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# Broadcasting and the Administrative Process in Japan and the United States

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## Broadcasting and the Administrative Process in Japan and the United States

JONATHAN WEINBERG\*

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Much of the material in this Article is drawn from interviews with Japanese government officials and industry members. I have listed those persons in the Appendix; all of them sacrificed unusually long periods of time answering questions I put to them, and I want to extend to them my special thanks. I want to thank, in addition, a number of persons to whom I spoke more briefly and whom I have not identified. Because a number of field interviews were entered into under an assurance of confidentiality, and because of the Japanese practice that journalistic and scholarly interviews are presumptively conducted on a non-attribution basis, I will as a general matter in this Article not make specific citation to interviews. In this footnote, as elsewhere in this Article, I have written English transliterations of Japanese names in the modern style, with the family name appearing last.

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**I**N every nation that allows private exploitation of broadcasting and other electronic mass media,<sup>1</sup> some government agency is assigned the job of regulating those media. That agency's job is to determine who is to be allowed to speak over the airwaves, who is to be forbidden, and what those who are allowed to speak may say. In the United States, that role is played by the Federal Communications Commission (FCC). In Japan, it is played by the Ministry of Posts and Telecommunications (MPT). In other countries, the gatekeepers have other names.

Governments justify their control over who may broadcast in a variety of ways. Many justifications are based on the idea that the ability to speak over the electronic mass media is not merely a source of profit or of

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1. I will use the terms "broadcast," "broadcasting," and speech "over the airwaves" in this Article to refer to the electronic mass media generally, including media such as cable television that reach the ultimate consumer through wires rather than spectrum. This usage, while lacking in precision, avoids the mind-numbing effects of repeating the phrase "electronic mass media" every sentence or so.

gratification; it is a source of power.<sup>2</sup> Leaving that right to the market is seen as allocating that power to those who are already economically favored, and allowing them to use it to shape public views and desires.<sup>3</sup> I do not propose to discuss in this Article the justifications for broadcast regulation, however, or the important constitutional law questions raised by a government agency parceling out the right to speak over the airwaves to some individuals and not to others.<sup>4</sup> Nor do I propose to discuss more than fleetingly questions of comparative constitutional law raised by different countries' reactions to those issues.<sup>5</sup>

My focus in this Article, rather, is on how contrasting regulatory approaches and philosophies in two countries — the United States and Japan — have shaped the doctrines and practices those countries' broadcast regulators have selected.<sup>6</sup> The basic documents for the governance

2. See, e.g., Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574, 604-06 (1971).

3. Some politicians fear that a "tiny, unelected and elitist" group of broadcasters can set the agenda of social debate and usurp political authority. R. HOMET, *POLITICS, CULTURES AND COMMUNICATION: EUROPEAN VS. AMERICAN APPROACHES TO COMMUNICATIONS POLICYMAKING* 54 (1979).

To the extent that broadcast speech is a vehicle of social and political power, it is debatable whether the ability to engage in it should be distributed according to the prevailing distribution of wealth. See Weinberg, *Questioning Broadcast Regulation*, 86 MICH. L. REV. 1269, 1272-73 (1988). The United States system of broadcast regulation, however, is only superficially responsive to that concern. Under the American approach, in contrast to that of the Japanese, broadcast licenses once awarded are freely transferable. In fact, Congress acted in 1952 explicitly to disapprove an FCC policy limiting license transferability. See 47 U.S.C. § 310(d), added by Act of July 16, 1952, ch. 879, § 8, 66 Stat. 716; *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1263-64 (D.C. Cir. 1968); see also 47 C.F.R. § 73.3597 (1987). As Professor Tobin has pointed out, distributing the right to a commodity on an egalitarian basis but allowing that right to be freely transferred in the market is unlikely to produce an ultimate distribution much different from that which the market would have produced in the first instance. See Tobin, *On Limiting the Domain of Inequality*, 13 J.L. & ECON. 263 (1970); see also Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 406 (1965) (Lee, Comm'r, concurring).

4. Compare *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1933) (regulator may withdraw license of broadcaster because its words "offend . . . religious sensibilities . . . , inspire political distrust . . . , or offend youth and innocence"), *cert. denied*, 288 U.S. 599 (1933), with *Near v. Minnesota*, 283 U.S. 697 (1931) (regulator may not forbid publication of newspaper notwithstanding that its words are "malicious, scandalous, and defamatory"). See generally L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987); I. POOL, *TECHNOLOGIES OF FREEDOM* (1983); Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989).

5. But see *infra* notes 120-30 and accompanying text.

6. I shall not discuss one of the most important elements of Japan's broadcasting system: Nippon Hoso Kyokai (NHK or Japan Broadcasting Corporation), Japan's quasi-governmental public broadcaster. The relationships of MPT and other regulators with NHK are very different from their relationships with private broadcasters, and are beyond the scope of this Article. Any discussion of Japanese broadcasting that does not mention NHK, however, is seriously skewed; the reader should

of the electronic media in Japan are based on American models;<sup>7</sup> they were drafted by or under the supervision of Americans, during the Occupation period following World War II.<sup>8</sup> The two countries, however, are characterized by fundamentally different regulatory styles. This Article examines how, starting from similar points, the two systems diverged. It evaluates the different approaches they have taken, and the degree to which those differences can be traced to the two countries' respective regulatory approaches. Finally, the Article attempts to use the two countries' experiences to draw more general conclusions about the appropriate role of bargaining and negotiation in the administrative process.

The FCC is commonly seen as having performed rather badly in regulating broadcasting in this country. It has been one of our most criticized agencies: the Landis Report on Regulatory Agencies wrote in 1960 that the FCC

presents a somewhat extraordinary spectacle. Despite considerable excellence on the part of its staff, the Commission has drifted, vacillated and

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remember that many of Japan's highest-quality (and most-watched) television programs are not broadcast on private stations at all. See S. Shimizu, *The Changing Face of Japanese Broadcasting: Toward a Multi-Channel, Multi-Media Era* 15-16 (May 1991) (unpublished paper, copy on file with author) [hereinafter Shimizu 1991]; S. Shimizu, *The Challenges to Public-Service Broadcasting: How NHK Prepares For The Future* 12 (paper prepared for the Aspen Institute Conference, Berlin, June 8-11, 1986, copy on file with author) [hereinafter Shimizu 1986]. NHK, moreover, has played a crucial role independent of both MPT and the commercial broadcasters in introducing new technology into the mass communications marketplace. See *infra* notes 477-484 and accompanying text; see also L. Johnson, *Development of High Definition Television: A Study in U.S.-Japanese Trade Relations* 7-10 (RAND Center for U.S.-Japan Relations monograph). See generally J. Geller, *Japanese Public Broadcasting: A Promise Fulfilled* (1979) (Aspen Institute Program on Communications and Society monograph); Shimizu 1991, *supra*; Shimizu 1986, *supra*; Ishii, *The New Media and Public Broadcasting Service*, 21 *STUD. BROADCASTING* 77 (1985); Kabira, *Public Broadcasting: The Issues in Japan*, 8 *INTERMEDIA* 19 (1980). *Studies of Broadcasting* is published yearly, in English, by the NHK Broadcasting Culture Research Institute.

7. These include the Japanese constitution, drafted by General MacArthur's staff in 1946, see E. REISCHAUER, *THE JAPANESE* 106 (1977), which guarantees "[f]reedom of . . . speech, press, and all forms of expression." Kenpo (Constitution) art. XXI. They include as well the Broadcast and Radio Laws, Laws No. 131 and 132 of May 2, 1950, which constitute the basic charter of Japanese broadcast regulation. See generally NIHON SHIMBUN KYOKAI [hereinafter NSK], *PRESS LAWS IN JAPAN* 36-41 (1985); Shiono, *The Development of the System of Telecommunications Law in Japan*, 21 *STUD. BROADCASTING* 29, 32 (1985) [hereinafter Shiono 1985]; Shiono, *The Development of Broadcasting Technology and Related Issues in Japan*, 14 *STUD. BROADCASTING* 7, 10-11 (1978) [hereinafter Shiono 1978].

8. Japan before the Second World War had a single, government-controlled broadcast entity. See *infra* note 194. After the war, however, American authorities rewrote Japan's broadcast laws, see generally Uchikawa, *Process of Establishment of the New System of Broadcasting in Post-War Japan*, 2 *STUD. BROADCASTING* 51 (1964), to provide that private, advertiser-supported over-the-air television and radio broadcasting would coexist with a quasi-governmental Japan Broadcasting Corporation (Nippon Hoso Kyokai, or NHK). See *supra* note 6.

stalled in almost every major area. It seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems. The available evidence indicates that it, more than any other agency, has been susceptible to *ex parte* presentations, and that it has been subservient, far too subservient, to the subcommittees on communications of the Congress and their members.<sup>9</sup>

Much of the criticism that has been heaped on the FCC over the years is justified.<sup>10</sup>

United States observers view the Japanese bureaucracy more approvingly. As American industry lobbies Congress for financial assistance in meeting the Japanese challenge in high-definition television,<sup>11</sup> it exploits a general perception that Japanese regulators have succeeded where their American counterparts failed. American observers, to a great degree, have viewed Japanese bureaucrats with an "awe bordering on reverence";<sup>12</sup> most agree that the Japanese government has played a remarkable role in what can only be characterized as an economic "miracle."<sup>13</sup>

9. Quoted in E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION* 34 (3d ed. 1982) (hereinafter E. KRASNOW); see also *id.* at 33-35; V. MOSCO, *BROADCASTING IN THE UNITED STATES: INNOVATIVE CHALLENGE AND ORGANIZATIONAL CONTROL* 13-26 (1979).

10. The FCC has adopted an unwieldy, expensive, and largely pointless mechanism for selecting broadcast licensees. Its allocation policies have sharply and unnecessarily limited the number of broadcast signals in most areas of the country, and its approach to new technology has overprotected the status quo and overburdened innovators. See *infra* notes 167-69, 180-86, 317-35 and accompanying text; see, e.g., S. BESEN, T. KRATTENMAKER, A. METZGER & J. WOODBURY, *MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC* (1984) (hereinafter S. BESEN). But see Cass, *Review, Enforcement, and Power under the Communications Act of 1934: Choice and Chance in Institutional Design*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, at 90-92 (M. Paglin ed. 1989) ("Compared with other administrative agencies, the FCC has done fairly well" in fashioning policy; its "work, outside of the notorious quicksand of comparative licensing, has often been praised.").

11. See L. Johnson, *supra* note 6, at 38-40.

12. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 923 (1984).

13. See, e.g., C. JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1986) (characterizing the Japanese bureaucracy as farsighted, coherent, and firmly in control). Some scholars take the contrary view that the governmental role in Japan has on the whole been subordinate to the workings of the market. See, e.g., Trezise, *Politics, Government, and Economic Growth in Japan*, in *ASIA'S NEW GIANT* 753 (H. Rosovsky & H. Patrick eds. 1976). Others emphasize the mutual interaction between politicians, bureaucracy, and industry, e.g., T. PEMPEL, *POLICY AND POLITICS IN JAPAN: CREATIVE CONSERVATISM* (1982), or stress the "patterned pluralism" formed by a strong state's institutionalized accommodations with industrial and other elites and less structured interaction with other elements of society, see Muramatsu & Krauss, *The Conservative Policy Line and the Development of Patterned Pluralism*, in 1 *THE POLITICAL ECONOMY OF JAPAN: THE DOMESTIC*

Congress, thus, has recently sought to move American administrative law in a more Japanese direction. The Negotiated Rulemaking Act of 1990<sup>14</sup> and the Administrative Dispute Resolution Act of 1990<sup>15</sup> seek to encourage resolution of public-law disputes through negotiation and conciliation rather than through the traditional processes of rulemaking and adjudication. This legislative movement can be traced in part to a perception that the success of Japanese industry flows from that country's informal regulatory system, relatively unconstricted by process or rules.<sup>16</sup> Pursuant to those statutes, the FCC is now considering the extent to which it should incorporate arbitration, mediation and negotiation into its own decisionmaking procedures.<sup>17</sup>

The Japanese regulatory model, however, has provided no magic cure for the problems of choosing broadcast allocation policies, selecting broadcast licensees, and planning for new electronic mass media technology.<sup>18</sup> Japanese regulators have limited their license awards to entities that represent coalitions among the powerful and the well-connected, with the regulator subsequently protecting the market position of the regulated. The Japanese experience has tended to protect the position of old technology, and to suppress or marginalize the development of new technology. Japanese policymakers have instituted a decisionmaking process less incoherent and wasteful than our own, but with drawbacks that we would find unacceptable. Their regulatory approach, in this instance, would not serve the U.S. well; their experience, however, may provide some lessons as to where bargaining-oriented regulation is most likely to succeed or fail.

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TRANSFORMATION 516, 537 (K. Yamamura & Y. Yasuba eds. 1987); see also M. AOKI, INFORMATION, INCENTIVES, AND BARGAINING IN THE JAPANESE ECONOMY 258-97 (1988).

14. Pub. L. No. 101-648, 104 Stat. 4969 (1990).

15. Pub. L. No. 101-552, 104 Stat. 2737 (1990).

16. See, e.g., *Regulatory Negotiation: Joint Hearings before the S. Select Comm. on Small Business and the Subcomm. on Oversight of Government Taxation of the S. Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 18-19, 28 (1980) (statement of Francis Murray, Director, National Coal Policy Project); cf. E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 236-37 (1979) (urging that U.S. regulators "follow the Japanese model and rely on . . . creating a consensus of concerned people" in rulemaking rather than on "legalistic rigidities and adversary relationships").

17. See *Alternative Dispute Resolution Procedures*, 6 F.C.C. Rcd. 2267 (1991).

18. While Japanese export-oriented industries are commonly highly capital-intensive, efficient, and productive by U.S. or European standards, the Japanese domestic service sector and infrastructure are commonly labor-intensive and inefficient by international standards, reflecting low levels of capital investment and an orientation to goals other than economic efficiency. See Davidson, *Japanese Telecommunications Policy: New Directions and Old Dilemmas*, 11 TELECOMMUNICATIONS POL'Y 147, 147-48 (1987). Japanese broadcast regulators have operated at the intersection of those two sectors, as the export-oriented telecommunications equipment segment and the domestic mass communications infrastructure have become increasingly intertwined. *Id.* at 148.

Part I of this Article discusses regulatory practice and legal ideology in the two countries. In United States regulation, important functional advantages of what I call a "bargaining model" are counterbalanced by elements of doctrine and ideology pulling towards what I call a "formal rationality model"; the U.S. system is driven by the tension between those two forms. In Japan, by contrast, legal ideology and regulatory practice each reflect a bargaining model and reinforce one another; ruling legal ideology bolsters the dominant regulatory technique of administrative guidance. After Part II considers some of the problems inherent in a comparison of different nations' broadcast regulatory systems, Parts III and IV of the Article examine the consequences of those differences in regulatory style for the broadcast-law systems of the two countries. In both systems, broadcast regulators have demonstrated a tendency to develop special relationships with existing industry members and to exclude outsiders from the bargaining that takes place between the agency and the regulated. The systems differ crucially, however, in the mechanisms by which they allow outsiders to challenge those exclusive ties.

Part III disusses the process of license allocation, involving regulatory decisions affecting what broadcast licenses shall be available, to whom they are awarded, and what standards govern their award. In the U.S., both allocation policy decisions and decisions concerning the selection of individual recipients for specific contested licenses were initially made informally through a process incorporating some elements of a bargaining model. Formal-rationality factors emphasized in judicial review, however, ultimately propelled the regulatory agency to a more formal mode of decisionmaking. In Japan, by contrast, license allocation decisions have always been made through processes reflecting a pure bargaining model. When different entities file applications for a single license authorization, for example, the regulator does not engage in a competitive selection process, as it would in the U.S.; rather, it facilitates the creation of a joint venture representing, to the extent possible, all influential applicants.

These procedural differences have significant consequences for the substantive policies adopted by each country and for the nature of the mass media system each creates. The United States allocation system is seriously flawed. Its formal-rationality roots have led it to incorporate decisionmaking processes that are, in context, inefficient and largely pointless. The Japanese system is less wasteful, but manifests flaws more closely associated with bargaining-oriented regulation. In comparison to that of the United States, it artificially restricts the number of broadcast



licensees, centralizes media power, encourages blandness in programming, and fosters political involvement in the licensing process. It places media power squarely within the establishment consensus of the socially and politically acceptable, diffusing it through shared authority within that class, and perpetuating communications power through negotiation among power-structure groups.

Part IV addresses the advent of cable television in Japan and the United States and considers the regulatory reaction to the intrusion of new technology into a broadcast marketplace dominated by the old. In the United States, the FCC's initial approach to cable was client-oriented. The Commission sought to preserve the market position of over-the-air broadcasters, its long-term clients and the mainstays, until then, of the electronic mass communications system. Coercive shocks provided by the courts' application of formal-rationality standards, however, helped break up that system and propel the Commission into a new, deregulated age. In Japan, MPT was similarly initially hostile to cable and protective of old technologies. Consistent with the pure bargaining model, however, the interplay leading to the breakup of the old system was provided not by the judicial system but by interbureaucratic competition from a rival agency. Interbureaucratic interaction served the function undertaken in the U.S. by judicial review. This interaction led MPT to shift its general policy outlook and to expand its client base to include a host of new players with a stake in the new technology.

Part V applies the lessons of U.S. and Japanese broadcast administration to draw more general conclusions about bargaining- and formal-rationality-oriented regulation. Bargaining-oriented regulation, I conclude, can be problematic. It is least problematic when parties excluded from the bargaining can successfully turn to some outside actor, such as the judiciary or a competing agency, with the power to shock the agency into opening up the bargaining process. In both the United States and Japan, bargaining-oriented policymaking for new technology ultimately proved more or less manageable, because institutional interaction in each system undercut the cliquishness of the old regime. Japan's use of bargaining techniques in license allocation, by contrast, is more problematic, because no external checks allow politically uninfluential actors entree into the bargaining process. Japan's pure bargaining system erects a formidable set of barriers to entry into the licensing process, different from those created by U.S. formal-rationality techniques.

## I. REGULATORY MODELS AND LEGAL IDEOLOGY

A. *Two Approaches to Regulation*

I hope to explain U.S. and Japanese broadcast regulation in this Article, and to illuminate the enterprise of regulation more generally, through the use of two stylized models to describe day-to-day agency interaction with regulated parties.<sup>19</sup> I refer to these as a "formal rationality"<sup>20</sup> model on the one hand, and a "bargaining"<sup>21</sup> model on the other. They are ideal-types, and oversimplified; most regulation incorporates elements of both.

Under the formal rationality model, regulatory enforcement emphasizes detecting and prosecuting violations of the law, and punishing violators through the imposition of legal sanctions.<sup>22</sup> The enforcement style is adversarial, and stresses formal legal process as a routine device.<sup>23</sup> In the United States, OSHA enforcement has provided the paradigmatic example of such an approach to regulation.<sup>24</sup>

Policymaking under this model<sup>25</sup> emphasizes formal procedures, fo-

19. For analysis relying on similar stylized regulatory models, see generally ENFORCING REGULATION (K. Hawkins & J. Thomas eds. 1984); P. GRABOWSKY & J. BRAITHWAITE, OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES 7-8 (1986).

20. I refer here to an approach commonly referred to in the enforcement context as "deterrence" regulation. See Hawkins & Thomas, *The Enforcement Process in Regulatory Bureaucracies*, in ENFORCING REGULATION, *supra* note 19, at 3, 13-15; Reiss, *Selecting Strategies of Control Over Organizational Life*, in ENFORCING REGULATION, *supra* note 19, at 23, 23; Kagan & Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in ENFORCING REGULATION, *supra* note 19, at 67, 68 (first of three models).

The same approach has been referred to as a "stringency" approach, R. KAGAN, REGULATORY JUSTICE 9, 44-48 (1978); a "legalistic" approach, Shover, Lynxwiler, Groce & Clelland, *Regional Variation in Regulatory Law Enforcement: The Surface Mining Control and Reclamation Act of 1977*, in ENFORCING REGULATION, *supra* note 19, at 121, 123; and a "penalty" approach, Veljanovski, *The Economics of Regulatory Enforcement*, in ENFORCING REGULATION, *supra* note 19, at 171, 172 (citing A. REISS, JR. & A. BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW-BREAKING 274-99 (1980)).

21. This model is also commonly referred to as a "compliance" approach. See Hawkins & Thomas, *supra* note 20, at 13-15; Reiss, *supra* note 20, at 23; Veljanovski, *supra* note 20, at 172; an "accommodation" approach, see R. KAGAN, *supra* note 20, at 9, 44-48; and a "conciliatory" approach, see Shover, Lynxwiler, Groce & Clelland, *supra* note 20, at 123.

22. See Veljanovski, *supra* note 20, at 172.

23. See Hawkins & Thomas, *supra* note 20, at 13.

24. See S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY 191 (1981).

25. Most observers have discussed these models in connection with enforcement rather than policymaking (rule formulation). The models seem to me, however, useful in the policymaking context as well. For those who are interested in alternative models for policymaking, a helpful summary can be found in Arnall & Mead, *Decision Making at the FCC*, in TELECOMMUNICATIONS: AN IN-

cusing on the promulgation of rational rules in a clear, objective, and unbiased manner. The formal rationality approach to enforcement demands that regulated parties be able easily to ascertain the law and to follow it. Since the regulator does not seek to work informally with regulated parties in the enforcement process — and, indeed, rejects such contacts as inconsistent with fairness and objectivity — informal bargaining of rules only serves to undermine the values on which the system depends.

Regulators under the bargaining model, by contrast, hinge their enforcement efforts on low-visibility negotiation, involving “accommodations, threats, and tradeoffs between enforcement official and violator that results in compromises and modifications of the [effective] law.”<sup>26</sup> The process deemphasizes the actual imposition of formal sanctions as stigmatizing and counterproductive; such sanctions are commonly threatened but rarely imposed. The agency hopes to induce compliance by combining flexibility on its own part with threats, education and exhortation.<sup>27</sup>

Such regulation is characterized by continuing personal contact between regulator and regulated. Close relationships, social and otherwise, are seen as important to facilitate negotiation and to keep regulators informed of problems and violations.<sup>28</sup> In seeking to achieve effective industry-wide compliance at minimum cost, regulators deal with regulated parties on a political basis; that is, they reach results based on relative bargaining power and appeals to shared values.

The bargaining model in policymaking yields a pluralist process, with policymaking accomplished largely through negotiation among regulators and affected interests. The close contacts intrinsic to informal rule enforcement foster informal action in the policymaking arena as well. An administrator oriented towards a bargaining approach to enforcement will pursue the input and agreement of regulated parties for policymaking, so as to come up with rules that industry members will be

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TERDISCIPLINARY TEXT 37 (L. Lewin ed. 1984). See also Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981-82) (contrasting “incrementalist” model, emphasizing decentralized, remedial, incremental policymaking intended to meet short-term demands, with “comprehensive rationality” model, emphasizing synoptic, wide-ranging policy analysis).

26. Veljanovski, *supra* note 20, at 172.

27. See Kagan & Scholz, *supra* note 20, at 67.

This, again, is an ideal model, useful for didactic purposes; it assumes regulators who are diligent and committed to official regulatory goals. That not all government employees can always be so described is too well-accepted to require citation.

28. See Hawkins & Thomas, *supra* note 20, at 13.

willing to obey.<sup>29</sup>

Bargaining-minded administration tends to merge rulemaking and enforcement. Where the agency sees itself as enforcing flexible, "real-world" law, rather than mechanically imposing the formal text of official rules, ongoing policymaking becomes a part of the enforcement process.<sup>30</sup>

## B. Regulation in the United States

It has become a commonplace that regulation in the U.S. follows a formal rationality model. Formal rationality characterizes much of our thinking about administrative law, and most of our judicial rulings. Our bureaucrats sometimes are said to stress formality unduly: to enforce formal rules even when such enforcement is unreasonable, to insist on the letter of the regulatory law at the cost of common sense.<sup>31</sup> That characterization, though, slights the role in our society of bargaining-oriented, accommodationist approaches. One can observe both modes of regulation by United States agencies;<sup>32</sup> indeed, informal policymaking and rule enforcement seem to be the norm, "the 'bread and butter' of the process of administration."<sup>33</sup>

On examination, this apparent inconsistency begins to resolve itself as follows: There are important functional pulls in our regulatory scheme leading agencies to bargaining-oriented regulation. Important elements of ruling doctrine and legal ideology, though, at the same time pull towards the formal rationality model. Our regulatory system thus lies to some degree suspended between those two poles.

It should not be surprising that a United States agency would find it convenient or even necessary to operate informally, interacting with reg-

29. See *infra* notes 39-41 and accompanying text.

30. See Veljanovski, *supra* note 20; see, e.g., Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261 (discussing EPA's shifting policies regarding the terms on which it would settle Superfund enforcement actions).

31. See, e.g., E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982). Ronald Reagan won the Presidency in part on the theme of getting just such regulation "off our backs." See Safire, *Come the Millennium*, N.Y. Times, Nov. 30, 1980, § 6 (Magazine), at 16.

32. See, e.g., Shover, Lynxwiler, Groce & Clelland, *supra* note 20, at 121 (contrasting "conciliatory" surface mining regulation in the Western U.S. with "legalistic" regulation in the Eastern U.S.).

33. Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); see ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, ADMIN. PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 55-59 (1941); *infra* notes 34-49 and accompanying text. But see E. BARDACH & R. KAGAN, *supra* note 31, at 30-57 (trend in the United States throughout the 1970s favored a legalistic, deterrence-oriented style).

ulated parties on an unconstrained, day-to-day basis. Formality is costly; an agency can attempt to achieve its goals more cheaply through informal procedures.<sup>34</sup> In the policymaking process, an informal approach is responsive to the administrative agency's greatest policymaking problem: collecting necessary information.<sup>35</sup> The agency cannot make intelligent — or even coherent — policy without a good understanding of feasibility, costs, and competitive impacts. It may lack the technical ability, or the firm-specific data, to develop the information itself. Outside consultants and consumer groups may be similarly limited.<sup>36</sup> These limitations commonly leave the agency with little choice other than to rely on industry members for information. It cannot get that information, however, in a rigidly adversarial posture.<sup>37</sup> Thus, regulators often find it helpful to meet informally with industry parties, discuss the issues, trade information, and negotiate a standard.<sup>38</sup>

Other factors also lead agencies to make policy through a more political, and less formal, process.<sup>39</sup> As a practical matter, any enforcement system must rely heavily on voluntary compliance. Moreover, judicial review may, as a practical matter, indefinitely suspend the operation of an agency rule as the cycle of rule-review-remand-rule-review-remand proceeds.<sup>40</sup> If the agency can work with regulated parties to devise a

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34. Those cost savings carry with them significant disadvantages. See, e.g., E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969). My goal here, however, is not to characterize these approaches as good or bad; rather, it is to describe why agencies adopt them.

35. See S. BREYER, REGULATION AND ITS REFORM 109 (1982); see also Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 216-24 (1978).

36. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713-14 (1975).

37. See S. BREYER, *supra* note 35, at 111:

The adversary process requires the agency to propose a standard; the industry responds to questions related to the proposed standard. To shift the proposed standard requires a new set of questions. The more hostile the industry, the more narrowly responsive will be its answers, the more strictly the questions will be interpreted, and the less likely it is that the information provided in response to the first set of questions will help when the agency shifts to the second set. While the adversary process can determine whether a specific proposed standard is good or bad, it cannot readily show which of the myriad of unproposed standards is preferable. To use it to test each plausible alternative standard would take forever.

38. In order to satisfy APA requirements, the negotiated standard can then be set out for public comment, and adopted after due formalities have thus been complied with. See *infra* note 64 and accompanying text.

39. See S. BREYER, *supra* note 35, at 107; see also Stewart, *supra* note 36, at 1686, 1775.

40. This concern is a substantial one; Environmental Protection Agency Administrator William Ruckelshaus has estimated that more than 80% of all EPA rules are challenged in court. Susskind

solution that they will be inclined to comply with, and will not be inclined to challenge, it may secure better compliance without delays.<sup>41</sup>

Federal Communications Commission policymaking illustrates the ubiquity of informal *ex parte* contacts.<sup>42</sup> In FCC rulemaking, "political deals and interest group bargaining . . . are present in considerable degree."<sup>43</sup> The Commission has negotiated proposed rules with industry groups, and has in the rulemaking process adopted the results of bargaining among industry groups.<sup>44</sup> Indeed, until 1977, AT&T rates were set not by formal procedures but by negotiated settlements between AT&T and FCC common carrier staff.<sup>45</sup>

Pure negotiation, further, is not the only informal tool at the agency's disposal. In appropriate cases, an agency can use informal techniques in order to deflect the judicial and political weapons that an industry party might otherwise bring to bear against an agency decision. For example, the FCC successfully applied informal pressure to bring about the adoption of a "family viewing policy" by the networks and the National Association of Broadcasters, under which programming deemed inappropriate for viewing by a general family audience was not shown during certain evening hours.<sup>46</sup> The FCC used less subtle threats to dissuade radio licensees from playing songs that the Commission might deem to be "drug-oriented."<sup>47</sup> The FCC enforced informal limits on the amount of time broadcasters devoted to commercials through the technique of granting license or renewal applications routinely by staff action if the applications represented that the licensee would satisfy the limits,

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& McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 134 (1985-86).

Agency rules are not automatically stayed simply because someone files a petition for review, but courts have often been receptive to requests to issue such stays. A rule is, of course, automatically vacated once a reviewing court finds it to be flawed and remands for further proceedings.

41. See S. BREYER, *supra* note 35, at 114; see also Stewart, *supra* note 36, at 1735.

42. See Robinson, *supra* note 35, at 225.

43. *Id.* at 201. The author is a former Commissioner of the FCC.

44. Compare Cable Television Report and Order, 36 F.C.C.2d 143, 307 (1972) (Johnson, Comm'r, concurring and dissenting) with *id.* at 287 (Burch, Chairman, concurring); see *MCI Telecommunications Corp. v. FCC*, 712 F.2d 517 (D.C. Cir. 1983); *Daytime AM B/C Stations*, 99 F.C.C.2d 1087 (1984); *AT&T, Offer of Facilities For Use By Other Common Carriers*, 52 F.C.C.2d 727 (1975); see generally Brotman, *Communications Policymaking at the FCC: Past Practices, Future Directions*, 7 CARDOZO ARTS & ENT. L.J. 55 (1988).

45. See *Public Util. Comm'n v. United States*, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966); Robinson, *supra* note 35, at 256.

46. See *Writers Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

47. See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

but subjecting them to significant and expensive processing delays if they did not.<sup>48</sup> In all of these cases, the agency used informal techniques to avoid either judicial or congressional scrutiny of its policies.<sup>49</sup>

Powerful elements of United States legal ideology, however, significantly check these aspects of regulatory practice, and oblige agencies to conform more closely to the formal rationality model. That ideology is embodied in part in a line of cases, beginning around 1970, establishing what came to be known as "hard look" judicial review.<sup>50</sup> The cases arose out of a perception that agencies could not be trusted to rule in the public interest because they had become "captured" by industry, or at the least, had come to afford industry members an unacceptably high, and unac-

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48. See E. KRASNOW, *supra* note 9, at 197.

The Commission took a similar approach regarding public affairs and local programming. Setting up required minimum percentages of public affairs or local programming, the Commission declared, would place impermissible restrictions on licensee discretion. See *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978); *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, 66 F.C.C.2d 419, 428-29 (1977); *Hubbard Broadcasting, Inc.*, 48 F.C.C.2d 517 (1974), *aff'd sub nom.* *Allanza Federal de Mercedes v. FCC*, 539 F.2d 732 (1976). It nonetheless developed unofficial guidelines that were used as application processing criteria.

The Commission later abandoned both its commercialization and its programming guidelines as part of a deregulatory effort. See *Deregulation of Commercial Television*, 98 F.C.C.2d 1076 (1984), *on reconsideration*, *Programming and Commercialization Policies*, 104 F.C.C.2d 357 (1986), *rev'd in part*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *aff'd in part*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

49. The approach has not been limited to the FCC; "[r]egulation through 'raised eyebrow' techniques seems inherent in the structure of most administrative agencies." *Consolidated Edison Co. v. FPC*, 512 F.2d 1332, 1341 (D.C. Cir. 1975). See, e.g., *United States v. Gaubert*, 111 S. Ct. 1267 (1991) (Federal Home Loan Bank Board informal pressure regarding banking practices); *United Steelworkers v. Weber*, 443 U.S. 193, 222-23 (1979) (Rehnquist, J., dissenting) (Office of Federal Contract Compliance informal pressure to adopt affirmative action plan); *Hercules, Inc. v. FPC*, 552 F.2d 74, 77-78 (3d Cir. 1977) (Federal Power Commission informal pressure to impose pipeline curtailment policies); *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136, 143 (D.C. Cir. 1974) (informal pressure to adopt "voluntary [imports] restraints" on steel), *cert. denied*, 421 U.S. 1004 (1975); *Council on Wage and Price Stability Act*, 12 U.S.C. § 1904 (1982) (creating the Council on Wage and Price Stability).

When Atlanta city officials used informal techniques to require minority set-asides in city-funded construction while avoiding judicial challenge, city officials referred to it as their "Muhammad Ali" approach, after that heavyweight champion's motto: "Float like a butterfly, sting like a bee. They can't hit what they can't see." When the city finally enacted a formal ordinance in 1982 mandating set-asides, the rule was immediately challenged in court and overturned. *Presentation of Alford Dempsey, Jr.*, Atlanta Assistant City Attorney, before the AALS Section on Minority Groups, San Francisco, California (Jan. 1990); see *Georgia Branch, Associated General Contractors v. Atlanta*, 253 Ga. 397, 321 S.E.2d 325 (1984).

50. The phrase is from *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

ceptably one-sided, degree of influence in the decisionmaking process.<sup>51</sup> Courts responded by tightening their review of agency rulemaking, insisting that agency procedures be transparent, that agency reasoning be clear, and that agency goals be tightly rooted in what the courts deemed to be acceptable readings of the underlying statutes.<sup>52</sup> The courts also expanded greatly the class of persons who could initiate court proceedings in which agency actions would be measured against those standards.<sup>53</sup>

The role of the administrative agency, when subjected to such review, is far from that suggested by the bargaining model: The agency, in making the decisions that are at the heart of its job, is expected to apply neutral criteria, in a rational and unbiased manner, to the parties before it. It is expected to follow a process under which it determines its goals with reference to its statutory mandate; considers which of various courses of action will most nearly achieve those goals; and adopts the course that this analytical process generates.<sup>54</sup> Moreover, the agency must structure its processes so as to make its actions amenable to judicial review, which in turn will test those actions against a rationality standard. Administrative actions that are not fully transparent cannot properly be reviewed, and are inconsistent with "the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."<sup>55</sup> Through the enforcement of these rules, the judicial branch is meant to constrain administrative bodies from wielding unchecked power.<sup>56</sup>

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51. See Stewart, *supra* note 36, at 1681-88.

52. See Robinson, *supra* note 35, at 228.

I speak here to judicial intentions, not to results; it is by no means clear that judges are capable of meaningful review of agency decisions. See Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1352 (1984); see also *infra* note 60.

53. See Stewart, *supra* note 36, at 1711-47. Professor Stewart sees the standing cases as part of a move towards "administrative law as interest representation," that is, as an injection of a pluralist participation approach into the administrative process. The cases, though, can also be read simply as an attempt by the courts to widen the sphere of rationality by making it easier to get review of agency actions.

54. See, e.g., *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

Professor Diver, contrasts a synoptic approach similar to that described here, which he calls "comprehensive rationality," with what he calls an "incrementalist" approach, focusing on more limited policymaking to meet incremental, short-term concerns. See *supra* note 25. Both approaches, however, emphasize rationality when contrasted with a process that derives policy through bargaining among affected interests.

55. *Home Box Office v. FCC*, 567 F.2d 9, 56 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

56. Cf. Frug, *supra* note 52, at 1334-38 (describing "judicial review" model of administrative and corporations law doctrines).



Such a requirement of "reasoned decisionmaking," however, is incompatible with a negotiated, political decisionmaking process. A bargaining-oriented process leads the agency to compromise neutrality, by giving greater weight to the views of those parties with greater bargaining power. It leads the agency to compromise rationality,<sup>57</sup> by choosing the policy most acceptable to the contending parties rather than the policy most directly advancing statutory goals.<sup>58</sup> The substantive rule most acceptable to the negotiating parties, indeed, may advance goals completely at odds with those Congress members thought important, and may call upon the agency to assert authority Congress members did not intend to give it.<sup>59</sup> Bargaining-oriented proceedings, thus, notwithstanding their practical merits, are problematic when set up against the formal rationality model's requirements of neutrality, reasoned decisionmaking and transparency.<sup>60</sup>

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57. FCC law for this reason limits the role that negotiation can play in some dispute-resolution contexts. *See, e.g.,* Agreements Between Broadcast Licensees and the Public, 57 F.C.C.2d 42 (1975). The conflict between negotiation and pure rationality erupted in 1972 in one prominent case when the Commission chose to adopt a negotiated compromise to govern cable TV development, rather than a somewhat different proposal it had earlier circulated as representing its view of the public interest. Commissioner Nicholas Johnson wrote in partial dissent that the Commission's decision "trampled on . . . the Administrative Procedure Act (APA), the philosophical concept of independent Congressional agencies, and the due process clause of the fifth amendment." Cable Television Report and Order, 36 F.C.C.2d 143, 315 (1972) (Johnson, Comm'r, concurring and dissenting). Chairman Burch answered that Johnson's criticism was part of an "incessant barrage of vilification, willful misrepresentation, and left-handed slander" issuing from one for whom all "[a]ccommodation and compromise equal 'sellouts.'" *Id.* at 287-88 (Burch, Chairman, concurring). No party sought judicial review, although the D.C. Circuit later directed the agency to reconsider the agreement in light of changed circumstances. *See Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979).

58. *See S. BREYER, supra* note 35, at 108. Indeed, the D.C. Circuit warned in one pathbreaking decision that it found negotiation simply unacceptable; it admonished the FCC that rulemaking "by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners," demonstrates "undue industry influence over Commission proceedings." *Home Box Office v. FCC*, 567 F.2d 9, 53 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Informal processes, the court continued, fail to yield the sort of transparent record that is necessary for rationality review: "Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable." *Id.* at 54. The *Home Box Office* decision was in some ways the high-water mark of hard-look thinking; its view that nonrecord contacts between an agency and outsiders should not be tolerated at all in rulemaking was not accepted by later courts. *See, e.g.,* *Action for Children's Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1977). The case is, however, an eloquent and pure exposition of hard-look philosophy.

59. *See infra* note 71.

60. As at the beginning of this section, I hasten to acknowledge that I oversimplify. Formal rationality does not reign unchallenged in the world of American administrative law. *See Frug, supra* note 52, at 1355-77; *see also* Stewart, *supra* note 36. The Supreme Court has emphasized that agency rulemaking should not be made functionally equivalent to a judicial proceeding, *see* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978);

The movement towards "regulatory negotiation," culminating in the recent passage of the Negotiated Rulemaking Act of 1990,<sup>61</sup> illustrates limits that formal rationality ideology imposes on the regulatory process. In negotiated rulemaking, an agency generates proposals for rules through a quasi-public and officially sanctioned process of negotiation among affected groups.<sup>62</sup> The agency is directed to include in the bargaining process representatives of each "interest" that will be affected by the proposed rule;<sup>63</sup> these representatives put forth, negotiate, and withdraw proposals and counter-proposals in a give-and-take similar to that between labor and management in collective bargaining.<sup>64</sup> After the various interests reach consensus on a proposal, the agency promulgates it for public comment and enacts it without change.<sup>65</sup> According to regula-

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United States v. Florida E. Coast Ry. Co., 410 U.S. 224 (1973), and has instructed courts that agencies, not courts, are the primary expositors of the statutory law, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Nor has formal rationality posed anywhere near an insuperable bar to informal regulation; judicial review ultimately defeated none of the "raised eyebrow" techniques detailed *supra* notes 46-48 and accompanying text. In part, this is because courts have not felt themselves able to extend to the enforcement process the stringent review techniques they have applied in the policymaking arena, see, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); in part, it is because courts have found themselves stymied by the necessary omnipresence of informal action in day-to-day regulation.

Finally, it has been argued that the procedural requirements enforced by formal-rationality review in fact serve a political function, enforcing the deal through which an agency was created by giving the parties to that deal an enhanced opportunity to block changes that would disadvantage them. See McCubbins, Noll & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

61. Pub. L. No. 101-648, 104 Stat. 4969 (1990).

62. See generally Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985); Susskind & McMahon, *supra* note 40; Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986); Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest*, 18 ENVTL. L. 55 (1987); see also *Negotiated Rulemaking Act of 1987: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) [hereinafter, *Negotiated Rulemaking Hearings*].

