ADMINISTRATIVE LAW — CORPORATE GOVERNANCE REGULATION — D.C. CIRCUIT FINDS SEC PROXY ACCESS RULE ARBITRARY AND CAPRICIOUS FOR INADEQUATE ECONOMIC ANALYSIS. — *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

In the midst of a contested, voluminous notice-and-comment rulemaking, Congress's Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (Dodd-Frank Act) authorized the Securities and Exchange Commission (SEC) to expand proxy ballot access for shareholder-nominated candidates for boards of directors.[2] Recently, in *Business Roundtable v. SEC*,[3] the D.C. Circuit struck down the resulting SEC rule, finding that the Commission's failure to adequately consider economic consequences made its decision arbitrary and capricious.[4] By parsing in fine detail the methods and results of the SEC's cost-benefit analysis, the panel asserted judicial power in a field that courts struggle to oversee and applied an excessively exhausting standard that all but bars contested reforms.

While proxy access proposals are nearly as old as the SEC, a renewed proxy access debate has raged for nearly a decade.[5] Before directors' elections, companies distribute proxy materials that allow shareholders who do not attend annual meetings to vote their shares.[6] Typically, these proxy materials include only those director candidates nominated by the existing board, but reformers have sought enhanced accountability by requiring that companies include shareholder nominees in official proxy materials.[7] Critics have countered that mandating access to proxy ballots would encourage expensive election fights and create corporate inefficiency.[8]

Thus the battle lines were drawn for a June 2009 proposal regarding one of "the most controversial regulatory issues in the Commis-

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1 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

2 *See id.* § 971, 124 Stat. at 1915 (codified at 15 U.S.C. § 78n(a) (2006 & Supp. IV 2011)).

3 647 F.3d 1144 (D.C. Cir. 2011).

4 *Id.* at 1148.

5 Before its recent rulemaking, the SEC considered but did not adopt proxy access reform in 1942, 1977, 1992, and 2003. Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,029 & n.73 (proposed June 18, 2009).

6 *See* Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 478–79 (2008).

7 *See, e.g.*, Lucian Arye Bebchuk, *The Business Roundtable's Untenable Case Against Shareholder Access* 1 (Harvard Univ. John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 516, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=686184.

8 *See, e.g.*, Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 743–49 (2007).

sion's history."[9] Concerned about links between limited board accountability and the economic crisis,[10] the SEC proposed Exchange Act Rule 14a-11 (Rule 14a-11), which would require that companies include qualifying shareholder nominees on proxy ballots.[11] Over the next fifteen months, the Commission received about 600 letters regarding the proposed rule from an array of interested parties.[12]

Near the end of the contentious process, and amid concerns about the SEC's statutory authority to issue a proxy access rule, Congress interceded.[13] Section 971 of Dodd-Frank provides that "[t]he Commission may issue rules [expanding proxy access], under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors."[14] Legislative history suggests Congress intended that the SEC have "wide latitude in setting the terms of such proxy access."[15]

In September 2010, two months after Dodd-Frank became law, the SEC promulgated a final regulation adopting Rule 14a-11 by a partisan three to two vote.[16] The final rule devoted nineteen pages in the Federal Register to cost-benefit analysis of the SEC proposals[17] and another six to potential burdens on efficiency, competition, and capital formation.[18] The Commission explained that Rule 14a-11 would increase corporate performance and argued that any costs of the rule were a necessary consequence of enforcing traditional state law rights.[19]

The Business Roundtable, a consortium of prominent corporate executives, challenged Rule 14a-11 in the Court of Appeals for the D.C. Circuit as based "on a fundamentally flawed assessment of the rules'

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[9] Reply Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America at 16, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014801, at *16.

[10] *See* Facilitating Shareholder Director Nominations, 74 Fed. Reg. at 29,025.

[11] *Id.* at 29,031. The SEC proposal also included amendments to Rule 14a-8(i)(8) that would have allowed shareholders to change an individual company's proxy procedures by placing reform proposals on proxy ballots. *Id.* at 29,056.

