann, of course, still had to win re-election from her own constituents, to whom she issued a veiled quasi-apology in a commercial aired ten days before the election. And, it may be that her Democratic opponent not only benefited from this national support, but suffered politically, too, as a result of the energetic and well-publicized backing given him by left-leaning activists around the country – exemplifying, perhaps, yet another accountability dynamic. Ultimately, Bachmann did win, though by a slimmer margin – three percent – than had been expected.⁷⁰

Bachmann's experience with engaged liberals around the country, while striking, may only exemplify a point I take up later in the Article: namely, that the Internet has created new tools for the segment of the electorate that was already politically engaged before the advent of the Internet.⁷¹ If true, this pattern suggests that the *collective* political knowledge of the citizenry will not change appreciably, even if some citizens become better informed and more effectively engaged than ever. What remains unclear, in other words, is whether the new technologies will make previously disengaged citizens more likely to *choose* to consume political information.

New, Internet-based content about Congress may well have some drawing power for the previously-unengaged. For example, it is probably more appealing for someone uninterested in Congress to navigate OpenCongress.org or OpenSecrets.org than it is to read a dry newspaper story about a congressional debate or speech by an elected representative. But it also seems intuitively obvious that one of the factors that has always depressed C-SPAN viewership is that many people – most, surely – would simply prefer to watch something else.

We might reasonably expect to see history repeat itself in the sense that the increased legislative and political information available on the Internet will also have to contend with what many probably regard as more alluring content on the Web. As the Internet has made digitized political information more

⁶⁹ Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 1006-08 (2002).

⁷⁰ Pat Doyle, *Bachmann Declares Victory in Sixth District*, MINNEAPOLIS STAR TRIB., Nov. 5, 2008, at 20A, available at http://www.startribune.com/politics/national/house/33871694.html?elr=KArksLckD8EQDUoaEyqyP4O:DW3ckUiD3aPc:_Yyc:aUncaec8O7EyUsl.

⁷¹ See *infra* Part II.B.1.

accessible, it has also made digitized information about sports, music, gossip, and many other things readily accessible. Similarly, as the volume, quality and interactivity of political content on the Web has increased, the same has happened in relation to other Internet content. That means there is plenty of compelling competition for Internet users' attention. It is hardly obvious that Project Vote Smart will outdraw YouTube, iTunes, eBay, MySpace or Amazon.com, to name just a few possibilities.

There is another way to think about this question, and that is to focus not on whether people will consume more political information because it has been made more readily available to them, but on whether the Internet might transform the category of political information itself. A dynamic like this is already apparent in some areas of traditional media, as *The Daily Show* has become an unorthodox source of political information made entertaining and appealing to many viewers, especially younger ones.⁷² It may be that the Internet and contemporary technologies will expand the range of politically-related content available to a broad segment of the population in potentially dramatic ways. In the context of elections, consider the viral videos of pro-Obama music during the 2008 primaries produced by the popular musician will.i.am.⁷³

Granted, it is hard to imagine the will.i.am-equivalent video inspired by a piece of congressional legislation. But it is not hard to imagine, for example, creative uses of social networking services (SNS) technology on sites like Facebook – uses that are steeped in the medium's sensibility. Imagine that a member of Congress, for example, moves away from a position taken during a campaign, accepts a contribution from a controversial source,⁷⁴ or backs or opposes a controversial measure. It is easy enough to imagine an enterprising Facebook user informing many friends about this, perhaps using a link or video if appropriate, and adopting a tone of irony or humor. This would represent a new kind of publicity, one that circulates on a website that is not limited to – or defined by – a political focus.

The social networking phenomenon, in fact, suggests another sense in which the Internet may alter the very concept of political information and knowledge, and it relates to the fact that much political engagement on the Web is *relational*. Sometimes – as with Congresspedia, a wiki about Congress and legislators – citizens collaborate so as to *create* a kind of political information

⁷² Jody Baumgartner & Jonathan S. Morris, *The Daily Show Effect: Candidate Evaluations, Efficacy, and American Youth*, 34 AM. POL. RES. 341, 343-44 (2006).

⁷³ Joan Anderman, *Video Woven with Obama Speech Catches Fire on YouTube*, BOSTON GLOBE, Feb. 7, 2008, at A15. The YouTube video, entitled *Yes We Can*, had received nearly 17.2 million views as of March 31, 2009. YouTube, *Yes We Can – Barack Obama Music Video*, <http://www.youtube.com/watch?v=jjXyqcx-mYY> (last visited Feb. 10, 2009).

⁷⁴ Websites like FundRace.org make information about donors and amounts given readily accessible. Campaign Donors: Fundrace 2008, <http://fundrace.huffingtonpost.com/> (last visited Feb. 10, 2009).

themselves.⁷⁵ More commonly, users interact with one another on political matters in cyber-communities, such as those created on blogs, listservs and, increasingly, social network sites like Facebook and MySpace. The information or knowledge about politics or policy that is shared in these contexts goes beyond bare facts, for an important part of what is being communicated is what others know and how they think. The political information, in other words, is inflected with the distinctive attribute of peer credibility (or, perhaps, lack of credibility, depending on the peer). That attribute, in fact, functions as an independent piece of political information.

Indeed, the social networking sites Facebook and MySpace loomed large in the 2008 election as a new political venue capable of producing and disseminating innovative kinds of political information. The state-of-the-art Obama effort dominated that of its rival in number of users and types of use.⁷⁶ It showed how the medium can be used by campaigns during elections to aggregate, communicate with, and mobilize supporters; to share media and try to induce distribution of videos; to get its message out; and perhaps most importantly, to enable and encourage supporters to communicate with one another in new ways that are not necessarily scripted or managed by the campaign. Indeed, the election richly illustrates the many ways in which Facebook users did, in fact, act independently of the campaign, including through “wall” postings, events planned outside the campaign, and the creation of candidate-centered groups. Some of these groups had quite an original flourish, such as the group in which members, en masse, added “Hussein” as their middle name (as in “John Hussein Smith”).⁷⁷

The 2008 campaign catapulted SNS (along with YouTube) to new prominence.⁷⁸ Only a few years ago, Facebook did not even allow candidates to post a profile.⁷⁹ The extent to which the presidential candidates tapped sites

⁷⁵ Congresspedia, <http://www.sourcewatch.org/index.php?title=Congresspedia> (last visited Feb. 10, 2009) (billing itself as “[t]he citizen’s encyclopedia on Congress that you can edit”).

⁷⁶ See Leslie Sanchez, *Commentary: GOP Needs to Catch up to Obama’s Web Savvy*, CNN.COM, Nov. 9, 2008, <http://www.cnn.com/2008/POLITICS/11/07/sanchez.technology/> (remarking that Obama signed up 2.4 million Facebook users to McCain’s 624,000, made effective use of Facebook to get out the vote, and in general used web resources more creatively and extensively).

⁷⁷ Jordan Golson, *Facebook Users Change Middle Names to Hussein in Obama Solidarity Protest*, INDUSTRY STANDARD, Aug. 14, 2008, <http://www.thestandard.com/news/2008/08/14/facebook-users-change-middle-names-hussein-obama-solidarity-protest>.

⁷⁸ SMITH & RAINIE, *supra* note 56, at ii (“10% of all Americans have used sites such as Facebook or MySpace for some kind of political activity. That amounts to 14% of Internet users and fully 40% of those who have created profiles on such sites.”).

⁷⁹ Christine Williams & Girish Gulati, *Social Networks in Political Campaigns: Facebook and the 2006 Midterm Elections* 6 (Aug. 30, 2007) (unpublished manuscript presented at the annual meeting of the American Political Science Association, *available at*

like Facebook and MySpace is unsurprising, given the rapidly rising use of SNS. As of 2008, MySpace had about seventy-three million users in the United States and Facebook thirty-six million.⁸⁰ Ten percent of adults in the U.S. have used SNS for some political purposes, including a very large percentage of those who have created an SNS profile.⁸¹ While younger people are much more likely to use SNS, the target audience is not limited to them.

