

## NOTE

### CHOOSING BETWEEN THE NECESSITY AND PUBLIC INTEREST STANDARDS IN FCC REVIEW OF MEDIA OWNERSHIP RULES

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*Section 202(h) of the Telecommunications Act of 1996, as amended, directs the Federal Communications Commission (“FCC”) to review its media ownership rules every four years. But the statute contains an ambiguity regarding the standard of review that the FCC must apply during such proceedings. To retain a particular media ownership regulation, must the FCC merely show that the regulation advances one of the FCC’s three public-interest goals for media: competition, diversity, and localism—applying a “public interest” standard? Or must the FCC meet the higher burden of demonstrating that the regulation is also indispensable for maintaining competition, diversity, or localism at some threshold level—applying a “necessity” standard? The answer to this procedural question has important substantive consequences for media policy. But, despite recent case law on the issue, the controversy over the standard of review can recur with each FCC media-ownership proceeding. Furthermore, neither canons of construction nor legislative history settle the ambiguous nature of section 202(h). But the analysis of previous appellate courts, as well as several policy considerations like facilitating cost-benefit analysis and ameliorating agency capture, suggest that the FCC and the courts should apply a public-interest standard until Congress acts to clarify section 202(h).*

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## INTRODUCTION

The Telecommunications Act of 1996 (“Telecom Act”)<sup>1</sup> changed regulation of media ownership in both substantive and procedural ways. The substantive changes—relaxing national and local station ownership limits in the radio industry as well as market share limits in the television industry<sup>2</sup>—have received considerable study by commentators<sup>3</sup> and increasing attention from the public at large.<sup>4</sup> In addition to the arguably substantial effects of allowing larger radio and television companies,<sup>5</sup> the procedural changes of the Telecom Act have also had a significant impact. These lesser-known procedural changes have affected both the framing and the pace of the regulatory debate. In particular, by requiring the Federal Communications Commission (“FCC”) to review its remaining media ownership rules on a periodic basis, Congress ensured continuing controversy over media regulation.

This Note shows that a significant part of the controversy centers on the FCC’s review procedure itself, rather than the substantive rules being reviewed. The specific provision establishing the FCC’s review of its media ownership rules gives the Commission ambiguous instructions. The source of this ambiguity, section 202(h) of the Telecom Act, reads as follows:

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. The Act eliminated the National Radio Ownership Rule, Telecommunications Act of 1996 § 202(a), which had previously capped the number of commercial radio stations one company could own at forty, with subcaps of twenty AM and twenty FM, Revision of Radio Rules and Policies, 57 Fed. Reg. 42,701 ¶ 3 (Sept. 16, 1992). The Act loosened the Local Radio Ownership Rule from a sliding scale of three to four stations, *id.* ¶ 6, to a sliding scale of five to eight stations per local market, Telecommunications Act of 1996 § 202(b). Finally, the Act raised the market share limit contained in the Local Television Ownership Rule from twenty-five percent, Multiple Ownership of AM, FM and Television Broadcast Stations, 50 Fed. Reg. 4666 ¶ 3 (Feb. 1, 1985), to thirty-five percent, Telecommunications Act of 1996 § 202(c)(1)(B).

3. See, e.g., ERIC KLINENBERG, FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA’S MEDIA (2007); ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999); C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839 (2002).

4. See Press Release, The Pew Research Ctr. for The People & The Press, Public Wants Neutrality and Pro-American Point of View: Strong Opposition to Media Cross-Ownership Emerges (July 13, 2003), <http://people-press.org/reports/pdf/188.pdf>.

5. See, e.g., PETER DiCOLA, FALSE PREMISES, FALSE PROMISES: A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY (2006), <http://www.futureofmusic.org/images/FMCradiostudy06.pdf> (criticizing the easing of restrictions on radio station ownership).

Commission shall repeal or modify any regulation it determines to be no longer in the public interest.<sup>6</sup>

The provision has three important aspects: (1) it established biennial review of media ownership rules, which Congress has since changed to a quadrennial review;<sup>7</sup> (2) it placed the burden of proof on the FCC to defend any media ownership rule it seeks to retain; and (3) it set a standard of review that the FCC must meet to satisfy that burden of proof. Changes (1) and (2) are clear, but change (3) remains murky. The language of the first and second sentences of section 202(h) differs—“necessary in the public interest” versus “no longer in the public interest”—leaving the standard of review ambiguous.

This Note argues for a “public interest” interpretation of section 202(h) as opposed to a “necessity” interpretation. Part I explains the dispute between these two readings of section 202(h) and why the controversy will recur with each quadrennial review despite a recent Third Circuit case addressing the issue. Part II demonstrates that the language of section 202(h) is ambiguous, based on canons of statutory interpretation, legislative history, and two D.C. Circuit cases that first analyzed the provision. Part III uses recent judicial precedent, comparative analysis, historical legislative context, and other policy considerations to argue that the FCC and the courts should adopt a public interest interpretation of section 202(h) until Congress acts to resolve the provision’s ambiguity.

#### I. THE STANDARD OF REVIEW FOR THE FCC’S MEDIA OWNERSHIP RULES REMAINS CONTROVERSIAL

This Part explains the nature of the controversy between the two interpretations of section 202(h). The standard of review in the FCC’s quadrennial reviews of its media ownership rules will shape more than commission procedure. It also has important implications for how many media ownership rules the FCC can justify and retain. In 2004, the Third Circuit adopted the public interest interpretation of section 202(h)<sup>8</sup> but, as this Part shows, the court’s decision did not settle the issue. Section I.A illustrates how the public interest and necessity interpretations differ. Section I.B shows that the controversy over section 202(h) will continue because different circuit courts could have jurisdiction over future reviews and because courts could defer to the FCC if it changes its interpretation. Section I.C discusses failed legislative attempts to eliminate the ambiguity in section 202(h) and end the regularly occurring controversy.

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6. Telecommunications Act of 1996 § 202(h). Section 11 of the Communications Act of 1934 was actually a 1996 amendment to that statute, also contained in the Telecom Act. § 402(a). It set up a periodic review of FCC regulations on telecommunications service providers (e.g., telephone companies). *Id.*; see also *Cellco P’ship v. FCC*, 357 F.3d 88, 91–92 (D.C. Cir. 2004).

7. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629(3), 118 Stat. 3, 100.

8. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3rd Cir. 2004).

A. *The Public Interest Interpretation and the Necessity Interpretation Differ*

The controversy over section 202(h) stems from a conflict between the language of its first and second sentences. Regulated media companies claim that the *first* sentence of section 202(h) establishes the phrase “necessary in the public interest” as the standard of review.<sup>9</sup> The “necessity” interpretation understands “necessary” in the sense of “indispensable,” setting a high bar for retaining existing regulations.<sup>10</sup> The FCC and media-watchdog groups, however, have usually advocated a lower standard, based on the wording of the *second* sentence of section 202(h).<sup>11</sup> Since Congress directed the FCC to eliminate those rules that are “no longer in the public interest[.]” this argument goes, only the words “in the public interest” set the standard of proof.<sup>12</sup> Under the “public interest” interpretation, the appearance of the word “necessary” in the first sentence of section 202(h) means “‘useful,’ ‘convenient’ or ‘appropriate’ rather than ‘required’ or ‘indispensable.’”<sup>13</sup>

The public interest interpretation and the necessity interpretation suggest very different inquiries and would lead to different substantive media policies. Applying a public interest standard requires the FCC to ask whether a particular regulation furthers one of the FCC’s three central policy goals for media: competition, diversity, and localism.<sup>14</sup> If so, then the FCC may retain the regulation. The necessity standard, on the other hand, involves a heavier burden of justification. To demonstrate that a regulation meets the necessity standard, the FCC must do more than show that a regulation has a positive effect toward one of the Commission’s three policy goals. The FCC must also show that, without the regulation, the level of competition, diversity, or localism would drop below an acceptable threshold—the point at which market forces in the media industries, in the absence of regulation, result in anti-competitive mergers or produce programming with too little diversity

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9. See *Fox Television Stations v. FCC (Fox II)*, 293 F.3d 537, 539 (D.C. Cir. 2002) (referring to the television networks’ assertion that “‘necessary in the public interest’ means more than ‘in the public interest’”).

10. See Stuart A. Shorestein & Lorna Veraldi, *Defining the Public Interest in Terms of Regulatory Necessity*, 17 ST. JOHN’S J. LEGAL COMMENT. 45, 46–47 (2003) (discussing “necessity” and “public interest” as different standards).

11. See Brief for Respondents at 23–28, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951, & 03-4073), available at <http://www.mediaaccess.org/programs/diversity/FCCRespondentBrief.pdf>.

12. *Prometheus*, 373 F.3d at 391.

13. *Id.*

14. PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 64 (2001). For an explanation and analysis of what competition, diversity, and localism mean in broadcast regulation, see *id.* at 125–74, 203–24.

and localism.<sup>15</sup> Requiring this additional evidence means that the necessity standard sets a higher bar for regulations. As a result, the necessity standard would probably lead the FCC to eliminate most, if not all, of its media ownership rules.<sup>16</sup>

B. *Periodic Review, Randomly Selected Appellate Jurisdiction, and  
Judicial Deference Will Generate Continual Controversy*

Despite a recent Third Circuit ruling on the meaning of section 202(h), the process of quadrennial review, in combination with jurisdictional rules and administrative-law principles, will foster continual controversy over the provision's standard of review. In *Prometheus Radio Project v. FCC*, the Third Circuit chose the public interest interpretation, writing:

In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified. Yet no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis.<sup>17</sup>

The Third Circuit declined to read section 202(h) as embodying a presumption against retaining media ownership rules, rejecting the necessity interpretation.<sup>18</sup> But *Prometheus* does not settle the question of how to interpret section 202(h).

After future quadrennial reviews, a judicial panel will select the appellate court randomly if parties appeal in multiple circuits. This procedure allows for the possibility that a different appellate court will adopt a different interpretation than the Third Circuit and bind the FCC to an alternative standard under section 202(h). The FCC will necessarily revisit section 202(h) in each quadrennial review because the provision requires the FCC to conduct the proceeding and interpret the standard of review. This procedure provides the parties on each side of the media ownership debate—regulated media companies and public interest groups—a guaranteed opportunity to challenge the FCC's statutory interpretation. As long as they file timely appeals in multiple circuit courts, the case could end up in any circuit court due to the random selection process used by the Judicial Panel on Multidistrict

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15. See *Fox Television Stations, Inc., v. FCC (Fox I)*, 280 F.3d 1027, 1042 (D.C. Cir.) (applying a necessity standard and assessing whether one of the FCC's rules was necessary to "safeguard" competition and diversity), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

16. See Rachel M. Stilwell, *Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*, 26 LOY. L.A. ENT. L. REV. 369, 371 (2006) (discussing judicial opinions opting for the necessity interpretation as "presumptively deregulatory").

