

3-2007

# Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process

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## Recommended Citation

Napoli, Philip M. and Seaton, Michelle (2007) "Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process," *Federal Communications Law Journal*: Vol. 59: Iss. 2, Article 3.  
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# Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process

**Philip M. Napoli\* & Michelle Seaton\*\***

This project was conducted with the support of a grant from the Social Science Research Council, as part of its Necessary Knowledge for a Democratic Public Sphere Program, which is supported by the Ford Foundation's Electronic Media Policy Portfolio.

I. INTRODUCTION.....	296
II. RESEARCH AND POLICYMAKING.....	298
III. EXTERNAL STAKEHOLDERS AND POLICY RESEARCH.....	303
IV. INFORMATION ASYMMETRIES AND POLICY RESEARCH.....	306
V. PRIVATIZATION OF DATA.....	307
VI. CASE STUDY: MEDIA OWNERSHIP.....	315
VII. THE NEED FOR IMPROVED ACCESS TO COMMERCIAL DATA SOURCES FOR POLICY RESEARCHERS.....	320
VIII. RECOMMENDATIONS.....	322
IX. CONCLUSION.....	330

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## I. INTRODUCTION

The communications policymaking process is becoming increasingly research-driven.<sup>1</sup> As has been seen across all policy sectors, policymakers rely heavily upon both internally- and externally-generated empirical studies in the formulation of, and justification for, specific policy decisions.<sup>2</sup> This has proven to be a controversial trend, both within and beyond communications policymaking, as debates have arisen about the appropriate role, usage, and capabilities of empirical research in policymaking.<sup>3</sup> Regardless of these disputes, it is safe to say that both the demand for—and utilization of—research have become more pronounced in communications policymaking. Consequently, stakeholders seeking to have an impact on policy outcomes find themselves increasingly reliant upon research to effectively support their policy arguments.<sup>4</sup>

One aspect of this trend that has been neglected, however, involves the growing importance of data generated by large-scale commercial data providers to policymaking and policy analysis. That is, market, audience, and content data gathered and aggregated by commercial organizations such as Nielsen Media Research,<sup>5</sup> BIA Financial Network,<sup>6</sup> Arbitron,<sup>7</sup> and Kagan Research<sup>8</sup> play an increasingly prominent role in the research submitted to—and conducted by—the FCC. These data providers often are the sole source of specific information that is central to developing portraits

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1. See Philip M. Napoli, *The Broadening of the Media Policy Research Agenda*, SOCIAL SCIENCE RESEARCH COUNCIL, available at <http://www.ssrc.org/programs/media/publications/PhilipNapoli.1.Final.doc>. (arguing that the media policy research agenda is broadening beyond economic/technological issues to account for political and cultural issues as well).

2. See *infra* notes 12–60 and accompanying text.

3. See *infra* notes 23–26, 46–50 and accompanying text.

4. See *infra* notes 51–60 and accompanying text.

5. Nielsen Media Research is the primary provider of national and local television audience ratings in the United States and in many other countries around the world. Clients include broadcast and cable networks, advertisers, local stations, and cable systems. Nielsen also provides Internet audience data through its Nielsen NetRatings affiliates. See Nielsen Media Research, <http://www.nielsenmediaresearch.com> (last visited Feb. 9, 2007).

6. BIA provides financial, ownership, and market data for the broadcast television, radio, and newspaper industries in the United States. Clients include financial institutions, investors, and media organizations. See BIA Financial Network, <http://www.bia.com> (last visited Feb. 9, 2007).

7. Arbitron is the primary provider of national and local radio audience ratings in the United States. Clients include radio stations, networks, and advertisers. See Arbitron, <http://www.arbitron.com> (last visited Feb. 9, 2007).

8. Kagan Research provides financial data, industry forecasts, and sector-specific newsletters for the cable, broadcast television, wireless, and motion picture industries. Clients include financial institutions, investors, and media organizations. See Kagan Research, LLC, <http://www.kagan.com> (last visited Feb. 9, 2007).

of media markets, audience behavior, or content availability,<sup>9</sup> and are at the core of policy decision making, analysis, and advocacy. However, these data sources also are often enormously expensive and are thus difficult to access. And, in some instances, the access terms can be very prohibitive—in ways that can undermine the effective dissemination of the research.

This Article considers the implications of the prominence of commercial data in the communications policymaking process. Specifically, this Article considers the kinds of imbalances in policy advocacy and policy decision making that may be created by unequal access to these important data sources by the various stakeholders involved in the policymaking process. Drawing upon theoretical and empirical work related to information asymmetries and knowledge utilization, this Article argues that the contemporary communications policymaking environment is one in which the disparity in resources across various stakeholder groups is amplified by the associated imbalances in access to the commercial data sources that are increasingly central to policy decision making and to persuasive policy advocacy. This Article therefore proposes a number of solutions to correct this imbalance and thereby reduce the information asymmetries that characterize contemporary communications policy analysis and policy advocacy.

The first Part of this Article provides background on the policymaking process and the role of research in this process, drawing upon the growing body of literature that focuses on knowledge utilization in policymaking. This Part documents the increasingly empirical orientation that has characterized policymaking as a whole and communications policymaking in particular. This Part also documents the importance of external policy analysts (i.e., scholars, advocates, industry associations, think tanks) and their research to policy decision making. This Part then situates these trends within the concept of information asymmetries and their impact on policy decision making.

The second Part explores the privatization of the data that feed into contemporary policy analysis. This Part documents trends across policymaking and database construction in general, as well as within the specific context of communications policymaking. This Part includes a case study of the FCC's 2003 media ownership decision<sup>10</sup> in order to illustrate the prominence that commercial data sources can play in

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9. For an analysis of the economics of ratings firms, see Harold Furchtgott-Roth, Robert W. Hahn & Anne Layne-Farrar, *Regulating the Raters: The Law and Economics of Ratings Firms 2* (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper 06-02, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=886099](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886099).

10. 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rule Making*, 18 F.C.C.R. 13620 (2003) [hereinafter 2002 Biennial Review].

communications policymaking and policy analysis, as well as the complications that can arise from this reliance upon such sources. This Part documents the range of commercial data sources used both by the FCC and by those filing comments/analyses cited by the Commission in connection with its June 2003 Report and Order.<sup>11</sup>

The third Part considers the normative arguments in favor of granting policy researchers broader access to data sources. This Part outlines the social benefits associated with expanded data access, as well as the dangers and costs associated with a policymaking environment in which substantial data access disparities exist.

The fourth Part offers a set of recommendations for developing expanded data access for policy researchers. This Part explores possible mechanisms for enhancing the role of the government in data gathering, as well as mechanisms (including legislation) for developing greater access to commercial data sources for policy researchers in ways that balance the financial imperatives of commercial data providers (whose adequate financial incentives are essential to the continued generation of these data sources) with the public interest considerations regarding the effective operation of the policymaking process. The concluding Part summarizes the key arguments presented in this Article and offers suggestions for further research.

## II. RESEARCH AND POLICYMAKING

Regulatory decision making inevitably involves the blending of empirical findings with normative judgments.<sup>12</sup> This, however, is a challenging balance to strike,<sup>13</sup> and one that requires an integration of value judgments and logical calculations.<sup>14</sup> Nonetheless, many observers of the policymaking process have identified a continued trend toward a greater reliance upon empirical research as part of a greater "rationalization" of

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11. *Id.*

12. Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 666 (2005). See also Paul Sabatier, *The Acquisition and Utilization of Technical Information by Administrative Agencies*, 23 ADMIN. SCI. Q. 396, 397 (1978) ("No policy decision can be based solely on technical information. Normative elements invariably enter, whether the value choices come from the statute, the personal philosophies of administrative officials, or their efforts to balance the preferences of competing constituencies.").

13. GIANDOMENICO MAJONE, EVIDENCE, ARGUMENT AND PERSUASION IN THE POLICY PROCESS 5 (1989) ("[H]ow can one separate the scientific from the political and value components of policy issues that encompass both?").

14. *Id.* at 8 ("Since to say anything of importance in public policy requires value judgments, this artificial separation between values and rational capacities is a threat to all notions of public deliberation and defensible policy choices . . . facts and values are . . . intertwined in policy-making . . .").

policy decision making.<sup>15</sup> Albaek describes the introduction of evaluation and policy research into U.S. policymaking in the 1960s and 1970s as “one of the most comprehensive attempts so far to allow research to make its original, relevant contribution to changing society for the better . . . .”<sup>16</sup>

There have been a number of explanations for this development. Some argue that it is a purely needs-driven phenomenon. As the National Research Council has noted, “As the economy grows more complex and the population becomes more diverse, increasingly detailed data and data analyses are required for policies to match well with economic and demographic realities. This is true not only for policy making, but also for policy assessment and evaluation.”<sup>17</sup> Others take a more critical stance, seeing this trend as a mechanism for marginalizing the citizenry in the policymaking process as well as marginalizing the role of value judgments in policy decision making.<sup>18</sup> Regardless of the reason, this trend certainly can be described as a self-sustaining process, one in which the initial influx of empirically-minded personnel into policymaking bodies creates internal motivations for empirical analysis, which in turn furthers the staffing of these bodies with similarly oriented personnel.<sup>19</sup>

These broad trends certainly characterize communications policymaking, where a stronger emphasis on research-driven policymaking developed within the Federal Communications Commission in the 1970s

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15. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 6–7 (1997) (describing the “rationality project” that she sees “at the core of American political culture since the beginning.”). *See also* BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* xi (1996) (noting that the “possibility of isolating objective truths from human values, and the ability to capture what is most important about public life with science, shapes both experts’ attempts to inform policy-making and scholars’ struggles to define methodology for understanding political action.”); Kurt Finsterbusch & Mary R. Hamilton, *The Rationalization of Social Science Research in Policy Studies*, 19 INT’L. J. COMP. SOC. 88, 88 (1978) (“Social scientists are becoming increasingly involved in policy research.”). *See generally* THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991).

16. Erik Albæk, *Between Knowledge and Power: Utilization of Social Science in Public Policymaking*, 28 POL’Y SCI. 79, 81 (1995).

17. NATIONAL RESEARCH COUNCIL, *EXPANDING ACCESS TO RESEARCH DATA: RECONCILING RISKS AND OPPORTUNITIES* 17 (2005).

18. *See, e.g.*, PETER DELEON, *DEMOCRACY AND THE POLICY SCIENCES* (1997); Douglas Torgerson, *Between Knowledge and Politics: Three Faces of Policy Analysis*, 19 POL’Y SCI. 33 (1986).

