

The Great Frame Robbery
The strategic use of public opinion in the formation of media policy

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Executive Summary

This research project entitled The Great Frame Robbery was an investigation into the ways in which representations of public opinion have been used strategically in an effort to influence media policy at the national level. The research project focused its attention on a limited number of bills that were passed by the US Congress since 1988. The legislative scope was quite broad, ranging from concerns about the risks to privacy derived from the use of videotape rental records to concerns about the risks to children derived from their unmonitored exploration of the World Wide Web.

Although the primary focus of the research was on the introduction of references to public opinion in congressional hearings, a critical analysis of the use of similar references in the news media was also included. The analysis of congressional hearings and media coverage of the issues explored in those hearings was designed to identify the sources of data, and the dominant policy frameworks that were favored by different classes of policy actors. The primary distinction was between opinions reflecting the interests of consumers, and those reflecting the interests of citizens that are ideally supported by the media in their engagement with the public sphere. The assumption underlying the project and reflected in its name is that talk about the interests of citizens has been displaced by talk about the interests of consumers as part of a move toward a marketplace model of policy formation and assessment.

The first conclusion to be drawn from this research is that public opinion plays a relatively insignificant role in the discursive framing of media policy debates. Only in the case of hearings related to funding for educational technology under the E-rate program did the proportion of those including references to public opinion in their testimony exceed 14%. Out of some 672 presentations from individuals in hearings related to the passage of the Telecommunications Act of 1996, only 30 (4.5%) made any references to the views and concerns of the public. Not a single witness in hearings scheduled in support of the passage of the Digital Millennium Copyright Act made reference to public opinion beyond identifying it as a necessary target of public relations efforts.

Although the balance of references to the views of consumers did outweigh those made to the views of the general public, concerns about the avoidance of harms associated with violence, pornography and invasions of privacy overwhelmed those views. More traditional concerns about the preparation of citizens for informed participation in the public sphere were remarkable in their absence.

The analysis of congressional hearings as well as the media coverage of the central issues debated within these hearings revealed the ways in which polls managed or sponsored by media organizations have come to dominate the policy discourse. The only exception to this pattern can be seen in the framing of the privacy debate by firms in the information intensive industries. Policy activists from the public interest community are forced to pick and choose from among the questions posed by media sponsored polls. Policy-relevant survey data that have been generated with foundation support enjoys

considerable visibility within the news media, but is rarely cited in congressional testimony.

The recent public uproar over being ignored by the leadership at the FCC suggests that the public is not willing to stand by in silence while the representatives of business interests transform the policy landscape. A new citizens' movement may emerge from a host of nascent struggles over the right to understand and to be understood, and the historic linkage between public opinion and the public interest is likely to be re-established along the way.

Introduction

The Great Frame Robbery is a research project that was designed to examine the role that the strategic use of public opinion data has had on the formation of media policy in the United States. As a policy research enterprise, it seeks to contribute to the literature on policy formation, implementation and change. As a piece of critical scholarship, it seeks to inform communication, information, and media policy activists and their supporters about the sorts of obstacles that have to be overcome if participation in the traditional public policy environment is to produce movement toward, rather than movement even further away from a vibrant, inclusive, and egalitarian public sphere.

Although the number of policy scholars who have concerned themselves with the role of public opinion in the policy process is not large, there is a substantial body of work which is devoted to examining whether there is, in fact any relationship between public preferences and public policies (Sharp, 1999). As is common in the realm of the social sciences, the evidence is mixed and the conclusions are tentative, although the dominant view seems to be that responsible governments tend to reflect the preferences of a rational electorate (Page and Shapiro, 1992), despite evidence of periodic attempts to disrupt the relationship (Ginsberg, 1986).

While the number of explanations for the occasional divergence of public opinion and public policy is already quite large and growing larger still (Sabatier, 1991), there are a relatively small number of directions in which our efforts might proceed; and they all have to do with media and information systems. It is in the nature of the information systems that people rely upon in forming their opinions, as well as in the means by which opinions once formed are communicated to those responsible for making policy that problems arise. While this project is focused on the latter concern, the first cannot be ignored. An increasingly commercial media system has assumed the role, or has been assigned the responsibility for informing the public about their interests at the same time that it shapes and defines them. By adapting the techniques of attitude and opinion measurement to produce the news at the same time that it markets access to the audiences its news attracts, the news media have come to play an increasingly critical role in the shaping and synthesis of the public's views (Cook, 1998; Herbst, 1993; Ladd and Benson, 1992; Page, 1996).

As Page and Shapiro suggest, "the information presented to the public through the mass media has certain persistent biases, slants, or value tendencies that may distort the public's picture of the world and lead its policy preferences astray" (1992, p. 394). This is a dangerous and disturbing trend, and this project seeks to make that clear.

Public opinion and public policy

There is considerable scholarly debate about the extent to which public opinion plays much of a role in policy formation. Democratic theory holds that policy makers ought to be paying attention to the interests and concerns of ordinary people.

Many argue that the “public” generally understood as the “Average American” should not play much of a role because it is only a small elite segment of the population that actually has a meaningful grasp on increasingly complex policy issues (Robinson, 2002).

Of course, there is considerable evidence that the public is largely uninformed on a number of relevant dimensions of contemporary policy debates. Research carried out in support of the goals of the People for a Better TV campaign provided compelling evidence that there is quite a bit about US media, and media policy that is shrouded in mystery and misinformation.

According to their survey, the public was largely uninformed about the nature of digital television, and an overwhelming majority of the public (71%) did not know that “broadcasters get free access to the airwaves” (Lake Snell Perry, 1999). As we will discuss later, it might be argued that the mass media, rather than the average consumer ought to be blamed for a lack of awareness about the ways in which the media business works.

In 1998, the Pew Research Center for the People and the Press reported on a survey of policy actors (members of Congress, presidential appointees, and civil servants). The majority of these policy makers agreed that the public was too ill-informed about policy matters to make reasoned decisions about what to oppose, or led their support to.

Among members of Congress, only 31% thought that Americans knew enough about public policy to “form opinions about what should be done.” Only around 14% of presidential appointees and senior civil servants felt that the public had any sense of what was at issue.

Despite sharing the view that the public is largely uninformed, nearly 70 % of the members of Congress responding to the survey identified “the pressures of public opinion” as an important obstacle to their getting things done.

Somewhat ironically, the same poll indicated that more than 30% of members of Congress identified the news media as their principal source of information about what the public feels about policy issues, while only 24% said that public opinion polls were as important as the news media as a source of information about the public’s views (Pew Research Center, 1998).

To the degree that the public’s concerns and policy preferences are reflected in the dozens of surveys and polls being reported by media and polling organizations, it seems reasonable to assume that policy makers would make reference to those polls in their policy deliberations (Cook, Barabas and Page; 2002; Gandy, 2003).

The measurement and representation of public opinion

Of course, there is a broad range of opinions about the extent to which public opinion as measured by polling organizations bears any necessary relationship to that aspect of the

public will that is assumed to derive from the operation of an idealized public sphere (Lewis, 2001)

Salmon and Glasser (1995) are especially critical of what they see as the misrepresentation of public opinion in the context of decisions about consumption. “Public opinion in the arena in the arena of the marketplace confers consent, of course, but it is consent of the kind that is characteristically weak, uncritical, and tentative. Existing as it does mainly through polls that measure it and which give it its public appearance, public opinion in the tradition of Gallup conceives consent as a sign of allegiance: the public is allowed to respond by acclamation—or by withholding acclamation—but the public is not expected to respond substantively or discursively” (p. 446). Indeed, they argue, that by “operationally defining public opinion as a compilation of individual opinions, polls in effect disclaim any requirement for individuals to stake a *public* claim for their opinions and the reasons for them” (pp. 449-450).

Challenges to the accuracy of polling data frequently focus on the framing of the questions at the same time that they suggest that the authors of the questions seek to bias the response to support a favored policy or candidate (Robinson, 2002). Lewis (2001) notes that in “most opinion surveys, it is the questioner who establishes the framework and sets the parameters for each response: most of the ideological work has therefore been done before a single question has been put. The respondent is merely asked to inhabit the questioner’s world for a few fleeting moments and push various buttons” (p. 18).

Polls that are the product of a cooperative or contractual relationship between an interested party and a mainstream research organization, as in the annual surveys administered by Gallup for Phi Delta Kappa (PDK) are likely to generate charges of bias. When challenged by the suggestion that PDK wrote biased questions in order to slant the public’s response to school vouchers, Gallup executives claimed full responsibility for the polls, suggesting that “no one at Phi Delta Kappa would pretend to have the expertise to do so” (Rose and Gallup, 2002). The Gallup Organization expressed pride in the quality of its questions, while noting plans to use split sample tests to assess whether additional sources of bias, such as question order, might be operating.