17. *Prometheus*, 373 F.3d at 395 (footnote omitted).

18. For a detailed analysis of the *Prometheus* court's reasoning and the key precedent cited, see *infra* Section III.A.

Litigation.<sup>19</sup> Since the FCC's media ownership rules apply nationwide, any circuit court (except the Federal Circuit) could have jurisdiction. A different circuit court could come to a different conclusion than the Third Circuit and force the FCC to follow their ruling as the most recent appellate ruling on the issue. Although the regulated media companies advocating the necessity interpretation lost at the appellate level in *Prometheus*, and although the Supreme Court denied certiorari,<sup>20</sup> they will still have multiple and continuing opportunities to challenge the Third Circuit's interpretation of section 202(h).

Principles of administrative law also suggest that the controversy will continue. If the FCC reversed its previous position on section 202(h), a reviewing court may well defer to the FCC's new interpretation under step two of the *Chevron* doctrine, as long as the court found under step one that the language of section 202(h) was ambiguous.<sup>21</sup> Under *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*,<sup>22</sup> the FCC would still have to survive "arbitrary and capricious" review, which some commentators have described as "step three" of *Chevron*.<sup>23</sup> But at that stage, the FCC could receive additional deference because its interpretation reflects the policy of a newly elected administration.<sup>24</sup> In theory, each successive quadrennial review could occur under a different president. If either regulated media companies or media watchdog groups could convince the FCC under a new administration to change its stance, then a reviewing court might well defer to the FCC's new interpretation, even if such deference would reverse that particular circuit's previous decisions. This agency-based dynamic would also render the section 202(h) controversy perpetual, short of congressional action.

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19. 28 U.S.C. § 2112(a) (2000); *Prometheus*, 373 F.3d at 388–89 ("Under 28 U.S.C. § 2112(a), petitions to review administrative orders filed in different circuit courts within the first ten days of the appeal period trigger a lottery conducted by the Judicial Panel on Multidistrict Litigation.").

20. *FCC v. Prometheus Radio Project*, 545 U.S. 1123 (2005), *denying cert. to*, 373 F.3d 372 (3d Cir. 2004).

21. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (instituting a two-step process for reviewing courts: first, determining whether a statute is ambiguous and, second, if the statute is ambiguous, determining whether the administrative agency's interpretation is reasonable).

22. 463 U.S. 29 (1983) (overturning the National Transportation Highway Safety Administration's revocation of its own previously promulgated seatbelt and airbag regulation as insufficiently justified).

23. *See* STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 433–34 (5th ed. 2002).

24. "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting).

The FCC's 2006 quadrennial review<sup>25</sup> indicates that interested parties do not consider the issue settled and suggests that they will seek to take advantage of these jurisdictional and administrative-law mechanisms. In its initial notice of proposed rulemaking, the Commission does no more than quote the statutory language and cite the relevant opinions; it does not offer an interpretation of section 202(h).<sup>26</sup> But the mere fact that the proceeding occurs under the authority of section 202(h) has led several parties filing comments to argue for a "deregulatory" slant to the FCC's standard of review.<sup>27</sup> Clear Channel Communications goes so far as to urge the FCC to change its interpretation from a public interest standard to the higher necessity standard.<sup>28</sup> Applying the whole act rule,<sup>29</sup> dictionary definitions for the term "necessary,"<sup>30</sup> and the rule against surplusage,<sup>31</sup> Clear Channel has explicitly urged the FCC to defy the Third Circuit's interpretation in *Prometheus*. In the future, parties on either side of the media ownership debate will have periodic opportunities to argue for their preferred interpretation of section 202(h).

### C. Congress has not Adopted a Legislative Solution

Legislation that would resolve the controversy over section 202(h) has not succeeded in Congress. Because of random appellate-court selection and judicial deference to changing agency interpretations, only legislation will avoid the continuing controversy. Two bills discussed by the Senate Commerce Committee in 2003 would have resolved the ambiguity in section 202(h). The committee held several hearings about media consolidation

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25. The FCC launched the proceeding on June 21, 2006 and has not completed its review as of this writing. 2006 Quadrennial Regulatory Review; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules, 71 Fed. Reg. 45,511 (Aug. 9, 2006) (to be codified at 47 C.F.R. pt. 73).

26. *Id.*

27. *See, e.g.*, Comments of the National Ass'n of Broadcasters at 4–5, Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act, FCC MB Docket Nos. 06-121, 02-277, 01-235, 01-317, & 00-244 (Oct. 23, 2006).

28. Comments of Clear Channel Communications, Inc. at 5–6, Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act, FCC MB Docket Nos. 06-121, 02-277, 01-235, 01-317, & 00-244 (Oct. 23, 2006) [hereinafter Comments of Clear Channel Communications].

29. *See infra* text accompanying notes 53–55.

30. *See* Comments of Clear Channel Communications, *supra* note 28, at 5 (citing WEBSTER'S THIRD INTERNAT'L DICTIONARY 1511 (1976) and OXFORD ENGLISH DICTIONARY (2001)).

31. Clear Channel's surplusage argument is that the Administrative Procedure Act ("APA") already requires any agency to continually justify its rules in light of changing conditions. If one interprets Section 202(h) to do no more than that, the argument goes, then it has been rendered superfluous, calling the entire interpretation into question. *Id.* at 6. The argument blurs the distinction between a vague notion of continual justification under the APA and the very specific provision represented by section 202(h)'s quadrennial review.

even before the FCC Order of June 2, 2003.<sup>32</sup> The FCC's standard of review remained contentious in both houses of Congress in 2004.<sup>33</sup> Neither of the two bills was passed by the full Senate and neither received support from House leadership.<sup>34</sup> The conference committee removed the proposed clarifying language for section 202(h) even as Congress adopted the shift from a biennial to a quadrennial review.

The first of these bills, the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003, would have resolved the ambiguity of section 202(h) by amending it in two ways.<sup>35</sup> First, it eliminated the word "necessary," so the FCC would justify rules by a simple "in the public interest" standard.<sup>36</sup> Second, the bill listed four actions available to the FCC: (a) strengthening or broadening a rule; (b) limiting or narrowing a rule; (c) eliminating a rule; and (d) retaining a rule.<sup>37</sup> A second bill, the FCC Reauthorization Act of 2003, had language changing the FCC's biennial review into a quadrennial review.<sup>38</sup> It would also have clarified Congress's intent with respect to Section 202(h) in exactly the same way as the Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act.<sup>39</sup> The bills' failure leaves the statutory language ambiguous.

## II. SECTION 202(H) OF THE TELECOMMUNICATIONS ACT OF 1996 IS AMBIGUOUS

This Part argues that Section 202(h) is inherently ambiguous and does not clearly set the standard of review that the FCC should apply in the quadrennial reviews of its media ownership rules. It examines the problems presented by the wording and context of section 202(h). Looking to traditional guides of statutory interpretation, Section II.A applies canons of construction, while Section II.B explores the legislative history of Section

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32. *E.g.*, Press Release, U.S. Senate Comm. of Commerce, Sci., & Trans., Ownership in Radio Industry Hearing Set for January 30 (January 24, 2003), <http://commerce.senate.gov/~commerce/press/03/2003124A29.html> (last visited May 17, 2007).

33. That the committee even sought to clarify section 202(h) reinforces the claim, made in Part II, that section 202(h) is ambiguous.

34. See Congressional Update, *Free Press Congressional Update: Congressional Session Winds Dows—Where Do We Stand?*, FREE PRESS, Oct. 31, 2003, <http://www.freepress.net/congress/update.php?id=26> (last visited May 17, 2007).

35. S. 1046, 108th Cong. § 5 (2003), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01046>: (last visited May 17, 2007). The bill narrowly passed in the Senate Commerce Committee but did not pass in the full Senate.

36. *Id.*

37. *Id.*

38. S. 1264, 108th Cong. § 4 (2003), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01264>: (last visited May 17, 2007). In the Consolidated Appropriations Act, Congress enacted this proposal, altering Section 202(h) from a biennial review to a quadrennial review. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629(3), 118 Stat. 3, 99–100.

39. S. 1264.

202(h). Section II.C surveys two cases in the D.C. Circuit Court of Appeals that illustrate the difficulty of the interpretive problem in practice.

### A. *Canons of Construction Cannot Resolve the Ambiguity*

Courts and the FCC have, with good reason, had difficulty making sense of Congress's directive in Section 202(h) of the Telecom Act. Three canons of statutory interpretation—plain meaning, *expressio unius*, and the whole act rule—have particular relevance to the language of section 202(h). While many judges and commentators have inveighed against application of *expressio unius*<sup>40</sup> and the whole act rule,<sup>41</sup> *expressio unius* can be a helpful canon of construction in some contexts,<sup>42</sup> and many regulated parties have argued for applying the whole act rule to section 202(h).<sup>43</sup> Because the plain meaning leads to impractical results and because the other two canons conflict, this section concludes that canons of statutory interpretation alone are insufficient to resolve the ambiguity.

#### 1. *Plain Meaning*

The plain meaning of section 202(h) involves a conflict between the provision's first and second sentences. The FCC must repeal media-ownership rules failing to meet a certain standard—but it's difficult to tell what standard. The choice of the verb “shall” in the first sentence of section 202(h) indicates that the FCC must engage in a quadrennial review and must make a determination about each rule.<sup>44</sup> That much is clear. But the second sentence's failure to repeat the same language as the first sentence implies that the statute expresses two different standards.<sup>45</sup> On its face, section 202(h)

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40. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 405 (1950) (arguing that for every canon of construction, there is an opposing canon).

41. Judge Richard Posner points out that an ambiguous portion of a statute could be a legislative accident; it may be a mistake to assume that a legislature has considered every implication of its language. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 281 (1985), quoted in WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 651 (2d ed. 1995).

42. See, e.g., *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 136 (1989) (Brennan, J., concurring), noted in ESKRIDGE & FRICKEY, *supra* note 41, at 639.

43. See, e.g., Comments of Clear Channel Communications, *supra* note 28, at 2–6.

44. The may/shall canon of construction holds that “shall” implies a limit on discretion. The notion of limiting discretion might be interpreted broadly to inform the whole purpose of the statute. But in ordinary usage, may and shall can be interchangeable, so this canon of construction (like all canons) is highly disputable. ESKRIDGE & FRICKEY, *supra* note 41, at 642.

