No Choice: Trans-Atlantic Information Privacy Legislation and Rational Choice Theory

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Many millions of Americans are online today. Information has turned into the lifeblood of a highly dynamic information society,[1] a society in which networks permit ever-increasing access to personal data. While Congress has repeatedly attempted to restrict certain types of information on the Internet,[2] it has not passed legislation protecting citizens' personal data, leaving this task almost entirely to industry self-regulation[3] and market forces.[4] Considering the long and remarkable history of privacy protection in America outside the information context[5] as well as the undeniable importance of privacy values in the American tradition and culture,[6] this fact is—to say the least—surprising.

Recently, privacy experts have suggested in informal discussions that rational choice theory may provide the key to explaining the lack of protection of information privacy in the United States.[7] In this essay, I will first briefly outline the relevant parts of rational choice theory, and describe how some

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1 *See* FRED H. CATE, PRIVACY IN THE INFORMATION AGE 5 (1997); Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flows in Transition*, 36 VAND. L. REV. 985, 987 (1983).

2 *See, e.g.*, Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-736 (codified as amended in scattered sections of 47 U.S.C.); Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 18 and 47 U.S.C.), *held unconstitutional in* Reno v. ACLU, 521 U.S. 844 (1997).

3 *See* FEDERAL TRADE COMMISSION, PRIVACY ONLINE: A REPORT TO CONGRESS (1998). See also David Harrison, *OCC Offers Ways to Comply With Customer Privacy Laws*, AM. BANKER, Mar. 31, 1999, at 2, for the distribution of guidelines by the Office of the Comptroller of the Currency "explaining how a bank may share customer data among affiliates without violating privacy laws."

4 *Cf.* ALAN F. WESTIN, PRIVACY AND FREEDOM (1967); Kenneth C. Laudon, *Markets and Privacy*, 39 COMM. ACM 92 (1996).

5 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that privacy is protected by the penumbras of the Constitution).

6 See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890), where the authors contend that a "general right of the individual to be let alone" exists. For an overview of privacy theory, see CATE, *supra* note 1, at 19-31.

7 One such lively discussion took place at the 1999 *George Washington Law Review* Privacy Symposium. For reasons unrelated to the subject matter, the interest group model advanced during the discussion and analyzed in this comment has not yet been published by its proponents.

have attempted to use a particular strand of rational choice theory—interest group theory—to explain the lack of privacy legislation in the United States. I will then show the fundamental flaws of this approach by sketching its theoretical fallacies. Finally, I will demonstrate that such a limited interest group model fails to explain the creation of the only large set of information privacy norms in existence, the European data protection statutes.

I. Rational Choice Theory and Its Suggested Use for Information Privacy

Rational choice theory in a nutshell is the application of economic methods and models to non-market decisionmaking, particularly in the field of political science.[8] The use of economic decisionmaking models to explain political behavior such as voting or lawmaking rests on a number of assumptions. The first and most important of these assumptions is that players in politics tend to act rationally overall.[9] Rational action is further equated with utility maximization.[10] Thus, politicians, for example, are seen as primarily focused on their own political survival.[11] Voters, it is argued, tend to cast their ballots in favor of politicians who will implement legislation beneficial to the voter's self-interest.[12]

In elections, therefore, focused interest groups will enjoy a substantial political advantage over the unorganized mass of voters, because interest groups have a clearly articulated shared set of values and goals which they actively pursue.[13] Indeed, being fully conscious of this relative advantage, interest groups will directly exert their influence on political decisionmakers. Consequently, interest groups constitute a very important, if not decisive, factor in political decisionmaking.[14] This strand of rational choice theory focusing on voting and legislative decisionmaking has been used both to describe and explain the disproportionately high impact of interest group influence in the political process in a wide number of subject areas.[15] It is, therefore, little wonder that commentators now suggest we use this interest group-centered theory to explain information privacy legislation as well.

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8 *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1 (1991).

9 *See* DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979).

10 *See id.*

11 *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 323-26 (1988).

12 *See* MUELLER, *supra* note 9, at 1-8.

13 *See generally* FARBER & FRICKEY, *supra* note 8, at 12-38; MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (2d ed. 1971).

14 *But cf.* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 47-70 (1994) (arguing that despite interest group influence in the political process, citizens still cast their vote—a non-rational behavior in terms of pure cost-benefit).