Of course, it was not always in the best interest of the policy process to give polls from Gallup or Harris the benefit of the doubt. As Jacobs and Shapiro (1995) report, Richard Nixon was apparently quite successful in manipulating both organizations in pursuit of policy goals. Nixon’s staff did this primarily by suggesting issues, questions, and frameworks that might be used in subsequent Harris and Gallup polls. Although Jacobs and Shapiro (1995) also uncovered strong evidence that the Nixon White House exercised considerable control over if, when, and how especially critical polling results would be released to the press.

This is not to suggest that all poll results invite the same level of confidence as those from major organizations. We are reminded that most “of the poll-based reporting about American politics consists of stories organized around surveys that news organizations

commission or conduct themselves. Sometimes, however, stories are offered to news organizations by interest groups or individuals because they believe that public consumption of the information they want disseminated will be enhanced by the credibility of an independent source such as a newspaper or network evening news show” (Traugott and Powers, 2000, p. 93). This form of “information subsidy” (Gandy, 1982) is probably less likely to succeed at major papers, such as the Washington Post or the New York Times. However, as the case of Frank Luntz, a Republican pollster active in helping the party achieve a majority in the House in 1994 demonstrates, you *can* fool some of the elites enough of the time to make it worth the effort. Luntz used press releases, interviews, and briefings for the Associated Press to insert a critical but false claim into the discursive stream: that all of the items in the “Contract with America” had been approved by 60% of the American public.

The analytical potential in survey data to help policy makers to develop an understanding of the nature of public opinion is often ignored in congressional testimony and media representation of that data. While the data are available that would support sophisticated interpretation and analysis of differences within the population, those who seek to influence policy discourse are more likely to emphasize what they can characterize in terms of majority views, substantial support, and rising or falling trends. Few can doubt that “a careful reading of polling data in recent years would reveal that people separated by class, race, or gender tend to have different interests and often view the world differently, and yet these divisions sit uneasily within a framework that suppresses such an overtly political fracturing of ‘the public’” (Lewis, 2001, p. 65).

Public policy regimes

It is important to place the development of media policy in the context of long-term historical changes in the relationships between technology, the market and the state. Public policies may be thought of as being constrained within the boundaries of reasonableness that come to dominate policy systems at particular points in time. There are a number of competing theories about the nature of relations between policy systems that adjust the coefficients of friction that apply to different policy goals and policy rationales.

Preston (2001) provides a comprehensive overview of these perspectives, although it soon becomes clear that he favors some variant of neo-Shumpeterian models that incorporate theories of long-wave business cycles with notions of harmonic transformations in the logic of governance and the organization of large systems. This “socio-technical paradigm” resonates quite well with claims that are made about the emergence of a particular “epistemic community” that has come to govern the transformation of the information policy regime at a global level (Haas, 1992; Yee, 1996).

Wilson (2000) associates the ascendance of this epistemic community with what some critics have come to call the “efficiency regime” and others characterize as a “neo-liberal project” that has elevated economists and neo-classical economic theory to a position of dominance in the policy environment. As Wilson suggests: “policies concerning

competition, convergence, and concentration are designed to promote innovation, greater efficiency, and greater choice of services and products for the consumer” (p. 275).

It is important to recognize that the “consumer” who has become the focus of media policy under the guidance of this so-called efficiency regime is a relatively recent invention. Cohen (2003) credits the Progressive Movement that emerged around the turn of the twentieth century with identifying consumers as an important constituency that could be mobilized in pursuit of benefits and rights that could be acquired through political action. The defense of citizens as consumers differed in important ways from their protection as members of a laboring class, however (Cohen, 2003, p. 23). Cohen suggests that it was Roosevelt’s offering the American consumer a “New Deal” as a way to prevent them from choosing a communist path that started to forge a link between consumer affairs and the public interest. That link has become all but an identity, and therein we find the problem.

It is this shifting of the focus of the policy frame from the interests and concerns of citizens with the common good, to the concerns of consumers about variety and cost that I have been moved to characterize as the “real digital divide” (Gandy, 2002). This epistemic shift has been enabled in part by a cognitive shift that has been accomplished by a rhetorical transformation that I wish to characterize as “The Great Frame Robbery.”

In assessing this shift, Wilson (2000, p. 279) is quite pessimistic about our short term prospects: “It is clear that there will be no significant reversals or changes in policy orientation at the level of the telecommunications policy regime in the near future. This becomes evident when the policy regime for telecommunications is situated in the larger historical context of the efficiency regime. There is little evidence to suggest that the regime has run its course or that another regime is around the corner.” Although Wilson (2000) sees clear signs of the failure of the policy more generally in terms of an increase in concentration, a widespread increase in prices, and the emergence of disparities within and between nations (Baker, 2002), the epistemic community seems quite capable of displacing challenges to its underlying theoretical structure (Aune, 2001; Reder, 1999).

Competition and Structural Regulation

The introduction of a marketplace logic into the media policy system was accompanied by an assumption that structural, rather than more direct intervention into the decision making of corporate managers, would be not only more effective, but would steer clear of more troublesome conflicts with First Amendment principles. The logic behind structural regulation of media markets was derived in part from the developments Industrial Organization (IO) Theory as advanced by Scherer (1971).

The IO model sought to examine the relationships between the basic conditions of supply and demand that were assumed to determine the competitive structure of markets. What mattered, of course was the nature of the conduct, or behavior of actors, primarily suppliers of goods and services, that ultimately determined the “performance” of the market. Markets were generally assessed in terms of productive and allocative efficiency,

progress in the development of new and improved goods and services, as well as more socially relevant impacts on equity and the employment of resources (Scherer, 1971, 5).

The application of the IO model in the markets for information goods and services has been far from satisfactory, in large part because of the characteristics of information as a public good. Two features of information goods, non-rivalrous consumption, and limited excludability, generally leads to problems in determining value, setting prices, and controlling access to goods and services (Babe, 1983; Napoli, 2001). Each of the media policies that are explored in this project are attempts to bring these problems under control.

Despite the substantial contribution that the IO model has made to our understanding of the markets for information and communication (Baker, 2002), this mainstream economic approach ignores a great many other dimensions along which the performance of media might be assessed (McQuail, 1992). None of the performance criteria common to IO analysis explicitly deals with the sorts of concerns that have been expressed in the context of talk about “the public interest” beyond the underlying concern about a “just” or “fair” price for goods and services. Gomery (2000) extends that list to include an evaluation of the extent to which the media system facilitates political discussion, while protecting and maintaining cultural quality. Critical scholars have been especially concerned about the ways in which the performance of media is associated with the performance of a democratic political system (Baker, 2002; Croteau and Hoynes, 2001; McChesney, 1999; Preston, 2001; Rossides, 2003).

Although the focus of critical attention has been concentrated on the performance of news media, because of assumptions about the role that news media play in the maintenance of a vibrant public sphere, there are also concerns about the impact of fictional entertainment on the development of cultural values, norms, and orientations to individuals and groups in society. As we will see, concerns about violence and sexual content have come to supplant earlier concerns about the representation of racial and ethnic groups (Gandy, 1998). We recognize this long-standing concern about content regulation as a reflection of the unique character of children as a population that is likely to be placed at risk in an unfettered market

Media Organizations as Interest Groups

Public interest organizations concerned with media policy can be distinguished from other organizations involved in the policy process by the nature of their interests. As Cook (1998, p. 138) suggests: “these groups believe the policies they advocate constitute a compelling moral cause that will benefit the public at large” rather than their own members, or an identifiable minority group.

Media organizations, and the associations that represent management, technical, and professional interests that are tightly bound by a common interest in the assured prosperity of the industry, are readily distinguished from public interest organizations. Among the most important ways in which these “interest groups” differ from “citizens”

groups is in the resources they have available for direct and indirect investments in the production of influence.

Although some scholars advise caution in assuming the news media play a powerful independent role in the policy environment (Schudson, 2002), few doubt that their involvement in the policy process has increased as media policy has moved up rather high on the issue agenda.

Media firms are actively involved in lobbying in support of or in opposition to a range of media and information policies. The Center for Public Integrity regularly (2000) estimates the level of investment in the production of influence in terms of professionals registered to lobby on particular issues before the Congress. In recent years, intellectual property and copyright were the most important concerns, followed closely by concerns about the regulation of violent programming (p. 62). According to public reports, the NAB earned a position at the top the list of media lobbyists because it spent in excess of \$16 million between the years 1996-2000. The NAB was followed closely by Time-Warner, a multi-media conglomerate, with lobbying expenditures in the neighborhood of \$15 million, with the National Cable Television Association (NCTA) coming in a close third with expenditures in excess of \$13 million (Center, 2000, p. 63).

Critics have suggested that public interest groups are no longer an effective voice in shaping media policy debates. More than twenty years ago a rather high level of pessimism had already been reached. As Haight (1979, p. 259) argued, “persuasion in the name of public interest is likely to fail not only because of opposition by special interests, but also because government officials are now defining the public interest in ways that diminish the interests of citizen groups....citizen groups have largely become a number of professionals raising arguments in the policy-formation process and not representatives of an organized and attentive constituency.”