45. The rule against surplusage indicates that the word “necessary” must mean something. See ESKRIDGE & FRICKEY, *supra* note 41, at 644. On the other hand, the term may simply refer to the “public interest, convenience, and necessity” standard, borrowed by communications law from public utility law. In that case, the term “necessary” would merely be an allusion to a standard that has simply come to mean “public interest.” See Shorestein & Veraldi, *supra* note 10, at 45 & n.2, 46 (opining that “convenience and necessity” had merely tagged along with “public interest” when applied to “broadcast” in the Communications Act of 1934); cf. STUART MINOR BENJAMIN ET AL., *TELECOMMUNICATIONS LAW AND POLICY* 59 (2001) (describing the “sloppy, last-minute scramble”

instructs the FCC to determine which rules are “necessary in the public interest” but eliminate the rules that are “no longer in the public interest.”<sup>46</sup> The provision does not explicitly instruct the FCC to eliminate the rules that are no longer “necessary.” The standard of proof changes from the first sentence to the second. Applied literally, the language of section 202(h) indicates that the FCC should: (1) generate a list of rules failing to be “necessary” but then (2) eliminate only the subset of those rules not in the public interest at all. This two-step process is the plain meaning of section 202(h).

Although the plain meaning of section 202(h) is not contradictory, it could lead to wasteful applications. The second step would render the determination of necessity in the first step functionally separate from the review process in the second step. Such an exercise would waste scarce agency resources. On the other hand, one might find this interpretation plausible; section 202(h) could be specifying an initial “fact-finding” mission with one criterion and a subsequent review step with an eye towards a less stringent criterion.<sup>47</sup> But courts have rejected an analogous two-step process as impractical and wasteful.<sup>48</sup>

## 2. Expressio Unius

The principle of *expressio unius est exclusio alterius* (“inclusion of one thing indicates exclusion of the other”<sup>49</sup>) supports the public interest interpretation. *Expressio unius* can be used to contrast language choices in separate statutory provisions. The language of section 202(h) contrasts with the language of a different biennial review provision in the Telecom Act that applied to the telecommunications industry rather than the broadcasting industry. Section 402(a) of the Telecom Act added section 11 to the Communications Act of 1934, providing:

- (a) Biennial review of regulations
  - In every even-numbered year (beginning with 1998), the Commission—
  - (1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

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in shifting from “public convenience, interest, or necessity” to “public interest, convenience, and necessity” in the Communications Act of 1934). The conflict between the rule against surplusage and this possible historical allusion only bolsters the claim that the statutory language of Section 202(h) is ambiguous.

46. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 65, 111–12.

47. Daniel Loeffler suggested this argument. The “fact-finding” step would involve determining which media ownership rules are necessary, storing that information, and providing a catalogue of research findings with which the FCC Commissioners could conduct their review. The review step, then, would involve eliminating rules that did not serve the public interest.

48. *See, e.g.*, *Cellco P’ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004) (calling a similar two-step process of the FCC adopting rules that are “in the public interest” but then eliminating those rules that fail to meet the higher bar of being “necessary in the public interest” as “absurd”).

49. ESKRIDGE & FRICKEY, *supra* note 41, at 638–39.

- (2) shall determine whether any such regulation is *no longer necessary in the public interest* as the result of meaningful economic competition between providers of such service.
- (b) Effect of determination  
The Commission shall repeal or modify any regulation it determines to be *no longer necessary in the public interest*.<sup>50</sup>

In section 402(a), Congress used very strict parallelism, in contrast to the first sentence–second sentence variation in Section 202(h). The determination with respect to regulations of telecommunications services is phrased negatively (“*no longer necessary*”),<sup>51</sup> whereas section 202(h) phrases the standard positively (“determine whether any of such rules are necessary”).<sup>52</sup>

Applying *expressio unius* involves comparing sections 202(h) and 402(a). Congress eschewed parallelism and included the “no longer necessary” language in the second sentence of section 402(a), whereas it did not include such language in the second sentence of section 202(h). For this reason, section 402(a) appears to contain a higher standard of review than section 202(h). This suggests that Congress intended the FCC to conduct its periodic review of broadcast media ownership rules according to the lower, public interest standard. Another prominent canon, however, counsels otherwise.

### 3. Whole Act Rule

The whole act rule prescribes interpreting each section of a statute in the context of the whole enactment,<sup>53</sup> an approach that, in the case of section 202(h), supports the necessity interpretation. Parsing the language of section 202(h) suggests that it contains a lower standard, but an analysis of the Telecom Act’s overall policy thrust suggests the reverse. The Telecom Act eliminated many regulations, made others less restrictive, and put review provisions in place that, at the very least, required a debate on the remaining restrictions on media ownership every two (now four) years.<sup>54</sup> This deregulatory context implies that Congress intended to create a necessity standard in section 202(h) of the Telecom Act, because a higher standard of review would lead the FCC to eliminate more rules in its periodic reviews.<sup>55</sup>

Applying the whole act rule to section 202(h) produces the opposite result of *expressio unius* analysis. Together, the canons imply that section 202(h) is ambiguous, because applying *expressio unius* and applying the

50. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161 (2000) (emphases added).

51. *Id.* (emphasis added).

52. Telecommunications Act of 1996 § 202(h), 110 Stat. 56, 111–12.

53. ESKRIDGE & FRICKEY, *supra* note 41, at 643.

54. Fox Television Stations, Inc. v. FCC (*Fox I*), 280 F.3d 1027, 1033 (D.C. Cir.) (explaining Congress’s deregulatory purpose in enacting the Telecomm Act), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002).

55. For a discussion of the hostility to regulation among some members of Congress, especially in the House of Representatives, see *infra* text accompanying notes 66–67 and Section II.B.2.

whole act rule produce equally sensible but conflicting results. Thus, the principles of statutory interpretation most relevant to section 202(h) conflict and do not clarify which standard of review the provision contains.

### B. *The Legislative History Does not Provide Conclusive Guidance*

Legislative reports<sup>56</sup> offer a way to investigate how Congress understood the language of section 202(h) in February 1996. Both “public interest” and “necessity” hark back to the historical Communications Act of 1934 standard (borrowed from public utility law), “public interest, convenience, and necessity.”<sup>57</sup> Historically, however, the FCC and Congress have emphasized the term “public interest” in their statutory and regulatory phrasing rather than “necessity.”<sup>58</sup> The legislative reports might resolve this tension in Congress’s policy directive to the FCC and explain Congress’s decision to employ differing language in its biennial review provisions, section 202(h) and section 402(a).

This Section analyzes the legislative history of section 202(h) the Telecom Act in the Senate, the House of Representatives, and the Conference Committee in turn. While some commentators and judges have criticized judicial use of legislative history,<sup>59</sup> it remains a very common tool in statutory construction.<sup>60</sup> Unfortunately, the legislative reports suggest that the two houses of Congress did not agree on an interpretation of section 202(h) and failed to reach an unambiguous compromise.

#### 1. *Senate Legislative History Indicates a Moderate View*

The Senate used relatively moderate language in discussing the proposed periodic review provision of the Telecom Act. In a September 14, 1994 report, the Senate Commerce Committee discussed its goals in requiring continued FCC review of its media regulations.<sup>61</sup> The report states that the FCC will choose whether to “modify or remove its national and local ownership rules

56. This Note will focus on Senate and House reports more than floor speeches because the floor speeches focused on broad policy goals rather than the provision-by-provision discussion of reports.

57. BENJAMIN ET AL., *supra* note 45, at 17, 59.

58. Shorestein & Veraldi, *supra* note 10, at 45–46 (“Over the years most interpretations have focused on ‘public interest,’ to the exclusion of ‘convenience’ or ‘necessity.’”); cf. Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 383 (2006) (“Given that each side of the debate over regulating media ownership invokes the ‘public interest’ as supporting its position, it is not surprising that the opposing sides have developed two distinct definitions of that concept.”).

59. *E.g.*, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) (questioning whether legislative history is “a legitimate and reliable tool of interpretation” and offering an interpretation of the legislative history contrary to that of the majority).

60. *E.g.*, *id.* at 704 (majority opinion) (“Our conclusion that the Secretary’s definition of ‘harm’ rests on a permissible construction of the ESA gains further support from the legislative history of the statute.”).

61. S. REP. NO. 103-367, at 98–99 (1994) (discussing what was then section 701, “Review of broadcast rules,” in the early Senate version of the Telecom Act).

for radio and television broadcasters,”<sup>62</sup> notably declining to employ such verbs as “retain” or “strengthen.” The Commerce Committee characterized the media ownership rules as dated and worried about incumbent broadcasters’ ability to compete with new, less regulated media companies:

Broadcasters and television networks should not continue to be subject to regulations which are outmoded or simply inappropriate to the new competitive environment which this legislation is attempting to facilitate. At the same time, the Committee has concerns about the diversity of programming and need for locally oriented programs. Accordingly, the Committee intends that the FCC review carefully and comprehensively these various regulations and make such changes as are consistent with the public interest.<sup>63</sup>

This language puts a more neutral spin on the “modify or remove” language earlier in the report. The Commerce Committee concluded that the FCC would make “such changes” to the media ownership rules—a neutral phrase that could encompass repeal, modification, or strengthening of rules. Furthermore, the Commerce Committee’s intention that the FCC take actions “consistent” with the public interest conveys no deregulatory bias or requirement of logical or empirical necessity. Under this language, the FCC would conduct serious research into the rules, but would also have flexibility to continue to foster the goals of diversity and localism with regulation.

Although the legislative history reveals the moderate position of the majority in the Senate, a few senators articulated the minority position in favor of deregulation. The senators’ decision to express this view, however, simply reinforces how moderate the majority position was. The later Senate Commerce Committee report, dated March 30th, 1995, uses very neutral language, further supporting the idea that the Senate envisioned a public interest standard. That report says, “The FCC is also required to review its ownership rules biennially, as part of its overall regulatory review required by new section 259 of the 1934 Act.”<sup>64</sup> In his additional commentary, Ernest “Fritz” Hollings (D-SC) does not discuss instituting any slant toward deregulation in the FCC’s periodic review.<sup>65</sup> The minority view in the Senate, articulated in the report by Conrad Burns (R-MT), Robert Packwood (R-OR), and John McCain (R-AZ), was that the Senate bill, as of 1995, did not go far enough towards deregulation. Their view advocated “total deregulation” for radio<sup>66</sup> and a “guaranteed end to regulation.”<sup>67</sup>

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62. *Id.* at 98.

63. *Id.* at 99.

64. S. REP. NO. 104-23, at 42 (1995) (discussing what was then Section 207(b) of the 1995 Senate version of the Telecom Act).