15 *Cf.* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989); Julie A. Roin, *United They Stand, Divided They Fall: Public Choice Theory and the Tax Code*, 74 CORNELL L. REV. 62 (1988). *See generally* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

In applying a rational choice approach centered exclusively on interest group alignment to the domain of privacy protection, it has been suggested that only two scenarios emerge in practice: one focused on the public sector use of information, and the other looking at the private sector use of information. In the first scenario, the government attempts to use the personal information of citizens. The proponents of the rational choice approach would label this scenario as "the government vs. the people." While the government desires to pass laws that would allow it to access personal information processed and stored in the private sector, private sector interest groups detest the additional bureaucratic and organizational burdens likely to be imposed by such a government policy. Hence, to avoid the implementation of this policy, interest groups in general align with citizens, oppose the government initiative and—being the decisive factor—tilt the balance in favor of the people. As a result, few laws are passed which allow for public sector access to personal information.

The only successful strategy for the government to pass such laws, it is argued, is to break up the coalition between the people and the interest groups. This can best be achieved by "buying off" the interest groups: they can be offered a regulatory framework in which they either would not have to shoulder the cost of such government access or would be reimbursed for it by the state.[16]

The alignment of interest groups differs in the scenario in which the private sector seeks to make use of information. Again, the government's motivation to regulate is juxtaposed with citizens' desires to remain free from any intrusion into their information privacy. But in this scenario, interest groups representing the private sector have no reason to side with citizens. After all, it is businesses, the very constituency these interest groups represent, which demand access and use of personal information. Consequently, interest groups will align with the government, thereby tilting the balance in favor of their proposal and permitting private sector intrusions into personal information.

According to the proponents of such a strict interest group-based model, only the above two scenarios will emerge. This is surprising, as most rational choice advocates suggest a much more complex picture of interest group behavior, emphasizing that interest groups are not a homogeneous mass easily aligned with one side or the other.[17] But in the end, the aggregate power of interest groups will either favor or oppose a certain legislative action, albeit with a variable intensity of support. In this ideal sense, the bipolar approach suggested may look overly simplistic, but cannot be dismissed up front.

In addition, the proponents of such an application of rational choice theory to information privacy legislation carefully point out that their analysis is purely descriptive. Their model supposedly is aimed just at explaining the apparent dichotomy of substantial prohibitions of public sector intrusions

16 For example, the government will reimburse telecommunications companies for providing wire-tap support. *See* Digital Telephony Act of 1994, 47 U.S.C. § 1001 (1994).

17 *See generally* KAY LEHMAN SCHLOSZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986).

into personal data and large-scale private sector uses of the data. No explanations other than these can or should be derived from this analysis, according to these theorists. But every theory which intends to accurately explain a particular process, like political decisionmaking, implicitly contains a prescriptive element. If the theory can be used to explain past behavior, why should it not be used to predict future behavior? If, in our context, information privacy legislation can only be achieved by keeping interest groups aligned with citizens, then the players in the political arena will, in order to become or remain successful, have to adapt their strategy accordingly.

Using such a bipolar model as a kind of guiding star, one almost necessarily will have to arrive at the general rule that in both of the described scenarios—public sector and private sector uses of personal information—laws will only be passed if the relevant interest groups agree. Not every political decision, however, can be explained that easily. Rational choice theorists themselves have identified at least three broad exceptions to this general rule. First, laws may be passed despite interest group opposition if they are focused on a narrowly-defined issue with high visibility.[18] A highly publicized violent shooting incident at a high school, for example, may provide the narrow focus and large publicity necessary to pass stringent gun control regulations even against fierce interest group opposition. Legislators may also refuse to go along with interest groups, it is said, if they themselves are or would be directly affected by the proposed law.[19] When legislators, for example, saw then-Supreme Court nominee Robert Bork's video rental file published in the media, they immediately grasped that they could be next in line for public disclosure. Legislators therefore acted quickly, and passed the Video Privacy Protection Act,[20] effectively limiting private sector uses of some personal information. Proponents of a rational choice approach to information privacy legislation point out that it was legislators' focus on their own self-interests which made it impossible for interest groups to muster an effective opposition against the regulation of private sector uses of information. Finally, legislators may abandon their rational choice thinking altogether and decide not to care about the maximization of their own self-interests, but instead about society's well-being. Even rational choice proponents accept that legislators sometimes do not act as rational choice theory would have it and turn into what one could call "irrational saints"—those who champion a common cause without directly gaining anything from it. But rational choice theory regards this legislative conduct as an aberration, a rare exception within an otherwise rational behavioral landscape.

Clearly, much rests upon these exceptions. As at least some legislative outcomes fail to conform to rational choice theory, the exceptions must explain these "failed" cases without substantially undermining the very premises rational choice theory is built upon. If one could therefore discover a tangible flaw in the exceptions, the entire structure of rational choice, at least in the context of information privacy, might fall.