63. See *Negotiated Rulemaking Act of 1990*, Pub. L. No. 101-648, §§ 584, 585, 104 Stat. 4969, 4971-74 (1990).

64. *Negotiated Rulemaking Hearings*, *supra* note 62, at 42 (testimony of Marshall Breger, Chairman, Administrative Conference of the United States).

65. The agency retains the theoretical right to modify the proposal after public comment, and for that reason the procedure is seen as consistent with the Administrative Procedure Act. The driving force behind the negotiation process, however, is the agency's implicit agreement *not* to deviate from the consensus proposal. See *Alternative Dispute Resolution Procedures*, 6 F.C.C. Rcd. 2267 (1991); S. REP. NO. 97, 101st Cong., 1st Sess. 19 (1989); *Negotiated Rulemaking Hearings*, *supra* note 62, at 34 (testimony of Sen. Levin). Were the agency to modify the proposal after the comment period, the carefully negotiated balance of concessions and counter-concessions would be

tory negotiation proponents, the constant requests today for review of agency decisions demonstrates that the rulemaking process has lost legitimacy; regulatory negotiation, following a pluralist rather than a rationality model, can restore that legitimacy.<sup>66</sup>

The debate over negotiated rulemaking proposals demonstrates the problems that formal rationality ideology poses for negotiation in the regulatory process. How, after all, should negotiated rules be reviewed in the courts?<sup>67</sup> The leading proponents of negotiated rulemaking have argued that courts should not examine the rationality of a negotiated rule at all; the rule "should be sustained to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties."<sup>68</sup> While the Negotiated Rulemaking Act as enacted ultimately rejected that approach,<sup>69</sup> the reasons for the argument should be clear. The legitimacy of negotiated rules does not depend on their rationality, and the distinctions drawn by such rules will not necessarily be either particularly rational from a pure policy standpoint,<sup>70</sup> or particularly faithful to the legislative direction.<sup>71</sup> For the bargaining process to work, the contract binding all affected parties *not* to seek judicial review must be maintained.<sup>72</sup>

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upset. Cf. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 867-68 (1987) (negotiated legislation).

66. Susskind & McMahon, *supra* note 40, at 133.

67. Monroe Price raised this issue long before the current vogue for negotiated rulemaking. See Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 VA. L. REV. 541, 565 (1975).

68. Harter, *supra* note 62, at 103; see also Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471, 485-89 (1983); Susskind & McMahon, *supra* note 40, at 164-65.

69. See Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 590, 104 Stat. 4969, 4976 (1990).

70. Cf. L. Johnson, *supra* note 6, at 3 n.2 (negotiated technical compatibility standards may not be socially optimal).

71. Professor Funk provides some examples drawn from the regulatory negotiation concerning Environmental Protection Agency woodstove emissions standards. The participants incorporated into the consensus standard a requirement of energy efficiency labels. This requirement had little to do with EPA's enabling statute or with emissions standards, but it was included because the representative of the Consumer Federation of America, supported by representatives of various states, was willing and able to bargain for it. The same standards categorize woodstoves as "stationary sources" within the meaning of § 111 of the Clean Air Act, a rather creative reading, and impose requirements that can be said to be authorized by § 111 only through an imaginative understanding of that section. See Funk, *supra* note 62, at 66-89.

72. I believe that the process that leads to negotiated regulations, and the theory that justifies them, are troubling in other ways. The legitimacy of the bargaining process as a means of making government policy must rest on the notion that everyone — or at least everyone who counts — is present — or at least represented — in the bargaining. Yet, as Professor Litman has demonstrated

Indeed, that may be the moral of the Radio Conferences of 1922-24, the very first attempts at American broadcast regulation. At the start of radio broadcasting in this country, the Federal Communications Commission did not yet exist, and the Secretary of Commerce had no explicit statutory authority to regulate broadcasting. Secretary Hoover, responding to practical pressures, convened four informal broadcaster conferences to agree on principles by means of which he could control broadcasting in the interest of avoiding frequency interference.<sup>73</sup> Hoover's administrative guidance, however, lasted only so long as the matter stayed out of the courts. Once the Secretary crossed that threshold and a federal court ruled on the formal legality of his actions, his entire regulatory edifice came tumbling down.<sup>74</sup>

### C. Regulation in Japan

Japanese administrative practice is consistent with a pure version of the bargaining model. Regulatory practice and legal ideology do not cut against each other, as they do in the United States; rather, they reinforce each other.

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in a related context, it is intrinsic to such negotiations that everyone who counts, or who may turn out later on to have counted, is *not* represented. See Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 299-301, 311-14, 357-58, 359 (1989). Nor, in any event, is a "representative" of small business or consumers necessarily a meaningful surrogate for individual small business owners or consumers. See Wald, *supra* note 62, at 21-22; see also Funk, *supra* note 62, at 95 (in the woodstove emissions negotiations, the Consumer Federation of America "may have represented the interests associated with the mentality of a *Consumer Reports* reader, but it did not appear to lobby on behalf of poor, rural folk for whom the rule will provide little benefit and perhaps significant burden"). In fancier lingo, the "subjective delineation of the 'relevant' groups" and the "objectification of people's subjective desires" necessary for representation destroys the legitimacy of the negotiation. Frug, *supra* note 52, at 1369.

In a bargaining process in which some individuals are more represented than others, inequalities in bargaining power and the nature of the ground rules of the negotiation may do more to influence the outcome than "the will of the people" as expressed in the bargaining process. See S. BREYER, *supra* note 35, at 178-79, 181; cf. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Against such a backdrop, I am hesitant to jettison the notion that rationality, and fidelity to such commands as appear to be embodied in the legislative mandate, should be at least aspirational goals.

73. See generally G. ARCHER, *HISTORY OF RADIO TO 1926* (1938), excerpted in D. GINSBURG, *REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS* 26-36 (1979).

74. See *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926). Hoover's real failure was that he was unable to use informal pressure to keep Zenith on its assigned frequency and off of a frequency assigned by treaty to Canada. In order to uphold United States treaty obligations, Hoover was forced to go to court against Zenith. See L. POWE, *supra* note 4, at 59. The court's ruling that the Secretary had no power to enforce his frequency assignments led to chaos in the radio industry, rampant interference, and the Radio Act of 1927. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943). See generally I. POOL, *supra* note 4, at 112-16.

The typical form of regulation in Japan is *gyosei shido*, or administrative guidance;<sup>75</sup> over 80% of Japanese regulatory activity, it is said, takes that form.<sup>76</sup> Under the administrative guidance approach, rule enforcement or other agency action is accomplished informally, through meetings between the regulator and regulated, and in the absence of formal process.<sup>77</sup> Administration is oriented around the notion that "the formal use of regulatory power is not considered desirable . . . . The approach preferred in Japan is to create a situation that is acceptable to both the administrative organs and the other parties through informal negotiation."<sup>78</sup> That regulatory mode is justified by Japanese scholars in tones familiar to American students of the bargaining model: "[R]esort to authoritative modes of regulation based on 'orders and coercion' [may] lead to friction in the relationship between the administration and the public, or it may even lead to negative resistance and law-evading behavior."<sup>79</sup>

Japanese administrators are well-positioned to engage in bargaining-oriented administration.<sup>80</sup> They commonly have at their disposal both the implied threat of formal regulatory action relating to the matter at issue, and the more amorphous (but no less effective) implied threat of general regulatory displeasure.<sup>81</sup> Moreover, regulators traditionally have

75. On administrative guidance, see generally LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES (J. Haley ed. 1988); Young, *supra* note 12; Shiono, *Administrative Guidance*, in PUBLIC ADMINISTRATION IN JAPAN 203 (K. Tsuji ed. 1984); Shibaiké, *Guidelines and Agreements in Administrative Law*, 19 L. IN JAPAN 62 (1986).

76. Young, *supra* note 12, at 954.

77. Administrative guidance involves, in the characterization of one American scholar, (1) administrative modification of private behavior, through (2) acts with no formal legal effect, leading to (3) "voluntary" compliance. Young, *supra* note 12, at 932-34.

78. Shiono, *supra* note 75, at 208. Professor Shiono has characterized administrative guidance as regulatory, emphasizing "restrictions on the [regulated] . . . which may be against their self-interest"; reconciliatory, emphasizing mediation between private actors subject to the agency's supervision; or promotional, emphasizing modernization, research, and planning for the future. *Id.* at 205-07; see also sources cited in Shibaiké, *supra* note 75, at 72 n.28.

79. Shibaiké, *supra* note 75, at 81. By contrast, "one of the aims of [a particular form of informal administrative action] is to create an all-embracing relationship of trust and cooperation between business and administration and thereby achieve administration objectives." *Id.* at 82.

80. Professor Haley has argued to the contrary. He takes the position that Japanese regulators have little bargaining power with industry, because the sanctions available to them are not sufficiently credible or effective. Rather, regulators rely on bargaining and informal sanctions only because their formal powers are even less effective. See Haley, *Administrative Guidance versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY 107, 116-20 (G. Saxonhouse & K. Yamamura eds. 1986).

81. See Shiono, *supra* note 75, at 203-06; *id.* at 210 ("[B]usiness enterprises are concerned that their relationships with the administrative organs may be impaired if they do not comply with administrative guidance, because they are subject to various controls by administrative organs in carry-

had ample opportunity to reward those who follow administratively favored paths.<sup>82</sup> Administrative guidance techniques allow them to influence private action without having to pay too much attention to the strict limits of their regulatory authority, or to the nature of their regulatory mandate.<sup>83</sup>

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ing out their business activities.”); Shibaïke, *supra* note 75, at 74-75; see also K. VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER* 344 (1989). But see Haley, *supra* note 80; F. ROSENBLUTH, *FINANCIAL POLITICS IN CONTEMPORARY JAPAN* 22-23 (1989) (regulators prefer to reward those who comply with guidance, rather than punishing those who do not; the latter course may draw the agency into conflict with politicians taking up the cause of the injured party).

According to Professor Johnson, Japanese regulators commonly refuse to accept even facially valid reports or notifications, thereby exercising a veto power over activity that the statutory law merely makes subject to a reporting requirement. Johnson, *MITI, MPT and the Telecom Wars: How Japan Makes Policy for High Technology*, in *POLITICS AND PRODUCTIVITY: HOW JAPAN'S DEVELOPMENT STRATEGY WORKS* 53 (C. Johnson, L. Tyson & J. Zysman eds. 1989). Japanese courts, however, in more than one context have rebuffed attempts by governmental units to treat as “incomplete,” and thus ignore, applications that are facially valid under the statutory law. See Upham, *Ten Years of Affirmative Action for Japanese Burakumin*, 13 L. IN JAPAN 39, 59-62 & n.63 (1980) (treatment by local government of applications for affirmative action benefits); Young, *supra* note 12, at 964-65 (treatment by local government of application for construction permit).

82. See Young, *supra* note 12, at 934. This is not to say that administrative guidance is uniformly successful. See *id.* at 950-53. For one prominent failure of administrative guidance, see C. JOHNSON, *supra* note 13, at 286-88, on Mitsubishi's flouting of an attempt by the Ministry of International Trade and Industry (MITI) to cause Japanese automobile manufacturers to merge into giant conglomerates led by Nissan and Toyota. Indeed, one observer has concluded that MITI has difficulty ensuring adherence to administrative guidance except where there exist

- (1) a relatively small number of companies in a given industry that have interacted over a period of time;
- (2) a clear opinion-leader or market-leader among them;
- (3) a fairly high degree of market concentration;
- (4) a mature stage in the industry's life cycle;
- (5) either a cohesive and strong industrial association or effective mechanisms of industry-wide consensus formation;
- (6) a high degree of dependence on MITI, or at least a history of dependence; [and]
- (7) common problems of sufficient severity to coax individual companies into cooperating, rather than “cheating,” in order to advance collective interests.

D. OKIMOTO, *BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY* 94 (1989); see also Okimoto, *Regime Characteristics of Japanese Industrial Policy*, in *JAPAN'S HIGH TECHNOLOGY INDUSTRIES: LESSONS AND LIMITATIONS OF INDUSTRIAL POLICY* 35 (H. Patrick ed. 1986); *Mighty MITI Loses Its Grip*, N.Y. Times, July 9, 1989, § 3, at 1, col. 2.

83. See Young, *supra* note 12, at 935-38. The area of broadcast regulation provides one example: The Ministry of Posts and Telecommunications decided during the oil crisis of 1973 that energy conservation called for shorter broadcast hours. MPT, however, issued no formal regulation embodying that policy, perhaps concerned about the constitutional status of a regulation that could be said to curtail broadcaster editorial discretion. It is unclear whether the Ministry had the authority to embody such a policy in a formal rule. Compare *id.* at 936 (MPT “no doubt had the power to issue regulations regarding conservation of electricity”), with Shiono, *supra* note 75, at 204 (MPT's ultimate request to curtail broadcast hours “was not based on any statutory authority”). Instead, the Ministry took the successful approach of *informally* pressuring broadcasters into cutting short their late-night broadcasting. See M. ITO, *BROADCASTING IN JAPAN* 102 (1978); NIPPON HOSO KYOKAI [NHK], *FIFTY YEARS OF JAPANESE BROADCASTING* 427 (1977). MPT has similarly exercised administrative guidance to encourage local programming; to supervise network-affiliate relations; and

As a bargaining model theorist might expect, Japanese bureaucrats engaging in administrative guidance consult extensively with the parties they are regulating.<sup>84</sup> This consultation builds legitimacy for the informal actions the regulator ultimately takes, making it more likely that the regulated parties will choose to comply with those actions rather than to fight against the agency pressure.<sup>85</sup> The likelihood of successful informal consultation is increased by shared values and backgrounds within the Japanese administrative and business elites; business leaders and bureaucrats frequently are graduates of the same universities and can draw on common ties.<sup>86</sup>

Consultation and consensus, however, are different things. Consensus is hard to achieve as a routine matter. Whether a regulator can do so will depend on the extent to which persons likely to cause difficulties are included in the decisionmaking group, and on the ground rules for managing interaction among the various members of that group. Japanese regulators have proved adept both at selecting and at managing the groups with which they consult in the policymaking process.<sup>87</sup> Organized labor is generally excluded from the process;<sup>88</sup> so, commonly, are industry members not represented in industry and trade associations,<sup>89</sup> and so are representatives of what we might call citizen interests (e.g., consumer or environmentalist groups).<sup>90</sup> Regulators, moreover, exercise their power to select "reasonable" representatives of competing groups to represent those groups in consultation.<sup>91</sup>

Sometimes the regulator formalizes the consultative process, by con-

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to encourage construction of new relay stations and other measures to alleviate reception difficulty problems. See M. ITO, *supra*, at 87.

There is considerable debate in the Japanese academic literature whether administrative guidance must have "legal foundation," see Shibaiké, *supra* note 75, at 72-75, 85; see also Yeomans, *Administrative Guidance*, 19 L. IN JAPAN 125, 143-58 (1986), but I am aware of no evidence demonstrating that this debate has had impact on actual administrative practice.

84. See Young, *supra* note 12, at 938-41; see also J. GELLER, *supra* note 6, at 5.

85. See Young, *supra* note 12, at 947-49.

86. See B. KOH, JAPAN'S ADMINISTRATIVE ELITE 86-94, 167-70 (1989); C. JOHNSON, *supra* note 13, at 57-62, 71; J. HIRSCHMEIER & T. YUI, THE DEVELOPMENT OF JAPANESE BUSINESS 314 (2d ed. 1981).

87. See F. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 210, 226 (1987); Young, *supra* note 12, at 947-49.

88. See, e.g., T. PEMPEL, *supra* note 13, at 31-32; see also Muramatsu & Krauss, *supra* note 13, at 533-34 (labor and citizen/political groups are relatively excluded, although not wholly without influence). But see M. AOKI, *supra* note 13, at 262-63 ("[T]he interests of labor are duly represented in the Japanese political economy.").

89. Young, *supra* note 12, at 947.

90. See F. UPHAM, *supra* note 87, at 28-77; Muramatsu & Krauss, *supra* note 13, at 533-34.

91. F. UPHAM, *supra* note 87, at 226.

stituting *shingikai*, or "deliberation councils": official bodies created by a Ministry, composed largely of non-governmental experts, to discuss Ministry policies and proposals. *Shingikai* are a useful device to publicize and legitimate new agency policies, as well as a factor in interbureaucratic warfare. Ministry staff input is substantial, and committee members, who are commonly prominent persons with little time to devote to committee activities, are often carefully selected in order to encourage reports consistent with the agency's contemplated action.<sup>92</sup> Whether the process is formal or informal, the consultative process, in the interest of achieving consensus, carries with it a degree of systemic exclusion from the consultations.

The Japanese pattern, under which regulators consult with affected groups and seek to achieve consensus among them before making and enforcing policy decisions, nonetheless seems largely congruent with the approach urged by American advocates of regulatory negotiation. In some respects the Japanese pattern of consultation could have been scripted as a regulatory negotiation model for Americans.<sup>93</sup> I argued earlier, however, that regulatory negotiation places severe strain on American legal ideology; the approach does not cause similar problems in Japan.

That pattern can succeed in Japan and fail in the United States in substantial degree because Japan lacks what the United States has: judicial rationality review.<sup>94</sup> Judicial review of administrative action in Ja-

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92. See Kobayashi, *Some Critical Remarks on the New Media Research and Development in Japan*, 18 *STUD. BROADCASTING* 23, 39-40 (1982); C. JOHNSON, *supra* note 13, at 47-48; Pempel, *The Bureaucratization of Policymaking in Postwar Japan*, 18 *AMER. J. POL. SCI.* 647, 658-63 (1974). Professor Pempel, in a study of seven *shingikai* advising the Ministry of Education between 1945 and 1970, notes further that while only 10% of the committee members were officials of government agencies, a substantial number were *former* bureaucrats, and that throughout the period studied over one third of those holding top committee positions (chairs or vice-chairs) were bureaucrats or ex-bureaucrats. Pempel identifies the presence of a large number of ex-bureaucrats as a further factor helping to cement bureaucratic control over the *shingikai* process. *Id.* at 660-63.

93. One important way in which the pattern may diverge from the pure pluralist model of regulatory negotiation lies in the role played by ideology of administrative expertise: the legitimacy of administrative orders may derive to some degree not from the negotiation process but from respect accorded to public officials as architects of the Japanese economic miracle. See C. JOHNSON, *supra* note 13, at 273-74.

94. One could, of course, argue the reverse: because administrative guidance is so successful in Japan, courts have not seen fit to extend much review. Indeed, the dominance of administrative guidance in Japan has been attributed to a variety of factors: cultural, political, and historical. See, e.g., Young, *supra* note 12, at 968 nn.163-65; F. UPHAM, *supra* note 87, at 202-04. Moreover, administrative guidance as a tool of regulation in general and media policy in particular dates back to the beginning of the modern Japanese administrative state; it is not tied to the exact legal rules prevailing in Japan today. See G. KASZA, *THE STATE AND MASS MEDIA IN JAPAN 1918-1945*, at 7-



pan is largely unavailable.<sup>95</sup> Administrative law doctrine excludes most agency decisions from the scope of reviewable agency action.<sup>96</sup> Agency behavior is not subject to judicial review unless it constitutes an "administrative disposition [*shobun*] or other exercise of public power," that is, unless it immediately and directly changes private legal rights or obligations. This test excludes from review most administrative acts with general effect. It also excludes any agency actions that can be construed as mere internal government behavior, not formally altering the specific legal rights or duties of private citizens. It, of course, excludes from review the informal agency action characteristic of administrative guidance.<sup>97</sup>

Standing doctrine is restrictive as well. The "legal interest" test, dominant in Japanese law, denies standing to would-be plaintiffs unless the government action in question invades a specific, individual, and direct interest conferred on the plaintiff by the positive law.<sup>98</sup> Moreover,

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10 (1988) (early Meiji period). The unavailability of judicial review, however, has played a major role in ensuring the dominance of administrative guidance: if rationality review were easily available to maverick Japanese businesses, they would be in a much better position to upset the administrative guidance applecart than they are today.

95. In that respect, Japanese administrative law today retains some flavor of its Meiji origins. The drafters of the 1889 Constitution adopted the German approach that administrative action should be reviewed only in a special administrative court located within the bureaucracy itself; they explained that "judicial courts . . . have no power to annul measures ordered to be carried out by administrative authorities . . . . [T]he independence of the administrative [branch from] . . . the judicature is just as necessary as that of the judicature itself." H. ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (M. Ito trans. 1889), quoted in Haley, *Japanese Administrative Law: An Introduction*, 19 L. IN JAPAN 1, 2 (1986). See generally Wada, *The Administrative Court Under the Meiji Constitution*, 10 L. IN JAPAN 1 (1977). Modern Japanese law has abolished the earlier law's special administrative court, but has retained its hostility to judicial control of administrative action.

96. See Haley, *supra* note 95, at 9-11.

97. See F. UPHAM, *supra* note 87, at 170-71; Upham, *After Minimata: Current Prospects and Problems in Japanese Environmental Litigation*, 8 *ECOLOGY L.Q.* 213, 235-39 (1979); see also Dzuibla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 *CORNELL INT'L L.J.* 37 (1985).

98. F. UPHAM, *supra* note 87, at 172-73 and 201 n. 40; Haley, *supra* note 95, at 10-11; Upham, *supra* note 97, at 239-44; see also Shibaik, *supra* note 75, at 89.

For a comparable approach to standing, see *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). The Supreme Court in cases including *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), found Congress to have legislatively overruled the *Perkins* common law. See *infra* notes 146-47 and accompanying text. The old approach survived in the United States to a small degree in the form of the "zone of interests" test, but the Supreme Court has only very recently indicated that this test should pose a meaningful bar to judicial review. Compare *Air Courier Conf. of Am. v. American Postal Workers Union*, 111 S.Ct. 913 (1991), and *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 3177 (1990), with *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987).

the remedies available to courts when they do review administrative action are sharply limited,<sup>99</sup> and substantive review is highly deferential.<sup>100</sup>

In a small class of cases, the Japanese courts have reached the merits in reviewing administrative guidance, most notably in connection with construction permits for new development.<sup>101</sup> Their treatment of those cases, however, is instructive: they have not typically adopted a hard look approach, testing the administrative action for rationality and fidelity to the agency's enabling statute.<sup>102</sup> Rather, they commonly have taken precisely the approach advocated by American proponents of regulatory negotiation — they have upheld the agency action so long as it constituted a good-faith attempt to encourage and implement negotiation, attempting to resolve conflicts among the various groups that make up its statutory mandate.<sup>103</sup> Japanese law thus eschews rationality review, which would undercut the informal, bargaining-oriented nature of the administrative system, in favor of review that reinforces that system.

Japanese legal ideology reinforces the administrative guidance system in other ways. Dominant ideology presents government decisions as reached through an administrative process aimed at consensus and harmony. The idea that administrative guidance is non-adversarial, combined with the process' informal and consultative nature, tends to mask the choices made in the decisionmaking process: It presents government decisions as inevitable and natural, rather than as conscious political choices advantaging some individuals and groups and disadvantaging

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99. See Haley, *supra* note 95, at 13.

100. F. UPHAM, *supra* note 87, at 173; see also Sonobe, *Comparative Administrative Law: Trends and Features in Administrative Law Studies (Japan)*, 19 L. IN JAPAN 40, 47 (1986) (Japanese law has not completely "conver[ted] to the Anglo-American model," in part because it still recognizes "the principle of deference to the decisions of administrative agencies and self-restraint relating to interference with technical or political decisions . . . of administrative agencies.").

It should not be too surprising that Japanese administrative law maximizes bureaucratic autonomy. In contrast to American administrative law statutes, which were drafted by politicians, Japanese administrative law statutes were drafted by bureaucrats. See generally Seki, *The Drafting Process for Cabinet Bills*, 19 L. IN JAPAN 168 (1986).

101. See Young, *supra* note 12, at 960-78.

102. But see Upham, *supra* note 97, at 245-46, describing a lawsuit challenging the Ministry of Construction's approval of a road construction plan in the area of Nikko National Park. The Tokyo High Court reached the merits and reversed, using analysis strikingly similar to that employed in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), two years earlier.

103. See, e.g., Young, *supra* note 12, at 960-65 (local authorities held justified in declining to rule on facially valid application for construction permits in order to facilitate compromise between developer and local residents); see also Upham, *supra* note 97, at 244 (Japanese courts examining the merits of environmental-law challenges to administrative action typically consider whether the agency or developer has adequately consulted with local residents. The plaintiffs in such actions phrase the question as whether the developer has followed "democratic procedures.").

others.<sup>104</sup> This understanding of government choices helps shield those choices not only from any legal attack that might be mounted, but from political attack as well. By suggesting that administrative decisions are "natural" and not the province of the courts, the legal ideology reflected in the bureaucracy-court interplay helps ensure that the negotiation intrinsic to the regulatory process is not upset by extrinsic attacks.<sup>105</sup>

In the United States, day-to-day realities of the administrative system encourage agencies to engage in bargaining-oriented regulation, but the institution of judicial review, enforcing an ideology of objectivity and rationality, limits the role of bargaining in the regulatory process. In Japan, by contrast, regulatory practice and legal ideology both emphasize bargaining-oriented administration, and reinforce one another. Judicial review does not provide significant external checks on the administrative guidance system.

## II. STUDYING BROADCAST REGULATION

Before turning to the specifics of broadcast licensing in Japan and the U.S., it is appropriate to devote a moment to the general goals of broadcast regulation, and to acknowledge the pitfalls of comparing different societies' broadcast regulatory systems. In today's industrial democracies, the electronic mass media regulators have two key jobs. First, they stand guard at the point of entry: they decide who shall, and who shall not, be licensed to speak. Second, they exercise control over what those admitted to the broadcast community shall be allowed to say.<sup>106</sup> Most of the recent debate in the United States over broadcast regulation has related to content restrictions such as the Fairness Doctrine, involving the latter of those tasks.<sup>107</sup> For all the attention paid by U.S. scholars

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104. F. UPHAM, *supra* note 87, at 208; cf. G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 44-49 (1978) ("customary" approach to allocation of scarce goods allows those in power to hide the method of allocation, and avoids social-values costs by pretending that no method has been chosen).

105. F. UPHAM, *supra* note 87, at 208; see also Kidder & Hostetler, *Managing Ideologies: Harmony as Ideology in Amish and Japanese Societies*, 24 L. & SOC'Y REV. 895, 895-901 (1990).

106. "Those admitted to the broadcast community," in the United States over-the-air context, are the broadcast stations licensed by the FCC. Individual producers or programmers are not subject to direct FCC control; they speak only at the sufferance of the broadcast stations whose facilities they seek to use. See, e.g., *Muir v. Alabama Education Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983). Recent FCC deregulatory moves have emphasized licensees' exclusive control over programming. See, e.g., *infra* note 107.

107. The FCC recently intensified that debate when it abolished the Fairness Doctrine, under which it had asserted authority to ensure that broadcasters devote time to coverage of public issues, and in so doing provide an opportunity for the presentation of contrasting points of view. See *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043 (1987), *rev. denied*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990); *In re The Handling of Public Issues Under the Fairness Doctrine and*

to such restrictions, though, actions enforcing them make up a relatively small portion of the regulators' output.<sup>108</sup> In this and in many other countries, constitutional and quasi-constitutional considerations have made regulators squeamish about controlling broadcast speech directly.<sup>109</sup> Many governments have found, moreover, that an appropriate decision as to who may engage in broadcast speech will obviate any need to control the speakers.<sup>110</sup>

In shaping the essential nature of a country's broadcasting system, the more basic regulatory job is the earlier one: deciding, directly and indirectly, who shall be allowed to speak in the broadcast marketplace.<sup>111</sup> In the United States and Japan, the general issue of broadcast entry resolved itself into two broad questions. First, the regulators had to decide

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the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974). The Commission declared the doctrine unconstitutional on its face, "disserv[ing] both the public's right to diverse sources of information and the broadcaster's interest in free expression." *Syracuse Peace Council*, 2 F.C.C. Rcd. at 5052.

108. See, e.g., *In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards*, 58 F.C.C.2d 691, 709 (1976) (Robinson, Comm'r, dissenting), *aff'd and rev'd sub nom.* National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

109. Historically, of course, nations have not always been so squeamish about imposing direct press controls, and most of the world's governments do censor the press in one manner or another. Those nations that today engage in direct and intrusive censorship of the *print* media, however, have been for the most part reluctant to allow private broadcasting at all. See generally G. GANLEY & O. GANLEY, *GLOBAL POLITICAL FALLOUT: THE FIRST DECADE OF THE VCR 1976-1985*, at 6-8 (1987).

110. Or, as Morris Ernst explained in 1926, "So long as the Department can determine which individuals shall be endowed with larynxes it does not need additional power to determine what shall be said." *Quoted in* I. POOL, *supra* note 4, at 122.

111. Until recently, most European countries barred private broadcasting entirely. The increasing role of cable television and direct satellite broadcasting in Europe, however, is spurring tremendous movement away from the old models. See *Encyclopedia Britannica, Book of the Year* 361 (1991) (satellite-delivered commercial services had a 30% audience share in Europe in 1990). The Swedish Parliament, for example, agreed to introduce domestic private broadcasting for the first time on September 15, 1990, the day after the Nordisk commercial satellite began its TV4 direct satellite broadcast service into the country. *Id.*; cf. J. TYDEMAN & E. KELM, *NEW MEDIA IN EUROPE: SATELLITES, CABLE, VCRS AND VIDEOTEX* 37-38 (1986) (previous Swedish regime). Almost all European countries have similarly moved in recent years to increase opportunities for private broadcasting. See generally *id.*; Hoffman-Riem, *Law, Politics and the New Media: Trends in Broadcasting Regulation*, 9 WEST EUROPEAN POLITICS 125 (Issue No. 4, Special Issue, 1986). For the tortuous tale of the advent of private broadcasting in France, see *Regulatory Change in Western Europe: From National Cultural Statecraft to International Economic Statecraft*, in *BROADCASTING AND NEW MEDIA POLICIES IN WESTERN EUROPE* 107-124 (K. Dyson & P. Humphries eds. 1988); for stories in other countries, see, *Spain is Moving to End TV Monopoly of State*, N.Y. Times, Aug. 28, 1989, at D9, col. 5; *Greece Opens the Way to Private Television*, N.Y. Times, July 29, 1989, at § 1, p. 48, col. 4. The Netherlands, by contrast, continues to operate a unique system under which governmental authorities allot television access time, making up the entire broadcast day, to ideological, religious and other groups in proportion to their public support. See J. TYDEMAN & E. KELM, *supra*, at 34.

how to choose the private speakers they would license in the established communications media. That question has been, in both the United States and Japan, subtle and complex.<sup>112</sup> It has raised other issues in turn, such as whether to allow transfer of licenses once awarded — United States regulators do,<sup>113</sup> while Japan's do not. Second, the regulators had to decide how to incorporate new technology into a communications marketplace oriented to, and dominated by, established media.<sup>114</sup> In the absence of regulatory intervention, new technology is often developed and controlled by different actors from those who control the old. The rise of new technology upsets existing distributions of media power, threatening to introduce new voices not previously heard. When regulators devise policy affecting the competitive viability of new technology, they determine who will succeed in the broadcast marketplace, and affect the distribution of power among media outlets.<sup>115</sup>

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112. In licensing the electromagnetic spectrum, a regulatory agency must begin by resolving allocation problems preliminary to actually selecting licensees. These include where to place each service (such as FM radio, UHF television, and land mobile radio) on the frequency spectrum, and how wide a portion of the spectrum to allocate to each service. United States broadcasting history has been shaped by choices such the FCC's 1945 decision to shift FM radio out of the 50 MHz range to its current position in the 100 MHz range, and its 1952 decision *not* to shift television entirely into the UHF band. See V. Mosco, *supra* note 9, at 54-61, 71-76.

After resolving these allocation questions the regulatory agency faces others: How shall stations be distributed geographically? How wide a frequency band should be allotted to each individual station? How much power and antenna height should each station be allowed? All of these decisions crucially affect the manner in which different stations will interfere with one another, and thus how many can be licensed.

Finally, the agency must deal with the second-order question of how to choose among potential individual users of the frequency bands. In practice, as with U.S. AM radio, an agency may conflate these inquiries. See *infra* notes 133-68 and accompanying text.

113. See *supra* note 3.

114. Cf. Litman, *supra* note 72.

115. For example, only a few years ago, the American electronic broadcast marketplace was controlled by the three networks and by the major Hollywood studios, who produced the bulk of television programming. While the networks have survived as key players, the major Hollywood studios have almost entirely dropped off the list of companies doing business in the U.S. that earn the greatest revenues from electronic mass media. As of 1989, the studios had been replaced by newcomers into the electronic marketplace whose position was made possible by new technology and by a regulatory scheme allowing the exploitation of that technology: Time Warner (owner of HBO, Cinemax, the former Warner Communications, and the nation's second-largest collection of cable systems); Tele-Communications Inc. (the nation's largest cable system operator); Viacom (owner of Showtime, MTV, and cable systems); and Turner Broadcasting (owner of TBS, CNN, and other cable programming services). See BROADCASTING, June 4, 1990, at 48. None of those companies, except for the individual constituents of Time Warner, even existed on the national scene twenty years ago. Other companies earning over a billion dollars in 1989 electronic mass communications revenues included the three networks; Sony (owner of Columbia Pictures, but drawing most of its electronic mass media revenues from equipment and manufacturing); News Corp. (owner of Fox); and Saatchi & Saatchi, an advertising company. *Id.*

How should we evaluate the choices that the United States and Japan have made? Some yardsticks are relatively straightforward. It seems reasonable to ask that a broadcast regulatory system, all other things being equal, achieve its results speedily and cheaply; it should reach its decisions in a manner that consumes a minimum of public and private resources. Other yardsticks, however, are more controversial. It is hard to evaluate mass media regulation without some consensus as to the goals that communications policy should serve and the means by which those goals might best be realized. A regulator must look to these basic philosophical issues when it decides, for example, whether to license a larger or smaller number of broadcast speakers; whether to use clearly defined standards for selecting those speakers, or vague and amorphous ones; and whether to select speakers from a single, homogeneous sector of society, or from as diverse a set of individuals as it can.

United States constitutional philosophy emphasizes a right to individual self-expression<sup>116</sup> that, in turn, supports a broadcast system in which as many people as possible have the opportunity to engage in mass communication on a meaningful level. United States philosophy stresses the notion that mass communications provide a "marketplace of ideas" in which important ideas can be threshed out, and through which individuals can decide for themselves what is true and right.<sup>117</sup> This ideology supports a broadcast system in which all, or most, important ideas are discussed, and a wide range of viewpoints are presented. United States philosophy, finally, stresses the role of free speech as fostering political self-government.<sup>118</sup> This perspective supports a broadcast sys-

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116. See generally T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

117. See Justice Holmes' famous pronouncement in *Abrams v. United States*: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385 (1969). The "marketplace of ideas" metaphor has been attacked from both sides of the political spectrum. Compare *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of New York*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting) (marketplace of ideas imagery is misleading because it belittles the proper government role in remedying communicative "market imperfections"), with Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5 (marketplace of ideas imagery pernicious because it encourages regulators to regulate speech in the name of correcting communicative market failures).

118. "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug 4, 1822), quoted in Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505, 506 (1979).

The Supreme Court has frequently identified self-government as the central social goal the First Amendment serves. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 771, 776-77 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272

tem that incorporates sufficient diversity to supply the community with all of the information and views that it needs in order to govern itself.

These elements of United States thought, if taken seriously, suggest a broadcast regulatory system without artificial limitations on speakers, with as wide a variety of speakers as possible, and without procedures that allow the government hidden control over the media system.<sup>119</sup> It is appropriate, therefore, to judge the U.S. broadcast regulatory system by those standards. In the licensing arena, one can argue, a regulator should not artificially or arbitrarily limit the number of speakers who could be licensed.<sup>120</sup> The regulator should not award its licenses only within a small group of favored applicants; rather, it should seek to ensure diversity among broadcast speakers.<sup>121</sup> It should base any licensing choices on neutral criteria, and not bias the roster of broadcast speakers in favor of supporters of the current regime.<sup>122</sup> The thrust of United States constitutional thinking suggests that broadcast speakers ought to be chosen by means of objective criteria and procedures, rather than in-

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(1971); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

119. See Weinberg, *supra* note 3, at 1282-84.

120. See *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) (requiring trial on constitutionality of government limitation on number of cable systems operating in a given area), *aff'd on narrower grounds*, 476 U.S. 488 (1986), *on remand*, 67 R.R.2d 366 (C.D. Cal. 1990) (holding limitation unconstitutional); *Rules Relating to Multiple Ownership*, 22 F.C.C.2d 306, 311 (1970) ("We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50."). But see Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 133 (1990) (FCC "policies have openly sought, virtually through the agency's entire life span, to restrict broadcast licenses and competition for broadcasters . . . to far below the quantity technically available"); see also *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) (public interest in certain contexts might demand the licensing of fewer, rather than more, broadcasters).

In general, under United States law, a communications regulator may not, without good and sufficient reason, limit the number of individuals who will be allowed to speak. Any government action limiting expression, even if designed to serve legitimate goals and neutral as to content, must bear a special burden of justification under the first amendment. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

121. See *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990); *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (traditional U.S. communications-policy goal of "diversity of program and service viewpoints"); see also *Assoc. Press v. United States*, 326 U.S. 1 (1945). From the perspective of traditional U.S. broadcast regulation, such diversity is necessary if broadcast listeners are to "receive suitable access to social, political, aesthetic, moral and other ideas and experiences . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

122. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) (Commission may not "choose among applicants upon the basis of their political . . . views, or upon any other capricious basis"); see also Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. RES. J. 521; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-71, 273-76, 291-92 (1964).

formal, vague, or discretionary ones.<sup>123</sup> In fact, U.S. broadcast regulation does not typically follow those rules,<sup>124</sup> but it is surely legitimate to measure the regulatory system against those standards.

By contrast, one cannot assume that other cultures bring the same philosophical background to communications-policy issues. Japanese culture may place less stress on the right to individual self-expression; it tends to emphasize group rather than individual identity.<sup>125</sup> Japanese thinking does not necessarily place so great an emphasis on rational discussion in the marketplace of ideas as a route to truth; the Japanese are said by some to discount verbal discourse as a means to truth in favor of more intuitive connections.<sup>126</sup> The notion of free speech as a tool of democratic self-government does not have as deep historical roots in Japanese as in Anglo-American thought; indeed, freedom of expression did not become an important or powerful part of Japanese constitutional thinking until after the Second World War.<sup>127</sup> Japanese communications scholars and bureaucrats raise concerns, moreover, that in the United

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123. The latter are seen as threatening first amendment values because they "intimidate . . . [would-be speakers] into censoring their own speech," and because they undermine the transparent decisionmaking that the first amendment is said to demand, "mak[ing] it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757-58 (1988).

124. Applying these criteria to broadcast licensing has been a special challenge for United States constitutional thought. *Compare* *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043 (1987), at 3 (fairness doctrine has unconstitutional chilling effect "because the process necessarily involves a vague standard, the application and meaning of which is hard to predict"), *rev. denied*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990), *Mayton*, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 763 (1989), and *Kalven*, *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15, 47-48 (1967), with *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (establishing vague and unpredictable standards for broadcast allocation), and *Spitzer*, *supra* note 4, at 1040 (questioning applicability of *Lakewood* to broadcasting).

125. See F. HAIMAN, *CITIZEN ACCESS TO THE MEDIA: A CROSS-CULTURAL ANALYSIS OF FOUR DEMOCRATIC SOCIETIES* 3 (1987). According to Professor Beer, the Japanese freedom of speech system in general protects the freedom of expression of groups better than it protects that of individuals. L. BEER, *FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY* 120-21 (1984).

For a caveat on "culture," see *infra* notes 252-55 and accompanying text.

126. See E. REISCHAUER, *supra* note 7, at 135-36; see also Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179 (1988).

127. See L. BEER, *supra* note 125, at 45.

The concept of free speech as a tool of democratic self-government can be traced in Anglo-American thought to the seventeenth-century Levellers and beyond. See L. LEVY, *EMERGENCE OF A FREE PRESS* 91 (1985). In Japan, by contrast, the concept of human rights in the Western liberal democratic sense was not introduced until the nineteenth century. L. BEER, *supra* note 125, at 101-02. Early English thinking regarding freedom of expression, however, may have been significantly less libertarian than is generally believed, see L. LEVY, *supra*, at 89-118, and the concept of Western-style human rights may not be younger in Japan than in many European countries.



