BUREAUCRATIC POLITICS AND ORGANIZATIONS: AN APPLICATION TO TELECOMMUNICATIONS POLICY

by

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(Under the Direction of Hal G. Rainey, Ph.D.)

ABSTRACT

This dissertation analyzes regulatory agencies as political organizations and addresses the nexus between bureaucratic design and effectiveness and accountability of public policy. A historical account of telecommunications regulation and the complex political organization that evolved with it is presented as a foundation. Two quantitative studies on the effects of various structures and institutions on policy outcomes and outputs are also presented. The first study asks if the sharing of authority among government actors is important for effectiveness; results provide guarded support for the importance of state-level program administration but condition its impact on the sharing of authority with other government subunits. The second quantitative study tests the impact of competition between the state legislature and its bureaucratic counterparts on the incidence of legislation that favors a subset of the electorate over the interest of the broader public; results show that state legislators are more likely to favor special interests when the locus of authority resides at the state level, and less likely to favor special interests when decision-making authority is shared between state and local government or when it is concentrated at the local level.

INDEX WORDS: bureaucratic politics, redundancy theory, public administration normative theory, telecommunications, cable television regulation, organizational structure, power and politics, authority, influence

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DEDICATION

This work is dedicated to my grandmother, Iolanda Malatesta-Ti voglio bene.

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CHAPTER 1

INTRODUCTION

In public administration's early days, organization design was approached from the standpoint of efficiency, which most believed could be accomplished through the separation of politics and administration. According to the orthodox view, politics, driven by special interests, was the main enemy of efficiency and effectiveness. The remedy was to relegate policy decisions to elected officials and to leave administration to value-neutral bureaucrats (c.f. Lynn 2001). Although the realization that politics and administration are inseparable (the end of the dichotomy) awakened researchers to new perspectives, scholars have not yet provided a coherent theory of political organization. Furthermore, it is evident that when public organizations adopt private-sector values or business practices, they do not automatically become more efficient or effective. Consequently, government reforms continue to reappear on the policy agenda, regardless of party control or leaning. The reason is simple- organizations are political; their structure and institutions have important implications for the distribution of authority and influence, and ultimately the allocation of policy benefits and costs (Seidman 1998). Broadly, this dissertation will analyze regulatory agencies as political organizations and will address the question of how bureaucratic design can facilitate public policy effectiveness and accountability. Approximately half of the dissertation will provide a historical account of telecommunications regulation and the complex political organization that evolved with it, while the other half will offer quantitative analysis on the effect of the various structures and institutions associated with telecommunications on policy outputs and outcomes. The research question in the first quantitative study asks, is the sharing of authority among government actors in different organizational subunits important for effectiveness? The research question in the second quantitative study asks, does competition between the state legislature and its bureaucratic counterparts, discourage state legislators from favoring special interests (subsets of the electorate) over the interest of the broader public?

Much of the traditional scholarship on public sector decision making is organizational or political in character, but not both. Organizational theorists focus upon "the social structure created by individuals to support the collaborative pursuit of common goals" (Scott 2003, 11). Conceived this way, their goal is to understand how to induce behavior, control, and coordinate resources to meet organizational objectives (Scott 2003, 11). The classic approach to the study of organizational structure associated with Weber (1946) Fayol (1949), Gulick and Urwick (1937) and Taylor (1911) aims to find the most efficient structure, one with clear lines of formal authority, with people organized according to function and guided by standard procedures (Rainey 2003). A later socio-technical approach makes the case that traditional rule-oriented formal hierarchies are better suited for stable and predictable environments, while flexible environments that facilitate participation, creativity, and flexibility are better for more unpredictable environments (Burns and Stalker 1961; Rainey 2003). More hierarchical and vertical structures have also been associated with control and efficiency, while flat, horizontal structures have been associated with flexibility and learning (Daft 2004, 119-120). However, despite stark differences between managing in the private sector and governing in the public sector, critics of public sector performance typically adapt efficiency logic to government reform efforts. Where government has been perceived as wasteful, inefficient or ineffective, the standard remedy has been to place agencies in vertical hierarchies, and by positioning those with functionally similar responsibilities together in divisions or departments. Yet, as the historical narrative will reveal, these paradigmatic solutions have not been associated with meeting expressed objectives, most notably the goal of furthering competition. Moreover, if these solutions really worked, the collective political organization associated with telecommunications would have evolved toward standard uniform structures, and only efficient and effective organizations would have survived. In the picture to be presented, multiple public organizations were formed to carry out the same federal goals, yet they evolved in varied forms.

Since the work of Downs (1967) and Olson (1965), theories of political behavior tend to apply economic rationales, explaining policy responses in terms of utility maximization models while recognizing the costs and benefits in forming and maintaining coalitions. These explanations are useful in part. However, they do not explicitly consider how the organizational system or institutional setting shapes the relationships between actors and determines their relative influence, and these factors appear to be important elements of telecom policy making. Researchers in more recent times have made strides toward a more coherent theory (Balla 1998; Bawn 1995, 1997; Calvert, McCubbins, and Weingast 1989; Epstein and O'Halloran 1994, 1996, 1999; Ferejohn and Shipan 1989a, 1989b, 1990; Fiorina 1986; Huber, Shipan, and Pfahler 2001; McCubbins 1985; McCubbins, Noll, and Weingast 1987, 1989; Moe 1989, 1990; Moe and Wilson 1994; Potoski 1999; Shepsle 1983, 1992; Volden 2002; Weingast 1984; Wood and Bohte 2004). Although much of this research is cloaked in positivism, the underlying premise and tone are indeed normative. The sentiment just below the surface portrays elections as the path to accountability and implies that because the bureaucracy is unelected, democratic values are necessarily compromised by the presence of an administrative state.

Indeed the phrase "political bureaucracy" has unfortunate connotations in both research and in practice. The public tends to equate politics with corruption and the bureaucracy with inefficiency. Combined, the concepts paint a bleak picture. Moreover, when researchers frame the problem as one of how to control the bureaucracy they perpetuate the problem and risk self-fulfillment; the research process itself brings about the expectation of a maligned bureaucracy. Even more problematic, the field has all but ignored other possible relationships between politics and the bureaucracy. For example, are policy goals more or less likely to be realized when policy is carried out by both the state and local government, i.e. by more than one bureaucratic subunit? This question is particularly pertinent to U.S. policymaking since implementation typically involves the assignment of tasks to multiple agencies at multiple levels of government. Moreover, government reforms often assume that inefficiency and waste can be curtailed by consolidating administrative functions without considering whether redundant bureaucratic structures are indeed more effective in terms of accomplishing voters' preferences. Equally as important, despite voters' expectations, elected officials sometimes have their own agenda. This begs the question, might the bureaucracy have a role in encouraging elected officials to advance the interest of the general public over their own self interest? If this question can be answered in the affirmative, reformers could focus on designing bureaucracies to supplement the voting mechanisms as the means of holding elected officials accountable.

Throughout the dissertation, references are made to the political nature of the administrative state; the bureaucracy is referred to as "political" and the FCC, various state agencies and local governments are conceptualized as subparts of a larger "political organization." These terms have specific meanings for the context of this dissertation. As used here, politics refers to the bargaining, influence, and interplay among various actors in the policy process. However, the reader should not abstract from this language any suggestion that the bureaucracy exists outside constitutional boundaries. The choice of words is to simply acknowledge reality, i.e. the bureaucrats often perform tasks initially assigned to elected officials by the electorate. Moreover, they directly engage with other actors such as legislators and special interests on their own behalf.[1] They influence and are influenced by the political process and the interactions of key stakeholders. As John Gaus (1947) and others (Gaus, White, and Dimock 1936) observed long ago, i.e. bureaucrats are not value-neutral agents of policy. [2]

Additionally, at points in the dissertation, the terms "politics" and "rationality" are used for purposes of contrast, the same way the terms are used and differentiated in common parlance. Rationality is not intended to meet the strict criteria in economic theory; i.e. no assumptions are made regarding the state of information. One hint that "politics" is the likely impetus of policy is the lack of rationality associated with the decision. The term "rationality" is not intended to meet strict definitions as in economic theories. As used here, rationality is intended to depict a process that is logical, one which involves fact-finding and such steps as the identification of the problems and issues, ***including the needs of the citizens***, the organizations' goals, the consideration of various options, and choice based on the careful deliberation. As Norton Long (1954) suggested, "…fact-finding …and procedures…discipline the tendency of politicians to manipulate [whereas] in a world of rhetoric and emotion solid facts evaporate…"[3] Another hint that "politics" is the driving force behind decision making is the lack of association between the policy decision and prevailing ideology, consistent principles, or standard operating procedure.

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[1] Special interests refer to a subset of the electorate. In a majority-rule system, policies that would be preferred by a minority of an informed polity are "special interest policies," whether or not they are normatively desirable (Levine and Forrence 1990).

[2] The term "politics" is used in the same spirit as in Seidman's *Politics, Power, and Position* (1998). The definition of politics provided by Katzman (1990) is also suitable for the purposes of this dissertation; specifically, politics involves "the shifting interplay of forces, bureaucrats (professionals, careerists, political appointees), legislators, courts, interest groups academics, the media, and the like, with differing objectives, views, and stakes-that are subject to change depending on the issues and circumstances."

[3] As cited by Bendor and Hammond (1992), which provides a thorough assessment of Graham Allison's decision making models.

Every study needs a context- a domain from which one can draw data, and test propositions necessary to making a theoretical contribution. Telecommunications is the context for this dissertation and the basis from which questions about the political dimension of a bureaucracy are approached.[4] Telecommunications is the cornerstone for the U.S. economy and the world economy; most businesses cannot do without the technologies that make up the sector. By some estimates telecommunications has an output of over $900 billion per year and comprises over 8% of the GDP in the U.S.[5] Broadband technologies make connectivity possible.[6] Thomas Friedman (2000, 192) put it this way: "Jobs, knowledge use and economic growth will gravitate to those societies that are the most connected, with the most networks and the broadest amount of bandwidth - because these countries find it easiest to amass, deploy and share knowledge in order to design, invent, manufacture, sell, provide services, communicate, educate and entertain. Connectivity is now productivity." Moreover, several countries have advanced well beyond the U.S. in terms of networking and the deployment of advanced services (broadband). If the U.S. is to regain valuable ground, it must develop uniform standards and a regulatory plan that fosters innovation and that can keep up with the technological leaps associated with the sector.

As a policy area, telecommunication regulation also has profound implications for a

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[4] Telecommunications is the bigger umbrella for early communications services that originated as independent technologies and later converged. These include radio, broadcasting, telegraph, telephone, and cable television, as well as the more recent technology of internet and wifi. Capital letters are often used to refer to the industries associated with the various technologies. For example, the broadcasting industry is referred to simply as "Broadcasting", the cable industry is shortened to "Cable," and telephone to "Telco." These terms plus others associated with the industries are defined in the glossary.

[5] Reported by the Telecommunications Industry Association (TIA). TIA's Telecommunications Market Review and Forecast analyzes the telecommunications industry trends. The latest report was released on January 21, 2007. See http://tia.vnewscenter.com/press.jsp?id=1169675640598.

[6] Broadband refers to the ability of a single access line, wireless connection or satellite link, connected to a telecommunications network, to provide advanced services such as digital content, simultaneously.

democracy. The presence of competition determines the content and diversity of messages communicated to the public. Free expression in any democracy requires maintaining a diversity of information sources. And a lack of competition among providers of telecommunications services puts at risk all the privileges associated with the First Amendment. The appropriate role for regulation and the market place has consequences for what the public gets to know about government and thus the quality of decisions on who should represent them.

This exposition is timely because the structure and scope of telecommunications regulation has recently come under scrutiny by the FCC and at various state legislatures. Serious questions have been raised as to whether the current framework is holding back the United States in the world economy. At the crux of the debate are questions about whether regulatory authority should reside at the federal level, state level or local level of government, or some combination thereof. According to Brookings economist Robert Crandall (2001), the widespread adoption of broadband could bring an estimated $500 million to the U.S. economy. Similarly, another Brookings economist, Charles Ferguson, estimates a U.S. loss of $1 trillion dollars over the next decade because of current regulatory deficiencies (Bleha 2005).[7] According to some federal level officials, the jurisdictional allocation and the main processes related to the granting of rights to provide advanced telecommunications services may be the root of the problem.[8] At the same time these issues are

[7] According to a recent OECD report, the US has fallen to 15th in the deployment of broadband among 30 industrialized nations. See OECD Broadband Statistics to December 2006. Available at http://www.oecd.org/sti/ict/broadband.

[8] In a recent Notice Of Proposed Rulemaking (NPRM), the FCC is seeking comment on "a number of issues related to the cable franchising process generally, and in particular, the process by which competitive cable franchises are awarded." The FCC also seeks comment on "the impact of state laws on the ability of new entrants to obtain competitive franchises" and directs attention to the "so-called level-playing-field statutes [adopted in some states], which typically imposes upon new entrants terms and conditions that are neither more favorable nor less burdensome than those to which the existing franchises are subject" See, FCC. In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television

being addressed at the federal level, major reforms are also being proposed before numerous state legislatures. Understanding the proposed reforms requires knowledge of the current regulatory regime and an appreciation of how it came to take its current form. It also requires an understanding of the political motivations of the various government actors and interests groups at the center of the controversy.

Several existing studies focus on the influence that private interests have had on FCC policy (Cole and Oettinger 1978; Krasnow, Longley, and Terry 1982; Napoli 2000; Quinlan 1974; Schwartz 1959; Streeter 1996;), including whether policy decisions are affected by regulators' prior employment in regulated industry, or by the potential of future employment with regulated industry (Quirk 1981; Gormley 1979). The latter is referred to as the "revolving door hypothesis."[9] Indeed, empirical evidence supports the influence of regulated industries on FCC decision making (Cohen 1996; Gormley 1979; Napoli 2000; Teske 1995). Support for the revolving door hypothesis, however, has been mixed (Cohen 1986).[10] In general, historical accounts of policymaking have also been limited with respect to the time period studied or the types of policy examined.[11] Studies on FCC policy find that influence flows from multiple sources. Some posit that the best indicator of policy decisions is the philosophy of the appointing President (Lichty 1962; Devins 1993; Kang

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Consumer Protection and Competition Act of 1992 . MB Docket No. 05-311. Adopted November 3, 2005. Available at http://www.natoa.org/public/articles/FCCNPRM111805.pdf

[9] The reader is referred to Gerber and Teske (2000) for a review of theories and evidence of policymaking in the American states.

[10] The revolving door hypothesis posits that regulators with prior employment in regulated industry tend to support the position of regulated industry. The lure of future employment with regulated industry is expected to induce similar behavior.

[11] For example, Williams (1976) studies FCC decisions from 1962-1975; Kang (1987) looks at the Roosevelt era from 1941-1944; Cohen (1986) covers the period from 1955-1974. On specific policy issues, Kim (1985) focuses on deregulatory decisions; Teske (1990) looks at decisions affecting the telephone industry; Fife (1984) reviews FCC policy on minority ownership in broadcasting.

1987), Similarly, Powe (1987) discusses the influence that President Franklin D. Roosevelt had on the broadcasting policy at the FCC. However, Wiley (1988) argues the most powerful and persistent "political influence" originates with important members of Congress, including those on appropriations and oversight committees.[12] And studies by Kim (1995) and McGregor (1986) find that public comment has had little effect on communications policy.[13]

Yet existing studies also differ in how they use the term "political." The "political factor" examined by some scholars denotes Congressional influence (Krasnow 1982), while for others, the White House (Friendly 1976). Moreover, some studies paint a picture of undue influence (Friendly 1976), while others refer to influence consistent with constitutional roles (Krasnow 1982).[14] In contrast, this research employs the term "politics" in the broadest sense possible, to include factors that influence the policymaking process, with no attempt to distinguish good from bad, and to further encompass influences considered constitutional, as well as those involving more questionable strategies.

This dissertation proceeds as follows. Chapters 2 through 5 are devoted to the history of telecommunications. The discussion is broader than existing studies in both time span and scope; it covers events prior to the establishment of the FCC, and extends more than 10 years after the passage of the Telecommunications Act of 1996. Whereas most studies focus on only one level of

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[12] Richard E. Wiley presided as Commission Chair at the FCC from 1974 until 1977. He also argues that White House influence was not a factor during his tenure (Wiley 1988).

[13] But note that citizens were not allowed to participate in broadcast license decisions prior to 1966. See, Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir 1966).

[14] For example, Friendly (1976) alleges that friends of Nixon filed applications for competing broadcasting licenses in Florida to strip the Washington Post of its power in retaliation for Watergate stories, an improper exercise of influence (discussed in Wiley 1988). In contrast, the Krasnow's (1982) study involves influence related to Congressional appointments and Congressional supervisory roles, both of which are lawful.

government, i.e. FCC policy making, an important objective of the present research is to understand how the relative positions and interactions among governmental actors at the federal, state, and local levels affect policy. Multiple policy areas are also discussed, including broadcasting policy, cable television policy, and telephone policy.

The discussion is divided into three main eras. The first era explores the government's early role in regulating radio and broadcasting, how it moved to an expanded role in regulating the AT&T's communications monopoly and eventually added the technology of cable television to the regulatory mix. It will introduce the main government actors and interest groups and discuss the regulatory environment already in place when the new technology of cable television came along. The FCC's authority expanded during this era, providing the necessary foundation for significant political wrangling inside the bureaucracy for years to come.

The second era of telecommunications begins in the 1970's, when cable television became a subscription service. Around this time, regulators at all levels of government began to take the cable industry seriously. Critical decisions matured regarding the appropriate role of government and how jurisdiction should be divided among federal, state, and local concerns. It is also during this period that regulatory authorities began to address the conflicting interests between the cable industry and the regulators' already established clientele, mainly broadcasting interests and telephone interests. How regulatory authorities administratively handled these controversies largely dictated policy winners and losers on major issues. The cycle of cable regulation and deregulation during this time also reflects the interplay of political forces and the distortions of the administrative structure.

The third era describes the period leading up to the Telecommunications Act of 1996, which was the first major overhaul in telecommunications regulation since 1934. It also describes the contemporary policy environment, a setting in which policy makers have heavily emphasized industry deregulation. This last era also characterizes the ideological setting associated with the current proposals for reform, which can be described as a product of the combined influence of regulatory tradition and new market place realities. Overall, the narrative paints a picture of the evolution of telecommunications regulation and the complex political organization that evolved with it, and it provides the reader with a framework for understanding the regulatory challenges that our government now faces as technologies and sectors converge. Finally, the various political interests and their relative influence along the way offer insight for understanding the circumstances necessary for reforming the current regulatory apparatus.

In all three eras, the policy decisions of interest concern big picture issues, including among others, the establishment of the Federal Communications Commission (FCC) and related decisions about the appropriate cooperative federalism schema, the establishment of various state agencies and related decisions about the nature and scope of state regulation, the 1934 Communications Act, the 1984 Communications Act, the 1992 Cable Television Consumer Protection Act, the divestiture of AT&T, and the Telecom Act of 1996. The primary source of data is archival records, including legislative histories and official government documents, which is supplemented by anecdotal evidence in some instances, including news reports and interviews. The particular policy initiatives are associated with shifts in the allocation of authority between federal, state, and local government, and have largely determined general policy direction over several decades.[15] A number of critical policy issues have also relied upon these decisions, including the potential for competition in the

[15] According to Rhodes (1994), decisions of this kind go to the heart of bureaucratic organization, its existence, and its influence on policy. They are particularly useful for understanding organizational politics because they are likely to bring out the parochial concerns of the various actors within government that will be affected by administrative design. They also tend to reflect the various power relationships at the time of the decision. The optimum case for the evaluation of a political model of bureaucracy should conform to the logic of critical cases, i.e. it should go to the heart of the very existence of the bureaucracy and thus be of critical importance. In such a case, bureaucracies are likely to take stances that are in line with their long-term interest. Policies having to do with how jurisdiction is assigned and the scope of the jurisdiction fit this criterion (Eckstein 1975; Rhodes 1994, at 4 citing Halperin, Kantor, and Clapp 1974).

market, the cost of video services, internet access, and content availability. These same decisions are likely to have implications for current policy questions, such as whether internet content should be taxed or monitored. The environment in which important telecommunications policy decisions are made are also of interest, including market forces, ideological tone, and relationships among the main actors at different levels of government.

Each narrative section is a discussion of the pertinent facts related to the particular era.[16] The intention is to characterize the market and its dominant forces at the time. With regard to government actors, the goal is to provide information on the nature and scope of regulation, jurisdictional assignments and the relative influences of the various levels of government. If there is an ideological perspective that appears to pervade decision making, it is also discussed. Wherever possible, important features of policy and the policy making environment are noted, including the principal issues of contention, the policy winners and losers, any rationales or goals expressed and any structural or process features that protect the gains of the enacting coalition or hinder policy losers from wrestling back the upper hand. Looking at these policies and impacts on telecom policy over the previous decades provides both macro and micro perspectives and will reveal dynamics among actors that have not been reported elsewhere.

Two dominant themes emerge from the historical discussion; one relates to politics and institutions, while the other to the public interest. First, consistent with other accounts, the discussion here reveals bargaining and the use of power and influence, i.e. the “pushing and hauling” that Allison (1971) refers to as “politics.” Bargaining and influence do account for many major policy decisions and for variations in approaches and scope of regulation across the states that can be observed today. This discussion is also replete with examples of how structure and process have

[16] Wherever possible, primary sources are used to describe policy and the policy making environment, including case law, official government reports, court briefs, official web sites for corporations, and party responses to notices of proposed rulemaking.

are used to determine outcomes. Evidence suggests many policies cannot be explained as rational decisions, nor does it appear that policymakers rely on standard methods of regulating monopolies, or on regulating other business models. Only a few policy decisions appear to be ideological, in the sense that they conform to a policy orientation, for example deregulation, and, even fewer seem consistent with routines or standard operating procedure. Thus, the political element appears almost self-evident.

Nonetheless, the question of whether politics is the **main** factor or the **only factor** in decision making is as elusive as it is important. Moreover, it is not difficult to retrospectively explain the observable with prepared explanations. Yet this has not prompted other scholars to make similar assertions (c.f. Seidman 1998). The present research goes a step further than previous research on telecommunications policy by inserting counterfactual arguments wherever possible to eliminate explanations other than politics.[17] The counterfactual simply negates the original presumption and offers an alternative means to arriving at the original conclusion. For example, consider the straightforward statement: If there is evidence of politics, the FCC's Final Order will resemble the Proposed Rule. Compare the counterfactual: If the FCC's Final Order does not resemble the Proposed Rule, there will also be no evidence that politics changed the result. The counterfactual assumes that the second part of the statement is false to show the logical conclusion that the first

[17] The counterfactual strategy is best suited for some historical explanations. Although some researchers have applied the counterfactual strategy to explain political models of organization, they typically stop at identifying the political elements of an agency decision. The proper use of counterfactuals requires also asking why the agency did not pursue other policies. It further requires looking at more than one case or policy initiative and asking why the particular policy initiative occurred instead of some other policy. The necessity of exploring more than one case can be understood in statistical terms: One case minus one explanatory variable = zero; to calculate the degrees of freedom requires subtracting an additional one (1); this leaves minus one (-1) degrees of freedom; negative degrees of freedom will not provide results on which any inference can be drawn. This point is often overlooked in claims of organizational politics (for example, Seidman 1998) (c.f. Carpenter 2001).

part of the statement is also false. In essence, the counterfactual prompts additional question before making the claim that politics is the reason behind the policy: How would decision makers have behaved if there were no stakeholders (no politics)? How did they act in other policies? If, in fact, the FCC's Final Order substantially varies from the Proposed Rule, some occurrence prompted a change in the initial evaluation of what was needed. This is a logical conclusion. However, although, political bargaining is the likely reason for the differences, it is not the only possible reason. It is also possible that the Proposed Rule, when drafted, contained a mistake, and the substantive change in the Final Order represents fact correction, rather than bargaining. The object is to imagine a world without politics in order to show that a substantive difference between the Proposed Rule and Final Order is much less likely in the counterfactual case (a world without politics). A reconstruction of rational actions or procedure that would have followed from a non-political environment yields the conclusion that the FCC would have started a new rulemaking as required by law to allow public comment on what was actually being considered. To be credible, the counterfactual must draw on some knowledge of the process and past actions of key actors. In the case at hand, the law requires public notice and comment on the proposed rule. If there are substantive changes to the proposed rule, a new notice and comment period is required by law. It is possible, although very unlikely, that FCC officials were not aware of these legal requirements. Knowing the federal agency had a stake in the outcome of the proceeding, and that its bargaining position may have changed if the required legal process would have been followed, implies what actually happened was neither rational or routine, at least for law abiding regulators. The use of counterfactuals simply helps to elucidate the political element and to discipline the thinking process to consider other possible causes. As used in the exposition that follows, it either adds support or negates the original claim but does not itself prove causation.

Thus, the narrative provides guarded empirical evidence supporting political perspectives on organization, which argue that administrative design is the product of power, politics, and position (Seidman 1998).[18] Political explanations of organization hold that bureaucratic design and reform cannot be explained with reliance upon rationality, standard operating procedure, or even agency culture. The objective of research in this tradition is to understand and explain how the formal lines of authority, institutions, and jurisdictional sharing arrangements determine the influence of a broad range of actors (Frederickson and Smith 2003, 53).[19] Political explanations of organization are also associated with the idea that politics is not confined to the legislature, i.e., the executive branch is also a political actor. On this, point the literature on political organizations departs from the classical paradigmatic view associated with politics-administration dichotomy. Political explanations also suggest that organizational structure, broadly defined, has implications for the distribution of power and resources.[20]

The narrative further suggests that the parochial interests and influence of the bureaucracy are as much a factor in decisions as the influence of outside actors. In many cases, policy appears to be dominated by the conflicting interests associated with the different governmental actors. What's more, the policy proposals that most often succeed are those that expand authority for the most

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[18] The bureaucratic politics school of organization reform is often associated with the seminal work of Harold Seidman 1998. *Politics, Position and Power.*

[19] The term "rational" as used here is intended to be consistent with Allison's (1971) discussion of alternative decision making models, and in particular Model I, the unitary rational actor model, which he argues has different features than decisions characterized by bureaucratic procedure (Model II) and political models (Model III).

[20] Structure, broadly defined, includes administrative variation, organization type, jurisdictional assignments, and the primary laws and institutions that govern the scope of regulation. In the present study, the term refers to the diverse and complex collection of governmental units, including the FCC, the state public utility commissions and the various local governments. The term provides a means to describe such characteristics such as the number of subunits within an organizational hierarchy.

governmental actors, regardless of the presence, and sometimes despite, pressure from any private interest. However, where one governmental unit is the clear policy winner, in the sense that its authority has been expanded, the unit's position in the hierarchy does not appear to be a determining factor in policy decisions, a finding which is at odds with other studies (Tannebaum 1968, 1974).

The structure and processes of the bureaucracy also appear to impact critical policy decisions. Together, the structure and processes form the institutional setting, which defines the relationship and relative influence among participants in the policy process.[21] Scott (2003) describes institutions as the "regularized aspects of the relationships that are associated with the organization that characterize the distribution of authority at any given time" (18). The institutional setting is the environment within which the policy process takes place (Scott 2003). The environment is underscored by a host of appropriate processes, formal procedures, and suitable methods. Policy occurs because these institutional elements are in place, or because they are not in place. To be sure, the structural and institutional factors can lead to conflict, tension and stress, just as they do stability and order (Merton 1957, 131-60). It appears that a large part of telecom decision-making can be explained by the operative institutional setting, which determines what issues can be decided upon and by whom, what issues are "off the table," whether decisions can be appealed, what information is considered, and what processes must be followed. Thus, what Scott (2003, 18) characterizes as institutions, i.e. the regularized aspects of the relationships associated with the

[21] The term institution is also used in a broad sense as described by Douglass North, i.e. the "humanly devised constraints that structure human interaction" (1990, 3). Consistent with the discussion of Dixit (1996), in the narratives no distinction is made between the term institution and similar concepts such as policy or rule, and in some instances, even structure. In the quantitative studies of this dissertation (Chapters 7 and 8), the terms are treated in more detail for purposes of analytical distinction.

organization that characterize the distribution of authority at any given time, appear to be important elements of the political environment and telecom policy.

Scott (2003) draws a distinction between material-resource environments and institutional environments that is helpful in conceptualizing what can be observed in telecommunications. Material-resource environments are driven to produce tangible commodities. The principal concern of those working in a material-resource environment is survival in the marketplace. To do this they employ technical controls, which Scott are based on the characteristics of outputs produced by the organizational system. Other organizations, including the one under study here, are characterized by different pressures; they operate within institutional environments. In institutional environments, controls are mechanisms to facilitate conformance with rules, regulations, and standards, for example. The policy actors also employ controls to legitimate processes and further accountability. The organization observed here, whether conceptualized as a collection of units, or any one governmental subunit, grows, survives, and makes decisions in relationship to these controls. As Scott notes, in institutional environments it is difficult to assess outcomes independent of knowledge of the process that produced them (Scott 2003, 140-141). The institutional environment that Scott describes captures the salient features associated with telecom regulation. Importantly, however, an assessment of the institutional setting alone does not paint the entire picture and cannot explain every policy decision. Thus, both the institutional setting and the power and influence that takes place within it and because of it, must be considered together to understand the evolution of telecommunications regulation.

Yet there is also evidence that despite the resourcefulness of powerful special interests, and despite the influence of the bureaucracy in ensuring its own survival, some policy cannot be explained by politics or standard economic theory. Thus, as an explanation, politics is insufficient to account for all telecommunications policy. Additionally, although some policy decisions appear to be motivated by interest in the common good, theories grounded in public interest cannot explain many of the decisions made. This paradox paves the way for two additional studies focusing on the role of the bureaucracy, which are laid out subsequent chapters. The first looks at the connection between organization structure and effectiveness, the second on the impact of bureaucratic structure in influencing legislative decisions.

The study in chapter 6 explores the variations in regulatory schemas associated with the regulation of telecommunication, and in particular those related to granting franchises to providers of video service. These are the bureaucracies that will play a pivotal role in determining the future of broadband in the U.S. The objective is to understand how organizational design, and the structure and institutions that define the bureaucracy, impact effectiveness, which in the present case is the fostering of competition among providers of broadband. In the process, two competing claims are assessed, one claiming that politically differentiated and autonomous bureaucracies situated in the middle tier of government (referred to as the mezzo-level) are more likely to innovate, defend the public interest, and meet and exceed policy objectives (Carpenter 2001). The second theory is an extension of redundancy theory applied to public organization settings, i.e. a theory of bureaucratic redundancy (Ting 2003). Results of econometric analysis lend only guarded support for the importance of the mezzo-level and condition its impact on the involvement of other organizational subunits. Collectively, findings point to the importance of the state level bureau only when local government is also involved in key policy decisions. Thus, the mere existence of a state-centered hub for decision making does not appear to be the most important factor in organizational effectiveness. As it turns out, redundancy, defined multiple ways in the study, does improve organizational effectiveness. Findings have important implications for government reforms -even if duplication of tasks by more than one bureaucratic subunit requires the use of additional public resources, possible losses in efficiency must be weighed against possible gains in effectiveness.

Chapter 7 addresses the question, can the bureaucracy's political dimension be employed to further democratic values? Specifically, under what conditions might the bureaucracy provide a check and balance on the legislature? It starts from the premise that the legislature is not always benign; sometimes the interests of elected officials and the public conflict, and elected representatives proceed in ways unanticipated by voters. One appropriate function of the bureaucracy may therefore be to counter ill-conceived legislative behavior. Organization theory is combined with insights from recent scholarship on the costs of information and monitoring to formulate an argument linking bureaucracy to control of the legislature. The logic of the argument is as follows: an unobservable degree of competition characterizes the relationship between the legislature and its bureaucratic counterparts, and the structure of the bureaucracy is associated with some level of "slack" which either conceals or exposes legislative behavior. Slack is an intangible attribute that shields decision makers from observation. Slack is also conceived as a non-monitored situation (Kalt and Zupan 1984). Different organization structures and implementation schemes are associated with different levels of slack. When slack is minimized, the costs of monitoring legislative behavior decreases, and the legislature is more likely to act in the public interest. State level data on legislatures and bureaucracies involved in the regulation of telecommunications is again used for the analysis. Evidence that some state legislatures sided with special interests in enacting legislation intended to thwart competition and protect monopolies, provides a unique testing ground for the argument. Results show that legislatures are less likely to favor special interests in the presence of some bureaucratic designs. The study adds to the literature on bureaucratic politics generally, and paves the way for new questions about the role of the bureaucracy in democratic governance.

There are also broader implications for democracy. Generally, a democracy requires that government include the public in its decision making. It also demands a balance between the interests of the public and those of business. The structure of the administrative system in many ways determines who has access to the ear of government and who does not. Indeed, Congress leaves much of the bargaining among interests groups to the bureaucracy. Vague Congressional mandates such as those that require governing in "the public interest" force bureaucracy into the center of the political landscape. The way the bureaucracy is structured, how jurisdictional authority is allocated, and the main processes that guide administrative decision making determine who, gets what, when, and how (Lasswell 1936). In other words, the structure of bureaucratic administration determines the politics of the situation. Conversely, politics determines the bureaucratic structure.

CHAPTER 2

THE FIRST ERA: THE EARLY DAYS OF COMMUNICATIONS REGULATION

Leading up to the Communications Act of 1934

Although the Communications Act of 1934 (Communications Act) preceded the technology of cable television by approximately 30 years, it provided the foundation for cable television regulation. The Communications Act itself was the product of more than a half a century of adaptive regulatory behavior, mostly in response to the telephone and telegraph monopoly. The Communications Act cannot be understood without consideration of its own history, which paints a picture of the prevailing goals and regulatory ideology of the time.

After the Civil War, Western Union built the first telegraph lines across the continent. With the acquisition of American Telegraph and United States Telegraph, Western Union established itself as a monopoly (Sterling, Bernt, and Weiss 2006, 44-45). In a series of enactments between 1860 and 1888, Congress sought to facilitate the development of the telegraph industry while at the same time curbing abuses associated with monopolies. One requirement was premised on the idea that monopoly powers should provide something in return for government-granted privileges business control of the market. For example, in 1860, Congress authorized the submission of bids to construct telegraph lines from Missouri to the Pacific. The successful bidder was to receive a ten-year contract providing for an annual monetary stipend, a grant of public lands, and a grant of authority to use public-rights-of-way. Recognizing a public interest at stake, the government also required bidders to recognize government priorities in using telegraph lines. Western Union won the bid.

Federal government action regarding communications providers was paralleled by state level activity. To effectively operate their businesses, telegraph companies needed state legislation to use public-rights-of-way and private property when necessary. Starting in New York, the states passed legislation conferring these rights to telegraph companies (Noam 1994). States also imposed obligations regarding the relationships between government, telegraph and railroads, and the public. For example, some states imposed obligations concerning dealings between telegraph companies to prevent monopoly abuses. In return for privileges conferred, some state legislation also asked for concessions. One requirement was to serve all customers without discrimination. Although not always with the same terms, legislation across states shared some common features, including the authorization to use public-rights-of-way, authorization for incorporation and limits of liability, requirements for reasonable and nondiscriminatory extension service, and eminent domain.

Another feature of early communications regulation concerns the concept of a "common carrier." The term was originally applied to freight or carriage companies, both water and inland. According to common law, common carriers provide regular service, have changing and unpredictable customers, solicit business from the general public, and operate under laws defining the responsibilities of the parties (Noam 1994, 3). On the other hand, contract carriers deliver occasional service to identifiable and stable customers. Contract carriers solicit business on a targeted basis and define their obligations with customers by private contract. The critical component of common carrier obligation is the prohibition of unreasonable discrimination, at least with respect to some portion of the business (Noam 1994). The justification for the prohibition of unreasonable discrimination was spelled out by the Supreme Court in 1876. In Munn v. Illinois, 94 U.S. 113 (1876) the Court confirmed states' rights to regulate railroads and other businesses within their borders. The Court also declared that some private businesses are "affected with the public interest." Businesses having this attribute therefore have certain obligations, but are afforded special privileges.

Herbert Hoover was president in the term prior to the enactment of the Communications Act. As with Presidents Harding and Coolidge before him, Hoover's relationship with business was a comfortable one.[22] Just like the previous administrations, Hoover had been criticized for his laissez-faire approach to business regulation.[23] As a reformer of the Progressive Era, Hoover believed government was riddled inefficiency and generally supported the Taylorist reforms.[24] The powerful ideological legacy of the Old Republican Guard embraced capitalism and credited technological progress with little government interference, except for the protection of property rights.[25] The expansion of patent rights and the dominance of big business is a product of this philosophy. Ironically, at closer look, early regulatory action in communications does not reflect an effort to stay out of the broadcasting industry's way. As Secretary of Commerce, Hoover stood

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[22] The Warren Harding presidency extended from 1921-1923; the Calvin Coolidge presided from 1923-1929; and the Herbert Hoover presidency governed from 1929 to 1933. Hoover was also the U.S. Commerce Secretary under both Harding and Coolidge.

[23] Hoover's philosophy of "associationalism," which forged voluntary cooperative agreements between government and business, is a reflection of his belief that relationships with business should be built more on parity than oversight. While some associated the country's social woes with the practices of big business, Hoover saw business as part of the remedy. His work with the large broadcasting industry and his relationships with utility companies embodied this sentiment. After the stock market crash, Hoover called many industrialists to the White House to gain their support. Among the commitments was a pledge of almost 2 million dollars from the utilities in new construction (Glad 1966).

[24] The teaching of Frederick Winslow Taylor became the flag for Progressive Era reformers such as Hoover. Taylorism held there was "one best way" to fix government problems. The key to organization was efficient management of time and costs, proper routing and scheduling of work, and standardization of tools and equipment. Frederick W. Taylor has been called the original "efficiency expert." *The Principles of Scientific Management* (1911) at Project Gutenberg, http://www.gutenberg.org/etext/6435.

[25] A letter to William Allen White from Harding typifies his sentiment toward business and progress: "My office is filled with all of the latest advances, I think that fact should be significant to you" (August 12, 1920.White Papers, cited in Glad 1966).

firmly behind the broadcasting industry, as it did behind him. As early as 1920, Hoover advocated for discretionary licensing of the airwaves based upon a "public interest" standard. However, as of 1925, Congress had not issued a standard and the courts questioned Secretary's use of discretion in assigning broadcast spectrum rights.[26] The position of the National Association of Broadcasters was clear. The industry did not want the courts to deal with complaints about interference and they certainly did not want the courts to decide these matters based on equity considerations, nor would the setting aside of additional spectrum space further the industry agenda. The industry's best option was to urge federal legislation that restricted bandwidth and favored the allocation of space to existing broadcasters. Hoover urged for such legislation, which eventually materialized in the Federal Radio Act of 1927 (Hoover 1923).[27] Thus, the privatization of the airwaves was institutionalized and the Federal Radio Commission was provided with the authority to issues licenses based on vague "public interest and necessity" standards. The spectrum assignment process became a rent-seeking platform for industry. [28] At the same time it solidified the need for a bureaucratic mechanism to sustain it. Industry and the bureaucracy were both winners (Minasian 1969; Posner 1971).[29] The

[26] Hoover v. Intercity Radio Co., 286 Fed 1003 (App. D.C. 1923) and United States v. Zenith Radio Corp., 12 F. 2d 614 (N.D. Ill 1926).

[27] See also Hoover's Opening Address at the Fourth National Radio Conference Proceedings in 1925, reprinted in Radio Control. Radio Control Hearings before the Commission on Interstate Commerce, United States Senate, Sixty-Ninth Congress (1926, 118-119).

[28] Economic theories of regulation posit that policy makers are able to extract private benefits as a result of the power associated with decision rights (Stigler 1975). The benefits are referred to as "rents." Regulatory rents are created when the regulators employ the coercive nature of the state to usurp the market and thus redistribute wealth among the competing interests (Buchanan, Tollison, and Tullock 1980).

[29] If there are no property rights to be exchanged, there is no need for the regulation which followed. In this way, industry and the bureaucracy both benefit.

property rights regime that ensued was neither in the public interest, nor necessary and the scarcity rationale upon which it was based was equally as dubious.[30]

Thus, coming into the presidency of Franklin D. Roosevelt, critics of the laissez-faire approach perceived market control by companies such Radio Corporation America (RCA) and American Bell Telephone as problems largely conditioned by government action or inaction.[31] Moreover, the pro-industry effects of commercial radio licensing were apparent. Roosevelt and his followers looked to government to undo what had previously been done.

When President Franklin D. Roosevelt took office, the communications industry was coming under increasing attack for monopolistic practices. On January 23, 1934, Roosevelt provided

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[30] As noted by Ronald Coase, quoting Congressman Henry Reuss, "the airwaves are public domain, and under such circumstances a decision should be made in favor of the taxpayers" (Coase 1959, 24). On the problems with the scarcity rational see, Spitzer (1985) and Fowler and Brenner (1982).

[31] In 1880, the management of the American Bell Telephone Company created what would become a nationwide long-distance network, AT&T Long Line. The company was christened AT&T in March 1885. See "History of AT&T at: http://www.corp.att.com/history/milestone_1913.html. Under president Theodore Vail, AT&T adopted a "one policy, one system" goal. As the company purchased its competitors, Vail brought them in line this goal. The growth of AT&T brought attention from government antitrust regulators but Vail was able to avoid antitrust action by striking a deal with government. The deal came to be called the Kingsbury Commitment of 1913. Pursuant to the agreement, AT&T was allowed to buy up telephone companies as long as it sold one off for everyone it bought. The business strategy was to buy and trade companies so that it effectively maintained specific geographic monopolies. AT&T was also required to allow competitors access to its lines. Stating national security as the chief reason, the government began discussing its role in bring service to everyone in the country. AT&T agreed and the government nationalized the telecom industry in 1918. The nationalization ended one year later and the states began to regulate rates to keep service affordable to rural areas. Under the premise that AT&T was a natural monopoly, and that one firm could more efficiently effectively serve the public than multiple firms, government prohibited potential competitors from installing new lines and wastefully duplicating service. RCA was formed in 1919 to control the U.S. patents of General Electric, AT&T, Westinghouse, and United Fruit. It quickly became the market's dominant force in broadcasting. The Telephone Act of 1921 permitted the merger of telephone companies with approval of the Interstate Commerce Commission. This was also premised on defining the telephone industry as a natural monopoly. (AT&T, History of the Network 2007, See http://www.corp.att.com/history/milestone_1913.html. see also wikipedia.org/wiki/Kingsbury_Committment.

the Chairman for the Interdepartmental Committee to Interstate Commerce with a report about the condition of the communications market. The writing reflects concern about the "near monopoly" of AT&T and its associated Bell companies. It notes Western Union's control of 23,000 telegraph offices as well as the dominance of RCA and its subsidiaries, including National Broadcasting Company (NBC), which operated a chain broadcast company. An excerpt of the letter describes what Roosevelt refers to as "an interesting picture of communication agencies not working in accordance with any national plan":

> *"Although the cable, telegraph, telephone and radio are inextricably intertwined in communications, the Federal regulation of these agencies in our country is not centered in one governmental body. The responsibility for regulation is scattered. The scattering of the regulatory power of the Government has not been in the interest of the most economical and efficient service. In this connection, the following is quoted from the report of the standing committee on communications of the American Bar Association adopted in the annual meeting Aug. 30- Sept. 1, 1932)"*
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> *There stands out in the study the following:*
> *(1) Continuation of private ownership and operation of communication;*
> *(2) Government regulation of such ownership and operation by one agency, whether an independent commission or bureau in an executive department;*
> *(3) Some further extension of permission to merge existing companies under the supervision of a regulatory body; and*
> *(4) A disagreement as to the extent of the elimination of competition.* [32]

On June 19, Congress passed the Communications Act of 1934. [33] The Act replaced the Federal Radio Commission with the Federal Communications Commission ("FCC"; "Commission")

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[32] Printed in *FCC Legislative Histories*. See, http://www.fcc.gov/Bureaus/OSEC/library/legislative_histories/41.pdf. Also, a collection of documents relating to the early years of the FCC is available at http://www.fcc.gov/mb/audio/decdoc/engrser.html#EARLY

and also transferred regulation of the interstate telephone services from the Interstate Commerce Commission (ICC) to the FCC. The legislative history and FDR's letter combine to give a clear indication of the expectations with regard to the new law: the service of communications should become generally more efficient; the new FCC should do a better job at coordinating plans with respect to the relationship of radio, wire and cable communication and; phone service should become more available to the rural population. Clearly nation-wide service was considered necessary for both public defense and the general advancement of society. Additionally, Congress specifically noted that jurisdictional centralization was intended for "effective execution" of communications policy. [34] The 1934 Communications Act also established a cooperative federalism regulatory system. The FCC was given authority to regulate interstate and foreign telecommunications, while reserving intrastate communications for the states.