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18 *See* GREEN & SHAPIRO, *supra* note 14, at 19.

19 *Cf.* FARBER & FRICKEY, *supra* note 8, at 20.

20 18 U.S.C. § 2710 (1994).

II. The Trouble With Rational Choice in Information Privacy

Rational choice theory has attracted not only many followers but also a substantial number of critics. The words critics use to describe the theory are anything but flattering. One reads of problems,[21] pitfalls,[22] paradoxes,[23] and pathologies.[24] In their works, critics focus largely on the less than optimal overlap between rational choice theory and political decisionmaking practice. Rational choice theory can only maintain its validity if it can explain legislative practices. Where it fails to explain practices as being self-interested, one of the "exceptions" must apply. Moreover, a rational choice model needs to explain not just a few legislative actions, but most of them. While this may not imply that such a model must explain all legislative actions, it must clearly define for which actions it is applicable and why, as well as how, it may explain them.

In the absence of arguments to the contrary, the interest group model suggested must cover the entire terrain of legislative decisionmaking in the privacy field. It therefore must fulfill the formal requirements for a universal model. At the same time, proving its validity becomes substantially more difficult. Furthermore, Donald Green and Ian Shapiro have pointed out that simply providing one explanation for some legislative actions is not sufficient. What is needed, according to Green and Shapiro, is an explanation far superior to other explanations for legislative behavior.[25] In the context of this essay, this requires that a model needs to prove interest group behavior as not only a possible factor, but as the decisive factor in legislative decisionmaking on privacy matters.

Hence, disproving the interest group model by, for instance, disproving the soundness of one or more of its behavioral exceptions may damage the entire approach. Not surprisingly, the theoretical critique of rational choice theory has been primarily to take on these exceptions—and, at least in the context of privacy, with good reason it seems. The single, narrow, publicized issue exception, for example, provides exactly the limited focus where interest groups are so successful. It may be difficult for interest groups to mobilize their constituencies for diffuse initiatives, but it is easy to do so for highly focused issues close to their members' hearts. Thus, using the example mentioned above, one might argue that gun control legislation introduced in the wake of a high school shootout will provide precisely the hot, single issue—

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21 *See* Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 380 (1990).

22 *See* Stephen F. Williams, *Public Choice Theory and the Judiciary: A Review of Jerry L. Mashaw's* Greed, Chaos, and Governance, 73 NOTRE DAME L. REV. 1599, 1623 (1998) (book review).

23 *See* FARBER & FRICKEY, *supra* note 8, at 47 (claiming that a theory "that cannot even account for people going to the polls, let alone explain how they vote once they get there, can hardly claim to provide a complete theory of politics"); GREEN & SHAPIRO, *supra* note 14, at 47; Dennis C. Mueller, *The Voting Paradox*, *in* DEMOCRACY AND PUBLIC CHOICE 77 (Charles K. Rowley ed., 1987).

24 *See generally* GREEN & SHAPIRO, *supra* note 14.

25 *See id.* at 35-36.

gun control—influential interest groups, like the National Rifle Association, have successfully managed to contest.

The second exception is not without serious shortcomings either. While it is plausible that decisionmakers will "forget" normal rational choice behavior when the proposed legislation will directly affect them, it is unclear whether this is always the case. In fact, one example repeatedly cited for such an exception in the context of information privacy, the passing of the "Bork Bill,"[26] which protects video rental record privacy, is of little value. Unlike Judge Bork, politicians do not have to go through a grueling confirmation process in which the media focuses on character rather than on values and issues. Furthermore, if lawmakers indeed fear the media's intrusion into their personal information, as the rational choice interpretation of the Video Rental Privacy Act example portends, why have they not enacted an omnibus information privacy act? Such an omnibus act would protect legislators' interests much more fully than a narrowly-crafted video rental privacy bill.[27]

Finally, suggesting an exception for politicians who act as "irrational saints" may be necessary to square rational choice theory with actual political decisionmaking. But its proposal also fundamentally undermines the very premise rational choice theory rests upon: lawmakers' maximization of their own self-interests. If one concedes that rational choice theory may explain some cases of lawmaking but not others, the value of such a theory in attempting to explain and predict political behavior is diminished. Some critics[28] have focused on many rational choice theories' weak proof of causality between rational choice and political outcomes and have pointed out that to prove causality, it is not enough to show that rational choice possibly may have caused a given decision. Instead, according to the critics, one needs to establish mono-causality and to show that rational choice and no other factor has caused that decision.

So although the two rational choice scenarios of lawmaking in the realm of information privacy might explain the current regulatory privacy framework, the scenarios do not demonstrate that rational choice is the only or even the most likely factor in understanding such a framework.