The production of influence

The political science literature is filled with competing views about the extent to which interest groups are able to influence public policy. The conclusions derived from periodic reviews remains mixed, in part because of the difficulty that researchers face in gaining access to the interactions between policymakers and those who would influence them (Kollman, 1997; Schlozman, 1984; Smith, 1995). Yet, there is a tendency toward assuming that members of Congress tend to agree with those who lobby them on specific legislative policies that come before them at the committee level.

As Jones, Baumgartner and Talbert (1993) suggest, the relationship between witness and venue is very strong. “When an agriculture committee has hearings on pesticide topics, its members are three times more likely to hear testimony from representatives from the pesticides industry or from others likely to have a favorable view on pesticides than from health or environmental perspectives....The relationship between witness and venue in the case of smoking could hardly be more powerful. Agriculture and trade committees, when considering tobacco questions, simply do not schedule witnesses who could be

expected to attack the industry.... Committees use hearings to garner support for the views they already hold “(p. 663).

As they see it, “proindustry committees do not often schedule critical hearings, and when they do, they hear from proindustry representatives. Similarly, critical venues tend to schedule witnesses that provide unfriendly testimony. In sum, committees neither seek nor receive balanced, objective policy information and thus cannot be viewed simply as information gathering agencies of Congress” (Jones, Baumgartner and Talbert, 1993, pp. 664-5). Still, it is clear that hearings serve a critical function within the policy making infrastructure. They are used to call attention to issues and concerns, and quite often, they identify a greatly narrowed list of policy options that are likely to be acceptable to those most intensely concerned. This issue definition or framing function is a vital policy role that provides far more than symbolic gestures.

Miller (1992) reminds us that committees vary in a number of others ways that may help determine the character and quality of the testimony that is presented in its scheduled hearings. While it is obvious that committees will differ in terms of their jurisdictions, and their relative power, there are also differences that are reflected in the specialization of their members. Many committees are dominated by lawyers and others like the Interior Committee has been dominated by non-lawyers. In Miller’s view, members of Congress are drawn to committees for a variety of reasons, not all of them related to constituent interest and the likelihood of re-election. With its population of lawyers, the Judiciary Committee is traditionally rather deferential to the courts, while the Commerce Committee is not so constrained. Miller (1992) makes use of this distinction to demonstrate how telecommunications policy matters were treated rather differently in different committees when the performance of Judge Green as overseer of highly fractious struggles over entry into information service markets was the issue at hand.

Theorists who argue that politicians are concerned more about re-election than about the fundamental importance of the policies they support tend to argue that mass opinion is less important than constituent opinion. At times, in the view of some, “constituent opinion seems to overwhelm policymakers and influence policy independently of any interest groups” (Kollman, 1998, p. 156).

Among the most important ways in which interest groups are able to influence the formation and implementation of public policy beyond the direct or indirect supply of money is through the supply of information, including information about constituent opinion (Gandy, 1982).

Cook, Barabas and Page (2002) explore the ways in which policy elites invoked public opinion in the formation of public policy related to social security. They observed that very few of the references to public opinion appeared to rely upon surveys or publicly available assessments of public sentiment. Because such a highly visible and well covered policy matter like social security was so rarely framed in the context of public opinion, these authors suggested that invocations of public opinion on other less visible, or less often polled issues might be rarer still. Gandy (2003) observed that the invocation

of public opinion in hearings related to a series of privacy bills was indeed quite rare, despite the increasing amount of attention that the press had been paying to privacy in recent years.

Jacobs and Shapiro (2000) suggest that the Clinton administration clearly recognized the importance of public opinion to the policy process and they invested substantial resources in its management. “Clinton and his aides consciously took a ‘much more aggressive role’ in ‘arguing with the media’s interpretation of polls’ and not ‘letting [congressional] opponents and interest groups announce their polls’ without rebuttal” (p. 105).

Of particular interest in this research is the extent to which there are differences among the participants in the policy process in the ways in which they make use of public interest data. An earlier analysis of references to public opinion in Congress revealed that even though representatives of interest groups were a relative small percentage of those providing testimony (15%), they accounted for almost half of the references to public opinion that were made. While nearly two-thirds of the references to public opinion were based on specific studies, members of Congress were rarely provided with specific details about the study, including the exact wording of the questions that were asked (Traugott, 2000, p. 380).

Media coverage of issues

Media coverage of public opinion polls is also an important component of the process through which public policies are determined. News media play an important role in the formation of public policy agendas that is not often acknowledged (Gandy, 1983; Leff, Protess and Brooks, 1986). Their use of public opinion data by the press has just begun to be explored (Herbst, 1993).

We have noted that politicians and public officials pay attention to public opinion, and they often invest time and limited resources in gaining access to assessments of that opinion. There is a distinction, however to be made between polls that are used to guide strategic action, and those which are released to the public. Public polls released through the press can “force the leaders to act where private polls might not” (Schoenbach and Becker, 1995, p. 336).

As Traugott and Powers (2000, p. 99) suggest: “Poll results are increasingly being used as the main topic of news stories, rather than as supporting information, because the rise of media polling operations means that news organizations often have direct control over content and have a direct financial stake in the production of the information.”

Media polls are thought to be held to a different, although not necessarily lower standard than that which guides other polling organizations. Robinson (2002, p. 133) suggests that the “organization’s political beliefs or journalistic interests determine when a poll is taken, how the questions are asked, and what findings will be emphasized when the story is reported.” Yet, as Robinson and others suggest, the “polls that are most likely to shape

debate, mold opinion, and have the most comprehensive consequences are those conducted by the nations' biggest media organizations' (Robinson, 2002, pp. 134-5).

Yet, media organizations, for reasons we have yet to determine, will differ in the ways in which they interpret, or frame the information provided by opinion polls. Traugott (2000) cites the example of a Gallup poll with two related, but substantively different constructions of American opinion about bombing Iraq. Using one question from the survey, CNN read the response to one Gallup question as justifying the headline "Support drops for military strikes against Iraq." Using another question from the same survey, USA Today ran a story under the headline, "Public solidly supportive of attacking Iraq" (Traugott, 2000, p. 378).

In her analysis of media coverage of the debates about television violence and the need for government regulation in addition to a technological response (V-chip), Hoffner (2000) noted considerable disparity in the opportunities that different interests were given to present their views. "The views of the television industry were depicted in 66.9 percent of the articles, those of government officials in 58.0 percent, and those of researchers in 14.3 percent. In comparison, only 5.8 percent of the articles cited average citizens (usually parents), and 5.1 percent reported the results of public opinion polls on the subject" (p. 325).

Although there are differences between surveys and polls in terms of the number of questions asked, and in terms of the number of different issues that are explored, there is always the chance that the selection of responses to report may be governed by interests other than informing the public of the nature and distribution of opinion on some issue. The press tends to select extreme responses to illustrate a point, and these extremes have considerable potential to bias understanding (Zillman and Brosius, 2000).

Legislative testimony

Observers note that congressional hearings are held for a number of different reasons. "Many times chairs will hold these events to promote their own agendas and invite witnesses who can help facilitate this effort. In other instances, a chair may be interested in using the forum to gain insight and information" including information about the likely response of constituents (Leyden, 1995, p. 433). When the goal is promotional, committee chairs expect their staffs to invite witnesses who will be able to attract the attention of the press, and who will be able to express their positions in ways that can be easily and reliably communicated to others. It is this latter function that leads committee chairs to invite Hollywood actors to offer comment on issues for which they have at best, limited expertise.

Kollman (1998) argues that interest groups are in a good position to provide legislators and other policy actors with information they find important. Much of that information relates to information about public sentiment. "There are hundreds of poll results published every year on public policy preferences, including those conducted by candidates within electoral districts...the salience policymakers are concerned about—whether a given issue will figure into constituents' voting or contributing decisions—is notoriously

difficult to discern. This is partially because the salience of issues is not the subject of many opinion polls....Certainly interest groups in a particular issue area are likely to have more information about the public salience on the issue than are policymakers" (pp. 24-5).

Whether a representative of some interest group or organization is scheduled to testify is determined by a host of factors, including the goals of the committee chair. Nevertheless, the resources, including reputations that are available to the organization help to predict whether an organization is likely to be scheduled to testify. The fact that groups with political action committees (PACs) that can funnel campaign contributions to committee chairs are more likely to be scheduled is consistent with the view that links committee assignment with the goal of re-election (Leydon, 1995). The fact that a highly visible presence in Washington, DC is associated with giving testimony also reinforces the impression that powerful interests dominate the policy process at the congressional level.

Media policy formation: Congress and the FCC

It was during an earlier and remarkably brief period in the history of the FCC that public involvement in the policy process could have been characterized as substantial (Cole and Oettinger, 1978). Public involvement in Commission activities increased following the success by the United Church of Christ in winning "standing" for representatives of the public. With support from the foundation community, advocacy organizations, including the Citizens Communications Center and the Stern Community Law Firm, pursued an increasingly aggressive program of engagement with Commission decisions. The most effective strategy developed by this activist community was to file petitions to deny the previously routine grants and renewals of broadcast licenses (Polic and Gandy, 1993). The petition to deny was characterized as "the most powerful weapon in the arsenal of a citizen group" (Cole and Oettinger, 1978, p. 204). From a slow beginning following the WLBT decision leading to two petitions being filed in 1969, non-industry groups filed some 237 petitions against the renewals of 618 broadcast licenses. Although the use of petitions almost never resulted in the loss of a license, those petitions that were designated for a hearing represented a substantial cost and a palpable risk that neither broadcasters, nor the "reluctant regulators" were willing to face.