The transfer of authority from the ICC to the FCC was a sign that Roosevelt and the new Congress wanted to separate themselves from the criticism associated with the old agency. For some time the ICC had been criticized for its close relationship with the railroad industry. [35] Roosevelt also intended to bring communications regulation under control of one agency while simultaneously addressing concerns about increasing dominance and anti-competitive practices of broadcasters and

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[33] Communications Act of 1934; Act of Congress, Pub. Law No. 416-73rd Congress, approved June 19, 1934. The intent of the Communications Act appears in Title 1, Section 1.

[34] The overlap of jurisdictional matters is acknowledged by President Roosevelt in Executive Order of September 24, 1940 Order establishing a Defense Communications Board to determine and coordinate plans "The purpose to coordinate the relationship between all branches of communication for national defense. As stated in 6th Annual Report of the FCC for Fiscal Year June 30, 1940.

[35] In fact, historians often cite the ICC as the classic example of regulatory capture. See for example, Fellmeth (1970), <u>Interest and the ICC; The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation</u>. Nobel laureate George Stigler is one of the main developers of the theory of capture which describes government agencies who become dominated by the vested interests they are supposed to be regulating (1971). See also Laffont and Tirole (1991).

telephone companies. There is also no doubt that FDR intended to provide the FCC with the full breadth of *advisory* authority needed to curtail monopoly abuses. Actual corrective action appeared to be a matter he wanted left to the legislature. In a message to Congress, President Roosevelt asked that the FCC "be given full powers to investigate existing businesses and make recommendations to Congress for additional legislation at the next session."[36]

According to the FCC's annual reports to Congress the allegations of anti-competitive practices continued after the agency was established, and they were not limited to one industry.[37] Advertisers raised concerns about rates charged by broadcasters. The education community complained about having to share frequencies with other interests. There were also allegations that AT&T was overcharging (Paglin, 1989). One drawn out proceeding apparently involved a complaint filed before the Telegraph Division of the FCC by a company furnishing a nation-wide radio service. The company had petitioned to require a telephone company to furnish leased wire service under tariff rates. Another complaint was filed with the Telephone Division of the FCC by Pensacola Broadcast Co. against American Telephone and Telegraph (AT&T) alleging that wire charges by AT&T were unjust and unreasonable.

<u>The 1940's and 1950's</u>

[36] Message to Congress, February 26, 1934; see also Hearings dated February 20, 1934 on Senate Bill S. 2910 before the Committee on Interstate Commerce [United States Senate]. In particular, Section 221, is a special provision relating to requiring approval for proposed telephone mergers, and Section 311 calls for revocation of licenses and permits of entities found guilt of anti-competitive practices. Available at: http://www.fcc.gov/Bureaus/OSEC/library/legislative_histories/42.pdf.

[37] Reports from 1935 to 1940 detail the nature and number of complaints the agency received. See the FCC Annual Report to Congress at http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/

In the early 1940's the first television networks were established, including NBC, CBS, ABC, and DuMont. Broadcasting industry revenues reached $200 million annually, most of which was from advertising (FCC 1942).[38] The FCC continued to regulate communications of licensed radio, broadcasts, and telephone under the Communications Act of 1934. The telephone and broadcasting industries continued to be the main clientele of the FCC. At the federal level, telephone regulation was pursued in the same tradition it had been in previous decades, i.e. according to the common carrier model. The states regulated telephone local exchange, which was typically done through state public utility commissions. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943) the agency's jurisdiction was challenged. NBC argued that the FCC's jurisdiction was limited to the technical elements of radio transmission. On May 10, 1943, the Court held that the FCC had authority to issue regulations pertaining to associations between the networks and their affiliates. The Supreme Court decision is of significance to administrative law because it determined that the scope of an agency's authority can be broader than that which is specifically stated in the agency's organic statute. Congress gave the FCC the authority to regulate according to the "public interest, convenience and necessity" and the Court ruled that the language included authority not explicitly contemplated as long as it was within the scope and purpose of the original law. According to the Court, the FCC's conception of "public interest" was authorized by Congress; the FCC's chain broadcasting regulations simply specified the particularization of the public interest concept. If there is a principal issue of contention between government and the communications industry during this time, it concerns the abuse of monopoly power; complaints about excessive charging by

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[38] See the FCC annual report to Congress at http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1942.pdf.

phone entities and ongoing company mergers in broadcasting are consistently featured in the FCC annual reports.[39]

In the 1950's, radio broadcasting began to lose its dominance as television broadcasts were ushered in. The same companies that had dominated radio broadcasts became the main actors in TV broadcasts. At the FCC, communications was divided by sector and regulated by a separate department within the agency. This regulatory demarcation meant policy was not a zero-sum game. Political compromises were not major issues because the firms did not intrude on each other's territory, nor did they threaten each other's profit margins. In fact, the sizeable revenues of broadcast industry sparked concern from the Department of Justice (DOJ), especially those of NBC, the premier television network. With pressure mounting, NBC was forced to divest some of its holdings. NBC's spin-off of its affiliates led to the creation of the American Broadcasting Company (ABC). The divestiture order was challenged in court, but upheld. By some indications, the FCC's relationship with AT&T was less favorable for the telephone giant than it had been in the past. One particular piece of evidence is the fact that the agency declined to allocate significant frequencies for mobile radio services when AT&T petitioned for them. Significantly, the FCC declined to act on the petition, preferring to reserve the spectrum for the developing television industry.

The Hush-a-Phone decision is evidence that AT&T and the FCC never totally parted ways. The case additionally reflects the need for oversight outside the boundaries of the existing regulatory structure. Hush-a-Phone was a simple device designed to reduce background noise. It worked much

[39] See the FCC annual report to Congress at
http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1944.pdf ;
http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1946.pdf ;
http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1949.pdf

like placing one's hand over the mouthpiece of the phone. AT&T argued that the device violated their tariff, which prohibited the attachment of any foreign object to their phones. AT&T threatened to cut off phone service of anyone caught using the device. Hush-a Phone brought the issue to the FCC, which agreed with AT&T. Hush-a-Phone appealed to the federal court who overruled the FCC on the grounds that the FCC's tariffs were restrictive and unreasonable.[40]

During the 1950's, the dramatic increase in ownership of television sets increased the public demand for television broadcasts. However, homes in low-lying areas were unable to receive television signals. This prompted local entrepreneurs to construct community antennae television systems (CATV), which were later called cable systems. These "cabled systems" sprung up first in Pennsylvania, Oregon, and Arkansas.[41] At first, cable technology boosted sales of television manufacturers and broadcasters, providing what appeared to be common ground for a coalition between the two. However, as time went on, business interests conflicted leading to some heated policy debates. Indeed the relationships between cable companies and the telephone industry were already contentious in many local government settings. For cable operators to effectively and efficiently extend its service, they needed access to utility poles, many of which were owned by Ma Bell. Disputes began to arise regarding fair rates for utility pole attachments. For the most part, Telco saw Cable as a nuisance; whenever Cable was granted the right to operate in a territory, Bell

[40] Hush-a-Phone v. Federal Communications Commission, 238 F. 2d 266, 269 (1956).

[41] As the story goes, in 1948, an appliance store owner in Mahoney City, Pennsylvania, John Walson, ran into difficulty selling television sets to rural residents who were unable to receive signal from broadcasts originating in approximately 90 miles away in Philadelphia. The mountainous terrain prevented reception to those who lived in the valley. Necessity being the mother of invention, Mr. Walson placed an antennae on the top of a utility pole planted on a nearby mountain, attached cable wire and ran it to his appliance store. When passersbys saw the pictures in his storefront, television sales soared. People buying televisions expected Mr. Walson to get improve their reception, which he did by extending the cable and boosting signal with amplifiers along the way. When another appliance store owner in the nearby town of Lansford heard the story, he went a step further, and decided to "cable" the whole town. A cable business was born. (Mayer 1987).

had to rearrange lines to accommodate new physical plant. The fact that utility pole access was a potential additional revenue source for AT&T did not seem to matter, since under the terms of the monopoly regulatory structure its profits were guaranteed. Moreover, Ma Bell appeared to be the indestructible giant. It is not at all evident that they foresaw any threat from the cable business. Even if they did, the fledgling industry was no match for the entrenched giant. At the same time, Cable's entry into the marketplace meant some involvement with local government. Local government struck deals at its own discretion and on its own terms. In some communities, Cable was required to get a simple business license; in other communities elaborate long-term contracts were put in place.

The 1960's

In the 1960's cable became a subscription service, and by 1962, approximately 850,000 residents were paying for better reception of TV broadcasts. Westinghouse, Teleprompter and Cox Cable became the first multi-system operators (MSO's) of cable. Cable's growth attracted the attention of the broadcasting industry and the FCC. In the early 1960's the FCC was reluctant to regulate cable, as it was an awkward fit into its current regulatory framework, but by the mid 60's the FCC took a more affirmative position on its regulatory role. The earliest rulemaking by the FCC was prompted by broadcasting interests who were concerned that cable companies could use their discretion to decide what broadcasts to carry. The FCC reasoned that the importation of distant signals by cable operators could create substantial competition for local broadcasting which could negatively affect local station revenues.[42]

[42] FCC First Report and Order, 38 F.C.C. 683, 707-13 (1965).

The FCC was challenged but the agency's role in regulating cable was upheld by U.S. Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157, 167-69 (1968). For its part, the FCC argued that it should retain jurisdiction on the basis of its obligations in regulating broadcasting. The agency claimed there would be regulatory spillover effects, and that it could not meet its duties to Congress without oversight of both industries.

The Hush-a-Phone decision had paved the way for a new device, the Carterphone, which again threatened the telephone monopoly. The Carterphone was a device that included a cradle, miniature microphone and speaker, allowing subscribers to connect their phones to radio and thereby circumvent some of AT&T's expensive long distance services. As it did with Hush-a-Phone, AT&T again argued that the Carterphone was a foreign device prohibited by the terms of its tariff. The battle ensued for the next 10 years and the FCC eventually made a decision that was consistent with the Hush-a-Phone decision, i.e. that the tariff was unreasonable.[43]

By this time, Cable had become an industry that had to be taken seriously. As a result, authorities were now faced with decisions regarding two related issues: 1) the appropriate regulatory model for the technology of cable television and; 2) the proper scope of regulation given its medium for service delivery. Cable television was an anomaly. There were similarities with broadcasting, print newspaper and common carrier regulatory models, yet none seemed to be the perfect fit. Under a broadcasting model, regulation is broad in scope and justified on the basis of scarcity of the electromagnetic spectrum. Privately held broadcasting companies apply their own independent editorial judgment in deciding what content to air. The newspaper or print regulatory scheme is characterized by a hands-off regulatory model based on First Amendment rights accorded to speech. And in the common carrier scheme, as in the case of AT&T, the operator uses public rights- of-way

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[43] In The Matter of the Use of Carterphone Message Device in Message Toll Telephone Service. 13 F.C.C. 2d 420 (1968).

and is subject to public utility jurisdiction; the operator controls the method of transmission but not the substance of the communication.

If Cable was to be regulated according to a common carrier model, regulators could require them to serve anyone who requested service. The decision might also have had implications for departmental assignments within the FCC. Treatment according to the same rules as the telephone industry would also dictate the relationship between the two industries for years to come. Another important aspect of common carrier regulation concerns their duty and obligation regarding the property entrusted to them. The extent of their liability was often determined by the extent to which they had control over what they carried (Noam 1994). In the case of Cable the question is whether they had control over the content of the broadcasts. As important as these decisions were, all signs indicate that Congress and the FCC avoided addressing them directly. Early policy was ambiguous as to how it should be regulated; however, the content of cable regulation borrowed the terms associated with all the models. The definition of a common carrier in the Cable Communications Act of 1934 did not clarify the issue.

Until the mid-1960's federal regulators were primarily involved in handing out broadcasting licenses, that is, until they ran out of broadcasting licenses to assign. There was not much to do in the way of telephone regulation; that task was primarily left to the states. When Congress pressured the FCC to investigate interstate rates, it became clear that the federal agency was not equipped to oversee the telephone industry. The information they needed was dominated by industry. Any information available to government resided at the state public utility commissions, where jurisdiction had been concentrated. When the FCC became involved, the telephone industry showed that it could confront regulators at all levels simultaneously. Thus, the multiple levels of jurisdiction meant more access points for established industry and a more difficult time for any smaller company with fewer resources that might want to compete. Within the FCC, the primary feature of the regulation was the continued compartmentalization of individual sector regulation. As a result, regulators could typically accommodate all industries. Ironically, the criticism of the ICC, from whom the FCC took jurisdiction of communications, now applied equally to the FCC. The FCC developed the reputation of going to great lengths to protect monopolies. In fact, some critics joked that the FCC stood for "Firmly Captured by Corporations." [44] At the end of the 1960's Cable was still not regulated at the state level, but some state governments began expressing concern with voids they perceived in FCC regulation that affect state interests.

Discussion

Reflecting on the early policy initiatives, the pertinent issue is whether some of policy and subsequent events reflect prevailing ideology, rational thinking or politics. If a pervasive ideology is at all apparent between 1870 and the time the FCC was created in 1934, it is the concern with monopoly domination. This is the case at both the federal and state levels of government. Monopoly abuse was persistently noted in the legislative history both before and after the Communications Act of 1934 as well as in the FCC yearly reports. There can be little doubt that the government ideology before the Communications Act favored the monopoly model. In government documents big business was portrayed as the reason for technical advances and disassociated with the ills of the society. Therefore, the ICC's administration, which by all accounts is also pro-business, appears consistent with the ideological position. If the ICC was being "political," it was doing so with the blessing of Congress and the President.

[44] This allegation was admitted in a speech by Reed Hundt, Chairman of the FCC to the Center for National Policy on May 6, 1996. See http://www.fcc.gov/Speeches/Hundt/spreh624.txt

The same cannot be said after the Communications Act of 1934 was passed. The documents characterizing FDR's intent and the new tone of government point to a shift in sentiment, i.e. toward the public interest and away from big business. Thus, the "politics of the FCC" appear to conflict with the characterizations of FDR's administration. The fact that FCC rulemaking continued to authorize the consolidations of large communications companies, at very least, leaves open the possibility that, absent politics inside the bureaucracy, the same policy initiatives would not have occurred.

An alternative regulatory structure can also be envisioned, i.e. a locus of authority at the state rather than the federal level. The Communications Act provided the FCC with the bulk of jurisdiction. If the states had been authorized to regulate both interstate and intrastate commerce, would the same policy initiatives have occurred? The answer, with respect to media consolidation, is that, in some states it would have, and in other states it would not. Clearly, the development of state law with regard to common carriers was not uniform, although there were some common features noted. The important point is that some state legislation enabled and provided privileges to common carriers without strings attached. Other states took the public interest standard more literally and required concessions, for example, requiring companies to provide service on a nondiscriminatory basis. This implies the policy beneficiaries may have been different under alternative regulatory structures. Also, the complaints about monopoly abuse continued even after the FCC was established and authority was shifted from the ICC to the FCC. Therefore, at least some degree of ineffectiveness followed the organizational restructuring. If the organizational reform was not effective in terms of the stated goals, there is the possibility that politics, rather than ideology or public interest, guided the decision process within the FCC.

Another question is whether, in the absence of politics, the same policy initiatives would have occurred. A sampling of the FCC rules can be looked at for this purpose. Consider first the

FCC's decision (or indecision) regarding the appropriate model for the regulation of CATV. The Communications Act had provided authority to the FCC to regulate interstate communications, including radio, telegraph, and telephone "…for the purpose of regulating interstate and foreign communications by wire and radio." [45] When cable television was introduced, there were at least three alternative regulatory models. Cable could be regulated under the common carrier model, the broadcasting model, or the model relegated to newspaper print. The FCC's decision would have implications for the distribution of authority between at the federal, state, and local government, as well as for the other communications businesses, namely broadcasting and telephone. The print media business (newspapers) would be marginally affected, if at all.

Attaching the common carrier label to Cable implies that Cable is similar in important ways to the telephone industry. It also suggests that costs associated with the cable industry prohibit more than one firm per area, i.e. the business is most efficiently operated as a monopoly. Common carriers typically have control over transmission but not message content; an acknowledgment that might make it harder to justify FCC rules requiring Cable to carry some broadcast stations. Indeed, the main concern of the broadcasting industry was that cable companies might opt not to carry some of their stations. The common carrier label also implies a likely shift of authority from the FCC to the State public utility commissions who deal with local telephone exchange. If the FCC does attach the common carrier label to cable, and assumes some role in regulation, there is also probably no reason for a separate department. Additionally, Telco is not required to obtain a local franchise for every municipality it serves, therefore the common carrier model calls into question any requirement for a local franchise and all the bargaining between local authorities and cable companies associated with the process. The label also carries potential risks for the traditional telephone industry; the industry had been afforded a privileged status in a category all its own and

[45] 47 U.S.C. §§ 151.

saw no benefit to sharing these privileges. The question of the appropriate model is clearly a policy issue in the hands of the FCC; state and local governments are not in a position to decide larger issues of national communications policy. Moreover, the FCC is the clear beneficiary of indecision; a strategy that minimizes risk that it might lose jurisdictional authority to the state and the likelihood of upsetting either the broadcasting industry or the telephone industry. The local government is also a beneficiary of indecsion, as it minimizes the risk of losing rents associated with the process of franchising.

The FCC could also have chosen to apply the broadcasting model of regulation to the new industry. The justification for regulation under this model is the scarcity of the electromagnetic spectrum, which does not wholly apply to CATV. As a new technology, CATV was carrying the content of broadcasters who had already been licensed for spectrum use. Cable television did not compete for use of the spectrum; it was merely a carrier of broadcasts signals already occupying a place in the spectrum. Any limitations for cable had more to do with the capacity of coaxial cable, amplifier and reception technology, not the electromagnetic spectrum. The acknowledgment of broadcasting characteristic implies essentiality. In the early days of cable, the essential nature of the subscription service would be difficult to justify. Moreover, just as in the case of the telephone industry, attributes of the broadcasting model provided privileges to the broadcasting industry, which they did not want to share. However, the scarcity rationale had been successfully used to justify the "public interest" standard and licensing procedures. Applying the broadcasting model to cable had its advantages, namely the room to apply discretionary in licensing decisions. This would provide for rents at the federal and the local level. There were also risks with similarly classifying the broadcasting industry and the cable industry. The Communications Act appears to tie the application of the public interest standard to licensing. Broadcasters were licensed. CATV operators were not required to be licensed in the early days. The more beneficial strategy for the FCC, one that did not risk the disapproval of broadcasters, was to emphasize some public interest attributes while ignoring other aspects of model fit. The fact that a later FCC rulemaking mandated licensing for CATV operators suggests the agency understood that regulatory authority could not be justified without the license requirement. The FCC's broad interpretation of its mandate as necessarily encompassing the regulation of CATV was intended to protect the broadcast industry and not preserve the electromagnetic spectrum. The strategy also had the effect of legitimating the FCC's jurisdiction and providing the basis for rents at all levels of government. With respect to the general public, the FCC's interpretation of public interest as a requirement to foster local broadcasting effectively impeded the growth of CATV for many years.[46]

The newspaper model emphasizes the First Amendment rights afforded to speech. Indeed there are similarities between the newspaper business and the cable business. In fact, the print media model is probably the best fit for CATV regulation. It is possible that the FCC recognized at the start, hence its resistance to assuming any regulatory role. The resistance was short-lived, lasting only until the broadcast industry prompted the FCC to regulate Cable. Not surprisingly, the cable industry advocated its similarity to newspapers and the prohibition of regulation associated with it. However, for obvious reasons, a model of "least regulation" does not secure the future of the bureaucracy. All considered, the FCC's indecision was self-regarding and risk averse, allowing for the maximum amount of discretion and control over the future of communications. Notwithstanding the nebulous foundation upon which the FCC asserted authority, its decision to regulate was inconsistent with its own earlier reasoning about why it should not regulate cable. According to the

[46] The FCC's inconsistent application of the public interest standard has been noted in Chamberlin (1982), Lessons in regulating information flow: The FCC's weak track record in interpreting the public interest standard, 60 *N.C.L. Rev* 1057 and in Robinson (1970), The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 *U.PA L. Rev.* 485, 531-35.

FCC, cable did not fit the common carrier model for regulation. In Frontier Broadcasting v. Collier, Memorandum Opinion and Order , 24 FCC 251, 16 R.R. 1005 (1958), the FCC argued that CATV was not a common carrier because it had some control over the content it carried, unlike AT&T who carried whatever came across the wires.[47] The FCC also concluded that CATV did not fit the broadcasting model because it operated by wire lines and did not involve radio transmission.[48] Thus, regulation of CATV in the early days by the FCC was a matter of satisfying the broadcasting lobby, and by its own admission, not one it could rationalize as within the existing scope of broadcasting or common carrier models. The FCC did not have anything to say on the similarities between Cable and the business of newspapers. The broadcast industry wanted to ensure that cable operators carried its content. This is ironic given that the market for CATV came about because antennae could not pick up broadcast stations in some areas.

There is evidence that events leading to both the enactment of the Communications Act and the establishment of the FCC were characterized by the "pushing and hauling" that Allison (1971) calls politics. The various private interests, including broadcasting, telephone, and cable, all lobbied for support of their position. The work of the ICC and its close association with the railroad

[47] A weaker but nonetheless plausible argument can be made regarding telephone's fit into the common carrier model. One attribute of common carriers is the essential nature of the service. On what basis was telephone service considered essential? Indeed, one could rationalize the essential nature of land line phone service at the time. Nonetheless the essential nature appears to be a matter of discretion, not one relying on fact. Moreover, it does not follow, that it was necessary to treat telephone as a monopoly. The expectation of universal service is also not supported in the record. For example, phone service was first extended to select customers. Its essential nature came about because of its popularity extended to the general public, not the other way around. In other words, someone decided on its essential "nature." Additionally, an alternative rational view at the time would have been to treat telegraph and telephone service as parallel entities competing for the communications market. Messages could be delivered either way, not necessarily one at the exclusion of the other. For that matter, railroads and the postal service could also have been viewed as competitors for the delivery of messages.

[48] *Id* at 254, 255, 256; 16 R.R. at 1010.

industry was a matter of record. This criticism, in fact, was one reason for the formation of the FCC and transfer of authority. The establishment of the FCC reflected the ideological differences between President Roosevelt and his predecessors. The simultaneous transfer of communications regulation from the ICC to the newly formed body also suggests the political implications of agency structural changes. That is, the formation of a new agency was seen as a way to put a distance between regulators and the industry they regulated, a promise that Roosevelt made in his bid for the White House.[49] However, given the close relationship between industry and the successor agency, it is not clear that industry would be any worse off or better off if the transition did not occur.

Would the policy beneficiaries have received the same gains if not for their political successes inside the FCC? Politics determines winners and losers. In this case, the FCC and Roosevelt's appointments were the winners. The previous appointments and the ICC lost some of their authority in the process. Rational decision making often results in a different set of winners and losers. Thus, one way to answer this question is to consider what a reform based on rational decision making might look like and how the gains and losses might differ in such a situation. Rationally, the newly formed agency would be structured in ways to remedy the specific problems associated with the ICC. However, despite the criticisms of the ICC, the very structural problems associated with it were carried over to the FCC. For example, the ICC and the FCC were both independent agencies consisting of Presidential appointments confirmed by the Senate. It's also significant that the ICC did not go away with the transfer of authority. In fact, the agency maintained jurisdiction over some matters until the 1990's when was finally disestablished. This suggests some influence either within

[49] The initial decision to transfer communications regulation away from the ICC does appear to be a decision to benefit the general public, regardless of its eventual effect. The formation of a new agency, the FCC, represents, if nothing else, the expansion of the administrative state. The separation of the FCC into designated departments institutionalizes different areas of expertise or authority.

the ICC or on its behalf enabled the agency's survival. It is also clear that AT&T benefited from the early policy. The FCC also continued to approve the consolidation of the industries.[50]

Logically or ideologically, one would expect the FCC to be organized in accordance with the touted principles at the time, including work standardization and the prevailing view that, as government became more complex, administration should be by hired professionals instead of elected officials. After all, agency capture was believed to have come about because industry possessed more knowledge of business. However, the Commission's initial divisional organization structure seems at odds with the original claim that centralization was needed to coordinate the various communications companies. The FCC's main clientele included broadcast, telegraph interests, and telephone interests. Each was regulated by separate division. Each division had three commissioners; Chairman E. O. Sykes served on all three divisions. The broadcast division had jurisdiction over all matters relating to broadcasting; the telegraph division had jurisdiction over matters related to or connected with record communication, including radio, wire, and cable; and the

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[50] Apparently the complaints and concerns about the monopoly abuses continued unabated in the early years of the FCC. Pursuant to request of a subcommittee of the Interstate Commerce Committee of the Senate, acting under Senate Resolution 95 of the Seventy-Sixth Congress, the Commission conducted an investigation into the conditions of the telegraph industry and submitted its report of findings in two parts. The report concerning domestic operations was transmitted December 23, 1939. The Commission recommended the enactment of legislation to permit consolidation of telegraph carriers into one or more unified systems for economic and national defense reasons. (check for needed quotes)
http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1940.pdf
The 1943 Annual Report reads, "… to meet the problem raised by concentration of control over standard broadcast stations serving substantially the same area, the Commission adopted a rule against multiple ownership. Another change in rules extended the license period of standard broadcast stations from two to three years." See.
http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1941.pdf.
http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1943.pdf.

telephone division had jurisdiction over communication by radio, wire and cable, except those defined as broadcasts. The early documents acknowledged the potential overlap and conflict regarding jurisdictional areas and provided procedures in the event such conflicts arose. The separation allowed each sector to go about its own business. When conflicts did arise, it was much easier for the FCC to resolve conflicts in a way that satisfied all parties.

The FCC structure also had implications for monitoring costs and information costs. Although departments were separated on the basis of industry sector, on many issues authority overlapped. This made accountability to Congress more difficult. Moreover, information flowed from each industry sector to its associated department within the FCC. Departmental separations complicate the flow of information and provide the means for filtering information. Departments share information only when they must, resulting in policy decisions not always based upon all the facts.

From another perspective, departmentalization conforms to the Taylorist principles espoused at the time. For example, similar functions should reside together to promote efficiency and effectiveness in decision making. However, the record is also clear that the separation of functions had caused problems in coordinating policy and had proven detrimental to the country's defense. From this perspective, a rational decision would call for a more centralized structure, one without departmental barriers. As it turns out, many years later scholars associate problems regulating broadcast, telephone and cable interests with the balkanized treatment that has carried on for years (Hazlett 2006)

Key rulings of the Judiciary further legitimated the FCC's role during this period. In United States v. Southwestern Cable Co., 392 U.S. 157, 167-69 (1968), the Court examined the legislative history of the Communications Act to assess the breadth of authority Congress intended to confer upon the agency. The Court concluded that … "the Commission was expected to serve as the single government agency with unified jurisdiction and regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio. It was for this purpose given broad authority."[51] The cable industry's position in Southwestern is also noteworthy. Cable argued that the FCC did not have jurisdiction because cable was not a common carrier. Although the Court concluded that nothing in the Communications Act limited the FCC's jurisdiction to common carrier types, it did not otherwise define the technology or instruct the FCC as to the appropriate model for regulation.[52]

The Hush-a-Phone decision revealed other problems with the regulatory structure intact at the time. In Hush-a-Phone, the Court ruled that the FCC's interpretation of the provisions of the tariff was correct; the connection of the Hush-a-Phone device did in fact amount to attaching a foreign object to AT&T equipment and therefore did violate the terms of the tariff. However, the Court questioned the legality of the tariff in the first place, finding it unreasonable and discriminatory. The decision underscores the power of framing the issue and also implies the tendency of organizations to legitimate their own authority. The FCC framed the issue in a way that assumed the sanctity of its previous ruling, i.e. its decision regarding the scope of the tariff and the rights it provided. The Court, on the other hand, did not accept the tariff at face value. Additionally, when decision making occurs within a closed structure, information filtered in such a way as to ignore the bigger picture. The FCC's main source of information was AT&T, which of course had its own agenda. As a result, the wrong issue was addressed and policy alternatives limited. The ruling also suggests that cracks in the regulatory apparatus are unlikely to come from within. In the case of the telephone monopoly, the Court and the pressures of the market were the threats to standard operating procedures at the FCC.

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[51] 392 U.S. at 168.

[52] *Id* at 172.

The tariff at issue also reveals the essence of the bargain struck between government and AT&T during the early days of communications regulation, which effectively served both government and industry well until sometime in the 1970's. Government effectively agreed to treat AT&T as a natural monopoly, despite early evidence that several phone companies could exist in the same market and compete. This is yet another example of how original decisions frame subsequent problems and limit future policy choices. Indeed, the telephone company's refusal to let carriers attach to their lines is evidence that competition was feasible given universal access. Telephone companies were the victors in the early disputes over connection to their lines. The bargain struck between government and industry included the institutional acceptance of the monopoly. In return industry agreed to rate regulations, which were designed to ensure a profit could be made. Importantly, AT&T telephone patents were expiring and thus it could not have achieved the same guarantee in a competitive environment. Moreover, the relationship gave AT&T the inside track on all regulation to follow, which not coincidentally protected the monopoly and precluded any competition that might have emerged. The laws and rules that followed were the spoils that resulted from the coalition's win.

Regulation also benefited government. The state PUC's were happy to maintain a symbiotic relationship with the telephone industry. State level involvement in telephone rate regulation provided an opportunity to increase political capital. The more rate proceedings can be protracted, the more the agency can expose its public interest function to the public and to legislators. The problem is that any state imposed constraints on telephone rates were easily cloaked as "in the public interest." At the same time, the costs associated with the business of providing telephone service were never revealed. The regulatory structure ostensibly shielded the public from having to understand the technical issues associated with telephone regulation. As a result, for decades, American accepted their phone bills without question and they were naïve to any opportunities being lost (Montayne 1996, 260).

The increase in customer owned equipment after the Hush-a-Phone and Carterphone decisions revealed an interesting dynamic between the federal and state regulatory institutions. An accounting procedure called the "separations principle" allowed state regulators and the telephone industry to shuffle revenues and costs between the different long distance and local services and also between the state and federal jurisdictions (Gabel 1967; Montayne 1996). The typical way to handle the compensation of carriers for switching costs was through contracts and settlement agreements. The states became concerned that AT&T was concentrating revenues in interstate long distance, an area which had been under the jurisdiction of the FCC since the Communications Act of 1934. State regulators wanted to capture as much interstate toll revenue as possible under the contract/ settlement agreements. The key was separating and assigning telephone costs, which are both fixed and varied. For example, the costs associated with telephones are fixed and incurred regardless of the volume of business. Other equipment and facilities are needed for both local and long distance operations, and for state and interstate operations. Costs had to be apportioned between the jurisdictions, creating a rivalry between the jurisdictions. Whoever has the upper hand in determining the apportionment is afforded a great deal of influence. AT&T and the Bell system resisted the state's efforts to separate costs. The Supreme Court finally settled the issue ruling that exchange operating costs and fixed costs should be divided between jurisdictions based upon usage. The proportion of fixed costs assigned to interstate jurisdictions grew after the Hush-a-Phone and the Carterphone decisions opened the market to competitive suppliers. The bottom line is that the rents associated with regulation at the state and federal levels were subject to redistribution. The state regulators had joined the telephone industry in resisting the FCC decision to allow the connection of customer devises to the phone system. The rivalry between the FCC and state reached a point where the FCC blamed the state regulators with hampering the use of customer owned equipment and asserted primary jurisdiction (von Auw 1983, 411).

CHAPTER 3

THE SECOND ERA: CABLE TELEVISION ENTERS THE SCENE

The 1970's

Three main forces characterized the communications market in the 1970's. In terms of earnings, broadcasting and telephone were the two dominant industries (state estimated annual revenues). Their dominant earning positions meant equally dominant stakes in policy. Broadcasting has effectively operated as a cartel since the earlier days of the Radio Act in 1927 (Hazlett 1990). There was no evidence the broadcasting industry's influence would change; it has been secured with favorable regulations that would serve them well in the future (Owen 1999). By all accounts the broadcasting industry was firmly entrenched at the federal level.

AT&T maintained a regulated monopoly. However, at the FCC, treatment of telephone concerns appeared inconsistent. On the one hand, when disputes arose over pole attachments, the FCC was not quick to take Telco's side. Indeed, it appears that the FCC was acting in the public interest in many pole attachment disputes. FCC rulings against the phone giant were apparently based on concern that Telco would exploit its monopoly position with regard to pole attachment rates at the expense of the fledgling cable industry. Additionally, telephone companies were at the same time banned from providing video services unless they first offered independent cable operators access to carriers' telephone poles.[53] On the other hand, pursuant to the language of the 1934 Act, the FCC had authority to direct carriers to interconnect, allowing other companies to use their facilities, but it never chose to exercise that authority (Huber 1997).

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[53] General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

Another dynamic between the telephone industry, the FCC, and the state regulators was underway. The Hush-a-Phone and Carterphone decisions, and the state shuffling of costs and revenues between local and interstate concerns, brought out the parochial priorities of the federal and state governments. In 1974, the FCC asserted primary jurisdiction arguing that the state was frustrating its ruling in Carterphone. The procedures for dividing costs resulted in higher prices for interstate calls. State regulators then set higher toll rates to subsidize local operations.

A new technology, microwave, was being introduced around the same time, which would allow private firms to operate their own telecommunications systems. Defense contractors were among the private interests pursuing the technology. MCI was the first company to pursue certification from the FCC to offer a specialized service. AT&T argued against granting certification and argued that the spectrum could not accommodate both common carriers and private microwave systems. Curiously, the state regulators joined the telephone industry in resisting the certification. Eventually, MCI prevailed and started operations in 1971. However, the state regulators and AT&T fought MCI every step of the way and together they effectively stunted the growth of MCI's specialized service. After being held back on the one front, MCI turned its attention to another line of business, competing with AT&T in the long distance market. For their part, state regulators declared MCI's new service, Execunet, as a "switched private line." Once defined as a switched private line, the FCC ordered MCI to cease and desist on the grounds that it was not an authorized provider of toll services. The dispute went to federal court, which to the surprise of many, ruled that the 1934 Act did not provide the FCC authorization to dictate which services a company could provide after it had been granted initial authorization.[54] However, the Court decision did not determine the market outcome, at least in the short term. AT&T, with the aid of state regulators

[54] MCI Telecommunications et al. v. Federal Communications Commission, 580 F. 2d 590 (D.C. Cir. 1978).

was very successful in preventing competition in the area of state toll service. This result points to another implication for the allocation of authority between multiple government units and the Judiciary, i.e. large companies have the benefit of forum shopping for the right result. When one authority does not provide the decision they need, they can simply go to another. By advancing the monopoly argument and the scarcity rationale, the state was also protecting its claim on monopoly rents. Absent discretion, there is no opportunity to extract rents from private interests. This provides a huge incentive to government to defend whatever authority it has. Importantly it took another governmental authority to curtail AT&T's influence, i.e. the Department of Justice. The DOJ antitrust suit sought to break up the monopoly by separating long distance, equipment manufacturing, and local exchange portions of the telephone business.[55] Importantly, it was a competing authority that led to a new balance of governmental power.

While all this was going on with the telephone business, the cable industry was quickly becoming an important player in the communications market, with approximately 6 million subscribers in 1972, 9.8 million subscribers by the end of 1975, and approximately 16 million subscribers by the end of the decade. (Warren Publishing 1996). Beginning with the launch of Home Box Office (HBO) in 1972, the cable industry took a major step forward in offering premium services. Cable picture quality also improved as equipment became more advanced. It was also clear by this time that the interests of Broadcasting and Cable diverged, as did the interests of Telco and Cable. Apparently recognizing Cable's growth, in January 1970, the FCC added the Cable Television Bureau to its departmental structure. However, the new bureau was added as a distinct unit, a conscious decision by the FCC to continue its tradition of regulatory atomization.

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[55] United States v. American Telephone and Telegraph Company, 552 F. Supp. 131 (D.D.C. 1982).

In 1971, the FCC reported to Congress with a list of proposed rules.[56] The FCC's plans, however, did not sit well with the Office of Telecommunications Policy (OTP), a newly formed office reporting directly to the White House on many matters clearly within the realm of FCC's authority. [57] The OTP expressed its dissatisfaction with some of the FCC's proposed rules, which it apparently thought were not strict enough on Cable. After the FCC issued its Letter of Intent with regard to the 1972 Rules, the OTP intervened. A main issue was copyright protection of the broadcast programming in major television markets. The OTP called together what it referred to as the three main stakeholders: Copyright Owners, Broadcasters, and Cable Operators. The end result was a compromise reached between the interests. The compromise was formalized in a consensus agreement, thereby significantly changing the substance of the originally proposed rulemaking. The final version of the 1972 Rules reflected the compromise struck with the OTP.[58] The FCC's new rules represented the first expansive exercise of authority over the cable industry and a 180 degree turn from the agency's earlier disinclination to regulate Cable at all. The revised and expanded rules prescribed the requirements of a license and standards the cable operator would have to meet for its issuance. The franchise requirement applied to all systems receiving rights to operate after March 31, 1972. Cable systems in operation prior to March 31, 1972 had until March 31, 1977 to obtain a

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[56] See FCC Report to Congress CATV Regulation reprinted in 22 Pike & Fisher Radio Reg. 2d 1755, 1760 (1971).

[57] The OTP operated under a broad mandate to advice the President and others in the Executive Office on domestic and international matters of technology. It also provided for an interagency effort to work with the private sector on technology policy. Some "advice" clearly overlapped the duties at the FCC. For example, the OTP proposed that Cable be given a common carrier status; however, the idea never got very far. See 47 U.S.C. 541(d) specifying that most traditional services of cable television companies do not bring them within the definition of common carriers. See also Noam (1994).

[58] Cable Television Report and Order, 36 F.C.C. 2d 143 (1972); 47 C.F.R. §76.1 (1976); hereafter 1972 Report and Order.

franchise with the local authority. The broadcasting industry was further appeased with the FCC decision to require that cable carry certain broadcasts, referred to as "must carry rules." Must carry rules were based upon the size of the television market in which the system was located; the rules specified which broadcasts cable companies had to include in their service offerings. More new rules required the filing of annual reports, financial disclosures, and adherence to minimum technical standards. If cable companies originated programming (cablecasts), they also had to conform to the Equal Time Fairness Doctrine. Additional requirements mandated programming for public, education and government purposes (PEG) and compliance with equal opportunity standards (EEO) in hiring.[59] However, before all the dust settled from the 1972 Report and Order, with dubious reasoning, the FCC began to unravel most of what it had done. From 1974 until the mid 1980's, the FCC relieved the cable industry of many the original requirements.[60]

By this time, the question of whether Cable should be regulated appeared to have been answered with a resounding "yes." However, the question of how regulatory authority should be divided between federal, state, and local governments remained unsettled. The question of the appropriate scope of authority was also in flux. In lieu of clarification from Congress, the FCC argued it was better suited to communications regulation than either Congress or the state or local government. According to the federal agency's plea, it needed the maximum degree of discretion to

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[59] These are just a few of many new requirements but are generally the most imposing. 47 C.F.R. §76.13 (a) (3) (1976) prescribes the requirement for a license with the local political body, for example a town council. 47 C.F.R. §76.31 (1976) prescribes the franchise standards to be embodied in the local ordinance in order to receive the FCC certification. Annual reports are at §76.401; equal time in cablecasts are at §76.204, PEG at §76.254, minimum technical standards are at §76.601; must carry rules are at §§76.57, 76.59, 76.61.

[60] See Mark Fowler and Daniel Brenner, A marketplace approach to broadcast regulation, 60 *Tex. Law Review* 207 (1982), commenting that deregulation was part of a general deregulatory trend that did not take for granted the assumptions associated with regulation. The relevant question in the context of this study is whether the deregulatory trend was the main reason for the rule retractions.

carry out its duties. The agency also told Congress that the "dynamic and rapidly changing industry was ill- suited to specific Congressional guidelines.[61] Taking note of the parallel regulatory activity going on before the state legislatures, the FCC argued that it was the most appropriate locus of authority. It further called for the preemption of state and local authority.

In case the FCC's parochial position was not clear enough, in 1976 the agency clarified its mission with respect to common carriers as follows: "(1) to create and maintain a rapid, efficient communications network; (2) to ensure that adequate facilities are provided for the network; and (3) to require the provision of service pursuant to tariffs offering just and reasonable rates, practices, procedures and regulations."[62] The clarification was not coincidental; the mission implied several ways in which the regulation of telephone and CATV overlap, while at the same time avoiding labeling CATV as a common carrier. It also implies the superiority of the federal system over state regulation. For example, according to the mission, the FCC had responsibility in ensuring telephone rates remain just and reasonable. If the local telephone companies were too busy accommodating CATV's requests for access to utility poles, or if the process of preparing utility poles for cable plant became too costly, telephone rates were likely to be affected. Thus, the mission provided the FCC with the justification to oversee the state's exercise of authority with regard to rates and to indirectly regulate the relationship between Telco and CATV. The tactic was similar to the strategy it previously used, which emphasized the overlap between the business of broadcasting and CATV.

However, there were indications that the FCC's muscle flexing was a bit more than it could handle, especially in requiring that all franchises issued by local governments be checked by the agency for compliance with its standards. Not willing to let go entirely, the franchise review and

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[61] Duplicative and Excessive Over-Regulation of Cable Television, Report and Order, 54 F.C.C.2d 855, 857, 34 R.R.2d 1229, 1232-33(1975). See also 54 F.C.C.2d 855, 857, 34 R.R.2d 1233 (1975).

[62] United States v. AT&T, 427 F. Supp 57, Sec II (DCDC 1976).

certification became something of an automatic stamp.[63] Authority gradually shifted to the local authorities on other matters, for example, the regulation of basic cable rates.[64] The fact that the FCC did maintain some degree of jurisdiction suggests that insufficient resources does not by itself guarantee the loss of power and influence. Conversely, resources do not alone guarantee power and influence.

In the late 1970's the Judiciary again curtailed some of the FCC's authority. In FCC v. Midwest Video Corp., 440 U.S. 689 (1979), the Court said the FCC could not regulate CATV as a common carrier, just as it could not regulate broadcast under the common carrier model. It also declared that any authority to compel carriage of public originated transmission must come from Congress. [65]This was another case of a shift in balance of power coming from outside the boundaries of the existing regulatory structure.

The filings related to the 1972 Report and Order point to a rocky relationship between the cable industry and some local governments. The NCTA, the cable industry's main advocate, wanted the FCC to strip local governments of all franchising authority, and argued for preemption of all local regulation. Cable's state trade associations joined in the argument that franchise requirements provided local governments with the incentive to renegotiate previous agreements. The cable industry's strategy can be seen as an attempt to put the hierarchical structure to work for them,

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[63] Amendment of Part 76-CATV Certificate of Compliance, Report and Order , 69 F.C.C.2d 697, 44R.R.2d 513(1978).

[64] CATV Subscriber Rates, Report and Order, 60 F.C.C. 2d 672, 38 R.R. 2d 110 (1976). However, local authorities could regulate only basic services and were preempted in regulation of any premium service. Brookhaven Cable Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978).

[65] Many local franchise authorities require franchisees to provide the public with access to studios and other facilities so that they may produce and disseminate messages. In this way, the cable operator becomes an electronic park of sorts, providing a platform for the exercise of free speech. See also "PEG Access" in glossary.

calling on the FCC to use its coercive authority to minimize the power local government had over their business. State and local government took predictable positions consistent with their parochial interest. Wanting to retain a hand in the franchising process, both state and local government were opposed to preemption.[66]

The state activity in the 1970's was perhaps the most proliferate during this period. There was a flurry of activity in the cable business, especially in the Northeast. New Jersey and New York both enacted legislation imposing a one year moratorium on local franchising until a state schema could be decided upon and put in place (Copple 1991).[67] Beginning as early as 1970, some state governments commissioned studies to explore the issues and to recommend the appropriate scope and form of state regulation.[68] Barnett (1972) attributes three academic reports as the foundation for numerous state level recommendations: a report by Commissioner William K. Jones to the State of New York, Public Service Commission entitled Regulation of Cable Television (1970); a Report on Cable Television in New Jersey prepared by the Center for Analysis of Public Issues, in Princeton entitled Crossed Wires- Cable Television in New Jersey (1971) and; the SLOAN Report, by the Sloan Commission on Cable Communications founded by the Alfred P. Sloan Foundation (1971).[69]

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[66] Petitions for Rulemaking filed by the Community Antenna Television Association (May 4, 1976); comments of the National Cable Television Association (July 1, 1976).

[67] N.Y. Gen MUNIC LAWS §§ (McKinney Supp. 1972); N.Y. Gen MUNIC LAWS §§ (McKinney Supp. 1972); New Jersey Laws [1971] Reg Sess. Ch. 221.