States are not the subject of much attention; for example, they are much more concerned than their American counterparts about the damaging or corrosive effects on society of *too much* information or speech, which they sometimes characterize as information "pollution" or "overload."<sup>128</sup> In certain ways, Japanese society can be characterized as *more* sensitive to freedom of expression issues than that of the United States; the spectrum of political discourse is broader, and the public commitment to a spectrum of political discourse ranging from socialism on the left to extreme conservatism on the right is genuine.<sup>129</sup> Nevertheless, freedom of speech philosophy in Japan springs from different sources, and reflects different values, from those that influence freedom of speech philosophy in the United States.<sup>130</sup>

How, then, is one to evaluate the success or failure of each nation's broadcast regulatory system? For my own part, I share the values that I have identified as underlying United States freedom of speech and communications-policy philosophy; I believe that the goals of access and diversity should be fundamental to any mass communications regulatory system. In evaluating the U.S. and Japanese broadcast regulatory systems, therefore, I have tried to remain cognizant of the value differences that can color any evaluation. At the same time, where I consider it appropriate, I do measure the two systems against an American yardstick, and approach the U.S. and the Japanese systems from the standpoint of regulatory efficiency and from a United States-influenced constitutional perspective. That evaluation is especially valuable now, given the call of some American reformers for U.S. regulation to adopt a more "Japanese" approach;<sup>131</sup> it is worth examining whether such a strategy would advance American values more or less effectively than does the current U.S. system.

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128. See ECONOMIC PLANNING AGENCY, *THE INFORMATION SOCIETY AND HUMAN LIFE* 37 (Mar. 31, 1983) (warning that the "information flood" could lead to "an increase in societal pathological phenomena"); Takagi, *Mass Media in "Information Revolution" and Some Problems of New Media*, in *INFORMATION AND ITS FUNCTIONS* 359-60 (Univ. of Tokyo Inst. of Journalism and Communication Stud. ed. 1986, copy on file with author) (warning of "unbalanced flow of information" and "social disintegration"); Bowes, *Japan's Approach to an Information Society: A Critical Perspective*, 2 *KEIO COMM. REV.* 39, 40-43 (1981) ("information pollution").

129. I am grateful to Frank Upham for this reminder.

130. See generally L. BEER, *supra* note 125, at 100-22.

131. See, e.g., *supra* notes 14-16, 61-72, and accompanying text. Professor Young has suggested that Americans might profitably adapt certain administrative guidance techniques for resolving small-scale land use and family-law disputes. Young, *supra* note 12, at 981-82.

## III. BROADCAST LICENSING

I now turn to broadcast licensing in Japan and the United States. For each of the two countries, I examine how regulators approach the general issue of how to allocate the limited broadcast spectrum, and the specific issue of selecting individual licensees for particular contested broadcast authorizations. Both the United States and Japan resolve these questions in a manner that to some degree epitomizes their respective regulatory systems: in looking at their answers to those questions, one can see the regulatory system of each country revealed in miniature.

A. *Broadcast Licensing in the United States*<sup>132</sup>

In allocating the broadcast spectrum, U.S. regulators initially used a somewhat bargaining-oriented approach: they made decisions both through large industry conferences and through individual meetings with politically powerful advocates for individual stations. In large part because of the pressures of judicial review, however, regulators came to make allocation decisions through a more formal adjudicatory process. In choosing between applicants for specific broadcast authorizations, the Federal Communications Commission moved from an opaque decision-making process for distributing broadcast licenses to one intended to be objective and transparent, shifting to a formal rationality model.

The system U.S. regulators created has not worked well in practice. Its allocation policy decisions for both radio and television have been sharply criticized, and its system for choosing between competing broadcast applicants is largely wasteful and pointless. The shift to a formal rationality model, while consistent with American first amendment and communications-policy philosophy, has not achieved good results.

1. *Allocation Policy.* At the time the Radio Act of 1927 went into effect, there were well over 700 AM radio stations already broadcasting, at frequencies and power levels of their own choosing.<sup>133</sup> The Federal

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132. I offer here what is necessarily a brief and unbalanced survey of some aspects of United States broadcasting law; I seek to offer only enough background for the reader to appreciate the different paths that Japanese law has taken. For further discussion, see, e.g., D. GINSBURG, M. BOTEIN & M. DIRECTOR, *REGULATION OF THE ELECTRONIC MASS MEDIA* (2d ed. 1991) [hereinafter D. GINSBURG]; V. MOSCO, *supra* note 35; Robinson, *supra* note 35.

133. See Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity"*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 10, at 61, 66; Caldwell, *Practice and Procedure Before the Federal Radio Commission*, 1 J. AIR L. 144, 151 (1930). By 1930, available channels on the broadcast band were "taxed to, and in many cases beyond, their capacity." *Id.* at 164.

Radio Commission's<sup>134</sup> first task was to get large numbers of those stations off the air and to rearrange the rest, sharing new frequencies and power levels, so as to make the most efficient use of the available spectrum. The Commission used bargaining to achieve some of its goals. For example, it developed its crucial General Order 40<sup>135</sup> through informal open conferences with representatives of all branches of the industry.<sup>136</sup> General Order 40 structured the broadcasting system by prescribing the power levels available to stations on each frequency (and hence the number of stations that could be accommodated on each frequency, and the distance their signals would reach).<sup>137</sup> The Commission resolved allocation of aircraft and ship-to-shore radio frequencies similarly.<sup>138</sup>

The Commission, however, did not resolve all of its problems through consensual bargaining. In its early years, it commonly ordered stations to shift their frequencies or to lower their power outputs without any notice or discussion.<sup>139</sup> These orders, to be sure, were the result of informal, bargaining-oriented contacts to some extent. The Commissioners had extensive off-record contacts with successful applicants and would-be applicants, and with their Senators and Representatives.<sup>140</sup> Cases in which the Commission changed station assignments without notice typically involved action on behalf of a politically powerful re-

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134. The Federal Radio Commission was established by the Radio Act of 1927; it was replaced by the Federal Communications Commission, established by the Communications Act of 1934. I refer to both in this discussion as "the Commission."

135. 1928 F.R.C. ANN. REP. 48 (as found in Supplemental Report for Period from July 1, 1928 to September 30, 1928). The Federal Radio Commission, in its first few years, rather than issuing codified formal rules or regulations, issued a variety of "general orders" of widely varying content and published those orders in its annual reports. See Caldwell, *supra* note 133, at 150-51.

136. Caldwell, *supra* note 133, at 152-53; see also Ashby, *Legal Aspects of Radio Broadcasting*, 1 AIR L. REV. 331, 338 (1930); Siegel, *A Realistic Approach to the Law of Communications*, 8 AIR L. REV. 81, 87 (1937).

137. The Commission allocated to each frequency channel a level of power at which licensees were authorized to broadcast. It classified all stations as either clear channel, high power regional, regional, or local. See, e.g., *Courier Post Publishing Co. v. FCC*, 104 F.2d 213, 215 (D.C. Cir. 1939). Present AM policy maintains the clear channel, regional, and local classifications. See 47 C.F.R. § 73.21-73.29 (1990).

138. Caldwell, *supra* note 133, at 152.

139. See *id.* at 173-75; see, e.g., *Federal Communications Commission: Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. 159 (1934) (statement of Rev. John Harney), reprinted in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 10, at 505; see also Cass, *supra* note 10, at 85.

140. Caldwell, *supra* note 133, at 182; see also Herring, *Politics and Radio Regulation*, 13 HARV. BUS. REV. 167, 170-71 (1935); 75 CONG. REC. 3688 (1932) (Rep. Horr) ("If any of you desire to secure a wave length, take plenty of us on this side of the Chamber and plenty on the other side of

quester, with or without the filing of a formal application.<sup>141</sup> The Commission, however, did not seek to bargain with the targets of these orders. It was not equipped to bargain with applicants that did not have Senators or Representatives to speak for them; there were far too many of them, they were located too far away, and the Commissioners had not had prior contact with them.<sup>142</sup>

The Commission thus followed the bargaining model to the extent that it made decisions based on relative political power, but departed from that model in that it did not seek to achieve consensus behind its choices. Nor did it seek to follow formal-rationality procedures. Such procedures might have interfered with the political commitments it had made; moreover, the Commission took the position that judicial review was not generally available to constrain its actions.<sup>143</sup>

That state of affairs did not long endure. As of July 1, 1930, Congress amended the Radio Act, sharply expanding the class of persons who could seek judicial review of Commission decisions relating to broadcast licenses.<sup>144</sup> In so amending the Act, Congress helped usher in a new age of expansive standing to seek judicial review of agency deci-

the Chamber, and then you will get your wave length."), reprinted in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 10, at 791.

Senators and Representatives also engaged in on-record contacts by acting as applicants' representatives at hearings. Caldwell, *supra* note 133, at 169.

141. Caldwell, *supra* note 133, at 164-65, 167; Caldwell, *Appeals from Decisions of the Federal Radio Commission*, 1 J. AIR L. 274, 285 n.45, 296-97 (1930).

142. *But see* 75 CONG. REC. 3687 (1932) (Commission sought to resolve some questions involving shared frequencies through bargaining among broadcasters), reprinted in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 10, at 790; Caldwell, *The New Rules and Regulations of the Federal Radio Commission*, 2 J. RADIO L. 66, 82-83 & nn.23-24 (1932); Notes and Comments, 1 J. AIR L. 356, 359 (1930).

143. Section 16 of the Radio Act provided for review only of the Commission's action revoking a license or refusing an application "for a construction permit, for a station license, or for the renewal or modification of an existing station license . . ." See Caldwell, *supra* note 141, at 274 n.2; Cass, *supra* note 10, at 82. The Commission took the position that when it renewed a station license (which it was required to do for each station every three months) but did so subject to modifications (such as a shift to a less desirable frequency, a decrease in power, or a requirement that the station transmit only during certain hours of the day), its order was not subject to review because it did not constitute an order refusing an application "for the renewal . . . of an existing license." See Cass, *supra* note 10, at 82-83; Caldwell, *supra* note 133, at 173.

144. Under the amendment, the class of persons entitled to review included any applicant whose application for license, or renewal or modification of license, was refused by the Commission; any licensee whose license was revoked, modified, or suspended by the Commission; and any other person "aggrieved . . . or adversely affected by any Commission action granting or refusing any such application or revoking, modifying, or suspending a station license." Act of July 1, 1930, Pub. L. No. 71-494, 46 Stat. 844. Essentially the same provision is still the law today; see 47 U.S.C. § 402(b) (1990).

On the 1930 amendment, see generally Note, 1 AIR L. REV. 416 (1930).

sions. The new language created review rights quite unheard of under the then-dominant "legal right" test,<sup>145</sup> and ultimately formed the basis for expansive review of agency action under the 1946 Administrative Procedure Act.<sup>146</sup> More immediately, however, the 1930 amendment made almost all Radio Commission licensing actions subject to judicial review, and centralized that review in the Court of Appeals of the District of Columbia.<sup>147</sup> While initially deferential to the Commission on substantive matters,<sup>148</sup> that court was steadfast in requiring formal process. It immediately ended the Commission's practice of modifying licenses without prior hearing,<sup>149</sup> and indeed held that the Commission

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145. See *Alexander Sprunt & Son v. United States*, 281 U.S. 249 (1930); see also, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137-39 (1939).

The "legal right" test for standing is similar to the approach taken by contemporary Japanese law. See *supra* note 98 and accompanying text.

146. The language of the 1930 Radio Act amendment, carried over into the 1934 Communications Act, was construed by the Supreme Court in the influential case of *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The language was later incorporated into the standing language of the APA, see S. REP. NO. 752, 79th Cong., 1st Sess. 44 (1945). The APA was itself expansively interpreted in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

147. This court was renamed the Court of Appeals for the District of Columbia Circuit under the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 11-308, 84 Stat. 473, 475 (1970).

148. See, e.g., *Radio Investment Co. v. FRC*, 62 F.2d 381 (D.C. Cir. 1932); *Beebe v. FRC*, 61 F.2d 914 (D.C. Cir. 1932); *Durham Life Ins. Co. v. FRC*, 55 F.2d 537 (D.C. Cir. 1931); *Riker v. FRC*, 55 F.2d 535 (D.C. Cir. 1931); *Reading Broadcasting v. FRC*, 48 F.2d 458 (D.C. Cir. 1931); *KFKB Broadcasting v. FRC*, 47 F.2d 670 (D.C. Cir. 1931); *Marquette Univ. v. FRC*, 47 F.2d 406 (D.C. Cir. 1931); *Ansley v. FRC*, 46 F.2d 600 (D.C. Cir. 1930); *Havens & Martin, Inc. v. FRC*, 45 F.2d 295 (D.C. Cir. 1930); *Carrell v. FRC*, 36 F.2d 117 (D.C. Cir. 1929); *City of New York v. FRC*, 36 F.2d 115 (D.C. Cir. 1929); *Technical Radio Lab. v. FRC*, 36 F.2d 111 (D.C. Cir. 1929).

The court handed down three early decisions reversing the Commission based on the court's own reweighing of the equities in the case. See *Great Lakes Broadcasting Co. v. FRC*, 37 F.2d 993 (D.C. Cir. 1930); *Richmond Development Corp. v. FRC*, 35 F.2d 883 (D.C. Cir. 1929); *General Electric Co. v. FRC*, 31 F.2d 630 (D.C. Cir. 1929). The court apparently abandoned that mode of review, however, after the Radio Act's 1930 amendment, which provided in part that the reviewing court was "limited to questions of law and that findings of facts by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." Act of July 1, 1930, Pub. L. No. 71-494, 46 Stat. 844. The change in statutory language was in part a reaction to the holding in *FRC v. General Electric Co.*, 281 U.S. 464 (1930), that the Court of Appeals under old § 16 had been acting in an "administrative" (Art. I) and not a "judicial" (Art. III) capacity, and that consequently its decisions could not be reviewed in the Supreme Court (or any other Art. III court).

149. See *Westinghouse v. FRC*, 47 F.2d 415 (D.C. Cir. 1931); *Courier-Journal Co. v. FRC*, 46 F.2d 614 (D.C. Cir. 1931); *Saltzman v. Stromberg-Carlson Telephone Mfg. Co.*, 46 F.2d 612 (D.C. Cir. 1931). All of these cases arose under pre-1930 law. In several other cases presenting similar facts the Commission entered into settlements favorable to the licensee while appeals to the Court of Appeals of the District of Columbia were pending. See *Nordhaus, Judicial Control of the Federal Radio Commission*, 2 J. RADIO L. 447, 460 & nn.38-39 (1932).

was required to grant a broadcaster a hearing before modifying *another* station's license so as to increase substantially the interference to which the first would be subject.<sup>150</sup> Finally, the court held, the Commission could base its decisions only on the hearing evidence.<sup>151</sup>

Reinforcing this trend towards greater formal process were provisions of the old Radio Act and of the Communications Act requiring the Commission to grant hearings before the denial of any application for a station license or for the renewal or modification of a license,<sup>152</sup> and the Commission's own regulations, first enacted in 1930, requiring hearings before the grant of any application that would adversely affect the interests of another broadcaster or broadcast applicant.<sup>153</sup> In a series of 1938 cases, the Court of Appeals began to apply quite stringent hard-look analysis to the reasoning underlying Commission license-related decisions.<sup>154</sup> Station owners disappointed by Commission decisions, moreover, were not shy about taking their disputes to court.<sup>155</sup> The collective force of these factors moved the Commission to a notably more formal posture in the process of license allocation.<sup>156</sup>

These procedural issues, however, left untouched the substantive

150. *Journal Co. v. FCC*, 48 F.2d 461 (D.C. Cir. 1931); *see also FCC v. National Broadcasting Co.*, 319 U.S. 239 (1943) (Communications Act of 1934).

151. *Saltzman v. Stromberg-Carlson Telephone Mfg. Co.*, 46 F.2d 612 (D.C. Cir. 1931).

During consideration of the Communications Act of 1934, the Commission unsuccessfully sought to restore the old, restrictive, judicial review provisions. *See A Bill to Provide for the Regulation of Interstate and Foreign Communications by Wire or Radio, and for other Purposes: Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73rd Cong., 2d Sess. 43-44 (1934)* (statement of E. O. Sykes, Chairman, Federal Radio Commission), *reprinted in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 10, at 165-66.

152. *See Radio Act of 1927* § 11, Pub. L. No. 69-632, 44 Stat. 1162, 1166, *repealed by ch. 652, § 602(a)*, 48 Stat. 1102 (1934); *Communications Act of 1934*, Pub. L. No. 73-416, 48 Stat. 1064, 47 U.S.C. §§ 308, 309(d),(e) (1990); *see generally Caldwell, supra* note 133, at 168-72.

153. *See Loucks, Comment on Procedural Rules and Regulations of the Federal Radio Commission*, 1 J. AIR L. 620, 620 (1930); *Caldwell, supra* note 142, at 73-74.

154. *See Tri-State Broadcasting Co. v. FCC*, 96 F.2d 564, (D.C. Cir. 1938) (agency conclusions not adequately supported by factual findings); *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554 (D.C. Cir. 1938) (same); *Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1938) (same; agency inadequately justified apparent policy determination); *see also Sanders Bros. Radio Station v. FCC*, 106 F.2d 321, 326-27 (D.C. Cir. 1939) (agency may not consider, in license-related decision, any evidence or argument not introduced at the hearing itself), *rev'd on other grounds*, 309 U.S. 470 (1940).

155. *See 75 CONG. REC.* 3686 (1932) (statement of Rep. Davis) (station owners "always appeal if they feel aggrieved, and frequently, perhaps, when they are not aggrieved"), *reprinted in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, supra* note 10, at 789.

156. *Compare Missouri Broadcasting Corp. v. FCC*, 94 F.2d 623 (D.C. Cir. 1937) (agency must file statement of facts and reasons with or immediately after each order) *with Caldwell, supra* note 141, at 314 (FRC in 1930 did not enter *any* written opinion explaining its decisions unless and until an appeal was taken).

questions of how many broadcasters the agency should license, whether it should license to the limits of technological availability, and what substantive factors should govern its decision in ruling on the application of a single applicant for an open frequency. After the shakeout of the late 1920s, the Commission accepted applications from new would-be broadcasters in a variety of geographical locations and required each applicant to specify the community it wished to serve and the frequency on which it wished to broadcast.<sup>157</sup> The Commission granted these applications if it found them to be in the "public convenience, interest, or necessity."<sup>158</sup> It looked to factors including technical interference with other, already-licensed stations,<sup>159</sup> and whether the applicant was technically and financially capable of running its proposed station as a going concern.<sup>160</sup> The FCC also, however, denied some applications for new service or for moves to new locations on the ground that there was no "need" for the proposed new service, because the community in question already could receive what the FCC deemed adequate broadcast programming.<sup>161</sup> The "need" analysis allowed the Commission to deny an application notwithstanding that spectrum was available in the short term, in the interest of preserving spectrum for future applicants in some other location;<sup>162</sup> it did

157. See *Chicago Fed'n of Labor v. FRC*, 41 F.2d 422 (D.C. Cir. 1930).

158. Radio Act of 1927, Pub. L. No. 69-632, §§ 9, 11, 44 Stat. 1162, 1166-67, *repealed by* ch. 652, § 602(a), 48 Stat. 1102 (1934); Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 47 U.S.C. § 307(a) (1990).

159. See T. CARTER, M. FRANKLIN & J. WRIGHT, *THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF THE ELECTRONIC MASS MEDIA* 45-46 (2d ed. 1989) [hereinafter T. CARTER].

160. See, e.g., *Great Western Broadcasting Ass'n v. FCC*, 94 F.2d 244 (D.C. Cir. 1937) (applicant financially unqualified); *Goss v. FRC*, 67 F.2d 507 (D.C. Cir. 1933) (insufficient showing that applicant financially qualified combined with other factors led to denial of application).

The FRC and FCC were constrained as well by the requirements of the Davis Amendment, Pub. L. No. 70-195, 45 Stat. 373 (1928), requiring them to equalize broadcast allocations among five geographic zones. While the Davis Amendment had substantial Congressional support, it was opposed by the industry and by commentators, see 1 AIR. L. REV. 117 (1930), and it was later repealed by Pub. L. No. 74-652, 49 Stat. 1475 (1936).

161. See, e.g., *Goss v. FRC*, 67 F.2d 507 (D.C. Cir. 1933); F.P. Cerniglia, 4 F.C.C. 146 (1937); see also Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR. L. REV. 295, 325 (1930).

162. The Commission was concerned, at least in part, that granting a station license in one area limited the frequency assignments that would be available, without interference, in other areas; granting a license in Monroe, Louisiana might limit the number of licenses available in New Orleans. Similar concerns led the Federal Radio Commission to consider factors such as duplication of programs or types of service from station to station, and even whether a station provided relatively less valuable public service because its programming was already available to the public on phonograph records. I. POOL, *supra* note 4, at 123.

so, however, in a subjective, ad hoc and opaque manner.<sup>163</sup>

Judicial review of the Commission's licensing decisions changed that practice as well. In *Courier Post Publishing Co. v. FCC*,<sup>164</sup> the D.C. Circuit reviewed a Commission decision denying an application for a broadcast station in Hannibal, Missouri (pop. 23,000), on the ground that Hannibal received enough broadcast signals. The court reversed, emphasizing that while Hannibal received signals originating elsewhere, it had no broadcast station of its own. In the wake of the *Courier Post* decision, the Commission largely abandoned its old policy that a station license should be denied where there was no need for new service, and adopted a new policy licensing stations regardless of whether it considered there to be need for the new service.<sup>165</sup> The Commission thus came to treat AM

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163. On other occasions, station owners argued to the Commission that it should deny applications for new licenses or for expanded service or applications to move a station from one community to another, not because there was no need for the new service, but for a somewhat different reason: because the new service would do economic damage to the existing broadcaster(s) in the locality. The FCC never accepted that argument as the sole basis for denying an application; it generally rejected it as unsupported by fact. See, e.g., *Red Oak Radio Corp.*, 1 F.C.C. 163 (1934); *WJW, Inc.*, 2 F.C.C. 110, 112 (1935); see also *Telegraph Herald*, 4 F.C.C. 392 (1937) (claim rejected by the Commission without discussion), *rev'd sub nom. Sanders Brothers Radio Station v. FCC*, 106 F.2d 321 (D.C. Cir. 1939), *rev'd*, 309 U.S. 470 (1940).

In *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), the Supreme Court held economic injury to existing broadcasters irrelevant to the licensing decision except insofar as it injured the public interest. As the Commission read the Supreme Court's decision, the fact that granting a new license might hurt or even bankrupt an existing station was irrelevant to the licensing process. See, e.g., *Presque Isle Broadcasting Co.*, 8 F.C.C. 3, 8-10 (1940) (on rehearing); see also *Telegraph Herald*, 8 F.C.C. 322 (1940) (on rehearing); *Sentinel Broadcasting Corp.*, 8 F.C.C. 140, 147 (1940); *United Theaters*, 8 F.C.C. 489 (1941). The Commission cautioned that economic competition was relevant to the extent that it meant that the *new applicant* would not survive, for that suggested that the applicant was not "financially qualified" within the meaning of FCC regulations. *Presque Isle*, *supra*, at 8.

In later years, the D.C. Circuit, which had been reversed by the Supreme Court in *Sanders Brothers* (see 106 F.2d 321 (D.C. Cir. 1939), *rev'd* 309 U.S. 470 (1940)), once again took up the cudgel with the Commission over the economic injury issue. See *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958) ("To license two stations where there is revenue only for one may result in no good service at all"; Commission must deny license for a new station if the competitive effect on the existing station would result in an overall loss of program service). The Commission, however, has never rejected proposed new service on that ground. *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 F.C.C. Rcd. 638, 639 (1988) (report and order).

164. 104 F.2d 213 (D.C. Cir. 1939).

165. See *F.W. Meyer*, 7 F.C.C. 551, 558 (1939), in which the Commission granted a license for a locally-oriented station in Denver, a city already blessed with five other radio broadcasters, four of which were network-affiliated. The *F.W. Meyer* decision, responding to *Courier Post*, reversed a ruling the Commission had made just six months earlier. The Commission declined to reach the hypothetical case in which a protestant made a strong showing that a single area was getting "an unduly large proportion of the limited broadcast channels," "to the prejudice of other districts where there is a demand for facilities." *Id.*



licensing largely on a first-come-first-served basis, limited only by objective qualifications<sup>166</sup> and the immediate availability of spectrum. In so doing, it made the allocation process more transparent, and gave up discretionary or informal control over who could broadcast on open frequencies.

The increasing transparency of the Commission's decisionmaking, however, did not necessarily result in substantively successful decisions. The first-come-first-served approach, coupled with initial FRC decisions favoring influential would-be broadcasters in urban areas, saturated the AM band in the most populated areas. As a result, some rural areas did not receive any AM radio service at all, and more received no nighttime service.<sup>167</sup> Moreover, the formal-rationality requirement of a hearing for all affected broadcasters allowed entrenched broadcasters to delay new stations with long and expensive litigation.<sup>168</sup>

When the FCC licensed television, therefore, it changed its approach. After extensive fits and starts, it promulgated a complete Table of Assignments for the United States, filling up the frequency band by assigning at least one channel to each of 1,274 different communities.<sup>169</sup>

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166. Some of those qualifications were mandated by law. *See, e.g.*, 47 U.S.C. § 310 (a) (1990) (station license cannot be granted to representative of foreign government). Others, such as the requirements of adequate capital and expertise, were developed by the Commission itself.

167. *See V. Mosco, supra* note 9, at 48; *see also id.* at 64 (FCC shoehorning additional AM authorizations into a saturated AM band); H. ZUCKMAN, M. GAYNES, T. CARTER & J. DEE, *MASS COMMUNICATIONS LAW* 386 (3d ed. 1988) [hereinafter H. ZUCKMAN].

168. In particular, an existing broadcaster was routinely positioned to argue that a new applicant would cause unacceptable frequency interference. *See H. ZUCKMAN, supra* note 167, at 386-87.

169. Sixth Report and Order on Television Assignments, 41 F.C.C. 148, 573-579 (1957); *see D. GINSBURG, supra* note 73, at 165 (quoting Alexander, *The Local Service Objective and FCC Broadcast Authorizations*) (unpublished student note).

A broadcast applicant, the FCC explained, would be entitled to a license if it met objective qualifications and was applying for an open broadcast "slot" on the Table of Assignments. The Commission rejected plans that assigned at least four or five VHF channels to each of the major markets, providing service to smaller communities primarily through the powerful metropolitan stations. Instead, animated by the same concern for localism expressed by the court in *Courier Post*, the regulators took the contrary approach of locating one or two assignments in almost every community in the nation, no matter how small. The Commission allocated additional channels to large markets only from the frequencies that were left over after the initial allocation to every community had been completed. *See Sixth Report & Order, supra*, at 167-72; *see also G. HESS, AN HISTORICAL STUDY OF THE DUMONT TELEVISION NETWORK 155-68* (1960 & photo. reprint 1979). The FCC, in addition, rejected plans that called for "deintermixture," that is, for an approach under which VHF and UHF stations would not be placed in competition with each other. Instead, the Commission ruled, VHF and UHF stations should be intermixed in the same communities. *Sixth Report and Order, supra*, at 205-09; HESS, *supra*, at 155-68; J. KITROSS, *TELEVISION FREQUENCY ALLOCATION POLICY IN THE UNITED STATES 234-47* (1960 & photo. reprint 1979).

This approach too has been sharply criticized. According to critics, the FCC's television allocation plan ignored the fact that many of the communities to which it made assignments could not

The process by which the Table of Assignments was drawn up gave the Commission the ability to make extensive policy choices as to where broadcast licensees should be located, whether to favor large or small communities, and so on. The Commission was thus able to assert the control over broadcast allocation that it had not been able to assert in the case of AM radio. Within the constraints set by its localism policy, however, the Commission made assignments in the Table to the limits of spectrum availability; and it bound itself to look only to the Table and to objective criteria in individual, non-comparative licensing decisions.

2. *Dealing with Competing Applications.* The other great problem facing the Commission was that of competing applications. This problem arises when the agency is faced with two or more inconsistent applications, each of which would be granted if considered in isolation, but which cannot all be granted: granting one requires denying the others. The Commission early on, encouraged by the Court of Appeals, adopted a policy that competing applications generally should be resolved by a joint hearing at which all applicants could be heard.<sup>170</sup> The Commission, however, adhered to that policy inconsistently at best<sup>171</sup> until the Supreme Court's 1945 decision in *Ashbacker Radio Corp. v. FCC*,<sup>172</sup> holding that comparative hearings are mandated by the Communications Act. Where two applications are exclusive, the Court decreed, the parties are entitled to an initial joint hearing at which the Commission con-

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support a local station, and pursued what proved to be a chimerical "localism" while undervaluing the broadcast diversity that other approaches might provide. In addition, critics argued, the FCC's policy underestimated the difficulties of competition between UHF and VHF stations. *See, e.g., S. BESEN, supra* note 10, at 13 (FCC allocation policy "almost guaranteed that no more than three full-scale, advertiser-supported nationwide networks . . . would arise"); *V. MOSCO, supra* note 9, at 50-84 (FCC allocation and intermixture policies contributed to failure of FM radio and UHF television); *J. KITROSS, supra*, at 234-47.

170. The policy provided that the Commission should, "where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing . . . any applications which by reasons of the privileges, terms, or conditions requested present conflicting claims." Where the Commission did not consolidate such applications for hearing, it was to schedule separate hearings on the same day. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 n.5 (1945) (quoting 47 C.F.R. §§ 1.193, 1.194 (1945)); *see also Caldwell, supra* note 133, at 179. *See Symons Broadcasting Co. v. FCC*, 64 F.2d 381 (D.C. Cir. 1933) (Commission should in general consolidate hearings when faced with inconsistent applications); *see also Pulitzer Publishing Co. v. FCC*, 94 F.2d 249 (D.C. Cir. 1937) (Commission need not hold comparative hearing when applications are not inconsistent); *Pittsburgh Radio Supply House v. FCC*, 98 F.2d 303 (D.C. Cir. 1938) (Commission need not hold comparative hearing when one application is on its face irreconcilable with FCC rules).

171. Over the period 1941-45, the Commission granted 14 applications without hearings, notwithstanding the pendency of inconsistent applications. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 337-38 & n.1 (1945) (Frankfurter, J., dissenting).

172. 326 U.S. 327 (1945).

siders their applications on a level playing field. In the wake of the *Ashbacker* ruling, the Commission consistently conducted formal comparative hearings whenever it had competing applications before it.

These hearings at first were not characterized by hard and fixed formal comparative criteria. Rather, the Commission retained extensive control by making its comparative decisions on the basis of an opaque, seat-of-the-pants, discretionary evaluation of a wide range of factors. The courts did not seriously challenge that arrangement.<sup>173</sup> A number of events, however, contributed to the demise of the approach, including allegations in the late 1950s that Commissioners had solicited and received bribes to vote certain ways in licensing proceedings. These allegations led to judicial remand of essentially every case decided during the relevant period.<sup>174</sup>

The Commission in 1965 took steps to make its process less opaque, less corrupt, and more rational. Under the 1965 *Policy Statement on Comparative Broadcast Hearings*,<sup>175</sup> which the FCC still follows to this day,<sup>176</sup> the agency compares competing applicants by considering the extent to which they already own interests in other media; the extent to which they will participate full-time in station operations; their proposed program service, if the differences are material and substantial; their past broadcast record, if outside "the bounds of average performance"; until recently, their character;<sup>177</sup> engineering considerations; and any other matter it considers relevant.<sup>178</sup> Each of these considerations incorporates a variety of sub-issues.<sup>179</sup>

173. See, e.g., *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 356-59 (D.C. Cir. 1949).

174. See T. CARTER, *supra* note 159, at 105-06; B. SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* 194-203, 252-53 (1959); *Investigation of Regulatory Commissions and Agencies: Hearings Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 553-1934 (1958) (Miami channel 10 affair); *id.* at 4892-935, 5055-266, 5298-348, 5498-535, 5621-44 (Pittsburgh channel 4 affair); *WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir. 1961); *Massachusetts Bay Telecasters v. FCC*, 261 F.2d 55, 65-67 (D.C. Cir. 1958).

175. 1 F.C.C.2d 393 (1965).

176. See, e.g., *In re Geller*, 102 F.C.C.2d 1443 (1985).

177. In 1986, the Commission deleted character, which essentially relates to whether the applicant has been found guilty of criminal or other bad acts, from the list of comparative criteria. *Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179 (1986) (report, order and policy statement). Character remains on the list of basic criteria. *Id.*; 47 U.S.C. § 308(b) (1988); *Character Qualifications in Broadcast Licensing*, 5 F.C.C. Rcd. 3252 (1990) (policy statement and order).

178. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-99 (1965) (public notice).

179. The Commission has, for example, created a preference for minority ownership as a sub-issue of full-time owner participation in station operations. See generally *Metro Broadcasting v. FCC*, 110 S.Ct. 2997 (1990).

The comparative process, however, does not work well, and has been the target of widespread criticism.<sup>180</sup> It produces proceedings that are formal, lengthy, and expensive, but of little value. The formal criteria are not in fact helpful in distinguishing among the applicants, much less in suggesting which should get the license.

Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. Then follows a tortuous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense — but comes the oral argument and all of the losers concentrate their fire on the “potential” winner and the Commission must thereupon examine the claims and counterclaims, “weigh” the criteria and pick the winner which . . . is a different winner in about 50 percent of the cases.<sup>181</sup>

Lack of useful controlling standards has made awards random and inconsistent, and proceedings long and unmanageable.<sup>182</sup> Nor has anyone come up with formal criteria that would do a better job. Indeed, to the extent that intelligent choices between competing applications are necessarily subjective, a comparative proceeding governed by uniform, clear and objective standards is bound to fail.<sup>183</sup> Nor has the process succeeded markedly in diversifying or democratizing broadcast ownership.<sup>184</sup> Indeed, in at least one notable context, the comparative hearing process has operated overwhelmingly to protect the interests of existing broadcasters. Where one applicant in a comparative hearing has been an incumbent seeking license renewal and the remainder have been insurgents seeking to take the license away, the Commission has routinely

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180. A recent administrative law casebook describes the process as having received “elaborate scholarly attention, almost all critical.” R. CASS & C. DIVER, *ADMINISTRATIVE LAW* 745 (1987).

181. *Policy Statement on Comparative Broadcast Hearings*, *supra* note 178, at 405-06 (1965) (Lee, Comm’r, concurring). Subsequent developments have not blunted the force of Commissioner Lee’s attack. See *Random Selection Lottery*, 4 F.C.C. Rcd. 2256, 2256 (1989) (notice of proposed rulemaking) (“The adjudicatory framework used to make this comparative selection can be described most charitably as laborious, exceedingly time consuming, expensive, and often result[ing] in choices based on, at most, marginal differences.”).

182. See generally H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 53-73 (1962); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471 (1975); Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971).

183. See S. BREYER, *supra* note 35, at 217; see also Fuller, *Adjudication and the Rule of Law*, 54 PROCEEDINGS, AM. SOC’Y INT’L L. 1 (1960).

184. See *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3003, 3019-22 (1990).

ruled in favor of the incumbent.<sup>185</sup> More generally, the comparative hearing process has failed to achieve diversity because it has effectively excluded those without economic means. There is no surer way to exclude most members of the public than to require payment of huge legal fees merely for the opportunity to *compete*, in an essentially random process, for a license, with no assurance of getting anything for one's money. The process thus "produces nothing but a senseless waste of the applicants' and the FCC's resources."<sup>186</sup>

The "woeful reality" of the comparative hearing process has led competing broadcast license applicants commonly to resolve their differences through settlement rather than adjudication.<sup>187</sup> Two-thirds of all comparative hearing cases examined in one FCC study, involving applications for new radio or full-power television licenses, were terminated by settlement, voluntary dismissal, or similar action before the rendering of the administrative law judge's initial decision.<sup>188</sup>

The FCC recently took steps, however, that may reduce the number of settlements in the comparative hearing process. From 1983 through 1990, there was no limit on the amount of money one applicant could pay to another as part of a settlement agreement;<sup>189</sup> the Commission con-

185. See *Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983):

[W]e are still troubled by the fact that . . . an incumbent *television* licensee has *never* been denied renewal in a comparative challenge. American television viewers will be reassured, although a trifle baffled, to learn that even the worst television stations — those which are, presumably, the ones picked out as vulnerable to challenge — are so good that they never need replacing.

*Id.* at 510 (footnote omitted; italics in original). See also *Cowles Florida Broadcasting*, 60 F.C.C.2d 372, 439-42 (1976) (Robinson, Comm'r, dissenting), *rev'd sub nom. Central Florida Enterprises v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

186. Robinson, *supra* note 35, at 239. The U.S. license allocation system does have good points. As administered today, it is relatively (although not completely, see *infra* notes 309-12 and accompanying text) resistant to political influence, and it succeeds to some degree in limiting concentration within the mass media. These goals, however, might be achieved through a less cumbersome system.

187. See Brotman, *The Potential Role of Mediation in Settling Comparative Broadcast Cases*, COM. LAW. 11 (Summer 1989).

188. *Random Selection Lottery*, *supra* note 181, at 2267 n.49 (1989) (studying 1982 cases). Another 17% of the cases were settled *after* the initial decision was issued. Compare *id. with id.* at 2266 n.12.

189. The policy was announced in *Texas Television, Inc.*, 91 F.C.C.2d 1047, 1049 (1982), as an interpretation of Pub. L. No. 97-259, 96 Stat. 1087, 1095 (1982), *amending* 47 U.S.C. § 311(c). Prior to that, settlement payments were limited to the legitimate and prudent expenses incurred by the applicant in prosecuting its application. Pub. L. No. 86-752, 74 Stat. 889 (1960) (formerly codified at 47 U.S.C. § 311(c) and amended by Pub. L. No. 97-259, 96 Stat. 1087, 1095 (1982)). See *Settlement Agreements Among Applicants for Construction Permits*, 6 F.C.C. Rcd. 85, 86 (1990) (report and order), *on reconsid.*, 69 R.R.2d 175 (1991).

cluded in 1990 that this regulatory regime encouraged the filing of sham applications, filed largely in the hope of later being withdrawn in exchange for a favorable settlement.<sup>190</sup> Under the FCC's new rules, settlements are limited to amounts that allow the withdrawing applicant to recover the costs it incurred in pursuing its application.<sup>191</sup> In addition, the FCC will closely scrutinize mergers among competing applicants during the comparative process, and has continued in effect rules that make such mergers less attractive.<sup>192</sup> The Commission hopes that the new rules, by limiting hearings to serious applicants, will help make the comparative hearing process "work."<sup>193</sup>

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190. *Settlement Agreements*, *supra* note 189, at 85.

191. An applicant may receive no more than its "legitimate and prudent out-of-pocket expenses" in preparing, filing and advocating its application, and in negotiating the settlement. *Id.* The Commission initially barred any payment where the settlement takes place after the start of the trial phase of the hearing, but eliminated that prohibition on reconsideration. *Settlement Agreements Among Applicants for Construction Permits*, 69 R.R.2d 175, 176 (1991).

192. *Settlement Agreements*, 69 R.R.2d at 177; *Comparative Hearing Process*, 6 F.C.C. Rcd. 157, 158 (1990) (report and order); *see also* *Daytona Broadcasting Co.*, 101 F.C.C.2d 1010 (1985), *on reconsider.*, 103 F.C.C.2d 931 (1986).

193. It is unclear as of this writing how large an effect the changes will have. It is worth noting that the study described *supra* note 188 and accompanying text, evidencing high settlement rates in comparative new hearing cases, was based on applications filed in 1982, *before* the removal of the limit on the amount of permissible settlement payments.

There was for a time some movement to replace comparative hearings with lotteries. The Commission in 1983 adopted lottery procedures for low-power television license awards, and in 1984 for cellular telephone awards. *Random Selection Lotteries*, 93 F.C.C.2d 952 (1983) (second report and order), *modified*, 95 F.C.C.2d 432 (1984); *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175 (1984) (report and order). In January 1989, the Commission proposed using lotteries to choose among competing applicants for new AM, FM, or full-power television stations. *Random Selection Lottery*, *supra* note 181, at 2256. That proposal, however, met with nearly unanimous opposition from the communications bar and from all segments of the industry. *Few Choose to Follow FCC's Bouncing Ball*, *BROADCASTING*, June 19, 1989, at 50. Opponents argued that the plan was inconsistent with the Commission's duty to select licensees on the basis of the public interest, convenience, and necessity; the Commission withdrew it in May 1990. *Random Selection (Lottery)*, 5 F.C.C. Rcd. 4002 (1990) (order). It is hard to escape the feeling that the opposition of the communications bar to the proposal was based at least in part on the economic value to the bar of the cumbersome and expensive hearing process. Newly appointed Commissioner Ervin Duggan, however, explained that for him a lottery would mean that a broadcast license would be a mere "economic asset," rather than a "sacred trust." Echoing the feelings of many communications lawyers, he stated: "I not only applaud the burial of the lottery idea, I would like to drive a stake through its vile and evil heart." *FCC Revamping Comparative Hearing Process*, *BROADCASTING*, May 14, 1990, at 31.