19. Sabatier, *supra* note 12, at 402 (“employees who are scientists or members of a profession with a tradition of empirical research also create significant internal pressures for technical analysis because of their training, their desire for esteem from their professional peers, and the enjoyment and sense of personal competence such research provides.”) (citations omitted).

and 1980s,<sup>20</sup> and the personnel make-up of the FCC shifted accordingly.<sup>21</sup> In 1973, the Commission introduced its own internal research and planning enterprise, the Office of Plans and Policy, so that the Agency would be better equipped with the data and analyses it deemed necessary to guide its decision making.<sup>22</sup>

A common concern raised about this trend, however, involves the extent to which it represents legitimate efforts to bring greater objectivity and analysis to policy decision making—or, rather, that research and analysis have been primarily utilized in support of predetermined policy outcomes. From this latter perspective, “research is used as ‘political ammunition,’”<sup>23</sup> serving a “legitimation” function in the realms of policymaking and policy advocacy.<sup>24</sup> Sabatier summarizes this position well when he notes, “it is quite likely that administrative agencies devote a considerable portion of their resources to the *acquisition* of technical information but that this information is often *utilized* to legitimate, rather than to influence, policy decisions.”<sup>25</sup> The credibility of the research inevitably gets called into question from this standpoint, as policymakers who are not, in fact, seeking decision-making guidance from empirical research, but rather, are seeking studies that support specific predetermined policy outcomes, may not engage in appropriate scrutiny in either the commission or the assessment of individual pieces of research.<sup>26</sup>

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20. As was characteristic across policymaking sectors, economics was the primary discipline around which this greater empirical orientation in policymaking was organized. See ROBERT CORN-REVERE, *Economics and Media Regulation*, in MEDIA ECONOMICS: THEORY AND PRACTICE 71, 83 (1993) (describing the FCC’s move away from an “intuitive model” of policymaking and the agency’s “newly discovered interest in the collection of economic data and analysis”); Philip M. Napoli, *The Unique Nature of Communications Regulation: Evidence and Implications for Communications Policy Analysis*, 43 J. BROAD. & ELEC. MEDIA 565 (1999) (discussing the implications of this trend for communication policymaking) [hereinafter *Unique Nature of Regulation*].

21. Wenmouth W. Williams, Jr., *Impact of Commissioner Background on FCC Decisions, 1975–1990*, in MEDIA AND PUBLIC POLICY 43 (Robert J. Spitzer ed., 1993).

22. See Philip M. Napoli, *Government Assessment of FCC Performance: Recurring Patterns and Implications for Recent Reform Efforts*, 22 TELECOM. POL’Y 409, 417 (1998). The Office of Plans and Policy was renamed the Office of Strategic Planning and Policy Analysis in 2003, at which point it was both expanded and restructured. See FCC, Name Change of the Office of Plans and Policy, Order (Mar. 5, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-03-445A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-445A1.pdf).

23. See Albæk, *supra* note 16, at 85.

24. James M. Rogers, *Surrendering the Ideal of Disinterestedness in the Policy Research Process: A Cautionary Note*, 2 KNOWLEDGE IN SOC’Y 6, 12 (1989) [hereinafter *Surrendering the Ideal*].

25. Sabatier, *supra* note 12, at 396.

26. Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROB. 63, 79 (2003). Wagner’s article states:

Agencies might have numerous reasons to rely on weak or valueless studies to

However, others argue that this kind of political utilization of research and analysis is perfectly consistent with principles of democratic deliberation, and the notion of a truly objective and rational policymaking process is an ideal type that never has, and never will, characterize the realities of policymaking.<sup>27</sup> Rather, policy analysis is better considered as a form of argument.<sup>28</sup> According to Rogers, "It seems that the policy research community is gradually coming to accept the politicization of knowledge utilization."<sup>29</sup> As a result, policy researchers have become more comfortable with politicized uses of their work and even more willing to consciously and directly employ their research expertise in more overtly political manners.<sup>30</sup> Similarly, analysts of the policymaking process have come to understand that politics and analysis can not be completely divorced.<sup>31</sup> The key, however, is that both rational and political approaches to the policymaking process involve substantial reliance upon research and analysis, albeit for different purposes.<sup>32</sup>

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support regulation. For example, either low-level staff or micro-managing, high-level administrators with political objectives might have both the incentive and opportunity to commission or combine studies that lead to a predetermined result. Malaise and inattention might also cause agency staff to include in their analyses studies that are not sufficiently scrutinized.

*Id.*

27. MAJONE, *supra* note 13, at 12–20 (discussing "decisionism": the model of a completely rational and objective approach to policy analysis that fails to provide a "realistic view of the uses of knowledge and analysis in policy deliberation"). See also Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 531 (1985) (presenting a theoretical model illustrating the value and utility of biased information and selectively consulting information sources according to particular biases for policymakers).

28. MAJONE, *supra* note 13, at 7 (stating:

The job of analysts consists in large part of producing evidence and arguments to be used in the course of public debate. . . . The arguments analysts produce may be more or less technical, more or less sophisticated, but they must persuade if they are to be taken seriously in the forums of public deliberation.)

29. *Surrendering the Ideal*, *supra* note 24.

30. *Id.* at 8 (characterizing uses of analysis as "strategic behavioral responses" in the policymaking and policy advocacy processes).

31. Bob L. Johnson, Jr., *The Politics of Research-Information Use in the Education Policy Arena*, 13 EDUC. POL'Y 23, 25 (1999) ("In short, post-Great Society policy frameworks reflect an increased sensitivity to the political nature and use of research information in the policy-making process.").

32. See MAJONE, *supra* note 13, at 33.

[I]t is wrong to assume that the only legitimate use of analysis is to assist the policymaker in discovering a solution to a problem. Policymakers need retrospective (postdecision) analysis as least as much as they need prospective (or predecision) analysis, and probably more. . . . As long as rationality is defined as choosing the best means to a given end, it is natural to consider retrospective justificatory arguments as being outside the pale of professional analysis—"mere rhetoric," propaganda, or rationalization. However, this instrumental view is not an adequate characterization of the role of reason in human affairs.



Not surprisingly, to the extent that there has developed a strong impetus for tighter linkages between research and policymaking,<sup>33</sup> there also has developed a substantial body of literature examining if and how research is, in fact, being used.<sup>34</sup> While the conclusions within this body of literature are wide ranging, most relevant to this Article are the findings that research can impact policymaking in a variety of ways, and that this impact can be both direct and indirect.<sup>35</sup> Indeed, one of the greatest challenges in the field of knowledge utilization research involves effectively capturing the variety of ways in which the use of a particular piece of research might take place.<sup>36</sup> In some (perhaps rare) instances, the relationship between research and decision outcomes may be very direct, with a particular study directly influencing a specific policy decision. In other instances, utilization of research may take place at a more abstract level, impacting which issues policymakers choose to focus their attention on, or perhaps influencing how a particular policy issue is framed.<sup>37</sup> There

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*Id.*

33. See Daniel Breslau, *The Political Power of Research Methods: Knowledge Regimes in U.S. Labor-Market Policy*, 26 THEORY & SOC'Y 869, 870 (1997) (as an example of the frequent calls for stronger linkages between research and policymaking) ("social-scientific research rarely has a discernible effect on policy decisions . . ."). See also Jan Hutjes, *Policy Research: Between the Accumulation and Implementation of Knowledge*, 4 KNOWLEDGE & POL'Y 10 (1991); James M. Rogers, *Social Science Disciplines and Policy Research: The Case of Political Science*, 9 POL'Y STUD. REV. 13 (1989) [hereinafter *Social Science*]. For examples that focus specifically on the communications policy context, see Philip M. Napoli & Nancy Gillis, *Reassessing the Potential Contribution of Communications Research to Communications Policy: The Case of Media Ownership*, J. OF BROAD. & ELEC. MEDIA (forthcoming) [hereinafter *Reassessing Contribution*]; *Unique Nature of Regulation*, *supra* note 20; Steven S. Wildman, *Toward a Better Integration of Media Economics and Media Competition Policy*, in A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY 573 (1998).

34. See, e.g., Albæk, *supra* note 16; Janice M. Beyer & Harrison M. Trice, *The Utilization Process: A Conceptual Framework and Synthesis of Empirical Findings*, 27 ADMIN. SCI. Q. 591 (1982); Rejean Landry, Moktar Lamari & Nabil Amara, *The Extent and Determinants of Utilization of University Research in Government Agencies*, 63 PUB. ADMIN. REV. 192 (2003); Cheol H. Oh & Robert F. Rich, *Explaining Use of Information in Public Policymaking*, 9 KNOWLEDGE & POL'Y 3 (1996); Sabatier, *supra* note 12.

35. David J. Webber, *The Distribution and Use of Policy Knowledge in the Policy Process*, 4 KNOWLEDGE & POL'Y 6 (1991) (discussing in detail the various uses of research in the policymaking process).

36. See Landry, Lamari & Amara, *supra* note 34, at 202.

37. See, e.g., Carol H. Weiss, *Research for Policy's Sake: The Enlightenment Function of Social Research*, 3 POL'Y ANALYSIS 531, 533-34 (1977):

The major use of social research in public policymaking may not be problem solving . . . [r]esearch use appears to be a much more diffuse and circuitous process. Evidence suggests that government officials use research less to arrive at solutions than to orient themselves to problems. They use research to help them think about issues and define the problematics of a situation, to gain new ideas and new perspectives. They use research to help *formulate* problems and to set the agenda for future policy actions. And much of this use is not deliberate, direct,

may be a variety of stages in the decision-making process in which research may have an impact.<sup>38</sup> Indeed, when a somewhat broader notion of the “use” of research is employed, the apparent role of research in the policymaking process expands considerably.<sup>39</sup>

Thus, as this review is meant to suggest, regardless of how research is used (or misused) in the policymaking process, its potential for influence has grown.<sup>40</sup> As a result, those interested in the extent to which the mechanisms of the policymaking process reflect and serve the full range of relevant policy considerations need to consider the dynamics surrounding the generation of policy-relevant research.

### III. EXTERNAL STAKEHOLDERS AND POLICY RESEARCH

One key element of these dynamics involves the extent to which external stakeholders are serving an increasingly important research function in the policymaking process. Many observers of the policymaking process suggest that the role of external analysts and researchers is becoming more prominent and more influential.<sup>41</sup> There are normative reasons for this kind of outsourcing of the analytical work that informs policymaking. According to the National Research Council, because the scope of research by governmental agencies is often narrowly focused, “data access by other researchers is necessary to ensure that alternative methodologies and uses are fully explored to advance social science knowledge and the design and evaluation of public policies.”<sup>42</sup> The separation between researchers and policymakers is further explored by Weiss, who notes that:

Researchers are not expected to participate as decision makers. In the public policy sphere, their task has generally been to illuminate the

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and targeted, but a result of long-term percolation of social science concepts, theories, and findings into the climate of informed opinion.