[68] However, while state legislation was being proposed across the country, federal level and state level regulation, for the most part, continued unabated.

[69] Hereinafter the reports are referred to as the New York Report, the New Jersey Report, and the Sloan Report. The Sloan Foundation was established in June 1970 with a grant of $500,000. The Commission was chaired by a number of prominent scholars and businessmen, among them the Chair, Edward S. Mason, former Dean of Harvard Graduate School's Public Administration program, scholars from Brookings, Urban Institute, The Rand Institute, and the President of MIT.

The reports discussed the various problems being experienced with regard to local government involvement in the franchising of cable television systems. A main concern featured in the reports was the political corruption of the franchising process (New Jersey Report, 1971, 50; Sloan Report, 1971, 141.) One widely publicized scandal involved the Chief Executive Officer of Teleprompter, Irving Berlin Kahn, nephew of the famed namesake composer. Kahn went to federal prison after being charged with bribing city council member in Johnstown, PA for the award of a renewal franchise there.[70] In another incident, former Trenton Councilman Martin J. Hillman went on trial for allegedly demanding a $50,000 bribe from a cable company executive in connection with the franchise award.[71] In New York City's Queens Borough, President Donald Manes was being investigated for extorting cable operators in relation to franchising decisions when he committed suicide.[72] Also in the Northeast, John Zaccaro, husband of former vice presidential hopeful Geraldine Ferraro, was charged with bribing a cable franchise bidder for $1 million to deliver the franchise award.[73] And in Tacoma, Washington, an election recount followed allegations that city councilmen had business ties with the cable company with whom they awarded the franchise.[74] Undue political influence was also noted in Buffalo and Chicago.[75]

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[70] Kahn provided a very casual account of the incident in his interview with Marlowe Froke July 1987. Available at http://www.cablecenter.org/education/library/oralHistoryDetails.cfm?id=234

[71] Paul Mickle 1972: The Cable Guy and the Alleged Bribe. *The Trentonian Online.* Available at http://www.capitalcentury.com/1972.html.

[72] John A. Barnes, Why Cable Costs Too Much*, Washington Monthly* (June 1989) , p. 2, Available at http://cfc.convio.net/documents/WashMonthly%5B1%5D.pdf.

[73] See Joseph P. Fried, Zaccaro Is Charged on 3 Counts; Pleads Not Guilty At Arraignment. *The New York Times* (Oct. 10, 1986), p. A1.

[74] New York Times, September 17, 1970, at 95, col 2-4. See also New Jersey Report (1971, 22-23).

[75] See Wall Street Journal, Feb. 2, 1971 at 32, col, 1-3 (Eastern Edition). Reports of the Chicago incident appear in the *Journalism Review* Aug 1971 at 3 under title "Cable TV Comes to Clout City."

The reports also expressed concern that local governments were awarding franchises of excessive length, thereby creating a disincentive for franchisees to invest and keep up with the state of the art in the industry (New Jersey Report, 1971, 56). The New Jersey Report also noted instances of local governments granting franchises without requiring that companies actually construct cable systems. Similarly, many franchises did not specify deadlines for the completion of construction. Most also did not require that companies extend service to all parts of the city (49). The franchise fees were also an issue. According to the report, cities were treating franchises fees merely as an additional revenue source with little understanding of how the cable operator derived revenue to pay the fee. The implication was that the local governments did not understand the public benefit and potential that cable TV could bring to their communities. The local government's lack of expertise meant it was unable to maximize the value of cable service. Although the reports were similar in the problems and concerns across states, the recommendations came in all sizes and shapes. The state policy that followed was just as varied. For example, by 1971, five states had enacted cable television rules through their Public Utility Commissions (PUC's).[76] New York and New Jersey opted for a mixture of state and local authority and put independent commissions in place to regulate the state's part. Typical provisions covered enforcement of state rules and regulations governing construction, rates, service standards, etc. The variation in regulatory structures across states and local governments defies classification. Forty-five states conferred authority for local franchising on local government. Five states preempted local authority, chose to exercise plenary jurisdiction over cable,

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[76] They included Connecticut (CONN GEN STATE. Ch. 289, §§ 16-330-333 (1966 Rev.)), Rhode Island (R.I. GEN LAWS ANN. §§ 39-19-1 et seq. (Supp 1970)), Nevada (Nevada Community Antenna Television System Law, 1967. Nev. Laws 1231 et seq. NEV. REV STAT. 711.101 et seq (Supp. 1971)),Vermont (VT. STAT ANN ch. 30 §§ 501 et seq (Supp 1971)), and Hawaii (1970 Hawaii Laws ch. 1124).

and established themselves as the sole franchising authority.[77] Within these classifications there were many other sub-classifications. For example, twelve states conferred specific authority on local government, and exercised some degree of jurisdiction in addition to local authority.[78] In other states, local authority was not specified in the commission's organic stature but was implied by virtue of home rule or other local police powers. By the end of the 1970's, federal, state, and local jurisdiction was a patchwork of statutes and regulations that sometimes conflicted and overlapped. Moreover, to fully understand the scope and distribution of authority in any one state and between any one state and its local governments required the study of many documents; authority was specified in a multitude of statutes, in the rules of state commission rules, often a part of the Administrative Code, in local franchise contracts with the cable operator, and in local ordinances. Even then, the contours of federal, state, and local jurisdiction were often unclear.

The basis for local government regulation of cable television business is less ambiguous.[79] The nature of cable technology involves laying lines across both public and private easements. One could argue that private easements are a matter between the cable operator and the customers, which does not require state involvement; if a resident wants to subscribe to the service he can grant permission to access the property. However, stringing cable wires from yard to yard, without

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[77] Alaska, Connecticut, Hawaii, Rhode Island and Vermont provided sole cable franchising authority to the state, claiming jurisdiction over all intra state cable operations. The remaining 45 are considered to confer some authority to local government; local jurisdiction is based on either the locality's police power to protect the safety, health, and property of its citizens, its jurisdiction over public streets, or specific statutory authority to issue franchises (FCC, Cable Television State Regulation as cited in Albert 1976).

[78] Arizona, Illinois, Indiana, Iowa, Kansas, Maine, Nebraska, Nevada, New Hampshire, North Carolina, South Dakota, and Virginia. The state's role in dual authority regulatory arrangements varied. States may provide oversight only, enforce state rules and regulations, act as a back up franchising authority, or as a second stage in a two-step franchising process. State regulation can occur through the state's PUC, a Public Service Commission or an independent agency.

[79] The term "local government" refers to any sub-state governmental authority including municipalities, towns, counties or other entity receiving power from the state.

traversing the streets, i.e. the use of the public right of way, is likely to be costly enough to prohibit extending the service to any resident who found himself at the end of the line, where at least one resident refused permission to traverse his yard. Granting the use of the public right way, including the utility poles and underground conduits, gets around this problem. Authority is typically takes the form of a contract, franchise, or ordinance specifying the terms for the usage of private and public property. Other terms of the agreement might include provisions for safety during construction, service boundaries, and timetables for completion and construction upgrades, franchise fees, programming requirements, customer service standards, rates, and complaint procedures. In addition to jurisdiction over public rights of way, the locality also had jurisdiction by way of its police power to protect the health, safety, and property of its citizens. Further institutionalizing implied rights, by the mid 1970's, a number of states enacted statutes expressly providing authority over cable franchising to local government.

Throughout the 1970's, Cable's relationship with state and local governments varied. With respect to state authority, Cable was opposed to any regulation, but especially opposed to situating authority within the PUC's, where regulators were accustomed to rate regulation. Cable opposition to PUC regulation underscores the impact the culture of an organization can have on its action. Rightly so, the cable industry feared a culture of rate regulation would dominate the regulators' thinking and destine policy direction. Cable also argued that state public utility jurisdiction would subject the franchising process to "unconscionable delay and confusion" (Barnett 1972 citing Sloan report, at 160-161).

Clearly, given reported payoffs and bribes associated with some of the early local franchising, some relationships between cable companies and local government officials were amicable, to say the least. Notwithstanding questions of legality, there were also reports of lawsuits across the country reflecting relationships between cable operators and local governments that were quite contentious. For example, in a widely reported case in Idabel, Oklahoma, the city council voted to deny the renewal franchise of Cablecom General and decided instead to award the franchise to some local businessmen, who took on the name Hugo Cablevision. Cablecom General filed an antitrust suit alleging Hugo conspired to restrain trade and illegally influence the council's decision. The matter landed both at the U.S. District Court for the Eastern District of Oklahoma and before the FCC. Broadcasting Magazine, the premier industry publication for the cable industry at the time, reported the National Cable Television Association's (NCTA) pleading to the Court, which urged the Court not to dismiss the incumbent cable operator's complaint against Hugo because it would "open the door to takeovers of established CATV businesses by persons who have an in with local officials."[80]

The 1980's

Broadcasting found itself in a very different market in the 1980's. The use of satellites by cable companies for reception of programming dramatically changed the prospects for programmers. Twenty eight programmers were in operation in 1980. By 1979, there were seventy-nine programmers in the business of providing content to cable operators. Large multi-system cable operators pursued a business strategy of vertical integration, allowing them to take full advantage of both the costs and the revenues associated with the business. Also, by the end of decade, Cable had almost 53 million subscribers. The proliferation of programmers resulted in an increasingly fractured viewing audience. Broadcasters not associated with the cable industry were hit the hardest with competition from new special interest networks. The traditional broadcasting industry was hit hardest by the changes.

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[80] Broadcasting Magazine, July 12, 1976 at 31 col. 1.

During this period, the telephone market could be characterized as "on the edge," not in the sense of technological breakthroughs, as it was with Cable, but in the sense of both public and regulatory disfavor. The antitrust suit by the United States Department of Justice, which had been filed in 1974, was coming to an end and there were many questions about how the telephone industry would fare in a competitive arena. For some time, AT&T's major concern had been fighting the antitrust suit brought by the DOJ; this took away from other business activities. In the final hour, the Court ordered the breakup of AT&T into seven "baby bells" and the terms of the breakup decreeing Telco's future took center stage.[81] This Order was a sign that the tide was changing for the phone monopoly. When the antitrust suit was settled, Telco faced a long line of business restrictions and persistent oversight by the Judiciary, which turned out to be much more onerous than the usual business before the FCC. Court proceedings were a major source of expense, not just for Telco but for other industries too. According to one report, more than five thousand legal briefs had been filed with the court in just a few years. In yet another setback, AT&T could no longer delay the FCC's licensing of cellular. The procedures established by the FCC were also on terms less favorable to AT&T than its potential competitors such as Motorola.

In a creative twist of the facts, AT&T's public relations machine depicted the government-ordered breakup as an unwarranted imposition of authority on a business that otherwise served the public interest with one new technology after another. A sign that hung in many Bell facilities captures the message:

> *"There are two giant entities at work in our country, and they both have amazing influence on our daily lives…one has given us radar, sonar, stereo, teletype, the transistor, hearing*

[81] The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

> ***aids, artificial larynxes, talking movies, and the telephone. The other has given us the Civil War, the Spanish-American War, the First World War, the Second World War, the Korean War, the Vietnam War, double-digit inflation, double-digit unemployment, the Great Depression, the gasoline crisis, and the Watergate fiasco. Guess which one is trying to tell the other one how to run its business."*** [82]

The MFJ shifted authority from the FCC and Congress to the Judiciary. As a result, lobbyists and lawyers spent more time before the Judiciary and less time before Congress, the FCC, state, and local governments. In this sense the legislative and executive branches of government were the policy losers with regard to the divestiture. Likewise, Congress and the FCC were the main policy winners when authority finally shifted back to them and away from Judge Greene, the principal designer of the Modified Final Judgment (MFJ). The FCC was also involved in protracted proceedings during this time (approximately 1987-1995) about how to regulate Telco owned cable companies and how to handle 3rd party programming. Cable fared well in these battles. Additionally, another expansion and reorganization was underway at the FCC; the Broadcasting Bureau consolidated with the Cable Television Bureau to form the Mass Media Bureau on November 30, 1982.

As it turned out, Bell had a difficult time achieving the same profit margins without monopoly protection. When finally forced to compete with other phone manufacturers, the Western Electric phones marketed by AT&T fell flat and eventually the company had to stop manufacturing phones. Telephone leasing by local Bell companies also ceased being profitable. AT&T's attempt to enter the computer business was likewise unsuccessful.

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[82] For Bell System history, see Porticus Centre Historic Documents at http://www.porticus.org/bell/bellsystem_history.html.

1984 Cable Act [83]

The overlap and conflicting lines of franchising authority persisted and Congress intended to deal with the issue with new comprehensive regulation modifying the Communications Act of 1934. With the passing of the 1984 Cable Act, Congress established a national system that clarified the scheme of federal, state, and local regulation with regard to cable television.[84] The 1984 Act identified areas requiring uniform standards and complete or partial preemption. It also addressed issues of ownership restriction, commercial third-party access, rate regulation, franchise fee limitations, franchise modification, and franchise renewal. Within this scheme, Congress emphasized localism to "assure that cable systems are responsive to the needs and interests of the local community."[85] With respect to rate regulation, for example, Congress did not specify maximum rates but instead discussed the conditions for regulation and deregulation. Congress directed the FCC to "consider the number and nature of services provided compared to the number and nature of alternative sources available," and further stated that the agency could consider factors in addition to the number of over-the air broadcast stations in a market, such as the penetration rate of the cable system.[86] Local franchising authorities were allowed to regulate only systems that were not subject to "effective competition," a term to be defined by the FCC. Rate regulation was also limited to the basic tier of service. Systems subject to "effective competition" were classified as deregulated systems any local authorities were prohibited from regulating any CATV rates.

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[83] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779

[84] H.Rep No. 934, 98th Congress., 2d Sess (1984)

[85] 47 U.S.C. § 521(2).

[86] House Report at 4703.

Consistent with the policy of localism, Congress confirmed the power of state and municipal governments to grant and enforce franchises (§§ 541, 544), to establish requirements for "facilities and equipment" and "broad categories of video programming or other services," (at §544), to require public, education, and government access channels, facilities and equipment, (§§ 531, 544), and to consider a number of factors including "future cable-related community needs and interests" when renewing a franchise (§ 546). Congress also expressly preserved state and local authority to regulate matters affecting public health, safety and welfare, (§ 556(a)), system construction, (§ 552(a)), consumer protection, (§ 552(d)), prohibitions on discrimination, (§ 543(e)(1)), equipment facilitating the reception of cable services by the hearing impaired, (§ 543(e)(2)), obscene programming, (§ 544(d)(1)), and the protection of subscriber privacy (§ 551(g)). Where the 1984 Cable Act did not expressly address certain matters, Congress left such matters to the exercise of state and local authorities (§ 636,47 U.S.C. § 556). For example, the 1984 Cable Act did not address certain terms and conditions related to the grant of a franchise, the construction and operation of the system, and the enforcement and administration of a franchise. Absent express statutory preemption, Congress left each Local Franchise Authority (LFA) free to decide for itself how best to tailor its cable system to the needs and interests of the community.

Overall, the 1980's provided a very favorable regulatory environment for Cable. At the FCC, Commissioner Mark Fowler, a Reagan appointee, pursued a plan of less regulation and more reliance on the market. With regard to the 1984 Cable Act, two areas were particularly significant with regard to the cable industry's growing influence: the preemption of local rate regulation, which began Dec 29, 1986, and the reduced restrictions on cable's offering of movies and sporting events, the later allowing cable to more effectively compete with independent broadcasters. With victory in hand, the cable's industry's new goal was to secure its win at the state and local levels, a strategy that worked because of the splintered authority. Accordingly, Cable pursued policy at state and local governments to make entry into the marketplace by any competitor difficult. For example, some states passed legislation to establish what they referred to as non-discriminatory franchise application review practices. The stated effect was to *leveling the playing field* between incumbents and potential competitors. The real effect was to raise the barriers to entry and to protect the incumbent cable operator's de facto monopoly. These statutes became known as *level playing field statutes*. Starting with Florida, a total of 12 states passed the legislation between 1987 and 1999. The statutory language was molded by the NCTA and thus similar from state to state, requiring local authorities, in reviewing the application for a franchise by a competitor (also called an *overbuilder*), to impose ***"no more burdensome or no less favorable"*** requirements than those imposed upon incumbents. Additionally, 13 states passed laws restricting, conditioning, or prohibiting municipalities from offering broadband services.[87] The potential for competition posed more of a threat in some states than in others. Where time was of the essence, another cable industry tactic was to lobby the state regulatory agencies to promulgate new rules establishing new standards for franchise approval, thus bypassing the authority of the legislature and any unnecessary exposure of the facts to the public. Agency rules had the same force and effect as laws. New Jersey's new rules were perhaps the most creative, requiring overbuilders (the term associated with competitors) to receive a verified estimate from the telephone industry for costs associated with attaching additional communications lines to utility poles, referred to as "make ready costs" Before providing the estimate to "make the poles ready," the telephone company had to confer with the incumbent cable operator to factor in estimates to move existing cable lines where necessary. Not surprisingly, the incumbent was free to

[87] In telecommunications, broadband is a signaling method and a relative term indicating how much signal be carried. The more bandwidth associated with a technology, the more information that can be carried. A television cable may be described as normal if it receives a certain range of channels, and said to be broadband if it receives more channels. There is no agreed on width that determines whether the amount of information is sufficient to define a technology as broadband. However, it is generally agreed that Digital Subscriber Line (DSL) and cable TV are broadband services.

use the process to protract time and costs of competition.[88] Nonetheless, the rules provided incumbent cable operators and telephone companies the incentives to adopt hazardous construction practices, for instance by not maintaining adequate distance between the various utility and communications lines on poles.

At local governments, the cable industry lobbied for longer franchise terms and for new rules that raised the costs for potential competitors, most of which were in the form of additional prerequisites to franchise approval. Some local ordinances enacted special provisions requiring competitors to agree to build out the entire franchise within a specified period. Cable's main argument in pursuing these policies was that second providers, whether in the form of private companies or municipalities, should not receive an unfair advantage. The cable industry conveniently forgot that many companies received original franchises without any obligation to actually construct a system and serve the community.

Some communities supported Cable's efforts to deny competition. To these local governments, a mandate for competition effectively reduced their authority over the public rights of way. They were not about to relinquish any political power they were not forced to. According to their argument, a cable monopoly was more efficient than competition, and granting a competitive franchise subjected the community to unnecessary disruption. Thus, they argued they had a right to grant exclusive franchises.

[88] The application of Shore Cable Company was delayed with this tactic, which was revealed in a lawsuit the company eventually filed with the Superior Court of New Jersey in Atlantic City, NJ., February 1990.

The 1992 Cable Act [89]

For every action there's a reaction. Such was the case with the 1984 Cable Act. As noted, The 1984 Act empowered cable operators in many ways. What followed was a steady flow of cable rate increases, which in turn led to consumer dissatisfaction. Congress reacted with the 1992 Cable Act, which re-regulated cable rates starting October 5, 1992. A rate freeze on cable rates began in 1993, with 10% rollback in Sept 1993, and a 7% rollback in July 1994. However, rate regulation only lasted until November 1994 when FCC guidelines informally deregulated rates. "Going forward rules" also allowed Cable to increase rates when adding to the basic tier. These rules plus a series of "social contracts" effectively erased Congress' re-regulation.

The 1992 Act did give a minor win to competition. The 1992 Cable Act aimed to reestablish a competitive environment. Accordingly, it prohibited local government from granting exclusive franchises and from unreasonably refusing to award additional competitive franchises.[90] It also required franchise authorities to allow new franchisees a reasonable period of time to become capable of providing cable service to all households in the franchise area and also prohibited build-out requirements that were unduly onerous to entrants. Additionally, it became unlawful for cable operators and their associated satellite cable programming vendors "to engage in unfair methods of competition or unfair practices with the purpose or effect of hindering significantly or preventing any multi-channel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[91]

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[89] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

[90] 1992 Cable Act § 7 and § 3

[91] 1992 Cable Act § 19

Discussion

Several policy initiatives had significant impacts for the parties in the period stretching from the time the cable industry's presence was felt in the market (1970's) until the passage of the 1992 Cable Act. In the 1970's, at the federal level, it is difficult to over-state the impact of the FCC's 1972 Rules, which comprehensively regulated the cable industry for the first time. At the state level, the same can be said about the significance of the various legislative and state agency decisions that established the contours of cable television regulation and the distribution of authority between state and local government for years to come. In the 1980's, at the federal level, the 1984 Cable Act and the divestiture of AT&T both profoundly impacted the nature of communications regulation and the relationships between stakeholders. At the state level, the various new franchise requirements, including those under the misleading title of "level playing field statute" created significant impediments for competition. In the 1990's, the 1992 Cable Act, a federal level initiative, established new ground rules for Cable by re-regulating rates and prohibiting certain anti-competitive practices. In each of these cases, the political bargaining leading up to the policy decision is a matter of record. The question becomes whether politics was the main reason for the decision, i.e., in the absence of politics, would the same decision have been made?

Evidence of the politics notwithstanding, the influence of market factors cannot be discounted. The period is marked by drastic changes in the technology for the delivery of communications services and the introduction of a significant competitor, cable television. Cable's entrance on the scene first posed a threat to the broadcasting industry. The market changes threatened to cause the redistribution of resources, thereby creating an environment for conflict. Simply put, the broadcasting industry saw the potential erosion of its market base and they were not about to stand by and let it happen. Thus, as a start, the presence of conflict, the *sine qua non* of politics, was apparent. The FCC, for its part, originally showed no intention of regulating cable, and in fact, stated its opposition to it. However, as some analysts have noted, the broadcasting industry had significant influence over the FCC. Thus, it could use the coercive power of the state to advance its interest. That's exactly what it did; it convinced the FCC to regulate the new industry.

There is also proof that the FCC's 1972 decisions were heavily influenced by broadcasting interests. When the FCC first issued its *Letter of Intent*, in 1971, which contained the substance of its proposed rulemaking, the broadcasting industry did not view the rules as strict enough on Cable. The broadcasting industry launched its lobby efforts at the FCC and simultaneously pressured the White House to intervene in the matter. However, the FCC was an independent agency; and as such, any influence coming directly from the White House would be questionable. Whether or not the Office of Telecommunications Policy (OTP) was specifically formed for the purpose of sidestepping the independent nature of the FCC is not clear. Either way, the OTP did manage to influence policy. The fact that the 1972 Rulemaking differed significantly from the original *Letter of Intent* is telling. The substance of the final rule reflected the consensus agreement reached between copyright owners, broadcasters, and cable operators under the auspices of the OTP.[92] Thus, the 1972 rules are a plain example of how regulatory structure can affect policy. Absent the newly formed OTP, the 1972 Rules would not have occurred or would not have occurred in the form they did. Likewise, absent the conflicting interests between Cable and Broadcasting, the 1972 Rules would not have occurred or would not have taken the form they did.

Further proof of the political motive is evidenced in the casting aside of due process rules.[93] Due process is bypassed when policy is not easily rationalized. A number of stakeholders were not

[92] Also see, FCC 1972 Report and Order at 170-85, 24 R.R. 2d 1534-51 ; 1557-58. LeDuc (1973) at 196-99 discussing the debate and consensus leading to the 1972 Rules.

[93] See also, Cable Television Report and Order 37 Fed. Reg. 3252 (Feb 12, 1972) at 1532 ¶ 67l discussing the main issues and the terms of consensus reached.

included in the 1972 rulemaking, including state and local governments and the public. In Commissioner Johnson's dissenting vote, he noted that the Administrative Procedures Act had not been followed in reaching the final decision; this apparently was the reason for his dissenting vote.[94] Likewise, the 1972 Rules did not reflect a process consistent with open participation and fair bargaining. Additionally, Commissioner Dan Burch noted in his statement that the FCC's final order was likely to be contrary to the Copyright Act. In other words, the FCC's decision could be construed as providing property rights otherwise not present. Thus, under different regulatory structures, specifically one that adhered to the APA, the major policy initiatives may not have occurred. Moreover, the final order contained a number of provisions not in the original proposal; absent the political factor, the 1972 Rules would not have taken the form they did. If Commissioner Burch was correct, comparable policy would also not have arisen from common law.

The FCC's quick undoing of the 1972 Rules is at first perplexing. Why would the FCC spend so much time and energy only to retract the rules soon after they were enacted? One possible answer relates to the concept of legitimacy. The FCC's rulemaking authority reflects the agency's power but not necessarily its legitimacy. Both power and legitimacy are methods of influence. Some scholars argue that power cannot be sustained without legitimacy. Legitimacy is achieved with procedural justice and other means that result in the perception of fairness. When rules are not based in sound reasoning, they are not likely to be perceived as fair and legitimate. They are also not likely to be sustained. According to the FCC's own statements, the agency's original restrictions on cable were based upon a finding that Cable would have a harmful effect on broadcasting. However, there is no evidence in the record that this "finding" was supported by any type of market analysis. Moreover,

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94 Commissioner Johnson's opinion was reprinted in Final Cable Television Decision, Television Digest (1972) at 146 et seq. Commissioner Johnson expressed concern with not only the complete disregard for the APA but also the complete delegation of authority to special interests. See also Broadcasting, November 17, 1972 at 31

subsequent FCC reports belie the agency's earlier position.[95] Likewise, there was no apparent reason for the FCC's decision requiring that the cable industry originate programming.[96] However, the effect accrued to the benefit of broadcasters, which is another indication of political rather than rational policy explanations.

While the FCC was pursuing its own theory of regulation, many state and local governments continued to play a part in the franchising process. The patchwork of regulation that resulted was confusing and sometimes contradictory. Some scholars have argued that the lack of uniformity in the regulatory structures is itself evidence of politics (Seidman, 1998). However, it is also plausible that the many varieties of agency structure and the various regulatory schemes at the state and local level can be attributed to the lack of a national program or established uniform standards. Simply, the states and local governments felt they had to deal with the new technology in some way as problems arose; of necessity, policy was formed ad hoc and according to their limited knowledge but best judgment at the time. One could also draw the logical conclusion that States established different regulatory structures because the needs, circumstances, and concerns varied across states. In other words, uniformity would not make sense because different conditions required different policy. If this was the case, and policy decisions were based upon the prevailing state and local conditions, the various state regulatory schemes should reflect the different issues discussed in the reports. However, where reports commissioned by the state governments suggest one policy, yet another is enacted, there is cause for suspicion. Likewise, a political motive can be deduced where the findings in the report and the eventual state policy are at odds.

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[95] CATV Economic Impacts, Notice of Inquiry, 46 F.C.C. 2d 175, 188, 29 R.R. 2d 1621, 1638 (1974).

[96] Cablecasting Rules Report and Order, 49 FC.C. 2d 1090, 32 R.R. 2d 123 (1974) eliminated the requirement that cable had to originate local programming; reconsideration granted in part 53 F.C.C. 2d 1104, 34 R.R. 2d 383 (1975).

The New York report, the New Jersey report, and the Sloan reports were the three main reports that influenced many of the original decisions by the states with regard to how authority should be distributed and the appropriate scope of regulation. Indeed, there are examples of state action that appear to conflict with recommendations provided by experts.[97] Consider, for example, the question of the appropriate franchise fee. The language in the New Jersey report suggests that local communities and their citizens were not realizing the full benefits of cable service because they did possess the necessary knowledge about the cable business, i.e. "they do not recognize the policy issues imposed by the medium" (NJ Report, p. 46-47). It goes on to imply that franchise fees paid to the city could be much higher if cable operators were required to provide a minimum number of channels, since the number of channels drives the subscriber base, which in turn is used to calculate the franchise fee the operator must pay to the city. The New Jersey report also suggests that by awarding lengthy franchises (p.55), for example, for 20 years or more, cities were removing the incentive for cable operators to add channel capacity or to innovate in general. Despite these findings, New Jersey did not opt for a maximum franchise term nor did it enact minimum channel requirements. With regard to franchise fees, the state capped the fee at 2%. Even today, when most local governments receive 5% of basic subscriber revenues as franchise fees, New Jersey state government requires cities to charge no more than 2%. It is probably safe to say that if all 567 municipalities in New Jersey could set their own franchise fee, in other words, if the regulatory structure were different in New Jersey, at least some would raise the fee from 2% to the federal maximum of 5%. Simple mathematics illustrate the consequences of the omission: For a community with 25,000 cable subscribers, assuming a basic cable rate of $40.00 and a 2% franchise fee, the monthly revenue to the city from the cable operator would be $20,000. If the fee were raised

[97] There are also undoubtedly many examples of policy that is consistent with the recommendations of the experts and academics. Space does not permit a thorough analysis relating the all of the findings to all of the policy initiatives.

to 4%, which is still under the federal maximum, the city would receive approximately $40,000 per month. The loss to the city is significant, especially given the persistent budget concerns of most local governments.

Importantly, compared to most states, New Jersey maintains a very extensive set of regulations all of which are codified in the New Jersey Administrative Code and have the same force and effect of state law. New Jersey also has a reputation for effectively using those rules to deter competition. As one entrepreneur noted, "when a company shows any inclination to compete with the existing cable operator, it seems the New Jersey Board of Public Utilities and its Office of Cable Television get together specifically to design new rules to make sure it doesn't happen."[98] When laws reside in multiple places, costs associated with monitoring governmental action increases. The public is not likely to consult with multiple sources to obtain all the information it needs to hold government accountable. The situation points again to the opportunities that a fractured organization structure affords private interests. If action is not likely in one forum it can approach another to accomplish its mission.

As another example, the New Jersey report comments at length about the corruption associated with local government franchising, which it associates with the lack of competition for the franchise award. It further opines that there is an inherent conflict of interest because the local franchise authorities receive franchise fees from the companies they regulate. The city is cast in the "dual role of regulator and business partner" (p. 54). However, in complete disregard of this finding, New Jersey set up a scheme of mixed authority where both state and local government regulate cable and where, importantly, both receive part of the franchise fee. Thus, it not only neglected to address the source of corruption, it chose to perpetuate the problem.

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[98] The quote is from a February 12, 2007 interview with Joseph O'Donnell, of Shore Cable of NJ, about his experiences with the NJ BPU in seeking approval for competitive cable television franchises in 1989 and 1990.

Despite evidence that overlapping authority created accountability problems, provided avenues for increased political influence, and fostered conflicting governmental goals, there is also evidence that redundancy served the public interest. In fact, the policy decisions that broke up AT&T and brought competition to the market were arguably facilitated by the fierce competition between the state PUC's and the FCC, both having some authority over aspects of telephone regulation. The period leading up to the antitrust suit featured a contentious relationship between the FCC and the state regulatory bodies with regard to how telephone revenues should be separated and allocated between the jurisdictions. The principles of separation, an accounting method, were based upon the areas of business, interstate and local exchange as well as the traditional FCC and state regulatory assignments. The states' creative accounting practices were an effort to dodge the limitations of the regulatory structure. The goal was to ensure its stake in telephone revenues as market demands shifted costs and profits between local to long distance services. In other words, they had to deal with the fact that market place changes were no longer consistent with the lines of authority that had been drawn, a fact that underscores the durability of bureaucratic structures. The maneuver aligned the interests of the state governmental bodies and AT&T and also put the state governmental bodies at odds with both the FCC and the DOJ. In symbiotic step, AT&T and the states pushed for self-regarding policy that got the attention of the DOJ. AT&T could not have been as successful engaging in antitrust activities without the aid of state regulators. Efforts were so blatant that the DOJ's antitrust suit became inevitable. Thus, it is plausible that competing interests between the FCC and the state agencies were an important factor leading to the end of the great monopoly.

The remedy sought by Department of Justice Antitrust suit against AT&T in 1974 reflects another implication of regulatory structure, i.e. its self-fulfilling nature. The DOJ could have pursued any number of remedies. Indeed there were many proposals on the table as to how to separate the businesses related to telephone services. Yet, at the end of the day, AT&T was divested along the lines of existing regulatory structure. Some DOJ's consultants questioned the structural remedy pursued (Coll 1991). As Coll (1991) noted, neither the DOJ nor the FCC had a coherent plan as to how a decentralized and divested system would work. In the end, the division of authority between the federal and state government was adopted as part of the divestiture logic. The result is another example of organizational endurance and structural effects.

The 1984 Act was another policy decision, or more accurately, a set of decisions, which profoundly affected communications regulation. In its attempt to clarify the lines of authority, it afforded more discretion to regulatory agents at every level of government. The 1984 Act was a major win for Cable; it allowed the regulation of rates only in communities not subject to "effective competition," which resulted in the deregulation of approximately 98% of communities.[99] The 1984 Act also reinforced the requirement for companies to obtain franchises or authorizations to operate, which in many respects legitimated the various franchise agreements and related laws and regulations already on the books. The Act's emphasis on the need for local involvement in cable regulation, a policy of localism, paved the way for Cable to lobby other levels of government for additional laws and rules to preserve the de facto monopoly. The 1984 Act also expressly stated that any area not preempted was not off limits to local government. The result was a flurry of activity by state and local governments. Anything not expressly covered in the 1984 Act or any language that could be creatively interpreted was fair game. New Jersey policy underscores the regulatory opportunity created by the Act's vagueness and the efforts pursued by some governmental bodies to protect

[99] Rate controls were eliminated in all communities where "effective competition" existed. Congress left the definition of "effective competition" to the FCC. The agency defined "effective competition" to require only the existence of three over-the-air broadcast television stations. This removed systems virtually all cable TV subscribers from rate regulation (Hazlett and Spitzer 1997, 55-56).

their turf. The emphasis on localism was apparent in the 1984 Act, but neither Congress nor the FCC defined the term "local authority," to denote local government, perhaps because it was too obvious. Seeing the void, the New Jersey Office of Cable Television declared itself to be the "local authority." The conclusion was hardly a logical interpretation of Congressional intent, but nonetheless effective because of the statute's ambiguity.

The break up of AT&T provided an additional opportunity for Cable. The divestiture meant Telco would be preoccupied with its new business plan. AT&T also had no choice but to direct a vast amount of resources to efforts to conform to the stipulations of the Modified Final Judgment (MFJ). Telco's preoccupation gave Cable the upper hand in lobbying state governments. Both the 1984 Act and the divestiture changed the relative bargaining power between the cable and telephone industries. The Modified Final Judgment (MFJ) also significantly altered authority among the regulators. From 1984 until 1996, the MFJ Court decided virtually all telephone policy. Much of the action that had occurred at the FCC and at State prior to the divestiture was now before the Judiciary. As a result, the relationships AT&T had developed over decades with regulators no longer carried the same weight. Additionally, the policies adopted pursuant to the MFJ Court were in many cases at odds with what the FCC recommended. The different approaches provide another example of how the number of policy alternatives increase with the changes in organizational structure.

The narrative also reveals how politics can be obscured by raising the cost of information. When information is difficult to obtain, the monitoring of governmental activity is less likely to be effective. One method involves the information distortion. For example, the level playing field statutes passed by approximately 12 states were blatantly anti-competitive. Yet, the label "level-playing field" suggests quite the opposite intent. The cable industry lobbied hard for their passage and the potential anti-competitive effects were brought out in many circles.[100] The cable industry's state and national trade associations made no attempt to conceal the victory. As the Virginia Cable Association exclaimed, "another competitive threat was muted this session… when the legislature included cable-backed 'level playing field' language into a bill…."[101] Similarly, then NCTA Chair James Mooney is quoted with saying, "I am filled with admiration for what the Florida association has been able to do."[102] Although the anti-competitive nature of the legislation was never really questioned, economic analyses after the fact confirmed its pro-monopoly effects (Hazlett, 1986; Hazlett, 2001).

The 1992 Cable Consumer and Protection Act and the 1996 Telecom Act were the dominant regulatory efforts of the early 1990's. The 1992 Act re-regulated rates, a reaction to the dissatisfaction consumers expressed with out-of-control cable rates. The 1992 Act was hotly contested both within and outside the FCC. President George Bush had lobbied the Senate against the legislation, which was eventually enacted by Congress over his veto. However, the new effort at rate control proved to be less than a full commitment. Less than two years after the Act's passage, new FCC guidelines relaxed rate controls, effectively undoing what Congress had done. The relevance for the cost of information and the consequences of monitoring difficulty are readily apparent. Public outcry led legislators to pursue rate regulation. The resulting legislation provided many legislators a platform to proclaim their pro-consumer interests. On the other hand, the FCC's rules relaxing the rate controls were not nearly as public. Agency rulemaking is much more difficult

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[100] John Wolfe, Florida Operators Gain Weapon in Fight Against Overbuilders, *Cablevision* (June 15, 1987, 50).

[101] *Regulatory Update, Virginia Cable Telecommunications Association* (Mar. 2002), available at http://www.vcta.com/industry/reg_reports/march2002.doc.

[102] Article by Jeanine Aversa, Florida Law Sets Rules for Overbuilds, *Multichannel News* (June 8, 1987), as cited in Hazlett and Ford (2001, 28, fn 39).

to monitor than legislation. Such a mechanism encourages activity that, if exposed, would not be readily accepted to the public.[103]

The issue of the timing of regulatory decisions is the basis for another counterfactual, i.e. under a different regulatory structure, policy would not have occurred when it did. According to the rent seeking theory of regulation, the decision making process creates a property right (Benson, 1984). When regulators act as soon as the market dictates, or as soon as any dominant interest group requires, they fail to maximize the value (rents) inherent in the regulator's right to decide the issue. There are numerous ways that decision makers at all levels of government capture rents, for example by pursuing private sector jobs with those they regulate once they leave their government position. To support this argument, however, there must be evidence that politicians and bureaucrats have personally benefited for their industry support. There are many cited cases where influential commissioners have been rewarded by industry for their loyalty on key policy issues. One example is Commissioner Kenneth Cox who supported the grant of authority to MCI and then soon after his tenure became the senior vice president of MCI. The phenomenon is also not limited to agency officials, and has included U.S. Presidents who appoint FCC Commissioners and key Senators who allocate agency funds. For example, the 1992 Act was hotly contested both within and outside the FCC. President George Bush had lobbied the Senate against the legislation, which was eventually enacted by Congress over his veto. However, this was not a total defeat for Bush. At least one company he supported showed gratitude; after Bush left office he was invited to the company Global Crossings to speak. In lieu of his usual speaking fee of $50,000, Global Crossings gave the

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[103] Some scholars have argued that the rate regulation was not the right policy decision in the first place (Hazlett, 2006). Policy merits aside, the subsequent rulemaking underscores the agency problem.

ex-President stock, on which he reportedly earned approximately $4 million. Shortly thereafter, Global Crossings filed for bankruptcy.

Additionally, when regulators act quickly on issues, private interests lose their incentive to provide votes, support, jobs, etc. The longer the decision making process is drawn out, the more rents that accrue. Moreover, whenever decisions are contested, the value of the decision increases and rent seeking and extraction also increase. Thus, a political bureaucracy acting for its own benefit will delay action when possible. Applying this logic, agencies act in due time when they have the full information before them, including the comments of all parties, any expert reports, etc. Rent extraction is suspected when decisions are unduly delayed. When agencies fail to act in a timely fashion, they are extending the decision making process to maximize rents, i.e. they are engaging in politics for their own benefit. The expectation of prompt decision making is arguably very relevant for expert agencies, because the reason for their existence is ostensibly because they are best equipped to deal with the substance of the matter. Extended rulemakings such as that which involved cellular licensing would seem to comport with the rent extraction explanation.

The rent extraction theory provides a plausible explanation for other policies too. For example, the 1996 Act came long after the market place had demanded change. The previous legislation no longer served any party and there was much to be gained for all parties once the legislation caught up to the market place reality.

CHAPTER 4

THE THIRD ERA: TELECOMMUNICATIONS COMPETITION

The 1996 Telecom Act

The market place changes took place even more rapidly in this period than in the last. By the end of 1995, there were 139 cable programmers in operation. Thus, the market for broadcasters continued to fracture. By 1998, there were 171 national video cable networks in operation. The impact on independent broadcasters was compounded as cable operators became equipped to carry more channels. Cable companies also undertook major upgrades to increase channel capacity, and replacing coaxial cable with fiber optics meant they could offer two-way services, including Internet, HDTV, and advanced digital video. Approximately 70% of all U.S. households had cable service by the end of 1990's. With regard to the telephone market, the dust had settled after the AT&T breakup. Local companies were doing business under the seven regional bell operating companies. The long distance telephone market continued to experience increasing competition. Also, a number of companies had successfully broken into the cellular market, which further diminished prospects for AT&T.

The 1996 Telecommunications Act was the main policy initiative of the era.[104] Its stated purpose was to advance competition in telecommunications sector. The legislation was an acknowledgement that previous attempts to promote competition had largely failed. The traditional broadcasting companies, cable companies, and telephone companies all reaped some benefit from the legislation. There really were no losers. The 1996 Act permitted Telco to own cable companies and directed the states to promulgate rules for competition. The 1996 Act, therefore, significantly increased state-level authority over telecommunications. The 1996 Act also gave broadcasters

[104] Telecommunications Act of 1996 (1996 Telecom Act), 47 U.S.C. § 157, S. 652, 104th Congress

valuable digital TV licenses. At the local level, the Telecom Act preempted local zoning restrictions on satellite dishes, which had held back the growth of satellite competition. Yet, for all the attention it received, The 1996 Act provided only a framework for telecommunications reform. The real substance of reform was left to the bureaucracy. The FCC pursued approximately 70 rulemakings pursuant to Congressional directive, to decide such matters as whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," what prices are "just and reasonable," what policies "promote the public interest and necessity," and what "good faith efforts" should entail. The fact of the matter is that the direction of telecommunications policy is shaped by political battles long after legislative activity ends. And, just as in the policy of the previous decades, the regulatory structure, various parameters for authority, and governmental arenas, determine who has the inside track in the political game. For all its praise, the Telecom Act of 1996 keeps much of the old regime intact. For example, there was no change in the method of allocating broadcast spectrum, a system which had protected broadcasters from competition since the Radio Act of 1927 and provided them free licenses (Hazlett 1996, p. 233).

By the mid 1990's, Cable's influence at the federal level and within some state governments peaked. In the late 1990's, some states were enacting legislation to promote local telecommunications competition or infrastructure; nineteen states had such legislation at end of 1999. However, many state laws, rules and regulations still effectively continued barriers to entry. For example, at the end of 1999, six states also had legislation prohibiting or limiting local governments' involvement in telecommunication networks. On March 31, 1999, federal preemption of local rate regulation started, a deregulatory policy provided also provided for in the 1996 Telecom Act.

The Act also lifted or relaxed media ownership concentration rules, which became the basis for several mega-mergers. In 2000, the merger of AT&T and Comcast created the largest telephone company with over 22 million subscribers. There was also dramatic growth in broadband services. Cable companies were successful in offering telephone service using cable plant and some telephone companies started to offer cable video services with DSL technology. As of 2003, approximately 20% of cable customers with computers used cable modems.

The relationship between the FCC and its traditional clients during this time is not easy to decipher. On the one hand, FCC documents do evidence a tone of concern regarding alleged anti-competitive practices of the big cable operators. The negative effects of media concentration and control are also an issue. However, Cable achieved a clear victory when the FCC limited the definition of a basic tier. [105]As internet and modem services are not be subject to the franchise fee. Another sign that the relationship between the FCC and the regulated broadcast and cable industries remained cozy involved a scandal over missing documents. As reported by the Associated Press, top FCC officials allegedly destroyed key documents related to as controversial rulemaking on media ownership. In 2003 the FCC voted to relax restrictions on the number of television stations a company could own in a single market. The missing documents were connected with an analysis of approximately 4000 news stories to determine influence in the media.[106]

Yet, it also appeared that the interests of some state and local governments and the major telecommunications players were finally on distinct paths. In the early part of the decade some states expressed an interest in operating their own telecommunications network. An increasing number of states and local governments were also pursuing government-owned or public private partnerships for advanced telecom services. At the same time, some large cities expressed an interest in advanced

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[105] The "basic tier" refers to the minimum number of services that can be purchased. Cable operators also pay a fee to the local franchising authority based on gross receipts associated with the basic tier.

[106] John Dunbar, *Lawyer says FCC ordered study destroyed*, Associated Press, September 14, 2006

telecommunications services as a way to attract business to the area. Pursuing the opportunity, some cities constructed their own network and while others extended the technological capacity of existing municipal networks (e.g. Glaskow, Kentucky).