The recent flurry of activity in response to the FCC's media ownership decision (Ahrens, 2003; Shales, 2003) serves to reinforce a decision to focus on Congressional hearings, rather than FCC rulemakings or proceedings. Despite receiving in excess of 750,000 comments from individuals, the overwhelming majority of which were opposed to further weakening of already minimal barriers to consolidation, the majority approved the liberalization plan. The rapid response from members of Congress on both sides of the aisle reinforced a widely held view that an administrative agency like the FCC has no relationship to the public that they must respect (Napoli, 2001).

Arguably, it is because such agencies face no possibility of sanction from the public that they are barely concerned about public sentiment (Holman and McGregor, 2001; Napoli, 2000). However, the public can express its dissatisfaction with the performance of the

FCC through its representatives in Congress, and it would seem that these legislators have either relied upon the press, or their electronic mail as a way of taking the public pulse.

The FCC is to be understood as an intermediary in the policy process, and although it is an executive agency, it takes its direction primarily from the Congress. It is for this reason that this research project has focused primarily on Congressional legislation, and congressional oversight of the FCC.

Method

Eight legislative examples were selected because of the breadth of issues and concerns that are touched by the legislation. Five of the eight legislative targets have signed bills as the marker of a completed process. One legislative area focused on hearings concerned with funding for a program established as part of the Telecommunications Act of 1996, while another was incorporated into a comprehensive budget resolution. In response suggestions made by a group of media policy activists and researchers who assembled at the Ford Foundation to hear the preliminary results of the project¹, a piece of “failed” legislation was added. The Tauzin-Dingell Broadband Deployment Act was selected in part because of the massive amount of money that had been spent by corporate interests lined up on one side or the other of a technological divide (Falk, 2003).

The Bills:

The Video Privacy Protection Act (1988)

The Video Privacy Protection Act was something of an anomaly. As Regan (1995) tells the story of privacy policy formation, the negotiation of a legislative response to public concerns about threats to privacy is a process that had traditionally taken years, even decades to unfold. In her view it was the definition of privacy as an individual right, rather than collective concern that explained Congressional reticence. “Opponents of privacy legislation did not attack privacy as an idea or value but instead emphasized the importance of a competing idea. In each of these cases, the competing idea had a broad appeal—efficiency of government operations, law enforcement and national security, and a reduction of theft and fraud in the workplace” (Regan, 1995, pp. 209-210). It was the high level of media attention that was drawn to the experience of a nominee to the Supreme Court (Robert Bork) that allowed the amplification of personal risk to distract the public from the broader privacy risks that passage of this bill would establish as a default position in the sphere of data base marketing (Gandy, 2003).

The Cable Television Consumer Protection and Competition Act (1992)

After a long period of regulatory constraint imposed by the FCC in defense of broadcast interests, Congress acted in 1984 to limit the regulation of cable rates to those markets

¹ The meeting was held on the afternoon of March 31, 2003. More than a dozen key members of the citizens and consumers media policy community were in attendance.

where there was no “effective competition.” It was up to the FCC to develop a basis for determining if this standard had been achieved. Because cable rates continued to rise, rather than fall as received theory would suggest,² Congress was moved to provide guidance to the Commission (Napoli, 2001). The focus on the pursuit of reasonable cable prices reflects the continued narrowing of the concept of the public interest. The public interest was defined as consumer protection that was to be assured by more effective competition. Attempts to acknowledge the relevance of traditional concerns about localism and access to a “diversity of views” were barely addressed within the legislation (Aufderheide, 1999).

The Telecommunications Act (1996)

The Telecommunications Act of 1996 is broadly understood as the high water mark of the efficiency rationale as pursued by the advocates of marketization (Wilson, 2000). This comprehensive act marked the end of a long struggle to re-write the Communications Act of 1934 that began in earnest in 1976 (Haight, 1979). Although the “Options Papers” developed by the House Communications Subcommittee staff were clearly deregulatory in focus and intent, of greater importance was an apparent shift in focus whereby the notion of “public trustees” with public interest responsibility would be replaced by “marketplace forces” that might be adjusted via structural means (Kopp, 1997; Polic and Gandy, 1993). This shift in focus was all but complete with the passage of the Act in 1996. The purpose of the Act was the promotion of competition, and the beneficiaries of competition are identified as consumers, rather than citizens. The discursive shift is quite clear. As Croteau and Hoynes have observed, the word “consumer” appeared 24 times in the Act, whereas the only reference to the commonly understood meaning of citizen was in reference to the potential of the Internet (2001, pp. 209-210).

The Telecommunications Act did include provisions designed to restrict access to violent, pornographic, or “indecent” content, including special efforts to protect children by enabling parents, and parental surrogates to block offending material.

E-Rate Program (1996)

The E-Rate Program was established as a component of the Telecommunications Act of 1996 in order to enable schools and libraries to have greater access to telecommunications equipment and services, with special concern for erasing barriers to accessing the Internet. The discounts that institutions would enjoy varied with their economic status and location. The public interest in E-rate legislation soon came to be associated with the need to eliminate the so-called “digital divide” (Puma, Chaplin and Pape, 2000).

Schools and libraries as providers of access to the Internet and other educational resources were assumed to be the best sources of information about needs and policy options. The interests and views of parents and members of communities that would be

² As noted in the text of the Bill, “the average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate regulation;” 102 P.L. 385; 106 Stat. 1460, Sec. 2. <47 USCC 521, October 5, 1992.

affected by improved access to information resources were assumed to have been represented by these advocates. This focus on the supply side of the telecommunications infrastructure has a long tradition in policy discourse (Gandy, 1992; Stedman and Bransford, 1992).

The Digital Millennium Copyright Act (1998)

The Digital Millennium Copyright Act (DMCA) is a legislative initiative designed to reflect the nation's commitment to participation in a global marketplace governed in part by international agreements under the banner of the World Intellectual Property Organization (WIPO). Some of the draconian measures taken to protect intellectual property interests under this bill indicate how important the copyright industries are expected to become in the US economy.

As the National Research Council Committee (NRC, 2000, p. 108) observed, resources in rapidly developing environment of digital storage, distribution, and display of content provides content owners with a variety of ways to "restrict access to and uses of their works in ways not possible in the print world." The DMCA was designed to defend those technical systems against circumvention by producing property rights over copyright management systems that in some ways exceeds existing rights over content.

Jessica Litman (2001) provides a critical insight into the history of copyright legislation in the United States. She makes it clear that copyright, like much of telecommunications policy has been framed so as to exclude the public as well as the public's interest. The policy problem had been framed almost entirely in terms of competing business interests involved in the production and distribution of content. To the degree that the public's interests were considered at all, it was through the claims that were framed in those terms by representatives of the consumer electronics industry.

The Digital Millennium Copyright Act (DMCA) took historic steps against what might be considered to be the interests of consumers in that it criminalized attempts to bypass or defeat copy protection systems. In Litman's view (2001, p. 145) "it seeks for the first time to impose liability on ordinary citizens for violations of provisions that they have no reason to suspect are part of the law." The commonplace understanding of what "fair use" actually meant with regard to non-commercial duplication and "sharing" of music and other was defined as false, and irrelevant in the copyright management technology. Broader social interests related to public access to information received scant attention.

While critics have explained the relative absence of public engagement in telecommunications policy debates through reference to its technical obscurity (Napoli, 2001), Litman (2001) suggests that the community of specialists in "intellectual property" matters is even smaller and less accessible. Indeed, when members of the Subcommittee on Telecommunications, Trade and Consumer Protection scheduled a hearing on the bill "supporters of the bill suggested gently but repeatedly that the members of the subcommittee should leave the business of making copyright law to their colleagues in the Senate and in the House judiciary committees, who understood it" (Litman, 2001, p. 138).

The Sonny Bono Copyright Term Extension Act (1998)

The public's interest in gaining access information at a reasonable cost was supposed to be assured by the grant of a limited monopoly right to authors. The Sonny Bono Copyright Act sought to extend that right for an additional 20 years. It was impossible to argue that such an extension served the public interest; so supporters claimed that the legislation was needed in order to protect American authors from exploitation by European publishers.

The bill was also concerned with determining just compensation for copyright holders whose works would be "performed." In this regard, the bill was a prime example of special interest legislation. It brought together a rather curious coalition: religious broadcasters and bar and restaurant owners. Both were seeking an adjustment in the royalties they had to pay composers.