To be sure, there is a question about how much Facebook activity of this kind is attributable to an unusually high-profile presidential campaign and how much will carry over to affect Congress. It is apparently now *de rigueur* for congressional candidates to have links to SNS; the majority of U.S. Senate campaigns had a social networking presence in 2008.⁸² More notable, perhaps, is the percentage of SNS users claiming to have used the site to communicate information about candidates and campaigns. According to Pew, 40% of those with MySpace or Facebook pages used them for political activity.⁸³ The penetration of social networking pages among younger Americans is 66%, and explains the fact that fully 32% of *all* eighteen to twenty-nine-year-olds say they have used a social networking site for political reasons.⁸⁴

While the 2008 usage figures have risen dramatically, there is evidence that Facebook played a significant role in the 2006 congressional midterm elections as well. A study of those elections found that 1.5 million Facebook users – 13% of the total user base – connected their profiles to a candidate or issue group.⁸⁵ Unsurprisingly, candidates were most likely to have a profile on Facebook if they were in a competitive race. The statistical analysis in the study found that candidate support on Facebook was correlated with total vote share, and concluded that this effect probably reflected the fact that greater Facebook support means more intensity and enthusiasm among the young voters who are overrepresented on Facebook.⁸⁶

But the 2006 evidence, of course, still concerns elections. The question remains whether the increased use of Facebook for political purposes will stretch much beyond the election context. There are, in fact, many instances of issue activism on Facebook. A search of the site reveals issue groups too

http://www.allacademic.com/meta/p208735_index.html) (indicating that the “membership eligibility rules prior to 2006 precluded most candidates from establishing their own profiles,” but that in 2006, Facebook created profiles for each candidate that allowed an unlimited number of supporters and gave access to the candidate’s staff to personalize the profile).

⁸⁰ Brian Stelter, *MySpace Might Have Friends, but It Wants Ad Money*, N.Y. TIMES, June 16, 2008, at C4.

⁸¹ SMITH & RAINIE, *supra* note 56, at ii.

⁸² J.W. CRUMP, THE BIVINGS GROUP, THE INTERNET’S ROLE IN POLITICAL CAMPAIGNS: 2008, at 4 (2008), <http://www.bivings.com/thelab/2008SenateReportTBG.pdf>.

⁸³ SMITH & RAINIE, *supra* note 56, at ii.

⁸⁴ *Id.* at 10.

⁸⁵ Williams & Gulati, *supra* note 79, at 2.

⁸⁶ *See id.*

numerous to be counted by Facebook's search tool, which stops at 500. For example, when immigration reform legislation was a hot topic before Congress in 2006, opponents of immigration reform created a Facebook group, "No Amnesty for Illegal Immigrants!" which had over 18,000 members at one time.⁸⁷ The group featured over 22,000 "wall posts" and sponsored a separate discussion board with over 1000 topics.

Those more friendly to immigration liberalization also used SNS and other tools of modern technology to mobilize and plan massive rallies, including MySpace and mass texting.⁸⁸ The most striking impact of this effort was the use of social networking technology to spur mass protests around the country. In California, for example, over 100,000 students participated in a boycott of class on a designated "day without immigrants."⁸⁹ The effort involved not only those who had been actively using social networking tools for political activism, but also widespread peer-to-peer communications, such as blogging and texting, to engage those who were not normally politically active.⁹⁰ Mobilization and mass action of this kind, in turn, can signal the direction and intensity of public opinion to Congress.

SNS thus seems to be creating a new channel for information that is more interactive and creative than traditional political information, one that may penetrate the consciousness of citizens unlikely to consume political information offline.⁹¹ At the same time, the SNS phenomenon is new and untested. It reflects many of the aspects of the Internet that make it so difficult to render definitive judgments about effects. SNS may fade in its novelty and attractiveness. Or, it may be replaced by something we cannot now

⁸⁷ Facebook, No Amnesty for Illegal Immigrants!, <http://www.facebook.com/s.php?init=q&q=no+amnesty+for+illegal+immigrants&ref=ts&sid=34497e1de8658f30a899a70d7f5f3a99#/group.php?sid=34497e1de8658f30a899a70d7f5f3a99&gid=2207701506&ref=search> (last visited Feb. 18, 2009).

⁸⁸ Daffodil Altan, *Walking Out and Standing Up*, IN THESE TIMES, Apr. 20, 2006, http://www.inthesetimes.com/article/2612/walking_out_and_standing_up (reporting that "fliers, text messages, MySpace bulletins" circulated through schools leading to "massive student walkouts" that were "among the largest in California's history"). I return to this point below to consider how these technologies affect the dynamics of interest groups and offer new means of mobilizing political action. See *infra* Part II.B.1.

⁸⁹ Ari Melber, *MySpace, MyPolitics*, THE NATION, May 30, 2006, <http://www.thenation.com/doc/20060612/melber>.

⁹⁰ *Id.* A good example is the MySpace page of "g," a high school student from Los Angeles. MySpace.com, g, <http://www.myspace.com/ilykdat> (last visited Feb. 10, 2009) ("I like to eat and im [sic] pretty lazy."). Melber reports that the page was usually "devoted to Nike sneakers and rap music" but that in April 2006, "g" posted a message to friends encouraging them to participate in the "National Boycott for Immigrant Rights No Work! No School! No Business as Usual!" See Melber, *supra* note 89.

⁹¹ For more on the question of whether the Internet is engaging new people in politics, see *infra* Part II.B.1.

contemplate. Indeed, some predict the onset of “Facebook fatigue.”⁹² It is also possible that the use of SNS by candidates and elected officials will diminish if they become convinced that it is not net-positive for them in political terms. Consider, for example, the problem of critical information about a candidate that can arise if a campaign chooses – as some do – not to remove hostile user-posted comments from SNS pages.⁹³ Consider also the separate problem of groups hostile to candidates using SNS to get out their message. Within two days of the 2008 election, for example, twenty-one “Impeach Obama” groups had sprung up on Facebook.⁹⁴

2. Creating New Opportunities for Accountability?

We have been focusing on issues relating to transparency and voter knowledge, but recall that there are other problems with accountability that relate to structural factors that undermine the ability of periodic elections to provide a meaningful forum for accountability. One of these problems is that legislators simply vote on far too many policy matters for a single election to test public support for more than a handful of the most salient issues. By providing efficient sources of political knowledge about members of Congress, Internet sites like Open Congress and Project Vote Smart might provide some relief by making not only extensive voting records available to voters, but also publicizing things like interest group ratings. Bloggers, too, are situated to pinpoint certain votes that might otherwise go unnoticed. In the face of an energetic blogosphere, the ability of political consultants and the traditional media to exercise strong control over which issues will see the light of day in an election may well diminish. On the other hand, even if bloggers bring new issues to the fore, it remains the case that, as a matter of arithmetic, there will remain many issues that simply do not or cannot surface in an election – even though some citizens might consider these issues important if they knew more about them. In addition, as discussed above, the mere existence of new and better informational resources does not guarantee that more citizens will consume the information. The Internet may in some respects mitigate, but cannot itself eliminate, the inability of periodic elections to facilitate serious debate about many of the matters on which legislators have voted.

There are also limitations as to what we might expect contemporary technology to do about the problem of safe seats, another factor that weakens

⁹² *Ten Likely Events in 2008*, BUS. WEEK, Jan. 2, 2008, http://www.businessweek.com/bwdaily/dnflash/content/dec2007/db20071229_145447.htm.

⁹³ See Curtis Gilbert, *Senate Candidates Learn the Pitfalls of Online Politics*, MINN. PUB. RADIO, Jan. 24, 2008, <http://minnesota.publicradio.org/display/web/2008/01/23/socialnetworking/> (describing negative comments on Senator Norm Coleman’s Facebook site).

⁹⁴ See Travis Pittman, *Impeach Obama Facebook Group Launched in Seattle*, KING5.COM, Nov. 6, 2008, http://www.king5.com/news/specials/politics/stories/NW_110608POB_obama_facebook_impeachment_TP.187ae7c08.html.

accountability by structurally favoring incumbents. The Internet might bring additional publicity to the sorry state of two-party competition in the House, and might even publicize alternative ways of drawing district lines, but it is unlikely to be a powerful force on its own in changing this part of Congress's contemporary institutional architecture.

Strategically-drawn safe seats are, however, only one of the incumbency advantages that weaken an election's opportunity to create meaningful political accountability. The Internet may be more of a productive force in disrupting some of the other advantages. For example, unmasking (and thereby presumably discouraging) pork is one way to dilute incumbent advantages. The Obama-Coburn bill moved in this direction by mandating governmental creation of a searchable online database of spending items.⁹⁵ The bill followed from advocacy by the Sunlight Foundation and others.⁹⁶

The Internet's effect on fundraising may be the most dramatic way for it to reduce incumbency advantage. The data on this are not yet clear, but the ability of lesser-known candidates to use the Internet to aggregate small contributions is one of the potentially big storylines out of the 2008 election, and is likely to be an emerging theme in campaign finance.⁹⁷ The wildly successful Obama fundraising effort online, building upon earlier efforts by Howard Dean's campaign in 2004, is sure to make aggressive Internet fundraising efforts part of standard political operating procedure going forward. The prospect of democratizing campaign finance through small donations is significant, and challenges some important assumptions that underlie the current regulatory paradigm. Indeed, the existing regulation has been criticized for having insufficient safeguards to police large numbers of small-dollar donations on the Internet.⁹⁸ Internet-based campaign finance is a large and important topic that merits its own careful study.⁹⁹ While I will not address that topic in any detail, it is worth noting how the flood of out-of-district funds to Representative Michelle Bachmann's opponent in the wake of her controversial comments in October 2008 demonstrates an intriguing

⁹⁵ Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186.