III. From Theory to Practice

While uncovering theoretical fallacies is highly relevant, this has been repeatedly and eloquently done before.[29] The ultimate value of a theory, though, may only be determined by subjecting it to real world analysis. Rational choice advocates emphasize, for example, the lack of information privacy laws in the United States as a prime example of their second scenario interest group alignment model, which prevents private sector legislation

26 Video Privacy Protection Act, 18 U.S.C. § 2710 (1994).

27 One might argue that, given the public sentiment, lawmakers may have wanted an omnibus privacy act but felt they could only "get" a narrowly-focused privacy bill protecting video rental records. Such an argument, however, begs the question by subsuming the example under the general self-interest principle and away from what supposedly was an exception to it.

28 *See* GREEN & SHAPIRO, *supra* note 14.

29 *See, e.g.*, GREEN & SHAPIRO, *supra* note 14.

from being passed. But there is little to gain from this example, because even when legislation is ultimately passed, rational choice theorists have difficulty establishing the maximization of legislators' self-interest as the sole cause. Attempting to use the same strenuous model of proof in cases resulting in no regulation quite possibly extends the then-assumed causal link between theory and reality well beyond its breaking point.[30]

What may be more helpful as a test-bed than the United States's lack of regulation in the area of information privacy is the multitude of legislative acts passed in European countries over the last twenty-five years. Phrased positively, if the "two scenario" rational choice approach outlined above provides a conclusive explanation for these statutes, it may indicate that rational choice can explain information privacy lawmaking.

Of the many possible examples from Europe, I examine three cases. These cases represent three very different generations[31] of norms covering the entire spectrum of information privacy legislation.

A. The First Information Privacy Norms in the Early 1970s

By the end of the sixties, a number of authors in the United States had pointed out the threat to information privacy caused by large scale automated data processing and advocated for the adoption of stringent legislation to correct the problem.[32] Their work, combined with the Watergate scandal, created a substantial public demand to enact privacy laws protecting citizens from the public sector and provided the ideal ground for legislative initiative. The result was Congress's passage of the 1974 Privacy Act.[33]

European nations, in contrast, experienced a much less vocal public debate about information privacy, although plans by European nations for gigantic nationally centralized data banks of public and private sector information were much more threatening.[34] But in Europe, information pri-

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30 For example, Schloszman and Tierney, *supra* note 17, at 315-317, point out that interest groups are much better in preventing rather than obtaining legislation. Thus looking solely at the lack of legislation and its link to interest groups may in and of itself provide a skewed picture.

31 For a generational model of data protection norms, see Viktor Mayer-Schönberger, *Generational Development of Data Protection in Europe*, *in* TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE (Philip E. Agre & Marc Rotenberg eds., 1997).

32 *See* MYRON BRENTON, THE PRIVACY INVADERS (1964); ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS (1971); VANCE PACKARD, THE NAKED SOCIETY (1964); ALAN F. WESTIN, PRIVACY AND FREEDOM (1967);.

33 5 U.S.C. § 552a (1994).

34 *See* COLIN BENNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES 47 (1992); DAVID FLAHERTY, PRIVACY AND GOVERNMENT DATA BANKS: AN INTERNATIONAL PERSPECTIVE 105 (1979). The German plan was made public in Das Informationsbanksystem. *See* VORSCHLÄGE FÜR DIE PLANUNG UND DEN AUFBAU EINES ALLGEMEINEN ARBEITSTEILIGEN INFORMATIONSBANKSYSTEMS FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, VOLUME I, BERICHT DER INTERMINISTERIELLEN ARBEITSGRUPPE BEIM BUNDESMINISTERIUM DES INNEREN AN DIE BUNDESREGIERUNG (1971). Similar plans in the U.S. to create a "Federal Data Center" were proposed in 1966, but met with heavy public opposition. *See* BENNETT, *supra*, at 46; *see also* Jeffrey A. Meldman, *Centralized Information Systems and the Legal Right to Privacy*, 52 MARQ. L. REV. 335 (1969).

vacy—or data-protection[35] as it was called—remained a topic for the elite to discuss in academic and bureaucratic circles. These groups concluded that far-reaching regulation was desirable.[36] Consequently, a number of governments passed omnibus data protection laws covering not only public but also private sector uses of personal data.[37]

This outcome stands not only in stark contrast to the United States, but also to the now-suggested rational choice model. Both the public and the private sector—represented well in powerful interest groups—suffered from these data protection acts. At that time European governments' expansions of the social welfare state were in full swing and the ability to process personal information was crucial to its effective administration. Limiting the use of personal data thus resulted in at least a temporary impediment to existing and effective government administration.