In 1987, finally, the Commission attempted to avoid the comparative hearing process for the selection of a mobile satellite service licensee by requiring all would-be applicants to enter into a single joint-venture consortium that, the FCC explained, would apply for and be granted the single license. *Radio Frequencies in a Land Mobile Satellite Service*, 2 F.C.C. Rcd 485 (1987), *vacated*, *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir 1991). The Commission reasoned that comparative hearings would be costly and time-consuming, and that making a valid comparison between applicants would be extremely difficult. *See Aeronautical Radio*, 928 F.2d at 436. The D.C.

3. *Conclusions.* In the allocation process, the Commission's initial approach was far from the formal-rationality ideal. The Commission resolved some issues through explicit bargaining; it resolved others by tilting towards the players with the greatest political influence; and it dispensed with formal process in order to enforce the decisions it thus made. Even in formal hearings, it maintained some control over broadcast allocation in part through opaque handling of the question of need for broadcast service.

Judicial review, however, in large part nullified the Commission's approach. The Court of Appeals of the District of Columbia asserted extensive jurisdiction to review Commission decisionmaking, and imposed substantial hearing requirements on it. It limited the Commission's decisionmaking to evidence introduced at those hearings and engaged in sometimes quite exacting hard-look scrutiny. The agency responded in the short term by importing greater formality into the allocation process and declining to make AM allocation policy decisions in that adjudicatory license-application context. It responded in the long term, with regard to television allocation, by moving allocation policy decisions into the context of Table of Assignments rulemaking.

The process of selecting among competing applicants for a single frequency authorization, similarly, was dramatically shaped by the requirements of formal rationality. Although the courts initially seemed willing to allow the Commission to maintain a somewhat informal approach to the substance of the selection, public perception of the Commission's proceedings as insufficiently transparent and fair led the agency to seek to conform closely to the pure formal rationality model, using adjudicatory processes to apply clear and objective rules to the licensee selection decision. This approach was a natural response to corruption and political bias but has not led the Commission to an efficient decision-making process.

From the perspective of American communications policy and first

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Circuit, however, rejected the Commission's approach as inconsistent with the Communications Act. "The comparative hearing process," it held, "is unquestionably the standard method for the Commission to resolve mutually exclusive applications." *Id.* at 450. "At a minimum, . . . any . . . departure from the statutorily prescribed and judicially recognized practice of resolving mutually exclusive applications through comparative hearings must be premised on some truly compelling grounds that are special to the particular proceeding" in question. *Id.* at 452. The record, the court concluded, presented no such compelling grounds; the Commission's stated reasons for finding comparative hearings undesirable in the mobile satellite service area were equally present in all licensing proceedings. *Id.* The FCC has reaffirmed its consortium requirement notwithstanding the *Aeronautical Radio* decision. See *Mobile Satellite Service Licensing Procedures*, 69 R.R.2d 828 (1991) (tentative decision).

amendment theory, the FCC's move towards greater formality in license allocation was a good one. United States constitutional law philosophy favors objective criteria and procedures affecting the selection of first amendment speakers over informal, discretionary, or bargaining-oriented ones; formal-rationality standards are thus especially appropriate, and bargaining especially inappropriate, in that area. The objective decision-making systems that the FCC has put in place, however, notwithstanding their ideological purity, have worked relatively badly. The Commission's first-come-first-served approach to AM allocation neglected the interests of less populated areas, and its Table of Assignments for television allocation promoted local stations in rural areas at the expense of broadcast diversity nationwide. Both of those flaws, moreover, seem relatively benign when compared to the expensive and largely pointless administrative exercise of the comparative hearing process.

### B. *Broadcast Licensing in Japan*

When the Occupation forces in Japan turned to reconstituting the Japanese broadcast system after World War II, they concluded that the existing monopoly broadcasting system should be dismantled, and replaced with a competitive system overseen by an independent government agency. MacArthur's staff drafted a new set of broadcasting regulation laws based on the American model, establishing a formal system similar to the U.S. communications regime. The agency in charge of regulating Japanese broadcasting pursuant to these laws after 1952 was the Ministry of Posts and Telecommunications (MPT).<sup>194</sup>

MPT, notwithstanding that the formal law it was applying was drafted according to an American model, constructed a system of broad-

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194. MPT's predecessor, organized in 1885, was known as the Ministry of Communications, and controlled the postal and telegraph systems, as well as maritime shipping and lighthouses. From 1891 through 1926, it added telephones, railroads, postal life insurance and banking, and civil aviation to its jurisdiction. See Johnson, *supra* note 81, at 187-88. The Ministry controlled radio broadcasting from the start of AM broadcasting in 1925 through the end of the Second World War. See G. KASZA, *supra* note 94, at 72-101, 252-65.

After the Second World War, the Occupation forces briefly experimented with an organization separating a Ministry of Postal Affairs from a Ministry of Telecommunications (1949-50), and then created an independent Radio Regulatory Commission (1950-52), modelled on the FCC. See Johnson, *supra* note 81, at 187-88. The Japanese government had strongly resisted establishment of the Radio Regulatory Commission. Its legal experts saw independent agencies as inconsistent with the basic forms of Japanese government, which were (and are) premised on a more hierarchical chain of command. U.S. planners, however, were resolute, and turned a deaf ear to Japanese pleas regarding "the peculiarities of Japanese government organization." Uchikawa, *supra* note 8, at 75. After the dispatch of a private letter from General MacArthur to Prime Minister Yoshida and some further skirmishing, the matter was sealed. The Radio Regulatory Commission Establishment Bill was



cast regulation sharply different from that of the United States. Enforcing American-drafted statutes through pure bargaining-oriented regulation, MPT developed broadcast allocation policies more restrictive than those of the U.S., and mechanisms for choosing individual licensees that bypass formal adjudicatory proceedings altogether. MPT chooses individual licensee recipients through a process emphasizing compromise between *all* politically influential applicants in the formation of a single joint-venture licensee. That license selection process has had significant consequences, one of which has been to confine media power almost completely within the structure of the socially acceptable and politically influential mainstream.

1. *Initial Choices.* In Japan, as in the United States, regulators had to resolve basic questions of license allocation: Would the regulator award licenses to the limits of spectrum availability? If not, what procedures would it use to exercise control over whether a frequency would be made available, and what substantive criteria would it apply? Japanese regulators were able to answer those questions on a clean slate; there were no private broadcasters when Japan's 1950 broadcast regulatory scheme went into effect.

Japanese regulators initially contemplated that broadcast diffusion would be quite slow. MPT's first broadcast allocation policy<sup>195</sup> was contained in its 1952 "TV Frequency Allocation Plan for the Three Major

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passed in 1950 creating an independent agency for the regulation of Japanese broadcasting. *Id.* at 75-79.

Immediately after the 1952 effective date of the peace treaty between Japan and the United States and the return of full sovereignty to Japan, the Yoshida Cabinet abolished the Commission and transferred its functions to the Ministry of Posts and Telecommunications. Since 1952, a renamed and (partly) reunited Ministry of Posts and Telecommunications has exercised authority over broadcasting, telecommunications, postal services, and postal banking and life insurance. See Hattori, *The Administration of Radio Waves for Broadcasting in Japan*, 25 *STUD. BROADCASTING* 41, 47 (1989); Omori, *Broadcasting Legislation in Japan*, 25 *STUD. BROADCASTING* 7, 15-16 (1989); Uchikawa, *supra* note 8, at 79-80; NHK, *supra* note 83, at 217, 407-08; NHK, *THE HISTORY OF BROADCASTING IN JAPAN* 214, 233-34 (1967); Tadokoro, *Japan*, in *BROADCASTING IN ASIA AND THE PACIFIC* (J. Lent ed. 1968).

195. MPT's predecessor, the Radio Regulatory Commission, *see supra* note 194, had begun awarding AM radio licenses two years before, *see infra* notes 202-10 and accompanying text. Japanese regulators, however, issued only 16 radio licenses before the start of television licensing in 1952, and largely neglected radio after 1952. MPT still has not licensed radio to any substantial degree: by the late 1980's there were only 47 commercial AM broadcasters in Japan, and 27 commercial FM broadcasters. See Omori, *supra* note 194, at 7, 10; *infra* notes 241-42. The history of AM radio licensing in Japan therefore provides a less useful illustration of its broadcast allocation system than does its television licensing experience.

Areas.”<sup>196</sup> The plan contemplated licensing only two commercial television stations in Tokyo<sup>197</sup> and one each in the cities of Osaka and Nagoya,<sup>198</sup> far fewer than the spectrum technically could support.<sup>199</sup> MPT revised its table of assignments in 1956, but still contemplated slow diffusion of television stations, broadcasting on four channels made available for civilian use. Television was to spread slowly from the three cities where it was so far available to seven “main areas of the country,” and ultimately to other areas.<sup>200</sup> MPT bureaucrats opposed any more rapid expansion, notwithstanding frequency availability, emphasizing that television was best brought along in an unhurried and steady manner.

A year later, however, the Ministry completely reversed course, awarding forty-three new television licenses on eleven channels; it thus increased the number of licensees over one thousand percent.<sup>201</sup> Why

196. In 1950, the Prime Minister and the head of the then-Ministry of Telecommunications told the Diet that commercial television was non-essential, an expensive luxury for the rebuilding economy, and that frequency allocation should wait until further technical research was completed. See Yamamoto, *The Growth of Television in Japan*, 2 *STUD. BROADCASTING* 81, 116-17 (1964). NHK, see *supra* note 6, did not plan to begin operational television service until 1953, and was pursuing its expansion plans in an unhurried manner; most commercial radio broadcasters agreed that there was no need to move into television for the time being. See NHK, *supra* note 83, at 214-16.

That appellation was upset by Matasaro Shoriki, a former president of the Yomiuri newspaper, who wanted to establish a commercial TV station without further delay. Shoriki, with the support of the major newspapers, submitted an application in 1951 to inaugurate Nippon Television (NTV) in Tokyo, Osaka, and Nagoya. The RRC, outside of the Ministry chain of command, agreed to the establishment of a Tokyo station. Its favorable response forced the hands of NHK and of other would-be television broadcasters, causing them to submit hurried applications as well, and brought Japan into the television age rather sooner than might otherwise have been the case. See *id.*; Nakajima, *The Broadcasting Industry in Japan*, in *INTERNATIONAL STUDIES OF BROADCASTING* 32,33 (H. Eguchi & H. Ichinohe eds. 1971); NHK, *supra* note 194, at 232.

197. MPT contemplated issuing one commercial TV license in Tokyo in addition to one already issued by the RRC, see *supra* note 194.

198. See Hattori, *supra* note 194, at 54-57. The Ministry also approved one NHK station in each city. See NHK, *supra* note 194, at 234.

199. The American-drafted Radio Act of 1950 might have been seen as a barrier to that approach. The statute directed MPT to license broadcast applicants if “it [was] possible to assign frequency” and if the applications set out acceptable construction design, appeared to have adequate financial basis, and satisfied further formal regulations promulgated by the Ministry. See Radio Law, Art. 7 (Law No. 131 of May 2, 1950) as amended (translation by MPT); see also Nakasa, *Effects on the Change in Telecommunications Policy*, 14 *STUD. BROADCASTING* 63, 75 (1978). The Ministry had promulgated no formal regulations meeting the requirements of that final provision. In the absence of such regulations, the statute arguably required licensing to the limits of frequency availability. The Ministry, however, interpreted the “possible to assign frequency” provision to give it discretion to deny applications based on informal frequency allocation plans taking into account a wide range of factors other than technical feasibility. See Hattori, *supra* note 194, at 47-48; M. ITO, *supra* note 83, at 26.

200. NHK, *supra* note 194, at 240; Hattori, *supra* note 194, at 57-58.

201. See NHK, *supra* note 83, at 411.

was MPT so initially cautious, and why did it undertake this sudden shift? To understand Japan's allocation policy choices, one must first understand its unique method of dealing with competing applications. The question of how to resolve competing applications, in the Japanese context, drove the broadcast allocation and licensing process from its earliest moments.

2. *Ipponka Chosei*. In December 1950, the Radio Regulatory Commission (RRC)<sup>202</sup> announced that it would grant two preliminary commercial AM radio licenses in Tokyo, and one in each of thirteen other cities.<sup>203</sup> Large numbers of applicants sought each of these scarce authorizations. How was the regulator to select licensees? Language in its regulations apparently provided for competitive selection: "When there is a shortage of availability in frequencies assignable to the applying broadcast stations . . . priority shall be given to the applicant whose plan can be considered to contribute most to the public welfare."<sup>204</sup> Instead, however, the RRC rejected the American approach of formal, competitive hearings, and substituted an approach of its own: *ipponka chosei*. The phrase is commonly translated as "coordination" (my own reading is "unification coordination").<sup>205</sup> It means that when many different entities file applications for a single license, the regulator, instead of engaging in a competitive selection process, facilitates the creation of a joint venture representing, to the extent possible, all influential applicants.<sup>206</sup>

202. See *supra* note 194.

203. See Hattori, *supra* note 194, at 48-50.

204. See *id.* at 50-52.

205. *Ipponka* has also been translated in this context as "unification adjustment," see *id.* at 64, and as "centralization," see Kobayashi, *supra* note 92, at 27. Chalmers Johnson has commented in a related context that while *chosei* is generally translated as "coordination," the term "when used by Japanese bureaucrats [is] invariably [a] euphemism for control." Johnson, *supra* note 81, at 212-13.

206. See Hattori, *supra* note 194, at 64; Komatsubara, *New Broadcasting Technologies and the Press in Japan*, 25 *STUD. BROADCASTING* 77, 80 (1989); Kobayashi, *supra* note 92, at 23, 27, 38.

*Ipponka* dates back at least to the original Communications Ministry plans for radio in 1923-24. The Ministry contemplated noncommercial private broadcasting supported by fees paid by radio manufacturers and listeners. While the Wireless Telegraph Act of 1915 established a government monopoly in all "wireless telephone and telegraph," Ministry officials chose to rely on a catch-all provision in that statute allowing exceptions as "considered necessary by the competent Minister." Nakajima, *supra* note 196, at 16-18 (citing Wireless Telegraph Act of 1915, Art. 2, c1.6).

Ministry officials felt that stations in Tokyo, Osaka, and Nagoya should each originate their own programming, rather than simply retransmitting national programming, because of the value of involving prominent persons in each area. Officials worried, though, that competing stations in a single region would fragment revenues, spread capital and broadcasting expertise too thinly, and pose problems of technical interference. They therefore supported establishment of exactly one enterprise in each area. See G. KASZA, *supra* note 94, at 74-79.

The Ministry therefore licensed broadcasters, created through an *ipponka*-like process, in each of

The RRC, as a result, notwithstanding that it was established on an American model,<sup>207</sup> did not follow the American approach to licensee selection.<sup>208</sup> It instead sought

to bring about voluntary mergers of plural applicants in each city by clarifying the prospects for commercial stations in areas where there were large numbers of applicants. It was particularly intended for Tokyo and Osaka as there were many applicants in each city. In the process of mergers of applicants in Tokyo and Osaka, serious troubles developed between those of opposing interests and there were cases in which political and financial leaders had to intervene to adjust matters.<sup>209</sup>

In the end, the RRC approved two stations in Osaka rather than one, because "no agreement could be reached among the applicants."<sup>210</sup>

*Ipponka*, rather than competitive selection, to this day remains the dominant mode of selecting Japanese broadcast licensees. The key national players in the *ipponka* process today are Japan's five major media groups, centered on Japan's five nationwide daily newspapers.<sup>211</sup> Each nationwide newspaper is associated with a "key station" television sta-

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the three cities between November 1924 and February 1925, and subjected them to extensive control. Such independence as the broadcasters had, though, was short. They were merged into a unified national monopoly broadcaster, Nippon Hoso Kyokai (NHK), modeled after the BBC, in August 1926. The Ministry had had second thoughts about local origination in each region: local stations might not have adequate programming and technical expertise. A national monopoly, by contrast, could more efficiently diffuse programming throughout the country. As war approached, the national broadcast monopoly became more and more an arm of the state, moving from a quasi-public to a wholly state-controlled entity. By 1942, the Cabinet Information Bureau had adopted a policy "to make all broadcast programs conform to state purposes." *Id.* at 79-88; see also Hattori, *supra* note 194, at 42-43.

207. See *supra* note 194.

208. One could argue that the Japanese and U.S. approaches are in fact essentially similar, since most comparative issues before the FCC in recent years have been resolved by settlement rather than by the application of formal procedures. See *supra* note 188 and accompanying text. There are crucial differences, however, between a system that unwittingly encourages settlement by making adjudication risky and expensive, and a system that requires it. The D.C. Circuit has held that the FCC generally may not, consistently with the Communications Act, require broadcast applicants to resolve their differences via settlement. See *Aeronautical Radio, Inc., v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *supra* note 193. The FCC's recent reforms of the settlement process, see *supra* notes 188-93 and accompanying text, seem predicated on the notion that settlement in comparative new hearing cases should primarily be a means of eliminating applicants who have no real chance of success, so that the remaining issues can be settled through adjudication. *Ipponka chousei*, by denying that adjudicatory procedures can or should determine the recipient of a broadcast license, fundamentally rejects that U.S. approach. In contrast to the U.S. system, *ipponka* precludes the possibility that a license can ever be awarded through formal application of comparative criteria.

209. NHK, *supra* note 194, at 213.

210. Hattori, *supra* note 194, at 48-50.

211. The Yomiuri, Asahi, Mainichi, Sankei, and Nihon Keizai newspapers each has a morning edition circulation of between two and nine million. See NIHON SHIMBUN KYOKAI (NSK), THE

tion in Tokyo, which in turn serves as the hub of a nationwide television network.<sup>212</sup> When a new license is made available, these networks approach an assortment of former employees or shareholders, or former employees or shareholders of related firms, to file applications on their behalf with the relevant regional Telecommunication Administration Bureau.<sup>213</sup> Applications typically number in the hundreds; in Nagano prefecture recently, over 1300 applications were filed for a single license. Not all of these applications, however, are legitimate. Almost all are filed by camouflage entities acting as proxies for a few real parties in interest, including the national media groups and leading local businesses.<sup>214</sup>

MPT selects a person with a high degree of influence in the prefecture to "guide" the coordination process.<sup>215</sup> This person must be famil-

JAPANESE PRESS 127-32 (1986); Tamura, *The Information Environment around the Japanese People*, 23 *STUD. BROADCASTING* 7, 13 (1987).

Each of the standard dailies other than the *Nihon Keizai* is affiliated with a tabloid "sports newspaper," featuring "a lower level of taste and intellect than the standard newspapers," see Nakasa, *Scandal vs. Social Responsibility: The Growing Criticism of Journalism in Japan*, 23 *STUD. BROADCASTING* 27, 33 (1987), and a variety of other publications: weekly papers, weekly and monthly magazines, and annuals. See Y. KIM, *JAPANESE JOURNALISTS AND THEIR WORLD* 9 (1981). Each, further, is engaged in a variety of outside businesses. See *id.* at 9-11; J. LEE, *THE POLITICAL CHARACTER OF THE JAPANESE PRESS* 79-80 (1985); Nakajima, *Revenue Resources of the Broadcasting Industry in Japan*, 7 *STUD. BROADCASTING* 31, 53 (1969); see also Chang, *Vertical Integration of Mass Media in Japan*, 27 *GAZETTE* 181, 182 (1981).

212. The newspaper-key station associations are cemented by personal relationships and exchanges of personnel, limited cooperation in newsgathering, and complicated stock ownership structures. Japanese broadcast concentration regulations limit newspaper holdings in broadcast stations to 10%. See NHK, *supra* note 83, at 239; Chang, *supra* note 211, at 183. The regulations, however, seem more in the nature of *tatemae* than *honne*, concerned more with outward appearances than inner reality. Thus the Yomiuri newspaper, itself family and employee owned, holds 10% of NTV (officially Nippon TV Broadcasting) in Tokyo. But one of the Yomiuri's individual (family) owners holds another 7% of NTV; Yomiuri TV (Osaka) holds another 7%; and additional smaller shares are held by other companies, such as Nagoya Broadcasting and YomiuriLand, that belong to what can loosely be termed the Yomiuri group. Similarly, while the Asahi newspaper, also family and employee owned, holds only 10% of Asahi Broadcasting (Osaka), a number of individuals linked to the newspaper hold major stakes in their personal capacities. This form of industrial organization is common in Japanese business. See M. AOKI, *supra* note 13, at 119-22 (discussion of "capital *keiretsu*"). But see Shimizu 1991, *supra* note 6, at 4 (TBS, while formerly associated with the Mainichi group, is now operated independently).

213. Translations of the names of Japanese government organs sometimes vary widely. This English-language terminology for the regional *Denki Tsushin Kanri Kyoku* is taken from MPT/JICA, *Outline of Broadcasting in Japan* 9 (Broadcasting Executives' Seminar, Mar. 15-29, 1987).

214. Networks are today significantly more cautious about the acquisition of new affiliates than they were in the late 1960s, when competition for new affiliates was at its peak. Compare *infra* note 280 with Yamamoto, *supra* note 196, at 81, 97-98, 122.

215. Two broadcasters told me that the first step in the process is self-coordination, in which the various applicants attempt to reach agreement without any official intervention at all. In that pro-

iar with the prefecture, credible with the applicants, and (in theory) neutral among them. As a practical matter, according to broadcasters, if the prefectural governor is a member of the ruling Liberal-Democratic Party (LDP)<sup>216</sup> then MPT will typically approach him first;<sup>217</sup> governors who are members of the main opposition Socialist Party are not approached. If the governor belongs to an inconvenient political party, the Ministry will typically approach the head of the local economic association or the head of an influential local company.<sup>218</sup> Alternatively, MPT may bypass the governor if a Diet member with particular clout in communications matters represents part of the area in question.<sup>219</sup>

One veteran of the *ipponka* process explained to me that his first step was to compare the contact telephone numbers listed on the various applications, and group together all those with identical numbers listed. This practice eliminated some sham applications, filed in the hope of gaining extra seats at the *ipponka* table, and began to narrow down the applications to the important players. His task, he explained, was to lead these players — most importantly, representatives of the key stations — to an agreement acceptable to all regarding the shareholder and board-

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cess, they said, powerful local business leaders, as well as representatives of the national media groups, have great influence. According to an MPT official, however, such self-coordination is unusual. For the most part, applicants view each other as opponents, and there is conflict among them. Voluntary agreement, according to the official, is therefore rare.

216. Japan is equipped with a full complement of political parties, but a single one, the LDP, has controlled the Diet since its creation through the merger of the Liberal and the Democratic parties in 1955. The LDP is “a vague and amorphous amalgam of conservative economic and cultural values” supported electorally and financially by organized business and organized agriculture. T. PEMPEL, *supra* note 13, at 35. While consistently excluding organized labor and labor ideologies, it has absorbed a variety of interest groups as Japanese society has developed, and has been successful in defining itself as the political mainstream. Although the LDP “appeases the opposition parties in order to maintain the pretense of a multi-party political system,” Johnson, *supra* note 81, at 199, and works within a political structure that allows the opposition parties something of a veto power on important issues, it is on a day-to-day basis reasonably successful in blocking the labor-based opposition parties and minor parties from meaningful participation in the processes of government. As a result, political competition is carried on for the most part not between parties, but between various factions within the LDP itself. See generally G. CURTIS, *THE JAPANESE WAY OF POLITICS* (1988); T. PEMPEL, *supra* note 13, at 12-45; E. REISCHAUER, *supra* note 7, at 279-85; N. THAYER, *HOW THE CONSERVATIVES RULE JAPAN* (1969).

217. See also Hattori, *supra* note 194, at 64 (*ipponka* conducted by “governor of the prefecture concerned or selected leaders in local economic circles”); Komatsubara, *supra* note 206, at 80.

218. In Kanagawa prefecture, for example, LDP Governor Atsuda was tapped to guide the *ipponka* process for TV Kanagawa, established in 1972. When FM Yokohama was established in Kanagawa prefecture 13 years later, the Kanagawa governor was a member of the Socialist Party; the chairman of the local economic association conducted the *ipponka* instead.

219. Diet member Shin Kanemaru, see *infra* note 239 and accompanying text, dominated the *ipponka* process for the formation of TV Yamanashi.

of-directors structure of the new venture.<sup>220</sup> When the dust clears, the *ipponka* leader is sometimes found at the top of the organizational chart of the new entity.<sup>221</sup>

3. *Allocation Policy.* MPT's initial allocation plan for television, as set out earlier, contemplated slow and steady diffusion for television.<sup>222</sup> At first television would only be available in Tokyo, Osaka, and Nagoya. It would spread from there to seven "main areas of the country," and would ultimately be made available in other areas. That unhurried diffusion, MPT bureaucrats explained, would best serve the interests of the nation.

Those plans changed in 1957 when Kakuei Tanaka, the most brilliant politician in postwar Japanese history and eventual Prime Minister, became Minister of Posts and Telecommunications. Tanaka was serving in his first cabinet assignment. At thirty-nine, he was younger than most of his subordinates in the career bureaucracy and knew little about agency affairs. He nonetheless overruled the bureaucracy's decisions<sup>223</sup>

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220. In carrying out that task, the *ipponka* leader may ask the important players to meet informally, in advance of a formal meeting of all applicants. Reaching an acceptable compromise may be difficult, as demonstrated by MPT's well-publicized but unsuccessful attempt to force a merger of two companies seeking to enter Japan's international telecommunications market. See Spaeth, *Telephone Systems in the United States and Japan*, 27 CAL. W.L. REV. 121, 133-34 (1990); Sato & Stevenson, *Telecommunications in Japan: After Privatization and Liberalization*, 24 COLUM. J. WORLD BUS. 31, 36 (1989); *Two Firms No Closer to Accord on Joint Telecom Venture*, Daily Yomiuri, July 28, 1987, at 4, col. 3.

MPT was similarly unsuccessful in trying to force a merger of two companies, one of which sought to use technology developed and manufactured by the Motorola Corporation, seeking to enter the Japanese cellular telephone market. See *Japanese Barriers Slow Motorola Mobile Phone*, N.Y. Times, Dec. 15, 1986, at D1, col. 1. MPT proved no match for Motorola's influence with U.S. trade negotiators. See *Trade Tempest Over Car Phones*, N.Y. Times, May 15, 1989, at D1, col. 3; *Japan to Give U.S. Increased Access in Key Trade Area*, N.Y. Times, June 29, 1989, at A1, col. 6; *Japan Picks U.S. Design for Phones*, N.Y. Times, June 7, 1990, at D1, col. 6.

Sometimes, companies file applications less out of a genuine interest in the new venture than out of a desire to avoid losing ground to their competitors. In that situation, the applicants may be in no hurry to reach an agreement. If no entity is licensed, that delay suits their interests as well or better than if a successful compromise is reached on a joint venture. See Kobayashi, *supra* note 92, at 23, 38-39.

221. When TV Shinshu (Nagano prefecture) and TV Kanagawa were formed, MPT initially approached the prefectural governors, who in turn delegated the task to their seconds-in-command. In both cases, the person who conducted the *ipponka* ultimately became the president of the new station. I do not believe that such a sequence of events is unusual.

222. See *supra* text accompanying notes 195-200.

223. The structure of the Japanese bureaucracy is superficially similar to that of the British; a Minister is appointed to head a department composed almost entirely of career bureaucrats. Most scholars agree that through the early 1970s the career bureaucracy, rather than Diet members or even Ministers, played the dominant role in government policymaking. See *infra* note 273; Johnson,

and announced that the Ministry would immediately award forty-three new television licenses on eleven channels.<sup>224</sup>

The new table of assignments produced an explosion in TV licensing, making licenses available in each prefecture and filling up the VHF band.<sup>225</sup> At least one station was allocated to each of twenty-eight or twenty-nine prefectures outside major metropolitan areas;<sup>226</sup> two stations were allocated to the Tokai (Nagoya) metropolitan area; and four were allocated to each of the Kanto (Tokyo) and Kinki (Osaka) metropolitan areas.

Increasing the number of licenses available necessitated selection or creation, through *ipponka chosei*, of new licensees.<sup>227</sup> In most prefectures, the process was relatively simple. A company had been formed a few years earlier to receive the radio license allocated to the prefecture by the RRC. It typically counted the most important companies and banks of the local area as its major stockholders, and took one in five of its directors from the prefectural newspaper.<sup>228</sup> That company was

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*supra* note 81, at 182; Johnson, *Tanaka Kakuei, Structural Corruption, and the Advent of Machine Politics in Japan*, 12 J. JAPANESE STUD. 1, 23-24 (1986); G. CURTIS, *supra* note 216, at 109-10 (bureaucracy "particularly powerful in the 1950s and 1960s"); cf. Muramatsu & Krauss, *supra* note 13, at 516, 523 (Prime Minister Ikeda's 1970-74 success at imposing his own policies on a hesitant Ministry of Finance "almost unprecedented in the postwar period"). But see Y. PARK, BUREAUCRATS AND MINISTERS IN CONTEMPORARY JAPANESE GOVERNMENT 92-94 (1986) (generally disputing "bureaucratic primacy" theories of Japanese government). Discussion of the complex relationship between Japanese politicians and bureaucrats can be found, in addition to the sources cited above, in M. AOKI, *supra* note 13; T. PEMPEL, *supra* note 13; N. THAYER, *supra* note 216. Cf. generally J. HACKER, THE COMPLETE YES MINISTER (J. Lynn & A. Jay eds. 1984) (British system).

224. See Y. PARK, *supra* note 223, at 25.

225. In fact, the agency reallocated spectrum to TV broadcast from other communications uses in order to facilitate expanded TV licensing. See NHK, *supra* note 194, at 240-41.

226. There are 31 prefectures outside the "wide areas" of the major cities. Fukushima prefecture had no television station established until 1963 (I am not aware whether the delay lay in frequency allocation or elsewhere). Saga and Shimane prefectures were the two rural prefectures that were considered too poor to support any broadcasting whatsoever. They did not receive broadcast stations until 1969 (Saga) and 1970 (Shimane).

227. Indeed, this appears to have been one of the principal attractions of the plan. See *infra* notes 232-33 and accompanying text.

228. Prior to the Sino-Japanese War of the 1930s, there were about 1200 small local newspapers in Japan. During the war years, however, the Japanese government forced their consolidation under a "one prefecture-one prefectural newspaper" policy. In each prefecture, therefore, there was a prefectural newspaper ready to participate in the prefectural radio station. See G. KASZA, *supra* note 94, at 187-93; H. YAMANAKA, E. BUCK, H. KATO & J. LYLE, JAPANESE COMMUNICATIONS STUDIES OF THE 1970S, at 60 (1986) (abstracting Uchikawa et al., *Local Information Media in Postwar Japan*, 27 BULL. OF THE INSTITUTE OF JOURNALISM AND COMM. STUD. 131 (1979) (in Japanese)) [hereinafter H. YAMANAKA]; see also DENTSU, INC., FOUR MAJOR ADVERTISING MEDIA IN JAPAN 8 (April 1987).

On newspaper participation in broadcasting, see NHK, *supra* note 194, at 215, 340.



awarded the new VHF license as well.<sup>229</sup>

In the large cities, however, competition was more keen. The major newspapers, already heavily involved in radio broadcasting,<sup>230</sup> realized that the award of television licenses presented a once-in-a-lifetime opportunity. Six new licenses were awarded in the cities of Tokyo, Osaka, and Nagoya in 1958-59, and extensive coordination was required in the *ipponka* process.<sup>231</sup> The coordination did not always treat all applicants equally; some ended up with greater stakes. Through that process, Tanaka is said to have gained substantial influence over the regulated companies and their newspaper sponsors.<sup>232</sup> He is also said to have raised extensive sums of money from would-be licensees.<sup>233</sup>

After the events of 1957-59, MPT did not license UHF television (which had begun service in the United States in 1952)<sup>234</sup> until the late

229. The radio licensees lobbied for the new television licenses invoking their expertise, their ability to save money through combined operation, and the specter of destruction of the infant radio industry through ruinous competition. See H. YAMANAKA, *supra* note 228; M. ITO, *supra* note 83, at 84. Their receipt of the new television licenses was hardly in doubt. Because they incorporated the most important members of the local power structure, it was futile in any prefecture to try to put together a comparably prestigious, well-connected coalition.

230. See NHK, *supra* note 194, at 215.

231. See generally *id.* at 338-40 (MPT "assisted in unifying those [applicants] from big urban areas where competition was keen"). In Osaka, for example, the Asahi, Mainichi, Yomiuri, and Sankei newspapers, together with the local Kobe and Kyoto newspapers, all sought to participate in the three new television stations. The sole existing television station in the area was an Asahi-Mainichi newspaper joint venture. The Mainichi newspaper's Mainichi Broadcasting radio station was awarded one new license. The other two licenses went to new entities now called Yomiuri TV and Kansai TV.

232. See generally K. CALDER, *CRISIS AND COMPENSATION: PUBLIC POLICY AND POLITICAL STABILITY IN JAPAN, 1949-1986*, at 207-08 & n.92 (1988). Y. KIM, *supra* note 211, at 169, provides one indication of Tanaka's own views of his relationship with the mass media after he became LDP president: "Since I am thoroughly familiar with the internal affairs of newspapers, there is nothing I cannot do. If I wanted, I could . . . suppress or do anything else I wanted to do. . . . It is easy to stop a story in the newspaper. I won't telephone the mass media as Sato used to do. It has already been arranged. . . . Don't pursue any trivial matters. If you don't cross a dangerous bridge, I will be safe. So will you. If I think a particular reporter is dangerous, I can easily have him removed."

233. Tanaka went on to revolutionize Japanese politics, according to Professor Johnson, through his understanding that "money was indeed the mother's milk of politics and that whoever controlled the largest amounts of it in the political system, controlled the system." Johnson, *supra* note 223, at 10-11. "[T]he usual commission charged by the Tanaka machine to get the bureaucracy to act—for example, to get a building permit out of the Ministry of Construction or to slow down the implementation of some market opening scheme from the Ministry of Posts and Telecommunications—was three per cent of the value of the project." *Id.* at 25.

Professor Thayer, speaking more generally, quotes the Yomiuri newspaper political section for the proposition that "through the use of the powers of government offices . . . substantial political funds can be gathered." N. THAYER, *supra* note 216, at 33-34. That statement, of course, could be made about the United States as well.

234. See *Sixth Report and Order*, *supra* note 169, at 167. The first U.S. commercial UHF sta-

1960s.<sup>235</sup> The Ministry, which had been besieged for years by UHF applicants, finally established a new table of assignments in November 1967 allocating UHF frequencies for eighteen stations. It awarded licenses for those stations by April 1968,<sup>236</sup> and had approved over thirty new stations by the end of 1970. In so doing, it again drastically increased the number of television licensees.<sup>237</sup>

In the establishment of each new station, it was (again) necessary to sort out the participation of local capital as well as that of national news interests. According to one industry analyst, the process was (again) valuable as a fund-raising device for the governing Sato faction. The process, moreover, afforded opportunities for the exercise of local power. The dominant figure in the UHF *ipponka* process in Yamanashi prefecture,<sup>238</sup> for example, was Shin Kanemaru, then a Diet member, a close associate of then-LDP President Tanaka, and a figure of growing influence in telecommunications matters. Kanemaru is now a managing director and the largest shareholder of the television station (TV Yamanashi) established in that process.<sup>239</sup>

MPT in 1970 did not come close to licensing to the limits of spectrum availability in the UHF band; many potential UHF frequency slots remained unfilled. Throughout the next decade, residents of most prefectures outside the three huge metropolitan areas could receive the signals

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tion went on the air in September 1952 as KPTV, Channel 27, in Portland, Oregon. E. KRASNOW, *supra* note 9, at 187.

235. The Ministry had begun to use the UHF band in the early 1960s for satellite stations rebroadcasting VHF programming in areas with poor reception, and for experimental use. *See* NHK, *supra* note 194, at 241-42; Nakajima, *supra* note 206, at 34.

The initial plan for conventional UHF service, announced by Minister Takeji Kobayashi apparently without extensive consultation, called for moving *all* television broadcasting to the UHF band over a ten-year period. The VHF band would be shifted to safety, emergency, civil defense, and similar uses. The policy stunned existing television broadcasters, and was ultimately dropped in the face of industry recalcitrance. *See* Tadokoro, *supra* note 194, at 71; *see also* Nakasa, *supra* note 199, at 63, 68; Nakajima, *supra* note 196, at 34, 62.

236. *See* NHK, *supra* note 83, at 358, 421-24.

237. This was a low-risk move from the perspective of existing broadcasters' financial health. In 1962, 29% of the entire nation's advertising was carried by its 45 broadcast companies. NHK, *supra* note 194, at 341. From 1963 to 1967, commercial broadcasters' ratio of profit to total liabilities and net worth ranged from 14-18%; comparable figures for other industries were 4-5%. Nakajima, *supra* note 211, at 31, 42-43.

238. For the background to that *ipponka* process, *see infra* note 290.

239. He is also, as of this writing, head of the Takeshita faction (successor to the Tanaka faction when the latter was reorganized in 1987), and thus a key political figure. He has been for some time the most influential Diet member regarding MPT matters. *See* Johnson, *supra* note 81, at 204; *infra* note 275.

of only two commercial television stations,<sup>240</sup> as well as only one commercial AM radio station<sup>241</sup> and no commercial FM radio station.<sup>242</sup> MPT regulators were reluctant to amend the allocation plan to permit new stations, notwithstanding the financial success of existing broadcast stations and notwithstanding frequency availability.<sup>243</sup> MPT officials explained that the entry of additional stations might introduce a competi-

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240. This figure does not include two channels of NHK television programming. *See supra* note 6.

By comparison, in 1972, a majority of United States TV households could receive at least seven television stations. Ross, *The Winds of Deregulation*, EBU REV., May 1987, at 29, 30-31. Research compiled by Professor Pool and others indicates that in 1975 United States television stations, taken as a whole, supplied to the viewing audience roughly three times as many "words" of programming *per capita* as Japanese television. *See* I. POOL, H. INOSE, N. TAKASAKI & R. HURWITZ, COMMUNICATIONS FLOWS: A CENSUS IN THE UNITED STATES AND JAPAN 86 (1984) [hereinafter I. POOL 1984].

241. This figure does not include two stations of NHK AM radio programming, *see supra* note 6. Nor does it include relay and translator stations. Finally, I note that Japan's development of AM radio was hindered by interference from stations in the USSR, the Koreans, and the PRC. *See* M. ITO, *supra* note 83, at 83; NHK, *supra* note 83, at 358-59. Nonetheless, given that the United States has roughly twice Japan's population, the mid-1980's difference between Japan's 47 commercial AM broadcasters (utilizing 207 transmitting stations, including relay stations) and the United States' 4,710 is striking. *Compare* Omori, *supra* note 194, at 10, and FOREIGN PRESS CENTER/JAPAN, JAPAN'S MASS MEDIA 46 (March 1986) with Cantor and Cantor, *United States: A System of Minimum Regulation*, in THE POLITICS OF BROADCASTING 162 (R. Kuhn ed. 1985).

242. They could receive, however, one channel of NHK FM broadcasting. *See supra* note 6. The history of commercial FM broadcasting in Japan has been troubled. NHK began experimental FM broadcasting in 1957. *See* NHK, *supra* note 194, at 248. In 1968, MPT licensed four FM stations, and MPT Minister Kobayashi announced that a major move into FM would be forthcoming over the next ten years. He declared that all local AM radio stations should convert to FM, with high-power AM stations concentrated in the large cities to cover national or regional areas. The plan, designed to counter AM radio's foreign interference problems, was later apparently abandoned. *See* Tadokoro, *supra* note 194, at 71; NHK, *supra* note 83, at 356-57, 423. As late as 1978, however, a commentator wrote: "Nationwide establishment of [commercial FM] stations is still in abeyance. This stems from the government's policy of, in the future, substituting FM broadcasting for [AM] broadcasting . . ." M. ITO, *supra* note 83, at 83; *see id.* at 90.

Recently, MPT instituted a channel plan contemplating at least one commercial FM station in each prefecture. *See* Komatsubara, *supra* note 206, at 85. By the beginning of 1988, however, while MPT had assigned FM frequencies to 41 of 47 prefectures, only 25 prefectures had a commercial FM station in operation. MPT, 1987 WHITE PAPER: COMMUNICATIONS IN JAPAN 17.