[12] Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,669 n.23 (Sept. 16, 2010).

[13] *See* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[14] *Id.* § 971, 124 Stat. at 1915 (codified at 15 U.S.C. § 78n note (2006 & Supp. IV 2011)).

[15] S. REP. NO. 111-176, pt. V, at 146 (2010).

[16] Ronald D. Orol, *SEC Approves Rule Giving Shareholders New Power*, MARKETWATCH (Aug. 25, 2010, 11:19 AM), http://www.marketwatch.com/story/sec-approves-rule-giving-shareholders-new-power-2010-08-25. Commissioners Troy Paredes and Kathleen Casey both criticized the theory and the methodology behind the final rule. *See Bus. Roundtable*, 647 F.3d at 1148.

[17] *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,753–71.

[18] *See id.* at 56,771–76. The SEC conducted this analysis to comply with 15 U.S.C. §§ 78c(f), 78w(a)(2), and 80a-2(c) (2006).

[19] Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,755, 56,765.

costs, benefits, and effects on efficiency, competition, and capital formation."[20] The plaintiffs alleged that the application of Rule 14a-11 to investment companies was similarly arbitrary and capricious and that the rule violated First Amendment protections of corporate speech.[21] The SEC stayed the rule pending the outcome of the case.[22]

The D.C. Circuit vacated Rule 14a-11.[23] Writing for a unanimous panel, Judge Ginsburg[24] concluded that the SEC had "failed once again . . . adequately to assess the economic effects of a new rule."[25] Under arbitrary and capricious review,[26] the Commission must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[27] Further, Congress in 1996 imposed on the SEC a special obligation to consider effects on "efficiency, competition, and capital formation."[28] Action is thus arbitrary and capricious if the SEC has failed to "apprise itself — and hence the public and Congress — of the economic consequences of a proposed regulation."[29] As in *American Equity Investment Life Insurance Co. v. SEC*[30] and *Chamber of Commerce v. SEC*,[31] recent D.C. Circuit cases assessing SEC economic analyses, the court held that the Commission's action fell short. Judge Ginsburg rebuked an agency that, in his eyes, had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[32]

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[20] Opening Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America at 31, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2010 WL 5116461, at *31.

[21] *Id.* at 53–59, 2010 WL 5116461, at *53–59.

[22] Order Granting Stay of Effect of Commission's Facilitating Shareholder Director Nominations Rules, Exchange Act Release No. 63,031 (Oct. 4, 2010), *available at* http://www.sec.gov/rules/other/2010/33-9149.pdf.

[23] *Bus. Roundtable*, 647 F.3d at 1156.

[24] Chief Judge Sentelle and Judge Brown joined the opinion.

[25] *Bus. Roundtable*, 647 F.3d at 1148.

[26] *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

[27] *Bus. Roundtable*, 647 F.3d at 1148 (alterations in original) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

[28] *Id.* (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c) (2006)) (internal quotation marks omitted). The new language sought to extend SEC consideration to economic efficiency, beyond its traditional focus on investor protection. *See* 15 U.S.C. §§ 78c(f), 80a-2(c).

[29] *Bus. Roundtable*, 647 F.3d at 1148 (quoting Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005)) (internal quotation marks omitted).

[30] 613 F.3d 166, 167–68 (D.C. Cir. 2010) (vacating SEC rule regarding fixed index annuities for failure to consider the rule's economic effects).

[31] 412 F.3d 133, 136 (D.C. Cir. 2005) (vacating SEC rule regarding independent directors on investment company boards for failure to consider costs and alternatives).

[32] *Bus. Roundtable*, 647 F.3d at 1148–49.