The Child Online Protection Act (1998)/Children's Internet Protection Act (2000)

The Child Online Protection Act of 1998 was concerned primarily with the protection of children's privacy interests within the Internet environment was included in a massive emergency budget resolution.³ The Act prohibited Internet Website operators from collecting personal information from children. In addition, the Child Online Protection Act required "commercial distributors of pornography or other material harmful to minors" via the Internet to restrict access to this material. The bill raises interesting questions about the right of youngsters to access otherwise legal materials under the First Amendment (Napoli, 2001).

The Children's Internet Protection Act was concerned with the responsibilities that libraries would be assigned to protect young users from gaining access to "harmful materials" through the use of content filters. Other means recommended insuring the safety of young users includes monitoring of their online activities. The bill was initially introduced in the Senate and moved successfully to the Senate floor, but was never voted on. It was one of many unrelated pieces of legislation that were cobbled together into an end of the year budget resolution. The bill raised a number of questions about the impact of the legislation on the digital divide because it linked compliance to eligibility for E-rate discounts.

Unlike the Communications Decency Act which was incorporated in the Telecommunications Act of 1996, the CIPA legislation survived constitutional scrutiny by the Supreme Court earlier this year.⁴

³ Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P.L.105-277.

⁴ United States, et al., Appelants v. American Library Association, Inc., et al, 2002 U.S. Lexis 4799, 71 U.S.L.W. 4465, June 23, 2003

The Internet Freedom and Broadband Deployment Act (Tauzin-Dingell)

Although the bill was approved in the House in 2001, it died in a senate committee. This bill had its origins in the break up of the AT&T monopoly into the Regional Bell Operating Companies (RBOCS). In order for these “local” providers to enter into competition with AT&T in the long distance market, they were expected to share their infrastructure at reduced rates established by the FCC. The Tauzin-Dingell bill would have eliminated this requirement. Like the Telecommunications Act before it, this broadband deployment legislation attracted a host of lobbyists seeking to define the emerging marketplace. Expenditures on lobbying and other attempts to influence this legislation have been among the highest on record for several years (Falk, 2002, Falk, 2003). “At issue are considerations such as pricing, service definitions, interconnection terms, and rules for the use of public resources...as well as a variety of special needs that are usually met outside of normal market action.” Also at issue are “questions of market power and related conduct” (NRC, 2002, p. 169).

The debate has been complicated by the fact that AT&T was participating in the broadband market through its control over cable systems offering high speed access to the Internet. The two sides, RBOCS on the one hand supporting the initiative to “set them free” are opposed by the long distance carriers (AT&T, Worldcom (MCI), and Sprint) some “competitive start-ups” fear they will be crushed by RBOCS freed of access obligations.

The legislation faced problems for a number of reasons, including the collapse of the dotcom market that had been accompanied by massive over-investment in capacity that was distorted by strategic misrepresentation of the status of corporate accounts.

Critical observers challenged the claim that regulatory burdens slowed the growth of broadband by suggesting that consumers were already over-extended by the costs of other telecommunications resources like cell-phones they had come to rely upon. It was unclear how, or even if opponents could frame the public interest—but it was easy to claim that both positions were pro-competitive.

Framing by committee chairs

As many observers suggest, committee chairs tend to use congressional hearings strategically, rather than as a resource for information gathering. Witnesses rarely introduce unexpected bits of information, and we assumed that those hearings in which witnesses did in fact evoke public opinion would be presaged by the opening comments of committee chairs or ranking members. This was rarely the case.

Although no witnesses were scheduled who would offer testimony in support of user interests, as Chair of the Telecommunications subcommittee organizing hearings on intellectual property, “Billy” Tauzin observed that “if this bill favors the copyright community, consumers, manufacturers, users of copyright work and the society as a

whole may in fact suffer.”⁵ House Commerce committee chair, Thomas Bliley, also suggested that the Congress needed to “understand precisely what impact this legislation will have on the ‘fair use doctrine.’ Educators and researchers rely on fair use to enrich all of us. Consumers rely on it as well. I know these groups have concerns with this legislation.”⁶ But, neither Bliley nor Tauzin felt that they needed to have those concerns expressed for the record.

Throughout its legislative history, the negotiation of the details of the Telecommunications Act was marked rather limited concern about the impact of policies on consumers, or on especially vulnerable segments of the population. Explicit reference to the public or to consumers was quite rare, and in some cases, when the testimony from public interest representatives was expected to be critical, committee members attempted to blunt their impact. A prime example can be found in comments before the commencement of testimony on the FCC’s price cap proposals:

“I know from a number of statements that were made at the time of the Commission’s notice that some individuals and groups are concerned by the impact that the price cap proposal would have on consumers. I want to reinforce those concerns, and urge the Commission to very carefully weigh the comments that it receives from consumer groups and others. But I do not believe that those concerns ought to prevent the Commission from going forward or moving ahead with its work in this area.”⁷

Although he would go on to reject government “censorship,” Larry Pressler did note that “Americans are concerned about television programs which degrade human dignity. Much of what passes for entertainment is simply salacious or grossly violent material which cheapens human life. It is high time that industry leaders accept responsibility to change this situation.”⁸

Because the cable bill was explicitly framed in terms of consumer interests, we were not surprised to see committee chairs and ranking members invoke those concerns in their opening statements. Chairman Markey was quite aggressive in his framing of a three-day schedule of hearings. “While much of the debate about cable deregulation or reregulation is couched in terms of the public interest, the true issues at hand more often than not are economic interests of competing parties....My focus, however will be the impact of the act on consumers. The public interest is not defined merely by the existence of programming that interests the public. The public interest is defined by the quality of service consumers receive from cable companies. The public interest is defined by restoring our historic commitments to localism and diversity....As we discuss competition, regulatory changes, technological developments, and other issues, my

⁵ Comment of Representative WJ Billy Tauzin in Hearings of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee on intellectual property, June 5, 1998.

⁶ Comments of Representative Thomas J. Bliley in the same hearing.

⁷ Comments of Representative Matthew J. Rinaldo in Hearings of the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, November 10, 1987.

⁸ Comments of Larry Pressler in Hearings on television violence before the Senate Committee on Commerce, Science and Transportation, July 12, 1995.

bottom-line question is how these issues affect the public, not just how these issues affect the bottom line of well-heeled corporations. I hope through these hearings to return the public interest to the debate on cable policy.”⁹

We found in the case of hearings on E-Rate and funding for education that rather than taking note of public opinion, the committee chair, and his scheduled witnesses were being organized in an effort to shape that opinion. Citing his earlier efforts to “raise public awareness of the importance of federal funding for education,” chairman Jeffords went on to say that “Because of my strong belief that the federal investment in education must remain one of our strong priorities, I applaud this morning’s witnesses for working to build national support for an increase in federal education funding.”¹⁰

We found explicit reference to survey data in only one set of opening comments. It was made in the opening statement of Michael Oxley in support of his appeal for support for his bill to protect children from “pornographers and pedophiles.” An unidentified national poll reportedly found “that the No. 1 concern on the minds of voters is the moral decline of our society.” And he proposed to respond to this concern by “protecting kids from the degrading content readily available on the Internet.”¹¹

The use of public opinion

On the basis of the legislative histories described by the Congressional Information Service for each of these bills, we identified all the witnesses and examined their testimony for references to polls, surveys, public opinion, and other associated references to public opinion that students of public opinion have used in similar analyses (Cook, Barabas and Page, 2002; Traugott, 2000).

The legislative history of these bills identified the date, committee, and witnesses for each scheduled hearing. The number of hearings and scheduled witnesses varied substantially. The Telecommunications bill had the greatest number of hearings (45) distributed somewhat evenly across four different committees, with the Energy and Commerce committee holding the most (17), and the House and Senate Judiciary committees holding the least (9 and 6 respectively).

The Cable Act held 17 hearings distributed across three committees, with the Senate Judiciary committee holding the smallest number (3). Seven different committees claimed jurisdiction over bills related to E-rate, and 17 hearings were held.

Only a very small fraction of all formal testimony included any references that could be interpreted as a reference to public opinion or sentiment.

⁹ Comments of Edward Markey in Hearings on Cable Television of the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, March 30, 1988.

¹⁰ Comments of James Jeffords in Hearings on Funding for Education Programs of the Senate Health, Education, Labor and Pensions Committee, September 14, 1999.

¹¹ Comments of Michael Oxley in Hearings on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, September 11, 1998.

Out of 672 witnesses who appeared before committees linked to the Telecommunications Act of 1996, only 30 (4.5%) made reference to public opinion. Witnesses before the Judiciary committees were least likely to make references to public sentiment or opinion.

Out of 235 witnesses who gave testimony in relation to the Cable bill, only 29 (12.3%) made reference to public opinion or some variant. A somewhat larger proportion (14.3%) of those giving testimony related to educational funding and E-Rate policies made reference to public opinion.

Not a single one of the 79 witnesses who came before committees engaged in the development of the Digital Millennium Copyright Act made direct reference to public opinion in their prepared statements. However, in response to a question, one witness, Steven Metalitz from the International Intellectual Property Alliance suggested that the industry was engaged in a “battle” *for* public opinion.¹²

Data based assessments

When we considered whether references to public opinion actually included references to empirical data (of the sort that might be provided by surveys or opinion polls), the numbers dropped substantially. For example, less than 3% of the witnesses in hearings related to the Telecommunications bill made claims about public opinion that were supported by reference to any survey or poll. Supporting data were most likely to be introduced in testimony related to the Cable bill.

