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

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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.

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[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,

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[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 information[9] 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* JÜRG 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

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[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.

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[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.