243. Before licensing any new station, bureaucrats looked to what each prefecture could "support," examining, on a case-by-case basis: population; economic strength; number of households owning television sets; total advertising revenues; and broadcast advertising revenues. These standards were formally approved by the Radio Regulatory Council in *FM Nara Radio Broadcasting Co.* (RRC 1983), an unusual appeal of an MPT licensing decision. The Radio Regulatory Council, a quasi-judicatory body with powers that are extensive on paper but rather less extensive in practice, was created by the Yoshida Cabinet when it abolished the Radio Regulatory Commission in 1952. *See supra* note 194. Radio Law chap. VII gives the Council authority over administrative appeals from MPT determinations, but few such appeals are filed, presumably for fear of Ministry retaliation. *See generally* Nomura, *System of Broadcasting in Japan and Its Characteristics*, 1 *STUD.*

tive ethic antithetical to public service broadcasting and might lower profits that could otherwise be used to subsidize such broadcasting, thus degrading public service and broadcast quality.<sup>244</sup>

In line with these concerns, MPT licensed, on average, only one or two new UHF stations each year from the early 1970s through the mid-1980s. From 1971 through 1977, the Ministry continued to concentrate on Japan's three huge metropolitan areas, and largely fulfilled its own fears. It created new independent stations, generally financially weak, in prefectures on the fringes of major metropolitan areas.<sup>245</sup> In 1978, however, MPT shifted its approach, authorizing additional network-affiliated stations in prefectures outside of the major metropolitan areas. Those stations have been successful.

In the 1980s, MPT shifted its approach once again to allow a more rapid increase in station authorizations, although still limiting its awards based on economic factors. In 1986, MPT announced as an aspirational goal that four commercial stations should be available throughout Japan,<sup>246</sup> and announced guidelines for determining where new stations would be allotted.<sup>247</sup> The assignment of new channels, according to MPT's new guidelines, is controlled by frequency availability, the finan-

BROADCASTING 65, 76-77 (1963); M. ITO, *supra* note 83, at 27, 41-42 (1978); Nakasa, *supra* note 199, at 67.

In this case, the would-be licensee had applied for an FM license in Nara prefecture. MPT denied the application on the ground that no frequency had been allocated to the prefecture. Appellant, arguing that MPT had erred in not allocating a frequency, then filed an administrative appeal with the Minister, who was by law required to refer the matter to the Council for a recommendation. MPT argued before the Council that it had examined Nara prefecture under the standards set out above, and that the prefecture was if anything oversupplied with broadcast stations under those criteria. The Council approved MPT's position in toto.

244. See Iyoda, *Changes in the Broadcasting System and Their Impact on Commercial Broadcasters*, 21 *STUD. BROADCASTING* 49, 53 (1985).

245. Most new television stations added by MPT during this period were allocated to prefectures that previously had received only metropolitan broadcasting. Unable to affiliate with networks because their broadcast areas already include affiliates of each of the major networks, and unable to broadcast significant amounts of independent programming because of the absence of an active syndication market, those stations take perhaps a quarter of their programming from would-be network TV Tokyo Channel 12, and produce the bulk of the rest themselves. TV Kanagawa, for example, produces about 75% of its own programming, heavily emphasizing music videos; amateur, scholastic, and professional baseball; and talk. The 11 independent stations, including TV Tokyo Channel 12, among them spend about ten billion yen each year on purchasing and producing programming; comparable costs for a single key station are about five times that.

246. See MPT, *supra* note 242, at 17.

247. MPT first liberalized its allocation rules, and foreshadowed its general policy shift, in 1982. In allocating broadcast frequencies, it stated, it would take as a basic policy goal the "audience's equal opportunity to receive broadcasting." *Quoted in Iyoda, supra* note 244, at 54. One new television station was established in 1982, and three in 1983. Hattori, *supra* note 194, at 55.

cial ability of the area to support new stations, and local demand for additional broadcasting.<sup>248</sup> On that basis, MPT accepted applications in 1986 for nine new television stations.

Japanese regulators, early on, adopted a table-of-assignments approach to control frequency allocation, rather than the ad hoc approach characteristic of United States AM radio. This did not mean, however, that they were adopting an objective system of license allocation, characterized by formal rationality; MPT assignment plans were informal, internal agency documents, largely unconstrained by procedural requirements, and could be revised conveniently without formal processes or explanation.<sup>249</sup> These revisions served as the vehicle for almost all of Japan's major broadcast policymaking.<sup>250</sup> MPT's discretion was increased by its reluctance to award licenses to the limits of spectrum availability; notwithstanding marked shifts in MPT allocation approaches, MPT adhered to a policy of not granting licenses unless it felt that economic conditions ensured new broadcasters' financial success.

4. *Ipponka Explained.* The narrative I have set out so far raises a number of questions. Most importantly, why have Japanese regulators chosen to select licensees via *ipponka*? MPT officials explained to me that *ipponka* is necessary in part because it is difficult to select the one applicant out of many who is most suitable and deserving of the license.<sup>251</sup> More importantly, selection of only a single applicant will make all the rest unhappy. *Ipponka*, they told me, is the natural and inevitable result of the need for consensus in matters such as the distribution of valuable resources. It represents an attempt to conduct governmental allocation of scarce resources on the principle that, as one Japanese communications scholar explained to me, "to fight each other is not good behavior."

One might thus rely on "culture" in explaining *ipponka*: because Japanese strive for harmony and seek to avoid conflict, they use the most

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248. Hattori, *supra* note 194, at 59-62.

249. See M. ITO, *supra* note 83, at 26; Hattori, *supra* note 194, at 54.

A 1988 amendment to the Broadcast Act required the Ministry, for the first time, to embody its frequency allocation plans in formal ministerial ordinances. See Omori, *supra* note 194, at 27-28. The amendment was part of the recommendations of the Commission on the Role of Broadcasting in the New Media Age, see *infra* note 510 and accompanying text, which took the position that the change would increase certainty, rationality, and fairness in the license award process.

250. See M. ITO, *supra* note 83, at 26.

251. See also Komatsubara, *supra* note 206, at 80 (selection of the one best candidate "would take a long time").

harmonious method of licensee selection.<sup>252</sup> Too much about Japanese society, however — including much that is not true — can be explained by a wave of the hand to “culture.”<sup>253</sup> Societies sometimes follow similar approaches notwithstanding different cultures. The British, not generally thought of as exhibiting a culture of consensus, established a quasi-governmental BBC broadcasting monopoly on the “Japanese” theory that

if they were prepared to license people, then you would have a very large number of firms asking for permission probably, and . . . you could not acquiesce in all demands. And then you would have the difficulty of selecting firms which the Post Office thought were most suitable for the job, and, whatever selection is made by the Post Office, the Post Office would be bound to be accused of favouring certain firms. So that the solution of the problem seemed to be to make all those firms get together to form one Company for the purpose of doing the broadcasting.<sup>254</sup>

The simple invocation of “culture” is hardly dispositive in explaining why different societies follow similar approaches some times and different approaches others.<sup>255</sup>

The approach, further, is vulnerable to attack on other grounds. Not all aspects of Japanese society reflect an overarching emphasis on harmony,<sup>256</sup> and it is in any event hardly clear whether *ipponka*

252. See, e.g., Geller, *supra* note 6, at 28. More deeply in the “cultural” realm, one commentator has suggested that *ipponka* should be understood in light of Chie Nakane’s thesis that Japanese society is primarily structured not by horizontal relationships among peers, but by vertical relationships between high-status/patron (“oyabun”) and low-status/client (“kobun”) figures:

Mergers of competing interests under the guidance of mediating elders is a pervasive form of conflict resolution in Japanese society. The mediating elders in this context function as a symbolic oyabun figure to competing interests who are, in themselves, incapable of creating horizontal linkages and resolving conflicts, but can come together under the common vertical linkage provided by the mediator.

R. Akhavan-Majid, *Telecommunications Policy-making in Japan, 1970-1987: A Case Study in Japanese Policy-making Structures and Process* (1988) (unpublished Ph.D. dissertation, available in Wayne State University Law Library).

253. See Ramseyer, *Takeovers in Japan: Opportunism, Ideology and Corporate Control*, 35 *UCLA L. REV.* 1, 40 (1987) (“Like any other cultural tradition, the Japanese tradition is an unstable set of conflicting and manipulable norms.”).

254. R. COASE, *BRITISH BROADCASTING: A STUDY IN MONOPOLY* 21 (1950) (quoting E.H. Shaughnessy, Wireless Section, Post Office).

255. National culture is both meaningful and, when treated with appropriate caution, useful for analysis. See L. BEER, *supra* note 125, at 100-22; Ramseyer, *supra* note 253, at 40 (“The point is not that Japanese culture is irrelevant.”) (emphasis in original); *supra* text accompanying notes 127-28. It should not, however, be used as a talisman.

256. See, e.g., the techniques of the Buraku liberation movement, described in F. UPHAM, *supra* note 87, at 78-123; see generally *CONFLICT IN JAPAN* (E. Krauss, T. Rohlen & P. Steinhoff eds. 1984). Professor Haley has strongly challenged reliance on Japanese “harmony” to explain differ-

manifests true harmony or merely its veneer.<sup>257</sup> The notion that *ipponka* reflects a pure commitment to "harmony" is as problematic as the notion that United States allocation reflects a pure commitment to "fairness." Each system in important respect shuts out certain classes of participants and benefits others.

This Article's earlier discussion of administrative guidance,<sup>258</sup> however, suggests another way of looking at the problem. *Ipponka* seems a natural extension of the principles of administrative guidance to the licensing context. In the process of administrative guidance, the regulator consults with selected interested parties in the hope of finding common ground regarding the agency's ultimate action. In order to achieve anything resembling consensus, the regulator must limit the sphere from which it draws those contacts, staying within the realm of government and industry representatives who share more or less common interests. The government selects people with whom it can do business, and attempts to achieve consensus within that group.

*Ipponka* reflects a similar approach. Here, too, the agency selects the "serious" applicants — those it can or must do business with — and seeks to achieve a consensus among them. That effort at consultation and voluntary or imposed consensus serves the goals of the pure bargaining model, in that it discourages broadcast applicants from seeking to challenge the agency's decisions through judicial or political channels. The agency, by making concessions to include various industry members in the joint-venture entity, can exert significant influence in that entity's final makeup. The process further serves the goals of the bargaining model in that the ultimate licensee, a creature of the local corporate and national media power structures and of the Ministry as well, may be more amenable to agency guidance than a less broad-based, more self-made licensee.

One might argue that it would be more consistent with the bargaining model reflected in administrative guidance for the regulator informally to negotiate with each of the applicants, and to select the one that seems, on the basis of its promises and makeup, to be most likely to fulfill administrative goals if licensed. The argument is flawed in that it ignores a crucial feature of both administrative guidance and the bargaining model: The agency uses negotiation to deflect political and judicial

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ences in U.S. and Japanese litigation rates. See Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

257. See *supra* notes 87-92 and accompanying text.

258. See *supra* notes 75-105 and accompanying text.

weapons that disappointed parties might otherwise bring to bear, and thus maintains control of the process. Selecting one applicant and rejecting the others, even after consultation, would not achieve that goal.

MPT's role as the Ministry of *Posts* and Telecommunications,<sup>259</sup> along with the practical consequences of *ipponka* in MPT's VHF and UHF TV licensing, suggest a second way of looking at this question. Japan has some 23,000 post offices, of which almost 18,000 are family-owned rural branch offices, usually with no more than two or three employees. MPT's predecessor began setting up these post offices through the award of franchises to prominent local families over a century ago; since 1875 they have not only delivered the mail but also served as branch banks for the postal savings system.<sup>260</sup> MPT gave its rural postmasters land tax exemptions, commissions on postage-stamp sales, and bounties on their savings accounts above a certain amount. The postmasters got a reasonably lucrative business; MPT got partial control of large sums of depositor savings and the allegiance of a local institution uniquely situated to mobilize voters in the rural stronghold of the Liberal-Democratic Party.<sup>261</sup>

When Tanaka became MPT Minister in 1957, he emphasized and exploited the existing post office symbiosis<sup>262</sup> by tripling the number of commissioned postmasters, adding about 2000 to the existing 1150, over the course of one year. He thus continued the process of distributing scarce and valuable resources — here, the right to participate in a monopoly delivery business and an administratively favored banking business — to prominent members of the local economic and social power structure. In return, the regulatees helped turn out the vote for LDP

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259. See *supra* note 194.

260. F. ROSENBLUTH, *supra* note 81, at 168-70; Johnson, *supra* note 81, at 190-92. The Japanese postal savings system, essentially a savings bank run out of post office facilities, has assets greater than any of Japan's (or the world's) commercial banks; it is highly popular because it offers high interest rates, long banking hours, and, until recently, certain opportunities for tax evasion as well. See F. ROSENBLUTH, *supra* note 81, at 167, 174, 180-82; Johnson, *supra* note 81, at 208-10.

261. See F. ROSENBLUTH, *supra* note 81, at 169, 172-73; Johnson, *supra* note 81, at 192. But see D. WESTNEY, *IMITATION AND INNOVATION: THE TRANSFER OF WESTERN ORGANIZATIONAL PATTERNS TO MEIJI JAPAN 122-23* (1987) (the new post office system, struggling in its early days, actively recruited local notables in order to invest the new system with local recognition and prestige; it wooed them not with the promise of monetary rewards, but with the prestige of a "government position" as a postal official).

262. Even before Tanaka, MPT had benefitted from the postmasters' political clout. In 1950, for example, the postmasters' support enabled MPT to beat back an attempt by the Ministry of Finance to seize control of postal life insurance and pension funds. See F. ROSENBLUTH, *supra* note 81, at 172-73.



politicians, who provided political support for MPT.<sup>263</sup>

MPT's radio and television licensing followed this same model.<sup>264</sup> In the broadcast context as well, the regulator had the task of distributing scarce and valuable resources. Through the distribution process, the regulator singled out its licensees for governmental largesse and, due to the debt thus created, gained political influence over them. The licensees, members of the local business structure and thus predisposed to support the business-oriented ruling party, were in a position to support politicians who could, in turn, provide the regulator support in its battles with other elements of the bureaucracy. Through *ipponka*, MPT was able to mobilize the entire political structure in this process, with a minimum of playing favorites or creating unhappiness, and thus could maximize the political benefits that would accrue.<sup>265</sup>

5. *Allocation Policy Explained.* The foregoing suggests some reasons why Japanese regulators have chosen to select licensees via *ipponka*. How, though, should one explain MPT's varying approaches to license allocation? Armed with the explanation of *ipponka* set out above, one can usefully view the evolution of Japanese allocation policy as an uneasy blend of what I will call "bureaucratic" and "political" components.

The original and short-lived 1956 MPT plan for broadcast allocation, apparently a creation of the career bureaucrats who made up the Ministry staff,<sup>266</sup> illustrates the bureaucratic component of Japanese allo-

263. F. ROSENBLUTH, *supra* note 81, at 177-78. One MPT official stated in my presence, referring to the conflicts between MPT and the Ministry of International Trade and Industry (MITI), *see infra* notes 407-60 and accompanying text, "MITI has the money, but we have the votes." *See also* C. Johnson, *supra* note 81, at 186, 190-91 (MPT, though scorned by MITI and Ministry of Finance bureaucrats as not a true "policy ministry," is politically powerful; the post of MPT Minister is a little-recognized but traditional way station on the road to the Prime Ministership); F. ROSENBLUTH, *supra* note 81, at 179-80 (noting the increasing political importance of the postal affairs caucus and the office of MPT Minister).

264. The model, of course, is not confined to postal services and broadcasting. *See* N. THAYER, *supra* note 216, at 70 (quoting Diet member Kenzo Kono on business regulation generally): "It's like a game of paper, scissors, rock. . . . The businessmen have influence over the politicians, the politicians control the bureaucracy, and the bureaucrats keep the businessmen in line. It's a natural system of checks and balances."

265. Japanese licensee selection thus may be described in organizational sociology lingo as having taken the path it did because of a strong isomorphic pull from the existing post-office model, combined with the utility of *ipponka* selection and market protection in facilitating and supporting administrative guidance. *See generally* D. WESTNEY, *supra* note 261, at 218; DiMaggio & Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 151-52, 154-56 (1983).

266. *See* Y. PARK, *supra* note 223, at 25 (detailing Tanaka's rejection of the 1956 MPT plan for delayed licensing of VHF stations).

ation policy. The plan provided for slow diffusion of television "in consideration of the density of population, economic conditions and cultural levels."<sup>267</sup> Under the bureaucratic component of allocation policy, license allocation is constrained not only by frequency availability, but also by economic factors and time. Regulators grant licenses only if the region, conservatively viewed, can "support" the new franchise. Substantial time must pass between the grant of one license and the grant of the next. Allocation is controlled by a table of assignments, sharply limited by economic factors, that nonetheless gradually expands over the years.

*Ipponka*-based selection of licensees suggests some reasons for this bureaucratic approach. *Ipponka*, seen as an extension of either administrative guidance or the post office model, arguably requires some limitation on the number of licensees. From the perspective of administrative guidance, MPT must limit the number of licensees in order to preserve for itself the threat of licensing competitors, the regulator's greatest weapon in exerting administrative-guidance pressure on industry members.<sup>268</sup> From the perspective of the post office model, MPT must limit the number of licensees in order to protect licenses' profit-making potential and ensure their value.

Moreover, if a regulator loosens limits on entry into broadcasting too far, it may find that a locality's powerful economic players have already been brought into broadcast license coalitions, and that support in the established business community for a new one is less than overwhelming. In order to license new stations, regulators are then forced to deal with persons on the fringes of the authority structure. At that point, regulators may find that they are no longer dealing with people with whom they can conveniently do business, and the consultation and consensus process breaks down. It is perhaps for these reasons that the *ipponka* process has worked awkwardly in MPT's most recent, post-1986, television licensing, as the Ministry has attempted to expand the number of television licensees. MPT officials have had to take a more interventionist approach, in some cases meeting directly with media representatives<sup>269</sup> and issuing their own proposals for the shareholder structure of

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267. NHK, *supra* note 194, at 240.

268. License revocation is another threat. That threat, however, is perhaps too drastic to be useful on a day-to-day basis. MPT has never revoked a broadcast license. If it did, moreover, it would be subject to political and judicial challenge.

269. In 1987, MPT officials invited the persons in charge of broadcast issues in all Tokyo-area media companies to meet with MPT officers regarding the new Tokyo FM radio station, and di-

the new ventures.<sup>270</sup> In one prefecture, MPT announced its intention to bypass the *ipponka* process entirely and choose an applicant through competitive selection.<sup>271</sup> The prospect of such failure gives the regulator an additional incentive to limit the number of broadcast licensees.<sup>272</sup>

Bureaucratic incentives alone, however, do not provide a complete picture of MPT's allocation policy. Analysis of the bureaucratic component assumes that bureaucrats control MPT: that while licensing incorporates "political" elements in that bureaucrats consider their political position within government in deciding on license allocation, it is bureaucrats who are the ultimate decisionmakers. Political considerations, however, can intrude into the licensing process in another manner: politicians can impose licensing decisions regardless of the wishes of the career bureaucracy.<sup>273</sup> The actual distribution of television licenses in 1957-

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rected them to submit a joint selection for the managing director who was to represent their interests in that station.

270. In Yamanashi prefecture, the *ipponka* process for a new FM station was peaceful, largely because Yamanashi's two television stations, one of which is associated with the influential politician Shin Kanemaru, accounted for almost all of the 35 applications. Stalled negotiations between the two nonetheless led MPT at one point to issue its own draft allocating shares between the two stations.

271. Yamagata prefecture has until recently been the home of an effective local media monopoly, with the newspaper Yamagata Shimbun playing a dominant role in both Yamagata Broadcasting (VHF) and TV Yamagata (UHF). When MPT announced allocation of a third television frequency, the role that existing local media actors were to play was a key issue. Negotiations were soon deadlocked, with a Miyazawa-faction Diet member supporting one camp and a Komoto-faction Diet member supporting another. The prefectural government and local economic actors were unhelpful in guiding the process. MPT ultimately announced that it would examine applications on a competitive basis and that any unification of applications was to take place immediately or not at all.

272. Limiting the number of broadcast licensees also protects existing broadcasters. A multitude of factors may cause regulators to wish to protect their charges; industry members provide regulators with "information, views, and most important, love and affection." Robinson, *supra* note 35, at 189 n.43 (quoting former FPC Chairman Lee White). An MPT bureaucrat told me it would constitute a failure on MPT's part should any broadcaster be forced by economic woes to relinquish its license. Moreover, it may in fact be correct that protecting broadcasters' market positions in some degree promotes the sort of programming regulators want to encourage. See generally Comanor & Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J.L. & ECON. 177, 178-82 (1972). The very universality of these considerations, though, see S. BREYER, *supra* note 35, at 194, makes them unhelpful in deciding why the Japanese system seems to place as great an emphasis on licensee protection as it does.

273. It is widely believed that through the early 1970s decisionmaking power in most policy areas in Japan was concentrated in the government bureaucracy. See sources cited *supra* note 223. Bureaucrats had the advantages of subject-matter expertise, permanency, and ultimate control over the policy implementation process; Diet members had none of those. LDP committees, according to some scholars, were dominated by bureaucrats recently retired to Diet seats and supervising the ministries they had just left. Committee meetings were occasions for bureaucrats to lecture Diet members on the ministry's intended plans. See Johnson, *supra* note 81, at 201-02. Other analysts assign politicians a more meaningful role in policymaking; decisionmaking, they say, was always an

1959, thus, was not a bureaucratic creation at all; it was ordered by Tanaka, a party politician.

The MPT Minister and influential Diet members contribute the political component of allocation policy; under that component, the number of licenses is determined on an ad hoc basis, with reference to political factors. The political component is important because politicians' interests in allocation policy diverge from bureaucrats' interests. In large respect, just as MPT bureaucrats have seen their role as one of *limiting* the number of broadcast licensees, Japanese politicians have had a simultaneous interest in *increasing* the number of broadcast stations, at least in their home districts. New broadcast stations are welcomed by the electorate and are easier and cheaper to provide than new railway lines. Voters in rural areas served by only one or two commercial television stations strongly favor new stations, providing additional television programming at zero cost to them. The creation of new licenses may give prominent local figures, shut out of earlier stations, opportunities to participate in the new one.<sup>274</sup> Getting a broadcast license for one's constituency affords a Diet member the opportunity to build political capital, demonstrate his political power, increase his connections, and accumulate political credit. He may become a shareholder of the new station; establishment of the station will likely pay off in campaign finance and conceivably, according to one analyst I spoke with, in editorial support.

It should not be surprising that politicians play a substantial role in license allocation. MPT has historically been viewed as subject to extensive political influence, in particular by the Tanaka faction of the LDP.<sup>275</sup> Nor should this be too surprising: Like the Ministry of Con-

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intimate process involving both bureaucrats and party politicians. See N. THAYER, *supra* note 216, at 226, 247; see generally Y. PARK, *supra* note 223.

Many scholars trace a shift in this structure beginning in the early 1970s. With the coming of tight money and the need for ministries to fight among themselves for Diet allocations, together with increased Diet-member expertise in policy areas, see Johnson, *supra* note 223, at 23-24; Y. PARK, *supra* note 223, at 30-38, influence shifted to Diet members, acting through party policy organs, with particular influence and expertise in given areas. These members have come to be known as *zoku* (generally, though unfortunately, translated as "tribe") Diet members. See G. CURTIS, *supra* note 216, at 114-16.

274. MPT's award of a fourth television license in Fukushima prefecture largely stemmed, a broadcaster told me, from the political ambitions of a Tanaka family member seeking a Diet seat in that prefecture.

275. See Kobayashi, *supra* note 92, at 37-38. The Diet membership of the LDP is divided into factions. The factions, which have no recognizable political views or ideology, provide the mechanism by which the LDP's (and thus the nation's) leadership is chosen. See G. CURTIS, *supra* note 216, at 86. The LDP factions began as highly personalized patron-client groupings, involving pow-

struction and the Ministry of Transportation, MPT controls a significant amount of governmental largesse.<sup>276</sup> Further, it has jurisdiction over sectors of society valuable to the electoral base of the party and its factions. Both of these factors make it a prime target for political colonization.<sup>277</sup> Moreover, the informal, non-rule-bound nature of the license allocation and selection process affords extensive opportunity for informal political intervention in that process.<sup>278</sup> Both the VHF licensing of the late 1950s and the UHF licensing of the late 1960s provide illustrations.

An understanding of the bureaucratic and political components of license allocation policymaking helps clarify many Japanese allocation decisions. Bureaucratic influence apparently prevailed regarding the original 1956 MPT allocation plan for television, emphasizing a slow increase in the number of television licensees, and MPT's unwillingness throughout the 1970s to engage in any rapid expansion of broadcast licensing. Political influence better explains the sharp expansion of licensing under Tanaka in 1957-59.<sup>279</sup> Why, though, did MPT decide in the mid-1980s to systematically expand broadcast licensing? Political influences on license allocation policy in the past have tended to bring about ad hoc increases in the number of stations, not systematic ones.<sup>280</sup> Ac-

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erful leaders dispensing large sums of campaign funds to their Diet followers. Today, however, they seem to a greater degree associations of convenience between new Diet candidates, who receive campaign and other organizational support, and the faction leadership.

The Tanaka faction, reorganized after Tanaka's death as the Takeshita faction, exercised disproportionate influence in a number of policy areas. Tanaka "was the last of an old school of political bosses whose power derived from their ability to provide patronage to a large circle of followers." *Id.* at 83. See generally *id.* at 80-88; E. REISCHAUER, *supra* note 7, at 279-83. Many of MPT's top officials during Tanaka's tenure became longtime loyalists; some observers came to call MPT a "Kakuei kingdom." See Y. PARK, *supra* note 223, at 155-56 & n.36. Professor Rosenbluth reports that from 1957 to 1982, through twelve cabinets, the MPT Minister was a member of the Tanaka faction. See F. ROSENBLUTH, *supra* note 81, at 178. Professor Park reports that from 1957 to 1979, at least one and sometimes all of the top three political and career posts in MPT (minister, parliamentary vice minister, and administrative vice minister) were held by Tanaka confidants. See Y. PARK, *supra* note 223, at 155-56. I was told as late as 1986 that a meeting with Shin Kanemaru, then head of the Diet telecommunications *zoku* and a key Tanaka faction leader, was indispensable for securing any broadcast license.

276. See Aberbach, Krauss, Muramatsu & Rockman, *Comparing Japanese and American Administrative Elites*, 20 BRIT. J. POL. SCI. 461, 463 (1990) [hereinafter Aberbach].

277. "Colonization" involves formation of personal relationships between bureaucrats and members of the various factions, cooptation of bureaucrats by the factions, and promotion within the bureaucracy of officials sympathetic to the factions. See Y. PARK, *supra* note 223, at 59-63, 153-55.

278. The Department of Housing and Urban Development in the United States during the 1980s provides, perhaps, a good parallel.

279. On the 1967-70 UHF licensing, see *infra* notes 299-305 and accompanying text.

280. An academic I spoke to saw the station increase plan as a straightforward recognition that television stations are institutional monopolies making unnecessarily large profits. That does not

According to MPT officials, the shift to a larger number of channels was necessitated by the growing role of information in the lives of the people. Japanese thinkers for the last two decades increasingly have seen their society as transforming itself into a new *johoka shakai*, or "information society,"<sup>281</sup> characterized by the easy availability of great amounts of information, together with universal, cheap, fast, efficient, and large-scale information transmission.<sup>282</sup> The *johoka shakai* promises an "information age" to follow the last "industrial age." As MPT officials put it, the old conservative rules are insufficient for the new age.

The shift in MPT's attitude and behavior towards new stations, though, seems quite drastic, and seems to go beyond what can be explained by a mere policy shift. MPT, after all, has even begun abandoning the *ipponka* procedural format.<sup>283</sup> The change reflects an institutional shift as well. As Section IV of this Article explains, MPT's conflicts with other components of government, and its reactions to those conflicts, in the course of developing its cable television policy led it to recast its own role as that of a "policy agency," adopting a more global and innovative outlook towards broadcasting issues; those same conflicts led it to expand its client base in such a manner as to forge new links with the electronics and other industries, and thus loosen its ties to the tradi-

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answer, though, why MPT should suddenly have come to that realization in the mid-to-late 1980s; broadcasters were no more profitable in that period than they had been previously, and were perhaps less so. While commercial broadcasters' ratio of profit to total liabilities and net worth in 1986 was almost three times the ratio for Japanese industries generally, see MPT, *supra* note 242, at 7, these numbers may be misleading. Broadcasters operating VHF television stations appear to be substantially more profitable than UHF or radio-only broadcasters, and thus skew the figures. See MPT, REPORT ON PRESENT STATE OF COMMUNICATIONS IN JAPAN: FISCAL 1986, at 64 (1986).

Local broadcasters tend to credit (or blame) the national media groups, who they see as pushing for additional stations so as to increase their bargaining power and newspaper sales. Indeed, the correlation between Japan's industry structure of four major television networks and a fifth minor one, and MPT's current plan to put four television stations in every prefecture and a fifth in every major city, seems striking. See Hattori, *supra* note 194, at 70. The national media groups, though, appear uninterested in the new stations, and have to a large extent been hesitant to invest in them. Only three of the five networks enthusiastically pursued the nine frequency slots MPT made available in 1986. One network, by contrast, filed applications in only two prefectures, and one filed in none. There appears to be a feeling in at least some network boardrooms that the new stations will indeed be unprofitable, at least initially, and that this is not the time to assume the burden of new money-losing affiliates.

281. *Johoka shakai* might be most accurately translated as "information-ized society" or "informationalized society"; those readings, however, lose in euphony whatever they may gain in technical precision. See *infra* note 414.

282. See ECONOMIC PLANNING AGENCY, THE INFORMATION SOCIETY AND HUMAN LIFE (Mar. 31, 1983); Ito, *The "Johoka Shakai" Approach to The Study of Communication in Japan*, 1 KEIO COMM. REV. 13, 13-14 (1980); *infra* notes 414-15 and accompanying text.

283. See *supra* note 271 and accompanying text.

tional broadcast media.<sup>284</sup> MPT's new role as a policy agency may well have made it more sensitive to scholarly criticism of its limits on broadcast licensing; the loosening of its ties to the traditional media may have blunted those clients' protests against the licensing of new competitors.

6. *Some Consequences of the Japanese Approach.* The Japanese approach to broadcast allocation has yielded some problematic results. Most obviously, if one assumes that some broadcasters MPT chose not to license would have flourished, then, for an extended period of time, Japanese listeners have received less broadcasting than they would have otherwise. This is most obvious with regard to radio, for which MPT to this day has made few station assignments.<sup>285</sup>

In an ideal world, one could compare the number of stations MPT chose to license in each market with the number that the market might have supported absent such policies, and thus determine the extent of MPT's limitation on market entry. The question of how many broadcasters an area's economy can "support," however, is an enigmatic one. Cross-national comparisons are unsatisfying; it is hard to know just what to do with the fact, for example, that different countries spend vastly different sums, per capita and as a percentage of GNP, on advertising.<sup>286</sup> Do low advertising expenditures mean that an area can support little over-the-air broadcasting, or would an increase in the number of broadcast stations stimulate greater advertising spending? While one cannot determine precisely the extent to which MPT artificially limited the number of broadcast stations, it seems clear that the Ministry deliberately chose to move slowly on license allocation. That limitation on the number of licensees may have been necessary to the smooth functioning of the *ipponka*-based system.<sup>287</sup>

A second consequence of the *ipponka* process is its tendency to centralize media power. In most prefectures, the RRC or MPT awarded the prefecture's single radio license to an *ipponka*-created consortium led by the prefectural newspaper, and MPT later awarded the single VHF television license to the radio licensee. These awards were quite natural, given *ipponka*'s internal logic. The obvious consortium to receive the

284. See *infra* text following note 475; text accompanying note 503.

285. See *supra* notes 241-42.

286. See DENTSU, INC., *supra* note 228, at 16. The United States spent more money in 1985 on advertising, per capita and as a percentage of GNP, than any nation in the world: \$397.11 per capita and 2.39% of GNP. Japan, perhaps unsurprisingly given its export-oriented economy, spent rather less: \$106.13 per capita (#12 in the world) and 0.98% of GNP (#16). *Id.*

287. See *supra* text accompanying note 268.

radio license was a coalition of the prefectural newspaper<sup>288</sup> and prominent local businesses; that coalition, once created, incorporated the most important members of the local power structure and thus was a natural candidate to receive the television license as well.<sup>289</sup> Policies of limiting the number of broadcast licensees checked the licensing of new radio or television stations to compete with the existing ones. Mass communication, thus, was an effective monopoly in most areas until the licensing of UHF in the late 1960s.<sup>290</sup>

This state of affairs persisted notwithstanding a 1959 MPT interpretive guideline entitled *Measures to Prevent Concentration of Mass Media*, prohibiting common ownership of a radio station, TV station, and newspaper in the same community, unless the diversity of information sources in that community would forestall the possibility of local media monopoly.<sup>291</sup> MPT's enforcement of that prohibition has been unenthusiastic.

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288. See *supra* note 228.

289. See *supra* notes 228-29 and accompanying text. United States allocation was not immune to this tendency, but the phenomenon manifested itself to a lesser extent. Newspapers received 50 of the first 142 U.S. television construction permits awarded through 1952, and radio stations were awarded many of the rest. See D. GINSBURG, *supra* note 132, at 199-200.

290. Cf. S. BREYER, *supra* note 35, at 194 (resource allocation agencies reinforce status quo when they follow historical distribution patterns).

In Yamanashi prefecture, for example, the dominant newspaper is the local Yamanashi Nichinichi, whose publicity materials today claim for it a 66% readership share. When Yamanashi Broadcasting (YBS) was formed in 1954 and awarded a radio broadcast license, its major shareholders were the Yamanashi Nichinichi and its shareholders, as well as newspaper and broadcasting interests from neighboring Shizuoka prefecture. When YBS was granted a television license in 1959, the result was that the dominant newspaper, the only radio station, and the only television station in the prefecture were in roughly the same hands, and were operated under common management as part of the "YBS Group." That state of affairs persisted until the licensing of a UHF broadcaster in 1970.

291. See NSK, *supra* note 7, at 40-41; NHK, *supra* note 83, at 239. In accord with the 1988 revision of the Broadcast Law, MPT recently promulgated the 1959 guideline as a formal ministerial ordinance. See Hattori, *supra* note 194, at 53-54.

For analogous United States authority, see Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975) (barring creation of broadcast-newspaper combinations and requiring divestiture in cases of local media monopoly), *aff'd in part & rev'd in part sub nom.* National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part & rev'd in part*, 436 U.S. 775 (1978) (upholding Commission's action in its entirety); Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), *on reconsideration*, 28 F.C.C.2d 662 (1971) (barring creation of radio-VHF television combinations, but not requiring divestiture of existing combinations); see also Amendment of § 73.3555, 4 F.C.C. Rcd. 1741 (1989) (relaxing prohibition against common ownership of radio and TV combinations).

The text of the MPT guideline goes beyond United States law in that it purports to prohibit any ownership or control by a single entity of broadcast stations in different communities, except for parent-satellite combinations. See NSK, *supra* note 7; NHK, *supra* note 83. For analogous U.S. law, see Multiple Ownership Proceeding, 100 F.C.C.2d 17 (1984), *on reconsideration*, 100 F.C.C.2d 74 (1985).



Media groups have been able, through a variety of legal fictions,<sup>292</sup> to operate radio, TV and newspaper outlets in a single community while complying with the formal terms of the MPT guideline. MPT has made no objection.<sup>293</sup>

A further possible consequence of *ipponka* allocation is blandness and mainstream orientation in programming. Japanese broadcasters apparently have engaged in remarkably little of what a regulator might consider objectionable on fairness doctrine grounds.<sup>294</sup> This is so notwithstanding the fact that MPT's ability to enforce content restrictions<sup>295</sup> either through administrative guidance or through formal procedures is limited, because the agency has relatively few sanctions to impose on broadcasters: the threat of relicensing denial is not credible,<sup>296</sup>

292. See, e.g., *supra* note 212 (exchanges of personnel and interlocking stock ownership structures). In the United States, such fictions are addressed by the FCC's cross-interest and attribution rules. See *Re-examination of the Commission's Cross Interest Policy*, 4 F.C.C. Rcd. 2208 (1988); *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 97 F.C.C.2d 997 (1984), *modified*, 102 F.C.C.2d 1001 (1985).

293. Recent trends in Japanese broadcast thinking have favored relaxing concentration requirements. The influential 1987 report of the Commission on the Role of Broadcasting in the New Media Age thus recommended rethinking existing concentration rules. The report specifically suggested allowing a Tokyo key station, or another local station, to invest in or to operate new licensees as a way of ensuring the financial stability of new stations in localities that otherwise might be deemed unable to support them. See Hattori, *supra* note 194, at 59-62; Hamada, *Toward a Theory of the "Open Broadcasting System"*, 25 *STUD. BROADCASTING* 89, 99-100, 104-05 (1989).

294. See, e.g., F. HAIMAN, *supra* note 125, at 4 (noting "blandness" of Japanese television in its treatment of public affairs). *But see infra* text accompanying note 301.

295. The relevant provision of the Broadcast Law, numbered as it was prior to that statute's 1988 revision, is Article 44, applicable to private broadcasters via Article 51. Article 44 required that broadcasters:

- (1) Shall not disturb public security and good manners and morals;
- (2) Shall be politically impartial;
- (3) Shall broadcast news without distorting facts;
- (4) As regards controversial issues, shall clarify the point of issue from all the angles possible.

Article 44 further required that broadcasters provide "cultural programs or educational programs as well as news programs and entertainment programs, maintaining harmony among broadcast programs." See Broadcast Law, Art. 44 (Law No. 132 of May 2, 1950), *as amended* (translation by MPT).

The 1988 revision reorganized and renumbered the statute, and exempted commercial radio broadcasting from the "harmony" requirement, but made no other pertinent substantive change. See Omori, *supra* note 194, at 28-29; Hasebe, *The Characteristics and Ideas of Japan's Broadcasting System*, 25 *STUD. BROADCASTING* 117, 117-18 (1989); Hamada, *supra* note 293, at 99-100.

296. Given MPT's commitment to keeping each licensee in business and its refusal to allow license transfer, nonrenewal would constitute an unprecedented and almost unthinkable step. MPT has never instituted formal proceedings to enforce the Broadcast Law's content provisions; there is some question as to whether the provisions are legally enforceable at all. See Shiono 1978, *supra* note 7, at 11-12. *But see* Tadokoro, *supra* note 194, at 70 (broadcasters decide in favor of progovernment programming because "governmental 'impartiality' checks," and the need for license renewal,

and the threat of licensing competitors is squandered once acted upon.<sup>297</sup> The answer may lie once again in the *ipponka* process: *Ipponka* helps ensure that broadcast licensees (1) are drawn from the conventional power structure, and thus are unlikely to have unusual views; and (2) are joint ventures comprising a large number of individuals and organizations, so that even if one shareholder should have unusual views, those views are unlikely to be reflected in station programming.<sup>298</sup> As a result, there may be little occasion for content regulation after licensing.

The licensing of UHF television stations in the late 1960's provides an exception to prove this rule. By 1967, two television networks, centered around Tokyo stations Nippon Television (NTV) and Tokyo Broadcasting Service (TBS), had become firmly established,<sup>299</sup> and com-

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make broadcasters "uneasy"). Regulators did, in one case reported to me, strongly caution a television network in connection with staged footage in a report on delinquent female high school students.

297. MPT, however, arguably has used the licensing of competitors as a weapon against uncooperative broadcasters at least once. See *infra* notes 299-305 and accompanying text.

298. A single individual owns a majority of the shares of the one broadcaster whose programming was cited to me as evincing strong political (in this case, right-wing) views; he bought out the other participants after the station started operation. MPT, I was told, has taken measures to prevent recurrence of that scenario, by requiring consent of the board of directors to any stock transfer by a shareholder.

299. MPT's early thinking regarding networks had been that each station should program independently. A 1959 amendment to the Broadcast Law prohibited private broadcasters from entering into "any arrangement relating to the supply of broadcast programs which includes any terms on which broadcast programs are supplied by a particular person only." Broadcast Law, Art. 52-3 (Law No. 132 of May 2, 1950), as amended (translation by MPT); see NHK, *supra* note 83, at 243-44. Because the law only banned 100% network control of affiliate programming, however, it had little force.