Opinion sources

We identified the sources for each of the surveys that were introduced into testimony. We classified these sources into a number of different categories that suggest that nature of their interest in the framing and interpretation of public opinion.

Sources that we identified as independent were not, as far as we could determine from testimony, associated in any way with the witness. We also characterized them as independent if they were not recognizable as a professional survey or market research firm. For example, while the American League of Cities is likely to have contracted with a professional firm to manage their survey, no firm was identified. The League was identified as “independent.”

Other categories included media organizations, polling or survey research firms, and media/research partnerships. We characterized surveys that were produced under contract or agreement with the witness’s organization as “related.” And finally, we classified other unspecified references to public opinion as “off-hand.”

¹² Testimony of Steven Metalitz, Hearings on “Intellectual property rights” before the International Economic Policy and Trade Subcommittee of the House International Relations Committee, May 21, 1998

The fact that a large proportion (29%) of all references to public opinion in legislative testimony could be characterized as “off-hand” remarks may help to explain the rather low regard with which claims of public support for particular policies are perceived.

As Ladd and Benson (1992) had suggested, the news media have become major sources of public opinion data, and those data were used quite frequently in congressional testimony.

Because media policy is increasingly about media organizations, it was important to assess the extent to which these polls were being relied introduced into the legislative record. The data suggest that polls involving participation or primary responsibility assigned to media organizations were the primary source of quantitative opinion data offered in testimony.

We examined the distribution of data from different organizational sources across the different bills. When we examined the sources of opinion introduced into the record in Telecommunications hearings, only 20% of them involved media organizations. A similar role was observed in E-rate testimony (14%). However, fully 45% of the witnesses on the Cable bill who evoked public opinion relied upon media sponsored surveys.

Opinion frames

As has been suggested, the source of the data, as implied by the sponsorship of the survey can be expected to exercise some influence over the framing of the questions that help to shape the opinions that can be reported in hearings and in the press.

Critics of the role that public opinion plays in the policy process suggest that contrary to the common view which associates bias and error to the ways in which samples are drawn, the most likely source of error and distortion in the assessment of public opinion is in the framing of the questions.

As noted earlier the “Great Frame Robbery” was being planned in the 1970’s, and was pursued in earnest in the 1980s, and it had become settled history by the 1990s when these bills were being negotiated. The frame shift I refer to is the substitution of the marketplace model for the trusteeship model of media governance. This shift was accompanied by an emphasis on the concerns of consumers over those of citizens or members of the public. A historical marker of this transition from the public interest to whatever the consuming public was interested in at the time is the cynical comparison of televisions to toasters that came to characterize the tenure of Mark Fowler at the FCC (Baker, 2002).

We examined the ways in which witnesses talked about those who held opinions. They could talk about them as citizens who were interested in public concerns, or talk about them as consumers who were interested in price and quality of media goods and services.

While more witnesses did in fact talk about consumers and consumer satisfaction (N = 45), a similar number (40) talked about the American public, or about citizens, or parents, or communities of interest.

The great majority of witnesses on E-rate concerns mentioned the views of citizens or the public (86%). The Telecommunications Act was an extremely comprehensive bill, and as a result, some two-thirds (67%) of the witnesses evoked public opinion through a civic, rather than a consumer frame. Those providing testimony on the Cable bill were the least likely to talk about citizens; no doubt because most of the witnesses were from competing service providers. There were only 8 cases (28%) in which witnesses referred to people in terms of their status as members of the public, and five of *those* witnesses *also* referred to respondents as consumers.

Additional frames

Testimony was also characterized in terms of the tendency of respondents to support or to oppose policies and practices of media organizations. More witnesses claimed that the public supported some policy or practice than opposed it (10 versus 6). Three times as many witnesses reported that the public supported regulation (9) than opposed it (3).

Because so much of the testimony was about consumer satisfaction, we observed that more than twice as many witnesses claimed that the public was pleased with the services they were provided (22), than were not (10).

Pollsters appear to be reluctant to frame questions in ways the present public policies as choices between two options, such as between “opt-in” and “opt-out” privacy policies (Gandy, 2003). There were however, twelve cases in which consumers reportedly favored one product or service over another.

As we noted earlier, policy makers, and students of public opinion tend to suggest that the public is largely uninformed, or even confused about goods and services, and the policies that may be involved in governing their supply. Twice as many witnesses suggested that the public was confused or uninformed (6) as was knowledgeable or well informed (3).

With the exception of privacy and the safety of children, there was little effort to frame the public as frightened or overly concerned. Overall, there were only eight witnesses who made such assertions, and most of those were about privacy or children at risk from violence, pornography, or sexual predators.

Whose frames?

Witnesses were also classified in terms of their primary orientation or identification. We distinguished between witnesses from government, from government agencies, from business organizations, or from public interest organizations (including foundations). While the differences are not dramatic, they are noteworthy. Some 58% of government witnesses invoked the opinions of citizens. Not unexpectedly, 54% of witnesses from public interest organizations made references to opinions of the public or citizens. Also,

not unexpectedly, only 39% of the witnesses from business talked about their opinion sources as citizens or members of the public.

Strategic use and misuse of polls

Because the hearings and the legislation they were designed to support were primarily concerned with the negotiation of business interests, rather than the interests of citizens and consumers, most of the witnesses wielding carefully selected statistics as weapons or shields were corporate representatives. In several cases, witnesses used responses to different items in the same survey to make a point designed to damage the positions of their opponents. Many of these examples emerged in the hearings for the Cable bill.

For a number of years the NAB/Roper surveys made direct comparisons of consumer satisfaction with broadcast and cable-originated programming. The format in the 1989 survey was somewhat unusual in that respondents had been provided with a list of performance assessments that they were asked to indicate whether they applied more to broadcasting or cable services. Out of 12 comparisons, respondents indicated that cable was superior to broadcasting in 10. James Mooney of the National Cable Television Association (NCTA) did not fail to note these favorable results in his testimony. Indeed, in reporting that “people now think cable offers better children’s, educational, cultural, and general entertainment programming than conventional television, and that the overall quality of cable programming is better than on conventional television,” Mooney made sure to note that these results were generated by a “Roper poll done for the broadcasters.”¹³ Not surprisingly, this particular set of questions had disappeared from the NAB/Roper schedule by 1991.

The results of a Wall Street Journal/NBC News survey in 1990 were also used rather selectively by Ed Fritts, President of the NAB, to indicate that consumers were more likely to apply harsh criticisms to their cable service providers, than they were to be critical of broadcasters. Despite the rather high comparative ratings that the annual Roper surveys indicated that the public gave their cable service, Fritts nevertheless used his own survey to claim that “the only product that consumers...thought was a worse buy [than cable] was auto insurance.”¹⁴ In making this comparison, Fritts conveniently ignored the public’s response to the very next item in Roper’s survey schedule. Respondents were asked to indicate the extent to which cable had increased their enjoyment of television. Some 62% of the respondents said that cable had improved the experience quite a bit or a great deal, while less than 7% said not very much or not at all.

Members of Congress either offering testimony or in establishing the tone for the days procedures were not always careful to distinguish between polls on the basis of their

¹³ Comments of James Mooney, Hearings on “Competitive problems in the Cable television industry” before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary, April 12, 1989.

¹⁴ Comments of Edward Fritts, Hearings on the Cable TV Consumer Protection Act of 1989, before the Subcommittee on Communications, Senate Committee on Commerce, Science, and Transportation, March 29, 1990

quality. As we noted earlier, it is important for legislators to have a sense not only of the popularity of a government policy, but the salience, or intensity with which these views are held within the population. One technique that can be used to indicate the level of concern is to make reference to changes in the proportion of the public that is concerned, or is in support of some policy (Zillman and Brosius, 2000). This sort of assessment is quite reasonable when the same question is asked of the public over time. In the absence of such indicators, policy advocates are likely to make use of whatever is available.

In an effort to indicate rising demand for V-Chip technology, Representative Edward Markey cited a 1993 USA Today survey as indicating that “68 percent of its readers supported mandating the inclusion of V-chip technology in new tv sets.” He went on to say that “by 1996, a similar survey found that this number had risen to 90%.”¹⁵ The same survey was included in the comments of Senator Kent Conrad within the same hearings. Neither of these supporters of V-chip legislation informed members of Congress that this so-called “survey” was in fact, a non-scientific, mail-in reader response poll of the readers of Gannett’s weekend magazine.¹⁶

There is one survey that has emerged as an especially unfortunate example of rather selective use of items that did not represent either the purpose of the survey, or the general impression of the public that the bulk of their responses would have supported. Ironically, the item was derived from a survey produced with support from the Ford Foundation as part of its Digital Media Forum Project (Shah, Kwak and Schmierbach, 2000). While there were numerous questions in the survey that indicated that the public was in support of policies that would improve public access to information, a single item taken from within a multi-item segment of the questionnaire was introduced into congressional testimony, and reproduced in the press. Susan Getgood, who just happened to be a representative of the firm which produced a leading filter technology (Cyber Patrol), cited the Forum’s survey as indicating that “92 percent of Americans thought pornography should be blocked on school computers.”¹⁷

Fudging the question

Even though two-thirds of those providing testimony about public opinions or sentiment offered some approximation of the original questions when they presented interpretations of the public response, witnesses often took great liberties to frame the responses in ways that favored their interests. The questions asked of respondents by survey firms are very often long and complex and no witness presented either the set-up or the question in its entirety.