*Id.*

38. See Landry, Lamari & Amara, *supra* note 34, at 194. The authors identify six stages of knowledge utilization: reception, cognition, discussion, reference, effort, and influence, each ultimately reflecting different ways that research can be incorporated into the policymaking process.

39. See *id.* at 202 (discussing when employing multiple stages of knowledge utilization into the research design, “findings suggest that university research is used more extensively than is commonly assumed.”).

40. See Oh & Rich, *supra* note 34, at 3 (“Whether policy processes are perceived as political or scientific activities, decision makers often face the necessity of using information in making complicated and dynamic decisions.”).

41. See BIMBER, *supra* note 15, at 1 (“The numbers of these external experts [performing policy analysis] have increased dramatically in recent decades . . . forming what has been called the ‘fifth branch’ of government.”).

42. NATIONAL RESEARCH COUNCIL, *supra* note 17, at 38.

consequences of alternatives in order that people in positions of authority can know what they will get and what they will give up when they select a particular course.<sup>43</sup>

Academic researchers often are identified as playing a particularly important role in this process, serving as the “second community” in the knowledge utilization process that provides research to policy decision makers (the “first community”).<sup>44</sup> Within the context of communications policymaking, Bauer et al., found that while some research and ideas are generated within policymaking institutions, “most originates from outside and needs to be introduced to policy-making and further processed by policy-makers.”<sup>45</sup> Findings such as these highlight the importance of maintaining both the quantity and quality of external research, as policymakers are becoming increasingly dependent upon this research in the formulation of their policy priorities and in their choice of policy solutions.

There are, of course, dangers inherent in such a system as well. Perhaps the most obvious, and most compelling, involves the possibility of biased analyses being injected into the policy process by stakeholders with a vested interest in a specific outcome. Such concerns become particularly acute in light of frequent observations that such external analyses do not necessarily receive sufficient scrutiny before they are used in policy formation.<sup>46</sup> Indeed, numerous criticisms have been leveled over the years against the use of “junk science” in policy decision making.<sup>47</sup> Wagner and

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43. Carol H. Weiss, *Policy Research as Advocacy: Pro and Con.*, 4 KNOWLEDGE & POL’Y 37, 38 (1991).

44. See Daniel Cohn, *Jumping into the Political Fray: Academics and Policy-Making*, INST. FOR RES. ON PUB. POL’Y, May 2006, at 3, <http://www.irpp.org/pm/archive/pmvol7no3.pdf>.

45. JOHANNES M. BAUER ET AL., MAKING U.S. TELECOMMUNICATIONS POLICY: WHO PARTICIPATES AND WHO IS HEARD? THE ROLES OF RESEARCH AND IDEAS, (Quello Center, Michigan State University, 2006), <http://www.quello.msu.edu/research/FORD01/WhitePaper.doc> (analyzing how stakeholders influence communications policymaking). See generally John M. de Figueiredo & Emerson H. Tiller, *The Structure and Conduct of Corporate Lobbying: How Firms Lobby the Federal Communications Commission*, 10 J. OF ECON. & MGMT. STRATEGY 91 (2001).

46. Linda R. Cohen & Robert W. Hahn, *A Solution to Concerns Over Public Access to Scientific Data*, 285 SCIENCE 535, 535 (1999) (“At present, analyses used in policy-making are rarely checked carefully before big regulations are put in place.”). See also Wagner, *supra* note 26, at 66 (“Problems with the quality of science underlying regulations arise if an agency weights these low-quality studies too heavily or ignores or gives insufficient credence to high quality research.”).

47. See *id.* at 79 (stating:

Agencies might have numerous reasons to rely on weak or valueless studies to support regulation. For example, either low-level staff or micro-managing, high-level administrators with political objectives might have both the incentive and opportunity to commission or combine studies that lead to a predetermined result.

Michaels argue that policy concerns over the objectivity and quality of scientific research used in policymaking have misguidedly emphasized publicly financed research to the neglect of external, privately funded and conducted research.<sup>48</sup> They document the various mechanisms that frequently are employed by private stakeholders to intentionally bias the privately-funded research that frequently is injected into—and relied upon in—the policymaking process, such that private research appears to be far more suspect than the publicly-funded research that has been the focus of regulatory attention.<sup>49</sup> The Authors therefore recommend that the exact same regulatory oversight mechanisms that currently are applied to publicly funded research be applied to privately funded research.<sup>50</sup>

What has been described, then, is a somewhat paradoxical situation: one in which policymakers increasingly rely upon research in their work but at the same time are ceding more of this research function to external stakeholders. In a policymaking environment that is increasingly research-driven, and in which outside stakeholders are expected to make the bulk of the substantial analytical contributions to the policymaking process, any stakeholder group's ability to effectively advocate for specific policy outcomes is becoming increasingly tied to that group's ability to conduct or commission relevant research. The mindset of policymakers is often heavily weighted in favor of arguments based upon empirical data. As has been noted within the context of environmental regulation, "comments not framed as 'scientific input' often remain ignored."<sup>51</sup> This is often equally true in communications policy contexts. In 2003, then-FCC Chairman Michael Powell noted, in response to an overwhelming tide of public comment against the relaxation of the FCC's media ownership rules,<sup>52</sup> that

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Malaise and inattention might also cause agency staff to include in their analyses studies that are not sufficiently scrutinized).

48. Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J. OF LAW & MED. 119, 120 (2004) ("[T]o the extent that there is a problem with regulatory science . . . the 'sound science' reforms miss the target by taking aim at public, rather than private science.").

49. *Id.* at 122–28 (describing tactics such as the falsification of data and research findings, ends-oriented biases in research design and reporting and the suppression of adverse results).

50. *Id.* at 148 ("[W]e recommend that whatever oversight is given to public research (and the appropriate level is certainly open to question) should also be applied to private research.").

51. See Tai, *supra* note 12, at 685 (citing Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, at 1062–63 (1997)).

52. See generally Press Release, Future of Music Coalition, Citizens Urge FCC to Retain Current Media Ownership Rules (May 14, 2003), <http://www.futureofmusic.org/images/PRFCCdocket.pdf> (documenting that over 99 percent of individuals and

such comments should not be considered as evidence because, according to Powell, “they tend to be at a very generalized level.”<sup>53</sup>

#### IV. INFORMATION ASYMMETRIES AND POLICY RESEARCH

It is within these dynamics that concerns about information asymmetries derived from inequitable data access arise. A number of researchers across a variety of disciplines have explored the concept of information asymmetries in relation to the policymaking process.<sup>54</sup> In some instances, the role of research has been a focal point for such analyses. Tai, for instance, in an analysis of environmental regulation, identifies asymmetries in participants’ abilities to proffer information to agencies and to process and understand information they receive from agencies as a key factor that can lead to “interest-group domination by parties better able to generate, receive, and process information.”<sup>55</sup>

The institutional dynamics of the policymaking process in many ways inherently favor large, well-resourced commercial interests over those of citizens or public interest advocates. As Tai notes (again, within the context of environmental regulation), “the complexities of participation may require significant resources to generate substantive public comments . . . .”<sup>56</sup> A key element of “substantive” public comments increasingly involves empirical research. Meaningful participation in the policymaking

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organizations filing comments in the FCC’s proceeding opposed relaxation of the Commission’s media ownership rules).

53. For an analysis of the public comments that generally supports Powell’s conclusions, see Anne C. Mulkern, *FCC Gets an Earful From Colorado*, DENVER POST, Mar. 23, 2003, at K-01. See also Michael A. McGregor, *When the “Public Interest” is not what Interests the Public*, 11 COMM. L. & POL’Y 207, 222 (2006) (noting that public comments “did not seriously address the specific economic, legal and policy questions asked by the Commission”). For similar observations within the British context, see David Docherty & Michael Tracy, *Scholarship as Silence*, 43 J. OF COMM. 230, 234 (1993):

It was quite clear that in order to engage with public policy debates we would have to have to (sic) play a numbers game. Clever thinking, elegant essays, treatises on history, disquisitions on philosophy, values and culture were important but not enough if we were to be taken seriously by those with power over policy.

54. See, e.g., Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. OF POL. SCI. 509 (1992); Otto Keck, *The Information Dilemma: Private Information as a Cause of Transaction Failure in Markets, Regulation, Hierarchy, and Politics*, 31 J. OF CONFLICT RESOL. 139 (1987); Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AM. POL. SCI. REV. 809 (1998); Tai, *supra* note 12.

55. *Id.* at 687. See also Dorothy Nelkin, *Scientific Knowledge, Public Policy, and Democracy: A Review Essay*, 1 KNOWLEDGE: CREATION, DIFFUSION, UTILIZATION 106, 118 (1979) (“Scientific knowledge, like land, labor, and capital is a resource—indeed a commodity—and the ability to manipulate and control this resource has profound implications for the distribution of political power in democratic societies.”).

56. Tai, *supra* note 12, at 680.

process therefore often requires the generation, or commissioning, of social science-based studies. Of course, “[w]ell-funded and organized entities, such as industries . . . can more easily afford to generate these studies than the lay public,”<sup>57</sup> or, for that matter, the public interest organizations that often serve as surrogates for the public in many policy debates, or the scholarly community. Ultimately, “[t]here is little doubt that unequal resources produces an imbalanced pool of analytic input.”<sup>58</sup> Such imbalances likely impact the integrity of the policymaking process whether the process is conceptualized as a primarily scientific or primarily political process,<sup>59</sup> to the extent that the policy arguments of some stakeholders (those with research to support their arguments) likely receive substantially greater consideration by policymakers than the policy arguments of other stakeholders (those without supporting research).<sup>60</sup>

## V. PRIVATIZATION OF DATA

What has been described thus far is a policymaking environment in which empirical research is increasingly influential in the policymaking process, where a large portion of that research responsibility has been ceded to external stakeholders, and where the resource differences between these stakeholder groups are substantial—suggesting a policy process that is highly unbalanced, purely from a research-generating capacity, in favor of certain stakeholder groups. The purpose of this Part is to illustrate how such imbalances may be compounded by another defining characteristic of

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57. *Id.* at 688–89.

58. *See Surrendering the Ideal, supra* note 24, at 14 (“Unequal resources and uneven representation take on added importance when the focus is on the partisan use of analysis. Inequality of resources becomes especially noteworthy when the cost of producing policy analysis ranges from hundreds of thousands to millions of dollars.”).

59. *See Keck, supra* note 54, at 157.

The theory of the information dilemma . . . proposes that a good deal of regulatory failure can be explained without recourse to any government failure or imperfection in the political system. Government may be truly motivated by the public interest and may be as perfect as perfect may be; if in regulatory policymaking it relies on the regulated firms for information in order to assess the impact of changes in regulation on public welfare, it may nevertheless produce regulatory outcomes that are suboptimal from the point of view of the public at large, suboptimal from the point of view of the regulated firms, and suboptimal from the point of view of total utility.