The economic forces encouraging networking, by contrast, were overwhelming. The "key stations" in Tokyo and Osaka attracted crucial advertising from national sponsors by promising the sponsors national coverage, signing up affiliates across the country, and promising those affiliates a steady revenue stream. The movie companies refused to supply programming for television, and so television stations had to produce their own; networking allowed the costs of producing a program to be spread over many stations instead of just one. Local stations, similarly, were not equipped to cover the news nationwide absent some sort of cooperative arrangement. See NHK, *supra* note 83, at 259.

Because creative talent was concentrated in Tokyo and Osaka, program production came to be centered there. Most news, similarly, originated in Tokyo, which made the Tokyo station first among equals in any cooperative news arrangement. This fact was made plain when stations across the nation were hurriedly opened in time to cover the 1959 wedding of then-Crown Prince Akihito and Princess Michiko. Local stations wanting the footage had to sign news agreements with either NTV or TBS, the only two stations designated to cover the event. See NHK, *supra* note 194, at 343; NHK, *supra* note 83, at 196, 256-60; Yamamoto, *supra* note 196, at 105-06; M. Ito, *supra* note 83, at 91. Four months after the wedding, sixteen commercial stations formed Japan News Network (JNN) as a result of their cooperative arrangement in wedding coverage. Shortly thereafter, other groupings were formed. NHK, *supra* note 83, at 259-60.

petition between the two was fierce.<sup>300</sup> At the same time, the Vietnam War — a highly divisive issue in the Japan of the time — was at its height. The government strongly supported United States involvement in the war; the two major networks were running news coverage critical of it. In May 1965, NTV broadcast part I of a three-part documentary called "Actions of a Vietnamese Marine Battalion," featuring such footage as a South Vietnamese soldier beheading a suspected Viet Cong. Government supporters — and a cabinet minister — were outraged; parts II and III were never shown. In October 1967, TBS broadcast the sympathetic report of a prominent Japanese newscaster from North Vietnam. A "mixture of government pressure and [broadcaster] self-control" forced the newscaster's removal.<sup>301</sup>

MPT ended the NTV-TBS duopoly in 1967 though its decision to license UHF television. The new frequency allocation established, virtually overnight, the Fuji Television network, associated with the Sankei newspaper, and boasting especially close links to the LDP. Fuji consisted of only six member stations before 1968. It built its network on the new UHF stations; of the thirty-three stations established 1968-1970, by my count, eleven of them are today Fuji sole affiliates and six more are joint affiliates.<sup>302</sup> Fuji went from a minor to a major network overnight. The Nippon Educational Television (NET) network, associated with the Asahi newspaper, and later reorganized as Asahi TV, also made substantial gains, roughly doubling in size. TBS and NTV, by contrast, picked up few new affiliates.<sup>303</sup>

The fact that MPT struck a strong regulatory blow against NTV and TBS during a period of intense government displeasure over those networks' news coverage suggests that either the initial decision to license UHF, or the process of licensee coordination, or both, were influ-

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300. On the island of Kyushu, in western Japan, for example, TBS managed to sign up six out of seven stations; NTV corralled four out of four on the neighboring island of Shikoku. Yamamoto, *supra* note 196, at 97-98.

301. Tadokoro, *supra* note 194, at 68-69; *see also* NHK, *supra* note 83, at 315-17, 420-21.

302. In prefectures with fewer than four television stations, broadcasters are in a position to choose their programs from among those of all four major networks, and need not be too closely tied to any one. Commonly, broadcasters nonetheless form an affiliation with a single network, promising (among other things) to carry national news exclusively from that network; these are referred to as "sole affiliates." A local station may form a looser affiliation with more than one network; these are referred to as "joint affiliates."

303. TBS, which today boasts twenty affiliates among stations established before 1968, was largely uninterested in the new stations, considering UHF an inferior medium. It picked up four UHF affiliates, in prefectures where the earlier VHF station had been affiliated with NTV. NTV, in a similar position, also gained four new affiliates.

enced by the political realities of the day. The analysis rests on a coincidence of timing, and is hardly conclusive. As far as the decision to allocate UHF frequencies to television origination is concerned, it may be that the decision came when it did for unrelated reasons.<sup>304</sup> To my mind, however, the coincidence is powerful. The least that can be said, I believe, is that MPT was aware in licensing UHF that the greatest opportunities for new affiliates would fall to conservative Fuji/Sankei and to NET, the stations that had not yet formed major networks. Further, MPT was aware that it was imposing upon *all* of the networks the knowledge that the content of their reporting might affect the license allocation process.<sup>305</sup>

This story indicates that Japanese broadcasters have hardly been uniformly pro-government. While the factors discussed above make Japanese broadcast stations more supportive of the status quo than they would otherwise be, broadcasters have, in times of crisis, staked out strong positions in the political opposition. The narrative further suggests that government officials have found weapons to retaliate against the broadcast press when it has strayed from appropriate behavior; this provides yet another factor reinforcing the natural tendencies of the *ipponka*-based system to mainstream reporting and views.

A final consequence of *ipponka* allocation worth considering is its contribution to the interplay of political considerations in the licensing process.<sup>306</sup> The 1957-59 VHF licensing under Tanaka<sup>307</sup> and the 1967-70

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304. One MPT officer told me that UHF became technically feasible in Japan during the late 1960s and was licensed then for that reason. See also NHK, *supra* note 194, at 260 (MPT in early 1960's considered UHF licensing "a matter of urgent need for solving the shortage of broadcasting frequencies"). A 1964 advisory commission report, on the other hand, advised MPT to refrain from UHF licensing except for translator stations and in prefectures served by only one commercial station, until much more extensive technical development had taken place. *Id.*

A prominent broadcaster and veteran of the UHF licensing process told me that the key pressure for change came neither from spectrum scarcity nor from Fuji's political connections, but rather from the fact that Prime Minister Sato's brother-in-law was an executive vice-president of NET.

305. Whether MPT, through the *ipponka* process, encouraged new stations to include links to Fuji, is a separate question. One broadcaster told me that network affiliation was generally not considered in the *ipponka* process in 1968-1969; that issue, he said, was typically discussed only after the station was formed. The shareholder list of that same broadcaster's station, however, contains a prominent stake held by Fuji/Sankei, and no comparable stake held by any other media group. If Fuji/Sankei gained that stake during the initial *ipponka* process, then any subsequent decision on affiliation would likely been largely academic.

306. Japanese regulators have sometimes been sensitive to, and critical of, the role politics plays in licensing. In 1965, three years after Tanaka left the Ministry, MPT submitted to the Diet a legislative proposal designed in part to limit political influence in licensing by moving Japanese allocation policy closer to the formal rationality model. The bill proposed to limit the Minister's discretion regarding frequency allocation and license awards, and to transfer authority over frequency

UHF licensing<sup>308</sup> each demonstrate that interplay. Japan, of course, is not alone in having a broadcast licensing system marked by political considerations in the licensing and policymaking process. The same can easily be said of the United States, notwithstanding the demands of formal rationality.<sup>309</sup> Individual members of Congress have extensive influence over bureaucratic decisionmaking.<sup>310</sup> Politicians meet with regulators privately to mark up agency regulations; they shape regulation through meetings between political staff (in particular, congressional committee staff) and agency personnel.<sup>311</sup> Indeed, the political process has intruded into licensing in rather more blatant ways: Professor Schwartz has observed that throughout the Eisenhower years, there was an almost perfect correlation between the FCC's treatment of license applications by newspapers, and the applicants' editorial support of Eisenhower for the Presidency.<sup>312</sup>

The two systems, however, are different in important ways. Japanese regulation, centered on administrative guidance and the bargaining

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allocation plans, broadcast license renewals, and other broadcasting-related matters to the quasi-judicatory Radio Regulatory Council, which was to decide only after holding public hearings according to statutory guidelines. See *supra* note 243. It also proposed statutory codification of the multiple ownership rules described *supra* note 291 and accompanying text; instructions to broadcasters to present programming "contributory to the elevation of the younger generation"; and a restructuring of NHK funding. Omori, *supra* note 194, at 18; NHK, *supra* note 194, at 260-61. According to a public official familiar with the proposed bill, then-Minister Kori Yuichi supported the proposal out of a desire to increase his own credibility and that of the Ministry as a nonpolitical institution.

It was rare in 1960's Japan for important bills submitted by a Ministry to fail; this one did. See Seki, *supra* note 100, at 168-69; T. PEMPEL, *supra* note 13, at 17. An MPT official involved in the controversy speculated to me that the Cabinet declined to support the bill because its members were not eager to see frequency and license issues removed from the political sphere. Other aspects of the bill, however, in particular its proposal regarding NHK funding, likely also contributed to its demise.

307. See *supra* text accompanying notes 224-33.

308. See *supra* text accompanying notes 299-305.

309. See generally L. POWE, *supra* note 4; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959).

310. See, e.g., E. KRASNOW, *supra* note 9, at 88 (quoting statement that Senate Commerce Committee chairman Warren Magnuson "doesn't have to ask for anything. The Commission does what it thinks he wants it to do."); *id.* at 87-89.

311. *Id.* at 117.

312. See Schwartz, *supra* note 309. Another example of political influence was supplied in 1977 by Senator Howard Baker of Tennessee, ranking Republican on the Senate communications subcommittee, supporting a controversial proposal for the FCC to "drop in" additional VHF TV authorizations at less than the normal geographic spacing. The Commission approved four drop-ins, including one for Knoxville, Tennessee. *Broadcasting* magazine speculated that "the rule-making was forced upon the FCC by the insistence of [Sen. Baker] that a V be dropped into Knoxville, Tenn. The assumption is that the commission had to include some other markets to reduce the visibility of the Knoxville accommodation." Quoted in E. KRASNOW, *supra* note 9, at 117-18.

model, provides few checks against the exercise of political influence in the regulatory process to the extent of the political actors' bargaining power. Indeed, the crux of the system is that *all* parties with a voice in the process be given an opportunity to exercise their bargaining power. Political considerations can be suppressed only to the extent that politicians lack bargaining power, or bureaucrats consider direct negotiation with politicians illegitimate.

Because procedures for making allocation policy and licensing decisions are informal and bargaining-oriented, there is extensive opportunity for negotiation with political actors in the regulatory process. No external institution such as judicial review limits that negotiation. I argue in Part IV that interbureaucratic competition extensively shapes regulatory policy in Japan today, and plays a role comparable in some ways to the role played in the United States by judicial review. That competition, though, only increases the role of political actors in the regulatory process.

The United States system also offers extensive opportunities for the exercise of political bargaining power in the regulatory process. With Congressional committees controlling the FCC's budget and statutory authority, things could hardly be otherwise.<sup>313</sup> Nor is political influence on agency policymaking even controversial; the D.C. Circuit has declared it "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking."<sup>314</sup> The ideology of procedural fairness and rationality, however, has to some degree helped to delegitimize political influence at least in resolving specific licensing questions. The Eisenhower years described by Professor Schwartz were followed by a period in which a stung Commission attempted to emphasize formal procedures and rules better to achieve fairness in license allocation. Whether those rules have in fact contributed to good decisionmaking is another question.

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313. See generally E. KRASNOW, *supra* note 9, at 87-132.

The fact that the FCC is an independent agency, while MPT is an executive department, suggests that political considerations might play a less important role at the FCC. The head of the FCC is not simultaneously a Cabinet member charged with carrying out the government's general program. The primacy of Congress in the budget process, though, cuts in the other direction. Congress in the United States plays a budgetary role that in Japan is played by other elements of the bureaucracy, in particular the Ministry of Finance. Some of the political-bureaucratic interplay found in this country, therefore, is channeled into intra-bureaucratic interplay in Japan.

314. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

7. *Conclusions.* In Japan, the informal, bargaining-oriented system, together with the force of the post office model, allowed — perhaps even mandated — an *ipponka*-based license award process. That process supports the positions of both the Ministry and the LDP within the political status quo. It limits the number of licensees, both because *ipponka* is inherently self-limiting — as the important local players are all drawn into broad-based license coalitions, one quickly runs out of suitable coalition members — and because licensee protection forms an important part of the administrative guidance interplay. At the same time, however, the informal nature of the license award process makes it highly vulnerable to political pressure, including pressures to award additional licenses on a politically motivated basis. Judicial review is unavailable to check any of these on a fairness-oriented or doctrinal basis.

The effect of *ipponka* in Japan has been to place media power squarely within the establishment consensus of the socially and politically acceptable, and to diffuse it through shared authority within that class, perpetuating communications power through negotiation among power-structure groups. Granting licenses only to “consensus,” and thus mainstream, licensees has to some degree obviated the need for content control of their later broadcasts. Compared to the United States allocation system, *ipponka* is less wasteful. It is also even more cozy, safe, and supportive of the status quo.

#### IV. NEW TECHNOLOGIES

Selecting among applicants wishing to speak via established media is only part of the broadcast regulator's job. The government also superintends the attempts of upstart media to challenge the status quo, and to force their own entry into the broadcast marketplace. Regulators devising policy affecting the competitive viability of new technology affect the distribution of power among media outlets, and help determine which media formats will succeed and which will fail.<sup>315</sup>

In particular, in both the United States and Japan, the rise of cable television as an alternative to over-the-air TV presented government officials with a series of important choices whether to foster the new medium or to protect the old. In both the United States and Japan, officials responded to those choices in ways that shed light on their respective regulatory systems. I will discuss the American reaction briefly, and then turn to how Japan answered the same questions.

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315. See *supra* notes 114-15 and accompanying text.

### A. Cable Television in the United States<sup>316</sup>

1. *History of FCC Cable Regulation.* The FCC's role in regulating new forms of mass communications technology over the past half-century has been widely criticized. Its treatments of FM radio, UHF television, cable television, and subscription television have all been attacked as too concerned with protecting old technology, rather than giving free rein to new.<sup>317</sup> The Commission has been said to see new technologies "not as a promise but as a problem": it is said to see new technologies as a threat because they might become successful and imperil established ones.<sup>318</sup>

Why should this be? According to some commentators, the FCC is unsympathetic to new technologies because it identifies too closely with the needs of the established broadcasters it regulates, defining the public interest so as to correspond to the profitability goals of existing market participants.<sup>319</sup> According to another commentator, the FCC seeks to preserve the status quo because any other course, in a complex and uncertain world, would impose upon it decisional costs it is unwilling to bear.<sup>320</sup> According to others, the Commission is unsympathetic because of its perception of the risks of change: the Commission has little to gain in championing a new technology if it succeeds, and much to lose if it

316. As with broadcast regulation, my survey here is necessarily brief. The U.S. response to cable has been described at length elsewhere; the literature is "vast, and much of it polemic." Robinson, *supra* note 35, at 245 n.177. I do not pretend to improve on others' presentations; as before, I hope only to give the reader sufficient background for an intelligent understanding of the Japanese experience. For further discussion of cable regulation in the United States, see, e.g., V. MOSCO, *supra* note 9, at 85-104; R. BERNER, CONSTRAINTS ON THE REGULATORY PROCESS: A CASE STUDY OF REGULATION OF CABLE TELEVISION (1976); D. LEDUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL (1973); Price, *supra* note 67; see also I. POOL, *supra* note 4, at 151-88; Litman, *supra* note 72, at 326-32, 342-46.

317. See, e.g., Robinson, *supra* note 35, at 191-92 (cable); V. MOSCO, *supra* note 9, at 50-69 (FM radio), 70-84 (UHF television), 85-104 (cable television), 105-18 (subscription television).

318. See Robinson, *supra* note 35, at 246 (cable).

319. This criticism has been levelled since the very beginning of American broadcast regulation. See, e.g., Herring, *supra* note 140, at 173; see also R. NOLL, REFORMING REGULATION: STUDIES IN THE REGULATION OF ECONOMIC ACTIVITY 21, 99-101 (1971) (regulatory agencies generally). Some commentators, on the other hand, view the phenomenon as a triumph of the American administrative law system. For them, the FCC's initial suppression of cable TV illustrates how administrative law keeps an agency in compliance with the current balance of political power. McCubbins, Noll & Weingast, *supra* note 60, at 269.

320. See V. MOSCO, *supra* note 9, at 37-44. According to Mosco, the Commission is often faced with complex decisions, resting on a large number of variables, about which its information is limited. It simplifies its task by relying on old assumptions, structures of thought, and information channels; it thus imposes on its choices a "unifying simplicity rooted in preserving the status quo." *Id.* at 5.



fails.<sup>321</sup> According to yet another commentator, the FCC favors established media because its staff members seek to preserve power bases rooted in their expertise concerning existing technology.<sup>322</sup>

The history of FCC regulation of cable television bears out a somewhat more complex version of the thesis that the Commission sees innovation as a threat to be managed in the interests of protecting the speakers it has already licensed. The Commission's initial actions towards cable seemed designed to retard cable's development. The regulatory goal, though, was not to suppress cable. It was to encourage its development in a market niche separate from that served by over-the-air television, so that cable could provide new services while not posing any danger to broadcast television. That concept ultimately proved unsustainable. When confronted with the strictures of formal rationality, the Commission could not justify its goal of keeping cable out of the larger broadcast marketplace. Cable systems were able to appeal successfully to the courts for relief from FCC-imposed burdens.

The Commission's first regulatory action with respect to the infant cable television industry was to deny cable systems permission to carry broadcast signals that might adversely affect local television.<sup>323</sup> The Commission expressed concern that "CATV service should be supplementary to and not cripple the local TV broadcast service or impede the growth of TV broadcasting;"<sup>324</sup> it announced a rule barring cable systems in the 100 largest television markets from carrying any non-local broadcast signal, unless the Commission had found after hearing that such carriage "would be consistent with the public interest," "particularly the establishment and healthy maintenance of television broadcast service in the area."<sup>325</sup> The affected markets contained 90% of the na-

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321. See E. KRASNOW, *supra* note 9, at 38. Sweeping change may pose unforeseen risks; it may force the abandonment of time-tested assumptions and evaluative standards.

322. D. LEDUC, *supra* note 316, at 27-28.

323. See Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). The Commission in 1959 had declined to assert regulatory authority over cable access to microwave facilities. CATV and TV Repeater Services, 26 F.C.C. 403 (1959) (report and order). After the *Carter Mountain* decision, however, the Commission quickly found that "the likelihood or probability of [cable's] adverse impact upon potential and existing service has become too substantial to be dismissed." It promulgated rules requiring cable systems to transmit the signals of all local broadcast stations and forbidding them to duplicate local programming for a period of 15 days before or after the initial program transmission. Rules re Microwave-Served CATV, 38 F.C.C. 683, 713-14 (1965) (first report and order).

324. FCC ANNUAL REPORT 80 (1965).

325. CATV, 2 F.C.C.2d 725, 782 (1966) (second report and order); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 166-67 (1968). The Commission did allow the continued carriage of certain distant signals under a grandfather provision. 2 F.C.C.2d at 784-85.

tion's television households,<sup>326</sup> the effect of the rule was to freeze cable's growth in any but the smallest markets.<sup>327</sup>

There was little evidence that cable posed a threat to over-the-air television.<sup>328</sup> Nor did the Commission feel that such evidence was necessary; it acknowledged that it did not know, and could not find out, whether cable would in fact do damage to broadcast TV. In the absence of proof that "the impact of CATV competition upon the broadcasting service would be negligible," however, it found restrictions on cable appropriate as "a potential equalization of the conditions under which CATV and the broadcasting service compete."<sup>329</sup>

It may be that the Commission was moved by the pleas of broadcasters that cable systems received a free ride because they — in contrast to broadcasters — paid nothing for their programming. Broadcasters and copyright owners at this time argued to Congress that cable retransmission of broadcast signals was copyright infringement.<sup>330</sup> The Supreme Court, however, took a different view. In *Fortnightly Corp. v. United Artists Television*,<sup>331</sup> the Court held that the copyright law posed no bar to cable retransmission of local broadcast programming.<sup>332</sup> The Commission responded with a new interim rule barring systems operating within 35 miles of a top-100 market from carrying distant signals without the permission of the originating station.<sup>333</sup> The rule, which re-

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326. *V. Mosco*, *supra* note 9, at 95. They ranged from New York [#1], Los Angeles [#2], and Chicago [#3], to Fargo (North Dakota) [#98], Monroe (Louisiana) [#99], and Columbia (South Carolina) [#100]. 47 C.F.R. § 76.51 (1990).

327. The hearing process was "largely unworkable." *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632, 650 (1979) (report [hereinafter *Economic Inquiry Report*]). Over the next two years, the Commission completed only one hearing, and then ruled against the applicant cable system. *V. Mosco*, *supra* note 9, at 96. The Commission did grant over a hundred waivers of the hearing requirements in small markets. *Id.* at 96 n.7; *Economic Inquiry Report*, *supra*, at 650 n.48.

328. See Robinson, *supra* note 35, at 246-47.

329. *Rules re Microwave-Served CATV*, *supra* note 323, at 700.

330. See Litman, *supra* note 72, at 327-28. Indeed, two months after the FCC promulgated its 1966 restriction on signal carriage, a New York court held that cable systems' retransmission of local television signals was illegal absent permission from the copyright holders. *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968).

331. 392 U.S. 390 (1968).

332. The Court held that cable retransmissions did not "perform" the copyrighted works within the meaning of the 1909 Copyright Act, ch. 320, 35 Stat. 1705 (*repealed by* Pub. L. No. 94-553, 90 Stat. 2541 (1976)). See 392 U.S. at 395-401. A week earlier, it had upheld the Commission's authority to restrict distant-signal importation. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

333. CATV, 15 F.C.C.2d 417 (1968) (notice of proposed rulemaking and notice of inquiry).

lieved the Commission of the burden of conducting hearings in individual cases, was "a kind of jerry-built substitute" for the decision the Supreme Court declined to hand down in *Fortnightly*.<sup>334</sup> The retransmission consent requirement, as a practical matter, continued the cable freeze.<sup>335</sup>

All this, however, is not to say that the FCC saw its role as simply one of suppressing cable. Industry members, academics, and analysts predicted great possibilities for cable in the late 1960's and early 1970's. Cable, it was thought by many, could revolutionize urban life: it could regenerate local community, revitalize participatory democracy, and revamp the educational system.<sup>336</sup> And the Commissioners to a large extent shared those views.<sup>337</sup> They were eager to encourage — even force — cable into its projected role; but they were committed to the premise that cable would flourish only in this niche, and that it would not emerge as a competitor to broadcast TV.

In 1969, thus, the Commission adopted a rule requiring all cable systems with more than 3500 subscribers to produce their own original programming.<sup>338</sup> The new rules, the Commission explained, "recognize[d] the great potential of the cable industry to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."<sup>339</sup>

The Commission, however, soon began to have second thoughts, and never put its origination requirement into effect.<sup>340</sup> The National

334. BROADCASTING, Dec. 23, 1968, at 18.

335. *Economic Inquiry Report*, *supra* note 327, at 651; *see infra* note 401.

336. *See Price*, *supra* note 67, at 545-53.

337. It is important to remember that the onerous requirements placed on cable in the Commission's 1972 rules, *see infra* text accompanying note 346, including those relating to channel capacity, two-way capability, access, and equipment, were imposed precisely because the Commissioners believed that cable could flourish and fulfill its promise while complying with those rules. *See Cable Television Report and Order*, 36 F.C.C.2d 143, 287 (1972) (Burch, Chairman, concurring) (1972 rules "turn a corner in communications technology that holds the promise at least of a whole new era of service to the American people"); *Price*, *supra* note 67, at 558 (FCC "savored the grand potential of the solutions and did not wish to be delayed despite a lack of information").

338. *CATV*, 20 F.C.C.2d 201, 223 (1969) (first report and order), *rev'd sub nom.* *Midwest Video Corp. v. United States*, 441 F.2d 1322 (8th Cir. 1971), *rev'd*, 406 U.S. 649 (1972).

339. *CATV*, *supra* note 338, at 202.

340. The Commission first stayed the rule pending judicial review, 36 Fed. Reg. 10876 (1971). It continued the stay after its authority to promulgate the rule was confirmed in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), and rescinded the rule in 1974 without ever having lifted the stay. 39 Fed. Reg. 43,302 (1974).

Association of Broadcasters had opposed mandatory cable origination, arguing that it positioned cable as a direct competitor, rather than in its proper place as "a supplement to broadcast television service. . . . CATV, still founded upon the carriage of broadcast signals, but now encouraged to originate programs independently, will be a greater threat to the public's reception of 'free' programs . . . ." <sup>341</sup>

The Commission agreed. It consequently imposed stiff new restrictions on cable called "anti-siphoning" rules, which sharply limited cable systems' ability to provide feature films, sports events, or series programming on pay channels.<sup>342</sup> That programming, the Commission reasoned, was already adequately furnished by broadcast TV; it would disserve cable's special role to allow cable programmers to compete in that arena. In promulgating the rule, however, and prohibiting some categories of cablecast programming, the Commission cut sharply against its own vision, just a few months old, of cable as originating its own programming. Cable would have to find a niche somewhere else — perhaps in local access, but in any event not in pay services offering programming to which over-the-air TV had a prior claim.

In 1972, the Commission further developed its vision of the special role that cable could play. As part of ongoing negotiations over the terms of new copyright legislation among broadcasters, cable operators, and program producers, the Commission managed to enforce a compromise relaxing existing restrictions on cable program carriage, while contemplating copyright payments by cable systems.<sup>343</sup> The compromise in significant respect favored the more politically potent broadcasters,<sup>344</sup> and embodied the Commission's vision of cable's special role: "[W]e are affording cable the minimum number of distant signals necessary to promote its entry into some of the major television markets but . . . ultimately, its success will depend on the provision of innovative nonbroadcast services."<sup>345</sup>

Under the new rules, cable systems continued to be required to carry all local broadcast signals. They were allowed to carry a somewhat greater number of distant broadcast signals. Their ability to carry new

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341. CATV, 23 F.C.C.2d 825, 827-28 (1970) (memorandum opinion and order).

342. The Commission had already put such restrictions in place for subscription television, which transmits scrambled signals over the air. Subscription Television, 15 F.C.C.2d 466, 508-09, 556-73 (1968) (fourth report and order).

343. The compromise was in large part engineered by Clay Whitehead, director of the White House Office of Telecommunications Policy. See Litman, *supra* note 72, at 330.

344. R. BERNER, *supra* note 316, at 39-50.

345. *Cable Television Report and Order*, *supra* note 337, at 167.

programming, however, was constrained by a complex set of restrictions, known as "syndicated exclusivity" rules, designed to ensure that cable systems would not duplicate syndicated programming carried by local broadcast stations. The Commission also adopted a set of "leapfrogging" rules, designed to prevent the development of superstations by requiring that distant signals carried by a cable system come from relatively nearby markets. The Commission, moreover, continued in effect the antisiphoning rules restricting cable systems' ability to carry sports and feature films from nonbroadcast sources.

At the same time, the Commission adopted a variety of rules calling on cable systems to fulfill the Commission's own vision of cable service. Cable systems in the top 100 markets were required to make channels available to local persons or groups for public access, and to make available educational and government channels as well. New systems were required to build in two-way capacity, and to make production facilities available to the public. In this way cable was to achieve "the fundamental goals of a national communications structure . . . — the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments."<sup>346</sup>

In 1977, the world changed. Home Box Office, a fledgling cable programming service, complained to the D.C. Circuit that the Commission's antisiphoning rules could not stand up to hard look review. In *Home Box Office v. FCC*,<sup>347</sup> the court agreed. The Commission's starting point for analysis, the court explained, had been "how cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that 'free' television service." The Commission, however, had never explained why cable television should be only a supplement to over-the-air broadcasting. "Such an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal."<sup>348</sup>

The Commission, the court noted, had sought to shield from marketplace intrusions the public's ability to receive current levels of broadcast programming; yet it had emphatically rejected just such protectionism when it came to competition between broadcast stations. That inconsistency went unexplained. Moreover, said the court, the

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346. *Id.* at 181-85.

347. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

348. *Id.* at 36.

Commission had no factual basis for its key conclusions. It had no adequate basis for concluding that the movement of feature films or ordinary sports events from broadcast to cable would be regarded by the public as an especially serious problem. It had no adequate basis for concluding that such movement would in fact take place. It had no adequate basis for concluding that cable firms would not resell their rights to feature film and sports programming in areas not served by cable, nor for concluding that cable firms could not price their pay services relatively cheaply once the Commission dropped its ban on advertising. The anti-siphoning rules thus violated both the first amendment and the general administrative-law principle of rationality; and in any event, they were invalid because they appeared to be the product of negotiation and "compromise among the contending forces, rather than by exercise of the [commissioners'] independent discretion in the public interest."<sup>349</sup>

*Home Box Office* was the first blow struck by hard look review to the Commission's cable regulatory scheme.<sup>350</sup> The next came a year later: the Eighth Circuit struck down the FCC's requirement that cable systems provide mandatory public access as unsupported, beyond the Commission's statutory authority, and probably unconstitutional as well.<sup>351</sup> The Supreme Court affirmed on statutory grounds: the Commission's authority to regulate cable was measured by its organic statute, and its access requirement was outside the statutory limits.<sup>352</sup>

By this point, the Commission's entire regulatory scheme began to unravel. Even before *Home Box Office* was handed down, the Commission had begun to question its regulatory regime.<sup>353</sup> After that decision, however, the process accelerated. In 1980, the Commission eliminated its syndicated exclusivity rules and all of its restrictions on distant signal

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349. 567 F.2d at 53; see also *supra* note 58 and accompanying text.

350. The D.C. Circuit, during the same period, issued decisions attacking protectionism in the FCC's regulation of long-distance telephone service. *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977) (*Execunet I*), cert. denied, 434 U.S. 1040 (1978); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590 (D.C. Cir.) (*Execunet II*), cert. denied, 439 U.S. 980 (1978). The *Execunet* decisions led to FCC reconsideration whether to allow competition in long-distance telephone service, MTS & WATS Market Structure, 67 F.C.C.2d 757 (1978) (notice of inquiry and proposed rulemaking), and thence to our current "open access" telephone system. See generally *NARUC v. FCC*, 737 F.2d 1095, 1105-10 (D.C. Cir. 1984).

351. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

352. 440 U.S. 689 (1979).

353. In 1975, for example, the FCC deleted most of its anti-leapfrogging rules. Leapfrogging Rules - Cable Television, 57 F.C.C.2d 625 (1975) (report and order). In 1976, it issued a notice of inquiry questioning the continued need for the syndicated exclusivity rules. Cable Television Syndicated Program Exclusivity Rules, 61 F.C.C.2d 746 (1976) (notice of inquiry).

importation.<sup>354</sup> The system has continued to disintegrate.<sup>355</sup>

The history of U.S. cable should not be painted as the triumph of searching, intelligent and public-spirited judicial review over short-sighted, recalcitrant agency bureaucrats. The regulators played a crucial role in the changes that took place in cable regulation beginning in the late 1970s; much of that change can be attributed to the appointment by President Carter of FCC Chairman Charles Ferris<sup>356</sup> and to the rise of a new deregulatory philosophy within the agency itself. Moreover, courts are by no means ideal technical decisionmakers. Their decisions may be free of protectionist sentiment, but they are also generally free of technical expertise.<sup>357</sup> Judicial review introduces a random factor into the policy process. That random factor, though, in U.S. cable regulation served as an important catalyst to break down agency protectionism. The FCC's cable regulatory process, initially more informally oriented, was reshaped by the requirements of formal rationality. In that respect its history parallels the history of license allocation.

2. *Conclusions.* The FCC's initial approach to cable appears to have been client-oriented, an approach consistent with the bargaining model. The Commission sought to preserve the market position of the over-the-air broadcasters, its long-term clients and the mainstays, until then, of the electronic mass communications system. Within that constraint, it attempted to react to cable innovatively; the situation disfavored cable firms because they were unable to break into the inner circle and achieve equal status, in give-and-take with the Commission, with the more established broadcasters. When cable achieved more political

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354. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980) (report and order), *aff'd sub nom.* Malrite T.V. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Copyright Royalty Tribunal, however, to some degree nullified the FCC's move by imposing high royalty fees on the importation of broadcast signals not permitted under the FCC's old, pre-1980, rules. See 47 Fed. Reg. 52,146 (1982), *aff'd*, National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983). The Commission has recently reimposed syndicated exclusivity rules. Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C. Rcd. 5299 (1988) (report and order), *on reh'g*, 4 F.C.C. Rcd. 2711 (1989), *rev. denied sub nom.* United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989); 47 C.F.R. §§ 73.658, 76.92-76.97, 76.151-76.163 (1990).

355. The D.C. Circuit, for example, struck down the Commission's must-carry rules in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); see also Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

356. See *The Laissez Faire Legacy of Charlie Ferris*, BROADCASTING, Jan. 19, 1981, at 37.

357. *Accord* Ethyl Corp. v. EPA, 541 F.2d 1, 66-67 (D.C. Cir. 1976) (Bazelon, J., concurring), *cert. denied*, 426 U.S. 941 (1976).

power, the Commission reacted by attempting to resolve some of the differences between the competing groups in a consensual, bargaining format.<sup>358</sup> *Home Box Office* and later decisions provided coercive shocks leading to the breakup of that system.

The Commission had itself helped bring those shocks about by seeking information from a variety of sources in the process leading up to the 1972 rulemaking. Hard look review meant that the new information available to the Commission drastically confined "the limits of credibility within which the political consensus of the industry participants could form."<sup>359</sup> The Commission's old bargaining-influenced vision for cable could not withstand strict rationality review. The collapse of that vision helped propel the Commission into abandoning its old assumptions and entering into a new, deregulated, world.

A look at the FCC's recent grappling with High Definition Television (HDTV), however, demonstrates that the bargaining model remains important in U.S. policymaking for new technology. HDTV was thought to require more frequency bandwidth than does conventional television; for HDTV to be implemented in the U.S. as an over-the-air medium, therefore, the FCC would either have to push many existing broadcasters off the air, or authorize use of significant additional bandwidth not currently being used to carry broadcast signals. The Commission addressed the problem of how much new spectrum to authorize, how to distribute it, and to whom it should be distributed, through a classic bargaining-model technique: it convened a *shingikai*<sup>360</sup> private advisory committee, composed largely of existing broadcasters.<sup>361</sup> The committee report, unsurprisingly, recommended that new spectrum for HDTV be given to existing broadcasters (rather than to new entrants); the FCC has agreed.<sup>362</sup> That approach is characteristic of the bargaining model as practiced in Japan and the United States.

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358. That the parties were simultaneously negotiating the terms of new copyright legislation, substantively inextricable from the issues before the Commission, was another important factor contributing towards the Commission's use of bargaining to determine its cable rules. See *supra* text accompanying note 343.

359. Price, *supra* note 67, at 565.

360. See *supra* text accompanying note 92.

361. The committee also included "industry leaders representing . . . equipment manufacturers, cable systems, and the communications bar." See *Advanced Television Systems*, 3 F.C.C. Rcd. 6520, 6522 (1988).

362. See *id.* at 6537-38. I owe thanks to Ron Ambrose for pointing this out to me.



## B. Cable Television in Japan

The Japanese response to cable television in some respects paralleled the U.S. reaction, but with crucial variations. As in the United States, Japanese regulators were reluctant to allow cable a market position from which it could compete directly with over-the-air TV. The courts, however, played no significant role in the Japanese cable regulatory story; rather, with the coming of cable, new players entered the game.

1. *The Old Regime.* Early cable systems in Japan, as in the United States, were small and offered no programming of their own. They existed to retransmit local television signals in areas where it was difficult to receive those signals over the air.<sup>363</sup> As in the United States, those cable systems did not threaten the broadcast status quo.<sup>364</sup>

That situation, however, threatened to change in 1968, when a new company called Nippon Cablevision Network (NCV) attempted to wire part of the Shinjuku neighborhood in central Tokyo. Recently constructed tall buildings impeded television reception in Tokyo,<sup>365</sup> and NCV therefore proposed to retransmit broadcast signals by cable to about 1400 Shinjuku residents. NCV's founder, with visionary dreams and political connections, hoped to extend his service throughout central Tokyo and beyond, and to conduct his own program production and sales.<sup>366</sup>

NCV's potential impact was revolutionary. If a cable system were established in an affluent urban neighborhood such as Shinjuku, it would

363. See Kobayashi, *supra* note 92, at 25-26; Tadokoro, *New Towns and an Advanced Cable System*, 14 *STUD. BROADCASTING* 87, 94 (1978). NHK began bearing part of the costs of these systems in 1960 in order to help fulfill its statutory obligation to broadcast throughout the country. See Tadokoro, *supra*; M. ITO, *supra* note 83, at 38. That support led to the construction of over 6000 local systems by the end of the decade. Kobayashi, *supra* note 92, at 25-26. As of 1980, only a small proportion of systems with over 500 subscribers were owned by for-profit corporations. See Doi, *Government Regulation and Copyright Aspects of Cable Television in Japan*, 29 *J. COPYRIGHT SOC'Y* 298, 303 (1982). It seems reasonable to assume the same of smaller ones. Many systems charged no start-up or monthly fee.

364. A very few of the rural systems did offer some local origination, see Kobayashi, *supra* note 92, at 25-26, including at least two systems in areas with no over-the-air programming at all. These two systems folded, however, after over-the-air broadcasting reached the areas some years later. See Tadokoro, *supra* note 363, at 95; H. YAMANAKA, *supra* note 228, at 233-34 (abstracting Yanai, *A Case Study of Cable Television in a Local Community*, 10 *BULL. OF THE FACULTY OF HUMANITIES OF SEIKA U.* 45 (1974) (in Japanese)).

Cable systems were also successful to some degree in importing distant signals into small cities relatively unserved by broadcast. See Tadokoro, *supra* note 363, at 94-95.

365. Government earthquake safety rules limiting building height to about 100 feet had been relaxed in 1963. See Kobayashi, *supra* note 92, at 26.

366. See generally Kobayashi, *supra* note 92, at 26-27; see also Tadokoro, *supra* note 363, at 95.

be easy for it to transmit programming, whether self-produced or purchased, that was derived from somewhere other than over the air. Moreover, its superior signal quality would make that programming especially attractive. NCV thus had the potential to break both conventional broadcasters' monopoly over TV programming and distribution, and MPT's monopoly over legal control.

Unfortunately for NCV, a 1951 statute intended to regulate cable music services, written before the invention of cable television, barred "wired broadcast operators" from retransmitting radio programming without the consent of the original broadcasters. Tokyo television broadcasters, including the quasi-public NHK (Nippon Hoso Kyokai, or Japan Broadcasting Corporation), took the position that the statute barred any cable TV retransmission of their signals absent their consent, which they uniformly refused to grant. When NCV began service notwithstanding that refusal, MPT assumed the task of mediating the dispute via administrative guidance.<sup>367</sup>

The upshot of that guidance was that NCV, NHK, and the Tokyo commercial broadcasters all joined into a single Joint Operating Committee for the CATV Systems in Shinjuku District. That entity was to limit itself to cable retransmission of television signals that could already be received locally over the air; it was to provide no other programming. In 1970, the Committee was reorganized as Tokyo Cablevision, and expressed some renewed interest in local origination. Hamstrung by its structure as a consensus-bound joint venture of competitors, however, it took no innovative action.<sup>368</sup>

The Shinjuku incident is widely regarded in Japan today as a case in which MPT cooperated with an industry-wide effort to suppress cable at its inception.<sup>369</sup> MPT bureaucrats were primarily responsive to existing over-the-air broadcasters; those broadcasters were the pillars of the existing communications structure, and MPT was reluctant to undermine that structure. Moreover, the politically influential media conglomerates were heavily involved in conventional media, and had little to gain from

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367. Kobayashi, *supra* note 92, at 26-27. NCV contended that under the statute it was entitled to provide service for one month without consent, but the one-month period expired without further developments. *Id.*

368. *Id.* at 27-28.

369. *But see* Tracy, *Television and Cable Policy in Japan: An Essay*, in *CABLE TELEVISION AND THE FUTURE OF BROADCASTING* 196, 206 (R. Negrine ed. 1985) (suggesting that MPT in the Shinjuku incident "impose[d] controls in the interests of an orderly supervision of the existing ecology of communications").

overturning the old order.<sup>370</sup>

MPT had neither the imagination nor the boldness to let cable take its own course; its regulators were not positioned to engage in creative and powerful new thinking about the mass communications world. The agency's most important duty since World War II had been the management of various post office services,<sup>371</sup> a task that, as discharged by MPT, had not called for enterprise or innovation.<sup>372</sup> While MPT had supervised over-the-air broadcasting and Nippon Telephone and Telegraph (NTT), the telephone common carrier, those responsibilities had not required any thinking other than business-as-usual.<sup>373</sup> Indeed, a bold step to jettison the old communications order would have been unthinkable for MPT, whose decisionmaking depended so heavily on bargaining and consensus among its broadcaster clients.<sup>374</sup>

MPT did not protect the interests of existing broadcasters in every context. At the same time as the Shinjuku incident, MPT was substantially increasing the number of broadcast competitors by licensing UHF television.<sup>375</sup> UHF licensing, however, was consistent with the bargaining model. Its proponents included important entities in the existing broadcast status quo, including the newspapers and major media groups, as well as a variety of politically powerful actors;<sup>376</sup> moreover, the consequences of UHF licensing seemed predictable. Cable television did not have support from any established actors, and its consequences for program origination and delivery seemed more unpredictably threatening.