The Current Regulatory Environment

There is no heated policy debate concerning the distribution of regulatory authority between the levels of government and about the video franchise process. State-level proposals have been advocated by telephone companies who argue that they are unnecessarily delayed by the requirement of obtaining a franchise for every local community where they would like to compete with the cable industry. A number of state governments have also expressed frustration with the failure of federal guidelines to advance competition in the market place. Texas was the first state to pass a law providing for a state-wide franchise (2005), thus eliminating the need to obtain a franchise from every city. The Texas legislature designated the Texas Public Utility Commission ("PUC") as the franchising authority for state-issued franchises, and required the PUC to issue a franchise within 17 business days after receipt of a completed application from an eligible applicant. By Texas law, applicants are also not required to build-out the franchised area, i.e. to provide service at the company's cost to the entire franchised area. However, franchised companies are prohibited from denying service to geographic areas based on its income level.[107] Indiana, Kansas, South Carolina, New Jersey, North Carolina, and California all passed legislation providing for a state level franchise

[107] TEX. UTIL. CODE ANN. §§ 66.001, 66.003. *Id.* at §§ 66.005, 66.006, 66.008, 66.009, 66.014. *Id.* at § 66.007.

grants.[108] In Virginia, the Virginia legislature did not opt for a statewide franchise but did shorten timeframes for the franchise approval process at the local level. Specifically, according to the new Virginia law, a "certificated provider of telecommunications service" with existing authority to use public rights-of-way is authorized to provide video service within 75 days of filing a request to negotiate with each individual local franchise authority (LFA).[109] The Michigan legislature established a 30-day time limit within which local government must make a decision; it also eliminated all requirements that a competitor must service the entire franchise area (build-out provisions).[110]

However, not all states are approving the reforms. A Florida bill proposed state-level approval, where applicants could obtain a franchise from the Office of the Secretary of State; however, it died in committee.[111] A Louisiana law calling for a statewide approval did not make it past the Governor's desk. The bill also provided for automatic grant of an application 45 days after filing, and contained no requirements to fully build within the franchised territory.[112] Maine's bill replacing all municipal franchises with a standard state approved grant was withdrawn.[113] Likewise, a Missouri bill preempting local authority and providing its Public Service Commission (PSC) all authority to grant franchises died in committee.[114] In Iowa, the State Senate voted 44-6, on March

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[108] IND. CODE § 8-1-34-16 (2006); 2006 Kan. Sess. Laws 93 (codified at KAN. STAT. ANN. § 17-1902); S.C. CODE ANN. § 58-12-310 et seq. (2006); Assemb., No. 804, 212th Leg. (N.J. 2006); 2006 N.C. Sessions Laws 151 (to be codified 1/1/2007 at N.C. GEN STAT. ANN. § 66-351 (West 2006); CAL. PUB. UTIL. CODE § 401, et seq.

[109] VA. CODE ANN. § 15.2-2108.1:1 et seq.

[110] 2006 Mich. Pub. Acts 480.

[111] S 1984, 2006 Sess. (Fla. 2006), HB 1199, 2006 Sess. (Fla. 2006).

[112] HB 699, 2006 Reg. Sess. (La. 2006).

[113] LR 2800, 2006 Leg., 2d. Reg. Sess. (Me. 2005).

[114] SB 816, 2006 Sess. (Mo. 2006).

20, 2007 for a statewide franchise. As of this writing, the bill is in the Iowa House for consideration. The Iowa legislation would allow companies to negotiate a single franchise agreement with the state. That statewide agreement would apply to all municipalities where there is more than one cable provider.[115]

Nonetheless, it appears state and local governments understand that advanced telecommunications services can attract businesses and residents to their jurisdiction and provide numerous economic and social benefits. As of 2007, nine states, including Connecticut, Indiana, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Virginia and Washington, have introduced broadband-related legislation. Lawmakers in New Hampshire and New York, for example, introduced bills that create broadband development authorities. Kansas and Washington are considering bills that create a state-wide survey on broadband deployment. Connecticut lawmakers introduced a measure that permits municipalities to offer broadband wireless Internet services. Bills for similar reforms are pending in 12 states including Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Massachusetts, Minnesota, Missouri, New York, Ohio, Oklahoma, Tennessee, Utah, Washington, and Wisconsin.[116]

The positions of the major political players deserve attention. The United States Telecom Association (U.S. Telecom) is the premier trade association representing service providers and suppliers for the telecom industry. The Association's member companies provide local telephone service across the country, ranging from the very largest telecom companies, like AT&T and Verizon, to companies with only a few hundred customers. Telco is the principal beneficiary of

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[115] By Rob Poggenklass, "Iowa Video Franchise Bill Passes Senate." West Branch Times., March 28, 2007.

[116] Pending legislation can be tracked at http://www.freepress.net/statetracker.

legislation establishing a statewide franchise and eliminating any the requirement to negotiate and obtain approval in every town. Telco points to the legislation passed in Texas as an example of the type of pro-competitive franchise reform it supports.[117]

The National Association of Broadcasters (NAB) represents the traditional broadcasters. NAB is a nonprofit incorporated association of radio and television stations and broadcasting networks. A recent filing before the FCC implies that the broadcasters support the legislation.[118] The language of their position states, "Promoting competition in the multi-channel video marketplace is an important governmental goal because enhanced competition would benefit consumers and programming providers unaffiliated with nationally and regionally consolidated cable operators, including broadcasters…. The Commission should use the authority it possesses under the Communications Act to ensure that the local franchising process does not unreasonably impede the entry of new competitors into local MVPD markets." It goes on to say that the FCC should also act to "**maintain a level playing field…** the well-established carriage, retransmission consent and program exclusivity policies applicable to traditional multi-channel video providers, such as cable operators, should apply in a comparable manner to all new platforms that provide comparable video services" **(Emphasis added)**. Importantly, the NAB's use of the term "level playing field" comes directly from the cable industry's playbook. The language reveals the NAB's true position, which is to support the current pro-monopoly regulations.

The National Cable and Telecommunications Association, the cable industry's primary

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[117] Position of U.S. Telecom Association is available at: http://www.ustelecom.org/getFile.php?k=031230514FB35BB8010CC4E114A26C4C.

[118] Notice of Proposed Rulemaking in Federal Communication Commission MB Docket No. 05-311, FCC 05-189 (rel. November 18, 2005). See position of National Association of Broadcasters: http://www.nab.org/AM/Template.cfm?Section=Search&section=20065&template=/CM/ContentDisplay.cfm&ContentFileID=347.

voice, exclaims that the "cable industry supports fair franchise reform that expedites entry for new video providers while establishing a level playing field for all competitors…." They also support reforms that ensure "local governments have the ability to negotiate and enforce the policies of Congress." The NCTA also argue, that "Bell monopolies don't deserve to be treated like startups."[119]

The principal government stakeholders include the FCC, state public utility commissions or independent state cable commissions, and local governments, including counties, municipalities, and towns, etc. As for the FCC, their recent rulemaking duplicates many of the pro-competition proposals at the state level. Significantly, the FCC notice of proposed rulemaking came after the first state legislation passed in Texas. As for the states, their varied positions on the reforms are reflected in the language of the relevant bills. If state legislation has passed, reform advocates obviously prevailed. Where bills have failed to get through committee or failed by vote, the position of the cable industry prevailed over the telephone industry. Local government organizations representing municipal and county officials argue that the FCC action to streamline the franchise process will severely restrict their ability to protect their citizens, public rights-of-way, community channels and public safety networks. According to their argument, it would also lead to a reduction in the revenues received by local governments for use of their rights of way, as well as loss of cable services to many governmental buildings and schools. Advocates for local government filed formal Petitions for Review of the FCC order on April 3, 2007; they maintain the FCC order "exceeds the FCC's statutory authority," is "arbitrary and capricious," "an abuse of discretion, unsupported by substantial evidence, and in violation of the United States Constitution." The Petitioners also claim

[119] NCTA Web site 2007. http://www.ncta.com/. The position of NCTA is available at www.**ncta**.com/DocumentBinary.aspx?id=567

it "violates both the Communications Act and the Administrative Procedure Act's public notice requirements."

Discussion

The current calls for reform can only be understood after examining the history of communications regulation and the effects of major policy initiatives, a version of which is provided in here abridged form. Indeed, the persistent ineffectiveness of some policy suggests that the stated goal of competition was never actually intended. Moreover, until recently, all the major players have benefited from state-imposed barriers to competition: broadcasters have maintained an antiquated spectrum process that has afforded the industry free licenses and protection from competition with government help; Ma Bell remained the unchallenged monopoly for years; and in more recent years the cable industry has managed quite well to maintain its de facto monopoly with the creative use of regulatory structure and process.

Indeed, the problem has been recognized for years. Authorities dealt with the issue by fashioning slightly different language with each new major legislative initiative. For example, Section 621(a) (1) in the 1984 Act stated that "franchising authority [ies] may award…. one or more franchises within its jurisdiction."[120] The operative word is "may," which cable companies took as a signal that they could advance pro-monopoly legislation at state and local government. Not surprisingly, a few years later, the FCC determined that the language was not strong enough to accomplish the Congressional goal of fostering competition among suppliers of video programming. Almost immediately after the passing of the 1984 Act, it became evident that the franchising process was being implemented in ways to limit competition in the market, as opposed to fostering it. The

[120] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984).

FCC recommended that Congress "forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[121] Subsequent legislation was fashioned to correct the problem with less ambiguous language. When Congress passed the Cable Television Consumer Protection and Competition Act of 1992[122] (1992 Cable Act), it again revised language of Section 621(a) (1) regarding competition.[123] The 1992 Act read: "A franchising authority may award, …. one or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."[124] The language of the 1996 Act ostensibly tries yet again to accomplish the goal. In the Telecommunications Act of 1996 (1996 Telecom Act), 47 U.S.C. § 157, S. 652, the 104th Congress expressly noted the goal of advancing competition in the market; Section 706 of the Telecommunications Act of 1996 also directed the FCC to encourage broadband deployment and infrastructure investment.[125]

If any of the major initiatives prior to the 1996 Telecom Act were genuine attempts to promote competition, they are belied by statements of at least one FCC Commissioner. Former FCC Chairman in 1996 explained it this way, "The 1996 Act rejects the old paradigm of encouraging

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[121] *Id.* at 4974; s*ee also id.* at 5012."

[122] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[123] *See* H.R. REP. NO. 102-628, at 47 (1992).

[124] 47 U.S.C. § 541(a)(1). See also H.R. CONF. REP. NO. 102-862, at 1231 (1992)

[125] High-speed Internet is also known as broadband. In the near future, telephone, television, radio and the Internet will likely be delivered to homes through a high-speed Internet connection. However, despite leading the world in broadband subscribers, according to one study, the United States dropped from 17th to 20th place in broadband penetration over the past year, falling behind Sweden, the United Kingdom, and Luxembourg.

monopolies and oligopolies as the best market structure to deliver communications services."[126] Thus, the FCC itself has acknowledged that pro-monopoly protections have been standard practice for many years.

In its Notice of Proposed Rulemaking (NPRM), the FCC sought comment on "a number of issues related to the cable franchising process generally, and in particular, the process by which competitive cable franchises are awarded." The FCC also asked for comments on "the impact of state laws on the ability of new entrants to obtain competitive franchises" and directs attention to the "so-called level-playing-field statutes [adopted in some states], which typically imposes upon new entrants terms and conditions that are neither more favorable nor less burdensome than those to which the existing franchises are subject" (Commission 2005)(FCC, 2005, p.8-9). The FCC Order was adopted December 20 in a 3-2 vote, with McDowell and the commission's two other Republicans supporting it.

The new FCC measure could be construed as an attempt to limit its embarrassment. The states acted first, starting with the Texas legislation. The state legislation can also be seen as an attempt to usurp the FCC's authority, a move that jeopardizes the federal agency's legitimacy. [127] Similar to some of the state measures, the FCC order requires local regulators to decide within 90 days on phone companies' applications to offer TV. It also limits the fees and requirements that local agencies can place on TV franchises.

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[126] Reed Hundt, "Reserving a Lane for the Public on the Privately Funded Information Superhighway," Address Before the Center for National Policy (May 6, 1996). Available at: http://www.fcc.gov/Speeches/Hundt/spreh624.txt

[127] However, in the rulemaking documents the FCC notes that state-level franchising "may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas."

Thomas Hazlett (1997, 220) provides an interesting take on the factors that led to the reform environment we find ourselves in today, which fully comports with the narrative here.

> *"Balkanization in the law- treating various industry segments as separate and distinct, with barriers created to keep those segments apart-has been labeled political apartheid by Peter Huber. Its salient economic feature is protection of industry incumbents by erecting impediments to entry to new entrants in any one market."*
>
> *"Regulatory apartheid has developed to facilitate such political outcomes. The active policy entrepreneurship of private firms seeking to disadvantage potential competitors, has led them to propose rules that blockade entry. Naked protection, however, is a political nonstarter, "public interest rationales must accompany industry protection, and some benefits of monopolistic restrictions to non-industry interest groups must exist (else coalition partners will be lacking)."*

The policy reform embodied in the 1996 Act is

> *"…a result of the interests of various policymakers and influential pressure groups shaped by both market forces and endogenous factors. Eventually a new regulatory equilibrium came to eclipse the status quo."*

Hazlett (1996) provides a convincing argument about the political nature of the process, an opinion which is supported by comments of key FCC figures as well. In one account, Hazlett recalls a phone conversation with an FCC economist regarding a telecom policy issue. In mulling over the economic consequences, the FCC economist bluntly concluded that the issue was too important to be decided on the merits." Still for all its faults, the 1996 Act is the first sign that the market competition can actually occur and the old regime can be broken down. The important question is how this came about, i.e. how a formidable regulatory regime that afforded benefits to all the major telecommunications stakeholders and provided extensive rent extraction opportunities for the bureaucracy can become undone? From another perspective, how did it survive public scrutiny for so long? As to the second question, the narrative provides ample evidence of how structure and process can cloak self-regarding motives. The corollary is, absent discretion, processes cannot be used for such purposes.

CHAPTER 5

POLITICAL HISTORY IN RETROSPECT: SOME INSIGHTS

This previous three chapters described the history of telecommunications regulation and the evolution of a complex political organization including the FCC, various state agencies, and local government. Discussion spanned more than a century. Along the way, we looked at several key policy initiatives that have shaped the regulatory landscape, mainly the big picture issues, such as the decisions to transfer authority over communications regulation from the ICC to the newly formed FCC in 1934, related decisions about the appropriate cooperative federalism schema for communications regulation, decisions on the establishment of various state agencies, and decisions about the nature and scope of state regulation of cable technology in the 1970's. Other key policy initiatives affecting how telecommunications is regulated today included the 1984 Communications Act, the 1992 Cable Television Consumer Protection and Competition Act, the divestiture of AT&T, and the Telecom Act of 1996. We also covered the environment in which important policy decisions were made, such as market forces, the ideological tone, and the relationships among the main actors at different levels of government. These were all momentous policy decisions that largely determined policy direction over the years and established the environment for significant political wrangling among the industry interests and regulators at various levels of government. These decisions are likely to have just as significant an impact on current policy questions, such as the potential for competition in the market, the cost of video services, internet access, and content availability, and the extent to which the internet content should be taxed, controlled or monitored. The reform environment we find ourselves in today questions whether the regulatory roles that have evolved over the decades are optimum with respect to encouraging competition.

We observed that the focus of communications regulation, and later telecommunications regulation, often emphasized the technology that dominated during various periods: the telegraph was introduced not long after the Civil War; telephone and broadcasting interests dominated the early part of the 20^{th} century, and; the introduction of cable television added a featured dimension to communications regulation around mid century. The divestiture of AT&T in the 1980's ushered in a new competitive environment which was later more fully embodied in the 1996 Telecommunications Act. Moreover, the regulatory structure, which largely separated authority and regulation of the various industry segments, yielded few policy losers. Industry influence was also facilitated by ambiguous lines of authority, and overlapping power situated among the various levels of government. More often than not, policy initiatives also expanded the bureaucratic apparatus. Thus, the bureaucracy was as much a policy winner as any other party. Moreover, the bureaucracy, including its structure and rule-oriented institutional setting was the foundation for conflict as well as the foundation for order.

We endeavored to provide a macro and micro perspective accounting for both political and organizational elements over the entire lifespan of telecom regulation and to reveal dynamics of telecommunications policy that have not been reported elsewhere. Consistent with other accounts, the discussion here revealed bargaining and the use of power and influence, i.e. the "pushing and hauling" that Allison (1971) refers to as politics. Politics was endemic to both industry interests and the parochial interests of the bureaucracy. And, as noted, influence among the various actors was shaped by the structural and institutional setting, which was oriented toward complicated rules and processes. Policy outcomes and the politics that produced them can not be understood without understanding the institutions that shaped the relationships and determined the issues. Both the institutional setting and the power and influence that takes place within it, and because of it, must be considered together to understand the evolution of telecom regulation.

The term "politics" is abound in the literature on telecommunications policymaking and the previous pages can be considered an extension of this general theme. In a benign interpretation, politics is bargaining, i.e. the means by which interests of population subsets are represented and advanced before government. Similarly, if organizations are conceived as collectives of individuals of varied interests, there must be some method of arriving at decisions that does not favor all members equally. Conceived this way, politics is a method of bargaining, without which organizations would be overcome by inertia. An example of this vein of politics appears in the legislative history of the 1984 Act and the 1992 both of which evidence the different private interests advocated before government. All indications point to an inclusive process; many voices and many positions are in the record, at least with regard to the enactment of the statutes. In a more negative light, politics is conceived as a quid pro quo exchange between government decisions makers and private interests, where decisions, not necessarily optimum in terms of increasing social welfare, are provided in return for the promise of future employment or similar benefits. In such situations, benefits are typically concentrated and afforded to the influential few, in relation to the burden or policy cost, which is typically dispersed among a large politically unorganized population. An example of politics in this vein is evident in the policy of granting licenses for the use of the electromagnetic spectrum. The record shows that the policy process was exclusive, not even allowing for public input until the 1950's. Licenses also afforded benefits to a few large companies at the expense of a broader public. To lend further support to the prevalence of politics in telecom policymaking, we have also cast suspicion on competing explanations which would suggest the introduction of a range of alternatives and careful deliberation as well as explanations depicting the policy process as a function of culture, ideology, routine, or standard operating procedure. Finally, we inserted counterfactuals to give weight to the proposition that politics, however conceived, has been and remains a key element in the evolution of telecommunications policy.

Some of the facts depicted herein bear resemblance to versions of interest group theory. Yet, it is also clear that interest group theories cannot account for all that has occurred. Versions of interest group theory conceive of regulation in economic terms. Political actors function in an exchange relationship as suppliers and demanders of policy; interest groups "demand" regulation to further their interests, and government decision makers "supply" policy to those who offer the highest payoff in terms of votes, future jobs, and other benefits (Stigler 1971; Peltzman 1976; Becker 1983). In a compatible explanation, capture theory depicts bureaucrats as initially motivated to serve the public interest. As agencies age, however, bureaucrats adapt views of regulated industry and eventually become captive to their interests. As bureaucratic motives evolve toward self-interest, policy management resembles a cartel (Bernstein 1955). Modern versions of capture theory describe regulators as self-interested rational actors with narrow goals such as wealth, the accumulation of power, and the guarantee of future employment (Downs 1957; Olson 1965; Stigler 1971; Posner 1971; Becker 1983; Peltzman 1976). Indeed, over the history of telecommunications regulation, some policy "wins" can be associated with the vast resources of powerful interest groups. As suggested, a plausible argument can be made that interest group influence largely explains spectrum licensing policy. Long before the technologies of cable television and telephone were introduced, the airwaves were provided to large corporations, at no cost. Licenses were obtained without bidding, and license holders were free to sell government-granted rights in a very lucrative second hand market. The process conferred significant economic rents and the politicians that supported the policy were rewarded, Herbert Hoover, in particular. An argument can also be made that Hoover began to see policy through the lens of industry, in effect taking on their cause. And, consistent with Bernstein (1955), the Interstate Commerce Commission gained the reputation of representing industry at the expense of the public. At some point, the agency lost any credibility as a protector of the public interest, or even as an objective overseer. Eventually, the functions of the ICC that related to communications regulation were transferred to the newly formed FCC.

Notwithstanding, theories explaining policy outcomes as the product of powerful private interests controlling the bureaucracy do not adequately explain some of the policy decisions we have explored. For example, consider the transfer of some authority from the ICC to the FCC in 1934. ICC policy may have been dominated or captured by industry influence, but industry influence cannot account for the eventual loss of ICC authority. Clearly, industry would not have wanted to ruin a good thing. Also, in very early spectrum policy, the Federal Radio Commission assigned licenses only on a short term basis and retained ownership of the spectrum as public property. More industry favorable policy would dictate long term licenses and ownership assignment. Likewise, nothing in the record indicates that industry had a strong preference for structuring the newly formed Federal Communications Commission with separate divisions for each industry segment. The decision to regulate according to separate departments is also at odds with Roosevelt's memorandum stating the necessity to bring the various industries together for a more uniform national policy. Thus, despite the recognition of industry similarities and regulatory spillover effects, the FCC decided to treat each industry as distinct. Although there is evidence that the balkanization of policy decisions ultimately benefited broadcasting, telephone, and cable interests, there is no evidence that this was part of industry influence early on.

There is also evidence of a public interest motive behind other decisions. For example, the break up of AT&T was based upon public outcry regarding telephone service pricing, lack of choice in telephone equipment, and allegations of anticompetitive behavior. Although the cable industry largely benefited from the breakup of the telephone giant, this appears to be an unintended consequence. The 1992 Cable Act, which re-regulated cable television rates for a short period, is another example of regulatory response to public sentiment. Further, the 1992 Act was passed over the veto by President Bush. This suggests that White House influence was not a factor in the final policy decision, or at least not a factor of sufficient weight to overcome the cable industry's influence.

The conclusion we draw from several accounts is that, even if we know the motivations and incentives of private interests, we cannot predict outcomes unless we account for the organizational structure and institutional setting in which they exist. The idea that structure affects outcomes is not new. For example, Ostrom (1965, 1971, 1986, 1990, 2001, and 2006) has written extensively on the effects of redundant units and processes on policy. However, before discussing what we observed with regards to structural impact on policy outcomes, it is necessary to elaborate on the definition of structure, an exercise which itself provides important insights.

Researchers of organization and management theory use the term structure to refer to the overall configuration of an organization, including its hierarchical levels, specialized units and positions, and the formal rules that govern the arrangements (Rainey 1997). There are different dimensions of structure, including the degree to which it centralizes authority, is formalized, has red tape, and is complex (Rainey 1997). We started by conceptualizing structure in the simplest way possible, by focusing on the physical aspects of the regulatory scheme, i.e. who does what at what level of government. The objective was to reveal relationships between political outcomes and the location of governmental authority. At first glance, the only complication with regard to describing the structure of telecom regulation was that the "structure" varied across states. Some states concentrate authority at the state level, some at the local level, and some have a mixed scheme involving both levels of governments. However, within these settings there were other structural considerations, more specific classifications that might impact policy. For example, when the states began setting up the regulatory apparatus for cable television regulation in the 1970's, the cable industry argued against regulating within the existing public utility commissions; they preferred to be regulated by independent agency if they had to be regulated at all. Their objection to situating regulatory authority within the public utility commissions was based on the potential impact of structure on policy decisions; the cable industry argued that co-locating regulatory activities would subject the emerging industry to an ideology of rate regulation associated with utilities. The main point is that a broad definition of structure intended to identify only the level of government within which the locus of authority exists, may not be specific enough to evaluate the impact of structure on policy.

It is also clear that the impact of structure is policy specific. Telecommunications regulation is a broad term that includes very different types of policies. For example the regulation of telephone rates and the process and substance of issuing video franchises have different distributional consequences for the public, the former being more readily apparent. Additionally, the policies tend to bring about conflict to the extent they affect profit margins. Policy regarding telephone rates does not directly affect the business of providing cable service and therefore not likely to bring pressure one way or another from the cable industry. The co-location of regulatory authority within public utility commissions may have no impact on the policy relating to telephone service rates; commissioners may have to consider the interests of both industries but only the telephone interest is directly impacted. Yet, co-location of regulatory authority will have an impact on the video franchising decisions, which is guaranteed to bring about fierce lobbying from both camps. This is especially true after the 1996 Telecom Act which officially opened up the cable market to the telephone industry. Moreover, even when analyzing just one policy, such as video franchising, distributions of authority vary with regard to the time period. For example, in the 1960's and the early 1970's franchising was primarily a local decision. In the 1970's, the states became involved in earnest, and in some but not all states the locus of authority shifted from the local level to the state level. Thus, in determining the impact of the locus of authority on policy decisions, generalizations should be limited to a time period when the distribution of authority remained constant and when interest in the policy can be identified.

Also, blurred lines of authority were necessary to achieve some political outcomes. Consider the state level playing field statutes passed by some states in the 1980's. Although the stated intention of the 1984 Communications Act was to clarify the various governmental roles, it expressly preserved authority of local government to regulate matters affecting public safety, health, and welfare of the community. This left the door open for states and local governments to regulate in ways that were inconsistent with the goal of competition. In fact, the 1984 Act preserved any authority not specifically preempted. State statutes that protected the monopoly status of cable operators remained on the books because they were not specifically preempted, despite the pro-competition intentions expressed by Congress. Further confusing matters, the 1984 Act divided authority between levels of government on the same policy. For example, the law prohibited local authorities from regulating CATV rates that were not subject to "effective competition," a term to be defined by the FCC.

The organizational chaos was also deep rooted. Blurred lines of authority persisted in part because some of the "big picture" decisions were never made. Specifically, neither Congress nor the FCC ever declared the appropriate regulatory model for cable television. The indecision exacerbated the problem of locating authority. For example, the FCC worked under the premise that cable technology and broadcasting technology had some similarities. By default, government regulation adopted some of the features associated with the regulation of broadcasting. The licensing of cable adopted a discretionary standard based upon the public interest that had been used in broadcasting. In fact, the term "public interest" was incorporated in many state statutes and local ordinances related to cable regulation without addressing the basis for the public interest standard, namely the scarcity of the electromagnetic spectrum. Somewhere along the line the scarcity logic was connected to the space on utility poles, yet without ever establishing how many cable lines could be accommodated on utility poles, or alternatively in underground conduits. A tradition of local regulation remained intact under the assumption that local government could best decide if the utility poles and underground conduits lining their streets could accommodate communications lines. The fundamental question as to whether local concerns could be more effectively addressed with uniform standards was side-stepped. Without addressing the appropriateness of the scarcity doctrine in cable television regulation, local authority lingered in varied degrees. Likewise, the FCC and the states worked under the assumption that cable and telephone were also similar in important ways. Again, the assumption was made without addressing the issue head on. The split between federal and state regulation associated with telephone was adopted by cable regulators. State governments, already regulating aspects of telephone, assumed they should be regulating cable television as well. Thus, some features of the common carrier model of regulation were boot - strapped to cable regulation. At the same time, key aspects of the common carrier model, including the question of whether cable should be considered an essential service and therefore provided to all residents on a non-discriminatory basis, were never addressed. The decision by some states to regulate cable television within existing utility commissions attests to the fact that government officials believed the similarities between the two businesses were significant. The telephone-like treatment of cable may also account for the practice of granting the cable industry monopoly-like privileges. Again, cable was not declared to be a natural monopoly, just treated that way. Similarly, neither Congress nor the FCC ever declared cable to be a Speaker, in the sense that its content should be delivered without government interference. As a result, a misplaced emphasis on Cable's ability to carry messages led to the sort of hands-off and minimal regulatory treatment associated with those afforded First Amendment concerns. Wavering on the issue of First Amendment status led to inconsistent policies regarding what broadcasts the cable industry should or should not be mandated to carry. The failure to formally determine the appropriate regulatory model enabled the cable industry to advocate various positions when it suited them. For example, when the cable industry was in its development stage, the industry argued that it had a right to deliver cable service. This argument was especially useful when privately owned apartment complexes, high rises, condominiums, and the like did refused cable operators access to their property. First Amendment rights and the power of eminent domain gave the state the ability to compel access. Conveniently, however, the cable industry abandoned the First Amendment argument as service became saturated, because, not coincidentally, the same argument establishes the right of competing cable companies to deliver service. The main point is that a declaration by a government authority that cable did or did not fall into any one of these categories would have itself clarified lines of authority as well as the proper scope of governmental authority.

Different governmental subunits have different parochial interests. Thus, maintaining authority at all levels perpetuated conflicts and led to conflicting goals. It is well-established that federal legislation was not as successful in fostering a competitive market as Congress had hoped. The lack of success is true despite efforts to increasingly clarify the goal of competition in a sequence of legislation. For example, some local governments argued that the federal government had no right to mandate competition. The position was as much a matter of staking claim to territorial jurisdiction as anything else. The fact that opposition might lead to a cable monopoly was only secondary.

Cyert, Simon, and Trow (1956) point out the problem in understanding the decision process involving the sort of long range questions such as the appropriate model and scope of regulation at issue here. In their observation of a business decision, Simon and Trow show that the rational process cannot account for decisions unless problems are well-defined and understood. The rational process assumes individuals have specified alternative courses of action, and to each alterative they attach a set of consequences; preferences or utilities then permit the selection among alternatives. When the problem itself is not given, organizational attention is turned to searching for the problem and for alternatives. They further differentiate between "programmed" and "unprogrammed" decisions. A decision process is programmed to the extent the problems are well defined and repetitious. Issues involving long range overarching issues are unprogrammed decisions. According to their analysis, to understand how unprogrammed decisions are made we must understand the choice process. Here, the most critical issues, whole strategy type problems were either never understood or understood and not decided upon. Either way, the ensuing processes cannot be described as following a rational, standard, uniform, or repetitious pattern, in the sense depicted by some economic models because the basis for rationality was never established. This being the case, the ensuing processes unnecessarily complicated, subjective, value-based, and political. Applied to the history of telecommunications regulation, the government's failure to decide critical issues relating to the proper regulatory model and scope of authority for cable television precluded a logical orderly policy process.

A related issue involves the relationship between structure and the critical function of information in the decision process. If authority is situated at the lowest level of government, public choice theory predicts more publicly-oriented decisions, in part because decisions are more easily monitored and officials are more accountable through the election process. When decisions are spread among governmental units, outcomes are not as easily traced. Thus, it becomes more difficult to hold specific governmental authorities accountable. The structure of an organization also determines the flow of information and what information is screened or filtered. Situating authority at the state level is not as likely to produce information on local concerns as it would be if authority were concentrated at the local level. Likewise, we noted that reports commissioned by the state to recommend the appropriate division of authority between state and local government predictably emphasized the benefit of expertise at the state level and associated some problems with the lack of expertise at the local level.

Similarly, the number of alternatives for any decision is determined by the source and scope of information available. If industry is the best source of information on technical matters, decision alternatives are not likely to include policy that may be detrimental to industry. For example, AT&T did not recommend its own divestiture. In 1949, the U.S. government brought the original suit alleging that AT&T and Western Electric and AT&T had monopolized the manufacture and sale of telephones and equipment.[128] The remedy sought by the government included the divestiture by AT&T of Western Electric and the termination of their exclusive relationship. The government requested, among other remedies, the separation of the manufacturing of telephone equipment from the provision of telephone service. However, when a court approved consent decree was handed down in 1956, it did not include the divestiture of Western Electric from AT&T.[129] Instead, the court enjoined AT&T from engaging in any business other than the provision of common carrier communication services, and required both Western Electric and AT&T to provide service to company that requested so long as they were able to pay appropriate royalties. Thus, there were substantial differences between the original remedies requested by government and the substantive provisions on the consent decree. A few years later, the House Judiciary Committee held hearings on the decree issued in 1956.[130] The Subcommittee's investigations revealed that AT&T actively

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[128] The United States first sued AT&T for monopolization and other violations of the Sherman Act, 15 U.S.C. §§ 1-3 in New Jersey federal court in 1949, which ended with a consent decree in 1956. United States v. Western Elec. Co., Civil Action No. 17-49 (D.N.J.).

[129] Civil Action 82-0192, Transcript 1-24-56.

[130] A Report of the 86th Congress First Session, Jan. 30, 1956, "Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice."

lobbied the Secretary of Defense who eventually wrote a letter to the U.S. Attorney General requesting an end to the litigation and recommending against a divestiture. The Subcommittee, in its 1959 report, concluded that the letter provided by the Attorney General was prepared by AT&T.[131]

Along the same lines, when the public is not involved in the decision process, a valuable source of information is excluded. The principal source of information then becomes the private interests, which is the foundation for a political decision. The structure of the organization also has an impact on the relationship among parties providing information, and thus how information is checked or validated. For example, when both states and local governments are involved in the regulation and they see each other as potential competitors for jurisdiction, and tend to screen and validate the others' decisions. The 1934 Communications Act established a dual system of federal and state regulation, providing the FCC authority to regulate interstate and foreign telecommunications and the state with authority to regulate intrastate communications.[132] In the 1970's and 1970's the FCC sought to extend its jurisdiction by preempting intrastate state regulatory authority. In 1986, however, the U.S. Supreme Court, in its decision in Louisiana Public Service, reinforced the system of dual authority and restricted federal preemption of state law.[133] The FCC attempted similar preemption again in the 1980's after the breakup of AT&T, arguing that preemption was necessary to foster an efficient nationwide telecommunications system. The competition between the FCC and the state PUC's created an environment of checks and balances. Both governmental units are less likely to enact policy that might be questioned as unreasonable or

[131] Subcommittee Report, 55

[132] The Communications Act of 1934, 48 Stat. 652 (1934); 47 U.S. Code, sections 151, 152 (a) and 152 (b) outline the division of authority between federal and state authority. Prior to the 1934 Act, the ICC regulated had some authority over communications regulation as did the states. However, the focus of the ICC was the railroads and it showed little interest in telephone regulation. Thus, the practical locus of authority was at the state level.

[133] Louisiana Public Service Commission v. FCC, 106 S.Ct. 1890 (1986)

inequitable for fear of giving the competing governmental unit ammunition to seize jurisdiction. Similarly, the structure of an organization also determines how much information is available and the type of information available for the decision process. For example, if both state and local governments are involved in franchising, the FCC has two sources of information to use in its evaluation of the franchising process. Where only state government is involved, the information upon which decisions are based is not as likely to reflect local conditions or concerns. It is also assumed that state bureaus have expertise on technical matters, thus altering the type of information available for decisions.

Lee and Sawhney (2007) argue the relevance of bureaucratic autonomy in decision making. Evaluating PUC autonomy in Arkansas and New York, they conclude that local telephone competition in Arkansas and New York is explained by relative autonomy of the public utility agencies. They argue that the state PUC in Arkansas and the legislature have historically exhibited a contentious relationship. Both entities wanted to shape telecom policy, but the executive branch was left with little real authority in the aftermath of the Whitewater scandal. The State Legislature, who distrusted the Arkansas Public Service Commission, dominated policy decisions. Because pro-competition interests lacked clout, the incumbent local telephone providers were able to become too close and unduly influential. Thus, there was no institutional structure to mediate interests between the incumbent telephone providers and the legislature. The way in which the policy occurs depends a great deal on whether or not there is a balance of power between state policy players; a lack of countervailing forces, such as other interest groups, the governor, consumer advocates increase the probability that incumbent local carriers will have an undue influence on legislators. In contrast, the State Legislature of New York has a history of deferring to the Public Service Commission and its experts on most telecom policy. The opportunity for tight bonds between legislators and incumbent local carriers is mitigated by countervailing forces that keep relationships in check and preserve the autonomy of the Public Service Commission. Party politics also tends to be strong in New York; the Senate and House of Representatives are often at odds and the resulting stalemate leaves little room for any one interest to dominate the process. In sum, deference to the experts and party politics creates a climate that encourages agency autonomy while curtailing the influence of private interests. According to Lee and Sawhney the institutional differences in Arkansas and New York explain why Arkansas has been unsuccessful in fostering local competition in telephone service compared to New York's progress.

Lee and Sawhney's findings imply that competition between some government units matter more than others, and also that the relative influence between the government units affects outcomes. In their observations, Arkansas's public service bureau and the state legislature distrusted each other. Potential competition between the two bodies did not seem to matter because the public service bureau had little discretion and influence. On the other hand, they associated New York's tradition of competition between political parties with the inability of any one interest to dominate decision making. They also noted the tradition deference afforded the bureau experts by the legislature. In some cases we examined, where two government entities involved in regulation had competing self-interests, the public interest prevailed. The most notable example is the breakup of AT&T which was largely fostered by competition between an independent judiciary and the FCC, and by competition between the FCC and the state PUC's. However, some structural divisions created opportunities for rents. However, dual authority among entities potentially competing for jurisdiction also provided industry with an additional avenue for influence. If industry did not accomplish objectives at the federal level, it was free to try the same strategy at the state and local level. Thus, multiple government subunits units involved in the regulatory process increased the number of avenues available for influence. For instance, the FCC policy promoting competition was nullified by some state legislation that erected barriers to entry by adding requirements for the granting of competitive video franchises. The sharing of franchise authority at the local level can have a similar effect. Complicated local ordinances can work to the benefit of large cable operators with vast resources. They can hire attorneys and experts to understand the variations of regulations across states and local communities. Incumbents have a number of opportunities to repay local authorities for their support, for example, by using Public, Educational, and Government Programming (PEG) to air the political views of some public officials over others. At the same time, complicated ordinances increase information costs for the public and for other authorities, making it more difficult for the public to understand the process and to hold authorities accountable. Thus, local level authorities retained the incentives and thus the motivation to control as much of the franchising process as possible. The effectiveness of overlapping authority is evident in that it is whole heartedly supported by operators who once argued for preemption of all local authority. Incumbents now want to give a local government as much discretion as possible. Local authority triggers public hearings, needs assessment and protracted proceedings which cost potential competitors valuable resources.

The power of the organizational subunits is fundamentally determined by the importance of what they do in the organization (Pfeffer p.98). At different points in time, the FCC played a major role in some decisions, for example, when Congress charged them with defining "effective competition." However, once that task was accomplished, power shifts to the government unit involved in the process. Also, a government unit's position in the hierarchy does not necessarily reflect its relative influence. As was observed, the ability of the state and local government to mold the terms of the franchise to local needs effectively trumped the influence of federally imposed standards. This suggests that the relative influence has more to do with the degree of discretionary authority than with hierarchical position. Similarly, States did not enforce compliance of the 1992

Act which was intended to ensure competition and to prohibit build-out and other franchising rules that were deterring entry. The lack of enforcement rendered federal intentions meaningless.

The above discussion suggests that power and influence do impact policy. Moreover, structure and institutions provide the foundation for bargaining among policy actors. However, the examples also imply that the structure and institutions do not always shape interactions in predictable ways. Conclusions are also mixed with respect to the impact of structure in the presence of competition among bureaucratic units. Importantly, the issue of organizational survival appears to be just below the surface of the major policy shifts. The 1934 Act, the early policy initiatives by the states, the 1984 Act, the 1992 Act, and the 1996 Act can all be described as creating a new regulatory equilibrium. This implies that explanations based in organization theory may explain the variations that cannot be explained by political theories. Thus, the question of policy change can be recast as a question of why some organizations survive and some do not. Weber's discussion regarding the association between authority and legitimacy is a useful starting point.

Weber's typology of the various sources of legitimacy distinguishes between legitimacy associated with rules and their interpretation (rational bureaucratic authority), authority based upon deference to customs (traditional authority) authority linked to actions or character (charismatic authority). According to Weber, sustaining authority is more complicated than exerting influence. Authority derived from statute, resources, or even independence is not enough to sustain an organization long-term. Weber's writing makes clear that statutes and rules are but one source of authority, and thus one of many ways in which the existence of organizational arrangements can be justified. Literature on legitimacy also tells us that organizations strive to legitimate themselves. On other words, if their authority is not justified, in the sense that it is perceived as legitimate, the organization cannot survive. Similarly, Zelditch & Walker (2003) argue that every authority system tries to cultivate a belief in its legitimacy. Consistent with this idea, we have observed that agencies have an interest in preserving their own authority. The states emphasized their expertise to justifying concentrating authority with them as opposed to at the local level. The FCC on several occasions attempted to preempt state level authority on the basis that sole authority was required to guarantee uniform policy. In this view, bureaucratic policy that is self-regarding persists not only on the basis of personal utility, such as the guarantee of future employment, but also on because authority perpetuates the idea of legitimacy.

Writing on legitimacy may also explain why the actors that appear the most powerful in terms of resources, hierarchical position, statutory authority, etc. do not always come out on top- because legitimacy is a source of external power; it originates on the receiving end of authority. Thus, even if one could observe and measure the relative degrees of influence possessed by the various industry groups, the bureaucratic subunits, public advocates, etc., it would lack validity because the party being influenced is not accounted for. French and Raven (1959) refer to legitimacy as social influence induced by feelings of "should," "ought to," and "has a right to." It is a generalized assumption that the exercise of authority is rightful and appropriate. Thus, legitimacy is an additional form of authority that can be distinguished from coercive authority (French and Raven 1959). Legitimacy is important because coercive power alone cannot sustain an organization long-term. Moreover, coercive authority, for example, by the exercise of sanctions, is an expensive means of governance.

Of course there is a point when organizations can no longer be perceived as legitimate, such as when authority is pushed to the point where inequities are obvious or intolerable in relation to societal norms. The ICC's loss of control may be a result of gaining a reputation for capture. At some point, its policies became too pro industry and they were unable to sustain any perception of legitimacy in the eyes of the public or of Congress. Such an explanation explains why influential private interests do not always prevail. At some point the trend of control reverses itself, despite no loss in resources or capacity for influence.

The conceptualization of legitimacy as an additional form of power may explain why explanations built upon the principal-agent relationship do not always hold. Even when federal regulators declared the goal of competition and had the coercive authority to compel compliance, any room to justify inconsistent regulations was enough for competing polices to persist. The principal-agent claim also holds that asymmetric information and competing interests increase transaction costs and monitoring costs. According to legitimacy theory, information would matter inasmuch as it changes perceptions of legitimacy and not because it alters monitoring costs uncertainty.

A core finding in the literature on legitimacy is that decisions are more likely to be accepted when viewed as legitimate (Tyler and Huo, 2002; Smith et al. 2003; Tyler 2001; Hoffman 2005). Kelman (1969) emphasizes that "it is essential to the effective functioning of the nation state that the basic tenets of its ideology be accepted" (p. 278). There is also a consensus in recent organizational psychology literature that organizational viability is linked to perceptions of legitimacy (Elsbach 2001; Haslam 2004; Ambrose 2002; Konovsky 2000; Baum and Oliver 1991; Human and Provan 2002; Cohen-Charash and Spector 2001, 2002; Colquitt et al. 2001, 2005). Bansal and Clelland (2004) show that perceptions of legitimacy insulate firms from unexpected variation in stock prices. Similarly, when political organizations do not follow norms of procedural justice, they lose legitimacy.

Legitimacy theory also accommodates the importance of leadership style, whereas institutional theory either ignores the role of leaders or subordinates it to institutional effects. A leader can be key in furthering the perception that institutions are morally appropriate or worthy of compliance. From the standpoint of legitimacy, institutions are ineffective unless they are perceived as legitimate. The importance of leadership style in fostering norms and on influencing behavior is consistent with the work of some social psychologists (Lewin 1951; Gold 1999) Thus, effective leadership can bring about compliance with or without coercive capacity.

This view provides an alternative explanation for the continued expansion of the bureaucracy. The practice of regulatory apartheid accommodated many policy winners. In the eyes of each industry segment, the exercise of authority within this structure was equitable. Individuals and groups are likely to interpret their own situation as resulting from fair processes. Major (1994) argues that people tend to legitimate the status quo, giving it the benefit of the doubt whenever possible, an argument that accommodates the organization's ability to endure.

The proliferation of bureaucratic power seems at first contradictory to industry interests. These multiple subunits endured and regulation at multiple governmental levels persisted not because of the power and influence of any particular unit, nor because they all relatively equal power. It was also not because the most powerful industry group at any one time preferred the compartmentalization over regulation by a single authority at any one governmental level. Likewise, there is ample evidence that the chaotic and ambiguous structure was not efficient, either in terms of meeting stated goals or in producing streamlined regulations. Regulation persisted in its chaotic form because it could be justified, even though at times it was justified on shaky ground. For example, the argument that local government has an interest in the regulation of cable television is justifiable on the grounds that the technology uses locally situated rights of way. As long as the issue is not probed any further, for example, by requiring evidence of scarcity, local authority maintains the appearance of legitimacy. Similar arguments can be made to justify federal and state interests in regulation in the face of inefficiency and ineffectiveness. Some writers on the subject of legitimacy also point to the possible negative consequences of legitimacy, mainly because it can replace judgment. Similarly, Kelman and Hamilton (1989) and Kelman (2001) discuss the risk of employing legitimacy as a replacement for moral judgment.

The argument that legitimacy can have negative consequences can be advanced with examples of using institutions to legitimatize authority that would otherwise not be accepted. An example is the case of the enacting coalition preserving its policy gains by instituting new rules to protect its de facto monopoly. Thus, the state's coercive capacity can be used as a tool to legitimate behavior. However, if authorities are unsuccessful in perpetuating the perception of legitimacy, institutionalization becomes a less effective tool.