⁹⁶ See *supra* notes 30-34 and accompanying text regarding the bloggers who uncovered the identity of the senators who secretly placed a hold on this bill.

⁹⁷ Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WASH. POST, Nov. 11, 2008, http://voices.washingtonpost.com/the-trail/2008/11/20/obama_raised_half_a_billion_on.html; Holly Watt, *Obama Went Online to Build an Army of Fans*, SUNDAY TIMES (London), Nov. 9, 2008, at 16, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article5114836.ece.

⁹⁸ Neil Munro, *FEC Rules Leave Loopholes for Online Donation Data*, NAT'L J., Oct. 24, 2008, http://www.nationaljournal.com/njonline/no_20081024_9865.php.

⁹⁹ See, e.g., Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443 (2005).

possible dynamic in campaign finance.¹⁰⁰ The ready availability of that kind of a national funding base may reconfigure the arrows of accountability by giving local legislators some plausible form of accountability to a national body of voters.

A different way of thinking about how the Internet might improve the capacity of elections to serve as meaningful mechanisms of congressional accountability brings us back to the problem of voter ignorance. Some argue that, even if voters do not typically know enough about enough current events to hold legislators accountable in elections, representatives still carefully assess the degree to which issues are *likely*, one day, to become election issues, and align their position with assumed voter preferences in order to avoid electoral trouble down the road. This view is most prominently associated with Douglas Arnold's *The Logic of Congressional Action*.¹⁰¹ I have previously called this view a species of "proxy accountability" that I call "accountability by prediction."¹⁰² In the absence of *actual* accountability, Arnold's theory holds, the values underlying the idea of accountability may be served if representatives seeking re-election try to anticipate future public opinion.¹⁰³ The election that is relevant to this account is not the actual election, but the hypothetical one *anticipated* by strategic legislators.

The Arnold-modeled predictive enterprise has various elements, requiring representatives to identify issues likely to become salient for the broad electorate at the next election; predict the position that a majority of voters would take; predict the position that organized interests would take; and weigh all of this information and assess the likely future political profile of the issue.¹⁰⁴ I have argued that each step of this inquiry can be riddled with uncertainty and contingency, not least because the conscientious legislator cannot know what will transpire and shape the issue between the time of calculation and the next election.¹⁰⁵

The rise of the Internet, however, may mitigate the uncertainty that elected officials have about which issues are most likely to resonate at election time. The Internet can do this by multiplying the ways in which citizens can express (and perhaps *form*) political preferences. Elected officials need not rely solely on opinion polls. Highly trafficked blogs and political sites – like DailyKos, on the left, for example, or a less-trafficked analogue like RedState on the right – provide an ongoing way for elected officials to ascertain what seems to be moving, or at least grabbing the attention of, particular segments of the

¹⁰⁰ See *supra* notes 64-70 and accompanying text.

¹⁰¹ See generally ARNOLD, *supra* note 14.

¹⁰² See Schacter, *Proxy*, *supra* note 4, at 54-63.

¹⁰³ See ARNOLD, *supra* note 14, at 84.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 54-63.

electorate.¹⁰⁶ Recall that a 2006 study revealed that it is, in fact, very common for staffers in congressional offices to read blogs and use them to assess public opinions.¹⁰⁷ Similarly, to the extent that issues (as opposed to candidates) spur significant activity on sites like Facebook, that activity may inform elected officials about an issue's importance and ability to catch political fire.¹⁰⁸ Both scenarios may provide elected officials with early warning of an issue's potential importance, even if the traditional media does not take notice.

Of course, activated citizens are likely to communicate their sentiments to Congress through more direct (though not necessarily more effective) methods than relying on congressional consultation of blogs and SNS. In the past, direct constituent communication with congressional offices was mostly done by letter, phone or fax. Today, communication is overwhelmingly done by e-mail, reflecting another way that technology has affected Congress. Thus, one factor to consider in assessing the capacity of technology to improve political accountability is how effectively Congress uses the contemporary technology of communications. So far, the news is not particularly encouraging on this score.

Congress is not monolithic, but the picture that emerges from recent studies is one in which the institution is something of a "techno-laggard" that has yet to harness even a fraction of the communicative capacity the Internet provides. Even with something as basic as e-mail, many offices in Congress are apparently overwhelmed by the deluge.¹⁰⁹ The volume of communications to Congress increased fourfold between 1995 and 2004, with Internet-based communications accounting for the difference.¹¹⁰ In 2004, Congress received nearly 200 million total communications (online and offline), with ninety-nine million online communications to the House and eighty-three million to the Senate.¹¹¹ While some offices and committees are better than others, in many cases, unanswered e-mails pile up, and staffers still choose to reply – weeks later – by postal mail.¹¹² Various studies conclude that "today's massive influx of messages appears to be making it increasingly *difficult* for the individual

¹⁰⁶ Daily Kos, <http://www.dailykos.com/> (last visited Jan. 31, 2009); RedState, <http://www.redstate.com/> (last visited Jan. 31, 2009).

¹⁰⁷ See *supra* note 37 and accompanying text.

¹⁰⁸ Facebook, <http://www.facebook.com> (last visited Feb. 19, 2009).

¹⁰⁹ See BRAD FITCH & KATHY GOLDSCHMIDT, CONG. MGMT. FOUND., COMMUNICATING WITH CONGRESS: HOW CAPITOL HILL IS COPING WITH THE SURGE IN CITIZEN ADVOCACY 15 (2005), http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/communicatingwithcongress_report1.pdf.

¹¹⁰ *Id.* at 14.

¹¹¹ *Id.*

¹¹² See *id.* at 26.

voices of citizens and constituents to be heard.”¹¹³ In addition, many Internet users express dissatisfaction with the responses they do receive from Congress.¹¹⁴

A different problem with the veritable onslaught of e-mail to Congress has been identified by Clay Shirky. He points out that the nearly-costless quality of e-mailing a member of Congress means that “an e-mail message has become virtually meaningless.”¹¹⁵ The advent of forwarded mass e-mails makes it rational for legislators to believe that receiving an avalanche of e-mail on a subject may not signal any real public commitment or intensity on the subject of the messages. On the one hand, this may cast Congress’s failure to handle all the e-mail it receives in a better light because it provides some justification for not making it a priority. On the other hand, it suggests that there may be a baby-and-bathwater problem here, to the extent that Congress does not have, or appreciate the need for, tools that will sort more personalized e-mails from the less meaningful mass variety. From the perspective of citizens engaged in political action, these factors suggest the sharp limitations of e-mail as an advocacy tool and underscore the virtues of creativity. In his book, Shirky describes more attention-getting techniques, such as a coordinated action to send flowers to elected and other public officials in protest of immigration policy, a gesture signaling that “protesters are willing to express their opinion, even at some expense and difficulty.”¹¹⁶ This sort of creative collective action can also benefit from contemporary technologies that can mobilize many participants quickly.

Tactics like mass flower-sending, while attention-getting, are hardly a mainstay, and it is reasonable to believe that use of e-mail and websites will continue to be the dominant means by which members of Congress interact with constituents. And, while constituents want and seem to expect more sophisticated technologies from their representatives, studies have so far shown relatively little Web 2.0-style innovation in Congress.¹¹⁷ Indeed, the problems with congressional websites seem to run deep. In its 2007 review of all 618 congressional websites operated by member offices, leadership and committees, the Congressional Management Foundation gave the grade “D” more than any other grade.¹¹⁸ In the main, then, Congress is simply not

¹¹³ SROKA, *supra* note 37, at 12 (emphasis added); KATHY GOLDSCHMIDT, CONG. ONLINE PROJECT, E-MAIL OVERLOAD IN CONGRESS: MANAGING A COMMUNICATIONS CRISIS 3 (2001), http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/e-mailoverload.pdf.

¹¹⁴ FITCH & GOLDSCHMIDT, *supra* note 109, at 27-28.

¹¹⁵ CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 287 (2008).

¹¹⁶ *Id.* at 288.

¹¹⁷ COLLIN BURDEN, CONG. MGMT. FOUND., 2007 GOLD MOUSE REPORT: LESSONS FROM THE BEST WEB SITES ON CAPITOL HILL 20 (2007), http://npoapbox.s3.amazonaws.com/cmfweb/2007_GoldMouseReport.pdf.