65. *Id.* at 69 (Additional Views of Senator Hollings) (“[The] FCC is instructed to review these rules every two years.”).

66. *Id.* at 65 (Additional Views of Senator Burns).

67. *Id.* at 71 (Minority Views of Senators Packwood and McCain). It is not clear that the senators meant to refer to broadcast as well as telecommunications in their comments; their comments mostly concerned telecommunications.

Some have suggested that the biennial review provision represents a concession won by the dissenters in the Senate. For example, one account claims that Republican senators actually expected the FCC to fail to meet its burden of research in the biennial review, leading to more deregulation.<sup>68</sup> But the public record does not provide any evidence to support this account. The Senate did not explicitly agree on a procedure with a substantive slant toward eliminating rules as a substitute for repealing the media ownership rules outright. Both the early and late Commerce Committee reports indicate that the Senate version of the biennial review represented a substantively neutral procedural provision that would allow the FCC to continue to consider the goals of diversity and localism.

## 2. House Legislative History Shows a Deregulatory Slant

In contrast to the Senate's moderate approach, the early House version of the Telecom Act sought to deregulate media fully, indicating support for the necessity interpretation of section 202(h). The midterm elections of 1994 motivated the House's deregulatory zeal.<sup>69</sup> The July 24, 1995, House Commerce Committee report on the Communications Act declared: "In a competitive environment, arbitrary limitations on broadcast ownership and blanket prohibitions on mergers or joint ventures between distribution outlets are no longer necessary."<sup>70</sup> Section 302 ("Broadcast Ownership") of the draft House bill would have eliminated all FCC restrictions on broadcast ownership except the national television market share cap, relaxing the restriction from twenty-five percent to fifty percent within a year after passage.<sup>71</sup> The House sought to eliminate the national and local radio ownership rules, the cable-broadcast ownership rules, and newspaper-broadcast cross-ownership rules, which would have left only the national television market share cap in place for biennial review by the FCC.

Because of its desire to eliminate most media ownership rules entirely, the House did not provide details regarding the review provision. The House's draft bill includes only a one-time review of the rules, rather than a biennial review: "Within 3 years after such date of enactment, the Commission shall conduct a study on the operation of this paragraph and submit a report to the Congress on the development of competition in the television marketplace and the need for any revisions to or elimination of this paragraph."<sup>72</sup> Its sole, narrow review provision for the national television market share cap did not employ the "necessary in the public interest" language, though it did use the word "need." Speculating about the House's intent,

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68. See Alicia Mundy, *Put the Blame on Peggy, Boys*, CABLE WORLD, June 30, 2003, at 26-27; see also *infra* text accompanying note 175.

69. PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 53-55 (1999).

70. H.R. REP. NO. 104-204, pt. 1, at 55 (1995).

71. *Id.* at 220.

72. *Id.* at 41.

however, one can say with some assurance that the House—if it could not achieve total deregulation—would have preferred stringent review of media ownership rules with a deregulatory slant.

### 3. *The Conference Report does not Clarify which View Prevailed*

Unfortunately, the conference report from January 31, 1996<sup>73</sup> essentially recites the ambiguous statutory language of section 202(h), providing no additional clarification of the standard to be employed in the FCC's biennial review. After noting the gap between the Senate's inclusion of a biennial review provision and the House's approach of outright deregulation with a single FCC study to follow, the conference report states:

Subsection (h) directs the Commission to review its rules adopted under section 202 and all of its ownership rules biennially. In its review, the Commission shall determine whether any of its ownership rules, including those adopted pursuant to this section, are necessary in the public interest as the result of competition. Based on its findings in such a review, the Commission is directed to repeal or modify any regulation it determines is no longer in the public interest.<sup>74</sup>

The discussion merely mimics the bill itself, providing little interpretive assistance. It does not make clear whether the Senate's or the House's vision won out; this uncertainty leaves the interpretation of section 202(h) ambiguous.

Some aspects of the legislative history suggest that the final, enacted form of section 202(h) reflects the Senate's moderate position. Many media ownership rules survived the congressional conference on the Telecom Act, as did the Senate's idea of biennial review, while the House's notion of a single FCC study within three years vanished.<sup>75</sup> The conference committee may have adopted the neutral Senate version of broadcast regulation as part of an exchange for accepting the House's version of various provisions regarding the cable and telecommunications industries. Patricia Aufderheide, in her history of the Telecom Act, indicates that the conference negotiations largely focused on the bill's treatment of the incumbent telephone companies.<sup>76</sup> In her account, broadcasters became involved later in the legislative process than the phone companies and did not receive all the deregulatory provisions they had sought.<sup>77</sup>

Unfortunately, other aspects of the legislative history foreclose the decisive conclusion that the Senate's moderate interpretation won the day. Aufderheide's account also notes that broadcasters achieved relaxation of

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73. The Telecom Act passed both houses of Congress on February 1, 1996 and President Clinton signed the bill on February 8, 1996.

74. See H.R. REP. NO. 104-458, at 161-64 (1996) (Conf. Rep.).

75. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (requiring the FCC to review its media ownership rules "biennially").

76. AUFDERHEIDE, *supra* note 69, at 59-60.

77. *Id.* at 48-49, 60.

many media ownership rules and a chance every two years to challenge the regulations that remained.<sup>78</sup> Moreover, the term “consistent” in the early Senate version gave way to the term “necessary” as a modifier for “public interest,” suggesting that Congress wanted the FCC to scrutinize the media ownership rules thoroughly.<sup>79</sup> The language “repeal or modify” entered the final bill, while no language appears about the goals of diversity and localism.<sup>80</sup> Neither the Senate’s nor the House’s position on biennial review can guide interpretation of section 202(h) definitively.

### C. *The D.C. Circuit’s Analysis Illustrates the Ambiguity of Section 202(h)*

In 2002, two cases in the D.C. Circuit Court of Appeals dealt with challenges to FCC decisions<sup>81</sup> to retain certain media ownership rules in its 1998 biennial review.<sup>82</sup> They were the only cases to address Section 202(h) directly until the Third Circuit decided *Prometheus*. Both cases hinged on the standard of review in section 202(h) and highlight the ambiguity of section 202(h). Even for the brief period that the D.C. Circuit chose the necessity interpretation over the public interest interpretation, judges in the circuit who agreed on the necessity interpretation differed on exactly how high to make the necessity standard.

#### 1. Fox Television Stations

The D.C. Circuit, for a short time, opted for the necessity interpretation of section 202(h). In *Fox Television Stations, Inc. v. FCC* (“*Fox I*”), media companies challenged the FCC’s decision to retain two media ownership rules—the Cable–Broadcast Cross-ownership rule (CBCO) and the National Television Station Ownership rule (NTSO)—in its 1998 biennial review.<sup>83</sup> The D.C. Circuit ordered the FCC to repeal the CBCO after concluding there was no justification for the rule but remanded the NTSO to the FCC for further consideration.<sup>84</sup> The court held that, to retain a media ownership

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78. *Id.* at 67–69.

79. *Compare* Telecommunications Act of 1996 § 202(h) (requiring the FCC to “determine whether any of such rules are necessary in the public interest”), with S. REP. NO. 103-367, at 99 (1994) (requiring the FCC to “review carefully and comprehensively these various regulations and make such changes as are consistent with the public interest”).

80. *Compare* Telecommunications Act of 1996 § 202(h) (“The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.”), with S. REP. NO. 103-367, at 99 (“[t]he Committee has concerns about the diversity of programming and need for locally oriented programs.”)

81. *See* *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC* (*Fox I*), 280 F.3d 1027 (D.C. Cir.), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002).

82. 1998 Biennial Regulatory Review Pursuant to Section 202 of the Telecomm. Act of 1996, 15 F.C.C.R. 11058, 11061 (Fed. Commc’ns Comm’n May 26, 2000).

83. *Fox I*, 280 F.3d at 1033–34.

84. *Id.* at 1049, 1053.

rule, the FCC must find that rule to be “necessary ‘in the public interest.’”<sup>85</sup> The court interpreted these words as establishing a necessity standard, relying heavily on its interpretation of the Telecom Act’s—and section 202(h)’s—general purpose.<sup>86</sup> The court found that Congress, through section 202(h) of the Telecom Act, sought “to continue the process of deregulation.”<sup>87</sup> Rather than the “incremental” approach urged by the FCC, the court wrote that “the mandate of § 202(h) might better be likened to Farragut’s order at the battle of Mobile Bay (‘Damn the torpedoes! Full speed ahead.’).”<sup>88</sup>

On rehearing,<sup>89</sup> however, the court reversed itself and again left the standard ambiguous. The court abandoned its initial interpretation of section 202(h), finding it inessential to the holding in *Fox I*:

We agree with the Commission that the subject paragraph is itself not necessary to the opinion and should be modified. The court’s decision did not turn at all upon interpreting “necessary in the public interest” to mean more than “in the public interest”: It was clear the Commission failed to justify the NTSO and the CBCO Rules under either standard. . . . Thus, we decline the Commission’s and the intervenors’ request that we interpret “necessary” in their favor at this time, and we accept the Commission’s alternative invitation to modify the opinion in order to leave this question open.<sup>90</sup>

The original *Fox I* decision found that the FCC had defended the NTSO with insufficient evidence and had defended the CBCO with no relevant evidence at all.<sup>91</sup> Therefore, to remand the NTSO and vacate the CBCO the court only had to hold that section 202(h) placed the *burden* of proof on the FCC.<sup>92</sup> The *standard* of proof, however, was irrelevant to the outcome of *Fox I*.<sup>93</sup> The court might have chosen to leave the question open on rehearing in recognition of the important policy consequences of the standard of proof.<sup>94</sup>

85. *Id.* at 1041 (quoting Telecommunications Act of 1996 § 202(h)).

86. *Id.* at 1042.

87. *Id.* at 1033.

88. *Id.* at 1044.

89. *Fox Television Stations, Inc. v. FCC (Fox II)*, 293 F.3d 537 (D.C. Cir. 2002).

90. *Id.* at 540.

91. *Fox I*, 280 F.3d at 1041 (criticizing FCC for citing “a single, barely relevant study” to support the NTSO); *id.* at 1053 (“[T]he [FCC] failed to respond to the objections put before it.”).

92. In *Fox I*, the court had observed that “Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.” *Id.* at 1048. It appears from the court’s decision upon rehearing in *Fox II* that this presumption could be effected through changing the burden of proof alone, without necessarily setting up the highest possible standard of proof.

93. See *Fox II*, 293 F.3d at 541 (“Even if ‘necessary in the public interest’ means simply ‘continues to serve the public interest,’ for the reasons given above and below, the Commission’s decision not to repeal or to modify the NTSO and the CBCO Rules cannot stand.”).