Legitimacy is also an attribute of the system as well as of individuals or unit parts of a larger organization. As Kelman argues (1969), democratic governance depends on the legitimacy of the state. His discussion further implies that system level acceptance or wide-spread perceptions of legitimacy are critical to effective governance. The same idea is underscored by the popularity of mediation as an alternative to trial. Parties are more likely to perceive mediation as fair because by design it considers the interests of multiple parties. The perception of a fair process, in turn, leads to higher levels of cooperation and decision acceptance (Shestowsky 2004; Nugent, Williams, and Umbreit. 2003; Poulson 2003; Roberts and Stalans, 2004). There is also a link between legitimacy and relationships. The probability of conflict and social disorder has long been connected with institutional legitimacy. For example, one factor motivating the US support of the new Iraqi government is the fear that the entire Middle East will degenerate into chaos if the government is not perceived as legitimate. Similarly, Carpini, Cook, and Jacobs (2004) discusses the idea that public participation in decision making enhances overall political legitimacy.

An important question is whether legitimacy theory is useful in explaining observations that produce mixed conclusions. The study of Arkansas and New York's ability to foster competition in telephone policy implied that conflict among some governmental actors had the effect of balancing power but among others it did not matter. According to the argument, in Arkansas, the incumbent provider of telephone service was able to influence policy above all others because it controlled the state legislature and because institutions were not in place to balance power. Specifically, a weak executive branch, including a public service commission with little real authority did not have the capacity to assert its own influence, and presumably its expertise. The argument was also made that the institutional setting, i.e. the relative autonomy of the bureaucracy, for example, the relative autonomy of the public service commission in New York, also produced more effective policy outcomes. The case study is of particular interests because the policy issue is one of telecommunications competition and the question is why some institutions produced more competition among providers of local telephone service while others did not. The argument comes down to the assertion that influence of some policy actors prevails only when the institutions in place provide the necessary environment. Institutions determine the balance of authority which in turn determines if power interests get their way. Thus, the power provides the direct influence and institutions provide the indirect influence. However, as we know from a previous study, the sharing of authority between different government subunits, which was created by institutional arrangements, does not necessarily lead to similar policy outcomes, a finding indicated by our study of the effect of redundant institutions on policy effectiveness. Another problem with the argument is that says nothing of the actors' preferences or motivations. It assumes that agencies in both states desired to advance competition, because the goal was stated, yet one was more capable of producing the desired effect than the other. A primary feature of the regulatory environment we observed in the history of telecom regulation was the competing interests and goals of different government actors.

Legitimacy is not always evaluated against criteria of procedural fairness, such as with the inclusion of public participation in policy decisions. The public also evaluates legitimacy on the basis of outcomes, as in the case of markets. For example, the AT&T divestiture came about when the public began to question the corporation's economic standing as being too favorable. As differences in economic standing between industry and the public become more prominent and more unevenly distributed (according to established norms), issues are raised about the legitimacy of the policies that brought about those differences. This explanation may also account for the impact of market factors on policy. The legitimacy factor provides another lens through which to view ideology. Our discussion showed evidence that a market-based ideology at the turn of the 20^{th} century or in the 1980's did not produce less government regulation in practice. In fact, the telecommunications bureaucracy expanded throughout the history of the technologies despite changes in administrative orientation. Thus, the broader market system and the distribution of wealth that it produced factored into the public's overall acceptance of governmental intervention. The picture of legitimacy was formed by more than just a deregulatory orientation at different times; the effects of the market were also part of the perception of legitimacy. Thus, legitimizing myths about the market's ability to produce equitable outcomes can only go so far.

What insights can legitimacy theory provide regarding the current proposals for reform? The discussion suggests that reform proposals have come about because the prevailing distribution of authority is no longer perceived as legitimate. This perception has prompted calls for a new regulatory equilibrium. Without legitimacy, bureaucratic authority is threatened. In all organizations, the main argument of legitimacy theory is that legitimacy provides a "reservoir of support" for institutions and authorities, something besides immediate self-interest, which shapes reactions to their policies (Tyler 2006). Thus, the actors able to maintain the necessary reservoir of support, to perpetuate the legitimacy of their position will prevail.

Indeed, it is easier to mold observations to theory than to employ theory to predict what cannot yet be observed but will be observed in the future. If the tenets of legitimacy theory deserve the weight they have been afforded in the previous discussion, which admittedly is after the fact, it should be useful in predicting the outcomes of current attempts to redistribute authority. At very least, the theory should offer insight for understanding the policy reforms that are now on the policy agenda in most states and why some bureaucratic subunits might become undone while others endure. The core premise of legitimacy theory is that legitimacy is a successful influence strategy (Tyler 2006). Those who want to retain the status quo will be successful to the extent they foster the perception that the existing institutions are fair. Indeed, the cable industry's advertising strategy has been to depict the telephone industry as corporate giant asking for governmental favors. On the other hand, the cable industry is depicted as the embodiment of American values, the pioneering company who overcame all odds to achieve success. According to the cable industry, they only want a "level playing field," i.e. to be treated fairly. The cable industry will continue to support the authorities and institutions that have served them well. They will defer to the rules that embody the current regulatory regime and defer to the authority and value of the existing institutional arrangements whenever possible (Tyler 2006; Elsbach 2001, Tyler 2001, Tyler and Huo 2003). On the other hand, the telephone industry will work to perpetuate a contrasting perception of the status quo, i.e. a picture of the current establishment as interfering with the market, hindering American technological progress, and fostering undersupply and steep prices. Both messages can be fashioned to take advantage of "good old American values." The bureaucratic authority under the most scrutiny is local government. Local government will have to perpetuate the perception of its own legitimacy by highlighting the value of localism and the fairness of its past practices. The structural and institutional arrangements will matter only to the extent they facilitate the relevant messages of either side. Additionally, the objective performance of either industry and of government will carry only secondary weight.

In sum, two dominant themes emerge from the historical discussion; one relates to politics and the other to the public interest. First, bargaining and influence do account for many major policy decisions and for the variations in the approaches and scope of regulation across the states that can be observed today. Evidence suggests many policies are not consistent with careful deliberation and the consideration of a range of interests, nor does it appear that government officials relied on standard methods of regulating monopolies, or on regulating other business models. The narrative further suggests that, in addition to the influence of outside actors, parochial interests of the bureaucracy, and the structure and processes of the bureaucracy, had much to do with critical policy decisions. However, there is also evidence that despite the resourcefulness of powerful special interests, and despite the influence of the bureaucracy in ensuring its own survival, some policy cannot be explained by politics or standard economic theory. This paradox paves the way for two additional studies focusing on the role of the bureaucracy. These studies are the subject of subsequent chapters. The first study is the topic of the next chapter, Chapter 7, which looks at the connection between organization structure and effectiveness. The subsequent chapter, Chapter 8, explores the impact of bureaucratic structure on legislative behavior.

CHAPTER 6

ORGANIZATIONAL STRUCTURE AND EFFECTIVENESS

Introduction

The idea that organizational structure has consequences for effective governance has received persistent attention. Yet after numerous disciplines have weighed in on the subject, the question of the "right" structure is far from settled. Current scholarship on bureaucratic politics contains competing claims on how organizational structure and actor relationships combine to affect policy outcomes. One approach focuses on the "autonomous bureaucrat," and the critical nature of positioning senior bureaucrats at the mezzo-level of an organization to achieve policy success (Carpenter 2001).[134] However, recent work extending redundancy theory to political agencies emphasizes the importance of duplicating tasks assigned to organizational subunits (Ting 2003).[135] The present research contrasts these claims and then empirically evaluates them in the context of

[134] The term and the details of an "autonomous bureaucracy" are taken from a recent book by Dan Carpenter (2001) with the same title. The term "mezzo-level" is used broadly throughout Carpenter's study narratives and ostensibly refers to a middle tier in any hierarchical ordering of organization subunits. For example, in a program established by federal authorities, and carried out by state and local governments, the state-level public managers are located in the mezzo-level. According to Carpenter (2001), these bureaucrats are positioned close enough to the top to gain access to other authorities, and at the same time best positioned to understand the implementation details associated with local authorities or street-level bureaucrats. State level agency heads are the key power brokers, possessing the political know-how as well as the ability to learn and the authority to innovate.

[135] There is no single correct definition of redundancy. The term redundancy refers to any number of ways in which functions or organization subunits are duplicated. In the empirical section of the present research, multiple definitions are considered and tested. The work on redundancy that is most applicable to the present research is offered by Ting (2003) who tests game theoretic models in which political principals choose different numbers of agents to carry out tasks. Scholars working in this area have also defined redundancy multiple ways to explore its effects on outcomes, for example, considering the ways tasks might be divided and repeated to decrease error (Sobel 1992), or looking at whether some interdependencies matter more to results than others (Grandori 2001). For an overview of the different ways redundancy is defined depending on the discipline, the reader is referred to Low, *et al.* (2000).

telecommunications policy. The research question is, why have some states had more success than others in achieving competition in the market? Competition among providers of video service is a national goal articulated by Congress and the Federal Communications Commission, which has significant implications for the U.S. economy. The research question is addressed using data related to the arrangement patterns and jurisdictional assignments of agencies charged with granting cable television franchises, which vary across states.

This chapter proceeds as follows: the first section discusses the literature relating organization structure to effectiveness, how it has evolved and where it stands now; the subsequent section looks in more detail at competing claims of the autonomous bureaucracy and bureaucratic redundancy, and also provides a summary comparing and contrasting the pertinent features of each. Cable television regulation, the context of the present study and the basis for the assessing competing claims is discussed next. This is followed by a methods section describing the research design, measures of key variables, and econometric application. The chapter concludes with a discussion of findings.

Theory Connecting Organization Structure and Effectiveness

The classic writings on organization structure made strong arguments for efficiency and effectiveness by way of scientific management, functional specialization, division of labor (Taylor 1911; Gulick and Urwick, 1937), firmly ordered systems of subordination (Weber 1946; Gulick and Urwick 1937), chain of command, unity of command, hierarchy, and authority (Fayol 1949). In the same tradition, large-scale organizations and democracy were also seen as incompatible, because they were subject to coordination and control problems that could only be alleviated by concentrating power in the hands of a select few (Michels 1915). An implication of such principles was the widely accepted view that redundant systems were wasteful and inefficient, and even undemocratic. Although later work emphasized incentives and coordination, it did not entirely abandon the notion that less complex structures were more efficient (Barnard 1938; Simon 1947). Not entirely inconsistent, contingency theories of organization design argue there is a "right" structure given organization size, task, technology, and level of environmental uncertainty (Burns and Stalker 1961; Lawrence and Lorsch 1967; Galbraith 1972; Woodward 1965; Donaldson 2001). In this school of thought, effective organizations must fit within their environment, and subsystems must all fit with each other. More current scholarship, based in economics, points to reasons why organizational structure and actor relationships might matter, including the reduction in information costs (Miller and Moe 1983) and agency costs (Jensen and Meckling 1976). Still, the question of how organizational structure and actor relationships combine to affect policy outcomes remains largely unresolved.

Two recent lines of research address the issue, but emphasize different attributes of organization structure as critical to outcomes. One particular model of bureaucratic politics focuses on the "autonomous bureaucracy" and the critical nature of positioning senior bureaucrats at the mezzo-level of an organization to achieve policy success (Carpenter 2001), while another emphasizes the importance of redundancy, i.e. duplicating tasks assigned to organizational subunits (Ting 2003). The next section looks at these competing claims in more detail and summarizes the pertinent dimensions of each for purposes of comparative assessment in the context of state telecommunications policy. The comparative assessment is detailed more fully in the methods section.

<u>The Autonomous Bureaucracy vs. Bureaucratic Redundancy</u>

An autonomous bureaucracy is, at its core, politically savvy, relying on no single group, yet able to call on a diverse coalitional support at opportune times. According to this line of thinking, organizational structure shapes the potential for key bureaucrats to build issue coalitions to affect policy. Thus, bureaucratic autonomy cannot exist apart from the agency's organizational characteristics. Additionally, "…the hierarchical structure of many bureaucracies… leaves middle-level managers in the best position to experiment, learn, and innovate" (p. 21). It is the positioning of bureaucrats in the middle-tier of an organization that fosters a learning environment necessary for policy success.

Moreover, politicians defer to autonomous bureaucracies once they have achieved a reputation of political legitimacy because it is politically costly not to do so. Autonomous bureaucracies also have the power and resources to use procedures to their benefit (p. 357). From this perspective, procedures are more a means to constrain politicians than the other way around. These agencies also see themselves as defenders of the public interest, which often leads them to depart from established or expected practice. Moreover, agencies can achieve "political legitimacy" even when their actions are not popular, not preferred by politicians, and not even preferred by interests groups.

> ***"… If it exists, bureaucratic autonomy must be premised not upon the popularity of a policy, not upon the occasional administrative fiat, and not upon a single well-heeled lobby, but upon the stable political legitimacy of the bureaucracy itself. To focus on organizational politics is not to divorce bureaucracies from politics. Instead it is to reconceive politics as a process of coalition building and to acknowledge that in some circumstances bureaucrats can take the decisive initiative (at times the only initiative) in building them. It is to these reputations- and the capacities and coalitions that supported them-that autonomous bureaucracy in America owe their origins…"*** (p 357).

Recent work extending redundancy theory to political agencies offers a competing explanation on how political forces interact with organizational structure to impact policy outcomes (Ting 2003). Here, the structural feature brought into focus is the overlap of organizational subunits and tasks (redundancy). The question of interest is whether redundant bureaucratic arrangements increase the probability that policy outcomes will coincide with the intentions of the political principal. Thus, the main argument about organizational design is that it has different consequences for effectiveness when the interactions of key policymakers are taken into account.

Redundancy theory is built upon principles of probability. Probability theory tells us that two systems that are independently 50 percent reliable are together 75 percent reliable. Applied to organizations, this means that if subunits of an organization have independently distributed probabilities of achieving a goal, then combining them will result in a higher success rate. Reliability theory is also a product of engineering studies (Barlow and Proschan 1965) and as such is concerned with improving the overall reliability of a system *ex ante,* by adding functionally similar components. According to Landau (1969), the single most important feature of organizations is that they are error prone. An organization is not so much a "rational actor" as it is a "risky actor" (Landau 1991, 13). We can only approximate the limits of fallibility and we cannot assume that reliability and efficiency are a function of the subparts of an organization. There is no safety net to reduce the probability of error when only one agency or bureaucracy implements policy. Perfecting subparts through management control or updating technology does not necessarily bring efficiency or reliability to the overall system. However, overall reliability can be achieved even when parts of a system are alone unreliable (Perrow 1984; Thompson 1967; La Porte and Consolini 1991; Bendor 1985).[136] The key is having "sufficient redundancy" (Landau 1969). The concept of sufficient redundancy emphasized

[136] Ting (2003) is not the first to apply redundancy theory to public organization settings. See also Low and Ostrom (2002), Miranda and Lerner (1995) and Bendor (1985).

the importance of independence in decision-making as a condition of improved reliability. Bendor (1985) showed improved reliability can be achieved when units are interdependent.

Ting (2003) incorporates these common features of American policymaking into a formal model and constructs a simple game where a principal decides to have one or multiple agents carry out her intentions.[137] In the simplest version of the game, there is one agent (no redundancy) who stands to receive all the possible benefits of success. In this case, the agent shares the principal's desired outcome, and the result is dichotomous: either the agent succeeds or fails. The result is intuitive-the desired outcome is more easily achieved when there are no conflicting goals, interests, preferences, side agendas, etc. When the principal decides to employ more than one agent (a strategic interaction game), a success by at least one agent constitutes an overall success. The resulting equations indicate an optimal level of redundancy depends upon whether agents are inclined to exert more effort in the presence of other agents, for example, when agencies perceive the potential for competition with other agencies for the work assigned. In general, the need for redundancy arises when agents' interactions create externalities. The games point out that redundancy is more valuable when preferences of more than one agent diverge from those of the principal. However, when at least one agent and the principal have aligned interests, the benefits of redundancy are reduced. Also, if the principal can terminate the agency, her ideal outcome can be achieved with only moderately friendly agents.

The characterization of a bureaucratic autonomy and the theory of bureaucratic redundancy can be contrasted and empirically evaluated. Both assume the inseparability of politics and the administration and both fall under the broad heading of bureaucratic politics. Both stress the importance of some aspect of organizational structure in achieving policy success, the mezzo-level

[137] For explanatory purposes and to compare our findings with Ting's theory, we adopt his broad use of the terms principal and agents. In simplest terms, principals are the decision makers and agents are employed to carry out decisions.

and the overlap of jurisdictional assignments, respectively. In accounts of autonomous bureaucracies, structural characteristics of the organization and attributes of the bureaucracy combine to put the bureaucracy in control of policy outcomes. Specifically, bureaucracies are successful if they are positioned where learning can take place, in the mezzo-level. Moreover, bureaucracies tend to endure if they develop an independent political base and reputation of legitimacy. Under bureaucratic redundancy theory, results are achieved from the top down, starting with the principals' preferences and goals. Yet, the importance of the bureaucracy is also emphasized. Principals are able to achieve their desired results if they assign tasks to more than one agent or subunit and use to their advantage the potential for competition among agents.

The pertinent dimensions of the autonomous bureaucracy and bureaucratic redundancy can be summarized along six dimensions: structure, main driver of policy, preferences of principal preferences of bureaucracy, relationship between actors, and indicators of effectiveness. Table 1 at the end of this chapter provides a side by side comparison.

The next section describes the context for comparative evaluation, which is the regulation of cable television, and more specifically the authority to franchise providers of video services.

Context: Cable Television Policy and State and Local Government Success in Achieving the Federal of Goal of Advancing Competition in the Market

The U.S. Congress and the Federal Communications Commission (FCC) have expressed several goals with regard to telecommunications policy; one is the advancement of competition in the market in the form of multi-channel video programming.[138] The process of bringing competition

[138] See FCC(Commission 1990) the FCC acknowledged the lack of competition in the market. The Commission recommended that Congress more explicitly prohibit franchising rules whose intent or effect was to create barriers to competition (Id. at 4974). Congress addressed this problem by

to the market and making it available for consumers lies mainly with the states and local governments (franchising authorities) that issue awards to companies seeking to "overbuild" an existing cable operator.[139] In some states, there is only one franchising authority, either the state government, typically a public utility commission, or a local government, which is typically a county or municipality. Other states have overlapping (redundant) systems for franchising, with both the state and local government sharing authority in some manner. Efforts to achieve head to head competition among franchised cable operators have not met with the success intended. Competition remains limited, with less than 2% of households having a choice between two cable television system operators.[140] An important question is why some states have been more successful than others in bringing competition to their jurisdictions? Additionally, are states more successful when their jurisdictional structure as it relates to cable television franchising can be described as having a mezzo-level? Does overlapping jurisdictional authority lead to the issuance of more competitive franchises?

As of 1999, the average number of competitive franchises granted was just under 7 per state. However, 19 states have not managed to grant a single competitive franchise, yet other states show at least some degree of effectiveness in meeting the federal goal. Table 2 at the end of this chapter is an effectiveness summary showing the cumulative number of franchises granted by successful states. The 19 states not appearing on the list did not issue competitive franchises and thus failed to achieve

revising Section 621 (a)(1) in the 1992 Act to prohibit local franchising authorities from granting exclusive franchises and from unreasonably refusing to award additional franchises.

[139] When a competing cable operator builds a cable network system in an area already serviced by a cable operator, this competing cable operator is known as an overbuilder.

[140] This slow progress is not due to market factors. As one report states, a competitive cable operator can make a profit in any community with as few as 40 homers per mile (Hazlett 2006).

the main goal of telecommunications policy put forward by Congress and the FCC.[141] Additionally, the states that have had success appear to have improved each year in the time periods observed. For example, Illinois awarded a total of 25 franchises in years 1996 through 1999. In the first year observed, Illinois issued 2 competitive franchises; in the second year, 5 franchises were awarded; in the third year, 8 franchises were awarded; and in the fourth year, 11 franchises were awarded. These facts suggest some states have not experienced organizational learning, yet others have.[142]

A Word on Empirical Tractability

The application to cable television regulation is empirically appealing for at least three reasons. First, there is ample evidence of the "pushing and hauling," which is characteristic of bureaucratic politics generally (Allison 1971). There are numerous accounts of applicants' efforts to gain approvals to construct competitive systems. Anecdotal evidence suggests the process entails negotiating with state and/or local officials on matters such as the construction timetable, bonding

[141] According to the autonomous bureaucracy argument (Carpenter 2001), theses states failed to exhibit any learning. Carpenter's claim is not unlike other references to organizational learning. For example, Weick (1991) argues that learning can be inferred if outcomes vary yet the stimulus remains unchanged. With regard to organizational learning, Ackoff and Emery (1972) similarly claim that organizational learning has taken place if improvements in efficiency can be observed yet environmental conditions remain constant.

[142] It is possible to measure the average annual improvement by running a linear regression for each state that awarded competitive franchises or showed evidence of some success in meeting the federal goal. The slope coefficients from these models would indicate the average annual improvement in number of franchises awarded. Another option involves asking agency heads what outcomes are desired and what behaviors are necessary to achieve those ends. One drawback of this approach is that it assumes learning has taken place just because goals have been achieved. Another option is to look for indicators of activities intended to produce learning: meetings, seminars, public forums, etc. The problem with this approach is that it assumes learning has taken place if the steps toward the end are put in place. Moreover, this approach misses the fact that learning is not always intentional; learning can be incidental. A third option involves looking for evidence of learning behavior, traits of learning organizations (Pedler 1997; Argyris 1992).

requirements, possible disruption to roadways and easements, and availability and access to public, education, and government programming. And anecdotal evidence also points to the bargaining and power plays among interests on both sides of the issue, those preferring competition and those resisting it. A typical battle puts local residents, smaller entrepreneurial cable companies, and telephone companies on the side of competition, with large incumbent cable providers attempting to preserve their *de facto* monopoly position. The state governments and, in particular, state public utility commissions often weigh in on these decisions.

The political nature of the process, and in particular the competing goals at various levels of government, is further evident in the following quote by an entrepreneur with experience seeking competitive franchises.

> *"In my experience, state involvement in franchising only serves to protect the big guys, the large multi-system cable operators. I have applied myself or been involved in attempts to get franchise approvals in several states, including Nevada, New Jersey, and Virginia. Any time the state determines the standards for approval, the application process is drawn out. In New Jersey, where I was an investor in a competitive company, approvals sometimes seemed impossible because the state Office of Cable Television would add new rules, regulations and conditions as we went along. I believe they took four years. They essentially gave us a moving target that was impossible to meet. It was also no secret that state commissioners and the head of the OCTV were being courted by the incumbents. There were two reasons why the company finally managed to get approval. One of the company's officers was an attorney, and when we brought suit against the state for their discriminatory practices, they backed down and issued the approvals. The other reason is that the municipal officials became angry because the ordinances they passed to bring competition to the city were in effect being ignored by the state. Once they complained to the state bureau, the process became a bit easier."* *Joseph O'Donnell, President Clover Cable*[143]

[143] Joseph O'Donnell, interview with author, 13 April, 2007.

The cable television context also offers a parallel to the cumulative effect of organizational learning characteristic of autonomous bureaucracies in Carpenter. Specifically, the narratives of the United States Postal Service and the Department of Agriculture tell a story over an extended period of time, which starts with the emergence of those agencies in the Progressive Era. The implication is that bureaucratic autonomy and policy success cannot be identified in single actions. One promulgated regulation, one defiant action, or one experiment does not make an autonomous bureaucracy. It is an evolutionary process, and a process of survival. Applied to the present context, whether a state agency gains a reputation as defender of the public interest and whether a franchise is finally issued depends on a number of factors that occur over time. Substantive legislation, bureau rules on standing and public participation, agency budget increases, and local procedures for passing ordinances are just a few factors that provide clues about the nature of the collective bureaucracy we are dealing with. The important point is that the data in the present research provides a distinguishable policy outcome, which is a count of the cumulative number of franchises issued in the state. The outcome, whether viewed as an indicator of organization effectiveness, organization learning, or productivity, is a result of various outputs over time and is consistent with the logic embodied in the autonomous bureaucracy argument.

Because Carpenter connects effectiveness to organization learning, and indeed appears to use the terms synonymously, a valid comparison requires evidence of sources for learning.[144] In other words, to call it "learning" one should show evidence of characteristics associated with the learning process or learning environment. Argyris and Schon (1978) submit learning involves the detection of error, testing and reforming organizational action. As it turns out, in the context of

[144] Although the term "organization learning" is used throughout, and agency results are characterized as evidence that learning has occurred, Carpenter makes no attempt to introduce theory on organizational learning or otherwise qualify his reasons for the characterization.

cable TV regulation, various bureaucracies have multiple avenues available for learning and coalitional support, including industry sources, and think tanks. These resources can be identified at every level of government involved in the franchising process.[145]

Additionally, the policymaking environment characteristic of cable television regulation is typical of American policymaking. Bureaucracies often have numerous subunits, many have redundant assignments and conflicting goals; this is the nature of the federal system. For example, environmental policy is administered by numerous federal, state and local efforts (Wise and O'Leary, 1997; Whitford 2005). Moreover, goals of agencies do no always coincide and many tasks overlap. The same can be said of many other policy domains, including welfare policy, telecommunication policy (Hazlett 1999, 2006; Crandall and Hazlett, 2000), and defense policy. Implementation efforts often depend upon the interests of the subunits, which cannot be entirely known. As is common to many policy areas, in the case of cable TV regulation, federal goals are implemented according to different organizational arrangements across states. The cable TV regulatory environment consists of varied hierarchical relationships with different government units having some connection to the eventual outcome. Thus, there is reason to be optimistic that the present research is generalizable to other settings. To compare findings here to those in Carpenter's narratives, variations in regulatory designs across states are such that some, but not all, can be characterized as having a middle-tier or mezzo-level, typically a public utility commission.[146] To compare with the Ting model, jurisdictional

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[145] For example, the National Cable Television Association (NCTA) research division is a useful source of industry data. The FCC Cable TV Bureau serves in an advisory capacity and as an information clearinghouse. There are also studies completed by FCC for purpose of assisting state legislators. Also at the state level the National Association of Regulatory Commissioners (NARC) is useful for the heads of bureaus. The National Association of Counties (NAcO) and the League of Municipalities provide FAQ sheets and model ordinances to aid local governments in issuing franchises. The Cable Television Information Center created by Ford and Marcle Foundation as part of Urban Institute conducts relevant market research.

[146] The regulatory structure is one of cooperative federalism, where Congress and the FCC have set

arrangements can also be classified as redundant or non-redundant with regard to the task of deciding on the standards for franchise approval and/or actually granting franchises.

The next section details the research design and empirical measurements to compare the theories relating organizational design to outcomes.

Methods and Application of Negative Binomial Analysis

Dependent Variable

For the dependent variable, a total count of the number of competitive franchises issued by state from 1996-1999 were collected from industry sources. The counts reflect the achievement of the federal goal- competition. Data on state-level agencies involved in issuing cable TV franchises was collected from various sources including enabling statutes, administrative codes, and the National Association of Regulatory Utilities. Individual agency websites were also checked to update information on the organizational structure and franchising process. A detail of all data sources is set out in Table 3 at the end of this chapter.

Independent Variables: The Organizational Structures Involved in Implementation

Looking across states, there are three main observable structural arrangements involved in cable TV regulation. In all cases, Congress and the FCC have set the basic framework within which

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the basic framework within which local franchising authorities can act. Additionally, Congress specifically preserved state and local laws and lawmaking authority not inconsistent with Congressional intent. In most instances a local franchising authority regulates the basic tier of cable service (the lowest level of service consumers can buy), customer service standards, and franchise fees. As examples, in New Hampshire only a state level bureaucracy, the Public Utilities Commission, has jurisdiction to issue cable television franchises (S 1). In Arizona and Colorado the county governments, and not a state level bureaucracy, have jurisdiction to issue cable television franchises (S 2). In Massachusetts and New York the state and local government share authority to issue franchises; the local government decides whether to award a franchise and that award is then subject to state review (S 3).

franchising authorities at lower levels of government can act. Congress specifically preserved state and local laws and any lawmaking authority not inconsistent with Congressional intent. The three observed organizational structures for cable television franchising appear in the figure below. The presence of absence of a particular organizational design or structure is denoted with dummy variables, a one indicating the presence of the particular structure in a state and zero indicating it is not. For explanatory purposes, these are referred to as S1, S2, and S3 in Figure 1 at the end of the this chapter.[147]

In the first type, S1, the state is the locus of authority; it sets the standards for franchising. Local governments may sign a franchise agreement with the cable operator and pass an ordinance incorporating its terms, however, their involvement is otherwise minimal; any decisions they make are determined state parameters and they have little discretion beyond that. This structure has a mezzo-level, in the sense described by Carpenter. The presence of the mezzo-level may not be obvious at first- it includes the FCC at the top tier, the state is the mezzo-level. Although there is no local government to "sandwich" the state bureau, if we are to compare results with the success of the USPS and the USDA, the pertinent aspects include a combination of the available expertise, the political proximity to the FCC, exposure and access to powerful state lobbies for multiple and diverse interests, access and likely involvement in the broader state telecommunications goals, and access to bureau chiefs charged with regulating other utilities. In comparison with Ting's

[147] Although there is variation across states, these basic structures have remained relatively stable within states since the 1970's, when most states started implementing cable regulation and during the time encompassed by this study. Only recently (since 2004) has there been a trend of reassessing, and in some cases reassigning, jurisdictional authority.

conceptualization of redundancy, the state is the implementation agent. There is no second agent with regard to setting franchise standards. [148]

In the second organization design, S2, local government is the locus of authority; it sets its own franchise standards and determines whether companies meet requirements. These systems do not have mezzo-level with regard to the franchising process, and they are not redundant. They also do not have the advantages/ disadvantages associated with the first structure.

In the third organization design, S3, state and local governments share jurisdictional authority in franchising matters. These systems include a mezzo-level, the state bureaucracy, with regard to the task of issuing franchises. They are also redundant; two agents, and state and local government, have discretion in deciding the standards for approval. Two organizational subunits, arranged hierarchically, have franchising authority. [149]

According to explanations of the bureaucratic learning environment (Carpenter 2001), the presence of a mezzo-level is critical to achieving policy success and is associated with autonomous and enduring bureaucracies. Innovation and learning is said to occur at the center of a hierarchy; the hierarchical structure of many bureaucracies leaves middle range bureaucrats in the best position to innovate, experiment, learn, and affect results. Bureau chiefs and division chiefs are the key actors

[148] No doubt one could quibble with the definition of redundancy chosen. However, the idea at the core of Ting's model is that the overlap of tasks or functions matters more when the preferences of principals and agents diverge. The "tasks" he is referring to is left open for interpretation. The conceptualization adopted here assumes that what matters most is whether agent(s) have latitude to stray from the goals set by the principal. The goal here is competition, expressed through the grant of more than one franchise granted within the boundaries of the local jurisdiction. Thus, the distinction made is discretion with regard to setting the standards for approval and discretion in deciding if an applicant meets the standards already set. The present research uses the former, i.e. standard setting discretion, for the purpose of analytically distinguishing redundancy, as it is more consistent with the idea of goal conflict. Of course discretion is also a matter of degree, and we realize that results of analysis may also vary according to this dimension as well.

[149] The simple and broad classification scheme is sufficient for the present explanation. Other classifications and alternative definitions are explored later.

(Carpenter 2001, 19). State agencies can most easily observe what needs to be changed and have authority to effectuate change (22). This implies that bureaucrats in the middle-tier, the state level in this study, are sufficiently elevated to compare across offices yet also close enough to the action to know program details. Organizational arrangements classified as S1 and S3 fall into this category. Local-level only franchising (S2) does not include a mezzo-level. Organizational learning is not likely at the local level (23). If evidence supports the explanation associated with learning environments and autonomous bureaucracies, S1 and S3 should have a positive effect on outcomes, and S2 should not have a significant impact.

In contrast to the primacy of the mezzo-level in achieving program success, redundancy theory emphasizes the way in which overlapping systems improve reliability. Redundant systems decrease the probability of error and thus increase the probability of achieving policy success. The organization structure classified as S3 is redundant; both state and local governments share franchising authority. However, a significant relationship for S3 structures may also be explained as supporting the autonomous bureaucracy explanation; it also has a mezzo-level. To isolate some of the effects, additional consideration is necessary.

The structural dimensions of interest can be represented in matrix form.

		Mezzo-Level	
		Y	N
Redundancy	Y	S3 M, R	Null Set ~M, R
	N	S1 M,~R	S2 ~M, ~R

The mezzo-level dimension is represented on the horizontal axis and the redundancy dimension is represented on the vertical dimension. S 3 in the upper left quadrant is the organization form and regulatory scheme with both the mezzo-level and the redundancy dimensions. In S 3 forms the state and local government share authority in franchising. The presence of state-level authority provides the mezzo-level dimension while the sharing of tasks provides the redundancy dimension. S1 in the lower left quadrant has the mezzo-level dimension but no redundancy (~R). S 2 in the lower right quadrant does not have a mezzo-level (~M) AND does not have the redundancy dimensions(~R). In this regulatory scheme, the locus of authority is at the local government level. The upper right quadrant is a null set because no organization form in the study fits this profile, i.e. no regulatory scheme is redundant with state level authority.

Predications and interpretations can be summarized as follows:

Does redundancy increase effectiveness? A positive and significant coefficient on S3, the only redundant form, would seem to provide preliminary evidence that the sharing of authority increases effectiveness. However, the mezzo level dimension is also characteristic of S 3 forms. Thus, any significant effects might be related to the mezzo level feature and not the redundancy feature. To isolate effects and provide certainty of the importance of (or conditions for) redundancy, structures with NO Redundancy should DECREASE effectiveness, i.e. S1 and S2 should show negative coefficients and should be jointly significant.

Does the presence of a mezzo level, i.e. state-level authority, increase effectiveness? S1 and S3 both have a mezzo level. Thus, to answer in the affirmative, both forms should have positive and statistically significant coefficients. The coefficients should also be jointly significant. The contribution of the mezzo-level feature is determined by subtracting the coefficient on S1 from the coefficient on S2.

To be sure, there are multiple ways that redundancy can be defined. The decision process might involve two sequential steps, where local government evaluates applicants and issues a franchise and then the state re-evaluates to decide whether to approve the local decision. Alternatively, the state franchise can serve as a backup or parallel system, where an applicant needs approval from either the state or local government, but not both. In other instances, there is evidence of authority on the surface; however, when carefully explored, the existence of real authority is dubious. For example, in some states, local government issues a franchise based solely on state prescribed standards. There is little or no meaningful local discretion applied to the decision at the local level- a *de facto* state franchising process. In other cases, states prescribe franchising standards yet also, by statute, expressly recognize the authority of local government. Authority at the local level is this institutionally set. In yet another scenario, state-granted home rule authority might be labeled and interpreted as *de jure* shared authority. These observations make clear that institutions serve an important role in defining authority and ultimately in understanding how structure and actor relationships combine to affect policy outcomes. In sum, there are multiple types of redundancy as well as degrees. To differentiate support for each theory and to increase confidence in results, the enabling statutes and other sources were consulted, and all the above definitions were coded and evaluated. The alternative definitions are also used to qualify and narrow other findings.

Number of Lobbyists per Legislator:

According to the bureaucratic autonomy argument, the organization's authority and effectiveness depend on access to numerous power bases. A coalition formed of network ties to diverse groups is likely to be less dependent on politicians or any single interest. Network affiliations form the basis for bureaucratic reputation and political legitimacy. Moreover, lobbying is the principal means by which regulators gain access to multiple sources of information. Lobbying can also be a source of technical expertise, thus adding to the bureau's capacity. According to the argument, the number of state lobbyists per legislator should improve policy outcomes.

Pro Competition Legislation

Whether authority resides at the state level, the local level, or both, it is helpful for the bureaucracy to have legislative support. State law that encourages competition can facilitate efforts to meet policy objectives. States that have statutes supporting the deployment of broadband meet this criterion.[150] A positive association between pro-competition legislation and policy outcomes is expected.

Controls

Finally, three controls were added to the equation: state density (population per square mile), number of community units within a state, and state per capita income. Both state density and number of community units within a state are related to demand. Density increases the profit potential for competitors, and therefore the demand for competitive franchises. The number of community units registered with the Federal Communications Commission as separate jurisdictions indicates the number of places within a state available for franchising. More units available for franchising is expected to increase the number of franchises actually issued. Also, although the number of registered community units registered is not the same as the number of sub state governments, there is a correlation between the two. Many designations for community units

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[150] Broadband is a descriptive term for evolving digital technologies that provide consumers a signal switched facility offering integrated access to voice, high-speed data service, video-demand services, and interactive delivery services.

coincide with boundaries for counties, cities, and townships, etc. Thus, the number of units can also be conceived as a measure of fragmentation. Some states are more fragmented than others, which may have an independent effect on the ability of governments to work together to accomplish goals. Finally, state per capita income may affect the resources available for implementation, and thus increase effectiveness.

Summary statistics of variables, including alternative measures discussed in more detail later, are available in Table 4 at the end of this chapter. The correlation table appears in Table 5 at the end of this chapter.

Interpretation

The model of choice is a negative binomial because the dependent variable is a count. The data indicates a positive range with the variance exceeding the mean, i.e. it is overdispersed.[151] Evidence of possible overdispersion is apparent in looking at the data spread for the dependent variable as presented in the frequency counts shown in Table 6 at the end of this chapter.

Overdispersion becomes even more obvious after viewing the gap between the observed values and those derived from a Poisson estimation, which is graphed in Figure 2 at the end of this chapter.

The first set of results appears in Table 7, which compares main effects of the 3 main structures, S1, S2, and S3, on policy outcomes using standard OLS regression. Table 8 shows results

[151] Overdispersion rules out the use of the Poisson model. The overdispersion is likely due to the heterogeneity in the state institutions or different levels of state productivity. When states that differ in their productivity are considered together, the univariate distribution of the number of franchises issued is overdispersed and estimates are biased. This is because when a Poisson is used, the variance and mean are treated as equal. Since the negative binomial distribution has one more parameter than the Poisson, the second parameter can be used to adjust the variance independently of the mean. The choice of a negative binomial was verified with a Vuong test. Model reliability was also checked with a likelihood test.

using a negative binomial. Table 8 also shows results of the likelihood ratio test of alpha =0 for all three models. In all cases, results are very significant, providing evidence for overdispersion and evidence that the negative binomial is preferred to the standard Poisson regression model.

The point of the first set of equations (Table 8) is to compare the primacy of the mezzo-level to simple definitions of redundancy. The first set of equations is also parsimonious, using only those predictors relevant to all three organization designs. See Tables 7 and 8 at the end of this chapter.

Table 8 includes three count models.[152] The model is non-linear so the value of the marginal effect depends on both the coefficient for an independent variable (x) and the expected value of the dependent variable (y), given the value of x. The larger the value of E (y|x), the larger the rate of change in E (y|x). Additionally, the values of all marginal effects depend on all levels of all variables (Long, 1997, 224). For dummy variables, partial effects have no real meaning; it's more informative to look at factor change or discrete change.[153] Raw coefficients are typically presented in published research and are included here as well. However, for purposes of the present study, other interpretations (factor changes, percent changes, and changes in predictions) may be more intuitive for understanding substantive effects; these are provided where warranted, but not included in the table.

[152] The interpretation of count models depends on whether we are interested in the expected value of the count, the number of competitive franchises under certain conditions, or the distribution of counts (Long 1997).

[153] In general, for a unit change in x_k, the expected count changes by a factor of $\exp(ß_k)$, holding all other variables constant. For discrete changes, a change in x_k from x_s to x_E the expected count changes by $\Delta E(y|x) / \Delta x_k$, holding all other variables constant, where the discrete change in the expected value of y for a change in an observation x_k, starting at x_s and ending in x_s. For discrete changes, the total possible effect of $x_{k,}$ is considered, letting $x_{k,}$ change from its minimum to its maximum.

Models I, II, and III focus on the effects of the three main organization designs (S1, S2, and S3) on policy outcomes and include predictors relevant to all three. In addition to the indicator for structure, the models include predictors for lobbyists per legislator and the presence of pro-competition legislation along with controls.

Model I focuses on the effects of S 1 and answers the question, do jurisdictional structures that have a mezzo-level, but no redundancy, affect policy outcomes? When policy is carried out according to this regulatory schema, the locus of bureaucratic activity is at the state level. The state either has sole jurisdictional authority or prescribes all standards related to franchising. In the latter case, local level discretion is severely restricted, if present at all. The Prob >chi2 of .00 indicates the model is significant overall. Two predictors are statistically significant at the .05 level, the presence of pro-competition legislation (coef. = .704) and the control for the number of community units (coef. =.001). Pro-competition legislation has an expected log count of .704. Exponentiation of the coefficient for pro-competition legislation is 2.02, indicating the factor change of the expected count in the presence of pro-competition legislation; e^b = exp (b). The percent change in the expected number of competitive franchises in the state associated with pro-competition legislation is 102.2%, ceteris paribus.

Model II focuses on the effects of S 2 and answers the question, do jurisdictional structures that have no mezzo-level and no redundancy affect policy outcomes? In this jurisdictional schema, the locus of bureaucratic activity is local, i.e. the county or city has most authority in franchising decisions. In most of these cases, the state expressly grants authority in state statutes specifically pertaining to cable television franchising. In some cases local authority is augmented by the presence of home rule authority, which can be either by statute or by charter. In either case, no state level bureaucracy such as a public utility commission has statutory authority with regard to cable TV franchising. The Prob >chi2 of .00 indicates the model is significant overall. When there is no task sharing but authority resides at the local level, as is characteristic of this jurisdictional schema, policy effects are positive although not statistically significant. The presence of pro-competition legislation and the control for the number of community units remain statistically significant in this model. Exponentiation of the coefficient for pro-competition legislation is 2.04, indicating the factor change of expected count in the presence of pro-competition legislation; e^b = exp (b). The percent change in the expected number of competitive franchises in the state associated with pro-competition legislation is 104.3%, with all other variables are held constant.

Model III focuses on the effects of S 3 and answers the question, do jurisdictional structures that have both a mezzo-level and redundancy affect policy outcomes? Redundancy is defined here as some sharing of authority with regard to franchising. It may be that the sate functions in an oversight capacity or that it can overrule local decisions. In other cases, the local government grants approval/denial on some aspects of the application, such as whether the applicant's proposed programming meets community needs, and the state exercises authority on other aspects of the application, such as whether the proposed cable system meets minimum technical standards.[154] The

[154] As previously note, redundancy can be defined many ways and it can vary in degrees. The models presented here define redundancy broadly to include the general sharing of authority between state and local government with regard to franchising standards. However, other variations on the term were also evaluated. For example, when both the state bureau and local government have a hand in franchising, it doesn't seem to matter whether the franchising process is parallel or sequential; however, because the number of observations is severely limited, results cannot be stated with confidence. Laws and practices can also change the level of acceptance associated with authority. Redundant systems where the state prescribes franchising standards but also expressly recognizes local jurisdiction in the enabling statute is positively associated with results (coef = -1.27; z=-2.77; Prob > |z|=.01). Results cannot be stated with confidence when the state prescribes franchising standards but does not expressly recognize local jurisdiction in the enabling statute. In these cases, local authority is assumed because of inherent police powers or, jurisdiction is implied because of inherent authority over local rights-of-way. In another variation, states grant franchising authority to local government in the enabling statute and local governments within the state also have home rule. In home rule states, local government has full jurisdiction over matters within its defined territory, unless preempted by state law. In these cases, one might argue that local government authority is more institutionalized or legitimated as compared to situations of implied authority. Redundancy of this type has a clear positive effect on results. (Prob > chi2 = .002; coef =5.14; z=2.70; Prob

Prob >chi2 of .00 indicates the model is significant overall. Unlike the other two organization designs, the effects of shared authority are positive (coef. = 1.416) and statistically significant at the .05 level. S 3 organizations have an expected log count of 1.416 more than alternative organization designs which amounts to 3.87 more competitive franchises granted than other organization designs, holding other variables constant. The factor change of the expected count of franchises when authority is shared is 4.12. The percent change associated with shared authority is 312%, indicating improvements in policy outcomes are substantively significant as well as statistically significant. The importance of pro-competition legislation persists in this equation as it does in the other two models. The expected log count is .786 more than in other organization designs, providing a 104.3% increase in the expected count of competitive franchises. This translates to an increase of approximately 4.5 competitive franchises when the state legislature supports the efforts of the bureaucracy with pro-competition legislation. Results suggest that regardless of the jurisdictional schema, wherever authority resides, the bureaucracy is better able to meet goals if it has legislative support. State law that encourages competition by making franchising requirements easier to meet for applicants is one way to accomplish this. It is also plausible that the presence of pro-competition legislation proxies for goal congruity, as it indicates alignment between the federal goal state goals.