¹¹⁸ *Id.* at 13.

innovating with its websites. One can imagine, for example, elected representatives blogging about bills, inviting constituents to submit comments on proposed bills, or holding town hall conferences online to update constituents about pending legislation.¹¹⁹ Thus far, however, Congress seems too technologically primitive to run particularly useful websites or offer many creative uses of technology.¹²⁰

There appears to be an interesting gap between what campaigns are doing and what Congress can manage. The 2008 election showed the powerful ways that Internet technologies can be harnessed in a political campaign.¹²¹ Perhaps this will carry over to Congress, although resource challenges will presumably prevent it from operating at the level of a well-funded campaign. Nevertheless, there may soon be a model for interested members of Congress to study and adapt to the congressional context, as the Obama White House effort seems to be replicating with its web presence at least some of what it did on the web during the campaign.¹²² The early establishment of its transition website, for example, signaled that it was going to bring a Web 2.0 approach to the White House.¹²³ The campaign's e-mail list – reported to contain well over ten million addresses – supplies a ready way for the White House to communicate with and try to mobilize supporters.¹²⁴ It is not yet clear whether supporters will be as receptive to contact as they were during the campaign. It

¹¹⁹ The Sunlight Foundation created the Open House Project to facilitate study of how the House of Representatives integrates the Internet into its operations and to suggest ways to promote public access to its work and members. See The Open House Project Recommendation Checklist, <http://www.theopenhouseproject.com/resources/checklist/> (last visited Feb. 18, 2009). The Congressional Management Foundation has also published a report of its recommendations. TIM HYSOM, CONG. MGMT. FOUND., COMMUNICATING WITH CONGRESS: RECOMMENDATIONS FOR IMPROVING THE DEMOCRATIC DIALOGUE (2008), http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/cwc_recommendationsreport.pdf.

¹²⁰ See GOLDSCHMIDT, *supra* note 113, at 41; SROKA, *supra* note 37, at 11-12.

¹²¹ See *supra* note 76-77 and accompanying text.

¹²² See Welcome to the White House, <http://www.whitehouse.gov/> (last visited Feb. 19, 2009).

¹²³ Change.gov: The Obama-Biden Transition Team, <http://change.gov/content/home> (last visited Mar. 2, 2009); see also Shalaigh Murray & Matthew Mosk, *Under Obama, Web Would be the Way*, WASH. POST, Nov. 10, 2008, at A2; Stephanie Condon, *Obama Policy Docs to Live on Change.gov*, CNET NEWS, Dec. 8, 2008, http://news.cnet.com/8301-13578_3-10117938-38.html; Helene Cooper, *The Direct Approach*, N.Y. TIMES, Dec. 18, 2008, http://www.nytimes.com/2008/12/19/us/politics/19web-cooper.html?_r=2.

¹²⁴ Some on the right have questioned the legality of Obama's use of his campaign email list for grassroots lobbying. See Karl Rove, Op-Ed, *Organizing the White House Is Obama's First Test*, WALL ST. J., Dec. 18, 2008, at A1. How the Obama White House plans to use the campaign's organizing tools remains to be seen. See, e.g., Lisa Taddeo, *The Man Who Made Obama*, ESQUIRE, Feb. 2, 2009, <http://www.esquire.com/features/david-plouffe-0309> (asserting that it is David Plouffe, Obama's campaign manager – not a part of the new administration – who owns the “thirteen-million-name contact list”).

is also worth noting that the ratchet of cyber-communication runs both ways, and the exigencies of governance may differ from the campaign in ways that officeholders must take into account. Internet resources like these, after all, will also make it easier for supporters to mobilize and communicate with the White House, including to communicate messages of dissatisfaction.¹²⁵ That ability can facilitate accountability, but accountability may, at some point, run headlong into officeholders' preference for political flexibility.

B. *Prospects for Reducing Asymmetries in Accountability*

1. *Ameliorating Stratified Political Knowledge?*

One principal aspect of asymmetrical accountability relates to the stratification of political knowledge. Citizens who are more politically knowledgeable are better positioned to seek legislative accountability by virtue of their knowledge and facility with issues. In the previous Section, I considered whether the Internet will create a citizenry that is, collectively, better-informed about politics and policy.¹²⁶ The point more pertinent to the asymmetry issue is whether the Internet is likely to help close the large knowledge gaps between and among groups of citizens – gaps that track income and education levels, race, and other demographic factors.

If the question is whether the Internet has closed these gaps, the short answer is: not yet. Studies instead suggest that the Internet's informational resources have largely "activated the active" and have not changed the basic demographic profile of political knowledge or engagement.¹²⁷ To the contrary, those who use the Internet for political purposes or information tend to come from precisely the same advantaged groups as those who are more politically knowledgeable in general.¹²⁸ There are several explanations for this continuity.

First, there is a sense in which the information-rich are getting richer. Those with a prior interest in politics, and habits of consuming political information, are those for whom the reduced costs and enhanced accessibility of political content on the Internet is most attractive. Indeed, those most able and/or motivated to be politically well-informed and engaged are those who most aggressively exploit the new information environment.¹²⁹ This dynamic can lead to a paradoxical result: the Internet-driven increase in the availability of

¹²⁵ See Murray & Mosk, *supra* note 123.

¹²⁶ See *supra* Part II.A.

¹²⁷ PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 229-31 (2001).

¹²⁸ See BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER 219 (2003); Samuel J. Best & Brian S. Krueger, *Analyzing the Representativeness of Internet Political Participation*, 27 POL. BEHAV. 183, 185-86 (2005); Schlozman et al., *supra* note 23, at 68-69.

¹²⁹ BIMBER, *supra* note 128, at 219.

political information may actually *widen* existing inequalities.¹³⁰ As the best-informed use the Internet to turbocharge their own knowledge, the least informed, meanwhile, either seek out other types of content on the Internet or do not use it at all. This tendency may be aggravated by a fact emphasized by Delli Carpini and Keeter, scholars who have long studied the stratification in political knowledge: “[W]ith greater volume and fewer gatekeepers come greater costs associated with organizing and finding relevant information, and these costs will be more difficult for poorer, less educated, and less politically experienced or motivated people to meet.”¹³¹ In this respect, there is an intriguing parallel to political cues and heuristics – informational shortcuts that, some scholars suggest, allow relatively uninformed voters to make rational political decisions based on signals that point them in a direction consistent with general views or priorities.¹³² There are a number of grounds to question the ability of cues to excuse the electorate’s knowledge gaps and deliver a satisfactory form of proxy accountability. Most pertinent here is that better-informed voters (those least in need of cues) are, in fact, better-situated to make good use of cues than low-information voters.¹³³ So it may prove to be, as well, with navigating the mass of political information on the Web: low-information voters are less equipped to make their way effectively through the mass of political information on the Web and are, correspondingly, more vulnerable to the political misinformation spread far and wide online.

Second, there is a strong demographic overlap in the resources that lead to political engagement offline and online.¹³⁴ These resources are not identical (general civic skills for offline participation, Internet skills for online), but tend to be possessed by the same demographic cohort.¹³⁵ The fact that higher socioeconomic groups are more likely to have relevant Internet skills is unsurprising, given the digital divide.¹³⁶ While that divide is shrinking to some extent as Internet use expands, striking gaps still remain. For example, according to a 2007 Pew study, Internet use is “uniformly low” for whites (32%), Latinos (31%) and African-Americans (25%) who have not completed high school, while higher among more educated citizens in each of these groups (with 71% of non-Hispanic whites, 60% of blacks and 56% of Latinos using the Internet).¹³⁷ In terms of broadband access, the 2007 study found that

¹³⁰ See *id.* at 217.

¹³¹ Delli Carpini & Keeter, *supra* note 24, at 141-42. For their earlier work on gaps on political knowledge, pre-Internet, see generally DELLI CARPINI & KEETER, *supra* note 22.

¹³² See Schacter, *Proxy*, *supra* note 4, at 51-52.

¹³³ *Id.* at 67-68.

¹³⁴ See Best & Krueger, *supra* note 128, at 197.

¹³⁵ *Id.*

¹³⁶ See generally NORRIS, *supra* note 127.

¹³⁷ SUSANNAH FOX & GRETCHEN LIVINGSTON, PEW HISPANIC CTR. & PEW INTERNET PROJECT, LATINOS ONLINE, at i (2007), http://www.pewinternet.org/pdfs/Latinos_Online_March_14_2007.pdf.

only 29% of Latino adults had such access, compared to 43% of white adults.¹³⁸ A 2008 study found significant variations in broadband adoption by education, with 28% of those without a high school degree having it compared with 79% of those with a college degree.¹³⁹ Similarly, 25% of those with an income under \$25,000 had broadband, compared with 85% of those earning over \$100,000.¹⁴⁰ The racial divide seems to be shrinking, but the income and education-based divides persist.

Moreover, it is increasingly apparent that there are multiple aspects of the digital divide. For example, long-term advocacy of bringing the advantages of technology to schools in less affluent areas has been successful if measured by the acquisition of computer hardware or broadband access.¹⁴¹ But there are stubborn social and economic inequalities that shape how technology is used in schools, such as those relating to curriculum, quality of teachers, availability of home computers, and rates of student absenteeism.¹⁴²

It is difficult to say whether the gaps in political knowledge that correspond to income, education and race will remain entrenched. The greater use of the Internet among youth provides some reason to think that things may change, though the question remains whether this growing cohort of proficient Web users will translate into increased Internet use for political purposes. As alluded to earlier, there is no particular reason to believe, a priori, that these new users will specifically seek out political content, as opposed to all the online content that competes with it.