The court found that Rule 14a-11 was arbitrary and capricious on three basic grounds.[33] First, and most prominently, the court adjudged the SEC's analysis of costs and benefits to be insufficient.[34] The SEC underestimated the expenses that directors would incur campaigning against shareholder nominees because the Commission relied on projections with "no basis beyond mere speculation."[35] The SEC similarly erred when, to support its position that Rule 14a-11 would improve board performance and increase shareholder value, it "relied exclusively and heavily upon two relatively unpersuasive studies" instead of following "the numerous studies submitted by commenters that reached the opposite result."[36] The SEC's analysis also broke down when it explained that existing state law rights, not the SEC rules designed to enforce them, were to blame for potential costs: "[T]his type of reasoning, which fails to view a cost at the margin, is illogical and, in an economic analysis, unacceptable."[37]

Second, the court held that the SEC failed to consider properly how institutional investors like unions and pension funds might manipulate Rule 14a-11.[38] Such concerns pervaded corporate comment letters but were strenuously opposed by shareholder advocates.[39] Judge Ginsburg sympathized with the Business Roundtable's view of institutional investors, finding arbitrary action because, though "[t]he Commission did not completely ignore these potential costs, . . . it [did not] adequately address them."[40]

Third, the court criticized the SEC's projections of the frequency of election contests.[41] The Commission argued that its figures were correct, and that they applied only for purposes of the Paperwork Reduction Act,[42] but the court was not persuaded, declaring the estimates "internally inconsistent and therefore arbitrary."[43]

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[33] *Id.*

[34] *Id.* at 1149–51.

[35] *Id.* at 1150. The SEC "did nothing to estimate and quantify the costs it expected companies to incur" even though "empirical evidence about expenditures in traditional proxy contests was readily available." *Id.*

[36] *Id.* at 1150–51.

[37] *Id.* at 1151.

[38] *Id.* at 1151–52.

[39] *Id.*

[40] *Id.* at 1152.

[41] *Id.* at 1152–54.

[42] Final Brief of the Securities and Exchange Commission at 42–43, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014799, at *42–43 (claiming that estimates for the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521 (2006 & Supp. IV 2011), designed to assess the burden of collecting and reporting information, did not have wide implications); *cf.* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) (suggesting a faulty projection was not necessarily arbitrary and capricious if it was made for a limited purpose).

[43] *Bus. Roundtable*, 647 F.3d at 1153.

Beyond those three basic reasons, the court explained that the application of Rule 14a-11 to investment companies would have been separately arbitrary and capricious because it had been justified with "unutterably mindless" reasoning.[44] The court did not reach the First Amendment corporate speech challenge.[45]

In *Business Roundtable*, the D.C. Circuit waded into a political fight under the guise of dispassionate scientific oversight to vacate a proxy access rule produced after years of open, contentious debate. While statutes require the SEC to consider the consequences of its regulations,[46] courts should recognize the limitations of economics and of their own expertise by acknowledging thorough, competent analyses. Perpetuating *Business Roundtable*'s exacting review could impose a judicial blockade on complex financial rulemaking, which would impede regulators' ability to police the marketplace in accordance with congressional intent.

Courts hardly outperform the SEC at evaluating the imperfect science of economics.[47] Judges can struggle with expert testimony in their own decisions,[48] and traditional training leaves most jurists ill-prepared to engage with sophisticated econometrics.[49] And the validity of economic analysis is cloudier than that of many other scientific methods because economic models rely on complex, interrelated assumptions.[50] Even practiced analysts struggle to isolate the impact of

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[44] *Id.* at 1156. The SEC claimed that costs for investment companies would be incurred only if shareholder nominees won elections, an argument the court faulted as undercutting the rule's basic rationale. *Id.* at 1155–56.

[45] *Id.* at 1156.

[46] *See* 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c) (2006).

[47] In previous decisions, the D.C. Circuit has recognized expertise as a reason for deference. *See, e.g.*, Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1478 (D.C. Cir. 1998) ("Under the arbitrary and capricious standard of review, 'an agency's predictive judgments about areas that are within the agency's field of discretion and expertise' are entitled to 'particularly deferential' review, as long as they are reasonable." (citations omitted) (quoting Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 821 (D.C. Cir. 1983))).

[48] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 599 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) ("[The briefs here] deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review — in short, matters far afield from the expertise of judges. . . . [T]he unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.").