Taken together, the three parsimonious models focusing on the differential impacts of organizational structure provide inconclusive evidence that improvements in outcomes relate to the duplication of tasks and not the presence of authority at the mezzo level. Individually, the models suggest the positive effect of redundancy. However, to conclusively attribute effects to redundancy, structures with **no redundancy** should **decrease** effectiveness. Since coefficients are not jointly significant results must be considered inconclusive. It's appropriate at this point to look further into

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>|z|=.007). The percentage increase in the franchise count is 511% for this variation of structure and institutional setting.

the effects of shared authority. Table 9 at the end of this chapter provides several additional models for this purpose.

Table 9 provides results of four additional models, all of which all focus on the organization design referred to as S 3, shared authority. These additional models serve three purposes: to test for differential impacts of shared authority under various conditions, to see if the original equation for shared authority (Table 8, column 3) is robust to alternative specifications, and to test for effects related to additional claims contained within the Carpenter study. Additionally, four new predictors are added to these models including, the number of state commission staff per 10,000 households with cable; the number of staff increases in years 1988-1995, an indicator of State APA limits on bureaucratic discretion, and an indicator for the presence of multiple clientele. The number of lobbyists per legislator and pro-competition legislation are retained as main predictors. Density, state per capita income, and number of community units within the state are retained as controls.

Regulatory Staff per 10,000 Households with Cable and Staff Resources

According to Carpenter (2001), autonomous bureaucracies have three main characteristics characteristics: 1) unique organizational capacities; 2) political differentiation, and; 3) political legitimacy.

Capacity is a function of resources including, the number of staff available to accomplish goals, functional expertise, and network ties. To some extent, previously discussed models tap into this characteristic with the inclusion of per capita income and lobbyist per legislator. However, the literature on organizational learning argues the importance of slack resources for innovation.[155] The idea is that when an organization is not stretched thin, i.e. it has staff available beyond that required

[155] The term slack as used here refers simply to additional resources, i.e. slack in capacity. It should not be confused with the use of the term legislative slack in a separate chapter of this dissertation.

for meeting immediate goals, it also has capacity for innovation. To test for the impact of slack, a continuous variable is included for regulatory staff size at the state level (the number of regulatory staff members per 10000 households with cable). A positive association is expected.

Number of Staff Increases in Years 1988-1995

The concept of political differentiation is closely tied to reputation. In Carpenter's accounts of the USPS and USDA, organization reputation was a defining characteristic of an autonomous bureaucracy. According to the argument, bureaucratic autonomy cannot prevail without perceived efficacy-the agency must have a solid reputation. The concept of reputation is not easily tapped into and indirect measures are crude, at best. Two measures are considered, the number of years the state bureau staff increased between 1988 and 1996, and a measure of limits on discretion. In the first case, the assumption is that the legislature does not increase staff size or its budget if it questions the expertise of the bureau. The measure used is a count variable indicating the total number of years staff increased (minimum =0; maximum = 4). A positive association is expected.

Likewise, legislatures curtail authority when they question the capacity of the bureau or the likelihood that staff will follow the prescribed policy. Three procedures largely impact the range of discretion, including the right of the legislative committee to review proposed rules (shape the agenda), the power of the committee to suspend rules, and the authority of the committee to review existing rules. Values range from zero to three. If results are consistent with the autonomous bureaucracy argument, there should be an inverse relationship between policy outcomes and constraints.

Clientele

Political differentiation and legitimacy refer to the affiliation between the bureaucracy and outside consultants and other stakeholders. These attributes open the door for the consideration of more viewpoints and innovation. The more access to diverse groups, the less an autonomous bureaucracy must rely on any one source for its authority. This ideal was the reason for adding lobbyists per legislator to previous models. The indicator for shared authority may also partially tap into this concept. New models add another variable, clientele, with the same purpose. Clientele refers to the total number of industries regulated by the same state bureau. An independent agency dedicated solely to cable TV regulation has the value of 1. At most, three additional industries (max=4) may come under the jurisdiction of the same agency. A positive association is expected.

Interpretations

The additional models are considered collectively and then separately. Raw coefficients and robust standard errors appear in Table 8. Again, factor changes and percent changes do not appear in the table but are discussed where pertinent. In all four models, the full equation is significant overall at the 1% level or better. Holding other variables constant, the coefficient for shared authority (S 3) is positive in all four models and it is also statistically and substantively significant. Looking across models, the variation in the values of the coefficient for shared authority is tight; coefficients range from 1.418 to 1.687. Statistical significance varies between .00 and .05. Similarly, the factor change in the expected count of the number of competitive franchises in the presence of shared authority ranges from 4.12 to 4.16, and the percent change in the expected count in the presence of shared authority ranges from 312.8% to 440.4%. Sign and significance are also consistent across models. Thus, the equations are robust to various specifications and shared authority appears to positively affect outcomes under diverse conditions.

Model I adds one predictor, clientele. Additionally, predictors for shared authority, lobbyist per legislator, per capita income, pro-competition legislation, density, and the number of community units within the state are retained. Shared authority is significant at the .02 level, and has an expected log count of 1.42 more than other designs; this amounts to 3.846 more franchises holding other factors constant. For these data, the expected log count for a one unit increase in per capita income is .0001, which is marginally statistically significant (.055). This translates to a 2.5 franchises for a one standard deviation increase in per capita income, all else held constant. Pro-competition legislation has an expected log count of .917 more than other designs, which amounts to 1.3 more competitive franchises compared to cases without pro-competition legislation.

Model II adds one predictor, the number of staff increases in years 1988-1995, which is not significant at any reasonable level. Changes in individual coefficients are very slight. Shared authority is again significant at the .02 level, with an expected log count of 1.42 more than other designs; this amounts to 3.846 more franchises holding other factors constant. For these data, the expected log count for a one unit increase in per capita income is .0001, which is again marginally statistically significant (.058). This translates to a 2.4 franchises for a one standard deviation increase in per capita income, all else held constant. Pro-competition legislation has an expected log count of .918 more than other designs, which amounts to 1.3 more competitive franchises compared to cases without pro-competition legislation.

Model III adds discretion limits, which is marginally significant (.06). The association is positive, meaning more limits on bureaucratic discretion improve policy outcomes. The expected log count for a one unit increase in discretion is .273. This translates to a 1.2 franchises for a one standard deviation increase in constraints. Changes in individual coefficients again are very slight: shared authority is again significant at the .02 level. In these data, it has an expected log count of 1.68 more than other designs, which amounts to 4.09 more franchises, holding other factors constant. The expected log count for a one unit increase in per capita income is .0001; statistical significance drops slightly from .058 to .07; effects translate to a 2.12 franchises for a one standard deviation increase in per capita income, all else held constant. Pro-competition legislation has an expected log count of .823 but adds nothing in substance (.0001 when the value goes from 0 to 1).

Model IV considers the effects of adding additional staff at the state level. The coefficient on state bureaucratic staff per 10,000 households is negative, -.0830 and statistically significant at the .001 level. In terms of substance, there is a decrease of .66 franchises for a one standard deviation increase in staff. In this model, three factors stand out as varying from previous results. Clientele takes on additional significance. The expected log count for a one unit increase in clientele is .34; the significance level is .02. All else held constant, this translates to an increase of .77 franchises for a one standard deviation increase in clientele. Also, per capita income is no longer significant in this model. Additionally, limits on bureaucratic discretion have an added impact in this model. Statistical significance also improves. The expected log count for a one unit increase in constraints is .342 and is significant at the .015 level. This translates to a 1.37 franchises for a one standard deviation increase in constraints. This result makes sense as it implies that constraints are more important to overall outcomes in the presence of a larger staff. Shared authority is again significant, and confidence improve slightly (alpha change from.02 to .00). Shared authority has an expected log count of 1.49 more than other designs, which amounts to 3.25 more franchises, holding other factors constant. Pro-competition legislation has an expected log count of .587, which translates to an additional 2.5 franchises granted. [156]

[156] Goal conflict was another important consideration in Ting's (2003) bureaucratic redundancy theory. The underlying argument was that goal conflict is associated with externality effects, transparency, accountability, and competition for resources and authority. In formal models, the relationship between government subunits modified the effectiveness of redundant structural features. Specifically, redundancy improved results when agents' preferences were not aligned with the preferences of the principal. Yet, redundancy was less helpful when a single agent had

Summary

This research compared and evaluated two versions of bureaucratic politics, one claiming that bureaucracies with unique preferences achieve autonomy when their mezzo-level officials gain a reputation among diverse coalitions for innovating and defending the public interest. This version was recently articulated by Carpenter (2001) in a book entitled *The Forging of Bureaucratic Autonomy* that received much attention from the academy. The second version is an extension of redundancy theory applied to public organization settings, i.e. a theory of bureaucratic redundancy. This theory was articulated and evaluated by Ting (2003) in several formal models. We test both versions in the context of cable television regulation. The policymaking environment is typical of federal systems that preserve some degree of state and local government authority.

Results lend only guarded support for the importance of the mezzo-level and condition its impact on the involvement of other organizational subunits. Collectively, results point to the importance of the middle tier (state level bureau) only when local government is also involved in decision making. Thus, the mere existence of a state-centered hub for information processing does not appear to be the most important factor in organizational learning and effectiveness. Results do imply that some level of state involvement is necessary. State statutory grants of authority to local government, whether embodied in the enabling statute or in statutes granting home rule positively impacts success. This implies that local government must feel some responsibility in the outcome to ensure policy success. The characteristics of autonomy, reputation, and access to multiple power (in the form of lobbyists per legislator) bases are not associated with bureaucracies that show evidence

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preferences close to that of the principals. In the present research, the focus of inquiry is on the state and the sub governments below the state level. The state and the local government are conceived as agents, who in some cases share authority in important aspects of franchising. Principals are assumed to include Congress, the FCC, and voters. We did not speculate as to the actors' preferences and thus cannot make a serious contribution to testing that aspect of Ting's model.

of policy success. Moreover, policy success appears to rely as much on the support of the legislator than anything else. Resources are also important to policy success, i.e. if state per capita income is a valid indicator of resource availability.

Additionally, redundancy may improve organizational effectiveness. In single effects models, results are substantively and significantly significant and results are robust to alternative definitions and measures of redundancy. However, we would also expect that organizations with **no redundancy** should **decrease** effectiveness. Yet, these results cannot be obtained with statistical confidence. On the other hand, different combinations of variables do not eliminate the positive and statistical significance of shared authority, suggesting that limitations may be related to the limited number of observations.

Results also have implications for organizational reforms and the way duplication of functions is viewed. Even if duplication requires the use of additional public resources, possible losses in efficiency must be weighed against possible gains in effectiveness. As for scholarship on organizational structure, findings imply the utility of thinking about organizational structure as a system attribute that has different consequences under different assumptions about human behavior.

Finally, there are implications for democratic governance and a theory of public administration. The argument for bureaucratic autonomy and the theory of redundancy both conceptualize the administrative state as an independent force affecting policy. The extension of redundancy theory to political settings further suggests that the interactions between bureaucrats and key policy actors (including both other bureaucratic actors and the legislature) matter to outcomes. These ideas also beg interesting questions about bureaucracy's role in affecting the decisions of others. For example, can bureaucratic subunits be structured to prevent the possible misuse of legislative power? This question is addressed in the next section.

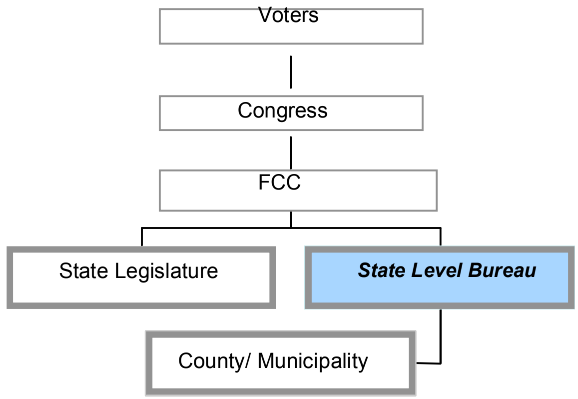
Table 1
Comparing the Autonomous Bureaucracy and Bureaucratic Redundancy

	The Autonomous Bureaucracy	**Bureaucratic Redundancy**
Structure	The arrangement of the administrative implementation scheme is critical to results; narratives emphasize the primacy of the mezzo-level. An administrative structure with a middle tier will perform better than one without.	Policy implemented by one agency or one actor is not considered redundant. A multi-unit administrative design involved in a task or implementation plan is considered "redundant," whether or not units are arranged vertically or horizontally
Main Driver of Policy	The bureaucrats in the middle tier (state level) drive policy	Policy direction determined by principal
Preferences of Principal	Preferences of principals are not likely to control outcomes unless they coincide with goals of bureaucracy.	When preferences are likely to diverge, principal can hedge against political uncertainty by choosing redundant implementation arrangement
Preferences of Bureaucracy	If a bureaucracy can be shown to have the requisite attributes (reputation, political differentiation, independent power base), it will be effective	Agents are strategic actors with preferences that may differ from each other and from principal Risk of principal's ineffectiveness arises from divergent preferences
Relationship between actors	The arrangement of organization subunits guides actors' relationships. The culture of the subunit is due to its position within the configuration (Miles' Law).	Potential competition between subunits drives effort levels and externality effects
Indicators of Effectiveness	Two main indicators of policy effectiveness and agency endurance: 1) presence of the mezzo-level; 2) reputation of political legitimacy associated with mezzo-level bureau.	Redundant systems increase probability of effectiveness when principal and agent have divergent goals. In cases with more than one agent, redundancy is less helpful when a single agent has preferences close to that of the principal.

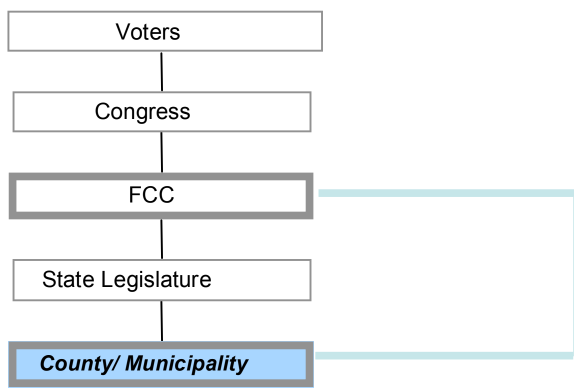
Table 2
Effectiveness Summary Showing the Cumulative Number of Franchises Granted by Successful States

State	Number of Competitive Franchise Awards 1996-1999
West Virginia	1
Oklahoma	1
Virginia	1
Wyoming	1
Indiana	2
South Dakota	2
New York	2
Nebraska	2
Maryland	2
Montana	3
Pennsylvania	3
Connecticut	4
New Jersey	4
Arkansas	4
Missouri	4
Alaska	4
Oregon	5
Tennessee	5
Wisconsin	5
Arizona	5
Kansas	5
Washington	6
Kentucky	7
North Carolina	7
Alabama	9
Colorado	11
California	11
South Carolina	12
Massachusetts	12
Texas	14
Minnesota	15
Florida	16
Georgia	18
Iowa	19
Illinois	25
Ohio	47
Michigan	50

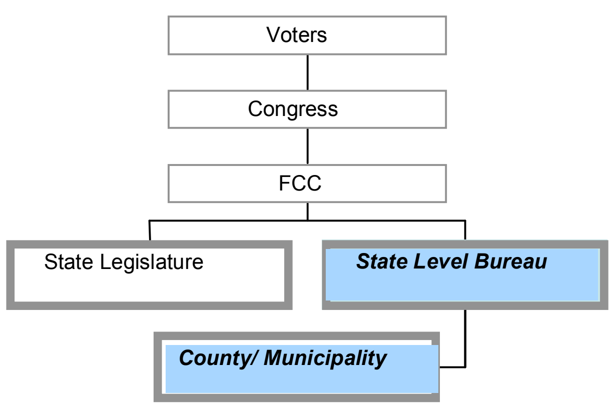
Figure 1
Observed Organizational Structures for Cable Television Franchising



Structure 1: Mezzo-Level, No Redundancy



Structure 2: No Mezzo-Level, No Redundancy



Structure 3: Mezzo-Level, Redundancy

* *The organizational subunit with locus of authority is shaded and text is italicized.*

Table 3
Data Sources

Total Number of Competitive Franchises Issued	Television and Cable Fact Book (1995-1999). Washington, D.C.: Warren Publishing, Inc
Reg Structures (S1, S2, S3)	Multiple sources: Federal Communications Fact Sheet June 2000. See http://www.fcc.gov/mb/facts/csgen.htmlhttp://www.fcc.gov/mb/facts/csgen.html; Robert Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles,* 44 Fed Comm L.J. 1991-1992; PUC Websites
Number of Lobbyists Per Legislator	The Center for Public Integrity WASHINGTON, August 10, 2005; See http://www.publicintegrity.org/telecom/default.aspx
State Per Capita Income	U.S. Census 1984
Pro-Competition Legislation	Westlaw; LexisNexis Academic Dayton, Ohio. Retrieved from University of Georgia Library Website: http://web.lexis-nexis.com/universe
1980 Population Density Per Sq. Mile	U.S. Census 1980
Number of Community Units in State	FCC Filings. Registered community units are available electronically at http://www.fcc.gov/mb/engineering/liststate.html

Table 4
Summary Statistics for Structure and Effectiveness Analysis

	Obs	Mean	SD	Min	Max
Total Number of Competitive Franchises Granted	50	6.88	10.42	0.00	50.00
S3-State Level Authority; Mezzo-Level; No Redundancy	50	0.30	0.46	0.00	1.00
S2-Local Level Authority; No Mezzo-Level; No Redundancy	50	0.84	0.37	0.00	1.00
S1-Shared Authority; Mezzo-Level and Redundancy	50	0.86	0.35	0.00	1.00
Lobbyists Per Legislator	50	5.50	3.69	1.00	20.00
State Per Capita Income 1984	50	22410	3436.2	16659	32006
Clientele	50	3.34	0.66	1.00	4.00
Pro-Competition Legislation	50	0.14	0.35	0.00	1.00
Density (Pop per sq mile)	50	179.93	243.28	1.00	1093.80
1984 No. of Community Units in State	50	804.50	746.02	0.00	3528.00
1984 State APA Limits on Discretion	50	1.86	1.16	0.00	4.00
No. of Staff Increases 1988-1995	50	1.72	1.16	0.00	4.00
1984 State Staff Per 10,000 Households	50	1.20	0.96	0.25	4.97

Table 5
Correlation Table for Effectiveness Study

		1	2	3	4	5	6	7	8	9
1	Competition/ Total Number of Competitive Franchises	1.00								
2	S1	-0.23	1.00							
3	S2	0.24	-0.81	1.00						
4	S3	0.22	-0.36	0.62	1.00					
5	No Lobbyists Per Legislator	0.38	0.05	0.02	0.10	1.00				
6	State Per Capita Income	0.07	0.50	-0.53	-0.46	0.25	1.00			
7	Pro Competition Legislation	0.13	-0.14	0.14	0.16	-0.01	-0.18	1.00		
8	Density	0.05	0.46	-0.42	-0.26	0.02	0.60	-0.10	1.00	
9	Number of Community Units	0.60	-0.25	0.31	0.36	0.41	0.02	0.01	0.02	1.00

Table 6
Frequency Tabulations for Effectiveness Analysis

Cities with Competition	Frequency	Percent
0	14	27.45
1	4	7.84
2	5	9.8
3	2	3.92
4	5	9.8
5	5	9.8
6	1	1.96
7	2	3.92
9	1	1.96
11	2	3.92
12	2	3.92
14	1	1.96
15	1	1.96
16	1	1.96
18	1	1.96
19	1	1.96
25	1	1.96
47	1	1.96
50	1	1.96

Figure 2
Graph of Data Overdispersion
Structure and Effectiveness Analysis

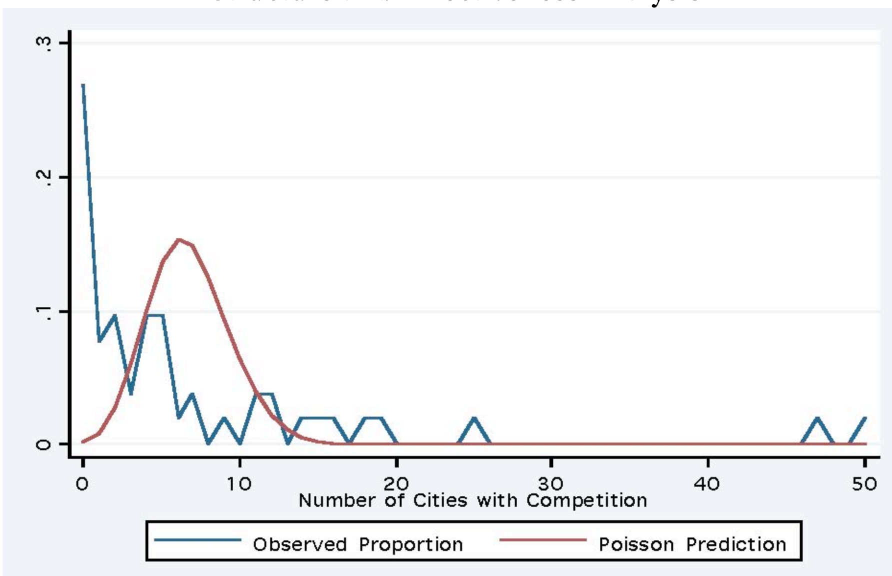


Table 7
OLS Results Comparing Main Structures

	I	II	III
Dependent Variable	Total Number of Competitive Franchises Granted		
S1: Mezzo Level, No Redundancy	-0.401*		
	(1.89)		
S2: No Mezzo Level; No Redundancy		2.956	
		(1.24)	
S3: Mezzo Level; Redundancy			.628
			(.23)
No Lobbyists Per Legislator	.464	.419	.414
	(0.75)	(0.67)	(0.64)
State Per Capita Income	0	0	0
	(.87)	(.81)	(.41)
Pro Competition Legislation	3.65	3.78	3.90
	(1.57)	(1.66)	(1.70)
Density	.003	.002	.001
	(0.81)	(0.48)	(0.27)
No of Community Units in State	0.007*	0.007*	0.007*
	(1.70)	(1.70)	(1.72)
Constant	-7.197	-10.392	-5.88
	(1.10)	(1.37)	(.70)
Observations	50	50	50

*Robust z statistics in parentheses; * significant at 10% **significant at 5%; *** significant at 1%*

Table 8
Negative Binomial Results Comparing Main Structures

	I	II	III
Dependent Variable	Total Number of Competitive Franchises Granted		
S1: Mezzo Level, No Redundancy	-0.412		
	(-0.92)		
S2: No Mezzo Level; No Redundancy		0.774	
		(1.36)	
S3: Mezzo Level; Redundancy			1.416
			(2.19)**
No Lobbyists Per Legislator	-0.016	-0.041	-0.047
	(0.18)	(0.47)	(0.53)
State Per Capita Income	0	0	0
	(1.01)	(1.03)	(1.81)
Pro Competition Legislation	0.704**	0.714**	0.787***
	(2.25)	-(2.33)	-(2.65)
Density	0	0.001	-0.001
	(0.20)	(0.49)	(0.63)
No of State Community Units	0.001	0.001	0.001
	(2.65)**	(3.08)**	(2.82)**
Constant	-1.342	-2.306	-4.186
	(0.75)	(1.18)	(1.96)
Observations	50	50	50
Likelihood-ratio test of alpha=0	chibar2(01) = 149.92	chibar2(01) = 151.31	chibar2(01) = 163.08
Prob>=chibar2	0.000	0.000	0.000

Robust z statistics in parentheses
** significant at 10%   **significant at 5%; *** significant at 1%*

Table 9
Negative Binomial Results For Variations of Shared Authority

	I	II	III	IV
Dependent Variable	Total No Competitive Franchises Granted			
S3: Mezzo-Level; Redundancy	1.427**	1.418**	1.682***	1.490***
	(2.33)	(2.37)	(2.72)	(2.77)
No of Lobbyists Per Legislator	-0.043	-0.048	-0.047	-0.057
	-(0.48)	-(0.54)	-(0.52)	-(0.83)
State Per Capita Income	0	0	0	0
	(1.92)	(1.89)	(1.73)	(.93)
Clientele (other bureau chiefs)	0.255	0.235	0.247	0.338**
	(1.58)	(1.42)	(1.46)	(2.27)
Pro Competition Legislation	0.917***	0.918***	0.824***	0.587*
	(3.11)	(3.13)	(2.77)	(1.85)
Density	-0.001	-0.001	0	0
	(0.76)	(0.78)	(0.29)	(0.17)
No of Community Units in State	0.001***	0.001***	0.001**	0.001**
	(2.81)	(2.84)	(2.43)	(2.52)
No of Staff Increases 1988-1995		0.056	0.058	0.167
		(0.38)	(0.37)	(1.28)
State APA Limits on Discretion			0.273*	0.342**
			(1.87)	(2.43)
State Staff Per 10,000 Households				-0.830***
				-(3.47)
Constant	-5.255**	-5.228**	-5.678**	-3.376*
	-(2.48)	-(2.48)	-(2.72)	-(1.66)
Observations	50	50	50	50

Robust z statistics in parentheses
** significant at 10%   **significant at 5%; *** significant at 1%*

CHAPTER 7

BUREAUCRATIC STRUCTURE AND CONTROL OF THE LEGISLATURE

Introduction

When policymakers are provided the option of favoring special interests or advancing policy in the interest of the general public, what motivates them to do the "right" thing? This question goes to the heart of democracy because we expect elected and unelected government officials to pursue policies that are in the general interest of the public. The typical approach to the question assumes that elected officials can be held accountable through the ballot box and focuses on ways elected representatives can control bureaucrats when they delegate authority. Yet, experience tells us that elected officials sometimes have their own agenda. This begs the question: can the bureaucracy and its related institutions be structured to motivate elected officials to subordinate their own self-interest to the interest of the general population? Put another way, could the bureaucracy supplement the voting mechanism as the means of holding elected officials accountable? These are challenging questions as they involve defining slippery concepts, such as what constitutes special interest policy, and analytically distinguishing among a bewildering array of different organization structures and institutions associated with the policy process.

This research takes as a starting point several well-developed arguments contained in the literature. First, bureaucrats exert an independent force on policymaking (Rourke 1984; Long 1949); second, the relationship between the legislature and the bureaucracy is important to determining legislative behavior (Wood and Waterman 1994; Calvert, Moran and Weingast, 1987; Calvert, McCubbins and Weingast 1989; McCubbins 1985), and; third, organization structure can condition the relationship among key policymakers and induce certain behavior (Niskanen 1971; Miller and Moe 1983; Donahue 1989, 1991; Landau 1969, 1991; Bendor 1985; Ting 2003).

Taking these points as given, the main argument here is that bureaucratic design impacts costs associated with monitoring legislative behavior and thus either encourages or discourages lawmakers to act in accordance with the public interest.[157] The logic is as follows: the structure of a public organization, including its subunits and divisions of authority, define the availability, character, and flow of information necessary to assess the performance of its representatives. There is an information problem, or agency problem, inherent in every public organization and the structural characteristics of the organization can either mitigate the agency problem or exacerbate it. Thus, all political organizations have slack, an unobservable characteristic that determines the state of information asymmetry and the extent to which elected representatives can conceal their actions from the public (Kalt and Zupan 1984; Levine and Forrence 1990). The importance of slack is that it affects monitoring costs, i.e. the difficulty with which the public can observe the behavior of elected officials. Moreover, political actors in different subunits of an organization exist in a natural state of competition, which reduces slack and therefore monitoring costs.

The above logic is incorporated into a theory of regulatory policymaking, which is tested in the context of state telecommunications policy. Variations in regulatory structure across states are identified and employed as proxies for slack and monitoring costs. The impact of different regulatory configurations is tested using legislative action that most would agree is special interest in nature.

[157] A similar argument is developed in Levine and Forrence (1990) wherein they decompose public interest models of regulation into models of motivation and differentiate between public and private interests. Motivation and monitoring costs are the two variables featured in their models. The organization structure is not explicitly dealt with as it is here, and their model is not tested.

This chapter proceeds as follows: the first section addresses literature that has evolved to explain regulatory policy. The next two sections are an attempt to analytically distinguish concepts that are important to the main argument and subsequent analysis. The concept of public interest is discussed and an attempt is made to distinguish between motives that are other-regarding and those that are self-regarding and between general interest policy and special interest policy. This is followed by a discussion of the concept of slack and mechanisms that increase and decrease slack. The subsequent section lays out a basic approach to determining the factors behind special interest legislative action. A model is then tested using state-level data. The final section summarizes the findings and key insights.

The State of Theory

Up until the 1980's, three perspectives dominated discussions about the regulatory process: economic theory, public interest theory and the politics of ideas. Economic theory describes the regulatory environment as being controlled by narrow special interests. More specifically, in a supply and demand political market, industry seeks (demands) the power of the state for its private benefit; regulation is offered (supplied) by self-interested policymakers. A policymaker's motive for acting in self-interest may include, among other reasons, job security, future employment, or reelection (Bernstein 1955; Downs 1967; Olson 1965; Stigler 1971; Peltzman 1976; Posner 1971; Becker 1983).[158] In contrast, public interest theories depict politicians and bureaucrats as well-intended civil

[158] To simplify the discussion, a number scholars have been associated with the broad genre of economic/political theories of regulation. However, there are distinctions. For example, Posner (1971) distinguishes between legislation and regulation, the latter having the advantage of redistributing wealth under cover, i.e. with little visibility to the public. Other theories represented in the regulation literature include Owen and Braeutigam's (1978) status quo theory, Posner's (1971)

servants; regulation is procured in the public interest to cure market failures and to protect a vulnerable population from big business who might otherwise take advantage (Davis 1994; c.f. Posner 1971). [159]

However, neither regulatory economic theory nor public interest theory has proved adequate in accounting for all policy (cf. Derthick and Quirk 1985). Indeed, in the previous discussion of the history of telecommunications, some policies reflected public sentiment, for example those relating to telecommunications deregulation, while, other policies, such as those relating to broadcast licensing, appeared to do little more that satisfy well organized interests.[160] Extensions of economic theory, employing a principal-agent framework and emphasizing conflicts of interest and information asymmetry have emerged to fill this gap (Bendor and Moe 1985; Moe 1991; Mitnick 1980; McCubbins, Noll and Weingast 1987, 1989; Wood and Waterman 1994; Wood and Bohte 2004).

Attempting to explain what economic theory and public interest theory has not, scholars applying principles of agency theory to public sector decision making focus on how information impacts the behavior of legislators and regulators. As they see it, the problem of motivating one

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taxation theory, and Goldberg's (1976) social contract theory. Gerber and Teske (2000) provide a survey of theories and evidence of U.S. regulatory policymaking.

[159] Posner (1971) notes that public interest theory tends to be subsumed in arguments rather than expressly stated.

[160] Clearly, even when the motivations of policymakers can be ascertained, they cannot be reliably employed to predict outcomes. McCubbins, Noll and Weingast (1989) makes a convincing argument that policy cannot be understood apart from consideration of the underlying political and institutional processes. To be sure, undemocratic outcomes can obtain because voting procedures have substantive effects, thus transforming original preferences. For example, Arrow (1951/1970) demonstrated that a voting system based on ranked preferences cannot possibly meet a certain set of reasonable criteria when there are three or more options to choose from. Similarly, Condercet showed that collective preferences are not necessarily transitive, even if individual preferences are; see Gehrlein and Fishburn (1976). What this means is that a person who can reduce and control alternatives can secure the outcome of an election. Evidence of the use of institutional processes by enacting coalitions to protect their win from ambitious political rivals is consistent with this premise.

party to abandon self-interest and to act in the interest of another is a principal-agent problem.[161] And, because exchanges (transactions) always take place in a world of information asymmetry, uncertainty and risk, the problem is always present to some extent.[162] Applied to the U.S. political system, the issue is that voters (principals) do not know whether elected officials (agents) are putting the public interest above their own self-interest. Motives of self- interest are not always easy to decipher and they are easily cloaked in public interest rhetoric. This information problem is one of moral hazard (Akerlof 1970; Spence 1973; Holmstrom 1979; Stiglitz 1975; Greenwald and Stiglitz 1986; Sappington and Stiglitz 1987; Rothschild and Stiglitz 1986; Milgrom and Roberts 1986).[163] A less cynical view notes that voters may not fully understand the policy problem, which is often the case in complex regulatory policy, or they may find it too difficult (costly) to observe the agent(s). Both points of view assume that, in a world free of information and monitoring costs, policymakers always act in the public interest. Conversely, policy that serves only a narrow self-interest could not exist absent discretion and information costs. Thus, information economics and agency theory view

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[161] The related branch of economics is referred to as information economics, and studies how information affects decision making. According to the Greenwald-Stiglitz (1986) theorem, information has unique qualities because it easy to create and disseminate, yet difficult to trust or control, thus complicating many decisions (transactions).

[162] In economics, information asymmetry occurs when one party to a transaction has more or better information than the other party.

[163] Information asymmetry is typically divided into two types: moral hazard and adverse selection; both terms originated in insurance. In contract terms, when there is moral hazard, parties come to an understanding about services/ goods to be rendered but one party lacks information about whether performance occurred in accordance with the agreement. In adverse selection models, the information asymmetry occurs while negotiating an agreement. According to information economic theory, there are two ways to resolve the information asymmetry, signaling and screening. Signaling involves transferring information to indicate a person's type, as in the case of indicating a college degree on a job application to convince the would-be employer of one's credentials (Spence 1973). The other way to mitigate the information problem is through screening, whereby the party lacking information convinces the other to reveal relevant information (Stiglitz 1975).

institutions that reduce information costs or facilitate monitoring as the key to keeping self-interested behavior under control.

An alternative to both the economic theory of regulation and the public interest perspective is the "politics of ideas"-an alternative perspective that acknowledges a greater diversity in the motives of political actors and a broader array of effective political forces (Quirk 1988, 31). The origins of this perspective are attributed to James Q. Wilson's conceptualization of policy entrepreneurs, skilled policy advocates adept at tapping into shared beliefs and values (1980). According to this view, ideas are seen as symbols (Stone 1988), buzzword prescriptions (Derthick and Quirk 1985) or even moral imperatives (Kelman 1990) that are important independent forces affecting policy. In the politics of ideas, advocate groups (policy entrepreneurs) and issue networks play a more important role than organized special interests. In Derthick and Quirk's interpretation of the deregulatory movement in the trucking, airlines, and telecommunications industries a favorable sympathetic regulatory appointees, legal authority and a supporting intellectual community combined to loosen industry controls and promote competition.

This secondary role of market forces is also a feature of this literature. Proponents argue that market forces are a factor in policy change and deregulation, in particular, but not the predominant force, as they are in regulatory economic theory (Derthick and Quirk 1985; Quirk 1988). The contrasting view argues that economic change is the driving force behind deregulation and emphasizes the advantages of well-organized special interests (Hammond and Knott 1988). As they see it, the larger economic context is a key factor. For example, Hammond and Knott argue attitudes and stakes within the financial industry changed in reaction to economic, technical, and legal changes, which in turn generated competitors outside the industry who pressured the regulatory status quo. In their view, changes in preferences were nonetheless driven by self-interest. The inside/outside pressure for deregulation had a snowball effect, shaking the stability of the regulatory foundation.[164]

The level playing field statute and the events surrounding its passage share some common ground with both explanations. The timing of the statute coincides with a deregulatory movement. In general, deregulation invokes the "idea of competition," which has been credited as a causal mechanism for change in other policy areas such as immigration (for example Schuck 1992). However, the level playing field statute was actually intended to raise barriers to market entry and inhibit competition. Even so, advocates of the legislation claimed it promoted "fairness" among competitors, a concept that has its own attraction as a symbol. If the politics of ideas carries weight as an explanation of policy change, the legislation gained acceptance to the extent that policy advocates sold the idea that the policy would promote fairness and competition.

As for the general trend of deregulation, it is plausible and likely that the idea of competition has a symbolic importance and carries weight with Americans as well as with policymakers seeking public support and could have contributed in some way to policy changes. Yet deregulation was also an important goal to traditional telephone operators who lobbied hard the passage of the Telecom Act of 1996. Thus, it is difficult to distinguish whether the politics of ideas or the organization of well endowed interests or some combination of both lead to policy change.

As some have pointed out, making progress toward a theory of a politics of ideas requires differentiating "ideas" from "interests" and separating their influences (Kingdon 1984). Regan (1993) argues that ideas and interests are two dimensions of policymaking. When ideas and interests

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[164] Hammond and Knott seem to equate deregulation with the lessening of government authority. Part of their argument is that deregulation leads to regulatory instability; they contrast this view with claims that government is predisposed to grow because of the strength of political relationships (as in the case of iron triangles) or budget maximization (as in the Niskanen argument). This implies that deregulation always has the effect of curtailing government authority. I disagree. Neither the divestiture of AT&T in 1983/1984 nor the Telecom Act of 1996, led to a decrease in bureaucratic staff associated with the regulation of telecommunications.

are both opposed to policy change, it will not occur. When interests favor policy, but ideas are opposed to it, pork barrel politics will result. And when interests are opposed, but ideas support policy, policy change is difficult to obtain but still possible. In the latter case, it is also difficult to determine how important each factor is in the policy outcome (Regan 1993 454).

A recent approach to ascertaining motivations for legislative behavior is consistent with the above discussion; Levine (2006) proposes an extension to regulatory economic theory that explicitly incorporates information and organization costs. The modification specifically accounts for "slack" that shields policymakers from public scrutiny and presumes that constraints can be introduced which increase public exposure to policy issues and the behavior of legislators.[165] According to the theory, without slack, policymakers could only pursue policy the electorate would sanction; they could not enact special interest policy.

Emerging literature on yardstick competition in political agency further supports the argument that relationships among key policy actors can mitigate information problems.[166] Political yardstick competition emerges in the context of multiple jurisdictions. The key idea is that voters can compare policy and performance of one jurisdiction when they have a benchmark or yardstick for comparison. The common theme in this literature is that politicians are concerned about their reputations and are motivated to act in ways that the electorate would approve. Voters are never completely certain about the character of politicians or their policies. This uncertainty is an agency

[165] Slack is an intangible attribute that shields decision makers from observation. Slack is also conceived as a non-monitored situation (Kalt and Zupan, 1984). Slack can encourage either good or bad decisions; in this regard slack can be contrasted with the concept of "shirking", the moral hazard problem in team production associated with Alchian & Demsetz (1972). Kalt and Zupan (1984) discuss what creates "slack." For a review of the literature on legislative shirking and its association with ideology, the reader is referred to Bendor and Lott. "Legislator Voting and Shirking: A Critical Review of the Literature." 87 *Public Choice* (1996)."

[166] Surveys of the literature on yardstick competition and political accountability can be found in Besley and Case (1995, 2001) and in chapters 4 and 9 of Persson and Tabellini (2000).

problem. Yardstick competition disciplines the behavior of politicians thereby reducing the agency problem. As Bodenstein and Ursprung (2005) note, the concept of political yardstick competition is closely related to the line of reasoning in our separation of powers system and can be traced to the Federalist Papers (1788) (Rossiter 1961). "Political yardstick competition imposes a constraint on elected governments, even if they are immobile across jurisdictions" (p.332). The argument has empirical support in the context of the United States policy (Besley and Case 1995) as well as in other countries (e.g. Bordignon, Cerniglia and Revelli's 2002 study of electoral behavior in Italy). Political yardstick competition can relate to either non-hierarchical (Nechyba 1997; Cremer and Palfrey 2000) or hierarchical structures (Cremer and Palfrey 1999).[167]

Although not typically pointed out, research on political yardstick competition portrays power and conflict as natural properties of organizations. That is to say, the political dynamics, or patterns of interactions and dependence, are the lifeblood of organization (Salancik and Pfeffer 1977; Pfeffer and Salancik 1978; Astley and Zajav 1991). The premise is that actors who are associated with different parts of an organization have different goals, an assertion connected to Miles' Law: "where one stands on an issue depends upon where on sits" and also central to Allison's (1971) models of decision making. Moreover, power is the property of the group or organization subunit as long as the organization stays together (Arendt 1970). Organizations themselves are bargaining and influence systems (Abell 1975). And negotiations and exchange are constrained by the structural context in which decisions are made (Day and Day, 1982). Organization designs represent an accommodation of power and a managed equilibrium reached by militating against conflicts (Astley and Zajac 1991). Indeed, there is nothing novel about the idea that structures condition the principal-agent relationship, and there is no reason to assume the causal direction only

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[167] But see Dixit and Londregan (1998) comparing policy outcomes in different structures.

runs one way. Literature depicting the relationship between the legislature and the bureaucracy as in a natural state of competition is consistent with this logic, even if it emphasizes control of the bureaucracy. This depiction also finds support in Pfeffer (1978) which provides evidence that conflict subsides when different departments are allocated their own turf (Chapter 8). Thus, organization structure is a reflection of the relative power positions of the parties. Moreover, as argued by Astley and Zajac (1991), issues of intra-organizational power are inseparable from issue of organization design.

Similarly, there is a respectable tradition of scholarship on redundancy and redundant structures, which posits that characteristics of organizational design can produce competitive relationships and hedge against political uncertainty (Bendor 1985; Ting 2003; Ostrom and Ostrom 1965; Ostrom 1971, 1986, 1990, Agrawal and Ostrom 2001). This implies that when competitively situated actors scrutinize legislative behavior, monitoring costs are reduced and better conceived policies are devised (Levine and Forrence 1990). As a consequence, the discretion to pursue special interest policy is attenuated. This logic may account for telecommunications policies discussed in a previous chapter that could not be explained by either political/economic theory or public interest theory. More specifically, some regulatory structures may have produced a watchdog effect on legislative behavior. Thus, the same mechanisms that operate to foster legislative control of the bureaucracy may also have a reverse causal effect, i.e. reducing legislative slack and discouraging decisions that, absent information costs, the electorate would not approve.

This section presented an overview of regulatory theories and their shortcomings. It also reviewed literature on agency theory and information economics, which evolved to fill the gap. Because this study assumes that the relationship between the legislature and the bureaucracy is important to determining legislative behavior, and that organizations can be structured to induce certain behavior, other research consistent with these assumptions was briefly noted; this included scholarship depicting organizations as bargaining systems with inherent conflict as well as literature depicting organization design as a reflection of the equilibrium resulting from the conflict; it also included literature on yardstick competition and redundant structures, both of which support the argument that organizational design can reduce monitoring costs and improve decisions. Before explaining the methodological approach employed to look at the impact of bureaucratic structure on legislative policy, it is necessary to distinguish among some concepts. This is the objective of the next section.

Key Concepts

General Interest, Public Interest, Special Interest

The question of whether policy secures the general interest of the population or reflects the self-interest of policymakers can be subjective. There are also problems in classifying policies as either in the general interest or in the self-interest of decision makers because policies are not necessarily mutually exclusive in type; they may be the product of both self-interest and other-regarding motives Levine and Forrence 1990). Putting the question to the public also poses difficulties. Because a typical regulatory policy is not easy to understand, obtaining reliable and valid indicators of policy types by way of a survey instrument would necessarily involve educating a sample population on the particulars of policy while avoiding the transmission of bias in the process.

To understand the concept of public interest, some distinctions are in order.[168] Levine and Forrence (1990) distinguish regulators' motives as either *other-regarding* or *self-regarding*. A regulator

[168] This section adopts the language employed by Levine & Forrence (1990) for the purpose of analytically distinguishing among like terms. However, the reader is directed to Katzmann (1990) who points out ambiguities associated with *other-regarding* (Burkean) behavior. For purposes of the subsequent analysis, the important term is *special-interest*, which refers to policies that would only be

who enacts other-regarding policy does so because she believes the public would favor the policy, or because the policy, in her view, is in the best interest of the public, even if the public may not agree. In the latter case, the policy is imposed on the public for its own good, as opposed to being undertaken for the purpose of being sold to a subset of the population.

Motivations aside, a policy can be defined as either *general interest* or *special interest* in character, depending upon whether the general population would likely adopt it. General interest policies are those undertaken that would be acceptable to the general population absent any information costs. In other words, these policies would be adopted if the electorate were not inhibited by collective action problems (Levine and Forrence 1990, 176). The opposite of general interest policies are special interest polices. Special interest policies would be acceptable to only a small self-interested subset of the polity. Special interest policies are only ratified by the general population when information, organization, and monitoring costs for the special interests are lower in comparison to the benefits they would receive than they are for the general population. But for self-interested motives, regulators do not adopt special interest policies. In the present context, the focus is on a special interest policy referred to as *level playing field statutes*. For reasons argued in detail later, this study assumes that legislators' motives in enacting level playing field statutes could only have been self-regarding. Furthermore, legislators could not have enacted level playing field statutes absent high information and monitoring costs.