94. The court in *Fox II* relied explicitly only on the parties in *Fox I* not having briefed the issue. *Id.* at 540. But reopening a question on rehearing suggests that the court recognized that the standard of review was a key policy issue, meriting a full briefing.

## 2. Sinclair Broadcast Group

*Sinclair Broadcast Group, Inc. v. FCC*<sup>95</sup> demonstrates that section 202(h) can be ambiguous even after a circuit court has chosen one of the two possible interpretations. In this case, the plaintiff challenged the Local Television Ownership Rule (LTO) as arbitrary. The LTO allowed ownership of two television stations in a single market only if one of the stations did not rank in the top four in ratings and if eight independent owners of television stations would exist in that market after the merger.<sup>96</sup> Because the D.C. Circuit decided the case during the four-month period between *Fox I* and *Fox II*,<sup>97</sup> the court applied the higher necessity standard established in *Fox I*.<sup>98</sup> The court's majority remanded parts of the LTO to the FCC but held that parts of the LTO had been justified adequately. Despite the high standard of proof, the *Sinclair* court did note the FCC's discretion to draw quantitative lines and to exercise its judgment, informed by its expertise in the subject area.<sup>99</sup> The notion that the FCC has discretion stands in tension with the necessity interpretation, because that interpretation limits the agency's discretion in favor of a deregulatory presumption.

Judge Sentelle concurred in part and dissented in part, with his disagreement focusing on the contradiction between adopting the necessity interpretation and leaving the FCC some discretion.<sup>100</sup> Judge Sentelle argued that the FCC had not met its burden sufficiently to retain any of the LTO.<sup>101</sup> His concept of "necessity" differed greatly from the majority's, imposing stricter limits on the FCC's discretion. Under his approach, the FCC itself would specify these limits based on, first, more specific and concrete definitions of its policy goals and, second, explanations of how media ownership rules further those goals.<sup>102</sup> The majority only asked whether the FCC had abused its discretion,<sup>103</sup> leaving the FCC with flexibility to define its policy

95. 284 F.3d 148 (D.C. Cir. 2002).

96. *Id.* at 152.

97. The D.C. Circuit decided *Sinclair* on April 2, 2002. *Id.* at 148. The court had decided *Fox I* on February 19, 2002. *Fox I*, 280 F.3d at 1027. The court issued its opinion in *Fox II* on June 21, 2002. *Fox II*, 293 F.3d at 537.

98. *Sinclair*, 284 F.3d at 159.

99. *Id.* at 162 ("[T]he Commission 'has wide discretion to determine where to draw administrative lines,' and, therefore, the court will reverse that choice only for abuse of discretion." (citing *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000))).

100. *Id.* at 171–72.

101. *Id.* at 170 (Sentelle, J., concurring in part and dissenting in part) ("[H]ere there are no meaningful limits to the diversity rationale offered by the Commission. There is no suggestion as to how much diversity is enough, how much is too little, or how much is too much." (citation omitted)).

102. *Id.* at 170 ("Even accepting for the moment that the FCC could regulate in the name of diversity without further elucidating that goal, it must still, at a minimum, explain how its rule furthers the goal of diversity.").

103. *Id.* at 162 (majority opinion) ("[T]he Commission 'has wide discretion to determine where to draw administrative lines,' and, therefore, the court will reverse that choice only for abuse of discretion." (citing *AT&T Corp.*, 220 F.3d at 627)).

goals. In applying the necessity standard, the majority focused on the sufficiency and logic of the FCC's explanation connecting the LTO to diversity.<sup>104</sup> In contrast, Judge Sentelle understood necessity to require a higher level of specificity from the FCC to justify its rules.<sup>105</sup> Thus, during the brief time when the D.C. Circuit recognized the necessity standard as law, exactly how much more demanding a necessity standard was remained unclear.

### III. THE FCC SHOULD USE THE "PUBLIC INTEREST" STANDARD FOR JUSTIFYING ITS MEDIA OWNERSHIP RULES

This Part advocates for the "public interest" reading of section 202(h), arguing that the FCC should apply this interpretation until and unless Congress clarifies the provision. Section III.A discusses the precedent for the public interest interpretation provided by recent cases in the D.C. Circuit and the Third Circuit. Section III.B compares other substantive areas of administrative law and draws analogies to show that a public interest interpretation is more consistent with typical agency practice. Section III.C looks to laws contemporary to the Telecom Act that focus on regulatory efficiency and concludes that the public interest interpretation is more consonant with the cost-benefit analysis those laws instituted than the necessity interpretation. Finally, Section III.D argues that several different policy considerations call for a lower standard of proof.

#### A. Two Recent Judicial Decisions Provide Precedent for the Public Interest Interpretation

In 2004, both periodic-review provisions of the Telecom Act came before circuit courts. *Cellco Partnership v. FCC*<sup>106</sup> addressed section 402(a) (section 11 of the Communications Act), and *Prometheus Radio Project v. FCC*<sup>107</sup> addressed Section 202(h). Each court decided that the respective periodic-review provisions called for a public interest interpretation rather than a necessity interpretation.<sup>108</sup> They provide important precedent that should inform how the FCC and future reviewing courts interpret section 202(h).

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104. *Id.* at 163–65.

105. *Id.* at 170.

106. 357 F.3d 88, 90 (D.C. Cir. 2004).

107. 373 F.3d 372, 382 (3d Cir. 2004).

108. *See infra* Sections III.A.1–III.A.2. These cases did not provide finality to the controversy over section 202(h), because of the possibilities of differing, randomly selected appellate forums for review of future quadrennial reviews and judicial deference to changing agency interpretations. *See supra* Section I.B.

## 1. Cellco Partnership

In *Cellco*, the D.C. Circuit resolved the conflict between the longstanding public interest standard of the FCC's usual rulemaking authority, and the proposed necessity interpretation of section 11 biennial review, in favor of the former.<sup>109</sup> Verizon Wireless and Verizon Telephone challenged the FCC's use of the public interest interpretation, and Verizon Wireless challenged the FCC's decision to retain two telecommunications regulations.<sup>110</sup> The Commission used this interpretation despite section 11's two uses of the "no longer *necessary* in the public interest" phrasing.<sup>111</sup> Judge Rogers, author of the *Sinclair* majority opinion, wrote for a unanimous panel that deferred to the FCC's legal interpretation.<sup>112</sup> The court distinguished *Cellco* from *Sinclair*, because it took the standard of review of section 202(h) as given, based on *Fox I*.<sup>113</sup> Furthermore, the court held that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that § 11 embodies a presumption in favor of deregulation."<sup>114</sup>

*Cellco* upheld the FCC's public interest interpretation to maintain consistency between section 11 and the FCC's rulemaking authority. Although Congress's delegation to the FCC for making rules regarding telecommunications uses the phrase "necessary in the public interest,"<sup>115</sup> the court explained that the FCC adopts rules according to a public interest standard rather than a necessity standard.<sup>116</sup> Criticizing the word "necessary" as "chameleon-like,"<sup>117</sup> the court emphasized the need to interpret such a vague word in its particular statutory context. Based on section 11's context, the court agreed with the FCC that the words "necessary in the public interest" mean the same thing in section 11 that they mean for the FCC's rulemaking authority.<sup>118</sup>

Interpreting section 11 as a public interest standard, the court held, "avoids absurd results where a rule is 'necessary' when adopted but not

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109. *Cellco*, 357 F.3d at 90. For a discussion of section 11 of the Communications Act (enacted by section 402(a) of the Telecom Act), see *supra* Section II.A.2.

110. *Cellco*, 357 F.3d at 90.

111. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161 (2000) (emphasis added) (adding section 11 to the Communications Act of 1934, 47 U.S.C. § 151 et seq.).

112. *Cellco*, 357 F.3d at 99 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

113. *Id.* at 98.

114. *Id.*

115. Communications Act of 1934, 47 U.S.C. § 201(b) (2000) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

116. *Cellco*, 357 F.3d at 96 ("[T]he Commission can adopt rules upon finding that they advance a legitimate regulatory objective; it need not find that they are indispensable.>").

117. *Id.* at 96.

118. *Id.* at 96, 98 (discussing FCC's rationale approvingly and holding in favor of the FCC's interpretation).

when it is subjected shortly thereafter to biennial review under § 11.”<sup>119</sup> The FCC would have to repeal any new media ownership rules that met a public interest standard but fell short of a necessity standard within four years or less—and could then pass them anew immediately afterwards.<sup>120</sup> *Cellco*’s holding does not necessarily apply to section 202(h), but since section 11 uses the word “necessary” once more than section 202(h) does, it has particular weight for having rejected the necessity interpretation.

## 2. Prometheus Radio Project

In *Prometheus Radio Project v. FCC*,<sup>121</sup> the Third Circuit Court of Appeals partially remanded and partially affirmed the FCC’s 2002 biennial review of its media ownership rules, affirming the FCC’s use of the public interest standard of review.<sup>122</sup> The FCC’s report and order of June 2, 2003, replaced the newspaper–broadcast cross-ownership rule and relaxed the national television ownership rule, among other actions.<sup>123</sup> Both public interest groups and regulated media companies appealed the FCC’s order. Judge Ambro, writing for the majority, rejected the regulated media companies’ argument that “§ 202(h) . . . somehow provides rigid limits on the Commission’s ability to regulate in the public interest.”<sup>124</sup> As in *Cellco*, the *Prometheus* majority saw section 202(h) and section 11 as closely related and discussed the D.C. Circuit’s opinion in *Cellco* approvingly.<sup>125</sup>

*Prometheus* provides arguments unique to the Section 202(h) context, in addition to those in *Cellco*, that support the public interest interpretation. The court analyzed the conflict in the text of Section 202(h).<sup>126</sup> As the court noted, “[f]or the ‘determine’ instruction [in the first sentence] to be meaningful, ‘necessary’ must embody the same ‘plain public interest’ standard that Congress set out in the ‘repeal or modify’ instruction [of the second sentence].”<sup>127</sup> The court rejected the necessity interpretation partly because the word “necessary” does not appear in the second sentence.<sup>128</sup> Furthermore, the court explained (in an echo of *Cellco*) that a necessity standard

119. *Id.* at 98.

120. Courts would probably not overturn the FCC’s actions in such a cycle for being arbitrary or capricious, because, in this hypothetical situation, they would have been ordered by Congress and the courts to perform both functions in the cycle.

121. 373 F.3d 372 (3d Cir. 2004).

122. *Prometheus*, 373 F.3d at 382.