*Id.* *See also* Sandra Braman, *Facing Out: Researchers and Policy-makers, in* COMMUNICATION RESEARCHERS AND POLICY-MAKING 221, 223 (Sandra Braman ed., 2003). “The Federal Communications Commission (FCC) conducts research on its own and solicits input from scholars regarding policy options, but too often relies almost exclusively upon data provided by corporations in the industries being regulated . . .” *Id.* (footnote omitted).

60. *See Johnson, Jr., supra* note 31, at 34 (“The amount and quality of information possessed by arena participants on any given issue and the skill with which they make use of this information are thus important variables in the policy arena.”).

the contemporary policymaking/policy analysis landscape (particularly in relation to communications policy)—the increased privatization and commercialization of the core data necessary for rigorous policy analyses.

Embedded within the broader trend of the privatization of many aspects of governmental authority<sup>61</sup> is the more specific issue of the privatization of the data-gathering mechanisms that feed into policy decision making. Across a variety of fields, there has been a trend towards the commodification of data and information that previously was treated as a public good.<sup>62</sup> A recent *Washington Post* article illustrates the extent to which national security policymaking is becoming increasingly reliant upon data obtained from private vendors.<sup>63</sup> Greenbaum details the decreasing role that the U.S. government has played in the generation of databases over the past thirty years, noting that in 1977 government-sponsored databases accounted for 56 percent of the American market, but that by 2002 this number had fallen to 6 percent.<sup>64</sup> Reasons for this phenomenon are both economic and political, with rising database production costs coupled with mounting governmental costs in other areas accounting for the economic pressure; lobbying from industry groups eager to fill, and profit from, the voids left when government agencies withdraw

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61. See generally Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 U. TORONTO L.J. 243 (2001).

62. J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793, 796, 809–10 (1999) (noting budgetary cuts for government funded data collection and the privatization of much raw data production) [hereinafter *Database Protection*]; J.H. Reichman & Paul F. Uhlir, *The Public Domain: A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROB. 315, 351, 367 (2003) (“The private sector generates an ever-increasing amount of scientific data that are indispensable to academic research . . . . During the last ten years, there has been a marked tendency to shift the production of science-relevant databases from the public to the private sector.”) [hereinafter *The Public Domain*]. See also Paula Baron, *Back to the Future: Learning from the Past in the Database Debate*, 62 OHIO ST. L.J. 879 (2001) (discussing the historical perspective on the issues of database access and database protection that arise from privatization).

63. Arshad Mohammed & Sara Kehaulani Goo, *Government Increasingly Turning to Data Mining*, WASH. POST, June 15, 2006, at D3.

As federal agencies delve into the vast commercial market for consumer information, such as buying habits and financial records, they are tapping into data that would be difficult for the government to accumulate but that has become a booming business for private companies.

Industry executives, analysts and watchdog groups say the federal government has significantly increased what it spends to buy personal data from the private sector . . . . They expect the sums to keep rising far into the future.

*Id.*

64. Dov S. Greenbaum, *The Database Debate: In Support of an Inequitable Solution*, 13 ALB. L.J. SCI. & TECH. 431, 480 (2003).

from data collection account for the political pressure.<sup>65</sup> It is worth noting, however, that “[t]his significant loss of government capital in the industry still paralleled a phenomenal increase in growth of the industry, indicating that the degree of private investment has more than made up for the government’s pullback . . . .”<sup>66</sup> The financial incentives for government agencies to move out of the data collection enterprise can, of course, be substantial, as funds can be freed up for other activities.<sup>67</sup> The danger that arises, however, involves how the terms of access available to other users of the data change as the data move from public to private hands.<sup>68</sup>

As the data move to private hands, researchers increasingly find themselves at the mercy of the often prohibitive pricing platforms and often very restrictive licensing conditions of the commercial data providers.<sup>69</sup> And there are, at this point, no regulations or policies directed at specifying access parameters or price ceilings that commercial data providers must abide by when their data are sought for policy-relevant research. As Reichman and Uhlir argue:

The lack of any restraints on licensing, especially on sole-source data providers, adds to the dangers inherent in the creation of a strong exclusive property right in collections of data . . . . Without a concomitant duty to deal fairly and reasonably with public-interest users, these combined powers could lead to high prices for data and to the imposition of harsh and oppressive terms concerning both access and subsequent uses<sub>70</sub> of data that would especially disadvantage academic researchers.

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65. See *The Public Domain*, *supra* note 62, at 368–69 (“The budgetary pressures on the government are both structural and political in nature.”).

66. Greenbaum, *supra* note 64, at 480–81.

67. Charles Brill, *Legal Protection of Collections of Facts*, 1998 COMP. L. REV. & TECH. J. 1, 48 (1998) (“By promising the government agency free, or reduced cost access to the database, a database provider may convince the government agency to cease publishing the information, thereby allowing the government agency to spend its resources on other projects.”).

68. *Id.* (“[T]he monopoly power granted to the database publisher may allow the database provider to price the database service beyond the means of some users of the information.”).

69. Tomas A. Lipinski, *The Commodification of Information and the Extension of Proprietary Rights into the Public Domain: Recent Legal (Case and Other) Developments in the United States*, 22 J. BUS. ETHICS 63, 71 (1999).

An information owner may also ‘negotiate’ for enforceable rights (contract or license) which may in essence remove any public domain rights such as fair use from the user. Here an individual user is forced between choosing either to not have access to the information (through forgone purchases) or having access to information but on the conditions imposed by the seller (information owner).

*Id.*

70. See *Database Protection*, *supra* note 62, at 814–15.



The ultimate danger of such scenario is a “chilling effect on data-intensive research.”<sup>71</sup>

Recently, we have seen efforts to enhance the control that database providers have over the usage of the information they provide. For instance, had the Collections of Information Antipiracy Act<sup>72</sup> passed, the Act would have prevented an individual from extracting or using in commerce a substantial portion of the information contained in a database compiled by another party—even if the information contained within the database was factual in nature (facts generally not being copyrightable) so as to harm the actual or potential market for the product.<sup>73</sup> Although the Act included language that granted permission to individuals to extract data for nonprofit, educational, scientific, or research purposes in a manner that did not harm directly the actual or potential market for the product, Pollack points out the glaring loophole in such apparently permissive language: “Scientific databases are used largely by scientists and educators . . . [A] scientist who uses a scientific database for free is, therefore, hurting the database’s market.”<sup>74</sup> Similarly, Reichman and Uhler warn that:

Especially serious problems seem likely to arise when the public research community becomes the target market for the commercial data supplier, and there is a resulting tension between freedom of contract and the needs and capabilities of the nonprofit research sector. In principle, one expects that a supplier will not price itself out of the market. In practice, some science publishers have adopted exorbitant pricing strategies that do limit scientists’ abilities to access and use their products.<sup>75</sup>

Consequently, those under-resourced providers of external policy analysis (scholars, public interest/advocacy organizations) find themselves at a tremendous disadvantage in terms of their ability to provide relevant information and analysis to policymakers. Policymakers—and their

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71. *Database Protection*, *supra* note 62, at 819.

72. H.R. 2652, 105th Cong. § 1292 (1998).

73. See generally Mark Schneider, *The European Union Database Directive*, 13 BERKELEY TECH. L.J. 551, 558 (1998) (discussing comparable legislation—the European Union Database Directive—already passed by the European Union).

74. Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 117 (1999).

75. *The Public Domain*, *supra* note 62, at 460. The logic of this sort of apparent irrationality in pricing may be that the research community ultimately represents such a small revenue source for these data providers that whatever miniscule risks of sale to a policy researcher carries in terms of harming other revenue streams, it may be sufficient to overcome any willingness to price the product more accessibly to the research community. The extent to which the commercial data providers in the media sector have begun to consider the research community as a distinct market is illustrated by the recent appearance of data providers such as Nielsen Media Research at exhibit booths at academic association meetings such as the annual Broadcast Education Association conference.

decision making—then suffer as well.

Concerns such as these do, of course, need to be weighed against the economic imperatives facing commercial data providers. The collection and aggregation of the type of data used in policymaking are incredibly expensive. And, to the extent that this sector has become privatized, sufficient financial incentives need to be in place to encourage the continued creation of such databases, absent a return to greater government involvement in the collection and dissemination of policy-relevant data.<sup>76</sup>

Ultimately, then, the somewhat paradoxical situation is one in which:

Although society has a strong interest in encouraging the creation of valuable databases, society also has an opposing interest in open access to the factual information comprising the databases. Therefore, society's grant of protection to database compilers attempts to strike a balance between the rights of the database producers to profit from their own labor and society's interest in access to the information.<sup>77</sup>

According to many analyses, the balance may currently be tilted in favor of the commercial database vendors.<sup>78</sup>

This trend towards the privatization of policy-relevant data, and the tensions between the interests of the data providers and the interests of the policy analysis communities, have been particularly pronounced in the area of communications policy. The deregulatory trend of the past thirty years has been characterized in communications policy by a continued withdrawing of the FCC from gathering various forms of standardized data from the organizations under its regulatory authority.<sup>79</sup> Thus, for instance, broadcast license renewal requests, which once required the submission of a substantial amount of information regarding licensee performance, now take the form of a simple "postcard renewal," in which little, if any, substantive information is gathered from the licensee.<sup>80</sup> In the past, the

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76. See Charles R. McManis, *Database Protection in the Digital Information Age*, 7 ROGER WILLIAMS U. L. REV. 7, 23 (2001) ("The compilation of a database requires a substantial investment.").

77. Brill, *supra* note 67, at 3.

78. See, e.g., Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 600 (2000) (arguing that legislative efforts to protect commercial database providers are based upon insufficient evidence of the threat, or reality, of significant piracy). See also *The Public Domain*, *supra* note 62, at 460.

79. See John Dunbar, *A Penchant for Secrecy: Why is the FCC So Determined to Keep Key Data from the Public?*, THE CENTER FOR PUBLIC INTEGRITY, May 22, 2003, <http://www.openairwaves.org/telecom/report.aspx?aid=18> ("When the agency deregulates, and stops collecting data, they say we're going to rely on marketplace forces and public complaints to make us aware of problems . . . [However, the lack of available data] takes away the means of members of the public to do that monitoring.") (quoting Andrew Schwartzman of the Media Access Project).