But the data protection laws also affected almost every large business and its data processing approach. Surely, one would think interest groups fought hard against such legislative proposals. And, according to rational choice theory, by aligning with the government, large businesses should have won the battle instead of losing it. Nevertheless, Sweden,[38] Germany,[39] Austria,[40] and France[41] all passed omnibus acts protecting information privacy and limiting its use in both the public and the private sector. The "two scenario" interest group model described above would have predicted a different result.

According to rational choice theory, the above legislative aberrations may be explained through one of the three exceptions to the general rule of rational choice. If these pieces of legislation do not fit into any of the three exceptions, the rational choice model will crumble. Given the limited public debate on data protection, the single issue exception is unlikely. There is also no indication that lawmakers found themselves directly affected by data processing and thus pushed for legislation. The only remaining exception would see the lawmakers—temporarily at least—as "irrational saints." It

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35 The term stems from the German word "Datenschutz"; for a brief analysis of its content, see BENNETT, *supra* note 34, at 13.

36 *See* ADALBERT PODLECH, VERFASSUNGSRECHTLICHE PROBLEME ÖFFENTLICHER INFORMATIONSSYSTEME, DIE ÖFFENTLICHE VERWALTUNG, 23 (1970) 473; Wilhelm Steinmüller et al., *Gutachten: Grundfragen des Datenschutzes*, BT-Drs 6/3826, 5.

37 *See, e.g.*, Hessisches Datenschutzgesetz (Data Protection Act of Hessia), v. 7.10.70 (GVBl.Hesse S.625-627); Svenska Datalag (Swedish Data Act) 1973; Rheinland-pfälzisches Landesgesetz gegen mißräuchliche Datennutzung (State Act against the improper use of data of Rhineland-Palatinate) v. 24.1.74 (GVBl.Rheinland-Pfalz S. 31-33); Loi relative à l'informatique, aux fichiers et aux libertés (French Data Protection Act) 1978, Law No. 78-17 of January 7, 1978, J.O., revised January 25, 1978 <http://www.legifrance.gouv.fr/textes/html/fic781761978.htm>; Deutsches Bundesdatenschutzgesetz (German Federal Data Protection Act), v. 27.01.77 (BGBl.I S.201).

38 *See* Svenska Datalag (Swedish Data Act) 1973.

39 *See* Deutsche Bundesdatenschutzgsetz (German Federal Data Protection Act), v. 27.01.77 (BGBl.I S.201).

40 *See* § 1 Datenschutzgesetz (Data Protection Act) BGBl 565/78.

41 *See* Loi relative à l'informatique, aux fichiers et aux libertés (French Data Protection Act) Law No. 78-17 of January 7, 1978, J.O., revised January 25, 1978 <http://www.legifrance.gouv.fr/textes/html/fic781761978.htm>.

may be flattering to politicians, but hard to believe that politicians suddenly give up self-interest maximization in favor of information privacy legislation in a whole string of diverse European legislatures.

B. The German Data Protection Act After 1983

In the early 1980s, the West German government planned a nationwide census.[42] The detailed census questionnaire was viewed by many as unduly breaking into the private sphere. The Greens, Germany's environmental party, called for a boycott of the census.[43] To the surprise of the government, which had passed a law permitting the imposition of fines on boycotters, a substantial number of German citizens openly resisted and opposed the census.[44] Subsequently, the issue was brought before the German Federal Constitutional Court by representatives of the elite group of experts[45] who had been instrumental in the passage of the first German data protection act during the 1970s. In a stunning decision, a fairly conservative, business-oriented, government-supportive court declared the census law unconstitutional based upon what the court termed a fundamental right to informational self-determination implicit in the German Constitution.[46]

Even more surprising from the perspective of the above-stated rational choice model, however, was the behavior of the pro-business, liberal-conservative German government. In the wake of the court decision and after substantial debate, the legislature amended the German Data Protection Act in 1990 to embody the right of informational self-determination not only vis-à-vis the government—the original thrust of the anti-census movement—but vis-à-vis the private sector as well.[47] According to the rational choice model

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42 *See* DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 79 (1989).

43 *See id.* at 83 (acknowledging that "[t]he census is one of the best available vehicles for an opposition group like the Green party to mobilize public opinion against an incumbent government for political purposes").

44 *See Bonn Urges Census Compliance*, INT'L HERALD TRIB., Mar. 28, 1983, at 2. In 1983, a public poll indicated that "52 percent of the population mistrusted the census questions and that 25 percent of the 25 million households would not complete the form." FLAHERTY, *supra* note 42, at 79.