Edward Whitaker, CEO of SBC Communications, who offered extended testimony on behalf of the RBOCs provides a prime example. In advance of his comments, Whitaker claimed the strategic high road by claiming to offer testimony in the “spirit of reform” by

¹⁵ Comments of Edward Markey, Hearings on Television Violence before the Senate Committee on Commerce, Science, and Transportation, July 12, 1995.

¹⁶ Alan Bash, “CBS hopes ‘News’ rating upswing calms affiliates” *USA Today*, June 1, 1995, 3D

¹⁷ Comments of Susan Getgood, Hearings on E-Rate and Filtering before the House Committee on Energy and Commerce, April 4, 2001

“focusing on what consumers expect of us. Let’s focus not on what we say the public should want, but on what consumers say for themselves....If we allow ourselves to fall into an industry centered quagmire, nothing will be accomplished. We must instead center on what should be the read focus of this legislation: our customers and your constituents.”¹⁸

Whitaker went on to suggest that at least 56% of the respondents to an industry-funded survey “fear monopoly harms.” What respondents had actually been asked to do was to indicate whether a “reason...to oppose permitting the Bell telephone companies to compete in the areas of long distance and cable television and the long distance companies to compete in local telephone services” was a “convincing reason to oppose” this policy. The specific rationale that Whitaker referred to without quoting it was the following: “Monopoly power by the regional and local Bell companies has given consumers no choice and higher rates in local service. Why give them even more opportunities to exert their power and hurt consumers?” This is the question that led 56% of the respondents to agree that the argument was at least somewhat convincing. But, of course, Whitaker abstracted rather cynically from that construction of the issue.¹⁹ Of course, as the question was actually phrased, it was the monopoly power of the RBOCs that was source of concern.

Choosing very carefully, indeed

Traugott and Powers (2000) advise journalists to examine items from an increasing number of survey databases in order to compare the survey results presented by an interested source with those produced by other, hopefully independent organizations. Policy actors, especially those from the resource constrained public interest community apparently follow that advice when they select questions and responses to incorporate in their testimony.

A search of public files identified dozens of relevant, but unused surveys and policy related questions. Perhaps the fact that so little of the relevant, and publicly available opinion data is actually used by witnesses, from either the corporate or the public interest community underscores the limited role that such surveys are thought to play.

Harris surveys were relied upon for all testimony related to the privacy concerns raised in CIPA, Video Privacy, and E-Rate testimony. More than a dozen relevant surveys produced by other organizations were ignored, at least as far as Congressional testimony was concerned. Many of those surveys however did find use in news media reports about privacy concerns.

There was considerably more competition among sources of public opinion regarding educational finance and E-rate legislation. In addition to the five surveys that figured

¹⁸ Comments of Edward Whitaker, Hearings before the House Telecommunications and Finance Subcommittee, May 10, 1995

¹⁹ Question RH10 from a survey by The Mellman Group and Public Opinion Strategies for the Regional Bell Operating Companies, March 1995

prominently in Congressional testimony, four equally relevant surveys were publicly available at the time.

The relatively small number of references to public opinion regarding the components of the Telecommunications Act would lead one to believe that the views of the public had not been sought. Nothing could be further from the truth. Numerous publicly available surveys examined public views about media violence as well as the promise of competition versus regulation.

The same was true for debates about the level of public satisfaction or dismay regarding the cost and quality of cable television service. While seven surveys were relied upon to provide evidence of consumer views, another 17 readily available surveys provided relevant assessments of consumer perspectives on the service and its regulation.

It is especially noteworthy that at least six publicly available surveys examined the problem of limiting children's access to pornography and "harmful" content on-line, but only one question from the survey released by the Digital Media Forum was introduced into testimony. Perhaps it was because none of the other available surveys had a number that was as high as the Forum's 92% level of agreement (Best, 2001). The next highest level of agreement was for a statement that almost matched perfectly the wording of the Child Internet Protection Act (CIPA). Some 83 % of respondents expressed approval of a "federal law which makes it illegal to send indecent or obscene material to children under 18 through the Internet."²⁰

Although the hearings on the DMCA simply ignored representations of the public's views on "intellectual property," a highly relevant survey from the Markle Foundation was disregarded, despite the fact that 62 percent of respondents agreed that "people should not be allowed to share copyrighted works, such as songs and movies on the Internet free of charge...because artists deserve to be paid for their work."²¹

While it is probably unrealistic to expect witnesses to report the range of opinions that are produced by different questions in different surveys, some of the disparities in estimates are noteworthy.

Edward Markey and Kent Conrad, both active supporter of V-Chip legislation²², made use of the same non-scientific surveys to claim that the public was overwhelmingly in support of V-chip technology. Markey's source indicated that in 1993 68% of respondents supported the mandatory incorporation of V-chips in new televisions. A differently worded survey produced by CBS and the New York Times suggested that only 31% of the respondents thought that the "government should require manufacturers to install a v-chip." However, the question also included a powerful distraction that no

²⁰ Question 65 from a Pew Research Center survey, USPSRA.041197, R32C, April, 1997

²¹ Question 59, from a survey by the Greenberg Quinlan Rosner organization for the Markle Foundation, June, 2001 [ID: USGREEN.00MKL0, R070]

²² Hearings on "Television Violence" before the Senate Committee on Commerce, Science, and Transportation, July 12, 1995

doubt biased the response. Respondents were also asked, as part of the same question if they thought “it would involve too much government regulation of television.”²³

Alternative frames

Because the Cable Bill was so clearly framed in terms of consumer’s interests in lower costs, and higher quality, we thought that it was important to determine if any of the surveys available around the times the hearings were scheduled actually evoked the interests of citizens in other standards of performance that we might associate with the public interest.

A Gallup Organization poll released in October 1990 included a rather remarkable indication of consumer preferences that seem to reflect the concerns expressed by media critics (Croteau and Hoynes, 2001; Baker, 2002; McChesney, 1999). Fully 81 percent of respondents indicated that they would support regulation “requiring television networks and stations to broadcast more education, news, information and documentary programs.”²⁴ A considerably smaller proportion (64%) said they would support regulations that would require cable systems to carry all local television stations.²⁵

Among the buried or forgotten surveys that seemed quite relevant to debates over competition in communication and information services, there was a series by Cambridge Reports that revealed a high level of dissatisfaction among respondents. When asked in 1988 whether they thought the “deregulation” of the “telephone and telecommunication industry” has been in the “best interest of the country and individual consumers,” only 37% agreed that it was.²⁶ This was a substantial decline from the 52% who thought that deregulation was in the public interest in 1986,²⁷ but higher than the 35% who thought so by 1989.²⁸

In less than ten years, the efforts by the corporate media to separate the provision of non-entertainment content from whatever remained of a public interest obligation appear to have been successful in that only 38% of respondents to a Fox News survey felt that tying license renewal decisions to the “type of programs the broadcaster shows is better described as insuring the public interest,” whereas 44 % apparently felt that it was “better described as censorship.”²⁹

The flag of government censorship has been raised routinely when public concern about media content reaches some criterion level. It is understandable that it is in polls sponsored by media organizations that we see questions designed to frame the issue in those terms. For example, in seeking to control the framing of the violence debate, an

²³ USCBSNYT.95007A, Q46, CBS, NYT, August, 1995

²⁴ Question 31, from a Gallup Organization Report, USGALLUP.301GR, R25A, October, 1990

²⁵ Ibid. Question 38

²⁶ Question 92, Cambridge Reports National Omnibus Survey, USCAMREP.88APR, R096, April, 1988

²⁷ Question 73, Roper Report, USROPER.86-6, R16D, August, 1986

²⁸ Question 122, Cambridge Reports National Omnibus Survey, USCAMREP.89APR, R124, April, 1989

²⁹ Question 14 from a survey by Opinion Dynamics for Fox News, USODFOX.060900, R16, June, 2000

ABC/Washington Post poll asked a clearly biased question: “What worries you more—that the government will go too far in the direction of censoring what can be shown on television, or that the government won’t go far enough in taking steps to reduce violence on television entertainment programs?”³⁰ When asked in this way, the distribution of concern was nearly equal (49 v. 48%). When asked a slightly different way in the same survey, the public’s willingness to hold the media responsible was substantially higher (62%).³¹ What becomes important, of course, is seeing which of these frames provides the numbers that get reported in the press, get framed in the headlines, and then get included in Congressional testimony.