80. See Revision of App'ns for Renewals of License of Commercial and Non-Commercial AM, FM, and TV Licensees, *Report and Order*, 49 Rad. Reg.2d (P & F) 740,

Commission gathered detailed employment data in connection with its Equal Employment Opportunity rules, but the scaling back of these rules has been accompanied by a scaling back of the quantity and quality of the employment data the Commission gathers.<sup>81</sup> The Commission gathered cable system subscriber data but stopped gathering such data after an initiative to deregulate the cable industry was implemented in the 1990s.<sup>82</sup> An earlier deregulatory period led the FCC to cease gathering financial statements from broadcasters.<sup>83</sup>

Access to such data must now be obtained from a growing array of commercial data providers. Industry financial and ownership information, for example, is now provided primarily by an organization called BIA Research,<sup>84</sup> which aggregates television, radio station, and newspaper revenue, market, ownership, and ratings/circulation data into a large, comprehensive database that even the FCC relies upon heavily for its own analyses.<sup>85</sup> Similar information for the cable industry, which the FCC obtained regularly, now is gathered and supplied primarily by Kagan Research.<sup>86</sup> Today, in order to obtain the kind of information about television station programming practices that the FCC gathered in its license renewal process, researchers must consult television program schedule databases supplied commercially by organizations such as Tribune Media Services.<sup>87</sup> Reflecting these trends, a report by the Center for Public Integrity noted that its efforts to construct a database of media companies was repeatedly hampered by the lack of relevant publicly available data and that very little of the relevant data resided with the FCC.<sup>88</sup> These examples support Media Access Project's Harold Feld's

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741 (1981).

81. See Review of the Comm'n's Brdcast. and Cable Equal Employment Opportunity Rules and Policies, *Second Notice of Proposed Rule Making*, 16 F.C.C.R. 22843, para. 52 (2001).

82. Dunbar, *supra* note 79 (noting that incomplete cable system subscriber data were found in the FCC's Cable Operations and Licensing System database due to the fact that "the FCC stopped collecting it after 'deregulation' of the industry in 1994.").

83. James G. Webster, *The Role of Audience Ratings in Communications Policy*, 12 COMM. & L. 59, 63 (1990) ("[T]he FCC stopped collecting financial statements from broadcasters several years ago.").

84. See BIA Financial Network, <http://www.bia.com> (last visited Feb. 14, 2007).

85. See FCC Brdcast. Ownership Rules, Cross-Ownership of Brdcast. Stations & Newspapers, Multiple Ownership of Brdcast. Stations in Local Markets, & Definition of Radio Markets, 47 C.F.R. § 73, para. 193 (2003) ("The Commission traditionally has relied on BIAs Media Access Pro database to obtain information about particular Arbitron Metros.").

86. See Kagan Research LLC, <http://www.kagan.com> (last visited Feb. 14, 2007).

87. See Tribune Media Services, <http://tms.tribune.com> (last visited Feb. 14, 2007).

88. See Dunbar, *supra* note 79:

When the Center for Public Integrity was constructing its database of media

observation that “[s]elf-generated and self-directed research . . . accounts for a vanishingly small amount of FCC data.”<sup>89</sup>

There are, of course, other data sources, such as the audience ratings data provided by firms such as Nielsen (for television)<sup>90</sup> and Arbitron (for radio)<sup>91</sup> that traditionally have been commercially generated. These data sources are also becoming increasingly important to contemporary communications policy analysis,<sup>92</sup> particularly in light of the trend toward economically-oriented analyses described above, as well as the recent trend toward better integrating analyses of audience behavior and media usage into the policy decision-making process.<sup>93</sup> Thus, while the government has never been involved in the creation of such data, such data are becoming increasingly important in the analyses that policymakers conduct and rely upon.<sup>94</sup>

Obtaining the relevant data from the private sector can often prove difficult, with price being the primary impediment. One might argue that since databases are public goods,<sup>95</sup> the sellers of these databases would be

companies, staff researchers were repeatedly referred by FCC staff to private companies for basic information on ownership, audience reach and cable subscribers. Getting market share information, which is key when reviewing whether broadcasters are within existing FCC regulations that limit the number of households that any one owner can reach, was all but impossible without going outside the agency.

89. HAROLD FELD, FCC PRACTICES REGARDING GATHERING DATA, PROCESSING DATA, AND PRESENTING DATA: AN ADVOCATE’S PERSPECTIVE 88 (2004), <http://www.fordham.edu/images/Undergraduate/communications/conferencereport.pdf>. Feld goes on to note that “[t]he FCC rarely compels the production of data on an industry-wide basis.” *Id.*

90. See Nielsen Media Research, *supra* note 5.

91. See Arbitron, Inc., *supra* note 7.

92. See Webster, *supra* note 83, at 60–66.

93. See *Reassessing Contribution*, *supra* note 33 (illustrating a “broadening analytical perspective” within the context of media ownership that accounts for issues such as “how citizens use different media technologies to obtain information; if/how media content varies in accordance with variations in market and ownership conditions; what factors contribute to biased or ideologically slanted news content; and what criteria should be employed in defining an information source and the magnitude of its impact”). See also Marc Raboy et al., *Media Policy, Audiences, and Social Demand: Research at the Interface of Policy Studies and Audience Studies*, 2 TV & NEW MEDIA 95, 96 (2001) (urging a “closer dialogue between scholars working in what ought to be seen as related areas of communication research: policy studies and audience studies.”).

94. See Webster, *supra* note 83, at 60–66 (discussing, for example, the range of policy questions that can be investigated via the use of ratings data).

95. The term “public goods” refers to goods that:

are characterized by their nonrival and nonexcludable properties. The former means it costs nothing to provide the good to another person once someone has produced it, that is, it tends to have zero marginal cost. The latter means that once such a good has been produced, the producer cannot exclude others from benefiting from it.

*The Public Domain*, *supra* note 62, at 362 (footnote omitted).

willing and able to make the data available to under-resourced groups (such as scholars or public interest/advocacy organizations) at a dramatically reduced price.<sup>96</sup> In reality, these data providers often do just that, though these dramatically reduced prices often can still be substantial by scholarly and/or nonprofit standards. Also related to this issue is the dynamics of the subsidization of data access. That is, most communications-related commercial databases are funded primarily by clients from within these industries.<sup>97</sup> Should these database providers then make their data available to the scholarly and public interest or advocacy communities at a dramatically reduced rate, these providers are vulnerable to criticism from their primary constituency. Specifically, the database provider's major client list may take issue with their substantial subscription payments being used to essentially help subsidize much less expensive data access for other constituencies—constituencies that ultimately may use the data to produce research highly critical of these very same communications firms.<sup>98</sup> Thus, there are more than basic pricing issues to be navigated by commercial database providers who produce information relevant to communications policymaking and policy advocacy.

In sum, the concurrent trends of the increased need for robust empirical analysis in order to meaningfully participate in the policy process and the increased privatization of much of the data necessary for such analyses create a situation in which the resource imbalances that characterize the stakeholder dynamics in the policymaking process can become magnified and contribute to even greater imbalances in terms of the analyses that different stakeholder groups are able to bring to bear on individual policy issues.

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96. See Webster, *supra* note 83, at 68 (discussing ratings data). Webster states:

Like other kinds of information, ratings are a 'public good.' That is, the cost of producing ratings is largely independent of the number of people who consume them. Because policy makers engage in secondary analysis of data that were collected for another purpose, the ratings service can, in theory, price the data very inexpensively.

*Id.*

97. PHILIP M. NAPOLI, AUDIENCE ECONOMICS 27 (2003) (discussing within the context of audience data that, "media organizations influence the structure and behavior of measurement firms because, like advertisers, the media industries are major clients of audience measurement firms.").

98. See Webster, *supra* note 83, at 69 (referencing ratings data) ("Indeed, there is no guarantee that the ratings companies will agree to provide data at all. They may fear offending an established client or being drawn into legal battle if their data are used in a proceeding.").

## VI. CASE STUDY: MEDIA OWNERSHIP

As has been argued, the situation in communications policy regarding the centrality of privately generated databases to effective policy analysis is particularly pronounced. Commercial databases ranging from television and radio audience ratings, to industry financial information, to newspaper circulation figures, provide the basis for the kinds of analyses that are at the core of many communications policy decisions. This Part illustrates this point via a case study of the FCC's highly publicized, and highly controversial, media ownership proceeding.<sup>99</sup> In this proceeding, the FCC voted to relax a number of restrictions on the common ownership of media outlets.<sup>100</sup>

This proceeding also was characterized by the relatively rare phenomenon in which the FCC commissioned twelve empirical studies in advance of its June 2003 decision which were conducted both by internal staff members and by outside scholars and commercial organizations.<sup>101</sup> This proceeding is also particularly illustrative in light of the controversies that arose in the wake of the Commission's release of these twelve studies. Specifically, the issue of commercial, proprietary data and the appropriate level of access that should be provided to such data in policymaking contexts came to the forefront of the media ownership proceeding. In October of 2002, the FCC released its twelve studies addressing various dimensions of the media ownership issue.<sup>102</sup> These studies were part of what FCC Chairman Michael Powell declared "the most comprehensive look at media ownership ever undertaken by the FCC,"<sup>103</sup> and ultimately figured prominently in the Commission's eventual decision on the media ownership proceeding.<sup>104</sup> When external stakeholders such as scholars and public interest advocates sought to verify the claims of these studies via reanalysis of their underlying data, their requests were initially denied.<sup>105</sup>

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99. 2002 Biennial Review, *supra* note 10.

100. *Id.* (relaxing rules limiting common ownership of television stations and newspapers within individual markets, as well as rules limiting multiple television station ownership within and across media markets).

101. Press Release, FCC, FCC Releases Twelve Studies on the Current Media Marketplace (Oct. 1, 2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A1.doc) [hereinafter FCC Press Release].

102. *See id.* *See also* FCC, Research Studies on Media Ownership, <http://www.fcc.gov/ownership/studies.html> (last visited Feb. 14, 2007).

103. *See* FCC Press Release, *supra* note 101.

104. *See generally* 2002 Biennial Review, *supra* note 10.

105. *See* Dunbar, *supra* note 79 ("The FCC's reliance on non-government, private data is so ingrained that when public interest groups asked for access to data underlying a series of media ownership reports . . . the FCC relented only after issuing a quasi-judicial 'protective order' meant to keep the information secret.").

Under substantial pressure,<sup>106</sup> the FCC eventually relented, though only marginally. Data for eight of the twelve studies were made available online in November of 2002.<sup>107</sup> Also in November of 2002, the Commission released a Protective Order<sup>108</sup> that granted limited access to the underlying data for the remaining four studies under highly restricted terms. These limitations on access were enforced due to the proprietary nature of the commercial data underlying these four studies.<sup>109</sup> Those seeking to review the data for these four studies were required to sign a Declaration promising to abide by the terms of the Protective Order. Access to the data would be limited to on-site access at FCC headquarters.<sup>110</sup> No removal or copying of the data were permitted,<sup>111</sup> though reviewing parties were permitted to conduct their own analyses with the data.<sup>112</sup> Of course, conducting such analyses on-site, under the time limitations imposed on

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106. Eric Alterman, *Think Again: Falling Upward at the CPB* (Apr. 21, 2005) CENTER FOR AM. PROGRESS, <http://www.americanprogress.org/issues/2005/04/b569645.html> (describing efforts of public interest groups to gain access to the underlying data for the media ownership studies).