45 Among them law professors Wilhelm Steinmüller and Adalbert Podlech, both of whom had been instrumental in the data protection debate of the early 70s, and the computer science professor and liberal politician Klaus Brunnstein. *Cf.* PODLECH, *supra* note 36; Adalbert Podlech, Datenschutz im Bereich der öffentlichen Verwaltung—Entwürfe eines Gesetzes zur Änderung des Grundgesetzes (Art. 75 GG) zur Einführung einer Rahmenkompetenz für Datenschutz und eines Bundesdatenschutz-Rahmengesetzes (1973); Steinmüller, *supra* note 36.

46 *See* BVerfG 15.12.1983, BVerfGE 65, 1 = 1 BvR 209/83 = NJW 1984, 419 = EuGRZ 1983, 577. The term "informational self-determination" was taken from scholarly writings. *See* CHRISTOPH MALLMANN, DATENSCHUTZ IN VERWALTUNGSINFORMATIONSSYSTEMEN 47 (1976); Adalbert Podlech, *Datenschutz und das Verfassungsrecht*, *in* NUMERIERTE BÜRGER 27 (1975); Spiros Simitis, *Die informationelle Selbstbestimmung: Grundbedingung einer verfassungskonformen Informationsordnung*, NJW 1984, 398. The concept is similar to Westin's definition of "information privacy" almost twenty years earlier, namely "the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others." WESTIN, *supra* note 4, at 7.

47 *See* Gesetz zur Fortentwicklung der Datenverarbeitung und des Datenschutzes ("BDSG") (Federal Data Protection Act) v. 20.12.90 (BGB1.I S.2954). For example, provisions

of interest group dominance in the area of information privacy legislation, this result should never have occurred. Pro-business, laissez-faire lawmakers had no rational incentives to side against the powerful private sector interest groups which opposed the amendment. A much more rational approach would have been to pay superficial lip service to the court decision, but to keep the changes in the use of personal information by the private sector to an absolute minimum.[48] But the political decisionmakers chose otherwise and indeed, were neither defeated in the general elections nor did they fundamentally alienate business interest groups.

The legislators' behavior was irrational. But the interest group model described above may be salvaged by explaining their actions through one of the three exceptions to the general rule. At first sight, one might be tempted to apply the single issue exception. After all, the German census debate was about a very narrowly-defined, single issue. But the public debate was raging in the early eighties, ending with the decision of the Constitutional Court in 1983 which found the census law to be unconstitutional. The Data Protection Act, on the other hand, was passed in 1990, at a time when neither the public nor the media focused on privacy issues. In addition, citizens' initial concerns in 1983 were not on private sector uses, but on public sector uses of personal information. Thus, the strengthening of private sector limitations on the use of personal data, as brought about by the 1990 amendment, disappeared from the public agenda. Neither were lawmakers particularly affected by private sector uses of information in 1990—certainly not more so than other citizens. Finally, there is no evidence that German lawmakers wanted to suddenly rise to "irrational sainthood" by pushing through a data protection amendment further regulating the private sector.

Rational choice advocates might use the examples described, particularly the German one, and point out that the European legislative process differs from that which takes place in the United States. In European nations, according to this argument, laws are not truly drafted by legislators, but by ministerial bureaucrats, and are championed by the governments in power, who usually hold substantial majorities in the legislature. In stark contrast to elected politicians, these tenured law-drafting bureaucrats form an elite body which is largely isolated from interest group influence. Or, in rational choice parlance, there is a principal-agent dysfunction[49] between interest groups, self-interested politicians, and unaffected bureaucrats.

This argument, however, overlooks the politicians' "power of the purse."[50] Lawmakers may not be able to put tenured bureaucrats out of their

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were amended (§ 8 BDSG) that shifted the burden of proof to the party processing personal data in liability and damage law suits and extended protection to all phases of information management, including information acquisition (§ 33 BDSG).

48 This seems to be the recent approach of the Austrian government in transforming the EU Privacy Directive into national law. *See* VIKTOR MAYER-SCHÖNBERGER & ERNST O. BRANDL, DATENSCHUTZGESETZ 2000 (1999).

49 *See* William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 301-02 (1988).