Social networking services will be relevant because they enable more politically-active users to invite their less politically-active friends to join politically-themed user groups and follow links to political content. To assess the prospect that this will occur and change the demographics of political knowledge, however, we would need to know how much demographic homogeneity there is in sub-communities of SNS users. I have not found data on this, but would not be surprised to find that a substantial percentage of those who “friend” someone on Facebook or MySpace are, at least as to education level, demographically similar to the person being friended.¹⁴³ And, those

¹³⁸ *Id.* at 12.

¹³⁹ JOHN B. HERRIGAN, PEW INTERNET AND AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2008, at 3 (2008), http://www.pewinternet.org/pdfs/PIP_Broadband_2008.pdf.

¹⁴⁰ *Id.*

¹⁴¹ BASMAT PARSAD & JENNIFER JONES, U.S. DEP'T OF EDUC., INTERNET ACCESS IN U.S. PUBLIC SCHOOLS AND CLASSROOMS: 1994-2003, at 4-5 (2005), http://www.schoolwires.com/5420101117101838280/lib/5420101117101838280/_files/2005015_NCES_InternetAccessinPublicSchools.pdf.

¹⁴² See Mark Warschauer, Michele Knobel & Leeann Stone, *Technology and Education in Schooling: Deconstructing the Digital Divide*, 18 EDUC. POL'Y 562, 585-86 (2004).

¹⁴³ Cf. CASS SUNSTEIN, REPUBLIC.COM 66 (2001) (stating that Internet users frequently seek out like-minded others online). But see YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 257 (2006)

likely to be the ones promoting political content or organizing politically-themed groups on sites like Facebook are likely to have some of the high socioeconomic characteristics associated with political engagement.

By way of analogy, consider a study by the Institute for Politics, Democracy and the Internet at George Washington University that profiled so-called “Poli-fluentials” – those “likeliest to volunteer, donate, promote candidates and join [political] causes through both online and word-of-mouth advocacy.”¹⁴⁴ Their “zest for politics”¹⁴⁵ and spirit of political entrepreneurship suggest an analogy to the type of SNS user who might be expected to use networking tools for political advocacy and distribution of political information. Poli-fluentials “tend to be older, richer, whiter and more educated than the general population.”¹⁴⁶ If the general parallel to politically entrepreneurial SNS users is apt and this demographic characteristic carries over, it would raise substantial questions about the idea that SNS advocacy will significantly expand the class of politically-knowledgeable citizens.

2. Ameliorating the Advantages of Interest Groups?

Recall that the other aspect of asymmetrical accountability relates to collective action issues. The Internet dramatically reduces the cost of obtaining political information and, in that way, threatens to rob organized groups of important structural advantages – their access to detailed, up to date information about the legislative process and their ability to monitor the legislative process closely.¹⁴⁷ The Internet is positioned to level these traditional informational advantages in various ways. Imagine, for example, that bill drafts and markups are routinely posted online, diluting the value of lobbyists’ privileged access to that information.¹⁴⁸ Imagine further that bloggers who are expert in a particular area of legislation analyze bills in detail, place contested provisions in political and legal context, and explain who would be helped and hurt by parts of the bill. Imagine, finally, that information about traditional lobbying appeared online, so that citizens could know, on a timely basis, who was lobbied by whom on a particular bill. To imagine this world is to imagine something very different from the legislative world we have always known, where it is frequently the case that the details and tradeoffs in pending legislation are principally intelligible only to a small

(discussing studies that suggest a less polarized picture of the Web than the one sketched by Sunstein).

¹⁴⁴ INST. FOR POLITICS, DEMOCRACY & THE INTERNET, GEORGE WASHINGTON UNIV., POLI-FLUENTIALS: THE NEW POLITICAL KINGMAKERS 1 (2008), <http://www.ipdi.org/UploadedFiles/Polifluentials%20Report%20-%20Final.pdf>.

¹⁴⁵ *Id.* at 42.

¹⁴⁶ *Id.* at 3.

¹⁴⁷ See BIMBER, *supra* note 128, at 229.

¹⁴⁸ See Congresspedia, *supra* note 75; The Open House Project Recommendation Checklist, *supra* note 119.

audience comprised of those with significant interests in the legislation, the resources to pursue preferred outcomes, and the ability to lobby out of the public's view.

Now, even if this new world were to come to pass, the question of how broadly it would expand the circle of persons closely tracking the legislative process would remain. Who would seize upon the newly available legislative information? Will it necessarily be the previously unorganized, or might it be other interest groups that were not active in a particular area, but now perceive advantages in pursuing ready access to information of this kind? More fundamentally, to what extent are collective action problems in particular legislative areas shaped by the dynamics of information alone, as opposed to other factors (like stakes and numbers)?

There is a different way in which the Internet and associated technologies might disrupt the political advantages held by organized groups. Phenomena like blogs, and especially SNS, set up a potential contrast between political groupings catalyzed by networks on the one hand, and those more traditionally organized on the other. In lieu of a top-down organization pursuing an established agenda and conventional tactics, imagine some different groupings. Consider, for example, transitory communities unified by commitment to an issue (like anti-war or anti-immigration reform), which become, in Bruce Bimber's words, "issue groups" instead of "interest groups."¹⁴⁹ Bimber considers the possibility of such groups to be part of what he calls a "postbureaucratic form of politics" that flows from the low cost and abundance of information, and that allows unconventional groupings to emerge in less institutionalized, sometimes fleeting forms.¹⁵⁰ Another possibility is the advent of groups that arise and act on a somewhat impromptu basis to protest or bring pressure on a legislative decisionmaker. In his book *Smart Mobs*, Howard Rheingold suggests that texting and related technology can enable "leaderless" self-organized groups to engage in collective action, sometimes on a fairly spontaneous basis.¹⁵¹ Clay Shirky has recently developed this idea by suggesting that contemporary technologies allow and encourage collective action that is increasingly more egalitarian and efficient, and less hierarchical.¹⁵² He notes several features of the current environment that reduce the barriers to collective action, including: the ability of citizens to simply and rapidly form groups; the fact that transaction costs of group communications are lowered because participants need not synchronize; the ways that texting and Twittering can remove the costly need for advance planning; the ability of citizens to promptly publish news they see; and the potential created by the emerging "interoperability" of the Internet and cell

¹⁴⁹ BIMBER, *supra* note 128, at 22.

¹⁵⁰ *Id.* at 21.

¹⁵¹ See HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION* 13 (2003).

¹⁵² SHIRKY, *supra* note 115, at 156.

phone-based technologies.¹⁵³ Developments like these suggest that new technologies may facilitate new pathways to, and new forms of, political mobilization and, at the same time, encourage some new dynamics of congressional accountability by loosening the grip of organized groups on the legislative process.

The possibilities for shaking up the role of interest groups in Congress – and thereby shaking up the dynamics of collective action – are intriguing, but grounds for skepticism remain. For one thing, interest groups themselves have acquired valuable new advantages by virtue of contemporary technologies.¹⁵⁴ Rather than being some sort of a populist club that weakens traditional groups, these new technologies also empower organized interests by allowing them to more easily communicate, shape opinion and mobilize citizens.¹⁵⁵ Take as an example the perhaps ironically-named “Grassroots Enterprise,” a business providing clients with cutting edge web strategies and advocacy using various Internet media, SNS and blogs.¹⁵⁶ The clients mentioned on the website are diverse, but include plenty of old-fashioned organized interests, such as those advocating on behalf of teachers, the telecommunications industry, environmentalists and government agencies.¹⁵⁷

It is tempting, but ultimately misleading, then, to suggest an epic faceoff between old and new. The choice is not a dichotomous one that pits top-down interest groups with organizational advantages unmatched by the mass public against a new world, in which decentralized action generated by tech-savvy citizens topples the reigning centers of power. Recall, instead, the earlier reference to a dynamic interaction between the old and new, offline and online. That framework is apt here. Interest groups have embraced the tools of modern technology for their own ends and, as repeat political players with an established presence and distinctive institutional resources, they may sometimes wield these tools to better effect than those who are networked, but not politically organized in the traditional sense.¹⁵⁸ On this score, as on so many others, much remains to be seen.

CONCLUSION

Because the Internet continues to evolve and change so rapidly, it is difficult to arrive at firm or stable conclusions about whether it is likely to improve congressional accountability. It is, in some sense, too soon to write this story since research in this area becomes dated quickly, as it is overtaken by events.

¹⁵³ *Id.* at 156-60, 172-87, 295.