Most would agree the level playing field statutes serves only a narrow special interest group and does not benefit the general population. The policy involves state legislation of telecommunications policy and requires companies wanting to compete with established cable operators to meet exceedingly high standards in order to be licensed to operate. The cable industry

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ratified by a self-interested subset of the population. Special-interest policy is associated with capture theory.

lobbied fiercely for level playing fields statutes and the real nature of the policy was concealed from the public. Wherever enacted, the effects have clearly provided benefits for the established cable industry, while spreading the cost over the population at large. In fact, according to the Government Accounting Office, cable rates are approximately 15% lower in areas where two wire-based cable operators compete.[169] According to the GAO report, less than 2% of subscribers have a choice between two wire- based operators. Experts outside of government also agree that cable's *de facto* monopoly status has resulted in a significant welfare loss to consumers (Hazlett 1990, 2001, 2006; Hazlett et al. 2004; Crandall and Hazlett, 2000). The lack of competition persists despite efforts by the federal government to enact policy encouraging competition, and the level playing field statutes remain in many states despite the obvious conflict with federal goals.[170]

Even with the advent of direct broadcast satellite (DBS) and market changes associated with deregulation and the passage of the Telecommunications Act of 1996, direct competition among providers of video services (overbuilds) are still considered the best means to contain costs for video services. The Federal Communications Commission has consistently reported that competition between cable television operators and direct broadcast satellite (DBS) does not produce the same

[169] See, General Accounting Office on "Issues Related to Competition and Subscriber Rates in the Cable Television Industry" (Washington, D.C. October 2003) GAO-04-8.

[170] The Cable Television Consumer Protection and Competition Cable of 1992, Public Law No. 102-385, 106 STAT 1460 (1992), specifically prohibited a locality from "unreasonably" denying a competitive cable franchise. The 1992 Act specifically prohibited a locality from "unreasonably" denying a competitive cable franchise. The full text of the 1992 Act is available at http://www.fcc.gov/Bureaus/OSEC/library/legislative_histories/1439.pdf. The Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996), which is considered the most important telecommunications law in the last two decades and, according to the FCC, the first major overhaul of telecommunications regulation in over 60 years, was also intended to increase competition in the market place. See generally, http://www.fcc.gov/telecom.html. Specifically related to franchising policy, Section 253 of the 1996 Telecommunications Act gives the FCC authority to preempt any state or local requirement that prohibits, or has the effect of prohibiting, the ability of any entity to provide any inter-state or intra-state telecommunications service. The full text of the 1996 Act is available at http://www.fcc.gov/Reports/tcom1996.txt.

benefits as direct competition between two wireline cable operators competing head to head in the same franchise area. [171] Similarly, a 2003 study released by the U.S. Government Accountability Office (GAO) shows that competition to an incumbent cable operator from a wireline provider lowered cable rates by 15% as compared to markets without competition.[172] In the same study, the GAO concluded that competition between cable operators and DBS had only a minimal effect on prices. The competitive effect of DBS was manifest in the addition of nonbroadcast networks to established cable operators' channel offerings. In 2004, GAO examined six market pairs to assess the impact of a broadband service provider (BSP) overbuilder. In each market pair, one market was served by a BSP overbuilder, and the other market was not. The market pairs were similar in terms of size and demographics. GAO found that, on average, rates for basic cable service was 23% lower in communities with overbuild competition. Service quality was also rated higher in the same communities.[173] Moreover, wireline competition also attracts better direct broadcast systems. A 2005 U.S. Government Accountability Office (GAO) study states that DBS market share varies

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[171] See the FCC's 12th Annual Report at In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket 05-255 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-11A1.pdf. Findings are consistent with previous reports about the advantages of direct competition among wireline services as compared to DBS competition. The Commission's previous reports appear at: *Implementation of Section 19 of the 1992 Cable Act* (*Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*), *1994 Report*, 9 FCC Rcd 7442 (1994); *1995 Report*, 11 FCC Rcd 2060 (1996); *1996 Report*, 12 FCC Rcd 4358 (1997); *1997 Report*, 13 FCC Rcd 1034 (1998); *1998 Report*, 13 FCC Rcd 24284 (1998); *1999 Report*, 15 FCC Rcd 978 (2000); *2000 Report*, 16 FCC Rcd 6005 (2001); *2001 Report*, 17 FCC Rcd 1244 (2002); *2002 Report*, 17 FCC Rcd 26901 (2002); *2003 Report*, 19 FCC Rcd 1606 (2004); and *2004 Report*, 20 FCC Rcd 2755 (2005). *See* Communications Act of 1934 § 628(g), 47 U.S.C. § 548(g).

[172] *See* U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, Oct. 2003, at 3, 9-10.

[173] *See* U.S. General Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241, Feb. 2004. See also *2004 Report*, 20 FCC Rcd at 2800 ¶ 68.

depending on the type of community (*i.e.*, urban, rural, or suburban), the technical capability of the cable competitor and/or the presence of an overbuilder.

Slack

Slack is another of those loose terms having various meanings in the literature. Perhaps the best way to clarify its use in the context of this study is to describe its effects. In general, any part of the policy process, or any characteristic of the system, organization or institution, that has the effect of concealing behavior, is slack producing. Slack provides the policymaker with discretion to act under cover. In a widely cited article, Kalt and Zupan (1984) associate the concept of slack with circumstances in which information and monitoring costs shield policymakers from observation. In the absence of slack, regulators are unable to "sell" policy to demanding special interests. Thus, institutional barriers which impose high costs on the public for monitoring are a necessary precondition for special-interest policy. Slack also provides regulators with the discretion to enact policy that regulators believe to be in the interest of the public but that the public would not likely approve. More specifically, a policymaker may impose her will on the people, not because she is acting out of self-interest, but because she believes her action best serves the public. Such policy falls within the other-regarding category and is referred to as *Burkean,* named after the philosophies of Edmond Burke.[174] Thus, only policies that would be approved by an electorate can prevail in the absence of slack.

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[174] Political theorist, philosopher, and member of the Whig party, Edmund Burke served in the British House of Commons as a member of the Whig party in the mid 18th century and is often considered to be the father of Conservatism. In Burke's Speech to the Electors of Bristol in 1774, Burke spoke on the duties of public representatives and proclaimed "your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion." See generally, Lock, Frederick (1998) *Edmund Burke*. Oxford: Oxford University Press.

Mechanisms that Increase or Decrease Slack

Slack is always present to some degree because parties are boundedly rational, and also because circumstances change, and the future is unpredictable. Parties to an exchange seldom, if ever, have complete information. Thus, slack can never be completely eliminated. Characteristics of the policy can either reduce or increase slack. Clearly defined and unambiguous mandates are slack reducing. In contrast, when the title of the stature obfuscates the special interest nature of the policy, it is slack increasing. For example, critics of the Clean Air Act contend that the law was cloaked in public interest rhetoric, yet never intended to actually reduce air pollution (Macey 1988, 508).[175] Arguably, the level playing field statutes, which are the subject of this study, have the effect of concealing the real nature of the policy. They provide lawmakers with slack to act under cover. In such cases, the public is not as likely to be informed, and therefore not as likely to participate or object to policy. Consequently, the cost of information and monitoring increases; accountability is also compromised in the process. Likewise, policy that is complex or technical in nature also increases slack. Typically, to understand regulatory policy, one must possess some knowledge of economics or some knowledge about the policy substance. This is clearly the case in environmental policy and telecommunications policy. The complexity provides policymakers some assurance that public scrutiny will be minimal.

Regulatory structure can increase or decrease slack. Regulation is accomplished under many different frameworks; regulatory authority can be centralized, decentralized, or fragmented. As a result, information flowing through the organization, its subunits, and to the public, takes different paths, is available in different degrees, and is validated or invalidated accordingly. Monitoring costs, therefore, also vary. On one level, the cooperative federalism approach to regulating

[175] Clean Air Act Extension of 1970, 42 U.S.C.A. §§ 7401.

telecommunications generally, is slack increasing. Cooperative federalism schemas often entail overlapping authority and responsibility. When lines of authority are unclear, the public faces a more difficult task in deciphering who is responsible for policy outcomes. The division of authority between state and local government can also vary across states. Policies are often non-uniform, ambiguous, and contradictory. These characteristics increase slack.

In the context of the regulation of cable television regulation, some would argue that slack evolved as a result of the inability or failure of existing communication regulations to accommodate the introduction of cable technology, which was introduced into the market at a quick pace. When cable TV originated in the late 1940's, it was only a means to retransmit broadcast signals in areas where the terrain hindered clear reception of over-the-air-signals. The technology did not fit neatly into the existing regulatory structure for other communications services such as broadcasting or telephone.[176] Over the years, the industry grew from a fledgling provider of retransmission signals to the main provider of original programming for most households. As it developed, communities required operators to receive approval to use the public rights-of–way. The franchise licensing process was introduced ad hoc by local governments and later in various degrees by state governments. In the early 1970's, the Federal Communications Commission (FCC), who had played an active role in protecting broadcasters, also began asserting jurisdiction over cable. Federal legislation institutionalized the FCC's authority in some areas, such as in disputes between telephone and cable companies, but left it to the states to specify rules in the oversight of cable TV operators. At the state level, legislation provided the basis for both state and local regulation of cable television. Local authority was provided by way of state statute under the principle that legitimate exercise of local authority required express delegation by the state. Yet states had different interpretations of

[176] See Copple (1991) detailing the allocation of regulatory authority that evolved as the technology of cable television was introduced into the market.

state interest and their regulatory role. Consequently, a variety of intergovernmental arrangements emerged as cable developed. For consumers trying to understand their rights, the regulatory structure is often confusing. Thus, the overall regulatory apparatus associated with the regulation of telecommunications, and in particular cable television, is slack increasing to the extent it hinders the flow of information to citizens necessary for monitoring the behavior of regulators.

On another level, the variations in institutions across states and within states can be either increase or decrease slack. For example, if the State Administrative Procedures Act (SAPA) simplifies and encourages public participation, it reduces slack. If the SAPA imposes strict deadlines for public comment, stringent requirements for standing, or otherwise discourages public participation, it would be considered a slack increasing institution. Indeed, agencies often prolong rulemaking to the point where some stakeholders drop out of the process. Often only well-funded organized interests can keep up with the process over a long period of time.[177]

Although information flow and monitoring costs are unobservable, this research contends that different classifications of regulatory structure have different implications for slack and carry different monitoring costs. The challenge is to identify variations in structure and process across states that tap into dimensions of the relationships among key actors that relate to information flow and monitoring. This challenge is taken up in Section 4, which describes attributes of a public organization believed to be most important to making analytical distinctions on the basis of slack and monitoring costs. Specifically, using positive political theory as a guide, a nexus is drawn between characteristics of observable regulatory structures and the increase or decrease in slack and

[177] The problem of governmental delay is the single largest complaint regarding agency rulemaking according to Macey (1992), citing a report by the Staff of Senate Committee on Government Affairs, 95th Cong., 1st Sess. "Delay in the Regulatory Process ix (Comn. Print 1977) (in poll of over 900 lawyers, undue delay was the most frequently mentioned problem with the federal regulations promulgated by eight different federal agencies).

monitoring costs. This forms the basis for the choice of structures, which are described more fully in Section 5, the methods section, and included in the subsequent analysis.

Linking Regulatory Structure to Slack and Monitoring Costs

As previously noted, there are significant differences in the regulatory structures associated with authority over cable television and video franchising matters policy.[178] Variations in the regulatory schema exist both across states as well as within states. The most obvious variation concerns the locus of bureaucratic authority. In some states, authority over cable television and video franchising is shared between the state and the local government. In other states, the locus of authority is at the state level; a state agency (such as a public utility commission or an independent agency) establishes standards for franchise approval, which local governments carry out. In other states, authority resides mainly with the local government; these states defer to counties, cities, or towns on franchising matters. The form of delegation from state to local government also varies. Some states expressly provide authority to local government in statutes related to cable regulation. In other states, authority is established in home rule statues and state cable statutes are silent on the issue.[179] Some states regulate by public utility commission (PUC), with one agency charged with

[178] The reader may refer to Chapters 2-6 for a historical account of the political design of telecommunications regulation and for a detailed account of the regulatory structures and agency designs established across states in the 1970's. Also see, Figure 1: Observed Organizational Structures for Cable Television Franchising illustrating the three main regulatory schemas.

[179] Broadly, home rule is defined as the transfer of general powers from the state to units of local government. In most states, home rule also provides local governments with freedom from state interference on local matters as well as the authorization to exercise powers without a prior express delegation by the state legislature. Prior to the enactment of home rule in many states, Dillon's rule was generally accepted. Thus, home rule is a counterbalance to state authority. Under Dillon's rule, state legislatures were often deeply involved in local matters. Also, some scholars associate Dillon's rule with undue state influence, local laws that do not reflect local concerns, unchecked state constitutional power, and the failure to provide for professional local government. Additionally,

authority over cable television as well as other sectors, such as telephone or electric. Another variation relates to the relationship between the legislature and the state bureau; differences in the state administrative procedures provide for different constraints on the bureaucracy, and thus different balances of power. These conditions imply different levels of interaction and different information paths for decision making and monitoring (Barnard 1938; Chamberlin 1982; Grandori 2001). In other words, the relative relationship between key policy actors (parity) varies according to these conditions.

As much literature point out, legislators and bureaucrats exist in a symbiotic relationship (Wright 1967; Abney and Lauth 1986; Abney 1998; Warren 1996). Legislators rely on agencies for their technical advice and bureaucrats partially rely on legislators for their budget. Legislators and agencies also directly compete with each other, at least in respect to potential gains associated with special interests. Economic theories of regulation posit that policy makers are able to extract private benefits as a result of the power associated with decision rights (Fama and Jensen 1983; Grossman and Hart 1986; Hart and Moore 1990). The benefits are referred to as "rents." Regulatory rents are created when the regulators employ the coercive nature of the state to usurp the market and thus redistribute wealth among the competing interests (Buchanan and Tullock 1975; Tullock 1965). From the perspective of the interest group, there is no reason to commit resources beyond that which is necessary to influence policy. Thus, the question becomes whether to direct resources toward influencing legislators, ostensibly to enact statutes, or to influence bureaucrats with the intention of obtaining favorable rules and regulations. In general, industry would prefer to have clearly articulated statutes as opposed to agency regulations, because statutes are more difficult to overturn. Industry's ability to do this, however, depends upon many factors, including but not

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Dillon's rule and home rule are not mutually exclusive. In some states they coexist (Carlson 1999). See generally, Lang (1991) "Dillon's Rule and the Birth of Home Rule" *The Municipal Reporter*.

limited to the nature of the policy, the urgency of the matter, the likelihood of success in the respective policymaking arenas, and the relationship between the legislature and the bureaucracy. Thus, because the legislature and the bureaucracy potentially compete for rent extraction and jurisdictional authority, some degree of competition is inherent in the system.

Consistent with the idea that there is a natural state of competition, positive political theory depicts an inverse relationship between legislative authority/bureaucratic authority and a tradeoff between legislative authority and control and delegation of the authority to the bureaucracy. Indeed, the point of constraining bureaucratic authority through structure and process is to control bureaucratic drift. Shepsle (1992) points out that drift from the original policy preference takes place in two forms. The form most applicable to the argument here is bureaucratic drift, which occurs when the bureaucracy, with interests that conflict with the enacting coalition, intercedes *ex post* to thwart the original bargain struck by the legislature.[180] Shepsle also argues that there is a tradeoff between bureaucratic drift and coalitional drift which creates a "legislative possibility frontier." In order for coalitional drift to occur, the bureaucracy must have enough control over rulemaking to substantively alter policy.

Not unrelated, positive political theorists point out that bureaucratic structure and process affect the capacity of legislators to monitor the bureaucracy (McCubbins, Noll, and Weingast 1989). The assumption is that some structures (and processes) will prevent bureaucracies from acting contrary to the intent of the enacting coalition and also prevent future legislators from overriding the original enactment (Horn and Shepsle, 1989). Thus, the arguments posed here, namely that legislative slack is associated with bureaucratic structure, and the structure and design of administrative agencies can impact principal-agent problems is simply a derivative of existing claims.

[180] Shepsle (1992) also describes coalitional drift, which occurs when a subsequent coalition thwarts the original deal. The typical case of coalitional drift occurs when a newly elected legislature with an opposing ideology favors a different coalition.

Latent competition may also be a strategy of organization survival. As is the case with all organizations, public agencies are concerned with their own survival (Niskanen 1968, 1975). Organizations are also inclined to look for ways to legitimate themselves (Zelditch and Walker 2003). One method of securing survival is to maintain or expand authority. Thus, each bureaucratic subunit looks to both maintain its original jurisdiction and to take on additional responsibilities associated with new regulation. They also look to receive authority that might be shifted among units as a result of reorganization efforts. This can be accomplished in multiple ways, including by displaying expertise when needed or by pointing out the errors of others. Indeed, these same strategies are evident in the historical account of the regulatory arrangements that evolved in tandem with telecommunications policy. Specifically, the state-commissioned expert reports in the 1970's emphasized both state-level expertise and local-level corruption associated with the franchising process.

Whether the policymaking environment is described as competitive or contentious is not the main point. The critical point is that bureaucracies do not operate independently of the political process. They have their own goals and can be predisposed toward certain viewpoints. Thus, larger bureaucracies mean more goals and viewpoints, in other words, more potential conflict. As noted, the bureaucracy may be the most important information source for legislators with respect to technical regulation. Latent competition produces a watchdog effect. Multiple decision making bodies, all having some interest in the matter, tend to bring more scrutiny to the process. This decreases the cost of information and monitoring. When a legislature or agency has exclusive jurisdiction, its actions are less transparent than under conditions of competition and heightened scrutiny. Also, the more jurisdictional authorities that have a stake, the more probable it is that issues are reported to the public (Levine and Forrence 1990). When issues gain public attention, legislators have more difficulty favoring special interests over the public interest. Recent efforts by municipalities resisting efforts at the state level to control video franchising illustrate this point. In a recent Notice of Proposed Rulemaking (NPRM), the FCC sought comment on "a number of issues related to the cable franchising process generally, and in particular, the process by which competitive cable franchises are awarded" (FCC 2005 8-9). In reaction to the NPRM, local government advocates, including the League of Municipalities and the National Association of Counties, have argued against any effort to remove authority form local government. Ting (2003) makes the case that this sort of latent competition has the effect of reducing errors similar to advantages provided in a redundant system.[181]

Methods and Application

The Approach

At this point, it is appropriate to briefly summarize the arguments, reiterate the research question and formulate hypotheses. This arguments and logic described to this point owe much to the work of Levine and Forrence (1990), who propose an extension to regulatory economics that specifically incorporates slack and information costs. According to their theory, it does not matter much if policymakers' motives are initially other-regarding or self-regarding. Initial motivations are not as important as the mechanisms that condition the decision process. Moreover, the most important features of the process either conceal or expose policymakers' actions.

The main research question is, why did special interest regulation succeed in some state legislatures although it would not have been approved by a general public? According to theories based in information economics, the statute could not been enacted absent high information and

[181] But see, Macey (1992) who argues that competition between agencies causes industry to align with the bureaucracy.

organization costs. The literature discussed above suggests three main predictions. (1) Latent competition between the legislature and the bureaucracy and among bureaucratic subunits lowers information and monitoring costs. More bureaucratic subunits heighten competition and scrutiny, and decrease legislative slack and the incidence of special interest regulation; (2) shared jurisdictional authority between the state and local bureaucracy in matters pertaining to video franchising produces a latent competition between bureaucratic units, lowers information and monitoring costs, and decreases legislative slack and the incidence of special interest regulation, and; (3) bureaucratic structures that serve multiple clientele produce intra-organizational competition, lower information and monitoring costs, and decrease slack and the incidence of special interest regulation.

Dependent Variable: Level Playing Field Statute

The special interest policy that this study will examine, the *level playing field statute*, involves rules applicable to companies seeking a cable television franchise in a jurisdiction where an incumbent cable operator already exists. The state statute raises the barrier for market entry by competitors and protects the *de facto* monopoly in place. The statutory language is similar from state to state and requires local authorities, in reviewing the application for a franchise by a competitor (also called an overbuilder), to impose **"no more burdensome or no less favorable"** requirements than those imposed upon incumbents. As indicated in the Table 10 at the end of this chapter, starting with Florida, a total of 12 states passed the legislation between 1987 and 2000. The dependent variable for the special interest regulation is dichotomous, denoting the presence or absence of the statute within the state.

Before proceeding to an explanation of the predictors, several points are made to support the use of this particular statute as a special interest policy. By definition, a special interest policy should be supported by the special interests it presumes to serve. The established cable industry's forceful lobby for the statute's passage is a matter of record. The lobby was motivated by changes in market conditions which prompted applications to provide competing cable service in several communities across the country. According to industry trade magazines, the legislation was the top priority of the Florida Cable Television Association (FCTA) because they were faced with a formidable challenger, Telestat Cablevision in Dade County, Florida (Wolfe, in Cablevision, 1987, p.50).[182] The law became known in cable circles as the anti-Telestat law. The FCTA was apparently the first to gain passage of such a law. The Chairman of the National Cable Television Association (NCTA) at the time, James Mooney, praised the Florida group for their success in gaining passage of the level playing field statute, which curtailed efforts by Telestat to compete in Dade County (Multichannel News, June 8, 1987). Although there is no direct evidence, more than likely the NCTA not only supported the legislation, it also wrote it, as there is very little deviation in the language from state to state.

Pursuant to our discussion, special interest policy would not be approved by the electorate absent considerable information, monitoring, and organizing costs. On September 18th, 2006, the United States Senate Committee on Commerce, Science and Transportation issued a press release with the results of a bipartisan poll regarding the public's sentiment toward competition. According to the release, a telephone survey of 800 registered voters nationwide conducted August 26-31, 2006, by Public Opinion Strategies and the Glover Park Group found that 90 % of Americans considered it important that there be more than one company to choose from for cable television services.

The survey also said that the vast majority of likely voters favor choice in cable TV because it would likely result in lower prices (82 percent), better customer service (81 percent), delivery of

[182] The National Cable Television Association (NCTA) along with its state counterparts, are the main lobby groups for incumbent cable operators.

new technologies and enhanced services to customers (78 percent), and higher quality programming, such as high definition TV and video on demand content (73 percent). [183]

Complaints and comments directed to the FCC and other franchising bodies further support this sentiment. A precise number of complaints filed with the federal, state and local governments regarding cable television is difficult to ascertain. However, every year, at least since 1985, the Federal Communications Commission has reported to Congress on the status of competition in cable television. In the process of gathering information, the Commission seeks comments from the public.[184] Throughout the year, the Commission also entertains comment on many related matters of rulemaking. Although the FCC directs complainants to local franchising authorities, the Commission still reports quarterly on complaints that do not find their way elsewhere.[185] State and local governments also receive complaints, as does the U.S. Department of Justice.[186] Literally, hundreds of thousands of complaints about the high cost of cable service and complaints about the poor quality of service are commonplace. The remedy called for by the public is competition. To be sure, the public sentiment favoring competition over monopoly is pervasive in the history of

[183] The related press release by the United States Senate Committee on Commerce, Science and Transportation and details of the survey are available at http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=248662&Month=9&Year=2006

[184] See for example, Federal Communications Commission Annual Assessment of Competition in the Market for Delivery of Video Programming. Ninth Annual Report. FCC 02-338 (Washington, D.C. December 31, 2002.).

[185] See the directions for complainants http://www.fcc.gov/mb/facts/complain.html and quarterly inquires and complaint reports at http://www.fcc.gov/cgb/quarter/welcome.html. Comments for open rulemaking can be obtained at http://www.regulations.gov/fdmspublic/component/main.

[186] See for example, see the ex parte submission from the Department of Justice In the Matter of the Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 specifically detailing complaints received regarding Cable's monopoly status and the state policies that inhibit competition at http://www.usdoj.gov/atr/public/comments/216098.htm.

communications regulation generally, and not just in cable television regulation. For example, the concern about monopoly abuse in radio was one reason for the formation of the Federal Communications Commission in 1934.[187] Similar concerns led to the eventual breakup of AT&T in 1984. With respect to cable television, both the legislative history of the 1992 Cable Television Consumer Protection and Competition Act and the 1996 Telecommunications Act cite evidence of similar public opinion.[188] Only special interest groups that serve a narrow constituency, such as the NCTA, are on the record suggesting that that cable competition is inefficient.

Moreover, the actions of the incumbent cable industry contradict any suggestion that it supports competition. Indeed, the industry's position on the record indicates that they are not opposed to competition, if it is fair; this is the substance of its media campaign and the position put forward on the NCTA's website.[189] However, it is only logical that the industry would want to protect its investment in infrastructure and its dominant position in the market. It also makes complete sense that they would advance the argument that service is delivered more efficiently with only one provider in the market.[190] Thus, as one would expect, the "level playing field" they are seeking comes in the form of multiple new requirements for companies proposing competition;

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[187] Communications Act of 1934; Act of Congress, Pub. Law No. 416-73rd Congress, approved June 19, 1934. See the FCC annual report to Congress at http://www.fcc.gov/ftp/Bureaus/Mass_Media/Databases/documents_collection/annual_reports/1936.pdf.

[188] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.); Telecommunications Act of 1996 (1996 Telecom Act), 47 U.S.C. § 157, S. 652, 104th Congress

[189] See generally, http://www.ncta.com.

[190] The incumbent industry's position is not debated on the merits, and is only put forward to support the claim that the level playing field statute is a special interest policy for the purposes of this study. Likewise, one may find support for the argument that a monopoly offers a more efficient solution than competition in some low density areas.

requirements that in effect protect the market share of established operators and raise the barriers to entry for competitors. Perhaps the most popular standard pushed by incumbents is the requirement that would-be competitors extend service throughout the entire jurisdiction by a specified date. The capital commitment necessary to satisfy this requirement is typically more than most companies can handle.[191] The timing of the lobby is also telling. The statute was not pushed until competitors began to emerge.

The level playing field statute also has the characteristics of a special-interest regulation. That is, it produced benefits for a narrow few, the incumbent cable industry, and it spread costs among the larger population (Levine, 2006). Moreover, the incumbent cable operators have clearly benefited from the establishment of new standards for granting franchises. As one researcher put it, "[A]ll forms of symmetric regulation contain an intrinsic bias toward some firm or technology" (Schankerman, 1996). Two well-known reports, Hazlett and Ford (2001) and Hazlett (1990), also find that these statutes actually tilt the balance against entrants because the mere existence of the statute creates opportunity for fact finding and argument in the form of hearings before the franchising authority. In the process, the incumbent raises the rival's entry costs. Thus, as Stigler (1975) notes, announced policy effects can be misleading, "…truly intended effects should be deduced from the actual effects" (p. 140).

The monetary commitment made by industry to secure the policy is also telling. Telecommunications companies spend billions of dollars every year in lobbying federal and state government. The Center for Public Integrity has tracked campaign contributions to all candidates for Congress and the presidency from 1998 to 2006, including money spent lobbying the federal

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[191] The incumbent industry fails to point out that many early franchises were granted and sold without every constructing a cable system. See, the report on Cable Television in New Jersey prepared by the Center for Analysis of Public Issues in Princeton, "Crossed Wires- Cable Television in New Jersey" (Princeton 1971).

government since 1998, and privately-funded trips for legislators and their aides since 2000. The Center provides breakdowns of expenditures by company, sector, and policymaker. All told, the employees and political action committees of the telecom companies spent $486 million on campaign contributions from January 1, 1997 to June 30, 2006.[192] As Levine and Forrence (1990) point out, there is no reason for special interests groups to politically support a legislator in any action that would spread benefits over the vast public. Political support is only necessary when policy will provide the special interest(s) with concentrated benefits at the expense of a larger public.

It is also highly unlikely that the legislative acts were "other-regarding" as defined by Levine and Forrence (1990). It is difficult to rationalize the vote as genuine in the sense that legislators believed it was in the best interest of the public even though the public would likely not have voted for it. The obfuscation of title alone makes any claim of Burkean behavior highly suspect. Good intentions are defensible, so there is little reason to raise the information costs by concealing the true nature of the policy. Burkean behavior is also highly unlikely in the face of such strong special interest support. For all the reasons stated, there appears to be little or no risk in defining the level playing field statutes as special interest for the purpose of this analysis.

Independent Variables

State statutes define the relative authority of the legislature, the state bureaucracy, and the local government with respect to cable television franchising. A contextual review indicates at least four structural/ institutional variations that create different environments for the interaction of key actors. Importantly, there is no way to confirm exactly how some conditions affect the dynamics of the relationships and the behavior of various parties. However, the underlying reasons behind the structural distinctions chosen for analytical purposes is consistent with other work related to how

[192] See http://www.publicintegrity.org/telecom/default.aspx

organizational structures shape attitudes and decision behavior (Gulick and Urwick 1937; Simon 1947; Cyert and March 1963; Perrow 1984; Ostrom 1986; Moe 1984, 1991; Hammond and Knott 1999; Ting 2003). Clearly, there is a general consensus that bureaucratic structure and process can affect principal agent relationships. Because the structures are not always mutually exclusive, in the analysis below, they are considered in alternative models and not as alternative values for one variable. A dichotomous measure (0/1) indicates the presence or absence of the following:

- Shared Authority: In these cases, a state statute provides local government with authority to set franchise standards, as long as they are not preempted by federal law. The state also preserves for itself some role in the franchising process. For example, local government may approve or deny a franchise application subject to state review. Review by the state is likely to consider whether all federal requirements, such as public hearings, were met in the process. As another example, the state bureau and the local government may each have authority over some aspect of a franchise application; the state might evaluate criteria related to the technical aspects of the system (converter equipment, bandwidth required, etc.), while local government might evaluate proposed programming in light of a community needs assessment. State and local government would have to communicate on whether the technical aspects of the proposed system can accommodate the programming described in the application. In both examples, the state agency and the local government interact in the franchising process. It is also likely that each could also perform the functions of the other without much difficulty. Each is in a position to scrutinize the other's behavior and each has an interest in any state legislation affecting the franchising process. Both levels of government are also likely to be in touch with the legislature on related issues, and therefore likely to scrutinize legislative decisions on relevant policy. Additionally, both the state and local government receive a portion of the franchise fee paid by the cable operator. Thus, these conditions imply some degree of parity and either actual or potential competition between state and local government. This structure and institution combination is expected to yield benefits to the public by reducing information costs and reducing slack, thereby lowering the incidence of special interest legislation. The coefficient on the variable designating this structure and institution combination should be negative.

- State Authority- State Sets Franchising Standards: In these cases, a state statute may or may not specify that local government has some authority in video franchising, but state statutes also specify the requirements and standards local government must follow in granting approval. Local government's franchise decisions are subject to strict parameters set by the state. Thus, as a practical matter, only the state bureaucracy has real authority. In these cases, there is little or no interaction between state and local government pertaining to video franchising. The locus of authority is the state. For information purposes, and for expertise, the state legislature is likely to contact the state bureau directly and the state bureau is likely to contact the local government, in turn, and if needed. Likewise, there is one entity, the state bureau, in a position to scrutinize legislative behavior. Local government is less involved overall, and likely less qualified to understand relevant policy decisions. As a matter of degree, there is less parity and more hierarchy in this arrangement as compared to the shared authority described above. Franchise fees may or may not be shared, and proportions may also vary. This structure and institution combination is expected to yield more legislative slack (as compared to shared authority). Without the same watchdog effect, information costs to the public are higher as compared to arrangements of shared authority. These conditions are expected to raise the incidence of special interest legislation. The coefficient on the variable designating this structure and institution combination should be positive.

- Local Government Authority: In these cases, a state statute expressly grants local government all authority over video franchising. The state has no authority in franchising, either in granting approvals or in setting standards. There is no overlap in state and local authority with regard to the task of video franchising. Interaction between state and local government is not expected to occur on a regular basis with respect to the franchising process. However, local government does not have a state agency dedicated to cable franchising to contact and therefore must rely on its own expertise. Similarly, there is no state cable bureau to relay information form local government. Thus, the state legislature is likely to hear directly from many local governments on video franchising matters. Members of the local government are also likely to have more incentive to understand the impact of various policies on their local community, because there is no state bureau to do this in their stead. When many sub state governments are involved in similar policy, some are more likely than others to keep abreast of the issues than others. However, the odds are considerably higher that the legislature will be in touch with many entities presenting diverse interests. Legislatures are not likely to avoid detection as they pursue special interest policies with many possible eyes upon them. Although this scenario does not change the nature of the environment between the state bureau and the local governments (either more or less competition), it is possible that local governments will compete for jurisdiction and treat contiguous cities or counties as one entity for the purpose of granting franchises. Under this scenario, there is a higher probability that issues will become salient. There is also more likelihood that some politician will seize upon an issue to gain support for policy. As this occurs, the cost to the public of becoming aware of issues decreases. These conditions are expected to decrease slack and decrease the incidence of special interest legislation. The coefficient on the variable designating this structure and institution combination should be negative.

- Home Rule: The state government has video franchising authority, but also provides home rule to local government apart from any statutory grant of authority in franchising matters. Home rule statutes yield local government considerable authority within its jurisdictional boundaries in any matters not specifically preempted by federal or local law. The presence of home rule, both by itself and in combination with other state statutes, defines the state-local relationship, and it determines what state governments and local governments can actually do in terms of advancing competition in the market place. Moreover, home rule authority institutionalizes and legitimates the local level jurisdiction, enhancing the parity between state and local government and encouraging other local governments and citizens to respond. In the context of inter-group relations, Major (1994) argues that the degree to which people view existing social arrangements as legitimate is central to their reaction to those arrangements. There is also substantial evidence that legitimacy encourages public cooperation. Specifically, those who support authorities and institutions defer to their decisions and to the policies and rules they create (Elsbach 2001, Tyler 2001, Tyler and Huo 2002). This structure and institution combination is expected to yield benefits by reducing information costs and reducing slack, thereby lowering the incidence of special interest legislation.

Size of Bureaucracy

If more bureaucracy means more potential scrutiny, larger bureaucracies should show an inverse relationship with special interest legislation. Moreover, the same result should be obtained whether "more bureaucracy" is defined as more horizontal subunits or more subunits in a hierarchical arrangement. Thus staff numbers of subunit counts should both be associated with less special interest legislation. The idea that an agency cannot grow in size without establishing a reputation for itself is consistent with other research (Carpenter 2001). State agency reputation is reflected in its general size (staff numbers) and its budget. A continuous variable is included for regulatory staff size at the state level. As would be expected, there is a high correlation between staff numbers and budget. In the present study, a variable indicating the total number of agency staff is included.

Administrative Procedures

With regard to the relationship between the state legislature and the state bureaucracy, the environment for interaction is conditioned by the constraints on agency discretion embodied in the States' Administrative Procedures Act and further affected by the relationship between the state bureaucracy and the local bureaucracy. State administrative procedures are a means to constrain agency discretion, and more importantly, define the authority of the state bureaucracy in relation to the legislature. Three procedures largely impact the relationship between the legislature and the bureaucracy described above. They concern: the right of the legislative committee to review proposed rules (shape the agenda), the power of the committee to suspend rules, and the authority of the committee to review existing rules. Some states have none of these procedures while others have all three. Taken collectively, more constraints on the agency (less agency discretion) should be associated with more legislative slack and a higher incidence of special interest policy (the relationship should be inverse). Conversely, fewer agency constraints should indicate more agency discretion, and less slack for the legislature.

Multiple Clienteles

Independent agencies provide more slack than agencies with authority over multiple clientele. Consider for example, a comparison between agencies that regulate one industry or several. When state-level regulation of cable television began in the 1970's, one of the earliest decisions made by the legislatures was whether to provide authority to existing public utility commissions or to form independent agencies. When an agency regulates one clientele, it is more likely to take on the interests of that clientele. When agencies regulate multiple clientele, commissioners and agency staff, they must consider the interests and effects of policy on all the industries within their jurisdiction (Bernstein 1955). Also, legislators rely heavily on the expert opinions of agencies in technical matters. Where agency opinions are shaped by competing interests, as in the case of an agency with multiple clientele, the quality of information provided to the legislator increases. Moreover, agencies with multiple clientele are more likely to provide expertise based upon more sources of information because their existence does not hinge on aligning themselves with one group. Industry also understands the advantage when they are regulated by an agency exclusively dedicated to one clientele. As a result, it is typical for industry to start to join lawsuits to preserve an agency's exclusive jurisdiction.[193] Finally, if the argument holds, state level bureaucratic structures serving multiple clientele lower information and monitoring costs, thereby decreasing slack and the incidence of special interest regulation. A dichotomous variable coded one indicates multiple clientele, although there are often several additional clientele, including telephone, transportation, electric and gas utility companies; a zero indicates cable television franchising occurs under the jurisdiction of a commission dedicated only to cable television.

Other variables suggested by the literature were included as controls. For state ideology, two such measures were available, which were developed by Berry, Ringquist, Fording, and Hanson in 1998 and updated in 2002 to data available through 2001.[194] Inclusion of both government and citizen ideology measures created a multi-collinearity problem. The measure for state ideology was therefore chosen. Based on Congressional voting records, the ideology measure places states on a continuum of liberal to conservative. Lower measures are considered more conservative. Higher measures are considered more liberal. The lowest measure belongs to New Hampshire (13.8) and the highest measure belongs to Connecticut (93.5). Common belief, although not necessarily wisdom, is that conservative governments are more pro-business than liberal governments. This

[193] See for example, Board of Trade of the City of Chicago v. SEC, 677 F. 2d 1137 (7th Cir 1982), (vacated 459 U.S. 1026, 1982).

[194] The measures have since been used in various studies. The full updated dataset and description of the method used for calculating the measures is available through the University if Michigan's Inter-University Consortium for Political and Social Research at www. Icpsr.umich.edu as study no. 1208

suggests that more conservative governments (lower ideology scores) are associated with more pro-industry regulation.

A main predictor suggested by economic regulatory theory is industry market power. For example, Stigler (1971) reasons that when occupations organize to obtain favorable regulation, free rider problems decrease for concentrated groups and increase for dispersed groups (p.14). Concentrated market power should increase lobbying effectiveness. Stigler operationalizes market power as the ratio of the occupation to the total labor force. An analogous measure is constructed for cable industry market power, i.e. the ratio of the number of basic cable subscribers to homes passed by cable (penetration). The relationship between market power and special interest regulation is expected to be positive.

As noted in the previous discussion, the level playing field statute was a response to applications filed for competitive franchises. To control for the reaction to market conditions, a variable was added to indicate whether there was any competition in the state prior to the enactment of legislation. Finally, a control for state population in the year 1980 was also added.

Data sources, summary statistics and the correlation table are included in Tables 11, 12, and 13 at the end of this chapter.

Model Estimation and Interpretation

Logit is an appropriate technique for estimation where the dependent variable is binary (Long 1997). In logit modeling, only sign and significance are interpretable. A positive relationship means the variable is associated with an increased probability of special interest policy; a negative coefficient means the variable is associated with a decreased probability of special interest policy. Results of four models are presented representing predicted probabilities of special interest policy under different organization structures. Table 14 at the end of this chapter displays the estimated coefficients and the robust standard errors used to compute the z test for the coefficient.

Model I includes predictors for the presence of shared authority, market power, competition in the state prior to the statute, multiple clientele, government ideology, constraints on agency discretion, state regulatory staff and population. The logistic equation can be represented as:

Predicted=-5.851 -2.03*statelocalshare +5.845*marketpower-.0864*competition-3.078*multipleclientele-.02*govideology-1.577*discretion-.001*staff-0*population.[195]

All coefficients are in the direction hypothesized. The model is statistically significant overall (Prob> chi2 = .01). In terms of individual predictors, our focus is on the various regulatory designs. This model predicts the impact of shared authority along with other factors. Two coefficients are significant at the .05 level, shared authority, and limits on state agency discretion. The indicator for shared authority is a binary predictor in which 1 indicates shared authority is present, and 0 indicates that it is not (coef. = -2.03; z statistic = -2.10). The coefficients indicate the amount of change expected in the log odds when there is a one unit change in the predictor variable, with all of the other variables held constant in the model. When shared authority is present, the log odds of the

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[195] Additional models were constructed to guard against biased results due to selection, including a Heckman 2 stage model and a similar procedure using an inverse Mills ratio. The latter assumes that states share some unknown characteristic that also relates to their respective regulatory schema. This involved constructing two equations. The first equation used a multinomial logit to predict the probability states were one of the three principal regulatory schemas S1, S2 or S3. Predictors included state per capita income, census region, density (and alternatively population). The results were used to calculate inverse Mills ratios for error correction. The ratios were then used as regressors in the second equation predicting the probability of legislation. The second stage equation varies from the main model presented in one important respect; it subtracts three additional degrees of freedom from an otherwise already limited model of 50 observations. The model produces similar results; there are no changes in signs on the coefficients and there are similar (but reduced) effects in terms of substantive and statistical significance. Results of the one-stage parsimonious logit are presented because it seems more plausible that states with specified regulatory schemas do not share some unknown and unobservable characteristic.

statute being enacted (vs. not being enacted) decreases by 2.02. Interpretations of odds ratios and percent change in odds are not reflected in the table but offered here because some may find them more intuitive. When shared authority is present, the odds of the special interest statute being enacted decreases by a factor of .131. The percent change in odds of the special interest statute being enacted in the presence of state level authority is 86.9%. This structure is also associated with resource competition; the state commission and the local government share the franchise fee paid by the cable operator (typically 5% of the gross revenue associated with the basic tier of service). Local government involvement should also increase public exposure of policy issues, forcing the state commission and the state legislature to consider the interest of local government and its citizens in their decisions. Results suggest that competition does in fact yield increased exposure, scrutiny, transparency, thus providing an incentive for general interest legislation and discouraging special interest legislation.

The indicator for limits on bureaucratic discretion contains values of 0 to 3 (coef. = 1.58; z statistic = 2.32). The association is positive; thus, for each additional constraint on agency discretion, the log odds of the statute being enacted (vs. not being enacted) increase by 1.58. Exponentiating, for each additional constraint on discretion, the odds of the special interest statute being enacted increases by a factor of 4.83. The percent change in odds for each additional constraint is 523%.

In Model I, two coefficients are significant at the .10 level: the indicator for market power (coef. = 5.84; z statistic = 1.72), which is positive, and multiple clientele (coef. = -3.07; z statistic = -1.74), which is negative. Industry resources are reflected in the measure of market power. As expected, more resources are associated with more lobbying power and an increase in special interest legislation. Competition between state and local government and competition in the form of multiple clientele is expected to add to the quality and integrity of administrative decisions, including expert opinions provided to the legislature. Because the state agency serves multiple clientele, its advocacy must be broader than in cases where the agency is dedicated to cable television.

Model II includes predictors for the presence of state level jurisdiction, shared authority, market power, competition in the state prior to the statute, multiple clientele, government ideology, constraints on agency discretion, state regulatory staff and population. All coefficients are in the hypothesized direction and the model is significant overall (Prob> chi2 = .03). The structure evaluated in this model is characterized by state level only authority. Model II indicates that, when only state government has real authority in video franchising, the probability of special interest legislation increases (coef. = 2.34; z statistic = 2.23). When state level jurisdiction is present, the log odds of the statute being enacted (vs. not being enacted) increases by 2.34. Exponentiating, when state level authority is present, the odds of the special interest statute being enacted increases by a factor of 10.38. The percent change in odds of the special interest statute being enacted in the presence of state level authority is 938%.

For every additional constraint on agency discretion, the probability of special interest legislation increases (coef. = 1.66; z statistic = 2.18). For each additional constraint on agency discretion, the log odds of the statute being enacted (vs. not being enacted) increase by 1.66. For each additional constraint on discretion, the odds of the special interest statute being enacted increases by a factor of 5.24. The percent change in odds for each additional constraint is 424%.

Multiple clientele is no longer significant in this model, but remains in the hypothesized direction. One interpretation might be that intra-agency competition, i.e. when the state agency has jurisdiction over more than one utility, does not constrain special interest behavior (or encourage general interest behavior) to the same extent when the state and local bureaucracy do not compete.

Model III features a bureaucratic structure where the locus of franchising authority is with local government. The model is significant overall (Prob> chi2 = .00). When local government has authority in video franchising, the probability of special interest legislation decreases (coef. = -2.60; z statistic = 2.70). The coefficient is statistically significant at the .01 level. When local level jurisdiction is present, the log odds of the statute being enacted (vs. not being enacted) decreases by -2.60. Exponentiation reveals that in the presence of local level authority, the odds of the special interest statute being enacted decreases by a factor of .073. The percent change in odds of the special interest statute being enacted in the presence of local level authority is -92.6%.

For every additional constraint on agency discretion, the probability of special interest legislation increases (coef. = 1.67; z statistic = 1.90). Additionally, this model shows that market power is more important than in other models. For each additional constraint on agency discretion, the log odds of the statute being enacted (vs. not being enacted) increase by 1.67. For each additional constraint on discretion, the odds of the special interest statute being enacted increases by a factor of 5.35. The percent change in odds for each additional constraint is 435%.