123. FCC Broadcast Ownership Rules, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

124. *Prometheus*, 373 F.3d at 382.

125. *See id.* at 393 (“For the same reasons proffered by the Commission and endorsed by the D.C. Circuit Court to reject the ‘indispensable’ definition of ‘necessary’ under § 11, we do so under § 202(h).”).

126. *See supra* text accompanying note 50.

127. *Prometheus*, 373 F.3d at 394.

128. *See id.* at 395 n.19 (“Textually it is not there.”).

would conflict with “the plain public interest standard that governs the Commission’s authority to regulate the broadcast industry.”<sup>129</sup> *Prometheus* rejected such “incongruous results.”<sup>130</sup>

The Third Circuit also rejected the whole-act-rule argument that the deregulatory emphasis of the Telecom Act calls for the necessity interpretation of section 202(h), which requires the FCC to put a thumb on the scale against its rules. As the *Prometheus* majority put it, “[W]e do not accept that the ‘repeal or modify in the public interest’ instruction must therefore operate only as a one-way ratchet.”<sup>131</sup> Partly this argument comes from the neutral word “modify,” which could refer to changes that strengthen, weaken, or simply change the media ownership rules. According to the majority opinion, the deregulatory aspect of section 202(h) is the requirement of periodic reviews by the FCC, not the standard of review.<sup>132</sup>

The dissent and the FCC actually advocated an even lower standard of review than the majority’s public interest standard. Although the FCC argued for a public interest standard to justify any rules it wanted to *keep*, the Commission wanted a standard requiring no evidence or justification at all for any rule it wanted to *repeal* or *modify*: “‘Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.’”<sup>133</sup> The dissent agreed with the FCC’s argument.<sup>134</sup> But the majority held that “[r]ather than ‘upending’ the reasoned analysis requirement . . . § 202(h) extends this requirement to the Commission’s decision to retain its existing regulations.”<sup>135</sup> This disparity appears to be the lone source of disagreement between the majority and the dissent regarding the interpretation of section 202(h).<sup>136</sup> The dissent otherwise agreed that the interpretation of “necessary in the public interest” means “useful” rather than “indispensable.”<sup>137</sup> That neither the majority, nor the dissent, nor the FCC advocated the necessity standard in *Prometheus* provides a strong precedent for the public interest standard.

129. *Id.* at 394 n.17.

130. *Id.*; *see also supra* text accompanying notes 119–120.

131. *Prometheus*, 373 F.3d at 394.

132. *Id.* at 395 (“What, then, makes § 202(h) ‘deregulatory’? It is this: Section 202(h) requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have.”).

133. *Id.* at 442 (Scirica, J., dissenting in part, concurring in part) (quoting FCC Broadcast Ownership Rules, 68 Fed. Reg. at 46,286).

134. *Id.*

135. *Id.* at 395 (majority opinion) (citation & emphasis omitted) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

136. *Id.* at 442 n.94 (Scirica, J., dissenting in part, concurring in part). *But see id.* at 395 n.20 (majority opinion) (opining that the dissent’s disagreement lies in the result, not in the standard of review).

137. *Id.* at 445 (Scirica, J., dissenting in part, concurring in part) (“While I would *not* term this standard a ‘deregulatory presumption,’ the FCC is required to demonstrate that its rules remain *useful* in the public interest.” (emphasis added)).

B. *Comparisons to Periodic Review Provisions in Other Areas of  
Administrative Law Support a Public Interest  
Interpretation of Section 202(h)*

Comparisons to other periodic reviews suggest that section 202(h) is best understood as embodying a public interest standard of review. This section looks to other congressionally mandated periodic reviews by administrative agencies as interpretive guidance for the FCC or a court.<sup>138</sup> The analysis surveys the U.S. Code for provisions comparable to the original, biennial form of section 202(h), not the amended, quadrennial form,<sup>139</sup> to find comparisons that shed light on Congress's original intent in the Telecom Act and to provide a larger sample size. Provisions calling for "biennial review" or "review every two years" typically encourage agencies to keep their regulations up-to-date but allow the agencies flexibility. Comparative analysis shows that periodic reviews do not typically function to change the broad, substantive goals of the agency.<sup>140</sup> Rather, such reviews aim to maintain agencies' focus on their central congressional mandates.

Biennial reviews appear to be most often used by Congress to direct agencies to review their own personnel or practices. For example, Congress employed a biennial review system in 1998 to evaluate state transportation improvement programs. Such programs "shall be reviewed and, on a finding that the planning process through which the program was developed is consistent with this section . . . approved not less frequently than biennially by

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138. This Note seeks to survey provisions that, like the original section 202(h), involve reviews by agencies of agency policies on a biennial basis. But the provisions of the U.S. Code discussed in this subsection are meant to be illustrative, not the results of a comprehensive survey (or scientific sample). The specific search executed on Westlaw, searching the U.S. Code Annotated database, was: "(review w/25 ((biennial OR biennially) OR (every w/10 'two years')))," which resulted in fifty-six matches as of February 6, 2004. The search results included the Telecom Act provisions discussed above and several provisions which did not constitute biennial reviews.

139. Congress appears to have made the change from biennial to quadrennial review for a reason unrelated to the interpretation of section 202(h)'s standard of review: the FCC's reviews were taking more than two years to complete. For example, the 1998 review was not completed until 2000. *See* 1998 Biennial Regulatory Review Pursuant to Section 202 of the Telecomm. Act of 1996, 15 F.C.C.R. 11058 (Fed. Comm'n May 26, 2000). The 2002 review was not completed until 2003. *See* FCC Broadcast Ownership Rules, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73).

140. A survey of these provisions shows that none of them involve repealing a rule if it is found unnecessary. *See* 7 U.S.C. § 1635j(b)(4)(A) (2000) (mandating biennial review of swine price reporting information by the secretary of agriculture as part of the Livestock Mandatory Reporting Act of 1999); 7 U.S.C. § 1964(d)(1) (2000) (requiring biennial review of emergency loan recipient's ability to repay by the secretary of agriculture); 12 U.S.C. § 1828(p) (2000) (requiring the FDIC to review its capital requirements); 22 U.S.C. § 2381(b) (2000) (allowing review at least every two years of eligibility of government contractors involved in foreign assistance projects who have been denied or suspended from receiving government funds); 29 U.S.C. § 208(a) (2000) (providing for biennial review of minimum wage in American Samoa, to be conducted by the administrator of the wage and hour division, whenever American Samoa's minimum wage is less than the federal minimum wage specified in 29 U.S.C. § 206(a)(1) (2000)); 49 U.S.C. § 30141(e) (2000) (directing the secretary of transportation to review every two years the amount of annual fee for importers of motor vehicles).

the Secretary [of Transportation].”<sup>141</sup> To take another example, a river management program in 2000 included a biennial review provision for management and protection of Florida’s Wekiva River as part of the national system of wild and scenic rivers. The Secretary of the Interior is instructed to report “any deviation from the plan.”<sup>142</sup> Another biennial review provision directs the Secretary of Defense to review, not less frequently than biennially, whether the supply practices of its agencies are efficient and in keeping with the Defense Department goal of “combat readiness.”<sup>143</sup>

These three examples of biennial reviews, as well as other biennial reviews that evaluate programs,<sup>144</sup> inform a reasonable understanding of

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141. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1204(f), 112 Stat. 107, 184 (1998) (codified at 23 U.S.C. § 135(f)(4) (2000) (repealed 2005)). For another biennial review of state programs, see 42 U.S.C. § 10405 (Supp. III 2003) (mandating a review “every 2 years” by the secretary of health and human services of state-run family violence prevention and awareness programs).

142. Wekiva Wild and Scenic River Act of 2000, Pub. L. No. 106-299, § 4(c), 114 Stat. 1049, 1053. For other biennial reviews of environmental and energy-efficiency programs, see 16 U.S.C. § 539e(b) (2000) (requiring the secretary of the interior to conduct a biennial environmental impact assessment in Alaska’s Tongass National Forest); 16 U.S.C. § 3334(a) (2000) (providing for a biennial audit of state plans to reduce fishing fleet capacity, to be conducted by the secretary of the interior); 20 U.S.C. § 7277c (Supp. IV 2004) (directing the secretary of education to conduct a biennial review of a program to promote energy efficiency in school buildings and to report to Congress); 30 U.S.C. § 1803(a)(8)(B) (2000) (requiring a biennial review and report to Congress by the National Critical Materials Council on national mineral and materials needs); 33 U.S.C. § 1314(m) (2000) (mandating biennial review by the administrator of the EPA of water pollution guidelines); 33 U.S.C. § 1345(d)(2)(C) (2000) (requiring the EPA administrator to review sewage sludge disposal provisions at least every two years); and 33 U.S.C. § 2263(a) (2000) (requiring the secretary of the army, in conjunction with officials from the Department of the Interior’s Fish and Wildlife Service, the EPA, and the National Oceanic and Atmospheric Administration, to review biennially conservation efforts by the Army Corps of Engineers with respect to conserving fish and wildlife indigenous to the United States).

143. 10 U.S.C. § 192(c) (2000). For other defense- and security-related biennial reviews, see 7 U.S.C. § 8401 (Supp. IV 2004) (requiring the secretary of agriculture to publish, at least biennially, a list of biological agents and toxins that pose a severe threat to animal or plant health); 10 U.S.C. § 113(g)(2) (2000) (requiring the secretary of defense to provide to the chairman of the joint chiefs of staff, at least biennially, policy guidance regarding “contingency plans”); 10 U.S.C. § 153(d) (Supp. IV 2004) (requiring the chairman of the joint chiefs of staff to review national military strategy every two years); 10 U.S.C. § 161(b) (2000) (mandating biennial review of combatant command missions by the chairman of the joint chiefs of staff); 42 U.S.C. § 262a (Supp. III 2003) (requiring the secretary of health and human services to publish, at least biennially, a list of biological agents that pose a severe threat to public health and safety); 42 U.S.C. § 1395u note (2000) (Improvements in Administration of Laboratory Tests Benefit) (mandating a biennial review by the secretary of health and human services of national policy on benefits for clinical diagnostic laboratory tests); and 49 U.S.C. § 44912(c)(4) (Supp. III 2003) (requiring the administrator of the federal aviation administration to review biennially the composition of the scientific advisory panel on technologies to counteract terrorist threats to civil aviation).