Media framing

Activists and policy scholars seem to agree that it is important to introduce survey data into the policy stream through the press (Cook, Barabas and Page, 2002; Gandy, 1983). On occasion when particular interpretations of opinion data have become popularized in the press, they begin to take on a life of their own and can be utilized without citation, clarification, or challenge in testimony (Cook, Barabas and Page, 2002, p.251).

An additional concern in media coverage as well as in congressional testimony is the way in which the failure of those who invoke public opinion to reveal the precise questions or framing stimulus that was used to evoke that opinion allows that opinion to be misrepresented. Where the actual survey may ask the respondent if they find some potentially noxious practice to be “acceptable,” media coverage and testimony are likely to transform that rather “tepid” form of acquiescence into “strong support” (Lewis, 2001, p. 39).

We utilized the Lexis/Nexis database to identify articles in the Washington Post, The New York Times, the wire services, and broadcast news transcripts to identify stories that referred to the surveys that had been introduced into testimony.³² After reviewing the stories for duplicates, 120 items were retained for analysis.

The greatest use of these surveys was by the Post (32) and the Times (31), followed by CNN (21) and NPR (12). We note that in the case of CNN and NPR, there were several cases in which slightly modified versions of earlier programs were re-used by later hosts and commentators, but unless they were fundamentally the same texts, they were counted as individual items.

We characterized the focus of the opinions cited in each article or story. The five most popular items were violence (42 stories), privacy (38), pornography or sexual content (22), media comparisons (17) and school funding (14).

³⁰ Question 15 from an ABC News/Washington Post poll, USABCWP.072095, R67, July, 1995.

³¹ Ibid., question 14

³² Because not all the broadcast news organizations have made their program transcripts available for the entire period, for example, NBC news was available only from 1997, while much of CBS news was available from 1990, this convenience sample can not be treated as representative of the electronic media. The New York Times and Washington Post files are the most complete.

We characterized the primary frames in the same way as they were characterized in testimony. The media were more likely to use survey items that framed the public as consumers or users of media (43.3%) than as citizens or members of the public (31.6%). This framing disparity was greater within the media than within congressional testimony, although the direction was the same (11.7% versus 6.3%).

Twenty six stories (21.7%) used survey data to indicate that the public supported or approved of some industry policy or practice, while only 16 (13.3%) indicated a lack of support or opposition. This ratio (1.6) was precisely the same as that which was observed in congressional testimony.

With regard to regulation, 17 stories (14.2%) indicated that respondents supported regulation, while only 3 indicated opposition. Here the press tended to provide more evidence of public demand for regulation than was suggested in testimony as the ratio of support to opposition was greater in the press (5.7) than in Congress (3.0).

The media were quite interested in reflecting public concern or fear about some danger or threat in that 43 (35.8%) of the stories included such data. Recall that only eight witnesses (10.1%) framed the public as being anxious or concerned in their testimony.

The media were somewhat more willing to present the public as confused or uninformed about media or media policy. There were 12 stories (10%) that included survey data in support of such conclusions, while only 9 witnesses (7.6%) made such a claim. While the ratio of uninformed to knowledgeable members of the public was greater in the media (3.0) than in congressional testimony (2.0), the focus on this aspect of the public was rather limited in both venues.

Media Surveys

As we noted earlier, the news media have become an increasingly active source of the opinion data that is available for public consumption and for use in congressional testimony. Because media firms have an invested interest in the outcome of policy debates that involve regulation of content or competition, it is important to examine potential for influence this new role represents.

The polls cited in articles, editorials, and letters to the editor were characterized by source in the same way they were characterized in the case of congressional testimony. Out of 120 items, 39 (32.5%) relied upon survey data provided by a media source, either alone, or in partnership with a survey research organization. A somewhat smaller number of witnesses (22, or 27.8%) relied upon these media sponsored surveys in their testimony.

While, as we noted with regard to the strategic use of NAB-sponsored surveys by representatives of the Cable industry, sponsors cannot control the use to which their surveys will be put. However, because the cost of mounting such surveys is substantial, we would expect that sponsors would make greater use of their own data. While it is not

possible to characterize usage in the absence of a base of surveys sponsored, we could assess the extent to which survey based stories relied upon in-house data. Of the 120 items we examined, 22 (18.3%) were cases in which the publisher of the story was the source of the survey data.

Surveys reported by the Harris organization dominated media reports about public opinion. Of the 25 items (20.8%) with data credited to the Harris organization, 21 were about privacy concerns.

As noted previously (Gandy, 2003; Regan, 1995), these Harris surveys have been financed primarily by business-related sources. Thus, it becomes important to note that more than half (55.2%) of the references to public concerns about privacy in these stories are based on Harris surveys. The Gallup Organization was cited far less frequently than Harris (11 items, or 9.2% of the total), and only one of those surveys cited dealt with concerns about privacy.

The electronic media (NPR, CNN, and CBS news) were far more likely to use data from their own surveys than were the Times or the Post. NPR stories relied most often on their own surveys (58%), followed by broadcast television (CBS, 40%), and CNN (33%).

Of the seven items that cited the joint NPR/Kaiser Family Foundation survey on education, six of them were broadcast on NPR. The Markle Foundation surveys were not produced in cooperation with any media organization, and as a result, citations to their surveys (7) were somewhat more evenly distributed among CNN (4), the Post (2), and the Times (1).

The fact that the New York Times and Washington Post made so little use of their own polls was rather surprising, given the observation made earlier by Ladd and Benson (1922) which observed an average of 5.5 stories for every reported survey. Of course, the Ladd and Benson study was of polls administered during presidential election years, rather than polls related to specific policy issues as was the focus of this research. In fact, neither the Post nor the Times were much involved in producing surveys that addressed these policy concerns, despite their being quite willing to cite the data generated by other sources. The Times, for example, cited Pew Center surveys in 5 (16%) of their stories.

Indeed, non-media interests, primary foundations or foundation-supported research centers, were the source for survey data cited in the majority (56.7%) of the news stories examined, and 56 of *those* 68 stories failed to include references to any media sponsored surveys.

Surveys from one of the media-related research organizations sponsored by the Pew Charitable Trusts were cited most often (10 stories, or 8.7% of the total). One of the Pew centers, the Pew Research Center for the People and the Press was previously active as the Times Mirror Center for People and the Press (1990-1995) which was cited in six additional stories.

Discussion

Andrew Kohut, director of the Pew Research Center for People & the Press, reported that the American public was becoming increasingly more concerned about what they perceived as a lack of news media independence from powerful interests, including advertisers, owners, and financial partners (Kohut, 2000). In his view, “the public faults the press for being too much of a watchdog when it comes to the pols, but suspects that it may turn a blind eye to problems when its owners’ corporate interests are at stake.” Understandably, according to Kohut, large majorities of journalists tend to deny the existence of untoward corporate influence over the stories they write.

We have to ask, how could they see it any other way and still believe that they performed a critical social function?

Despite this public concern about the performance of the media, there has been almost no scholarly attention paid to the relationship between the conglomerate status of most media organizations and the ways in which their news units cover media policy debates. Critics have decried the ways in which the news media have all but ignored the legislative battles over media policies. Understandably some observers attribute the low levels of public understanding and interest in the more obscure debates over network infrastructure and digital rights management to the fact that the media assiduously avoided these topics.

Although it is not possible to demonstrate that the media industries have been effective in shaping public policy discourse, our analysis suggests that they have clearly assumed a critical role in presenting representations of public opinion that reinforce associations of the public interest with what the public is interested in consuming at the moment.

While independent sources of public opinion data, such as the periodic surveys by Pew Research Centers have achieved a relatively high level of visibility within the press, they have not achieved a similar level of visibility within congressional hearings.

Other corporate sponsored surveys, such as those developed by Alan Westin for use in policy debates about privacy have dominated policy discourse within Congressional hearings and in the press. Westin’s command over the framing of privacy concerns has helped to justify the assignment of oversight of this issue to the Federal Trade Commission, a consumer protection agency. Yet, in the absence of a policy scholar of Westin’s stature being involved in the battle to frame the Digital Millennium Copyright Act as something relevant to the concerns of both citizens and consumers, the record remains silent on what the public thinks.

The voice of the people should be heard in every venue in which the interests of the people are affected. While public opinion surveys are at best an imperfect tool for the assessment and representation of those views, a critical truth remains. The range of relevant opinions is unlikely to be made available for distribution if we rely on media conglomerates to do this important work. It is not in their interest.

The public interest community, perhaps with the assistance of foundations, could at the very least facilitate the development of a database of policy relevant public opinion data. Obviously this compilation can not include public responses to questions not asked about opinions that are not well formed; but increased attention to the discursive aspects of the public sphere should increase both reflection and representation of the public will.

While the non-profit sector continues to struggle with its identity and its sense of mission, there is good reason to assume that there is still a fundamental commitment to the pursuit of the public interest as it might be defined within the public sphere. It is our hope that whatever our differences may be with regard to the best ways to achieve this common goal that we will reaffirm our commitment to its pursuit.

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