50 Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 44 (1998).

jobs, but they can certainly make their lives miserable by denying future budget requests and trimming existing budget lines. Furthermore, rational choice critics have noted that the principal-agent question is not limited to the relationship between bureaucrats and politicians, but is present at a number of levels in political decisionmaking.[51] In fact, as Steven Croley has pointed out, rational choice theory "highlights principal-agent complexities on the legislative side, but implicitly downplays them on the administrative side."[52]

Also, by pointing to tenured bureaucracies in Europe supposedly isolated from interest group influence, rational choice advocates draw their conclusions from crass over-simplifications of the decisionmaking processes in the United States and in Europe. These theorists overstate the dysfunctional link between bureaucracies and governments in Europe, while underrating this problem in the United States, in effect undermining their own straightforward economic argument.

C. *Business as Usual?—The Case of the United Kingdom Privacy Act 1984*[53]

The simple bipolar model put forth by rational choice theorists to describe the existence or absence of information privacy legislation, in which interest groups always play the decisive role, not only fails to adequately describe the data protection developments in continental Europe, but also in the United Kingdom. In the early eighties, the Organization for Economic Co-operation and Development ("OECD") and the Council of Europe drafted and signed two major international documents on data protection.[54] While the OECD document was non-binding,[55] the Council of Europe's Convention on Privacy and Data Protection required signatories under international law to bring their national legal frameworks in line with the Convention's principles.[56]

To prevent circumvention through the routing of personal data to other, more permissible jurisdictions, the Convention permitted member states to restrict the export of personal data to other countries, if these states had no

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51 *See id.* For an assessment of a similar principal-agent problem in rational choice theory, see Green and Shapiro's analysis of the U.S. Congress Committees. *See* GREEN & SHAPIRO, *supra* note 14, at 197-99.

52 *See* Croley, *supra* note 50, at 45 n.113.

53 Data Protection Act 1984, c. 35.

54 *See* Council of Europe, Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, January 28, 1981, Eur. T.S. No. 108, 19 I.L.M. S71 (1981) [hereinafter Council of Europe Convention]; Organisation for Economic Co-Operation and Development, Recommendation of the Council concerning Guidelines governing the protection of privacy and transborder flows of personal data, adopted by the Council 23 September 1980, OECD Doc. C(80) 58 final (1980) [hereinafter OECD Guidelines].

55 "The Council . . . *recommends* [t]hat Member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the Guidelines." OECD Guidelines (emphasis added).

56 *See* Council of Europe Convention, art. 4(1) ("Each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter.").

adequate protection of information privacy currently in place.[57] Fearing being "cut off"—as most European nations had signed on to the two privacy documents[58]—British business groups advocated for the omnibus data protection act, which eventually was passed in 1984.[59]

Proponents of a rational choice approach may view this example as a typical case of interest group alignment. After all, the interest groups decided it was better to be somewhat burdened by data protection legislation than to be cut off from doing business with the rest of the European Community, which consisted of Britain's biggest trading partners.[60]

This indeed may have represented a rational choice of the interest groups involved. But were the actions of the interest groups the reason British legislators ultimately voted for the data protection act?[61] Even more importantly, if being in favor of such regulations is rational in the British example, why isn't it rational for United States interest groups? After all, the United States today, like Britain was in the early eighties, is the largest trading partner of the European Union.[62] Three hundred thirty million Europeans have enough money to spend on American goods to make Europe a most attractive market for the export of goods and services.[63]

On the other hand, the European Union has passed a comprehensive Directive protecting personal data both in the private and the public sector.[64] The directive mandates the free flow of information within the European Union's member states while ensuring a high level of protection both in the public and the private sector.[65] At the same time, any transfer outside of this

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57 *See id.* art. 12(3)(a).

58 By 1984 the following countries had signed on to, and later ratified, the Council of Europe Convention: Austria (signed in 1981, ratified in 1988), Belgium (1982, 1993), Denmark (1981, 1989), France (1981, 1983), Germany (1981, 1985), Greece (1983, 1995), Iceland (1982, 1991), Italy (1983, 1997), Luxembourg (1981, 1988), Norway (1981, 1984), Portugal (1981, 1993), Spain (1982, 1984), Sweden (1981, 1982), Turkey (signed in 1981), United Kingdom (1981, 1987). *See* Council of Europe: Signatures and Ratifications ETS No. 108 (last modified June 23, 1999) <http://www.coe.fr/tablconv/108t.htm>. As of 1994, all OECD member states have adopted the OECD Guidelines. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PRIVACY AND DATA PROTECTION: ISSUES AND CHALLENGES (1994).

59 *See* BENNETT, *supra* note 34, at 91.

60 *See id*; *see also* Simon Davies, *Connected: Brussels Teeth for Privacy Watchdog Analysis— Feeble British Data Protection Law has Satisfied Nobody*, DAILY TELEGRAPH, Oct. 14, 1997 ("The only reason it was passed in the first place was that British businesses were worried that that their data trade with some privacy-loving European partners, such as Germany, would be imperiled.").