107. See Public Notice, FCC, FCC's Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies, at 2 (Nov. 5, 2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-02-2980A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2980A1.pdf) [hereinafter Public Notice].

108. 2002 Biennial Regulatory Review, *Protective Order*, 17 F.C.C.R. 22,178 (2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-02-2981A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2981A1.pdf) [hereinafter *Protective Order*].

109. *Id.* at para. 2. See also Public Notice, *supra* note 107, at 2 ("For four of those eight studies, the authors created data sets using proprietary information licensed to the author and/or the author's employer for purposes excluding public dissemination."). The four studies at issue were: C. ANTHONY BUSH, FCC, OFFICE OF THE GEN. COUNSEL, ON THE SUBSTITUTABILITY OF LOCAL NEWSPAPER, RADIO AND TELEVISION ADVERTISING IN LOCAL BUSINESS SALES (2002); GEORGE WILLIAMS & SCOTT ROBERTS, FCC, MEDIA BUREAU, RADIO INDUSTRY REVIEW 2002: TRENDS IN OWNERSHIP, FORMAT, AND FINANCE (2002); KEITH BROWN & GEORGE WILLIAMS, FCC, MEDIA BUREAU, CONSOLIDATION AND ADVERTISING PRICES IN LOCAL RADIO MARKETS (2002); JOEL WALDFOGEL, U. PA., WHARTON SCH., CONSUMER SUBSTITUTION AMONG MEDIA (2002).

110. *Protective Order*, *supra* note 108, at para. 6 ("The Data Sets shall be maintained by the Commission for inspection at its headquarters consistent with the terms of this Protective Order.").

111. *Id.* at para. 7 ("Authorized representatives may not remove Data Sets, or copies thereof, from agency headquarters.").

112. *Id.* at para. 9.

Reviewing parties may use information derived from the Data Sets to conduct their own analyses. Moreover, any such calculations or other analyses performed by the Reviewing Party using information derived from the Data Sets that do not reveal protected information shall not be considered part of the Data Set. However, a Reviewing Party's calculations, analyses or other derivative materials, the contents or outcomes of which do reveal protected information, shall be used and treated by the Reviewing Party in the same fashion as the underlying Data Sets used in such calculations, analyses and derivative materials under the terms of this Order.

*Id.*

access to the data would prove quite difficult; and thus, this arrangement hardly represents an ideal solution to the issue of access to the commercial data used in policy decision making. It is worth noting that the Commission did offer, as an alternative, that “[o]utside parties also may obtain licenses from any or all licensors of the underlying data to evaluate the results of the studies and/or develop other studies that will contribute to the record in this proceeding.”<sup>113</sup>

Given these circumstances, the media ownership proceeding probably cannot be considered representative of the role that commercial data play in communications policymaking. Rather, it represents an extreme scenario that illustrates the degree to which commercial data sources can factor into the communications policymaking process. To illustrate this extreme, the media ownership Report and Order was analyzed as follows: first, all references in the Report and Order were analyzed to determine whether they referenced a specific study. Referenced studies submitted to the FCC as part of formal comments filed with the Commission, as well as studies (published or unpublished) referenced directly by the FCC were included in the analysis (including the Media Ownership Working Group studies). Next, these studies were obtained and their methodologies analyzed to determine which, if any, commercial data sources were utilized in the analysis. Studies submitted as part of formal comments were obtained via the Electronic Comments Filing System (“ECFS”) available on the FCC’s home page.<sup>114</sup> Finally, all of the references in the Report and Order also were analyzed to determine which, if any, commercial data sources (such as industry statistical sources, or ratings reports), were referenced by the FCC directly in the Report and Order, independent of their use in any particular study. These efforts were undertaken simply to provide a thorough catalog of the range of commercial data sources that can have a bearing on a particular communications policy issue. In addition, each data source was associated with the appropriate category(ies) of stakeholder groups—FCC, industry, academic, or public interest organization—depending upon which of these stakeholder groups utilized the data source. The results of this analysis are presented in Table 1.

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113. Public Notice, *supra* note 107, at 2.

114. FCC, Search for Filed Comments, [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Feb. 14, 2007).



Table 1: Commercial Data Used in Media Ownership Analysis and Users

Data Source	Industry	FCC	Pub. Int.	Academic
<b>Databases</b>				
BIA Media Access Pro	x	x	x	x
Bear Stearns	x			
Adams Media Research	x			
Arbitron Radio Market Reports	x			x
CNW Marketing Research Surveys		x		
Duncan's American Radio		x		x
Morgan Stanley	x			
Newspaper Advertising Source	x	x		x
<b>Nielsen Media Research</b>				
Nielsen Station Index	x	x	x	
Nielsen Television Index	x			
Viewers in Profile	x			
Scarborough Primenext Data		x		
Service Quality Analytics Data		x		x
Standard & Poor's Compustat		x		
Standard Rate & Data Service	x			
UBS Warburg	x			
Vickers Stock Research				x
VoiceTrak	x			
<b>Industry Directories</b>				
Ayer Directory of Publications		x		
Broadcasting & Cable Yearbook	x	x	x	
Burrelle's Media Directory		x		
CBEMA Industry Marketing Data Book				x
Editor & Publisher International Yearbook	x			
Television & Cable Factbook	x	x		
Warren Cable & Station Coverage Atlas		x		

Data Source	Industry	FCC	Pub. Int.	Academic
<b>Trade Publications/Reports</b>				
Cable Television Advertising				
Bureau: Cable TV Facts	x			
Radio and Records Magazine		x	x	
Kagan Research				
Broadband Cable Financial Databook				
		x		
Cable Operator Revenues		x		
Cable TV Financial Databook	x	x		
Cable TV Investor		x		
Economics of Basic Cable Networks				
		x		
Economics of TV Programming	x			
Media Index	x			
State of DBS		x		
Media Dynamics TV Dimensions		x		
Myers Reports	x			
National Association of Broadcasters TV Financial Report				
	x	x		
Nielsen Media Research				
Report on Television	x	x		
Veronis Suhler Stevenson				
Communications Industry Forecast	x	x		

As Table 1 illustrates, forty different commercial data sources were utilized in the analyses that contributed to the FCC's media ownership decision. These sources ranged from large scale databases (such as BIA and Nielsen data), to annual industry directories (such as the *Broadcasting & Cable Yearbook*), to a wide array of industry financial reports (such as those provided by Kagan Research on the cable industry). The FCC Media Ownership Working Group's Study #1, *A Comparison of Media Outlets and Ownership for Ten Selected Markets (1960, 1980, 2000)*, alone utilized six different commercial data sources, including the BIA Master Access database, along with five different commercially published directories of

television, cable, and print outlet information.<sup>115</sup> Note that these results likely under-represent the range of commercial data sources used in relation to this policy issue, as only those sources that were cited directly by the FCC in the Report and Order or that were part of studies cited directly in the Report and Order were included in the analysis. Data sources utilized in any studies submitted to, but not referenced by, the FCC would not be reflected in Table 1.

Of perhaps equal interest is the information contained on the right side of the table, which identifies which stakeholders in the process utilized the data. As the table indicates, by far the most common users of the relevant commercial data sources were the FCC and industry stakeholders (utilizing twenty-four and twenty-three, respectively, of the forty data sources listed in Table 1). As was noted previously, the extent to which the Commission engaged in its own research in conjunction with this proceeding was somewhat uncharacteristic, which may account for the impressively wide array of data sources the agency itself drew upon in connection with this proceeding. Much less common was data usage by either public interest organizations or academic researchers, with cited public interest filers utilizing four different commercial data sources and academic researchers utilizing seven. As this combination of results thus indicates, not only did a wide array of commercial data sources figure very prominently in the analyses relevant to the media ownership decision, but utilization of these data sources appears to have been very unequally distributed across the various stakeholder groups, with the public interest and scholarly research communities exhibiting far less usage of these sources. The imbalance exhibited in these findings may simply be a result of the FCC more frequently citing the comments of industry stakeholders than the work of academic or public interest researchers, though the literature on the role of research in the policymaking process discussed previously would suggest that such a tendency would itself be a function of policymakers' preference for relying upon the submissions of stakeholders who engage in empirical analysis.<sup>116</sup>

## VII. THE NEED FOR IMPROVED ACCESS TO COMMERCIAL DATA SOURCES FOR POLICY RESEARCHERS

The extent of the commercialization of policy-relevant data contributes to an analytical imbalance that strikes at the core of the functioning of a representative democracy and the role of information in

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115. SCOTT ROBERTS ET AL., A COMPARISON OF MEDIA OUTLETS AND OWNERS FOR TEN SELECTED MARKETS (1960, 1980, 2000) 5 (2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A2.pdf).

116. See *supra* notes 41–50 and accompanying text.

the democratic process. There are a wide range of benefits that arise from a policymaking environment in which access to the relevant data is widely distributed. Arzberger et al. provide perhaps one of the most thorough catalogs of the social and economic benefits of expansive data access for researchers:

Open access to, and sharing of, data reinforces open scientific inquiry, encourages diversity of analysis and opinion, promotes new research, makes possible the testing of new or alternative hypotheses and methods of analysis, supports studies on data collection methods and measurement, facilitates the education of new researchers, enables the exploration of topics not envisioned by the initial investigators, and permits the creation of new data sets when data from multiple sources are combined.<sup>117</sup>

As Nobel Laureate Joshua Lederberg has argued, “Data are the building blocks of knowledge and the seeds of discovery . . . . They also are the foundation of sensible public policy in our democracy.”<sup>118</sup> Consequently, the greater the diversity of sources of analysis that have the ability to meaningfully participate in the policymaking process, the greater the likelihood that the information that ultimately guides, and is utilized by, decisionmakers will reflect the full range of policy options, considerations, and concerns. Ultimately, as the National Research Council has noted, “The benefits of providing wider access to microdata for researchers and policy analysts are better informed public policies.”<sup>119</sup>

Conversely, there are substantial dangers associated with a policy environment in which access to the data that fuels policy analysis and guides policy decision making is limited. Specifically, legitimate concerns regarding public confidence in its policymakers arise from any policymaking process that relies upon data and analysis that cannot be subjected fully to public scrutiny and reassessment. Thus, “public access to data ensures greater transparency, which lends legitimacy to the regulatory process. Transparency is a valuable aspect of public decision-making [sic] in a democracy.”<sup>120</sup> To the extent that the privatization of data undermines this transparency, public confidence in its policy decisionmakers suffers. Feld addresses this issue within the specific context of communications policymaking, noting that “no one has a monopoly on wisdom. Scholars and advocates have a right and responsibility to verify the FCC’s

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117. P. Arzberger et al., *Promoting Access to Public Research Data for Scientific, Economic, and Social Development*, 3 DATA SCI. J. 135, 139 (2004).