So far, MPT's initial reaction to cable seems similar to the FCC's. One way in which the two reactions differed, however, was in the *means* each used to keep cable within appropriate limits. In the U.S., the FCC relied heavily on formal mechanisms. At one point, it discouraged distant-signal retransmission by promulgating a formal rule banning such retransmission except after a formal Commission hearing.<sup>377</sup> In Japan, by contrast, the dominant regulatory mechanisms were informal. The only written regulation was a provision of an earlier-enacted statute of

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370. See Kobayashi, *supra* note 92, at 37-38.

371. See *supra* note 194.

372. See Johnson, *supra* note 81, at 189.

373. See Johnson, *supra* note 81, at 190 (NTT).

374. See *supra* text following note 258.

375. This was, moreover, the period of MPT's initial, quickly halted, move to license commercial FM. See *supra* note 242.

376. See *supra* notes 273-74, 302-04 and accompanying text.

377. See *supra* text accompanying note 325.

unclear applicability.<sup>378</sup> Instead of promulgating rules to end the confusion and clarify acceptable action, MPT achieved a repressive consensus through a mechanism quite similar to *ipponka*: through negotiation, it unified the opposing parties in a single joint-venture entity charged with the provision of cable service. Since the most influential members of that entity were unsympathetic to cable service, the consortium took no aggressive steps to advance cable.

After the Shinjuku incident, MPT sought to consolidate its administrative-guidance control over cable by utilizing *ipponka* to create, in each of Japan's four largest urban areas, a nonprofit "Cable Vision Foundation" with participation by NHK, local TV stations, NTT, electric power companies, electronics manufacturers, and banks.<sup>379</sup> These foundations, in theory, were to establish cable systems in their areas; under the law governing nonprofit foundations, they were required to obtain permission from the relevant governmental organ (here, MPT) for each of their activities.<sup>380</sup> This approach was well-designed to block any energetic or innovative action. The interests of the foundations' various participants were ill-defined and pointed in different directions.<sup>381</sup> Each participant was protected from any unilateral action by the others, but none was in a position to move the entire unwieldy body to take any dramatic steps.<sup>382</sup> MPT, apparently content with the immobility of the cable foundations, attempted to establish one in each of Japan's prefectures.<sup>383</sup>

MPT also sought to formalize its control by introducing new legislation with the stated goal of "establish[ing] order and mak[ing] both interests of CATV and conventional TV broadcasting harmonize."<sup>384</sup> MPT proposed that all urban cable systems would have to be licensed by it, and would be barred from retransmitting TV signals without the permission of the originating broadcasters.<sup>385</sup> Distant signal importation would not be approved without special permission. No cable system, moreover, could originate its own programming without an additional license.<sup>386</sup>

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378. See Shiono 1978, *supra* note 7, at 26.

379. See Kobayashi, *supra* note 92, at 27-28; Tadokoro, *supra* note 363, at 95-96; M. ITO, *supra* note 83, at 39. NCV was included in the Tokyo consortium. Tadokoro, *supra* note 363, at 95-96.

380. Tadokoro, *supra* note 363, at 95-96.

381. See Kobayashi, *supra* note 92, at 27-28, 38.

382. See *id.*; Nakasa, *supra* note 199, at 71-72.

383. See Tadokoro, *supra* note 363, at 90-91.

384. Kobayashi, *supra* note 92, at 29.

385. *Id.*; M. ITO, *supra* note 83, at 39.

386. Kobayashi, *supra* note 92, at 29-30. The bill as originally drafted by MPT had not required formal Ministerial permission for a cable system to originate its own programming; the Cabinet Legislative Bureau had apparently indicated to MPT that strict regulation would constitute an un-

The bill would have given the Ministry direct control over almost all aspects of urban cable, since it required permission both to establish a cable system and, as a practical matter, to run any programming.<sup>387</sup>

As if to illustrate to MPT the disadvantages of seeking formal legal controls, the bill was stymied in its initial Diet sessions. It ran into strong opposition from the newspaper industry, which saw it as potentially restraining profitable information services, and from academics and journalists.<sup>388</sup> Opponents argued that the Ministry should not be licensing program origination. Moreover, the newspaper industry insisted, the Ministry should set up an independent body for cable licensing, should explicitly exempt hard-copy transmission from government control, should not describe cable as supplemental to broadcast, and should explicitly provide for interactive services.<sup>389</sup> The Ministry of International Trade and Industry (MITI), representing the interests of its electronics industry clients, urged that MPT should be working to promote cable, not to restrain it.<sup>390</sup>

The bill ultimately succeeded in 1972, somewhat changed from its earlier draft. The law as passed required an MPT license for all cable systems with 500 or more subscribers,<sup>391</sup> and required MPT approval of the fees to be charged subscribers. Retransmission of broadcast programming was still forbidden absent the consent of the originating broadcaster,<sup>392</sup> but the bill did not place any additional limitations on distant

constitutional abridgment of free speech. The licensing requirement for local origination, however, was added at the insistence of LDP politicians. *Id.*

387. The bill did continue to allow a cable system to set up outside an urban area without a license, so long as it limited itself to retransmitting local programming with the permission of the local broadcasters; that, of course, was what cable systems had been doing for the past ten years or so. See *supra* note 363 and accompanying text.

388. See Kobayashi, *supra* note 92, at 29-30; see also Tadokoro, *supra* note 363, at 95-96.

389. Tadokoro, *supra* note 363, at 96-97.

390. *Id.* at 97.

391. Under Article 4 of the statute, the Minister must grant a cable permit, after consulting with the prefecture concerned, if, among other things, the application plan is reasonable and practical, and "[e]stablishment of the cable television broadcasting facilities is . . . needful and appropriate in the light of natural, social and cultural conditions in that area." Cable Television Broadcast Law, Art. 4 (Law No. 114 of July 1, 1972), as amended (translation by MPT).

392. The law did provide that MPT could designate zones of poor TV reception in which a cable operator would be required to carry all local signals; in such a case, no retransmission consent would be necessary. In addition, the law allowed either party to a retransmission consent dispute to apply to MPT for conciliation. Cable Television Broadcast Law, Art. 13 (Law No. 114 of July 1, 1972), as amended (translation by MPT); see also Shiono 1978, *supra* note 7, at 26.

Japan's copyright law, which had been drastically rewritten two years earlier, also impinged on retransmission of TV signals without the permission of the originating broadcasters, but its effect was not wholly clear. The Copyright Law (Law No. 48 of May 6, 1970), as amended (translation by

signal retransmission as such. The new statute declined to require an MPT license before a cable operator could originate programming; under the law as passed, the operator merely had to "notify" the Ministry.<sup>393</sup> With MPT unwilling to upset the accepted telecommunications order by legitimizing two-way and hard-copy cable transmission, the statute did not address those issues at all; they were left for future resolution.<sup>394</sup>

Cable technology in the early 1970s was the source of great excitement, heralded as an information industry of the future.<sup>395</sup> Japan was in some ways fertile territory for cable. Japan's population was concentrated in a few major urban areas, and thus was relatively easy to reach via cable. Poor reception was a problem in much of the country, whether because of tall buildings or high mountains. Many prefectures were served by fewer than four commercial TV stations. While U.S. cable operators had been limited to importing less-attractive independent stations into areas already served by all three networks, cable operators in Japan could offer consumers attractive and otherwise unavailable network

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MPT) provides for three categories of rights in broadcast programming. First, the statutory authors and/or maker of the programming have the right to transmit the work by cable. See Copyright Law Arts. 15, 16, 23, 26, 29. Second, the performers featured in the programming can assert "neighboring rights" in its cable transmission, see *id.* Arts. 91-95, in general entitling organizations representing them to secondary use fees or other remuneration when the work is broadcast or otherwise disseminated. Third, broadcasting organizations themselves can assert "neighboring rights" in the cable retransmission of their broadcasts (except where such rebroadcast is required by law). *Id.* Art. 99. See generally S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 776-814 (2d ed. 1990).

In practice, both the first and second categories of rights in cable retransmission of broadcast programming are governed by blanket contracts negotiated between the Association of CATV Operators and organizations representing the various rights holders. The scope of the third category — the broadcasters' neighboring right — is unclear, and has never been tested since it was duplicated by the retransmission consent requirement under the 1972 Cable Television Broadcast Law. The relevant copyright law provision, while phrased in terms of an exclusive right to rebroadcast and diffuse by wire, is part of a category of "neighboring" rights that in general give the rights holder compensation but not complete control of the work's exploitation. Historically, broadcasters and cable operators have tended to focus on the 1972 Cable Television Broadcast Law requirement when it comes to broadcast retransmission rather than on the broadcasters' neighboring rights. Where a broadcast station does grant retransmission consent to a cable system, the agreement typically recites a copyright-law license as part of the boilerplate.

393. Shiono 1978, *supra* note 7, at 26. That requirement may not be toothless; Japanese regulators are said to wield extensive power through their ability to accept or reject such "notifications." See Johnson, *supra* note 81, at 213-14. But see *supra* note 81.

The law also imposed content controls on cable origination identical to those the Broadcast Law, see *supra* note 107, imposes on over-the-air television. See Cable Television Broadcast Law, Art. 17; Shiono 1978, *supra* note 7, at 13; Tadokoro, *supra* note 363, at 98-99.

394. See Tadokoro, *supra* note 363, at 99; see also Shiono 1978, *supra* note 7, at 29.

395. See Tadokoro, *supra* note 363, at 90-91; Kobayashi, *supra* note 92, at 24.

fare.<sup>396</sup>

Nonetheless, the practical obstacles to a new role for cable were great. There was the problem of retransmission consent, drastically limiting cable operators' ability to run broadcast programming.<sup>397</sup> There was the problem of negotiating "pole attachment" rights to string or lay the cables that would reach into individual homes, and of negotiating construction permits with local authorities.<sup>398</sup> There was the problem of programming: with broadcast television closed off, and no healthy domestic motion picture industry,<sup>399</sup> what were cable programmers going to run? There was the problem of distributing programming to local cable systems without the use of commercial communications satellites, which did not yet exist in Japan. Finally, there was the basic problem of demand: Given all of the foregoing, with two channels of NHK public television plus one to four channels of commercial TV available throughout the country except in a few areas of poor reception, could cable programmers offer anything additional that consumers would want to buy?<sup>400</sup>

Many of these problems were intimately tied up with MPT's regulatory role; retransmission consent provides one example. In the United States, the legal regime created by Congress, the FCC, and the Copyright Royalty Tribunal allowing free retransmission of local signals and limited retransmission of distant broadcast signals was crucial to cable's development; it allowed cable the opportunity to grow through distant-signal retransmission while developing independent program sources such as HBO.<sup>401</sup> In Japan, however, MPT had secured passage of the

396. Some of these factors may have encouraged the Tokyu railway group to announce a major cable TV system project in 1970. The project, however, was never built. See Tadokoro, *supra* note 363, at 92-93.

397. See *infra* text accompanying notes 404-06.

398. See Kobayashi, *New Media in Japan Today*, 21 *STUD. BROADCASTING* 7, 11-12 (1985); Shiono, *supra* note 7, at 43; see also Tadokoro, *supra* note 363, at 96.

399. The Japanese movie industry was badly hurt by the advent of television, and never recovered: theater attendance dropped from 1.13 billion in 1958 to 373 million in 1965 to 160 million in 1985. See FOREIGN PRESS CENTER, *FACTS AND FIGURES OF JAPAN 107-08* (1987); I. POOL, *supra* note 240, at 91-93; Tadokoro, *supra* note 194, at 65 ("[T]he Japanese movie industry today is on the brink of extinction as a mass medium."); M. ITO, *supra* note 83, at 10; Yamamoto, *supra* note 196, at 105-06.

400. See Nakasa, *supra* note 199, at 71-72; see also Kobayashi, *supra* note 398, at 9-11. The problem was exacerbated by the absence of a significant TV syndication market. No such market had grown up because there were not enough independent TV stations to support it.

401. The FCC briefly experimented with a retransmission consent system for the cable rebroadcast of distant TV signals. That experiment proved unworkable, see *Economic Inquiry Report*, *supra* note 327, at 9; it is "generally considered a failure." Compulsory Copyright License for Cable Retransmission, 4 *F.C.C. Red.* 6562, 6565 (1989); *supra* text accompanying note 335. Only one cable

Cable Television Broadcast Law, which required that the originating broadcaster consent to cable retransmission of any broadcast signals. That requirement in practice denied Japanese cable systems the opportunity to grow through distant-signal retransmission.<sup>402</sup> Broadcasters commonly denied consent to distant signal retransmission; some cable systems rebroadcast distant signals without permission notwithstanding the law.<sup>403</sup> While the statute empowered MPT to further cable's development though administrative guidance in retransmission consent disputes, the Ministry, at least initially, was uninterested in doing so.

The matter of pole attachment provides another example. In the United States, the government moved aggressively in the late 1970s through passage of the Pole Attachment Act<sup>404</sup> to ensure that cable systems could install the necessary wiring at reasonable rates. While the Act does not explicitly empower the FCC to require a recalcitrant utility to enter into a pole attachment agreement,<sup>405</sup> the FCC apparently used temporary stays pursuant to its authority under the Act to prevent utilities from terminating such agreements.<sup>406</sup> In Japan, by contrast, the

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system sought to obtain the required consents, and was largely unsuccessful. Thus, for example, when the system sought to rebroadcast news programming containing materials supplied by the NBC News Program Service, it was referred to NBC and received the following answer: "[W]e have concluded that because of the nature of the material transmitted, as well as the manner of its transmission, we should not enter into arrangements to authorize other than affiliates to carry this service." Cable Television Report and Order, 36 F.C.C.2d 143, 151-52 n.22 (1972). The FCC therefore moved in 1972 to an approach better designed to allow limited distant-signal retransmission. See *supra* text accompanying notes 343-46.

402. One might see a retransmission consent requirement as economically beneficial, creating a market for broadcast rights and allowing broadcasters and program producers to exploit the full value of their works. See *generally Compulsory Copyright License, supra* note 401. In Japan as in the United States, see *supra* note 401, however, the retransmission consent requirement did not create a working market. The key stations have consistently denied or vetoed distant-signal retransmission consents in order to preserve good relations with their affiliates in the affected areas. Only a few broadcasters, in particular Tokyo TV Channel 12, have attempted to negotiate a fee for their programming.

In any event, the Copyright Law already provided a framework for trading money for retransmission rights. See *supra* note 392. The effect of the Cable Television Broadcast Law retransmission requirement, at least until recently, see *infra* text accompanying notes 463-65, was to stifle distant-signal retransmission altogether.

403. See Kobayashi, *supra* note 398, at 11-12. But see Shiono 1978, *supra* note 7, at 35 n. 9. Broadcasters typically (although not invariably) granted consent to retransmission within the local service area.

404. 47 U.S.C. § 224 (1988).

405. See *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987) (reserving the question whether the Act so interpreted would be constitutional).

406. See *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1543 (11th Cir. 1985), *rev'd*, 480 U.S. 245 (1987).



Ministry initially did not seek to intervene with utility companies and other governmental units over the issue.

MPT's initial reaction to cable, in sum, did not fit the image of the Japanese regulator constantly intervening through administrative guidance in order to promote new industries. MPT, at the outset, engaged in administrative guidance only to suppress cable; it declined to take available steps, such as involvement in retransmission consent or pole attachment disputes, to advance cable. Again, the Japanese regulator's behavior seems to some degree analogous to the FCC's early behavior. In the United States, judicial intervention ultimately helped effect a change in agency behavior, but that judicial intervention was the product of a doctrine of formal rationality that had no place in Japanese administration. Without formal rationality ideology and stringent judicial review, no judicial check was available to shift MPT out of the usual bargaining circles.

2. *The Revolution.* What outside force was available to lead MPT to a shift in its behavior? In this case, a force presented itself rooted not in formal rationality but in something more closely resembling politics: *interbureaucratic* competition, summed up in the phrase *tatewari gyosei*.<sup>407</sup> As the 1970s progressed, MPT found itself facing threats to its authority on a variety of fronts, most importantly from the Ministry of International Trade and Industry (MITI). MITI's attack forced MPT to jettison some of its old clients and approaches. As a result, MPT largely abandoned its anti-innovation positions. It describes itself today, with some degree of accuracy, as having an affirmative role in actively fostering all forms of new media. It sees a bright future for cable, and predicts 40% cable penetration by the end of the century.<sup>408</sup>

MITI, the new player that helped change the rules of the telecommunications game, is the agency to which authors most often refer when

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407. This phrase, which is usually translated "vertical administration," signifies competition among bureaucratic units that feel loyalty only to those directly above and below them in the chain of command, and not to agencies on the same "horizontal" level. See Y. PARK, *supra* note 223, at 114; Johnson, *supra* note 81, at 182-83, 187; Hanada, *The Convergence of Broadcasting and Telecommunications in Japan*, in COMMUNICATIONS POLICY IN EUROPE 287-88 (D. Elixmann & K. Neumann eds. 1990). Sectional competition among different government agencies has often characterized Japanese regulation. See Johnson, *supra* note 223, at 25-26; see also Aberbach, *supra* note 276, at 464; *infra* note 508.

408. MPT, POSTS AND TELECOMMUNICATIONS IN JAPAN: TOWARD A GLOBAL COMMUNICATIONS NETWORK, FISCAL 1987, at 38 (1988).

they speak of regulation as the source of the Japanese "miracle."<sup>409</sup> In contrast to MPT, which has been accurately described as "conservative, monopolistic, domestic, bureaucratic, labour-intensive, inefficient and driven by political as opposed to economic objectives," MITI is generally regarded as "innovative, aggressive, internationally-focused, efficient, capital-intensive and market-driven."<sup>410</sup> MITI has an impressive record of supervising Japanese industries' drive for international markets.<sup>411</sup>

MITI had long been involved in the promotion of Japan's computer industry,<sup>412</sup> and had longstanding ties with the export-oriented firms dominating Japan's telecommunications equipment industry.<sup>413</sup> By the end of the 1960s, some MITI officials had begun to see the agency's future in the high-tech industries of the coming information society;<sup>414</sup> the Ministry sponsored missions to the United States in 1967 and 1968 to study management information systems and the information industry.<sup>415</sup>

Telecommunications, however, belonged not to MITI but to MPT, which historically supervised the telephone and telegraph networks pursuant to its authority under the Public Telecommunications Law.<sup>416</sup> Under that law, Japan's only domestic telecommunications carrier was Nippon Telephone and Telegraph (NTT). No entity other than NTT could offer telephone or data transmission services, using either NTT's facilities or its own.<sup>417</sup> Moreover, no entity other than NTT could offer value-added network (VAN) services.<sup>418</sup> NTT, however, had never been subjected to the press of competition, and had created an inefficient tele-

409. See C. JOHNSON, *supra* note 13. Professor Johnson describes MITI as "the governmental sponsor and supervisor of high-speed economic growth." Johnson, *supra* note 81, at 183.

410. Davidson, *supra* note 18, at 148-49. "[I]t is generally accepted that MITI is outstanding in its aggressive policy-making. In contrast, . . . [MPT's policy orientation] had been rather conservative until the mid-60s, because its established telecommunication and broadcasting policies (1) had been valid for a long time, and (2) had hardly clashed with those of other administrations." Kobayashi, *supra* note 92, at 36.

411. See C. JOHNSON, *supra* note 13; for a more skeptical but still favorable appraisal, see D. OKIMOTO, *supra* note 82.

412. See Yokoi, *Agencies and Directions of Japanese Policy*, 6 TELECOMMUNICATIONS POL'Y 258, 260-61 (1982).

413. See Davidson, *supra* note 18, at 149.

414. The term *johoka shakai*, or "information society," had been coined just a couple of years before; the phrase was intended to be analogous to *kogyoya shakai* or "industrial society." See Ito, *supra* note 282, at 13-14; *supra* notes 281-82 and accompanying text.

415. See Kobayashi, *supra* note 92, at 31.

416. See J. HILLS, DEREGULATING TELECOMS 108 (1986); Johnson, *supra* note 81, at 185-86.

417. See Tomita, *Japan's Policy on Monopoly and Competition in Telecommunications*, 8 TELECOMMUNICATIONS POL'Y 44, 45 (1984).

418. A VAN is formed by the combination of communication, as over the telephone lines, with computer processing. By means of a VAN, data is communicated from one source to another and in

communications network. Its system configuration and software were unsophisticated, its financial and operating performance levels were low, and it relied too heavily on analog rather than digital switching equipment.<sup>419</sup>

NTT was slow to enter the VAN market. In 1968, however, MPT authorized NTT to offer a VAN service in which bank financial data flowed through leased circuits to and from a central computer owned by NTT.<sup>420</sup> This was a welcome move to some segments of Japanese industry wishing to utilize VAN services, but it aroused strong reactions among MITI's clients in the computer industry, who feared NTT domination of, or legal monopoly over, the future VAN market.<sup>421</sup> Against this background, MITI released a 1969 "Report on Information Processing and Information Industry Policies," urging that MPT's telecommunications doctrine was inadequate to the tasks of the new age, which would require free and efficient use of telecommunications networks for information processing.<sup>422</sup> The immediate controversy between MPT and MITI over VAN services was mediated by the LDP's Policy Affairs Research Council (PARC), the highest policy-making organ in the party. It resulted in a 1971 amendment to the Public Telecommunications Law slightly liberalizing the use of shared circuits, subject to MPT authority over interconnection with the public network.<sup>423</sup> MPT and MITI had fired the opening shots in a key jurisdictional battle for telecommunications leadership.

One front on which that battle was to be fought was the small city of Higashi-Ikoma, near the ancient capital of Nara, in the Osaka suburbs. MITI in May of 1972 established the Visual Information System Development Association, headed by Toshiba Electric president Toshio Doko, to develop a Highly Interactive Optical Visual Information System (HI-

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some manner processed in the transaction. A travel agency computer is part of a VAN, as is a Lexis or Westlaw terminal.

419. See Davidson, *supra* note 18, at 149-50.

420. See Yokoi, *supra* note 412, at 262.

421. *Id.* at 262-63.

422. See Kobayashi, *supra* note 92, at 32; Nakasa, *supra* note 199, at 68.

423. See J. HILLS, *supra* note 415, at 109 (rendering PARC as "Policy Deliberation Council"); Nakasa, *supra* note 199, at 77-78. The PARC chairman and executive committee stand astride some 17 divisions, corresponding to ministries and Diet standing committees, and 32 commissions (as of 1987). PARC sections have no staff and rely on the bureaucracy for expert advice and drafting; their independence in policy formulation is therefore limited. The PARC process nonetheless provides important avenues for powerful *zoku* politicians, see *supra* note 273, to veto agency initiatives and to mediate compromises between warring agencies. See G. CURTIS, *supra* note 216, at 113-14, 116; see also Y. PARK, *supra* note 223, at 38, 91, 100-01, 137.

OVIS) for a housing complex there.<sup>424</sup> This demonstration project was, in essence, an advanced interactive cable television plan. It ultimately connected a TV studio and ten public buildings by fiberoptic cable with a 20" color TV, a keypad, a video camera, and a microphone in each of 156 participating households.<sup>425</sup> For MITI, the HI-OVIS project was intended to establish its pre-eminence in the telecommunications field.<sup>426</sup>

MPT did not take this lying down. Within months of MITI's announcement of HI-OVIS, MPT announced plans for a demonstration cable television project of its own. It established a Board of Investigation on the Coaxial Cable Information System to plan a pilot project for cable technology at Tama New Town, a development to be built near Tokyo.<sup>427</sup> MITI's interest thus led MPT to promote cable television, a medium it had previously hoped to restrain.<sup>428</sup> MPT's reaction, however, reflected its status-quo-oriented approach. While MITI's HI-OVIS plan required new research and technical development, MPT's Tama project was intended to be an inexpensive and efficient system using off-the-shelf technology.<sup>429</sup>

MPT took steps to bolster its position in other ways. It established a Communications Policy division,<sup>430</sup> and began publishing a yearly Communications White Paper.<sup>431</sup> It thus hoped to establish itself as a policymaking ministry, or *seisaku kancho*, rather than a mere "business

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424. See Tadokoro, *supra* note 363, at 91-92; see also Dearing, *Telecommunications Infrastructure Planning in Japan*, 14 MEDIA ASIA 53, 56 (1987); Kobayashi, *supra* note 92, at 34-35. Toshiba was part of one of Japan's largest manufacturing groups, but had been largely shut out of the telecommunications equipment business because it was not part of the "family" of companies within which NTT did its purchasing. It thus had a substantial stake in an increased role for MITI in telecommunications planning. See *infra* notes 448-49 and accompanying text.

425. See Ikeda, "Hi-Ovis" Seen by Users, 21 STUD. BROADCASTING 95, 95-96 (1985).

426. See Tadokoro, *supra* note 363, at 90.

427. *Id.* at 92.

428. See J. HILLS, *supra* note 416, at 112.

429. See Kobayashi, *supra* note 92, at 33-35. An MPT research panel report implicitly criticized MITI as "mixing dream with reality" by fostering "excessive expectations for enhanced types of CATV [that] tend to neglect their technological difficulties, social needs and economic feasibilities." *Id.* at 33; see also Tadokoro, *supra* note 363, at 89-91.

While the Ministry of Finance forced MPT's Living Information System Development Division and MITI's Visual Information System Development Division nominally to pool their efforts as a single Living-Visual Information System Development Association, the two groups never engaged in any joint efforts. See *id.* at 91-92; Kobayashi, *supra* note 92, at 34-35.

430. See Nakasa, *supra* note 199, at 68-70; see also Kobayashi, *supra* note 92, at 37. MITI had established an Electronics Policy section about the same time. Johnson, *supra* note 81, at 197; Kobayashi, *supra* note 92, at 37.

431. Kobayashi, *supra* note 92, at 36-37.

ministry."<sup>432</sup> Because the Tama project did not require new technology, it began operation in 1976, sooner than HI-OVIS; it offered services including TV retransmission, TV origination, text news (screen and hard copy), emergency information, a still photo library, interactive educational programming, and facsimile transmission.<sup>433</sup>

HI-OVIS took longer to get going. From 1972 to 1974, the project supervisors conducted development, design and trial manufacture based on a coaxial cable plan. In 1976, the planners decided to use fiberoptic cable instead. Construction of the fiberoptic lines began in 1977, and the project began operation in 1978.<sup>434</sup> Notwithstanding its higher level of technical sophistication, HI-OVIS offered services similar to those at Tama.<sup>435</sup>

It is not clear, in retrospect, what either the Tama or Higashi-Ikoma projects accomplished. None of the services offered by the demonstration projects seemed to provide enough consumer benefit to justify their cost as a commercial proposition.<sup>436</sup> The projects' benefits, rather, were to the public image of their sponsoring agencies. MPT was by no means a convert at this point to the cause of opening up new media; it was providing little help to ordinary cable systems then in operation, and it was holding back the development of teletext<sup>437</sup> so as "not to cause confusion in the private broadcasting industry."<sup>438</sup> The Tama project, nonetheless, helped MPT establish its credentials as a policymaking ministry.

MPT continued to respond energetically to MITI's attack, establishing a new Communications Policy Bureau<sup>439</sup> to conduct policy and plan-

432. See Johnson, *supra* note 81, at 186; Dearing, *supra* note 424, at 56; cf. Aberbach, *supra* note 276, at 463 (comparing "political ministries," such as MPT, with the "highly prestigious 'economic ministries,' " such as MITI).

433. See Tadokoro, *supra* note 363, at 102-07.

434. See Kawahata, *Hi-OVIS Project*, 16 *STUD. BROADCASTING* 115, 125-26 (1980); Shimizu, *Chronology of Events Involving New Media in Japan (1976-1984)*, 21 *STUD. BROADCASTING* 121, 123 (1985).

435. See Ikeda, *supra* note 425, at 96-97; see generally Kawahata, *supra* note 434.

436. See Dearing, *supra* note 424, at 56; Kobayashi, *supra* note 92, at 35; Tadokoro, *supra* note 363, at 108-09. MITI was said to have spent 30-40 million yen per household on HI-OVIS.

437. The term "teletext" covers transmission of text and graphics on the otherwise unused "vertical blanking interval" of a television signal. Teletext signals can be received on any television set equipped with an appropriate decoder. See L. GROSS, *THE NEW TELEVISION TECHNOLOGIES* 161-70 (2d ed. 1986).

438. Shiono 1978, *supra* note 7, at 22-23. The Ministry later came to encourage teletext, but the business prospects of the industry have not been encouraging. See *Teletext Enters Third Stage*, *NSK News Bulletin*, Dec. 1987, at 3-4; *Expansion Plans In New Media Are Kept Realistic By Hikita*, *Variety*, Dec. 24, 1986, at 58, col. 1 (MPT insists broadcasters participate in teletext).

439. See Johnson, *supra* note 81, at 195; Yokoi, *supra* note 412, at 259 ("Bureau of Telecommunications Policy"). Professor Johnson states that the new bureau, established in 1980, was an expan-

ning<sup>440</sup> for telecommunications, satellites, new media, and the information society.<sup>441</sup> Both MPT and MITI soon announced separate demonstration projects for versions of an Information Network System (INS) intended to unite telephone, telegraph, data and facsimile services with new video services, and to use fiberoptic transmission, fully digital switching, satellites and computer technologies to transmit, store, and process information for the new information age.<sup>442</sup> MITI announced

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sion of the small NTT supervisory unit in the Ministry Secretariat, but it seems more plausible to me that it was an upgrading of the Communications Policy unit created in 1970, *see supra* note 430 and accompanying text.

440. Both MITI and MPT in 1981 received major *shingikai* reports, *see supra* text accompanying note 91, intended to articulate and publicize their telecommunications policymaking visions. MITI, thus, commissioned a report on "Visions of 'Information Society' and Information Industries in the 1980s," urgently calling for reform of the existing regulatory regime and active governmental promotion of research and development, *see Kobayashi, supra* note 92, at 42-43; MPT commissioned a report on "Telecommunications Policy Goals in the 1980s" by its newly-established Round Table Conference on Telecommunications Policy, and a report on new broadcast technologies by its newly-established Study Committee on the Diversification of Broadcasting. *See id.* at 41-42; Goto, *Japanese Project for Direct Broadcasting Satellite Service*, 19 *STUD. BROADCASTING* 9, 25-26 (1983); Shimizu, *supra* note 434, at 124.

MPT and MITI continued their *shingikai* war over the next few years. In 1983 MPT released the report of the Committee for Study and Research on the Future Image of Telecommunication Systems, recommending a more competitive telecommunications structure and construction of INS, *see infra* note 442 and accompanying text, using satellites and optical cable. *See Shimizu, supra* note 434, at 127-29. MITI released a report from the Information Industry Committee of the Industrial Structure Council on the future development of new media, *id.*, and announced new media policy as its top policy priority for 1984. *See Imai, Japan's Industrial Policy for High Technology Industry*, in *JAPAN'S HIGH TECHNOLOGY INDUSTRIES* 137, 155, 167 (H. Patrick ed. 1986). Professor Imai's article summarizes much of the Industrial Structure Council report.

441. In 1981, MPT proposed a new bill to regulate VANs. The bill would have partially opened up the VAN business to companies other than NTT, addressing concerns of both companies that wished to buy VAN services and companies that wished to provide them. At the same time, the agency reserved for itself strict licensing and approval requirements over these new services, and sharply limited the participation of foreign firms or their subsidiaries. *See Johnson, supra* note 81, at 211. MITI opposed the proposal, not wishing to cede control over computer-based services to MPT. MITI gained ammunition from the deregulatory philosophy of the newly-created Provisional Commission for Administrative Reform (Rincho), *see infra* note 457 and accompanying text. MITI won that round; the new bill failed. *Johnson, supra* note 81, at 211.

MPT was not beaten for long; it argued that it had to regulate foreign VANs as a matter of national security, so as to save the Japanese telecommunications industry from IBM and AT&T. *Id.* at 211-12. MITI, in contrast, argued for complete formal liberalization, relying on its traditional guidance powers over the computer and electronics industries. *Id.* at 212; *see also* R. Akhavan-Majid, *supra* note 251, at 56 (MITI sought to reduce formal regulation because it, to an even greater extent than MPT, derived its power from administrative guidance rather than formal legal provisions). The immediate dispute, like the 1971 dispute over VAN liberalization, was resolved in the PARC, *see supra* note 423; a compromise bill provisionally liberalized VANs for medium and small enterprises. *Johnson, supra* note 81, at 212; Shimizu, *supra* note 434, at 125.

442. Thinking about INS was first introduced in Japan at the end of the 1970s by NTT visionaries who saw a potential revolution in information technology before them, and sought to reinvent

its "New Media Community" and MPT its "Teletopia" plans; each was a scheme for installing integrated digital telecommunications systems incorporating videotext,<sup>443</sup> interactive cable, and other services at demonstration sites around the country.<sup>444</sup> MPT, however, had the advantage because it could design its projects to utilize NTT-developed INS and videotext technology;<sup>445</sup> MITI's systems were still on the drawing board.<sup>446</sup>

In early 1984, MPT announced drafts of three telecommunications laws revamping existing telecommunications regulation, and in particular allowing telecommunications services to be offered by companies other than NTT.<sup>447</sup> This represented a significant change in the status

the telecommunications network. See J. HILLS, *supra* note 416, at 110-11; Dearing, *supra* note 424, at 54; Davidson, *supra* note 18, at 159; see also Kobayashi, *supra* note 398, at 21; see generally Y. KITAHARA, *INFORMATION NETWORK SYSTEM: TELECOMMUNICATIONS IN THE TWENTY-FIRST CENTURY* (1983). In 1984 NTT started a pilot INS project in the Mitaka and Musashino suburbs of Tokyo, offering services including videotext, digital facsimile, digital telephone service, message storage, videophone, teleshopping, teleconferencing, and "sketch-phone." See Kawaguchi & Kimura, *Telecommunications Situation in Japan: 1986-87*, at 9-10 (report to IPTC 22nd AGM, June 8-12, 1987, Las Vegas, Nev., copy on file with author); Kobayashi, *supra* note 398, at 19-20.

INS technology is known outside Japan as Integrated Services Digital Network (ISDN). There has been debate among telecommunications planners across the globe whether the benefits of the technology justify its costs; some have stated that ISDN stands for "Innovations Subscribers Don't Need."

443. The term "videotext" covers any interactive service in which textual material travels through cables to the home screen; Sears Prodigy, for example, is a videotext service. See L. GROSS, *supra* note 437, at 171-85.

444. See Johnson, *supra* note 81, at 225-26; Shimizu, *supra* note 434, at 126, 130; Kobayashi, *supra* note 398, at 24.

445. NTT had begun experimental service in 1979 for a new videotext service it called CAPTAIN (Character and Pattern Telephone Access Information Network). The system was to provide information, teleshopping, telebanking, and similar services through the phone lines to home terminals. CAPTAIN went into commercial operation in 1984 as a joint venture between NTT and a large number of private companies, see Kobayashi, *supra* note 398, at 17-18; Shimizu, *supra* note 434, at 123, 129-30; R. Akhavan-Majid, *supra* note 252, at 127-28; it has not been an overwhelming commercial success. See Moritani, *Information Out of Formation*, J. JAPANESE TRADE & INDUST. 10, 12 (May/June 1987); Kawaguchi & Kimura, *supra* note 442, at 10-12.

446. See Dearing, *supra* note 424, at 55-56; Johnson, *supra* note 81, at 226; R. Akhavan-Majid, *supra* note 252, at 130.

MITI's New Media Communities plan was struck a serious blow by the Cabinet's 1986 decision to award little direct public funding to either the MPT or MITI designs. See Johnson, *supra* note 81, at 226-27. MPT, however, pressed along with its Teletopia plan. By 1988, MPT had designated 67 model cities and regions, and planned installation of over 250 media systems, including data communications systems, CAPTAIN, and interactive cable TV. See MPT, *supra* note 242, at 34-35; MPT, *supra* note 408, at 6.

447. The new laws also provided that stock in government-owned NTT should gradually be sold to the public, see *infra* text accompanying notes 457-59. I believe, though, that this NTT "privatization" was much less important than the market opening that took place the same year. Privatization, by itself, did not affect NTT's management or day-to-day operations. The crucial

quo. The traditional rules had assigned NTT a monopoly in telecommunications services, benefitting NTT and the "family" of telecommunications suppliers who dealt with it, including NEC, Fujitsu, Hitachi, and Oki.<sup>448</sup> In leading the move to an open market, MPT abandoned those clients and moved to benefit and support a new group of companies, including large telecommunications users, computer and electronics firms outside of the closed NTT supplier group, and would-be VAN providers, that had not fared as well under traditional MPT regulation.<sup>449</sup>

MPT, however, was moving from one client group to another, rather than simply promoting market opening generally. Its new draft rules were designed in large part to exclude two companies outside of its circle of consensus: IBM and AT&T. The rules would have prohibited any firm with more than a certain level of foreign stock ownership<sup>450</sup> from acting as a "Class I" carrier, that is, from providing telecommunications services using facilities owned by it.<sup>451</sup> Foreigners similarly would have been prohibited from acting as special "Class II" carriers. A Class II carrier was a carrier providing telecommunications services using facilities owned by another; the "special" classification swept in larger and more sophisticated networks.<sup>452</sup> All Class I and special Class II carriers were to be licensed by the Ministry.

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regulatory changes, rather, were those allowing companies other than NTT to own telecommunications facilities and provide telecommunications services, as well as those allowing NTT to expand into new service areas. Those changes did not depend upon privatization.

448. See Yokoi, *supra* note 412, at 260; Johnson, *supra* note 81, at 189; Davidson, *supra* note 18, at 152-53. Gregory also lists Iwasaki Electric. See G. GREGORY, *JAPANESE ELECTRONICS TECHNOLOGY: ENTERPRISE AND INNOVATION* 356 (1985).

The franchise was a lucrative one for NTT family members. Itself supported by consumers and shielded from competition, NTT had allowed its suppliers the highest returns of any major Japanese industry. See Davidson, *supra* note 18, at 151.

449. See generally Cowhey, *The International Telecommunications Regime: the Political Roots of Regimes for High Technology*, 44 INT'L ORG. 169, 195 (1990). Key electronics companies well-positioned to benefit from telecommunications market-opening included Mitsubishi and Mitsui (Toshiba) affiliates, none of whom were part of the NTT family. In 1984, NTT for the first time placed significant orders with Toshiba, see G. GREGORY, *supra* note 448, at 356, perhaps in an attempt to co-opt Toshiba's support. If so, it was too little, too late. Both groups of companies have moved aggressively since 1984 to enter the telecommunications and satellite markets. See Davidson, *supra* note 18, at 152-53; *infra* notes 496-98 and accompanying text.

450. See Johnson, *supra* note 81, at 213 (33 1/3% stock ownership); Muramatsu & Krauss, *supra* note 13, at 545-46 (50%); J. HILLS, *supra* note 416, at 146-47 (same).

451. Only Class I carriers would be allowed to provide voice services. Davidson, *supra* note 18, at 156-57; J. HILLS, *supra* note 416, at 146.

452. See Johnson, *supra* note 81, at 213 (under the MPT draft, special class II providers would include those exceeding narrow technical specifications to be provided by the Ministry, or offering any form of international service); Davidson, *supra* note 18, at 156-57 (those with more than 5000 lines and transmission speeds of more than 1200 bps); J. HILLS, *supra* note 416, at 146 (those "pro-



MITI opposed the bill as written, and instead supported legislation to remove all formal controls on VAN providers. The United States took the position that MPT's draft amounted to a trade barrier and a GATT violation; MPT accused MITI of selling out to foreign interests. Supporting MPT in this dispute was the influential Keidanren (Federation of Economic Organizations), the unified public-policy voice of Japanese big business.<sup>453</sup> Keidanren was usually aligned with MITI, but in this case it saw its interests as lying with MPT. The dispute was finally decided via compromise at the top levels of the LDP.<sup>454</sup> MPT retained the power to license Class I carriers, but special Class II carriers were to be required only to register with the agency; both categories were opened, in varying degrees, to foreign participation.<sup>455</sup> MPT reserved the authority to approve the tariffs of Class I, although not Class II, carriers under traditional public utility standards, and to approve the interconnection of new Type I carriers with NTT.<sup>456</sup> The bill, known as the Telecommunications Business Bill, was passed by the Diet in December of 1984.