61 See GREEN & SHAPIRO, *supra* note 14, at 34-38, for a critique of the mono-causal approach of public choice theory.

62 *See* U.S. Census Bureau, FT900—U.S. International Trade in Goods and Services, Exhibit 14a: Exports, Imports and Balance of Goods by Selected Countries and Geographic Areas—1998 <http://www.census.gov/foreign-trade/Press-Release/99_press_releases/February/exh14a.txt>. Moreover, America's total trade with the European Union increased by more than 50 (!) percent between 1993 and 1998. *See At Daggers Drawn*, THE ECONOMIST, May 8, 1999, at 17, 18.

63 In 1997, the European Union had a per-capita GDP (based on current purchasing power parities) of $20,546. *See* GDP Per Capita (last visited Jul. 14, 1999) <http://www.oecd.org/std/gdpperca.htm>.

64 *See* Directive 95/46/EC, 1995 O.J. (L 281) 31.

65 *See id.* at 3.

territory of high protection and free flow is severely restricted in cases where it can be demonstrated that the exported data is not afforded a similarly high level of protection abroad.[66] The adequacy of privacy protection abroad may, according to the Directive, either be guaranteed by a national omnibus data protection statute similar to the Directive,[67] or by comparable contractual warranties of the processing party.[68]

Given the strong economic incentives to engage in commerce with Europe, and the threat of being excluded from such commerce because of the lack of privacy protection, American private sector interest groups, like their British counterparts fifteen years ago, should have chosen to lobby for stringent data protection laws covering the private sector. But so far they have not. The interest group model advertised to explain political decisionmaking in the information privacy realm fails to account for this stark and unexpected dissimilarity in the British and American examples. Although the facts of the two cases are comparable, the results differ substantially.

None of the three exceptions apply to the British case but not the American. There was no "single issue" that permitted the British parliament, but not the U.S. Congress, to overcome interest group opposition, not least because there was no substantial interest group opposition in Britain.[69] Similarly, British legislators were not dramatically more affected by privacy intrusions from the private sector than their American counterparts. It is also quite unlikely that American politicians act rationally while their British colleagues' behavior in 1984 was devoid of any self-interest.

But it is not so much the rationality of politicians that differentiates the two countries here as much as the rationality of interest groups: these groups opposed legislation in the United States while acquiescing to regulation in Britain. However, at least in theory private sector interest groups—much more than governments or citizens—will act truly rationally. Thus, British businesses must have somehow found the free flow of information, combined with some protection of privacy, to be substantially more advantageous than did their American peers.

But, given the similar conditions in both nations, according to rational choice theory, either the British or the American interest groups then have behaved irrationally by choosing a strategy that fails to maximize their self-interests. Either way, this outcome cannot be explained by the simple "two scenario" model of information privacy legislation.

Conclusion

Rational choice theory attempts to explain political decisionmaking by applying economic models to legislative processes. Informally, some privacy experts have suggested that a strand of rational choice theory can clarify U.S.

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66 *See id.* art. 25.

67 *See id.* art. 25(2).

68 *See id.* art. 26(2).

69 See BENNETT, *supra* note 34, at 91, for the argument that, because of significant trading with European countries, there was no substantial opposition to the Data Protection Act 1984 in the United Kingdom.

information privacy legislation (or the lack thereof) in the public and the private sector. These theorists suggested a bipolar model which consists of the government and citizens, and in which interest groups play the decisive role.

Such a simplistic model of legislative decisionmaking suffers, as has been mentioned, from a number of theoretical shortcomings. More importantly, though, the model fails to explain the numerous enactments of data protection laws in Europe, as the cases of France, Austria, Germany, and Great Britain have illustrated. The first wave of data protection statutes passed despite the fact that they were not highly publicized single-issue proposals. The example of the German data protection amendment of 1990 illustrates that legislators may even strengthen privacy protection in the private sector without an obvious rational reason for them to do so. The British case finally made clear that even private sector interest groups may support privacy legislation and still remain perfectly rational. Further, the rational choice model fails to explain the "irrational" behavior of American interest groups vis-a-vis their British counterparts, except of course, if one were to suggest that the British in particular and Europeans in general tend not to be cutthroat rationalists, but "irrational saints."

This finding discredits the universal application of the suggested bipolar interest group model to accurately explain the existence or absence of privacy legislation, but not necessarily rational choice theory on the whole. Whether a different, perhaps more complex or territorially limited rational choice model may ultimately "work," remains to be seen. Until then, we have no choice but to continue searching for a different reasoning.