¹⁵⁴ See generally R. Karl Rethemeyer, *The Empires Strike Back: Is the Internet Corporatizing Rather Than Democratizing Policy Processes?*, 19 PUB. ADMIN. REV. 199 (2007).

¹⁵⁵ *Id.* at 202.

¹⁵⁶ Grassroots Enterprises, <http://www.grassroots.com/> (last visited Feb. 3, 2009).

¹⁵⁷ *Id.*

¹⁵⁸ See generally BIMBER, *supra* note 128.

There is also something of a “flavor du jour” phenomenon about the latest technological developments, with SNS and YouTube dominating the recent conversation, while new bells and whistles are likely to replace them, perhaps even in time for the 2010 congressional midterm elections. Because of this continual change, it is easier to identify issues that bear watching than it is to supply definitive answers. Some of these issues are, for example: the political behavior of networked groups in relation to traditionally organized groups (do they compete with one another, work together, or both?); the demographic changes in political knowledge (if any) generated by the spread of Internet skills among the young; the persistence of small online campaign donations and the regulatory response to that phenomenon; and the ways in which legislative staff and members of Congress consume blogs, whether and how they begin to blog themselves, and whether they otherwise become more interactive in their use of the Web.

As a general matter, it is also worth remembering that the Internet coexists with both traditional sources of political information and traditional political institutions, which the Internet will not categorically replace. These include organized groups (who use the Internet strategically) and old media reporters (who both consume the new media and sometimes assume its forms). The Internet as a political venue will be influenced by all of these forces, just as it is influenced and shaped by the social context in which it exists. Congressional accountability, then, will be affected not by the Internet alone, but by how these multiple forces interact.

Notwithstanding the flux and uncertainty, however, one theme has emerged that suggests the basis for some normative concerns. There are reasons to believe that the asymmetries in accountability will persist, and that Internet usage for political purposes will likely reproduce at least some of the political inequalities that have long existed in relation to political knowledge and engagement more generally. It seems fair to say that, thus far, the Internet has more dramatically affected the *how* than the *who* of politics. As to the *how* of politics, the Internet has most clearly created powerful new capabilities for those who are already politically engaged and intense – hence, Norris’s evocative “activating the active” phrase.¹⁵⁹ To be sure, new groups may join the already-active in exploiting the Internet’s capability, but it remains an open question whether they will do so in large numbers. Moreover, it is also possible that traditionally-engaged citizens, newly empowered with Internet tools, may use their powerful new tools in ways that redound to the benefit of those who are not involved and that improve congressional accountability in general ways. But note that this replicates the status quo in important ways with respect to the knowledgeable “attentive public” and “issue publics” that have long coexisted with the larger, poorly-informed public. Acute questions of democratic equality and democratic theory are raised by the idea that

¹⁵⁹ See NORRIS, *supra* note 127, at 229.

knowledgeable segments of the electorate can, will or should act to secure accountability on behalf of the whole.

Finally, as a source of political information and a possible springboard for greater political accountability, the Internet can be both a force for good (by making better, fuller, more textured and vivid political information available to those interested in and skilled at finding and using it) and for ill (by facilitating the rapid and substantial spread of misinformation). How the balance is struck as between these dual possibilities remains to be seen.

**CONGRESS AND THE COSTS OF INFORMATION:
A RESPONSE TO JANE SCHACTER**

ADRIAN VERMEULE*

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INTRODUCTION

Suppose that the costs of obtaining and using political information fall dramatically, due largely to new technologies such as the Internet. I understand Jane Schacter to ask what effects this will have for political accountability and social welfare.¹ I will attempt to put Schacter's important questions into a more systematic theoretical framework and offer a set of skeptical anti-conclusions. I believe that (1) the fall in political information costs has multiple effects, cutting in different directions: some will increase accountability, however defined, while others will reduce it; and (2) we can predict the direction of the relevant effects but have little idea of their magnitudes. It follows that the consequences for social welfare, given our current knowledge, are systematically ambiguous.

I will begin by sketching some marginal effects or comparative statics within the extant institutions of political accountability, focusing first on the relationship between legislators and voters, then on relationships among legislators, and finally on relationships among voters. Subsequently, I turn to even more speculative possibilities for new institutions of accountability altogether, such as a virtual Congress, the expansion of direct democracy into

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¹ See Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 643 (2009).

the federal lawmaking process, and legislation drafted through the putative wisdom of crowds – “wikis”² for legislation.

I. INFORMATION AND ACCOUNTABILITY: SOME COMPARATIVE STATICS

I will assume that one major political effect of the Internet and associated technologies is to reduce the costs of obtaining political information for all actors in the system – citizens, interest groups, media, and officials. This assumption is only plausible, not certain. Among the multiple effects of the Internet, some may increase political information costs. For one thing, the Internet makes it cheaper to produce as well as consume political talk, some of which is false. The rising volume of political talk, and the rising costs of winnowing information from background noise and pseudo-information, might swamp the cognitive capacities of boundedly rational consumers. Even for rational consumers, if the production effect is so great that the increase in search costs equals or exceeds the cost-reduction effect, the Internet might even raise the overall costs of obtaining useful political information.

Although this is possible in theory, it does not ring true in practice. As Schacter points out, it is now possible to find out how one’s legislator voted on a bill with a few clicks, whereas in an earlier day obtaining the same information required a trip to the library or a search through back issues of a newspaper.³ The increased search costs are kept within rather modest bounds by search engines and by intermediaries who package and distribute political information. That said, however, there is a degree of residual uncertainty about whether the overall effect of the Internet is to reduce or raise the costs of political information, and this illustrates my thesis that the Internet’s consequences are fundamentally unpredictable.

A. *Legislators and Voters*

Let us assume that the Internet reduces the overall costs of obtaining political information. What are the consequences? As Schacter notes, one major consequence is an increase in the transparency of congressional action.⁴ However, I will suggest that this in turn has multiple, exceedingly complex consequences, and that the welfare effects are ambiguous.

² A wiki is, according to Merriam-Webster, a “[w]eb site that allows visitors to make changes, contributions, or corrections.” Merriam-Webster’s Online Dictionary, Wiki, <http://www.merriam-webster.com/dictionary/wiki> (last visited Feb. 19, 2009).

³ Schacter, *supra* note 1, at 651-52 (using the case of roll call voting information to illustrate the transparency and ease of access that the Internet allows).

⁴ *Id.* at 648-62.

Cheerleaders of transparency, of whom there are still many,⁵ praise what they deem its main effect, which is to reduce agency slack between voters and representatives. Conventionally, we may understand this in terms of moral hazard. Because of information asymmetries between voters and representatives, the latter have scope to take unobservable actions that detract from voter welfare. Transparency reduces this scope. As information costs to voters fall, transparency increases, and this simple form of moral hazard is reduced. So far, so good.

Even within this conventional moral hazard framework, however, it is clear that transparency can have an offsetting cost. The same transparency that allows voters to observe the actions of their representatives also allows third parties to do so, such as executives or interest groups. Representatives can now make transparently verifiable, and therefore credible, commitments to vote as the Association of Ethanol Producers wants them to, in return for campaign contributions. Absent devices for creating selective transparency to the median voter but not to third parties,⁶ the net effects of increasing transparency within a moral hazard framework are ambiguous. Moreover, reducing the costs of information also makes it easier to organize interest groups or issue groups in the first place, as Schacter observes,⁷ and this increases the number of third parties to whom legislators might credibly sell their votes.

To make things even worse, recent work in economics and political science has uncovered other potential costs of transparency, in part by changing the subject from moral hazard to adverse selection.⁸ These models fall into two broad camps, with some focusing on the competence or expertise of representatives, and some focusing on their preferences. Because these are adverse selection models, representatives come in multiple types: some are more competent, some less, some have biased preferences, and some do not. Bias here carries no connotation of invidious intention; it just means, in the extreme case, that the biased representative is an ideologue who always favors a certain policy, regardless of the actual state of the world.

Simplifying greatly, the problem in these models is that voters would be better off in the long run if they could sort out the competent from the incompetent representatives, or the biased from the unbiased ones. However,

⁵ See, e.g., Change Congress, <http://change-congress.org> (last visited Feb. 13, 2008) (advocating transparency and campaign finance reform); Sunlight Foundation, <http://www.sunlightfoundation.com> (last visited Feb. 13, 2008) (advocating transparency in “money, lobbying, influence and government”).

⁶ For some devices of this sort, see ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 200-15 (2007) (identifying the costs of transparency and suggesting a system of delayed disclosure as a means of accomplishing selective transparency).

⁷ See Schacter, *supra* note 1, at 672-73.

⁸ See, e.g., Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 *AM. ECON. REV.* 1034, 1035 (2004).

transparency creates incentives for mimicking: anticipating that voters will observe their actions, the disfavored type of representative acts just as the favored type would act, and a pooling equilibrium arises. Interestingly, this mimicking behavior might or might not result in representatives choosing the action that is most popular with the voters.