[49] *See* Patricia M. Wald, *Judicial Review: Talking Points*, 48 ADMIN. L. REV. 350, 352 (1996) ("[Q]uestions have been raised about whether we in the courts are competent to review the minutiae of risk or cost-benefit analysis. For most of us, the answer is no."). *See generally* Patricia M. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1987, at 225.

[50] *See generally* JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS 4–7 (2009) (explaining the limits of econometric experimental design).

factors like proxy access,[51] and good-faith differences abound. Critics have little trouble singling out a controversial projection or a contentious source on either side of a reasoned debate. In such cases, it can be exceedingly difficult to distinguish principled from political nitpicking. Economic models rely on politically controversial assumptions: the numbers may look concrete, but their origins often are not.[52] Whether one believes that proxy access will improve corporate performance, for example, depends a great deal on one's political ideology.[53] In *Business Roundtable*, the court took aim at just such political judgments despite the judiciary's institutional limitations.[54]

Not surprisingly given the complexity of economic analysis, Judge Ginsburg's opinion made missteps similar to those for which he scolded the SEC. When the court faulted the SEC's discounting of potential costs of proxy fights without empirical evidence as "mere speculation,"[55] it mistakenly assumed that the Chamber of Commerce's economic arguments rested on firmer ground.[56] Pages later, the court, without empirical support, relied solely on a single, speculative sentence to criticize the SEC for failing to estimate the costs of union pension plans using proxy access as leverage in contract negotiations.[57]

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[51] *See generally* Yair Listokin, *Interpreting Empirical Estimates of the Effect of Corporate Governance*, 10 AM. L. & ECON. REV. 90 (2008) (explaining the confounding effect of endogeneity problems on corporate governance analyses).

[52] *Cf.* Jerome Culp, *Judex Economicus*, 50 LAW & CONTEMP. PROBS., Autumn 1987, at 95, 96–100 (exploring the assumptions behind Judge Posner's law and economics analysis). *See generally* Kenneth G. Dau-Schmidt, *Relaxing Traditional Economic Assumptions and Values: Toward a New Multidisciplinary Discourse on Law*, 42 SYRACUSE L. REV. 181 (1991) (examining assumptions underlying "neoclassical efficiency analysis," *id.* at 182).

[53] *See* Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW 361, 378 (2010) ("The proxy access debate is not an abstract academic controversy . . . . It is a knockdown, drag-out political brawl.").

[54] *Cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Judges are not experts in the field . . . . Courts must [not] . . . reconcile competing political interests . . . on the basis of the judges' personal policy preferences."); *id.* (holding that the judiciary should defer to an agency interpretation because "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies"); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 814 (2008) (presenting empirical findings "that in important domains, the hard look is hardened, or softened, by the political predilections of federal judges").

[55] *Bus. Roundtable*, 647 F.3d at 1150.

[56] *See* J. Robert Brown, Jr., *Shareholder Access and Uneconomic Economic Analysis:* Business Roundtable v. SEC 3–4 (Univ. of Denver Legal Studies Research Paper Series, Working Paper No. 11-14, 2011), *available at* http://ssrn.com/abstract=1917451 ("The approach used by the court . . . incorrectly interpreted the board's fiduciary obligations . . . [and relied on a comment letter that] was based upon a faulty premise.").

[57] *Bus. Roundtable*, 647 F.3d at 1152 ("[S]tate governments and labor unions . . . often appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest." (alteration in original) (quoting Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*,

Worse, in arguing that the SEC chose wrongly from conflicting studies about the effects of dissident directors on board performance,[58] the court simply chose the opposite side of a politically charged debate. Empirical evidence drawn from this very case suggests the court's error: markets preferred the 2010 proxy access rule, as shares of firms that would have been most affected lost value when the SEC stayed Rule 14a-11.[59]

These inconsistencies help demonstrate that no analysis of a politically contentious issue could survive *Business Roundtable*'s exacting arbitrary and capricious review. Over the years, the D.C. Circuit has earned a reputation for rigorous review of agency action,[60] but its current approach sets the bar even higher. When costs and benefits are inestimable and projections differ, a panel could always vacate rulemaking, and would be particularly likely to do so when the agency's political assumptions affront the court's sensibilities.