118. *Collections of Antipiracy Information Act: Hearing on H.R. 354 before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Joshua Lederberg, President, Rockefeller University), available at <http://judiciary.house.gov/Legacy/106-lede.htm>.

119. NATIONAL RESEARCH COUNCIL, *supra* note 17, at 1.

120. Cohen & Hahn, *supra* note 46, at 536.

research—an impossibility if the FCC cannot release the underlying data.”<sup>121</sup>

In the end, from a purely normative perspective, it seems fairly clear that in a well-functioning democracy, public policy should be made with publicly available data. For there to be increasingly privileged and unequal access to the raw data that guide policy decisions represents a significant failing in the construction of our policymaking process and, consequently, a significant roadblock to effective public policymaking and public confidence in policy decisions.

### VIII. RECOMMENDATIONS

In light of the multi-faceted problem outlined up to this point, this Part develops a set of possible paths for improving access to data that are used in communications policymaking and policy analysis. It is worth noting that, to this point, to the extent that policies have addressed issues of access to data used in policymaking, they have focused on data gathered with public funds,<sup>122</sup> on the quality of research conducted with publicly funded data,<sup>123</sup> or on the issue of privacy and confidentiality concerns associated with the dissemination of data gathered from individual citizens.<sup>124</sup> Yet, as this Article has demonstrated, private data are perhaps more integral to contemporary communications policymaking today than are public data. Little, if anything, has been done to address the access imbalances created by this situation and its implications for policymaking.

Ideally, of course, a reversal of the trends toward greater privatization of data and reduced government involvement in the data gathering process would be the most direct solution to the information asymmetry that currently affects communications policymaking. Legislation requiring that the FCC actively engage in a specific set of data gathering activities,

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121. FELD, *supra* note 89, at 88.

122. The Data Access Act was passed as a rider to the Omnibus Appropriations Act for the Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681 (1998). This Act requires that the data needed to validate a federally funded study be made available to requesting parties through the Freedom of Information Act. This Act is also referred to as the Shelby Amendment, after sponsoring Senator Richard Shelby. *See also* Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369 (2000).

123. The Data Quality Act, which was passed as a rider to an appropriations bill, section 515 of the Treasury and General Government Appropriations Rider for Fiscal Year 2001, Pub. L. No. 106-554, 114 Stat. 2763A, 153-54 (2001), provides mechanisms for interested parties to file complaints about the quality of regulatory science by requiring federal agencies to develop formal procedures for ensuring the quality, objectivity, and integrity of the information that they disseminate. Thus, like the Data Access Act, it too focuses on publicly funded data and research. Studies produced by external stakeholders, or that are part of public filings, are not covered under the Act.

124. *See, e.g.*, NATIONAL RESEARCH COUNCIL, *supra* note 17.

mandating that all such data be made available to the public in a timely and user-friendly fashion, and providing the necessary increase in the Commission's budget so that it could adequately engage in these activities would significantly address the problems outlined in this Article. Perhaps a separate government agency devoted specifically to data gathering related to communications and information policy could be developed,<sup>125</sup> or such responsibilities placed within the purview of another existing government entity such as the National Telecommunications and Information Administration (which already conducts some significant data gathering).

Such an approach would be particularly desirable in that it would allow for a better tailoring of the data being gathered to the nature of the policy issues generally requiring attention. This would stand in stark contrast to the contemporary situation, in which data gathered to serve entirely different needs (i.e., the needs of communications firms, investors, and advertisers) are essentially "repurposed"<sup>126</sup> to address policy questions. As Hesmondhalgh and Pratt have noted, although cultural industries (such as media and communications) produce substantial amounts of data to facilitate their operations, there remains a concern with the "fitness for purpose," of such data for research purposes, as "[s]uch data are functional for market making; but not for an understanding that will provide an evidence base for policy making or intellectual enquiry."<sup>127</sup>

As a reflection of this perspective, we can consider something as simple as the fact that, today, the FCC assesses the media system along geographical parameters established and measured by commercial audience measurement firms.<sup>128</sup> Thus, media markets as defined by Nielsen and

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125. See Thomas Wolf et al., *The Role of Research in Developing Cultural Policy*, 13 J. ARTS MGT. & LAW 184, 191 (1983) (proposing an agency to facilitate academic and private sector research on cultural policy issues via the establishment of a data archive and the regular collection of information at both the national and local levels. This agency would serve only a data-gathering function, as opposed to being involved in analysis or policymaking, for a similar proposal—but one that focuses on cultural policy).

126. Repurposing refers to the practice in which content/information produced for one market is later reused or resold in additional markets. Repurposing takes advantage of the public good nature of media/information products in that content is sold multiple times without additional production costs being incurred. See NICHOLAS NEGROPONTE, BEING DIGITAL 63 (1995) ("Repurposing goes hand in hand with the birth of any new medium. Film reused plays, radio resold performances, and TV recycled movies.").

127. David Hesmondhalgh & Andy C. Pratt, *Cultural Industries and Cultural Policy*, 11 INT'L J. CULTURAL POL'Y 1, 10 (2005).

128. The Commission notes, "we will rely on the Arbitron Metro Survey Area [Arbitron Metro] as the presumptive market." In addition, in paragraph 280, the Commission notes that it "traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros." 2002 Biennial Review, *supra* note 10, para. 274. See also David M. Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 COMM'LAW CONSPECTUS 21 (1994).

Arbitron become the FCC's units of analysis. There are, of course, many reasons why adhering to the market parameters utilized within the regulated industries is useful—particularly in relation to economic policy questions involving market competition. However, when we think more broadly about the mandate for communications policymaking—particularly in relation to the role of our media system in the democratic process—the fact that no systematic data are gathered that organize media outlets along political jurisdictions is quite unfortunate.<sup>129</sup>

The importance of such an approach is illustrated by the fact that some highly regarded communications policy research in recent years that has examined the relationship between media sources, media content, and citizen engagement in the political process, was only able to be conducted after the difficult and laborious process of roughly aligning political participation data (which are gathered and reported according to political jurisdictions) with media source and content data that are gathered and reported according to market definitions.<sup>130</sup> To the extent that policymakers

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129. For a thorough critique of the weaknesses of Arbitron data as a tool for communications policymaking and policy analysis, see David Gunzerath, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets*, in Comments of the National Association of Broadcasters, Definition of Radio Markets (Feb. 26, 2001) (MM Docket 00-244), Attachment B, at 17–18.

Arbitron's radio audience reports are specifically designed as a means through which buyers and sellers can reach agreement on the relative value of radio airtime in the commercial marketplace. . . . But the application of Arbitron data to other, unrelated purposes – such as defining radio markets and determining levels of competition and diversity that exist within them – uses this information in ways for which it is poorly suited.

*Id.*

130. See, e.g., Felix Oberholzer-Gee & Joel Waldfogel, *Media Markets and Localism: Does Local News en Español Boost Hispanic Voter Turnout?* (Nat'l Bureau of Econ. Res., Working Paper No. 12317, 2006), <http://www.nber.org/papers/w12317>; Felix Oberholzer-Gee & Joel Waldfogel, *Strength in Numbers: Group Size and Political Mobilization*, XLVIII J. LAW & ECON. 73 (2005); Lisa George & Joel Waldfogel, *Does the New York Times Spread Ignorance and Apathy?* (Working Paper, 2002) [http://rider.wharton.upenn.edu/~waldfogj/NYT\\_ignorance\\_2002.pdf](http://rider.wharton.upenn.edu/~waldfogj/NYT_ignorance_2002.pdf). This series of studies demonstrates the extent to which access to local information sources positively affects political participation—a finding with dramatic implications for media policies related to the principle of localism. Conducting such research requires aligning media market data with voting behavior data. See also Scott Althaus & Todd Trautman, *The Impact of Television Market Size on Voter Turnout*, 4 (Paper Presented at the Ann. Meeting of the Am. Ass'n for Pub. Opinion Res., 2004), <http://www.spcomm.uiuc.edu/salthaus/althaus%20and%20trautman%20AAPOR04.pdf>:

Our analysis of turnout draws upon aggregate voting data at the sub-county level for nearly every area in the continental United States, over four election cycles. We join data on the boundaries of television markets provided by Nielsen Media Research with turnout and demographic data from the Record of American Democracy (ROAD) project, which assembled comprehensive voting data for every precinct in the continental United States over the years 1984, 1986, 1988, and 1990.

should concern themselves with the political functions of the media outlets they regulate, it is surprising that neither they, nor the broader research community, has access to systematic data that map our media system according to local political parameters.

Along related lines, intensive usage and detailed scrutiny of the primary source of media market, ownership, and financial data utilized by the FCC and many other stakeholders in the policymaking process—the BIA Media Access Pro nation-wide database of television stations, radio stations, and newspapers—reveals that many minority-targeted and foreign-language newspapers are not included in the database.<sup>131</sup> Similarly, the standardized ratings reports generated by Arbitron for the radio industry somewhat selectively report minority audience compositions for individual stations, limiting such reporting only to those markets in which there is a substantial minority population.<sup>132</sup> Regardless of the reasons for these omissions (no doubt they are a reflection of the economics of database generation and a reflection of the allocation of demand priorities of the primary users of the databases), the end result is an inaccurate, incomplete portrait of the media system. The nature of omissions such as these undermines analyses related to vital communications policy issues such as the diversity of information sources available in media markets and the extent to which minority interests and concerns are being served at the local level.<sup>133</sup>

These examples are meant to illustrate how data gathering freed of market imperatives could potentially better serve communications policymaking and policy analysis. Certainly publicly-funded data gathering brings with it its own set of potential pitfalls, but the purely commercially-

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131. Mark Lloyd et al., *Measuring Local Media Diversity* 8 (Center for American Progress, Working Paper, 2006) (on file with author). This research project utilized BIA data to analyze the diversity of sources across different media available in individual media markets, but in so doing, “found that the BIA database did not adequately identify the ethnic media in the analyzed markets.”

132. Philip M. Napoli, *Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences*, 46 J. BROAD. & ELEC. MEDIA 169, 174 (2002):

It is important to note that Arbitron does not report ethnic composition for stations in all of the markets that it measures, but only in those markets where there is a significant minority population; nor does the company provide data on ethnic groups other than African Americans or Hispanics in any of its markets.

In addition, nearly half of all radio stations in the United States are not located within Arbitron-defined markets, further complicating the use of Arbitron data for certain types of analyses. See Gunzerath, *supra* note 129, at 8 (“However, it is vital to recognize that approximately 50 percent of all U.S. radio stations are not located in an Arbitron market.”).