If voters have a preference for one type of policy or another and observe how representatives vote, one possibility is a “pandering” effect: the representative will vote for the popular policy even if her private information⁹ suggests the policy is misguided.¹⁰ However, the contrary is also possible. In the “posturing” effect, a representative seeking re-election occasionally takes an action contrary to the voters’ preferences, even if he has reason to think that the unpopular action is also harmful.¹¹ His fear is that if he is always seen to do what is popular, voters will infer that he is of low competence.¹² For similar reasons, experts with no real insight will sometimes defy the conventional wisdom, even when they have no reason to think it incorrect, merely to avoid seeming to be a predictable hack.

For an example based on heterogeneous preferences, rather than competence, consider the “political correctness” effect:¹³ an adviser who knows that his principal will infer that he is biased against, say, free trade if he recommends protective measures may therefore recommend free trade, even if his private information suggests that protective measures would be a good idea. Likewise, a representative who knows that voters will stamp him as an ideological pacifist if he votes against war may therefore vote in favor of war precisely to signal his lack of bias, even if his private information suggests that going to war is a bad idea.¹⁴

Lowering the costs of political information, and thus increasing transparency, merely exacerbates these effects, which arise precisely because representatives anticipate that voters will observe their actions. Moreover, these models underscore that *lowering the cost of political information makes voters transparent to legislators*, as well as the reverse. The models typically assume that legislators have perfect knowledge of the voters’ preferences.¹⁵ In

⁹ “Private information” simply means that the representative gets an unobservable signal about the state of the world, a signal that the representative may not be able to credibly transmit to the public.

¹⁰ See Maskin & Tirole, *supra* note 8, at 1035.

¹¹ Gilat Levy, *Anti-Herding and Strategic Consultation*, 48 EURO. ECON. REV. 503, 504 (2004) (arguing that decision makers with career concerns may go “against the herd” or against their own beliefs).

¹² *Id.* at 504-05; see also Gilat Levy, *Careerist Judges and the Appeals Process*, 36 RAND J. ECON. 275, 286-87 (2005) (arguing that careerist judges tend to be more creative, going against precedent more than efficient judges).

¹³ See Stephen Morris, *Political Correctness*, 109 J. POL. ECON. 231 *passim* (2001).

¹⁴ Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23, 25 (2007).

¹⁵ See *id.* at 28.

the real world, of course, this is not so, and the opacity of voters' preferences can be beneficial – careerist representatives who are unsure of their constituents' preferences and beliefs on a given issue might as well vote their true beliefs about the world, rather than voting in the way that will allow them to look good. As the costs of discovering voters' preferences and beliefs fall, however, representatives can micro-target their votes on particular issues to pander, posture, conform, or mimic all the more successfully.

The magnitude of these adverse selection costs of transparency is unclear, in part because the structure of the problem is nonlinear. The adverse selection models, like principal-agent models generally, all assume that legislators have better information about the state of the world than voters do. That is what makes it damaging to voters' welfare when legislators pander, posture, conform or otherwise suppress their true beliefs. Where information costs are sufficiently high, voters know neither what the true state of the world is nor what action their representatives take. As information costs fall into a middle range, voters can observe what actions legislators take, but cannot observe the true state of the world, assuming that the latter is costlier to understand than the former. If information costs fall even farther, however, the informational advantage of representatives disappears, and the adverse selection costs of transparency diminish. Indeed, in the limit, as information costs fall towards zero, the whole structure of the principal-agent problem disappears because the agents have no informational advantage anyway and the case for representative as opposed to direct democracy dissolves. I very much doubt we will be anywhere close to that extreme in the near future, but short of that we do not know where we are on the scale of political information costs.

So far we have considered only models in which legislators vote without deliberating. When a deliberation stage is added to the mix, what happens? In general, public deliberation involves more arguing and less bargaining than nonpublic deliberation.¹⁶ This is not necessarily to say that public deliberation is better. Increasing transparency can make deliberation uninformative because legislators posture for constituents and are known to be doing so,¹⁷ or can prematurely freeze legislators into their positions because legislators incur a reputational cost from changing their minds in public. However, the reputational effect can have collateral benefits in the form of the “civilizing force of hypocrisy”:¹⁸ having opposed one bill on an impartial ground that then

¹⁶ See JÜRGEN STEINER ET AL., *DELIBERATIVE POLITICS IN ACTION* 98-137 (2004). The authors conducted case studies of the quality of deliberation in national legislatures in Germany, Switzerland, the United Kingdom, and the United States. The authors found that deliberation behind closed doors involved more bargaining and less arguing than in public, with fewer arguments appealing to the common good; however, public deliberation involved significantly more disrespectful speech acts. *See id.* at 128-31.

¹⁷ See David Stasavage, *Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy*, 69 *J. POL.* 59, 60 (2007).

¹⁸ See Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 111 (Jon Elster ed., 1998).

happened to suit her interests, the legislator may be somewhat constrained in rejecting that impartial principle when it cuts against her interests in a different context.¹⁹ Here too, the effects of increasing transparency on deliberation are ambiguous, as the most recent comparative case studies have shown.²⁰

The overall picture is complex. On the moral hazard side, there are benefits to increasing transparency, but also costs. In terms of adverse selection, there are newly appreciated costs of transparency. These benefits and costs obtain only in some middle range of information costs, a range that we may or may not be in. Adding deliberation to the mix introduces a new set of costs and benefits, adding further complexity.

We can state all these benefits and costs in terms of possibility theorems, identifying conditions under which one effect or the other will dominate in the abstract, but we usually lack actual information about the magnitudes of the effects. This means that as the Internet lowers the costs of information, and thereby increases transparency, the effects on legislators' accountability to voters and on social welfare are multiple, cross-cutting, and ambiguous.

B. *Legislators and Legislators*

We should not neglect that reduced costs of political information also affect relationships between legislators, sometimes in surprising ways. One well-documented anecdote involves a reform put in place by the new Democratic majority after the 2006 elections in order to increase the transparency of earmarks.²¹ The unanticipated effect was to "intensif[y] the competition for projects by letting each member see exactly how many everyone else is receiving. . . . Because everyone can see who is receiving what, rank-and-file members are clamoring for their districts to obtain a bigger share of the goodies."²² Another effect was to shift the distribution of earmarks within Congress; committee barons who had previously received the lion's share were faced with pressure to share their wealth with backbenchers.²³ Finally, organized interest groups, nonprofits, and other entities also demanded and obtained more benefits, arguably demonstrating the third-party moral hazard costs of transparency.²⁴ In general, "the new transparency . . . raised the value

¹⁹ See *id.* at 128-31.

²⁰ STEINER ET AL., *supra* note 16, at 128-31; see also DANIEL NAURIN, DELIBERATION BEHIND CLOSED DOORS 143-53 (2007) (studying lobbying in the European Union and finding little evidence that transparency increases the ratio of arguing to bargaining, or that it triggers the civilizing force of hypocrisy).

²¹ See Edmund L. Andrews & Robert Pear, *With New Rules, Congress Boasts of Pet Projects*, N.Y. TIMES, Aug. 5, 2007, at A1 (describing how Democrats denounced earmarks and then addressed the problem not by eliminating them but by making them more open to the public).

²² *Id.*

²³ *Id.*

²⁴ See *id.*

of earmarks as a measure of members' clout" as lawmakers "competed to have their names attached to individual earmarks and rushed to put out press releases claiming credit for the money they bring home."²⁵ Of course, some of these effects could have obtained in the pre-Internet era as well, but the Internet has surely made it less costly for legislators to inform constituents of their prowess at obtaining pork, and has plausibly made it easier for legislators to know what their colleagues are doing.

In general, *intracongressional transparency* is an underexplored subject, one that I can only identify but not analyze here. An assumption of models, theories, and causal analysis across the legal and political theory of legislatures is that legislators have perfect information about what other legislators do in Congress, and about what Congress does as an institution. The earmark reform episode shows that the assumption is at least sometimes false, and that as falling information costs make Congress more transparent to legislators themselves, surprising and perverse effects can occur.

C. Voters and Voters

Finally, it is worth glancing at how reduced information costs affect relationships among voters. In general, two main effects can be identified. The first is *cocooning*: the Internet makes it easier for voters to form informational and social networks with like-minded others, narrowing the range of points of view that voters hear and inducing polarization of political viewpoints.²⁶ An effect of polarization, however, is to induce greater participation in politics, albeit by people with extreme views. In general, there is a tradeoff between moderation and participation.²⁷

A second main effect is *social influence*: voters have more information about the preferences of other voters, including how many others will be likely to vote in the first place. Here the greater interdependence of voting decisions can produce bandwagon effects, in which voters vote for the candidate they think most other voters will vote for, or underdog effects, in which voters vote for the candidate they think most other voters will vote against. Even voters who are resolutely committed to a particular candidate can be affected by knowledge of whether like-minded others will vote. If many fellow supporters will turn out for the favored candidate or issue, some will be more likely to participate while some will be more likely to stay home.