144. For more examples of general program evaluations, see 8 U.S.C. § 1762 (Supp. II 2002) (requiring the commissioner of immigration and naturalization to study biennially whether educational institutions authorized to accept immigrants as well as exchange sponsors have complied with relevant regulations); 15 U.S.C. § 278k(c)(5) (2000) (stipulating that technology transfer centers must submit to biennial reviews, with procedures developed by the National Institute of Standards and Technology, as a condition of funding after their sixth year of existence); and 23 U.S.C. § 502 note (2000) (Transportation Technology Innovation and Demonstration Program § (b)(8)) (establishing Recycled Materials Resource Center and mandating a biennial review of the center’s program on recycling in the context of transportation infrastructure by the Secretary of Transportation). A pair of biennial reviews deal with education programs in specific. See 20 U.S.C. § 1011i (a)-(b) (2000)

section 202(h). When delegating authority but specifying that a program must be reviewed, Congress generally employs a standard of consistency with agency goals rather than a stringent necessity standard. Additionally, biennial reviews are most often used to monitor agencies and to provide information about agency activities to Congress. Section 202(h) allows Congress to monitor the FCC's effectiveness in achieving its statutory goals of competition, diversity, and localism more actively than it could without periodic review. Each review produces a public record (and, increasingly, public debate<sup>145</sup>) on a regular basis, giving Congress a chance to evaluate the FCC's success. Admittedly, Congress may have intended to do something completely different with section 202(h) than with other reviews by other agencies. Yet understanding the periodic review device as a monitoring tool for Congress provides important context for the FCC and the courts to resolve the ambiguity of section 202(h) and supports the public interest interpretation.

*C. A Public Interest Standard Allows the FCC to Conduct  
Cost-Benefit Analysis*

Contemporaneous with the Telecom Act, both Congress and the executive branch instituted additional requirements for federal agencies to assess proposed policies using cost-benefit analysis. These initiatives suggest that the FCC and courts should interpret section 202(h) from a cost-benefit perspective. Under this view the FCC should, every four years, determine whether the benefits of its media ownership rules outweigh the costs.<sup>146</sup> Only a public interest standard of review allows the FCC to execute cost-benefit analysis in a practical manner.

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(requiring institutions of higher education to institute biennial reviews of drug prevention programs and to make the results available to the secretary of education); 20 U.S.C. § 5508(d) (2000) (mandating a biennial report to Congress by the National Environmental Education Advisory Council on the state of environmental education). Finally, many other biennial review provisions deal with finance, efficiency, and fairness in the way agencies run themselves. *See* 5 U.S.C. § 5347(c) (2000) (mandating a biennial review of proportional representation on Federal Prevailing Rate Advisory Committee by the director of the office of personnel management); 12 U.S.C. § 1752a(e) (2000) (specifying biennial review by the NCUA board chairman of board members' areas of responsibility); 15 U.S.C. § 2227 (2000) (mandating biennial review of pre-fire plans for federal agency-owned buildings or housing units); 31 U.S.C. § 902(a)(8) (2000) (including biennial review of "the fees, royalties, rents, and other charges imposed by the agency for services and things of value it provides" in job description of federal agency chief financial officers); 31 U.S.C. § 7502(a)(3) (2000) (requiring biennial review by the director of the office of management and budget of the dollar amount of federal grants necessary to trigger an audit of non-federal entities); 37 U.S.C. § 303a(d) (2000) (instructing the secretary of defense to conduct biennial review of "special" or incentive pay for public health professionals in the armed services); 39 U.S.C. § 5402(k)(1) (Supp. IV 2004) (directing the secretary of transportation to engage in a review of the need for an investigation—a sort of meta-review—of "bush mail" carriage rates in Alaska).

145. *See, e.g.,* Jube Shiver Jr. et al., *FCC Ruling Puts Rivals on the Same Wavelength*, L.A. TIMES, June 9, 2003, § 1, at 1 (describing the building coalition of interests opposed to the FCC's decision in its 2002 biennial review).

146. The FCC could attempt to include assessments in its cost-benefit analysis regarding the fulfillment of its diversity and localism goals for media. But those goals are less easily quantified than the FCC's competition goal.

1. *Initiatives of the 104th Congress and the Clinton Administration  
Show the Predominance of Cost-Benefit Analysis at the Time  
of the Telecom Act's Passage*

Congress's commitment to cost-benefit analysis during the mid-1990s should inform any reading of section 202(h). Those who advocate the necessity standard often note the deregulatory zeal of the 104th Congress, both generally and with respect to the Telecom Act in particular.<sup>147</sup> That Congress passed, in addition to the Telecom Act, the Contract with America Advancement Act of 1996.<sup>148</sup> Along with its focus on social security, small business, and the line-item veto, the Contract with America Advancement Act also instituted section 801(b)(i) of Title V in the U.S. Code, a provision that requires agencies to provide cost-benefit reports to Congress regarding any agency rules.<sup>149</sup> Robert Hahn and Cass Sunstein have characterized section 202(h) and section 402(a) of the Telecom Act as examples of Congress's increasing interest in cost-benefit analysis.<sup>150</sup>

In addition, the executive branch enacted the most important across-the-board mandates for cost-benefit analysis. Section 801(b)(i) is definitely not the first<sup>151</sup> or only<sup>152</sup> directive requiring agencies to weigh costs and benefits. President Clinton's National Performance Review was part of the administrative context in which the Telecom Act was drafted and signed into law.<sup>153</sup> Nearly contemporaneous with the activity of the 104th Congress was Vice President Gore's initiative to streamline, or "reinvent," government.<sup>154</sup> Reducing costs and enhancing efficiency were among the key goals of this initiative.<sup>155</sup> Together with section 801(b)(i), these cost-benefit requirements

147. The majority opinion in *Fox I* involves such an argument, noting "the mandate of § 202(h) might better be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.') than to the wait-and-see attitude of the Commission." *Fox Television Stations v. FCC (Fox I)*, 280 F.3d 1027, 1044 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

148. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847.

149. 5 U.S.C. § 801(b)(i) (2000). The Contract with America Advancement Act also included the Congressional Review Act, which allowed the Senate to pass a resolution of disapproval of the FCC's June 2, 2003, order. S.J. Res. 17, 108th Cong. (2003); *see also* 5 U.S.C. § 802(c) (2000).

150. *See* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1508-09 (2002).

151. *See id.* at 1489 & n.1 (noting that President Reagan's Executive Order Number 12,291, 3 C.F.R. 127 (1982), first required that agency regulations pass a cost-benefit test).

152. *See id.* at 1490 & n.3, 1507 (citing Executive Order Number 12,866, 3 C.F.R. 638 (1994), and describing President Clinton's acceptance of the principles of cost-benefit analysis).

153. For example, around the time that the Telecom Act was drafted and debated, President Clinton started an initiative to promote coordination on cost-benefit analysis across agencies. Jeffrey S. Lubbers, *The Regulatory Reform Recommendations of the National Performance Review*, 6 RISK 153, 157 (1995).

154. VICE PRESIDENT ALBERT GORE, FROM RED TAPE TO RESULTS—CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993), *available at* <http://www.ibiblio.org/npr/nptoc.html> (last visited May 27, 2007).

155. President Bill Clinton, Remarks Announcing the Initiative to Streamline Government (Mar. 3, 1993), <http://govinfo.library.unt.edu/npr/library/speeches/030393.html> (last visited May 27,

push agencies toward administrative efficiency, greater accountability to Congress, and policy choices with demonstrable net benefits.<sup>156</sup>

## 2. Only a Public Interest Standard is Consistent with Cost-Benefit Analysis

The public interest interpretation of section 202(h) allows the FCC to engage in cost-benefit analysis. For the FCC to retain a rule, that rule must have a positive net benefit in terms of at least one of the FCC's policy goals of competition, diversity, and localism. Cost-benefit analysis suggests removing any rules that do not have a net benefit. The cost of any rule includes the opportunity cost of declining to adopt all alternative rules. With its current workload and backlog,<sup>157</sup> the FCC does not have the resources to examine absolutely every possible alternative to its rules. But as the result in *Prometheus* demonstrates, the public interest interpretation does require the FCC to compare its media ownership rules to some alternative policies. For example, to retain a rule restricting radio companies from owning more than eight stations in a market, the FCC must explain why the limit was eight, not seven or nine.<sup>158</sup>

Conducting cost-benefit analysis of a rule is not, however, practically compatible with the necessity interpretation of section 202(h). To justify its rules according to a necessity standard, the FCC would have to do more than show that a rule had a positive net benefit. It would also compare the outcome in the relevant media market with the rule to the outcome in that market without any rule at all. If the absence of regulation would not excessively threaten the policy goals of competition, diversity, and localism, then the rule would not be necessary.<sup>159</sup> The FCC would have to eliminate such rules. Therefore, a rule could fail to be necessary, but still have a positive net benefit. Removing rules that the FCC has shown to have positive net benefit is contrary to cost-benefit analysis. This conflict between cost-benefit analy-

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2007) ("Our goal is to make the entire Federal Government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment. We intend to redesign, to reinvent, to reinvigorate the entire National Government.").

156. Cost-benefit analysis remains controversial for reflecting a utilitarian philosophical perspective and involving monetization of all personal values. See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190–220 (1993). But within its admittedly limited framework, cost-benefit analysis can still be understood as flexible. In administrative law, it has been advocated as a way of steering agencies away from seemingly absurd tradeoffs, which need not invoke a full embrace of utilitarianism. See, e.g., W. KIP VISCUSI, FATAL TRADEOFFS 249–51, 263–65, 285 (1992), quoted in BREYER ET AL., *supra* note 23, at 175–80. In practice, cost-benefit analysis is typically supposed to be augmented with other considerations, especially in the Clinton administration's formulation. See Hahn & Sunstein, *supra* note 150, at 1507.

157. See Charles Babington, *Congress Nudges an FCC on Hold*, WASH. POST, Apr. 4, 2007, at D01.

158. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 432 (3d Cir. 2004) (holding that the FCC's order "lack[ed] a reasoned analysis for retaining these specific numerical limits" and remanding the rule for more specific justification).

159. See *supra* text accompanying note 15.

sis and the necessity interpretation provides additional support to the public interest interpretation.

#### D. Important Policy Considerations Call for a Public Interest Standard

Beyond the comparative considerations of Section III.B and the cost-benefit considerations of Section III.C, several policy arguments buttress the public interest interpretation of section 202(h). This Section considers the FCC's susceptibility to capture, its lack of responsiveness to the public, congressional agency burrowing, and the one-way ratchet problem, and concludes that the existence of these potential problems supports a public interest standard.