In this regulatory arrangement, the legislature does not have the same benefit of expertise on cable television matters typically associated with state agency jurisdiction. The mere presence of authority by a local authority should increase public exposure to the issues because the public often directs questions and complaints on cable TV matters to their mayor, town council, or similar figure. Often these are authorities they know by name and can hold accountable at elections. Thus, local level officials may be more compelled to call the state legislature on behalf of local citizens than a state agency representative would be. Findings suggest that concentrating authority within the hands of the local government local does have cost reducing benefits and discourages legislative behavior favoring special interests. Additionally, the insignificance of coefficient for multiple clientele makes sense because the state agency involvement is not a factor when franchising authority is concentrated within communities.

The importance of Model II and Model III is that results help in qualifying the effects of redundant arrangements and in identifying the effects of many potential sources of scrutiny. If the competition were the primary driver of reduced monitoring costs, the association between the dependent variable and structure would be positive, because state government has little or no authority in this regulatory structure. The Tennessee Municipal League, the Tennessee Association of County Mayors and the Tennessee Cable Telecommunications Association have been vocal opponents of the proposed changes. The argument was that city and county governments mean more voices directed at the state legislature and a higher tendency to expose the issues. A recent proposal to reform franchising procedures in Tennessee reveals this propensity. On January 7th, the Knoxville News Sentinel reported the opinions of Knox County Mayor Mike Ragsdale, who also serves as president of the Tennessee Association of County Mayors. In the mayor's opinion, "City and county governments are in the absolute best position to make certain that cable franchises are responsive to the needs of the communities they serve." The article also reports that the state of Tennessee has 90 counties and over 300 cities. There is no reason to expect them to be any less vocal as the proposal before the state legislature similarly affects all of them. The same article reported the opinion of Knoxville spokeswoman Margie Nichols: "This is an issue that affects a lot of people…We believe it's important that it be regulated locally. The closer to home it is; the more control citizens have." The sharing of franchise fees between county and local government was also an issue. Knox County received $2.2 million in franchise fees in the previous fiscal year from cable operators, and the city of Knoxville, received about $1.5. According to Ragsdale, "local +governments rely on cable franchise fees to help support essential services like public education and public health, services that make a direct difference in the day-to-day lives of our citizens.

Having these monies sent to Nashville and then redistributed to local governments could negatively impact these services."[196]

Model IV tests the impact of the presence of home rule. All coefficients are in the hypothesized direction. The model is significant overall (Prob> chi2 = .015). In the presence of home rule, the probability of special interest legislation decreases (coef. = -4.30; z statistic = -2.45). The coefficient is statistically significant at the .014 level. Exponentiating, when home rule authority is present, the odds of the special interest statute being enacted decreases by a factor of .013. The percent change in odds of the special interest statute being enacted in the presence of home rule is -98.6%.

The coefficient for constraints on agency discretion is also significant at the .01 level. For every additional constraint on agency discretion, the probability of special interest legislation increases (coef. = 2.31; z statistic = 3.73). For each additional constraint on discretion, the odds of the special interest statute being enacted increases by a factor of 1.01. The percent change in odds for each additional constraint is 910%.

In the presence of multiple clientele, the probability of special interest legislation decreases (coef. = -5.60; z statistic = -2.83) Where there is multiple clientele, the odds of the special interest statute being enacted decreases by a factor of .003. The percent change in odds for multiple clientele -99.6%.

In states with home rule statutes, local authorities have wide latitude within their jurisdictional boundaries. As a matter of law, and tradition, state law tends to be less imposing in the presence of home rule. Findings suggest that state government authority with respect to video franchising does not have the same impact in home rule states, i.e. where local government expects to take matters into its own hands. As in Model III, it makes sense that the presence of local

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[196] A copy of the article by Carly Harrington is available at http://www.freepress.net/news/20727.

authority brings the public closer to the issues. More exposure and transparency results yield a lower probability of special interest behavior. The benefits of local level authority are also supported by collective action theory, which posits that when political authority is dispersed, more effort is required to influence policy (Olson, 1965). If legislators must take into account the views of many local government representatives in arriving at decisions, special interests are forced to spend resources for lobbying many more individuals than if they had to appease one state legislature and a state bureau.[197]

The model is robust to various specifications.[198] The coefficients remain stable across models and associations all remain in the same hypothesized direction. This provides some assurance with regard to validity and reliability of the model as a whole and the individual measures. The failure of some coefficients to meet an acceptable level of significance is not unexpected with a dataset contains only 50 observations.[199]

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[198] Models 1-4 were compared on the basis of the percent correctly predicted, Wald tests, Likelihood Ratio (LR) tests and Bayesian Information Criterion (BIC). Results show them to be comparable in most respects.

[199] *Endogeneity Tests*- It is likely that some of the factors that determine special interest policy, which are not measured and are therefore in the error term, also affect other variables. If this is the case, and the effect is in the same direction, then treating the variables as exogenous will bias the impact upward (Achen, 1986). If the model is endogenous, an instrument is required. Census division meets the criteria for a weak instrument. To test the efficacy of census division as an instrument, it was regressed on the structure producing an R^2 of .58 and an individual coefficient t- score of .051. When structure is instrumented, the equation produces results comparable to the equation without the instrument, i.e. with respect to the significance for shared authority. The original coefficient is -2.03; the coefficient on the instrument is 1.99, remaining significant at the .05 level. However, the variable for penetration/.market share is no longer significant in the instrumented equation. The Durbin-Wu-Hausman tests for endogeneity in the original equation, the null hypothesis for which states that an ordinary least squares estimator of the same equation would yield consistent estimates, i.e. endogeneity among the regressors would not have deleterious effects on estimates. A rejection of the null indicates that endogenous regressor effects on the estimates are meaningful and instrumental variable technique is required (Durbin 1954; Wu 1973; Hausman 1978). The results (.135) indicate that the instrumented model is not necessary.

State administrative procedures constrain agency discretion. Pursuant to the arguments presented, more constraints on the agency (less agency discretion) should be associated with more legislative slack and a higher incidence of special interest policy. The measure is a sum of three constraints rules: the right of the legislative committee to review proposed rules (shape the agenda), the power of the committee to suspend rules, and the authority of the committee to review existing rules. It may be that some constraints on agency rulemaking are more effective than others.

Alternatively, in terms of the distribution of authority, parity in the relationship may not affect competition or tendency for bi-directional oversight. Latent competition as described by Perrow (1984) may be present regardless of how evenly or unevenly authority is distributed between the two.

Summary

This chapter explored the impact of different bureaucratic and regulatory schemas on legislative behavior. It was driven by a question at the core of democracy: when policymakers are provided the option of acting either in their own self-interest or in the public interest, what motivates them to do the "right" thing? Before exploring the question definitions and distinctions of public interest and special interest provided by Levine & Forrence (1990) were adopted. Then, core ideas about information costs, competition and redundancy worked out by several respected scholars were put in context (Landau 1969; Bendor 1985; Ting 2003 Levine and Forrence 1990; Levine 2006). According to the argument, policymakers need "slack" to enact any policy that would not otherwise be sanctioned by the electorate. Slack has the effect of altering information and monitoring costs, which in turn conditions the behavior of decision makers. Absent high information and monitoring costs, legislators could not favor special interests over the general interest. These arguments were combined and tested in the context of telecommunications policy to see if policy that most would agree is special interest in nature could be explained by information costs and slack associated with variations in regulatory structures across states.

Findings indicated that some regulatory structures, specifically those characterized by overlapping jurisdiction between state and local government, did lower the incidence of special interest policy. The sharing of authority between government levels was also more effective in conditioning legislative behavior than several other factors, including whether regulator authority took place in agencies dedicated to one or multiple clientele. Findings are consistent with the idea that some bureaucratic structures may foster competition among authorities. The benefit afforded the public is increased transparency and reduction in the costs of information necessary to hold government accountable. This also implies that the same mechanisms that operate to foster legislative control of the bureaucracy may have a reverse causal effect, i.e. reducing legislative slack and discouraging decisions that, absent information costs, the electorate would not have approved. The benefits of structures that foster competitive relationships also depend upon how competition is defined. In the present study competition was defined in multiple ways, based on what was believed to be appropriate to telecommunications policymaking. Other policymaking environments will inevitably require alternative definitions.

Research of the type provided here is important because legislators don't always decide matters as voters would expect, nor do they always act in the public interest. Additionally, as governance arrangements become increasingly complex, with multiple politicians and bureaucrats all having some hand in policy, it becomes more and more difficult for voters to ascertain who is responsible for policy outcomes. Bureaucracies designed to foster accountability in this way could help in ensuring democratic outcomes. It is also important for a theory of public administration that accepts the political nature of the bureaucracy.

However, the study does have its limitations. Any attempt to map institutions to policy outcomes requires that all relevant elements of the policymaking environment (at the time the policy is made) be included in order to get unbiased estimates of the on the institution of interest. The model postulates that the main regulatory schemas affected the process for a given political environment. However, the given political environment has many dimensions, not all of which are known. Nonetheless, various factors were considered in alternative models, including the composition of the legislature, inter-government competition, ideological stances of voters and elected officials, and whether the governor had veto power. None of these alternatives (individually or jointly) seemed to matter when modeling direct effects. Their inclusion also did not significantly change the effects of other variables. The conclusion is therefore that these institutions do not directly constrain the process or what the legislator will commit to. I believe this is plausible. Yet there is no way to know if all omitted variables were considered.

Also, the standard argument for endogeneity regarding institutions is that decisions about structures/institutions and other legislation is strategic. If this is true, decisions are not random, but based on expectations of how these choices will affect policy, and actors attempts to change policy. However, the choice of regulatory schema, including locus of authority, home rule, regulation by independent agency versus shared commission, constraints on agency discretion, etc. were all made decades before the level playing field statutes were passed. Thus, these factors are at least contemporaneously exogenous. Nonetheless, some might argue that structures and processes are fundamentally endogenous. The models presented would therefore suffer from omitted variable bias. The variables missing would be related to the actors' expectations, unobserved heterogeneity, or some simultaneous influence of factors on both sides of the equation.

It is also possible that institutional variations (S1, S2, and S3) interact with the given political environment. The measures may also be too crude and therefore further analysis should be done with more narrowly defined regulatory schemas, considering for example, degrees of centralization and intermediate forms of integration. More narrowly specified regulatory variations were not likely to produce reliable results with only 50 observations, but they may prove useful if additional special-interest legislation can be found and additional time periods added.

Also, the use of cross-sectional data omits state fixed effects and assumes time-invariant omitted regressors are driving institutional choice, an approach which is defendable but also refutable. Ideally, the study should be expanded to include multiple policies from the same state over time with an analysis that uses state fixed effects or robust standard errors to allow for unspecified forms of correlation between observations from the same state over time.

As for other limitations, one could refute the validity of such unobservable features of the policymaking environment as slack. Although a perfect measure is not possible, efforts could be made to isolate some the effects of slack that are part of the overall argument, for example, by looking for evidence that lawmakers were cognizant of public sentiment and choose to ignore it. The public sentiment could also be more closely approximated with a survey. Additionally, more could be done to get at the nature of the relationship between regulators and legislators. How contentious is it or isn't it? A survey of agency officials probing the interactions between the two branches may or may not be fruitful.

Table 10
States with Pro-Industry Regulation with Citations

Level Playing Field Statutes	
	Code/ Source
Alabama	11-27-2
California	Gov Code §53066.3 (d) (1995)
Connecticut	§ 16-331
Florida	§166.046
Illinois	65 ILCS 5/11-42-11 (1995)
Kentucky	
Minnesota	Chap 238.08 (1) (b)
New Hampshire	Chapter 53 C- Section 53-C:3b
Oklahoma	11 OKL St 22-107.1
Tennessee	59 § 7-59-204 through 7-59.206
Texas	Tex . Rev. Civ. Stat Ann. Art 1446c-0 (West Supp 1996) (PURA 95) See FCC Memorandum Opinion and Order FCC 97-346, Oct 1, 1997
Virginia	§ 15.1-23-1

Table 11
Data Sources

Level Playing Field Statutes	Westlaw; LexisNexis Academic Dayton, Ohio. Retrieved from University of Georgia Library Website: http://web.lexis-nexis.com/universe
Reg Structures (S1, S2, S3)	Multiple sources: Federal Communications Fact Sheet June 2000. See http://www.fcc.gov/mb/facts/csgen.htmlhttp://www.fcc.gov/mb/facts/csgen.html; Robert Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles,* 44 Fed Comm L.J. 1991-1992; PUC Websites
Home Rule	Westlaw; LexisNexis Academic Dayton, Ohio. Retrieved from University of Georgia Library Website: http://web.lexis-nexis.com/universe
Cable TV Penetration (market power)	Television and Cable Fact Book (1985-1999). Washington, D.C.: Warren Publishing, Inc
Competition in State Prior to Level Playing Field Statute	Television and Cable Fact Book (1985). Washington, D.C.: Warren Publishing, Inc
Clientele	National Association of Regulatory Utility Commissioners. NARUC Yearbook of Regulatory Agencies 1994-1995.Washigton, D.C. , National Association of Regulatory Commissioners, 1996, 425-25; 2006 NRRI Blue Pages; Report by McClean and Brown including number of commissioners, staff numbers and election or appointment
Government Ideology	Berry, William D., Evan J. Ringquist, Richard C. Fording, and Russell L. Hanson. 1998. Measuring citizen and government ideology in the American states, 1960-93. In *American Journal of Political Science*.
State APA Constraints on Discretion	Council of State Governments and American Legislators' Association. Book of States. Lexington, KY, 1994
Agency Staff per 10,000 Households with Cable	Television and Cable Fact Book (1991). Washington, D.C.: Warren Publishing, Inc

Table 12
Summary Statistics for Analysis of Legislative Action

	Mean	S.D.	Min	Max
Level Playing Field Statute	0.24	0.43	0	1
Market Power	0.67	0.15	0.31	1
Agency Staff	193.24	196.42	18	1024
Shared Authority	0.24	0.43	0	1
Local Authority; State Sets Standards	0.33	.32	0	1
Clientele	0.44	.38	0	1
Laws Limiting Administrative Discretion	1.86	1.16	0	3
Local Gov Authority	0.76	0.43	0	1
Home Rule	0.72	0.40	0	1
Prior Competition	0.74	0.44	0	1
Government Ideology Measure	53.11	19.57	13.88	93.5
1980 Population (in thousands)	4703.8	4995.9	504.8	25884
Citizen Ideology Measure	49.12	14.98	25.56	83.92

Table 13 Correlation Table

	1	2	3	4	5	6	7	8	9	10	11	12	13
1	Level Playing Field Statute	1.0											
2	S1	.18	1.0										
3	S2	.01	-.81	1.0									
4	S3	.05	-.36	.62	1.0								
5	Home Rule	-.15	-.11	.21	.42	1.0							
6	Penetration	.10	.24	-.12	-.11	- .25	1.0						
7	Prior Competition	.23	-.21	.31	.42	.27	- .12	1.0					
8	Clientele	-.12	.49	-72	-.86	- .32	.16	- .32	1.0				
9	Ideology	-.02	.32	-.37	-.29	.03	.28	.03	.39	1.0			
10	Discretion Limits	.34	-.07	.11	.10	.17	- .24	.40	- .17	.01	1.0		
11	Staff per 10000 Households	.00	.00	.05	.13	- 36	.12	- .10	- .15	- .11	.05	1.0	
12	Population 1984 (1000)	.29	-.10	.18	.29	.22	- .13	.40	- .22	.07	- .06	- .26	1

Table 14
Logit Results

	I	II	III	IV
Dependent Variable		Level Playing Field Statute		
State and Local Gov Share Jurisdiction	-2.03**			
	-(2.1)			
State Gov Jurisdiction		2.34**		
		(2.23)		
Local Gov Jurisdiction			-2.609***	
			-(2.7)	
Home Rule Local Authority				-4.302**
				-(2.45)
Cable TV Penetration (market power)	5.845*	5.699*	5.998**	4.172
	(1.72)	(1.65)	(1.96)	(1.18)
Competition in State Prior to Statute	-0.864	-0.593	-0.757	-1.756
	-(0.63)	-(0.44)	-(0.45)	(-1.31)
Multiple Clientele	-3.078*	-3.476*	-1.451	-5.609***
	-(1.74)	-(1.71)	-(1.03)	-(2.83)
Government Ideology	-0.02	-0.015	-0.012	0.011
	(0.86)	(0.66)	(0.36)	(0.35)
Constraints on State Agency Discretion	1.577**	1.657**	1.678*	2.313***
	(2.32)	(2.18)	(1.90)	(3.73)
State Reg Staff	-0.001	-0.001	0	0.001
	-(0.15)	-(0.14)	(0.05)	(0.26)
Population	0	0	0	0**
	(1.44)	(1.38)	(1.09)	(2.55)
Constant	-5.851	-8.659**	-6.886	-5.935
	-(1.69)	-(2.09)	-(1.91)	(1.89)
N	50	50	50	50

*Robust z statistics in parentheses * significant at 10% ** significant at 5%; *** significant at 1%*

CHAPTER 8

CONCLUSION

In the mid 20th century, Dwight Waldo (1952) challenged students of the field to develop a political theory of public administration, one that reconciles the political nature of the bureaucracy with democratic values. Yet more than fifty years later, an uneasy relationship between public administration and democracy persists (West 1997).[200]. This dissertation attempted to make a small contribution toward a coherent theory of political organizations by analyzing regulatory agencies as political agencies and addressing the question of how bureaucratic design can facilitate public policy effectiveness and accountability.

This dissertation departed from much of the so-called "positive" research on the topic, which focuses on the narrow question of how the legislature should control the bureaucracy. This is not to say that the bureaucracy should not be held accountable, nor that legislative oversight is not constitutionally proper. As James Madison stated in Federalist #51, "if all men were angels, no government would be necessary." However, as Warren (1996) contends, "it does not follow that we

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[200] Some scholars may disagree. For example, proponents of the Blacksburg perspective contend that public administrators have a moral obligation to participate in policy (Wamsley and Wolf 1996). Likewise, Charles Goodsell (1994) "makes the case" that the policy making role for administrators is inherently legitimate. And see Svara's (1994) co-equal model depicting the absence of control by elected officials over administrators in council governments and sketching blurred lines of authority in relationships between elected officials and the bureaucracy. Similarly, representative bureaucracy does not assume the sanctity of elections; instead it directs itself to exploring the connection between the demographic makeup of the bureaucracy and its constituency, and whether homogeneity of attributes, such as race, gender, socio-economic factors, and the like lead decision makers to act in ways that reflect the interest of those represented (Kingsley, 1944; Krislov 1974; Mosher 1982; Selden 1997). To date, however, evidence on representative bureaucracy is mixed (Keiser, et al. 2002).

should seek more controls over public officials than are necessary (p.153). Congress already has at its disposal a variety of ways to control administrators, including four specific oversight powers: "organization, authorization, financing, and investigation" (Neustadt 1978, 51). Agencies are created by Congress in the first place and their discretionary boundaries are often detailed in enabling statutes. If necessary, Congress can amend legislation to curtail powers it initially provided to the agency. With the power of the purse strings, Congress has the power to withhold funds whenever it deems necessary (Peters 1984). Congress also has investigatory powers, which it can use to constrain administrative power. And agency use of authority is subject to continued oversight by committees, often before during and after rulemaking. Some scholars believe that Congressional oversight is more than adequate and that too much control of the bureaucracy could be detrimental to policy. As Johnson (1992) notes, Congress has… "every advantage in prevailing over any dispute it may have with the bureaucracy" (159).

Additionally, there are many ways to achieve democratic outcomes, and we need not assume that the approach should be top-down. The issue of accountability should attach responsibility to elected officials as well as to administrators. The research domain should be more about the larger picture, i.e. securing a democratically responsible "system," not just a democratically responsible administration. Moreover, the more a top-down perspective dominates the research agenda, the less open we become to other ways of looking at the problem. The fact is, for better or worse, administrative agencies have legislative, judicial, and administrative functions (Warren 1996). The authority of the bureaucracy is backed by the coercive nature of the state, which provides it with the legal authority to make laws. No doubt there is some truth to the contention that administration and politics can never be fully functionally separated (Warren 1996, 175). Just as important, there is no reason to conclude that curtailing bureaucratic authority is the best way to achieve democratic accountability or, that limiting discretion is a worthwhile endeavor. It may or may not be, but the answer cannot be known without making serious attempts to understand the effects of bureaucratic authority on policy outputs and outcomes.

To pursue a political theory of public administration is to attempt to understand the nature of political organizations, what they look like, why some endure and some do not, and why they fail to take the forms suggested by theories based in rational choice. To pursue a political theory of bureaucracy is also to understand the relationship between key policymakers and how factors such as bureaucratic structure and process combine to affect policy outcomes. Answering these questions brings us that much closer to understanding how political organizations might be structured for effectiveness and accountability.

In pursuing questions about the impact of the bureaucracy this dissertation has neither denied nor ignored that bureaucratic authority is sometimes exercised in ways that conflict with ideals of rationality, objectivity, and the public interest in general. Indeed, Chapters 2 through 6 demonstrated that bureaucracies can be just as political as their legislative counterparts. That is to say, on their own behalf, they directly engage with other actors including lawmakers and special interests. They influence and are influenced by the political process and the interactions of key stakeholders. Chapters 2 through 6 also made evident that telecommunications regulation, and the political organizations that have evolved with it, do not always put the public interest first. Strong arguments can be made that the persistence of the AT&T monopoly for more than 75 years is evidence of special interest policy. Similar arguments were made regarding broadcast spectrum give a ways and the 1984 Cable Act. Yet it was also clear that sometimes the public interest does prevail despite regulatory economic theories that predict the opposite. Decisions that bear the hallmarks of public interest included the FCC's Order requiring NBC to spin-off affiliates in the 1950's, the FCC's Carterphone decision in 1968, and the breakup of AT&T. And on the state level, not all legislators decided to enact level playing field statutes. These examples make it clear that neither regulatory economic theories nor public interest theories fully account telecommunications policymaking

The historical account also made clear that authority "not to decide" is as important as authority "to decide." For instance, the FCC's failure to make a timely determination on the appropriate model of regulation (common carrier, broadcast, First Amendment status, etc.) has had critical implications. For example, at different junctures, federal, state, and local authorities treated Cable as a natural monopoly. As a consequence, the industry received preferential treatment, although no actual ruling on the merits of the issue was ever made and a number of respected economists have refuted the characterization.

The political history also brought out the bureaucracy's clear stake in policy outcomes, an interest that should be considered separate from that of legislators, special interests, and others. In some instances, the positions taken by a particular bureaucracy or government subunit appeared to be strategies of organizational survival. Consider, for example, the wrangling between the FCC and state agencies officials over who should have the upper hand in regulating telephone services. The success of these efforts was likely to determine, not just the scope of authority, but eventually whether some agencies would be necessary at all. State-commissioned reports in the 1970's, which contended that state agencies were better equipped than municipalities to regulate cable is another example of an attempt at legitimation and survival. And in a very recent example, many local governments are currently appearing before state legislatures to argue that the state should not be allowed to shift franchising authority to the state-level. These disputes over how regulation should be structured have implications for the survival of different parts of the larger political organization. It is also clear from the positions taken by the actors that the institutional location for decisions has implications for who will be heard and ultimately for which industry sector will prevail in the telecommunications marketplace. The telephone industry is lobbying for state-level authority, while the incumbent cable operators have taken the position that authority should be local.

Chapter 7 explored the variations in regulatory schemas associated with the regulation of telecommunications, in particular those related to granting franchises to providers of video service, and demonstrated a connection between the design of political agencies and effectiveness. Understanding the impacts of different structures and institutions on effectiveness is an important endeavor in itself. On a more practical level, it may also be *useful in the on-going debate regarding the optimum regulatory schema.

Before any level of understanding could be reached, however, it was necessary to decide what regulatory structures should be distinguished for the analytical purposes. Indeed, regulatory structure could have been defined many ways. The path chosen was to broadly classify schemes according to whether the locus of authority was the state, local government or both. However, even with a broad classification scheme, accuracy required looking past some of the initial clues to decipher the actual location of authority. To be more specific, just because an enabling statute specified that authority resided with the locality did not necessarily make it so. *De facto* and *de jure* authority did not coincide in all cases. To accurately determine the locus of authority required examination of a collection of institutions, including, for example, home rule statutes and APA procedures. These difficulties suggest that future studies will require care in defining the concept of structure in the context of authority. It will be equally important to take care in defining the concepts of competition (in relation to actors and not the policy outcome) and redundancy.

The objective of the study in chapter 7 was to understand how organizational structures impact effectiveness, which was indicated by the presence of multiple franchise agreements within the state. In the process, two competing claims were assessed, one arguing that governmental actors in the middle of the hierarchy (state-level agencies) were more likely to innovate, defend the public interest, and meet and exceed policy objectives (Carpenter 2001). The second theory was an extension of redundancy theory applied to public organization settings, i.e. a theory of bureaucratic redundancy (Ting 2003). Results of econometric analysis provided guarded support for the importance of the state-level bureaucracy and conditioned its impact on the involvement of other organizational subunits. Thus, the mere existence of a state-centered hub for decision making did not appear to be the most important factor in organizational effectiveness. As it turned out, redundancy, defined multiple ways in the study, did improve organizational effectiveness. Importantly, the definition of effectiveness in the study coincided with preferences expressed by the polity, i.e. more competition. The results suggest, therefore, as Kenneth Meier (1997) once put it, more bureaucracy can equal more democracy. Yet much more could be done with regard to testing the conditions under which redundancy is more likely to be effective. The question becomes, in what ways does the public win and in what ways does it lose? No doubt, if a policy win requires lobbying at multiple levels of government, resourceful and concentrated special interests have an advantage over a dispersed disorganized public. Evidence of substantial campaign contributions by industry at multiple levels of government suggest this kind of multi-pronged effort at influence is necessary. And logically, where authority is spread among multiple government units, the public has more difficultly deciphering who deserves credit and who deserves blame. Thus, on the one hand redundancy may disadvantage the public by diminishing accountability and hampering collective action, yet, on the other hand, it may foster competition among government actors, which may enhance accountability. These findings are not easily reconciled. The argument advanced by Ting, specifically that redundancy is not as important when the preferences of at least one agent are close to that of the principal's may provide an avenue for understanding the conditional effects of redundancy and is worthy of pursuit. Of course, this brings up the dilemma regarding how to measure preferences. I don't believe that such a study is doomed because preferences are not directly observable. One could make various assumptions about preferences of the multiple parties for the purpose of further testing Ting's claims, and these assumptions could be supported. For example, the FCC, Congress, and the general public (3 principals) have expressed an interest in advancing competition. It seems to me that the record is clear on this and one could take the position that preferences are inferred with regard to all three "principals." Conceptualizing the state and local government as multiple agents, preferences could be inferred from the effect of statutes, rules and regulations, and ordinances. These steps were not taken in the present research but could be in the future.

Chapter 8 showed that bureaucratic design can have an impact on legislative behavior. The main argument was that bureaucratic design impacts costs associated with monitoring legislative behavior and thus, either encourages or discourages lawmakers to act in accordance with the public interest. The policy used for evaluation was the level playing field statute, which was passed by various state legislatures in the 1980's and 1990's. A concerted effort was made to distinguish between concepts critical to the study, including general interest policies and special interest policies- an attempt to move passed the normative debate into a more positive realm and to somehow analytically distinguish policy outcomes. Arguments and studies were made to support the special-interest nature of level playing field statutes, including the benefits the statutes provided to a narrow group at the expense of the wider public and the fact that surveys indicate that an informed polity would not have likely supported the policy.

The logic of the analysis is essentially a long list of assumptions contained in recent research employing agency theory and information costs. The logic put forward was as follows: the structure of a public organization, including its subunits and divisions of authority, define the availability, character, and flow of information necessary to assess the performance of its representatives. There is an information problem, or agency problem, inherent in every public organization, and the structural characteristics of the organization can either mitigate the agency problem or exacerbate it.

Thus, all political organizations have slack, an unobservable characteristic that determines the state of information asymmetry and the extent to which elected representatives can conceal their actions from the public. The importance of slack is that it affects monitoring costs, i.e. the difficulty with which the public can observe the behavior of elected officials. Moreover, political actors in different subunits of an organization exist in a natural state of competition, which reduces slack and therefore monitoring costs. The assumptions themselves were not evaluated. Accepting the assumptions as truth, the empirics looked at the probability of legislative behavior as a function of institutions- taking the assumptions as true.

As it turned out, when legislative decisions were more exposed, vis-à-vis bureaucratic structure, lawmakers were less inclined to favor special interests over the interest of the public. However, there is no way to really know what politicians were going to do in the first place. Therefore it is difficult to know how regulatory arrangements could have changed what they actually did. Post-Dowsian literature on political economy suggests two ways that institutions can affect policy at this stage of the policymaking process. Institutions can directly affect policy priorities or they can change what the politicians can actually do. For example, if a legislator knows that the bureau will not carry out policy, for example, because it does not have sufficient resources, this may reduce the credibility of any promises (s)he makes to special interests.

Any attempt to map institutions to policy outcomes requires that all relevant elements of the policymaking environment (at the time the policy is made) be included in order to get unbiased estimates of the on the institution of interest. The model postulates that the main regulatory schemas affected the process for a given political environment. However, the given political environment requires careful consideration. Various factors were considered in alternative models including the composition of the legislature, inter-government competition, ideological stances of voters and elected officials, and whether the governor had veto power. In one equation, a control for Nebraska, which has only one House, was also done. None of these alternatives (individually or in combination) seemed to matter when modeling direct effects. Their inclusion also did not significantly change the effects of other variables. The conclusion is therefore that these institutions do not directly constrain the process or what the legislator will commit to. I believe this is plausible.

It is possible that regardless of the percent of party control or the ability of elected officials to credibly commit changes policy outcomes. In other words, not all sources of scrutiny may actually matter for purposes of behavior or incentives. However, it may also be that institutional variations interact with the given political environment. It may also be that the regulatory differences chosen for analysis were too crude, and that further analysis should be done with more narrowly defined regulatory schemas, considering for example, degrees of centralization and intermediate forms of integration. More narrowly specified regulatory variations were not likely to produce reliable results with only 50 observations, but they may prove useful if additional special- interest legislation can be found and additional time periods added. The policy examined, the level playing field statute, varied by state but not over time. Also, the use of cross-sectional data omits state fixed effects and assumes time-invariant omitted regressors are driving institutional choice, an approach which is defendable but also refutable. Ideally, the study should be expanded to include multiple policies from the same state over time with an analysis that uses state fixed effects or robust standard errors to allow for unspecified forms of correlation between observations from the same state over time.

As for other limitations, one could refute the validity of such unobservable features of the policymaking environment as slack. Although a perfect measure is not possible, efforts could be made to isolate some the effects of slack that are part of the overall argument, for example, by looking for evidence that lawmakers were cognizant of public sentiment and choose to ignore it. The public sentiment could also be more closely approximated with a survey. Additionally, more could be done to get at the nature of the relationship between regulators and legislators. How contentious is it or isn't it? A survey of agency officials probing the interactions between the two branches may or may not be fruitful.

Still, for any limitations, the possibility that bureaucratic control of the legislature may be just as important as legislative control of the bureaucracy in producing democratic outcomes has profound implications for the study of public administration and for integrating politics and administration into a coherent theory. Recasting the question of accountability in this way suggests that bureaucrats have a special stewardship role in assuring that elected officials enact policy in the public interest, hopefully offering at least a glimmer of new light on the most persistent question in public administration, i.e. how to reconcile the role of the bureaucracy with democratic values.

GLOSSARY

BASIC SERVICES TIER- The basic services tier must include most local broadcast stations, as well as the public, educational, and governmental channels required by the franchise agreement between the local franchise authority (LFA), or other governmental organization authorized by the state to regulate cable television service – The may regulate the rates your cable company charges for the basic services tier. If the FCC finds that a local cable company is subject to "effective competition" (as defined by Federal law), the LFA may not regulate the rates it charges for the basic services tier. The rates charged by certain small cable companies are not subject to regulation. They are determined by the companies.

BANDWIDTH-The capacity of a telecom line to carry signals. The necessary bandwidth is the amount of spectrum required to transmit the signal without distortion or loss of information. FCC rules require suppression of the signal outside the band to prevent interference.

BROADBAND-Broadband is a descriptive term for evolving digital technologies that provide consumers a signal switched facility offering integrated access to voice, high-speed data service, video-demand services, and interactive delivery services. vide video, voice and data services over a single network.

CABLE COMMUNICATIONS POLICY ACT OF 1984 (The 1984 Cable Act)- Pub. L No. 98-549, 98 Stat. 2779 preempted local rate regulation and it also clarified the then current regulatory structure of federal, state, and local regulation. According to the FCC, the 1984 Act continues reliance on the local authorities as the primary franchisors, while limiting the scope of authority so as to make it consistent with the new legislation. The legislation was sponsored by Senator Barry Goldwater and allowed monopolies on Cable Television in each community in exchange for 3% of all revenues to be granted to the communities themselves leading to the birth of modern day public access community television and what is called PEG or Public, Educational and Government(channel) TV.

CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992- Legislation (Pub. L. No. 102-385) of the U.S. Congress "to amend the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets, and for other purposes." This act was largely superceded by the Telecommunications Act of 1996

CLEC- Competitive Local Exchange Carrier (CLEC), in the United States, is a telecommunications provider company (sometimes called a "carrier") that competes with other, already established carriers (generally the incumbent local exchange carrier (ILEC))

COMMERCIAL LEASED ACCESS-Manner through which independent video producers can access cable capacity for a fee.

COMMON CARRIER-In the telecommunications arena, the term used to describe a telephone company.

COMMUNICATIONS ACT OF 1934- The earliest federal law governing cable. United States federal law enacted as Public Law Number 416, Act of June 19, 1934, ch. 652, 48 Stat. 1064, by the 73rd Congress, codified as Chapter 5 of Title 47 of the United States Code, 47 U.S.C. § 151 et seq. The Act replaced the Federal Radio Commission with the Federal Communications Commission (FCC). It also transferred regulation of interstate telephone services from the Interstate Commerce Commission to the FCC. According to this law the use of a franchise to govern the terms and conditions of cable's use of public facilities was justified on natural monopoly grounds.

COMMUNITY ANTENNA TELEVISION (CATV)-A service through which subscribers pay to have local television stations and additional programs brought into their homes from an antenna via a coaxial cable.

DIGITAL TELEVISION (DTV)-A new technology for transmitting and receiving broadcast television signals. DTV provides clearer resolution and improved sound quality.

DIRECT BROADCAST SATELLITE (DBS/DISH)-A high-powered satellite that transmits or retransmits signals which are intended for direct reception by the public. The signal is transmitted to a small earth station or dish (usually the size of an 18-inch pizza pan) mounted on homes or other buildings.

EFFECTIVE COMPETITION-Effective Competition: Where two or more cable operators provide service in the same municipality, one or both of the cable operators may seek a determination from the Federal Communications Commission ("FCC") that there is sufficient competition to control basic service tier ("BST") rates and thus government regulation is no longer required. If the FCC grants the cable operator's petition, the FCC deems the municipality to have effective competition and revokes the Cable Television Division's authority to establish BST rates for the cable operator in that municipality.

EMINENT DOMAIN- The power of the federal or state government to take private property for a public purpose, even if the property owner objects. The Fifth Amendment to the United States Constitution allows the government to take private property if the taking is for a public use and the owner is "justly compensated" (usually, paid fair market value) for his or her loss. A public use is virtually anything that is sanctioned by a federal or state legislative body, but such uses may include roads, parks, reservoirs, schools, hospitals or other public buildings.

ENHANCED SERVICE PROVIDERS-A for-profit business that offers to transmit voice and data messages and simultaneously adds value to the messages it transmits. Examples include telephone answering services, alarm/security companies and transaction processing companies.

FEDERAL COMMUNICATIONS COMMISSION (also referred to as FCC)- The FCC is an independent government agency, directly responsible to Congress. The FCC was established by the Communications Act of 1934 and is charged with regulating the communications infrastructure including interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions.

FRANCHISE FEE-Under federal law, non-capital costs relating to license requirements are considered franchise fees and may be passed on to subscribers. As a matter of federal law, a municipality may request up to five percent of the cable operator's annual gross revenue from operating in the municipality less the required License Fee.

FULL BUILD- A requirement sometimes imposed on the franchisee conditioning approval of the franchise on extension of service to all parts of the jurisdiction.

HEADEND-The electronic control center of a cable system. This is the site of the receiving antenna and the signal processing equipment essential to proper functioning of a cable system.

HIGH DEFINITION TELEVISION (also referred to as HDTV)-Improved television system that provides approximately twice the vertical and horizontal video resolution of existing standards and audio quality approaching that of compact discs. The result is an enhanced picture and audio quality.

HOMES PASSED-Those homes within a municipality that are located close enough to a cable line to be able to connect with cable service, regardless of whether those households actually opt to subscribe to the cable service.

INSTITUTIONAL NETWORK (also referred to as I-Net)-A separate closed loop network for municipal institutional use only. Used to connect police, fire departments, town or city hall, and schools; can contain both video and data; can also be used to monitor heat, light, and security systems.

INTERACTIVE VIDEO DATA SERVICE (IVDS)-A communication system, operating over a short distance, that allows nearly instantaneous two-way responses by using a hand-held device at a fixed location. Viewer participation in game shows, distance learning and e-mail on computer networks are examples.

LEC-Regulatory term. In the U.S., wireline telephone companies are divided into two large categories: long distance (interexchange carrier, or IXCs) and local (local exchange carrier, or LECs). This structure is a result of 1984 divestiture of then regulated monopoly carrier AT&T (American Telephone and Telegraph). Local telephone companies at the time of the divestiture are also known as Incumbent Local Exchange Carriers (ILEC).

LICENSE OR FRANCHISE- An agreement between the Issuing Authority and the cable operator that authorizes the construction or operation of a cable system. It also establishes the terms and conditions of cable television service such as the length of the contract, customer service standards, and procedures for funding access channels.

LINE EXTENSION-Construction of a cable line in an area that falls outside or exceeds the primary service area as defined in the license. The cable operator may require that subscribers pay for the extra costs involved in laying cable to this geographical area. (See also Primary Service Area; compare Non-Standard Installation).

LOCAL ORIGINATION-Cable channel owned and operated by the cable operator and over which the cable operator may exert editorial control. Typically carries programs of local interest and local advertising and may carry public, educational or governmental programming if provided for in the license. (compare Access Channels).

LOCAL SIGNALS-Stations falling within the Predicted Grade B Contour (see Grade B Contour and Must Carry).

MODIFIED FINAL JUDGMENT (MFJ)- is the 1982 antitrust suit settlement agreement (consent decree) entered into by the United States Department of Justice and the American Telephone and Telegraph Company (AT&T) that, after modification and upon approval of the United States District Court for the District of Columbia, required the divestiture of the Bell Operating Companies from AT&T

MULTIPLE SYSTEM OPERATOR (also referred to as MSO) cable operator that owns two or more cable systems, meaning service is provided in two or more distinct geographic areas. Adelphia, Charter, Comcast, Cox, RCN, and Time Warner all qualify as MSOs.

MUST-CARRY (Retransmission)-A 1992 Cable Act term requiring a cable system to carry signals of both commercial and noncommercial television broadcast stations that are "local" to the area served by the cable system.

NCTA- National Cable Television Association

NETWORK-Any connection of two or more computers that enables them to communicate. Networks may include transmission devices, servers, cables, routers and satellites. The phone network is the total infrastructure for transmitting phone messages.

NON-STANDARD INSTALLATION-Installation of cable service or a drop line that exceeds the standard installation distance specified in the license, which is typically greater than 150 feet from the cable line existing on a public road. The cable operator may charge the subscriber for the costs of laying the cable this extra distance (compare Line Extension).

OPEN VIDEO SYSTEMS-An alternative method to provide cable-like video service to subscribers.

OPERATOR SERVICE PROVIDER (OSP)-A common carrier that provides services from public phones, including payphones and those in hotels/motels.

OVERBUILD-When a competing cable operator builds a cable network system in an area already serviced by a cable operator, this competing cable operator is known as an overbuilder.

PAY-PER-VIEW- Programming, typically movies or special events, that a subscriber specifically requests to receive for a single fee added to the monthly cable bill. Some cable operators have the capability of determining whether the pay-per-view program was purchased via telephone or by on-screen interactive remote control and whether the converter channel was then set on the appropriate movie channel in order to receive the programming. Rates for pay-per-view programming are not regulated.

PEG: Public, educational, and governmental channels (see Access Channels and Local Origination).

PENETRATION- Ratio of basic cable subscribers to homes passed within an area; measure of market power

PREMIUM CHANNELS -Channels not included in a cable operator's regular service tiers. HBO and Showtime are examples of premium channels. In order to obtain premium channels, cable operators are allowed to require that the subscriber purchase the basic service tier, rent or purchase a converter box, and pay additional fees. Rates for premium channels are not regulated.

PRIMARY SERVICE AREA-The geographical area within the municipality designated by the Issuing Authority and the cable operator as the area where cable lines will be laid and cable service will be made available to all Residents.

RBOC-On January 8, 1982, AT&T settled the suit and agreed to spin off its local exchange service operating companies in return for a chance to go into the Internet services industry. Effective January 1, 1984, AT&T's local operations were split into seven independent Regional Bell Operating Companies known as Baby Bells.

REBUILD-Process where the cable television system in a municipality is reconstructed as if there were no existing wires or capabilities.

RIGHT-OF-WAY- The right to pass over property owned by another party, or the path or thoroughfare on which such passage is made. Public right of way concerns property owed by the pubic, such as streets or roadways. Government can grant use of rights-of-way to companies when deemed it in the public interest to do so.

SATELLITE-A radio relay station that orbits the earth. A complete satellite communications system also includes earth stations that communicate with each other via the satellite. The satellite receives a signal transmitted by an originating earth station and retransmits that signal to the destination earth station(s). Satellites are used to transmit telephone, television and data signals originated by common carriers, broadcasters and distributors of cable TV program material.

SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999 (SHVIA)
An Act modifying the Satellite Home Viewer Act of 1988, SHVIA permits satellite companies to provide local broadcast TV signals to all subscribers who reside in the local TV station's market. SHVIA also permits satellite companies to provide "distant" network broadcast stations to eligible satellite subscribers.

SATELLITE MASTER ANTENNA TELEVISION (SMATV)-A satellite dish system used to deliver signals to multiple dwelling units (e.g., apartment buildings and trailer parks).

SERVICE PROVIDER-A telecommunications provider that owns circuit switching equipment.

SPECTRUM-The range of electromagnetic radio frequencies used in the transmission of sound, data and television.

TARIFF-The documents filed by a carrier describing their services and the payments to be charged for such services.

TELECOMMUNICATIONS ACT OF 1996- Telecommunications Act of 1996 (1996 Telecom Act), 47 U.S.C. § 157, S. 652, 104th Congress. The first major overhaul of telecommunications law in almost 62 years. The goal of this new law is to let anyone enter any communications business -- to let any communications business compete in any market against any other. The 1996 Act envisions a network of interconnected networks that are composed of complementary components and generally provide both competing and complementary services. Moreover, it mandates interconnection of telecommunications networks, unbundling, non-discrimination, and cost-based pricing of leased parts of the network, so that competitors can enter easily and compete component by component as well as service by service. The 1996 Act imposes conditions to ensure that de facto monopoly power is not exported to vertically-related (complementary) markets. The Act preserves subsidized local service to achieve "Universal Service," that is, the provision of basic local service to the widest possible number of customers. However, the Act imposes the requirement that subsidization is transparent and that subsidies are raised in a competitively neutral manner. Thus, the Act leads the way to the elimination of subsidization of Universal Service through the traditional method of high access charges.

TELECOMMUNICATIONS RELAY SERVICE (TRS)-A free service that enables persons with TTYs, individuals who use sign language and people who have speech disabilities to use telephone services by having a third party transmit and translate the call.

TELEPHONY-The word used to describe the science of transmitting voice over a telecommunications network.

UNBUNDLING-The term used to describe the access provided by local exchange carriers so that other service providers can buy or lease portions of its network elements, such as interconnection loops, to serve subscribers.

UNIVERSAL SERVICE-The financial mechanism which helps compensate telephone companies or other communications entities for providing access to telecommunications services at reasonable and affordable rates throughout the country, including rural, insular and high costs areas, and to public institutions. Companies, not consumers, are required by law to contribute to this fund. The law does not prohibit companies from passing this charge on to customers.

V-CHIP-System that is built into television sets and allows users to screen out, based on television ratings, programs they do not want household members to watch. Those subscribers with older television sets may need to purchase a set-top box that utilizes V-Chip technology in order to access this feature (see Parental Lock Capability).

Sources: Communications Act of 1934, as amended, Section 601, et seq., 47 U.S.C. § 521, et seq.; 47 C.F.R. § 76.1 et seq.; Federal Communications Commission website (www.fcc.gov); National Cable & Telecommunications Association website (www.ncta.com); The Essential Guide to Telecommunications, Annabel Z. Dodd (1998).

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