At the same time, the Diet passed the NTT Corporation Law, providing for the sale of two-thirds of NTT's shares to the domestic public over a five-year period. This step, initially advanced by MITI, was heavily supported by Rincho — the Provisional Commission for Administrative Reform, strongly linked to MITI<sup>457</sup> — and by Keidanren. MPT soon came to support privatization as well, realizing that the step, together with market opening, would help the agency to expand its client base to include not only NTT and its family of telecommunications equipment suppliers, but also new entrants into the telecommunications

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vided on a wide scale serving many companies or unspecified individuals or the international market").

453. See J. HIRSCHMEIER & T. YUI, *supra* note 86, at 326-27.

454. MPT also had the solid support of the PARC Communications section and of the Tanaka faction, traditionally associated with MPT and the postal *zoku*. The PARC Commerce and Industry Division, normally a reliable MITI ally, was split. See Muramatsu & Krauss, *supra* note 13, at 545-46; Davidson, *supra* note 18, at 157.

455. See Johnson, *supra* note 81, at 213-15; Muramatsu & Krauss, *supra* note 13, at 545-46; Davidson, *supra* note 18, at 156-57; J. HILLS, *supra* note 416, at 146-47.

456. See generally Sato & Stevenson, *supra* note 220, at 32-33.

457. The head of Rincho was Toshio Doko. See Johnson, *supra* note 81, at 216. Doko was also head of the Visual Information System Development Association that developed the HI-OVIS cable television project for MITI, see *supra* text accompanying notes 424-26, as well as head of Toshiba Electric, a company with much to gain from any downgrading of NTT's official status, see *supra* notes 424 & 449. Rincho's official position was that privatization would provide the answer to the inefficiency of both NTT and the Japan National Railways. See Johnson, *supra* note 81, at 194.

field.<sup>458</sup> MPT thus reorganized itself again in 1984; it retained its Broadcasting Bureau and Communications Policy Bureau (established in 1980), and added a new Telecommunications Bureau, to promote and supervise the telecommunications industry.<sup>459</sup> A top MPT official explained at a press conference that MPT had joined the ranks of "truly elite officialdom."<sup>460</sup>

3. *Cable Revisited.* MPT's attitude towards cable seemed to change markedly in the mid-1980s. MPT became more liberal regarding cable licensing; it came to require less impressive showings than it had previously regarding the applicant's capitalization, level of preparation, and ability to realize its submitted plan.<sup>461</sup> MPT provided seed money investment and special, development-oriented financing for cable systems at low rates, allowed laid cable to be used as collateral, and supported research into cable hardware issues, especially those related to satellite transmission.<sup>462</sup>

The agency also became more aggressive in exhorting broadcasters to grant retransmission consent. It proposed, and saw enacted, a 1986 amendment of Art. 13 of the Cable Television Broadcast Law giving it the power to permit rebroadcast notwithstanding the originating broadcaster's refusal to grant consent.<sup>463</sup> It issued its first formal adjudication under new Art. 13 in 1987. The broadcaster, Sun TV (Kobe), had taken the position that it would be willing to sell its programming at what it

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458. Moreover, MPT might be able to keep control over some of the money to be raised from the sale of NTT shares. See Johnson, *supra* note 81, at 217-18.

The more controversial question was whether NTT was to be broken up as well as privatized. MPT opposed that step, and the parties agreed to defer decision. MPT ultimately came to advocate NTT breakup; opposition from the Ministry of Finance, however, caused the government in 1990 to defer any action indefinitely. See *Breakup of Nippon Telephone is Delayed*, N.Y. Times, April 2, 1990, at C4, col. 1; see also Sato & Stevenson, *supra* note 220, at 39.

459. See Johnson, *supra* note 81, at 195; Omori, *supra* note 194, at 19-20; MPT/JICA, *supra* note 213, at 9. Translations of the names of MPT units vary in English-language sources; I am here using those used in MPT/JICA, *supra* note 213. For a recent MPT organizational chart, see MPT, MINISTRY OF POSTS AND TELECOMMUNICATIONS 2 (August 1988).

460. Johnson, *supra* note 81, at 197.

461. MPT had from the start required these showings even when an application was unopposed. The agency was not about to allow an underfinanced or otherwise shaky system to lay cable and collect fees, only to go bankrupt down the road.

462. Some of this is discussed in MPT, *supra* note 408, at 38; MPT, *supra* note 242, at 16-17; J. Hamada, Deregulation and 'Soft Landing' Toward the New Media Age 3 (July 2, 1987, unpublished paper on file with author).

463. The legislative history reflects MPT's assurances that it would not overuse its new power, and that it would give due deference to broadcasters' views.

deemed a reasonable price,<sup>464</sup> San-in Cable TV asserted the right to re-broadcast without payment. Sun TV was financially weak, and MPT might well have decided that it deserved special solicitude. MPT nonetheless ruled for San-in Cable. In a sweeping decision, it held that a broadcast station could not refuse cable retransmission consent for financial reasons.<sup>465</sup>

The agency fought off an attack from the Ministry of Construction (MOC) that had threatened to stall the development of new cable systems. MOC, seeking to advance its own fiberoptic cable network to be laid underground along highway rights-of-way,<sup>466</sup> instructed local governments to deny construction permits to cable TV systems that sought to string cable overhead (rather than underground), even if telephone and electric wires were currently strung overhead. The cost of installing new underground wiring made the establishment of new cable systems prohibitively expensive. After extended protest from MPT, however, MOC backed down.<sup>467</sup>

While cable penetration in Japan is still below 20%,<sup>468</sup> it seems to be on the rise. Five large "city-type"<sup>469</sup> cable systems were in operation as of October 1987,<sup>470</sup> eight more were in operation eight months later, and an additional ten were authorized but not yet in operation.<sup>471</sup> Satellite

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464. TV Tokyo Channel 12, *see supra* note 243, had begun charging a fee for retransmission around 1985.

465. The decision did not explicitly address Sun TV's Art. 99 rights under the copyright law, *see supra* note 392. Industry members I spoke to, however, believed that it would be fruitless for Sun to assert its Art. 99 rights at this point; the broadcaster would have to submit to guidance eventually.

466. MOC, after the 1984 telecommunications liberalization, had formed Teleway Japan in conjunction with 49 private firms including Toyota and Sumitomo, offering long-distance telephone service along fiberoptic cable laid along the highway rights-of-way from Tokyo to Osaka. It began offering service in 1986 for leased lines, and in 1987 for switched telephone service. *See Dearing, supra* note 424, at 55-56.

467. *See generally* DENTSU, INC., 1985 CABLE TV TREND IN JAPAN (Nov. 1985), at 3-4; MINISTRY OF CONSTRUCTION, WHITE PAPER ON CONSTRUCTION 53 (1984).

468. As of March 1990, cable penetration represented 18.6% of NHK receiving contracts. Shimizu 1991, *supra* note 6, at 6.

469. MPT defines a "city-type" or "urban-type" system as one with more than 10,000 subscribers, as least five cablecast channels, and two-way capability.

470. MPT, *supra* note 242, at 16-17. Eight cable systems in 1980, *see Doi, supra* note 363, at 303, and fifteen in 1986, could boast more than 10,000 terminals. None of the eight systems, however, had five cablecast channels or two-way capacity.

471. MPT, *supra* note 408, at 37. The new systems are commonly joint ventures of private railway companies, media conglomerates, and other large capital ventures. *See Kobayashi, supra* note 398, at 8-9. Railway companies including Tokyu, Odakyu, Keio, and Seibu are involved in cable system construction; even the Japanese National Railway (at the time a government corporation, but later privatized and broken up) has gotten in on the act. *See DENTSU, INC., supra* note 467, at 4-5. The private railways traditionally have had close and economically interdependent relation-

distribution of cable programming began in 1989,<sup>472</sup> and existing media conglomerates and advertising agencies have made major moves into the cable programming business.<sup>473</sup> One cable system is offering innovative services: Lake City Cablevision, a large system in a rural area at the foot of the Japan Alps, offers, in addition to conventional cable television, station-to-station leased telecommunications circuits.<sup>474</sup> The system is also used for telemetering individual water usage and a medical support system connecting central hospitals with homes for the aged.<sup>475</sup>

How should one explain MPT's policy shift? One answer might be that MPT, as a consequence of its experience in the telecom wars, came to view itself, and therefore to act, as a true "policy agency," putting aside parochial concerns in favor of a more global outlook, setting aside compromise and bargaining in favor of a pure policy orientation. MPT surely realized that its world had irrevocably changed, and that it could not simply regulate broadcasting as it had in the past. Telecommunications, thanks to plans such as those NTT had for INS, was now intimately tied in with computers and information processing; and mass media, thanks to cable and videotext services, was now intimately tied in with telecommunications.

Another part of the picture, however, is that MPT reacted to MITI's pressure by expanding its client base. MPT fostered a close, symbiotic regulatory and political relationship not merely with the existing broadcasting community, but with a broad cross-section of the big business community, in particular the electronics industry. It maintained its traditional regulatory approach of consultation and bargaining within a circle of influential players, but it expanded that circle to include

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ships with the communities bordering their lines, investing in department stores and housing developments; they apparently view cable television as a natural outgrowth and as a common carrier enterprise economically similar to the railroad business.

472. See Sato & Stevenson, *supra* note 220, at 34; MPT, *supra* note 408, at 38; Komatsubara, *supra* note 206, at 86-87.

473. Tokyo Broadcasting System is the driving force behind Premier, likely to be a dominant force in Japan's cable programming. Other participants include Dentsu, Japan's largest advertising agency, NHK Enterprises, Shochiku and Toho film studios, Viacom, HBO, Columbia Pictures, Showtime, The Movie Channel, EMI, and Twentieth-Century Fox. See *Two Japanese Paycable in Urge to Merge*, *Variety*, Dec. 24, 1986, at 1, col. 5; DENTSU, INC., *supra* note 467, at 2.

Asahi Newspapers and TV Asahi, along with Dentsu, Hakuodo advertising, and others, are key investors in Eisei (Satellite) Channel. Asahi, Dentsu, and Tokyu advertising support JCTV (Nihon Cable Television). DENTSU, INC., *supra* note 467, at App. 3. Dentsu is also involved in Japan Cable Network, *see id.* at 1 & App. 1-2, and Japan Sports Channel. Hakuodo and Tokyu advertising are each lead investors in at least one other major program service, *see id.* at 1.

474. See Sato & Stevenson, *supra* note 220, at 33-37.

475. See *Suwa CATV*, *NSK News Bulletin*, Mar. 1987, at 8, col. 2.

new players, such as Mitsui and Mitsubishi, that previously had enjoyed little contact with the telecommunications world and had interests divergent from many of the old bargaining participants.

MPT's recent moves to expand postal service provide one small example of how the agency has moved away from its old clients in favor of an innovative policy outlook better serving the needs of business. Among its new services is the delivery of flyers and direct mail advertising to all households in a given geographic area. MPT's plans to implement the new service met with sharp protests from newspapers, whose agents deliver flyers as newspaper inserts, and previously had no competition for that lucrative business. The agency, however, rebuffed media protests; it explained that large users had expressed demand for the service, and that it was the government's duty to respond to such needs.<sup>476</sup>

A more extensive example can be found in the development of DBS.<sup>477</sup> NHK and the National Space Development Agency first launched an experimental direct broadcasting satellite in 1978,<sup>478</sup> and another in 1984.<sup>479</sup> MPT had not been involved in this development; the impetus had come from NHK, which was attracted by the new technology's potential to serve areas where the NHK signal could not otherwise be received.<sup>480</sup> The public broadcaster on that basis bore 60% of the cost of the 1978 and 1984 satellites.<sup>481</sup>

476. See "Yutopia" Concept and Newspapers, *NSK News Bulletin*, June 1987, at 6-7; see also MPT, *supra* note 242, at 10-12.

477. In a DBS (Direct Broadcast Satellite) system, television or other signals are beamed up from earth stations and bounced off satellites directly to receivers in individual homes. See L. GROSS, *supra* note 437, at 129-135.

478. See Goto, *supra* note 440, at 11. The World Administrative Radio Conference had allocated direct broadcasting frequencies the year before. *Id.* at 15; Shimizu, *supra* note 434, at 122.

479. See Kobayashi, *supra* note 398, at 12-13, 20-22.

480. "[Notwithstanding TV relay and cable installations,] there are still as many as 420,000 households in 2,200 remote areas, either in mountainous regions or distant off-shore islands, where terrestrial TV reception is difficult or impossible. The primary objective of using the broadcasting satellite, therefore, is to remedy this situation efficiently and economically." Ishii, *supra* note 6, at 80; see also Goto, *supra* note 440, at 29.

481. Ishii, *supra* note 6, at 80-81; Goto, *supra* note 440, at 14; Kobayashi, *supra* note 398, at 12-13; R. Akhavan-Majid, *supra* note 252, at 140-41.

NHK in 1987 began filling one channel of the 1984 satellite with new material not otherwise available to the consumer, including news and cultural and foreign sports events. See *NHK Starts 24-Hour Broadcasting*, *NSK News Bulletin*, Sept. 1987, at 5-6; see also, e.g., *Daily Yomiuri*, Aug. 2, 1987, at 4, col. 7 (program listings); *id.* at 5, col. 7 (same). NHK heavily promoted its new programming, and found itself with a hit. By March 1988, over 200,000 households were receiving the new programming on individual home dishes, and an even larger number were receiving the programming via cable, see *infra* note 505. By January 1990, the total number of households receiving the programming exceeded two million. By March 1991, the figure exceeded three million. See *Private Satellite Broadcasting Started*, *NSK News Bulletin*, Mar. 1991, at 1 [hereinafter *NSK 1991*]; *Border-*

Once NHK took the lead on DBS, ensuring that the technology would develop with or without MPT's encouragement, MPT in the early 1980s began thinking about commercial applications. Commercial broadcasters took the view that neither they nor any other private entity ought to participate in the new technology, which they saw as a direct attack on the network-affiliate system: if programming could be distributed to individual homes via satellite, they asked, what need would there be for local broadcasters at all?<sup>482</sup>

MPT nonetheless established the Study Committee on the Diversification of Broadcasting, including representatives of commercial broadcasters, NHK, and other media entities, as well as academics from the fields of law, engineering and economics.<sup>483</sup> This committee generated a compromise report two years later favoring commercial DBS.<sup>484</sup> The committee report rejected the operation of DBS channels by any narrowly-based private entity or entities; rather, it recommended that a joint venture be formed to engage in satellite broadcasting. Commercial satellite broadcasting should develop gradually, starting with a single channel; it should fund itself on a pay-TV basis rather than through advertising, so as to minimize the financial impact on over-the-air broadcasters.<sup>485</sup> The commercial broadcasters agreed to participate in the consensus venture hoping that it might stall DBS as the Cable Vision Foundations had stalled cable, and fearing the possibility that a genuinely competitive commercial DBS might start up without them.<sup>486</sup> They expressed their willingness to take part on condition that existing broadcasters hold a majority of the new venture's stock; that it not be funded by advertising; and that it produce no programming of its own, but rather purchase programming from member stations or from outside sources.<sup>487</sup>

In 1983, MPT solicited applications for a single commercial channel on a DBS satellite then scheduled for a 1989 launch, and actively en-

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*line Between Satellite Broadcast and Communications in Dispute*, NSK News Bulletin, Mar. 1990, at 7 [hereinafter NSK 1990]. NHK now offers a second satellite channel, see Shimizu 1991, *supra* note 6, at 4, and has begun limited HDTV broadcasting over DBS; see N.Y. Times, Dec. 6, 1990, at C1, col. 3; L. Johnson, *supra* note 6, at 11-12.

482. See Goto, *supra* note 440, at 25-26, 28-29; Kobayashi, *supra* note 398, at 26; R. Akhavan-Majid, *supra* note 252, at 141-43.

483. See Goto, *supra* note 440, at 25-26.

484. See *id.* at 30-37.

485. See *id.*

486. See *id.* at 38-40.

487. See *id.* at 40-41.

couraged participation by the major media groups.<sup>488</sup> It requested Yoshihiro Inayama, president of Keidanren (the big business trade association),<sup>489</sup> who was associated with five of the DBS applications, to take charge of the *ipponka*. At the close of the *ipponka* process in 1984, businesses outside the traditional mass media held 63.8% of the shares of the new entity, known as Japan Satellite Broadcasting. Broadcasters held only 19%; other mass media entities (including newspapers, news agencies, movie companies, publishers, and advertising agencies) held 20.6%.<sup>490</sup>

As of early 1990, no commercial DBS had yet begun operation. MPT, however, found it necessary to suppress the efforts of a renegade outfit that wanted to begin commercial DBS outside of the MPT umbrella. Skyport Center was set up in 1989 as a Class II telecommunications carrier to engage in the business of, among other things, distributing television programming to cable systems via private communications satellite. In early 1990, however, Skyport began marketing that programming to individual households, offering to sell them the dishes and descrambling equipment with which members of the public could pull in its signal directly. NHK, Japan Satellite Broadcasting, and the association of commercial broadcasters all reacted sharply. MPT called in representatives of Skyport, of its constituent firms, and of the company owning the satellite whose transponders Skyport proposed to use, and told them that the service would violate applicable laws. Skyport backed off.<sup>491</sup> Japan Satellite Broadcasting began its operation later that year.<sup>492</sup>

MPT, in promoting DBS, forced the creation of a service that commercial broadcasters had opposed and that other media entities had not sought. Clearly, its approach was different from the one it displayed to-

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488. See Shimizu, *supra* note 434, at 127, 128; Kobayashi, *supra* note 398, at 13; *Expansion Plans in New Media Are Kept Realistic by Hikita*, *Variety*, Dec. 24, 1986, at 58, col. 1 (TBS vice president Hikita states that TBS is participating in DBS "essentially to satisfy the government").

489. See *supra* text accompanying note 453.

490. See Kobayashi, *supra* note 398, at 13-14; R. Akhavan-Majid, *supra* note 252, at 143-45; Shimizu 1986, *supra* note 6, at 19.

491. See NSK 1990, *supra* note 481, at 7; Shimizu 1991, *supra* note 6, at 6. Legislation proposed by MPT and adopted by the Diet in 1989 provided that before engaging in such transmission the satellite carrier must obtain a broadcast license and all program providers must obtain MPT approval; approvals for program providers are to be governed by the broadcast frequency allocation plan. Hanada, *supra* note 407, at 290-92. U.S. law contains no comparable requirements.

MPT later agreed to license direct marketing of communications-satellite transmissions to home dish owners. See *TV Channels to Proliferate*, *Japan Times* (weekly int'l ed.), Sept. 9-15, 1991, at 17, col. 2.

492. See NSK 1991, *supra* note 480, at 1; Shimizu 1991, *supra* note 6, at 5. Its new DBS television channel, called WOWOW, primarily offers foreign movies.

wards cable in the Shinjuku incident. MPT, however, did not abandon bargaining-oriented regulation; rather, it included non-media businesses within the bargaining circle, and shifted power to them. That shift is demonstrated by its choice of the president of Keidanren to guide the *ipponka*. Although MPT tilted away from its old clients, the pattern of bargaining was largely the same: the agency proceeded via *ipponka*, used the *ipponka* process to control entry into the market, and used its regulatory powers to stop an upstart from outside of the bargaining circle from actually providing service.

Non-media firms are participating heavily in new media in Japan today.<sup>493</sup> MPT has developed a close relationship with the Electronics Industry Association;<sup>494</sup> that relationship is reflected in such bodies as the Space Cable Net Promotion Council, established by MPT to work out preferential financial and tax treatment for companies in the communications-satellite business.<sup>495</sup> The biggest winners in telecommunications liberalization, similarly, have been electronics companies shut out under the old regime. Mitsui and Mitsubishi, excluded from the telecommunications equipment market before 1984,<sup>496</sup> have moved aggressively both into telephone service — forming joint ventures with electric utilities in Japan's three largest metropolitan areas to offer local telephone service in competition with NTT<sup>497</sup> — and into satellite communications.<sup>498</sup>

This expansion of entry, however, has not meant the end of old-style regulatory approaches. Because MPT has maintained a fundamentally bargaining-oriented approach, the changes it has allowed in the broad-

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493. See Hamada, *supra* note 293, at 97-98.

494. One measure demonstrating that influence, I have been told, is MPT's increased success in securing *amakudari* (literally, "descent from heaven") positions in the electronics industry for retiring MPT officials.

495. See MPT, *supra* note 408, at 38.

496. See *supra* notes 424 & 449.

497. These regional carriers offer a powerful alternative to NTT for local service, building on their access to the existing power-distribution grid and to existing relationships within the business community. See Sato & Stevenson, *supra* note 220, at 33, 36. MPT, however, has not allowed them to interconnect with NTT, or with each other to form an interregional network; commentators have suggested that MPT views the electric utilities' ties to MITI as unshakable, and is unwilling to give MITI that additional new line into the telecommunications market. See *id.* at 39-40.

498. Of the two new domestic satellite carriers, one (Japan Communications Satellite Co.) is a joint venture of C. Itoh & Co. (a trading company), Mitsui, and Hughes Aircraft. The other (Space Communications Corp.) is a project of the Mitsubishi Group, using a satellite built by Ford Aerospace. See Sato & Stevenson, *supra* note 220, at 33; Davidson, *supra* note 18, at 153, 156; Hanada, *supra* note 407, at 302. Mitsui has also moved aggressively in recent years in the area of television program production and distribution. See *NBC Signs Two Deals with Japanese Firms*, BROADCASTING, Dec. 24, 1990, at 14 (NBC-Mitsui-TV Tokyo joint venture).



casting system have been only incremental; it has stressed "harmonious development" so that new technology and participants can coexist with old.<sup>499</sup> In telecommunications, similarly, while MPT has licensed three joint-venture companies to compete with NTT in providing long-distance telephone service along the lucrative Tokyo-Osaka corridor,<sup>500</sup> it has seen no value in encouraging competition *among* these enterprises. Service rates and charges for the three companies, approved by MPT, are almost identical; the Japanese Fair Trade Commission has faulted MPT's administrative guidance on the issue.<sup>501</sup>

With MPT enjoying a new role as a policy agency and new clients in the electronics industries, and with its ties to the traditional broadcast media loosened, the agency was able to push forward after 1985 with its new plan to expand licensing of over-the-air television stations, seeking four stations in each prefecture.<sup>502</sup> The agency's shift, however, has by no means been a complete one; it is still to some extent centered on the goal of preserving the status quo. Indeed, MPT's goal of placing four broadcast stations in each prefecture and five in the major cities seems well suited to preserving the existing four-major-and-one-minor networks. The agency, at least through the 1980s, did not wholeheartedly embrace industries such as DBS, which carry the threat of truly radical change.<sup>503</sup>

Moreover, the Ministry's new policies are not necessarily coherent; the agency has not coordinated its station increase, DBS, cable, and telecommunications policies.<sup>504</sup> Increasing the number of broadcast stations, for example, undercut MPT's goal of promoting cable: MPT's 1986 new license authorizations were designed to leave only 19 prefectures served by fewer than four broadcast stations. On a nationwide ba-

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499. Quoted in Hamada, *supra* note 462, at 4, and in Goto, *supra* note 440, at 29.

500. One was a purely private venture, linking some 200 participating companies headed by Kyocera, Sony, and Mitsubishi; the others were the product of efforts led by the Ministry of Construction and the Japan National Railways (then a government corporation), respectively. See Dearing, *supra* note 424, at 55-56; *supra* notes 466-67 and accompanying text.

501. See Sato & Stevenson, *supra* note 220, at 34; *Three New Telecommunications Companies to Start Operation*, NSK News Bulletin, Dec. 1986, at 8; R. Akhavan-Majid, *supra* note 252, at 86-90.

502. See *supra* notes 246-48 and accompanying text.

503. This stance may itself be changing. In one intriguing development, MPT has been discussing with NHK the possibility of phasing out one of its two terrestrial TV networks as its DBS channels become self-supporting. See Shimizu 1991, *supra* note 6, at 11-12.

504. *But see* Tracey, *supra* note 369, at 211 (the activities of MPT, MITI and NHK during the 1970s and early 1980s were part of a unified and coherent plan reflecting "a clear sense of the new information society . . . and a recognition that the sea change of the information society will not just be a drifting in with the tide of entertainment, fed by superficial consumer needs to be titillated and beguiled by the frothy offerings of Hollywood and its ilk").

sis, MPT sharply depressed the demand for importation of key-station broadcast signals<sup>505</sup> that in prefectures such as Shizuoka and Nagano, was cable's *raison d'être*. Cable may yet play a key role as a distribution vehicle for DBS,<sup>506</sup> but that development would be the product of accident, not planning. Similarly, while MPT has supported both telecommunications deregulation and the development of a broadband, fiberoptic, digitalized telecommunications network,<sup>507</sup> deregulation undercut the protected position that would have helped NTT embark on this large and expensive public-works project.<sup>508</sup> Some of this lack of coordination may be the product of infighting and sectionalism *within* MPT;<sup>509</sup> some may simply reflect the fact that the shift from status-quo orientation to industrial policy does not necessarily carry true vision along with it.

Thus, while MPT had originally charged its advisory Commission on the Role of Broadcasting in the New Media Age with formulating a radical revision of the old broadcast order, the committee's ultimate report, submitted in April 1987, largely ratified the status quo and contained nothing revolutionary.<sup>510</sup> MPT still has important choices before

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505. See Weinberg, *Cable Television and Copyright in the United States* (paper presented to the Copyright Law Society of Japan, June 5, 1987, copy on file with author), at 12 (published in Japanese as *Amerika Gasshukoku ni Okeru Yusen Terebijon to Chosakuken*, 15 *Chosakuken Kenkyu* 23 (1988)).

506. See *supra* note 481. At the start of NHK's DBS broadcasting, almost all households receiving the signal did so via their cable systems rather than through individual satellite dishes. As late as the end of March 1988, more than half of the 580,000 households receiving NHK DBS programming still did so via cable. See MPT, *supra* note 408, at 10. Cable industry members with whom I spoke in 1987, however, were worried by the prospect of NHK's requiring cable operators to collect a special DBS subscription fee from all persons receiving DBS programming via cable.

507. See *supra* note 442 and accompanying text.

508. See Dearing, *supra* note 424, at 54-56. But see *Japan Times* (weekly int'l ed.), Apr. 13-19, 1991, at 17, col. 1 (anticipating a nationwide fiberoptic network early in the 21st century); MPT, *supra* note 407, at 8 ("it is necessary to develop a nation-wide digital network . . . and development is in full swing under government support"). MPT, similarly, has failed to reconcile its advocacy of an NTT broadband network with its current refusal to allow NTT to make its network available to third-party cable operators for the provision of cable TV services. See Hanada, *supra* note 407, at 293.

509. *Tatewari gyosei*, see *supra* note 407 and accompanying text, is not limited to battles between ministries; battles between bureaus within a ministry can be every bit as fierce. See Y. PARK, *supra* note 223, at 52, 114. There is considerable friction, for example, between MPT's Broadcast Administration and Communication Policy bureaus. The Communications Policy bureau in recent years has sought to advance the position that the concept of "broadcasting" is no longer useful as a regulatory definition, and published an entire report on DBS without ever referring to the medium as "broadcasting." The Broadcasting Administration bureau, in turn, seems to regard the future of cable as outside its sphere of concern.

510. See *Crux of Proposed Revision of Broadcast Law*, *NSK News Bulletin*, Mar. 1988, at 6-7.

The report recommended, in part, that MPT consider relaxing anticoncentration rules and the

it; the electronic mass media in Japan hold the potential for tremendous change following upon further development of DBS, cable, videotext, or other telecommunications services. The story remains to be told how well Japan's regulatory system will serve it.

4. *Conclusions.* Japan's use of the pure bargaining model in policymaking for telecommunications in general, and cable in particular, yielded a story not all that different from the one produced in the United States by formal-rationality checks on an otherwise largely bargaining-oriented policymaking system. In Japan even more than in the U.S., the agency began with a bargaining-oriented, client-based broadcast regulatory system. In both countries, that system was undermined by coercive shocks from some outside source. In the U.S., those shocks were provided in considerable part by the courts; in Japan, they were provided by a political threat from MITI. In the U.S., the regulator responded in large part by expanding its client group to give previously powerless cable operators seats at the bargaining table. In Japan, similarly, the regulator responded largely by expanding its client group within the context of bargaining-oriented regulation to include parties, particularly electronics manufacturers, who previously had not had significant influence before it.

The pure bargaining model, in cable policymaking as well as in broadcast licensing, gave the Japanese regulator a seductive opportunity to limit new entry. Limiting entry makes the regulator's job easier, giving it more administrative-guidance influence over industry members and helping to foster a mutually beneficial relationship between regulator and

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rule limiting most stations' broadcast areas to the prefectures in which they are located, in order to facilitate the reception of a greater number of broadcast signals over the air in rural areas; that it reconsider anticoncentration rules restricting investment in new media by conventional media entities; that it exempt broadcast programming other than television and AM radio from some traditional content controls; that it consider giving an expanded regulatory role to the Radio Regulatory Council, *see supra* note 243; that it issue ministerial ordinances formalizing its license grant and frequency allocation processes; and that it seek to promote research into digital broadcasting. *See Revision of the Broadcast and the Radio Laws*, NSK News Bulletin, June 1987, at 7-8; A. Kawaguchi & S. Kimura, *supra* note 442, at 12-13; Hanada, *supra* note 407, at 288-89.

MPT in 1988 submitted to the Diet a set of minor revisions of existing law based on the report, and secured quick passage on the representation that the revisions implicated no new policies. *See Revision of the Broadcast and Radio Laws, supra*; Omori, *supra* note 194, at 25. The revisions required the agency to issue its license allocation plans, and its anticoncentration and cross-ownership policies, as ministerial ordinances. The new law also exempted broadcasters, other than commercial television or NHK, from certain content controls, and granted statutory recognition to subscription broadcasting. *See Crux of Proposed Revision of Broadcast Law, supra*; Omori, *supra* note 194, at 27-29; Hattori, *supra* note 194, at 59.

regulatees. MPT's restrictions on entry in cable policymaking, however, ultimately proved unworkable. The agency could not successfully exclude whole classes of influential large corporations, backed by the big business community, from an important area of industrial policymaking. The regulatory and political interplay, together with market forces in a system characterized by disparate sources of bureaucratic power, made that status quo unstable and eased entry to the system.

## V. REGULATORY MODELS REVISITED

"The system by which a country organizes its broadcasting system," one analyst has written, "contains to the outside observer a strange coded version of that country's entire political culture."<sup>511</sup> Comparing the Japanese and the United States approaches to broadcast regulation sheds light not only on the legal cultures of the two countries, but also on the appropriate role of bargaining-oriented regulation in the modern administrative state.

In the area of conventional broadcast licensing, the U.S. moved from an informal system in which the Commission operated both by bargaining and by fiat to a more formal approach attempting to exclude all subjective factors from the licensing process, focusing only on the mechanically and objectively determined public interest. The Commission adopted substantive criteria purportedly susceptible to mechanical application by a hearing examiner, after a formal fact-finding proceeding, to govern choices among competing applicants for a single license authorization. That approach, however, did not succeed markedly at diversifying or democratizing broadcast ownership, and its unworkability has imposed great administrative costs.

The pure bargaining-oriented Japanese approach to conventional licensing, however, has been even more troubling. It has artificially reduced opportunities to produce and receive broadcast speech, has centralized media power, has helped promote blandness in broadcast content, and has encouraged an active political role in the licensing process. While the U.S. approach has succeeded to only a small degree in diversifying media control, the Japanese approach rejects the basic philosophy of diversity. The Japanese approach is designed to keep control of broadcast licenses within the circle of the socially and politically influential.

In the area of new technology policymaking, the bargaining orienta-

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511. A. SMITH, *THE SHADOW IN THE CAVE* 257 (1973).

tion of the U.S. approach initially led it to inhibit the innovation of cable television; but the system recovered in large part through the mechanism of a judicial system attempting to apply standards of administrative rationality. Policymaking in the U.S. was driven in part by the tension between client bargaining and judicial application of formal-rationality rules; newcomers into the communications field such as cable programmers and cable and satellite operators, shut out before the Commission, could appeal to the courts to open new doors for them.

The Japanese regulatory system, more strongly bargaining-oriented, also initially resisted new technology through its orientation to status-quo actors. That system recovered through competition between government organs in the market for clients and power; policymaking was driven by the tension between MPT's desire to continue bargaining within an existing client group and its need to look beyond that group in order to cope with an interbureaucratic political threat. Arguably, interbureaucratic competition, as in Japan, is a more successful way of pressuring a protectionist agency in general policymaking than is judicial review, as in the United States. In comparison with U.S.-style judicial review, interbureaucratic competition may yield pressure that is more gradual and continuous, and less random and episodic; it has brought Japan some media services, most prominently DBS, still undeveloped in the United States. The two policymaking systems, though, used their different mechanisms to reach roughly similar bottom lines regarding cable television; in both countries, cable television policy ultimately lurched forward through a combination of fortuitous, perhaps random, factors.

Both the U.S. and Japan, thus, reacted to the regulatory problems posed by broadcasting in internally consistent ways. With regard to both license allocation and planning for new technology, the United States experience has been marked by a powerful administrative formal-rationality overlay working significantly against an underlying bargaining-oriented approach. The interaction has often been haphazard, unclear and wasteful. It has worked relatively badly in the case of conventional broadcast licensing; in policymaking for new technology, by contrast, the tension lent significant dynamism to the system.

Japan put in place an administrative-law structure that reinforces, rather than undercuts, its bargaining-oriented regulation. Japan's pure bargaining approach is much less costly in terms of administering the regulatory system itself. Bargaining-oriented approaches, however, share the disadvantage that they require bargaining *within some group*: the

agency must not only define the ground rules of the bargaining, but it must choose the interests that will be represented, and the individuals who will speak for those interests. In making those choices, the agency will narrow the confines of the group to those actors who are familiar to it, who have other links with the agency, and who cannot safely be excluded without upsetting the system through appeals to other governmental entities. Those who are unfamiliar, who do not have such other links, and who can, for the time being, safely be excluded, will be excluded. In the U.S., formal-rationality elements check that tendency of bargaining-oriented regulation to limit the group of those with access to regulatory decisionmaking. In Japan, however, those checks are unavailable; the system relies on purely political checks to open up the bargaining group.

The U.S. and Japanese approaches have yielded sharply different results in the area of license allocation. While the U.S. approach works badly in this context, the Japanese approach seems even less tolerable, suggesting that bargaining works particularly badly for broadcast license allocation. Where a bargaining-oriented regulatory system excludes politically powerless outsider interests from license allocation, such interests simply lose; by definition they have no political clout, and they continue to be excluded from the ruling consensus that defines who may be awarded a broadcast license. Nor is it sufficient that new, politically powerful actors can use political levers to force their inclusion in the agency decisionmaking process. In the license allocation context, U.S. freedom-of-speech and communications policy thinking require more: they require that politically *powerless* actors be able to seat themselves at the bargaining table and gain control of some of the resources that the agency is distributing. Bargaining-oriented license allocation cannot provide that.

By contrast, the U.S. and Japanese approaches produced somewhat similar results in the new-technology policymaking context. Bargaining-oriented regulation may be relatively innocuous in general policymaking, because of the ability of bad broad policymaking to correct itself. In a dynamic regulatory situation, disadvantaged interests over time are able to make themselves heard in some forum, whether it be the courts, the legislature, or a competing agency. New technology carries with it its own commercial momentum; where its beneficiaries are excluded from the regulatory process, the regulatory system is not stable and is ultimately subject to pressures shifting it into a new shape. Thus, while the regulatory structure at any given moment is likely to be repressive, ineffi-

cient, and behind the times, those very factors will pressure it to greater change. While regulation will not catch up with changing technology and markets, neither will it be frozen in place. In Japan, even in the absence of a judicial mechanism to check agency parochialism, electronics interests were too powerful to be locked out forever from MPT decisionmaking; the mechanism of interbureaucratic competition ultimately gave them access to MPT's decisionmaking process.

Bargaining-oriented regulation, in sum, seems least problematic when parties excluded from the bargaining can successfully turn to some outside actor, such as the judiciary or a competing agency, with the power to shock the agency into opening up the bargaining process. The ability of an excluded party to open up the process in this way, however, may be more or less important depending on the context. That ability seems highly important, from a U.S. perspective, in the context of conventional broadcast licensing; the Japanese approach to conventional licensing, as a result, is disturbing. Political checks on MPT broadcast licensing are available only where the agency seeks to deny a politically powerful actor entree into the *ipponka* process. A process that merely allows access for all politically powerful actors, though, does not seem sufficient in the area of licensing speakers. Indeed, to strive deliberately for such a result seems antithetical to the tenets of the American communications-policy system.

Bargaining-oriented regulation seems more acceptable in the context of U.S. and Japanese regulatory policymaking to meet technological change in the cable arena. Both the U.S. and the Japanese systems did ultimately adapt to the new cable technology, albeit after significant lag time. Shocks were provided by the courts in the U.S. and by MITI in Japan; those shocks sharply undercut the cliquishness characterizing the old regime. In the U.S., checks on the agency became available through formal rationality: the courts were open to any petitioner capable of paying its legal fees and waiting out the judicial-review process. In Japan, they were available through bargaining. MITI's own desire to aggrandize its jurisdiction and power gave it incentives to champion the cause of any industry actor left out under the old system. Moreover, the class of actors with a strong incentive to revolutionize the old electronic mass communications regime included such powerful players as Mitsubishi and Mitsui.

My cautions regarding the failure of bargaining in conventional broadcast licensing, though, should be tempered by an awareness of the failures of the U.S. formal-rationality approach. The U.S. system for

choosing licensees, while avoiding some of the disadvantages of bargaining, has to a significant degree collapsed under its own weight. Its requirement that would-be licensees have inexhaustible supplies of time and legal resources has lent the system exclusionary aspects. While judicial review is available to counteract agency cliquishness in the selection process, there seems to be no working process on which judicial review can act. The fact that both bargaining and formal rationality seem to work so badly when it comes to license allocation raises a final question. Are there other problems inherent in conventional broadcast licensing, so that no regulatory style is equal to the task? The difficulty here may lie in the bedrock task of having the government "choose" a broadcast licensee by *any* means involving the application of non-trivial standards.<sup>512</sup> It may be that such an enterprise will inevitably work badly; there may be no criteria or processes by which the government can select broadcast speakers that do not disserve first amendment or communications-policy values. That, however, is another issue for another day.

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512. Selection methods that do *not* involve the exercise of judgment or the application of non-trivial standards include lotteries and auctions. As to the likelihood of seeing either of those as a major part of the U.S. broadcast regulatory system any time soon, see *supra* note 193.



## APPENDIX

*Government Officials*

Shigeru Tateno, Member, Radio Regulatory Council and former Councilor, Radio Regulatory Bureau, Ministry of Posts and Telecommunications (MPT), 5/20/87

Yoshiaki Imaizumi, Planning Section, Broadcast Administration Bureau, MPT, 7/14/87

Masakuni Esaki, Deputy Director, International Cooperation Division, Communications Policy Bureau, MPT, 6/25/87

Tadashi Tatsuishi, Deputy Director, Regulatory Division, Broadcast Administration Bureau, MPT, 6/25/87

*Industry Members*

Iwao Ishida, Director, CATV Program Suppliers Ass'n, 7/16/87

Yunosuke Ohkura, Vice President, Tokyo Broadcasting System, 5/4/87 & 7/13/87

Reimei Okamura, Head, International Affairs Department and news commentator, Asahi Broadcasting Corp., 6/25/87

Shiro Kobayashi, President, TV Shinshu, 7/16/87

Shigeru Kobayashi, President, Yamanashi Nichinichi Daily Newspaper and Yamanashi Broadcasting System, 7/21/87

Toshiyuki Shinohara, Deputy Director, Planning Division, National Association of Commercial Broadcasters, 4/22/87

Isao Suganuma, Executive Director, Nagano Broadcasting Systems, 7/8/87

Atsuo Tako, Managing Director, Shin-Etsu Broadcasting Corp., 7/8/87

Izumi Tadokoro, Director, Development Department, Newspaper Publishers and Editors Ass'n, 3/25/87 & 7/4/87

Sadao Hinohara, Managing Director, TV Kanagawa, 7/17/87

Hisashi Matsudaira, Research and Development Department, New Electronics Media Division, Dentsu, Inc., 7/23/87

Takeshi Yamada, President, Lake City Cablevision, 7/22/87

*Academics*

Noritsune Takagi, Professor (now Director), Institute of Journalism and Communications Studies, Tokyo University, 3/13/87

Koichi Kobayashi, Associate Professor, Seijo University Department of Arts and Literature, 3/20/87