##### 1. Capture Concerns

The FCC has been particularly vulnerable to capture, and its quadrennial review procedure should not presumptively benefit media companies that enjoy superior access to regulators. Capture generally refers to the problem of regulated entities having undue influence on agency regulators at the general public's expense.<sup>160</sup> One form of capture is straightforward. Regulators sometimes provide disproportionate access to, or even associate socially with, representatives of regulated corporations or other organizations seeking to curry favor. This conflict of interest creates concerns about regulators providing favorable decisions in return for job prospects<sup>161</sup> or gifts.<sup>162</sup> The FCC also suffers, more subtly, from what is known as informational capture.<sup>163</sup> In the radio industry, for instance, the agency relies on data collected by a polling company (The Arbitron Company) and a consulting firm (BIA Financial Networks), each of which relies on media firms for its revenue.<sup>164</sup> The data companies' selection or omission of certain variables allows media

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160. For a survey of various capture theories, see Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 7–25 (2000).

161. The “exit side” of the “revolving door” theory of agency capture states that “the lure of a lucrative job in the regulated industry after tenure as a regulator ends will lead the regulator to support the industry.” Jeffrey E. Cohen, *The Dynamics of the “Revolving Door” on the FCC*, 30 AM. J. POL. SCI. 689, 690 (1986). One study found evidence that this effect existed, but only arose in a regulator's last year of tenure at the FCC. *Id.* at 695. An earlier study tested the “entry” side of the “revolving door” hypothesis. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 834 n.52 (quoting William T. Gormley Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 681 (1979) (“[T]he appointment of a former employee of a regulated industry to a regulatory agency does increase the likelihood of decisions favorable to the regulated industry.”)).

162. For example, FCC Commissioners were treated to over 2,500 corporate-sponsored junkets in just eight years. Bob Williams & Morgan Jindrich, *On the Road Again—and Again: FCC officials rack up \$2.8 million travel tab with industries they regulate*, May, 22, 2003, <http://www.publicintegrity.org/telecom/report.aspx?aid=15> (last visited May 27, 2007).

163. See, e.g., Croley, *supra* note 161, at 834 (recounting the theory that agencies may become unwittingly biased toward those they regulate because they rely so heavily on them for information).

164. See DiCOLA, *supra* note 5, at 16.

firms to shape regulators' perceptions of the industry and to avoid scrutiny in certain areas.<sup>165</sup>

Courts and the FCC should interpret section 202(h) as instituting a public interest standard to avoid exacerbating these problems. It is inappropriate to hold the FCC, an agency subject to capture, to a standard with a deregulatory bias that benefits the media firms it regulates. Weekend junkets and databases of industry information might already influence FCC regulators to side with media companies—whether consciously or unconsciously, nefariously or innocently. The additional deregulatory bias of the necessity standard would push in precisely the direction that agency capture already pushes—less regulation of business and less consideration of the public interest.

## 2. Democratic Responsiveness

The public interest standard also allows the FCC more flexibility to respond to public concerns about media ownership. In the time leading up to the Telecom Act's passage, the components of the legislation relating to media fell outside of the public eye. News coverage of the Act often gave more prominence to the issues of consumer choice in telephone service and long distance rates than to broadcast regulation.<sup>166</sup> But many members of the public did become aware of the FCC's media ownership rules during the 2002 biennial review.<sup>167</sup> Although individual members of the public overwhelmingly opposed further deregulation,<sup>168</sup> the FCC eliminated and relaxed several media ownership rules in its June 2, 2003, order.<sup>169</sup> The FCC held only one public hearing attended in person by all the commissioners.<sup>170</sup>

This lack of responsiveness suggests that using a public interest standard in the FCC's quadrennial reviews is preferable. An agency with demonstrably low responsiveness to public concerns lacks checks and balances—and

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165. For example, the BIA database lacks any information about the percentage of airtime that radio stations use for advertising. Software: MEDIA Access Pro 4.2 (BIA Financial Network, Inc. 2005) (on file with author).

166. See, e.g., Lee Bergquist, *For Many, Prices May Not Drop Much*, MILWAUKEE J. SENTINEL, Jan. 7, 1996, at 1; Lars-Erik Nelson, Op-Ed., *Communications Bill Sends Mixed Signals*, DAILY NEWS (N.Y.), Feb. 5, 1996, at 25.

167. See, e.g., Eric Boehlert, *Last Stop Before the Media Monopoly: FCC chairman Michael Powell is likely to get media ownership deregulated—even though public comment is running 97 percent against it*, SALON, May 23, 2003, [http://www.salon.com/news/feature/2003/05/23/powells\\_fight/index.html](http://www.salon.com/news/feature/2003/05/23/powells_fight/index.html) (last visited May 27, 2007).

168. Citizens filing comments in the FCC's 2002 biennial review opposed further relaxation or elimination of media ownership rules at a rate of ninety-seven or ninety-nine percent. See Press Release, Future of Music Coal., Citizens Urge FCC to Retain Current Media Ownership Rules (May 14, 2003), available at <http://www.futureofmusic.org/images/PRFCCdocket.pdf>.

169. 2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, 18 F.C.C.R. 13,620, at 13,622–24 (2003).

170. See Boehlert, *supra* note 167.

is not democratic.<sup>171</sup> If the FCC conducted its quadrennial reviews according to a necessity standard, it would become less responsive to the public. Even if a media ownership rule had positive effects about which the public commented in a review proceeding, the FCC would have to eliminate that rule if it could not meet the high burden of necessity. Using a public interest standard, on the other hand, allows the FCC more flexibility to retain or adopt policies that the public perceives as beneficial but that the agency cannot prove to be absolutely necessary.

### 3. Congressional Agency Burrowing

The FCC and the courts should not enforce deregulatory policy in the absence of specific, unambiguous language to that effect, and the legislative reports do not reveal any such congressional intent.<sup>172</sup> A necessity interpretation would result in the transparency and legitimacy problems associated with “congressional agency burrowing”—actions that embed the policy preferences of outgoing, short-lived, or previous legislatures.<sup>173</sup> Many members of Congress, including the House leadership, favored eliminating the FCC’s media ownership rules entirely, but could not win a majority for a bill that accomplished that result.<sup>174</sup> Having failed to eliminate the FCC’s media ownership rules outright in the Telecom Act, deregulatory advocates in Congress might have intended section 202(h) as a surreptitious way to achieve their desired end over time.<sup>175</sup> A necessity standard, placing a high burden on the agency, might result in the eventual elimination of all the rules. But interpreting section 202(h) with a deregulatory presumption is undesirable because it allows deregulation to operate subtly, without public attention, and against what a majority of Congress has been willing to support.

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171. Cf. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 325–26 (1997), *quoted in* BREYER ET AL., *supra* note 23, at 174–75.

172. *See supra* Section II.B.

173. This Section makes an analogy to Nina Mendelson’s theory of agency burrowing by outgoing presidential administrations. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003). Admittedly, the analogy to presidential agency burrowing is not perfect, because the legislative and executive branches are such different institutions. But the similarity lies in the way that section 202(h), under a necessity interpretation, would allow a policy without majority support at any time to stealthily become law.

174. *See supra* Sections II.B.1, II.B.2.

175. One account based on insider recollections speculates that media companies and some members of Congress had exactly this in mind with section 202(h):

Carefully crafted language in the bill mandated that the FCC “shall repeal or modify any regulation it determines to be no longer in the public interest” every two years. [Preston] Padden, [former News Corp. lobbyist Peggy] Binzel, and numerous GOP senators, some now sitting on the Commerce Committee, guessed that the FCC wouldn’t do the full justification exercise. And that would be the launching pad for a court challenge. The little time bomb became part of the total package and quietly began ticking.

Mundy, *supra* note 68, at 26.

#### 4. One-Way Ratchet

The public interest interpretation is also preferable because a necessity standard would exacerbate the norm against forcing media companies to divest media outlets once the companies have purchased them. The FCC's general reluctance to mandate divestiture of radio or television stations means that relaxing its media ownership rules functions as a one-way ratchet. Once corporations purchase broadcast licenses, newspapers, and other media properties, the FCC is unlikely to re-regulate and force widespread divestiture of television affiliates, radio stations, and newspapers.<sup>176</sup> As FCC Commissioner Michael Copps has put it: "Suppose for a moment that [the Commission] vote[s] to remove or significantly modify the ownership limits. And suppose simply for the sake of argument that we make a mistake. How do you put the genie back in the bottle?"<sup>177</sup> Practically speaking, increasing or eliminating the limits on media ownership might be difficult to reverse.

Because deregulation operates as a one-way ratchet, the ambiguous language in section 202(h) should be read to create a public interest standard. Asymmetry exists in the substantive policy because of the norm against divestiture to which Commissioner Copps referred. The FCC can relax stricter media regulations more easily than it can tighten looser media regulations. The necessity standard would set up an unbalanced procedure, tending toward the elimination of rules and exacerbating the asymmetrical quality of media ownership regulation. The even-handed public interest standard would avoid making the one-way ratchet problem more pronounced.

#### CONCLUSION

Section 202(h) requires the FCC to review its media ownership rules every four years, but contains an ambiguous standard of review. The controversy between the public interest interpretation and the necessity interpretation will continue indefinitely because appeals from FCC proceedings can end up in any circuit, courts might defer to the FCC if it reverses its position regarding section 202(h), and Congress has yet to address the problem. The usual tools of statutory construction and legislative history cannot resolve the tension between the necessity interpretation and the public interest interpretation. The first two cases about section 202(h), *Fox* and *Sinclair*, demonstrated the ambiguity of the provision but did not settle the question of how to interpret it. Recent court decisions *Prometheus* and *Cellco* provide

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176. Cecilia Rothenberger, Comment, *The UHF Discount: Shortchanging The Public Interest*, 53 Am. U. L. Rev. 689, 727 (2004) (noting "the Commission's traditional reluctance to force divestiture").

177. *Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Commission Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce*, 108th Cong. 40 (2003) (statement of Michael J. Copps, Comm'r, FCC), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_house\\_hearings&docid=f:86047.wais.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:86047.wais.pdf).

important precedent but do not settle the issue, precisely because of the reasons mentioned above.

Ideally, Congress would solve the problem by adopting the language contained in the proposed Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003.<sup>178</sup> Until that resolution occurs, the FCC and the courts should follow the reasoning outlined in *Prometheus* and read section 202(h) as implementing a public interest standard. This approach is consistent with the procedures and functions of periodic reviews conducted by other agencies. It allows for cost-benefit analysis without unnecessary burdens on the FCC research staff. A public interest standard best addresses policy concerns about administrative efficiency, capture, democratic responsiveness, congressional agency burrowing, and the one-way ratchet of media deregulation. The FCC and the courts should apply the public interest interpretation of section 202(h) to allow the FCC flexibility to act in accordance with its longstanding congressional directives of competition, diversity, and localism.

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178. See *supra* text accompanying notes 35–37.