Needless to say, these effects cut in multiple directions and produce multiple equilibria; their net consequences are unclear. One possibility is a general increase in political volatility, with higher participation by extreme voters, but

²⁵ *Id.*

²⁶ See CASS SUNSTEIN, *REPUBLIC.COM 2.0*, at 19-22 (2007).

²⁷ See DIANA MUTZ, *HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 3* (2006) ("Although diverse political networks foster a better understanding of multiple perspectives on issues and encourage political tolerance, they *discourage* political participation, particularly among those who are averse to conflict.").

more lability among moderate swing voters, who will lose partisan brand loyalties and display increasing tendencies toward bandwagon and underdog effects. Again, however, this is merely one scenario out of a bewildering range of possible futures.

II. NEW INSTITUTIONS?

So far I have mentioned some comparative statics of marginal reductions in information costs within the current institutions of accountability – using marginal here in both its colloquial and technical senses. As I mentioned when discussing the adverse selection models of transparency, however, a radical drop in information costs could have more drastic effects. In the limiting case, the whole principal-agent structure of accountability and of representative democracy itself might come unglued, premised as it is on the informational advantages of political specialization by representatives. Of course that is hardly likely in our world, as opposed to the political science-fiction world of a remote future. However, medium-sized institutional changes seem realistically possible in the medium-run future.

A. *A Virtual Congress?*

It is now technically feasible for Congress to become a virtual assembly. Legislators could hold committee meetings by teleconference, vote by some remote mechanism, and so forth. Three obvious questions are (1) whether this is legally permissible, (2) what causal mechanisms might bring it about, and (3) whether it is a good idea.

As to the legal question, the Constitution specifies that “[t]he Congress shall assemble at least once in every year,”²⁸ but does not literally specify that the assembly shall be physical. Of course, the framers assumed that it would be physical (for those who care about what the framers assumed), and the “tacit postulates” of the text clearly imply physical assembly, as when legislators are granted immunity from arrest in “going to and returning from” their “respective Houses.”²⁹ Yet it is also a tacit postulate of the text that money shall be coined, rather than printed,³⁰ and we threw that assumption overboard when technological and political circumstances changed enough to make it beneficial to do so.

As to the causal question, it is conceivable that legislators themselves might advocate for a virtual rather than physical Congress, both to reduce the personal costs of travel and for political advantage. In the latter scenario, legislators could bid for office by committing to live permanently among their constituents, promising voters increased access and running against the Beltway culture of interest-group influence, which is plausibly aided by

²⁸ U.S. CONST. art. I, § 4, cl. 2.

²⁹ *Id.* § 6, cl. 1.

³⁰ *Id.* § 8, cl. 5.

physical proximity to a concentrated assembly of legislators. Analogously, one elegant explanation for increasing legislative transparency, especially in the post-Watergate era, is that legislators themselves have offered voters greater transparency in order to outcompete other candidates for office.³¹ However, tests of this hypothesis produce ambiguous results.³²

I will ignore the normative question, except to say it seems obvious that permanently stationing representatives among the represented, rather than inside a partially autonomous professional space such as the Beltway, will have complex and ambiguous effects on voter welfare. Public-choice democrats will applaud the dispersion of the virtual assembly, which presents a less concentrated target for interest-group influence, and populist democrats will applaud stationing representatives among the people. Deliberative democrats will bemoan the loss of face-to-face discussion among representatives, although it is unclear how much of that occurs anyway, as opposed to strategic position-taking and posturing. As we have seen, the latter, ersatz form of deliberation is especially likely under the glare of transparency that Internet-era politics creates. Moreover, an effect of new technologies has been to allow legislators to watch floor proceedings from their offices or home districts, rather than from the floor.

B. *Virtual Voting and Direct Democracy*

It is also technically feasible to have much more virtual voting by citizens than we currently do, eliminating the substantial opportunity costs of physical voting in the sense of going to a designated balloting place. (Eliminating that practice would kill off part of the massive literature on the voting paradox – no mean benefit.) Virtual voting for candidates is already here, on a small scale, and it seems only a matter of time before it is widespread.

What is less obvious is that virtual voting could so reduce the costs of voting to citizens as to greatly increase the scope for mechanisms of direct democracy, even at the federal level. Congress could not only assemble virtually, it could decide some or many issues by direct-democracy referenda, delegating them back to the people at large, or could at least hold advisory referenda to get a formal statement of public opinion on particular issues. It is already the case that legislators are highly sensitive to polls; virtual referenda on federal legislative issues would simply formalize their sensitivity.

³¹ John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 131, 136-40 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999).

³² See generally James E. Alt & Robert C. Lowry, *Transparency and Accountability in US States: Taking Ferejohn's Model to Data* (Apr. 14, 2006) (unpublished manuscript, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/3/7/3/6/pages137364/p137364-1.php).

I will not attempt to outline the social costs and benefits of such practices, which are partly stated in the large literature on direct democracy.³³ Suffice it to say that it is hard to see any federal constitutional obstacle, at least to advisory referenda. If legislators may consult opinion polls – and it is impossible to prevent them from doing so – then they can consult what is essentially an opinion poll arranged by Congress. And the political mechanisms that would bring about federal virtual referenda are straightforward. A party in control of Congress that seeks public approval for a controversial measure, especially between elections, would have obvious political incentives to obtain a formal statement of (supportive) public opinion in this way.

C. Wiki-Legislation

Finally, the Internet is already starting to make inroads on traditional practices for proposing and drafting statutes. In early 2007, Utah State Senator Steve Urquhart launched Politicopia,³⁴ a wiki for debating and drafting legislation through the putative “wisdom of crowds.”³⁵ There is no reason that federal legislators could not create similar resources and use their products, or pretend to do so.

There are many obstacles to crowd wisdom in contexts of this sort, of which the most relevant here is the *iron law of epistemic oligarchy*: the crowd will in practice be epistemically dominated by the few.³⁶ Contributions to Wikipedia, for example, follow a power-law distribution in which a small group of dedicated users account for the bulk of the edits.³⁷ Legislation wikis will in all probability end up being dominated by a small set of intensely interested users, who may be highly informed but who may also be representatives of interest groups or advocacy organizations with high stakes in particular issues. In either case, it is not obvious that the products of such wikis will be systematically superior to the products of drafting by legislative staff acting in collaboration with interested groups; many of the same people will be involved in either forum. Yet it is predictable that legislators will have powerful incentives to create such mechanisms, either because they genuinely think that legislation-wikis can usefully inform their own decision-making, or because by

³³ For an overview, see generally John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185 (2005) (finding that direct democracy “often seems to improve the performance of government”).

³⁴ Politicopia Utah, <http://www.politicopia.com/> (last visited Feb. 11, 2009); see Scott Martelle, *Site Cedes Power to People*, L.A. TIMES, June 18, 2007, at A9.

³⁵ See JAMES SUROWIECKI, *THE WISDOM OF CROWDS*, at xiii-xv (2004).

³⁶ See Adrian Vermeule, *Many-Minds Arguments in Legal Theory* 24 (Harvard Law Sch. Pub. Law Research, Paper No. 08-02, 2008), available at <http://ssrn.com/abstract=1087017>.

³⁷ See, e.g., REID PRIEDHORSKY ET AL., DEP’T OF COMPUTER SCI. & ENG’G, UNIV. OF MINN., *CREATING, DESTROYING, AND RESTORING VALUE IN WIKIPEDIA 2* (2007), <http://www.cs.umn.edu/~reid/papers/group282-priedhorsky.pdf>.

doing so they can appear to be taking the side of “the people” against the side of “the powerful.”

CONCLUSION

If we are some twenty years into the Internet revolution, it is as hopeless to think we can predict its future course and political consequences as it would have been to predict the political consequences of the printing press in about 1460, some twenty years after Gutenberg. Or perhaps it is more hopeless, given that Internet technology is seemingly more fluid now than printing technology was in its era.³⁸ However, this notion of fluidity may be an illusion caused by the fact that we are living through the Internet era in real time, while the era of the printing press is now frozen in history.

If we assume that the main effect of the Internet is to reduce the overall costs of political information, that change has multiple cross-cutting effects, as illustrated by the complex costs and benefits of increased transparency. The directions of those effects can be roughly estimated, taken one by one, but their magnitudes and net outcomes are unknown and currently unknowable. As a result, the consequences of the Internet revolution for political accountability and social welfare generally are, for now, irreducibly unclear. Either the cheerleaders of Internet politics or the doomsayers might turn out to be correct, but their beliefs are unjustified given the current state of the evidence and our current theories. It will be decades or centuries before even tentative empirical and normative generalizations can responsibly be offered.

³⁸ Thanks to Jonathan Zittrain for suggesting this point.