133. See PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 125–52, 203–24 (2001) (discussing the media policy principles of diversity and localism).



driven data infrastructure towards which we are migrating raises the possibility of increased disconnects between policy questions and the information available to answer those questions—above and beyond the access disparity issue which has been the focus of this Article.

Absent—or perhaps best, in addition to—progress on the governmental data gathering front, efforts must also be made to enhance researchers' access to relevant commercial data sources. In pursuing such options, it seems reasonable to explore more effective mechanisms for balancing the needs of researchers and commercial database vendors in a manner that recognizes the substantial public interest in policy research.<sup>134</sup>

One possible approach would involve the creation of a consortium of academic and public interest policy researchers to collectively negotiate terms that could facilitate greater access to the relevant data sources than is currently taking place. Such a proposal would no doubt require not only substantial financial resources (be they from the academic/public interest organizations or from external funders), but also a commitment on the part of the commercial data providers to make their data available under terms and conditions that meaningfully reflect how the broader public interest is served by such access. It does seem safe to say that none of the commercial database providers whose products are used in the communications policymaking process consider the policy research community the primary, secondary, or even tertiary market for their products. If that were the case, these data products likely would not exist, as the policy research community is far too small and its resources far too limited to meaningfully support the creation of these data sets. To the extent, then, that the policy research community represents a largely negligible part of the revenue stream for most commercial data providers, this may encourage some flexibility in terms of how this community, when dealt with as a collective, is treated by the data providers. Of course, such an access model would need to rigorously protect the existing revenue streams of the commercial data providers and ensure that the access provided to the (relatively small) policy research community did not create opportunities for other customer bases to gain access to the data. It seems perfectly realistic that such a balance could be struck.

At the very least, such an initiative could work towards establishing greater formalization and transparency in relation to the institutional rules and policies surrounding data access and usage. There often is a very ad hoc nature to the processes of gaining access to the relevant data

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134. See Greenbaum, *supra* note 64, at 434–35 (“copyright law . . . ought to favor the advancement of science over unsubstantiated suspicions of the commercial database vendors.”) (citation omitted).

sources.<sup>135</sup> Pricing typically varies substantially in relation to the resources of the potential purchaser and how the data ultimately are to be used. Access terms can similarly vary from data provider to data provider and from client to client. These tendencies are, in many ways, inevitable byproducts of the business models surrounding public goods, where the substantial opportunities to engage in price discrimination are essential to the viability of public good production.<sup>136</sup> Nonetheless, to the extent that more formalization and transparency in transactions can be developed for situations in which the primary use of the data is for policy analysis, then improvement to the imbalances in data access that currently exist in the policy analysis playing field could be achieved.

Also toward these ends, policy researchers should engage in a concerted effort to compile and study the nonconfidential components of model standard licensing agreements in an effort to establish a broader understanding of standard access terms, to identify exemplary approaches, and to facilitate better-informed negotiations in those instances when data access is being sought.<sup>137</sup> This could also help contribute to reducing the extremely ad hoc nature of how policy researchers typically engage with commercial data providers.

A final possible mechanism for improving the current situation might be legislation that specifies that once a data source is utilized in any study submitted to, or conducted by, a regulatory agency, the underlying data for that research must be publicly available for reanalysis, regardless of whether the underlying data came from public or private data sources or whether they were obtained/gathered via public or private funds. Congress passed the Freedom of Information Act (“FOIA”)<sup>138</sup> with the intention of enhancing public access to “agency records.” There has been dispute in the courts over whether data compiled by third parties constitute agency

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135. Arzberger et al., *supra* note 117, at 141 (“To reach the necessary transparency in the tasks and responsibilities of those involved, terms of access to and use of data that rest on tacit agreements should be made explicit and formalised. A systematic and institutionalized approach is needed to help address operating characteristics of data access . . .”).

136. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 23 (1992) (“Even a monopoly producer of a public good from which free riders can be easily excluded may need to practice price discrimination among its customers.”). Within the context of data, this often results in there being no clear “fixed” price. Rather, pricing becomes quite flexible in accordance with the nature of the presumed usage of the data as well as the perceived level of demand (and resources) of the potential purchaser.

137. See Arzberger, *supra* note 117, at 148 (stating a similar suggestion within the specific context of access to publicly funded data policy researchers should, “[c]onsider conducting or coordinating a study to compile model licensing agreements and templates for access to and sharing of publicly funded data.”).

138. 5 U.S.C. § 552 (2000).

records,<sup>139</sup> and while the Shelby Amendment has since been enacted to enhance public access to data gathered with public funds, the increased importance of privately funded research conducted with commercially gathered data to the policymaking process (particularly in communications) raises questions about whether existing legislation sufficiently addresses the principles of transparency and accountability on which the FOIA and the Shelby Amendment are based.<sup>140</sup> As Justices Brennan and Marshall noted in their dissent in *Forsham v. Harris*, “One cannot even begin to evaluate an agency action without access to the raw data on which the conclusions were based.”<sup>141</sup> Consequently, the public versus private distinction in relation to the origins of the relevant data may need to be considered secondary. Instead, the focus should be on whether “the nexus between the agency and the requested information is close, and [whether] the importance of the information to public understanding of the decisions or the operation of the agency is great.”<sup>142</sup>

A more expansive definition of “agency records” may need to be explored—one in which the contemporary reality of the importance and influence of data gathered by commercial vendors, used in studies conducted by interested stakeholders, and ultimately utilized by policymakers in their decision making, is better recognized. The Supreme Court has developed a two-prong test for identifying “agency records”: 1) the documents are either created or obtained by the agency; and 2) under agency control at the time of the FOIA request.<sup>143</sup> It is the issue of “control” and how it is defined that generally precludes more meaningful access to any commercial data used in policymaking, as the access terms associated with the purchase or license of the data typically are quite restrictive in terms of how the data can be used or circulated.<sup>144</sup> As a result,

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139. See, e.g., *Forsham v. Harris*, 445 U.S. 169, 178 (1980) (Supreme Court holding that medical data gathered by a private entity with the support of a federal grant did not constitute agency records) (“Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to ‘agency records,’ 5 U.S.C. § 552(a)(4)(B), but did not provide any definition of ‘agency records’ in that Act.”). See also *Tax Analysts v. U.S. Dep’t of Justice*, 913 F. Supp. 599, 607 (D.D.C. 1996) (in which access was denied to portions of the Department of Justice’s JURIS database that contained information provided by legal publisher West Publishing due to the fact that the DOJ did not have “control” of the data provided to the agency).

140. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).

141. 445 U.S. at 190 (Brennan, J., dissenting).

142. *Id.* at 188–89.

143. *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

144. See, e.g., *Tax Analysts*, 913 F. Supp. at 603 (1996) (ruling that the Department of

the “control” threshold is difficult to meet in the context of commercial data sources. This situation becomes increasingly problematic if public decision making becomes increasingly reliant upon private data. Thus, a more lenient definition of agency control of its records, one that is less sensitive to the various usage restrictions that commercial data providers typically impose upon their data, would be necessary to increase the extent to which FOIA facilitates expanded access to the commercial data sources used in policymaking. An expansion of FOIA and the Shelby Amendment that in some manner accounts for the commercial data used in studies conducted by, or submitted to, and ultimately, used by, regulatory agencies is necessary to address the serious and systematic data inequalities that have been outlined.

Similarly, it has been argued—specifically within the context of communications policymaking—that the Administrative Procedure Act<sup>145</sup> requires that any data relied upon by an agency in its decision making be made available in the public record. In 2006, Direct Broadcast Satellite (“DBS”) provider EchoStar argued that the Administrative Procedure Act required that the company be entitled access to broadcast signal strength data used in an engineering report submitted by the National Association of Broadcasters (“NAB”) and the Association for Maximum Service Television (“AMTS”) and relied upon by the FCC in its determination of broadcast signal transmission rights<sup>146</sup> under the Satellite Home Viewer Act of 1998.<sup>147</sup> The U.S. Court of Appeals for the D.C. Circuit did not address EchoStar’s argument regarding a right of access to the data, on the grounds that EchoStar did not request the data until after the Commission had issued its final decision.<sup>148</sup> Consequently, it would seem there remains some question of the extent to which broad access to the data used in communications policymaking—particularly that gathered, analyzed, and submitted to the regulatory agency by interested stakeholders—is a required element of the policymaking process.

Perhaps of greater significance is the FCC’s argument in response to the data request. The Commission argued that EchoStar was not entitled access to the data because the Commission “had nor [sic] relied upon them

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Justice could deny access to its JURIS database because its contract with West Publishing “significantly restricted how it could use, transfer and/or dispose of the data.”)

145. 5 U.S.C. § 553(b)–(c).

146. See *EchoStar Satellite, L.L.C. v. FCC*, 457 F.3d 31, 35 (D.D.C. 2006).

147. 17 U.S.C. § 119(a)(2)(A)–(B). This Act grants satellite providers the right to retransmit certain over-the-air broadcast stations in individual markets.

148. *EchoStar*, 457 F.3d at 38 (“We need not decide whether EchoStar was entitled to these data before the Commission issued its final order for the simple reason that EchoStar, although on notice of the findings and conclusions of the NAB/AMST study, did not ask for the data before the Commission issued its final rule.”).

when it issued its final rule. Rather, the Commission based its analysis upon the description, methodology, and results of the study contained in the public comments filed by the Associations.”<sup>149</sup> The notion that a regulatory agency would legitimately consider relying upon a *study* utilizing a particular data set in its decision making as fundamentally different from relying upon the *data* analyzed within that study is certainly troubling, but particularly so if such superficial distinctions are being used to argue against providing access to such data for interested stakeholders. At the very least, the notion that the FCC considers such a distinction as a valid rationale for limiting access to the data used in policymaking suggests that significant clarification of the relevant statutory language or a significant strengthening of relevant legislation is necessary in order to maintain and promote sufficient levels of data access to ensure a democratic policymaking process.

### IX. CONCLUSION

This Article has argued that a confluence of circumstances (the growing importance of empirical research to public policymaking, the increased reliance of policymakers on externally-conducted research, and the increased privatization of the key data utilized in policy analysis) all contribute to a growing imbalance that can undermine effective and representative communications policymaking. This Article has documented the centrality of commercial data sources to communications policymaking and policy analysis, and it has presented arguments in favor of efforts to reduce the current imbalances in data access that characterize the contemporary communications policymaking and policy analysis environment. Finally, this Article has offered a series of suggestions for reducing this imbalance and providing more equitable access to the data source that are central to communications policy research. Future research should explore more extensively the legal issues surrounding access to commercial data sources within policymaking contexts, particularly in terms of possible relationships to FOIA, the Administrative Procedure Act, copyright law, and fair use considerations.

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149. *Id.*