Such stringent oversight should be especially suspect when statutes suggest proregulatory congressional intent. Since Congress fell short of legislating Rule 14a-11, Dodd-Frank cannot be understood as fully endorsing the SEC's proposal.[61] Still, at the very least, Dodd-Frank's

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119 HARV. L. REV. 1759, 1765 (2006)) (internal quotation marks omitted)); *see also* Brown, *supra* note 56, at 5.

[58] *Bus. Roundtable*, 647 F.3d at 1150–51. Theoretical models relating proxy access to board performance are especially unscientific. *See* Bo Becker et al., *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable Challenge* 12 (Harvard Bus. Sch., Working Paper No. 11-052, 2010) ("[Boards' endogeneity] makes the effect of any board characteristic . . . impossible to identify based only on the observed correlation between that characteristic and firm performance." (citing Benjamin E. Hermalin & Michael S. Weisbach, *Endogenously Chosen Boards of Directors and Their Monitoring of the CEO*, 88 AM. ECON. REV. 96 (1998))), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695666.

[59] Becker et al., *supra* note 58, at 4 ("Using a 1-day event window around October 4, 2010, we find that share prices of companies that would have been most exposed to shareholder access declined significantly compared to share prices of companies that would have been most insulated from the rule.").

[60] *See* Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1407–09 (1996). The D.C. Circuit's strict standards persist despite past corrections from the Supreme Court. *See, e.g.*, Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 108 (1983) (finding the court's scrutiny of a "minor ambiguity" to be "totally inappropriate"); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 525 (1978) (concluding that the court "improperly intruded into the agency's decisionmaking process"); *see also* Stephen Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1833 (1978) ("In the *Vermont Yankee* case, the Court of Appeals for the District of Columbia Circuit sought to require additional agency procedures [when dealing with a complex and important scientific or technical issue]. . . . The Supreme Court has reversed that approach, correctly so in my view . . . ." (footnotes omitted)).

[61] *See* Dodd-Frank Act, Pub. L. No. 111-203 § 971(b), 124 Stat. 1376, 1915 (2010) (codified at 15 U.S.C. § 78n(a) (2006 & Supp. IV 2011)) (providing that the SEC "may" issue a proxy rule, but not requiring that it shall do so). *But see* Thomas Quaadman, *Dodd-Frank: Governance Issues Galore and Not Limited to Financial Institutions*, METROPOLITAN CORP. COUNS., Aug. 2010, at 18 ("Some have speculated that [Dodd-Frank's] legislative grant of authority was given to try

grant of rulemaking authority contemplated the possibility of a proxy access rule.[62] But the strictness of the *Business Roundtable* standard of review ensured that the D.C. Circuit would only entrench the status quo.

The effects of this decision are troubling. The *Business Roundtable* ruling disrupts the SEC's ability to fulfill its statutory mandate to oversee the proxy process.[63] Many imagine *Business Roundtable* as the first domino to fall in the Dodd-Frank universe.[64] In an evolving financial climate, ossification of SEC regulations[65] may contribute to market failures that Congress designed Dodd-Frank to prevent.

Because the height of the *Business Roundtable* hurdle may prevent the SEC from demonstrating adequate analysis even after extraordinary efforts, Congress should guard desirable actions from excessive scrutiny. Congress could repeal the economic analysis requirement, or it could ensure that future legislation instructs courts to apply more deferential standards of review to particular regulations. Without such action, Congress may have to expend scarce resources enacting specific legislation absent a different judicial position.

The D.C. Circuit's hard-line application of economic review should change. Courts have little place joining political fights or parsing complex economic analyses. They should avoid using arbitrary and capricious review to impose unattainable standards that bar agency action.

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and inoculate the SEC from a legal challenge."); Becker et al., *supra* note 58, at 11 ("Congress's authorization to the SEC under Section 971 of the Dodd-Frank was intended to largely shut down [the] kind of challenge [brought in *Business Roundtable*].").

62 *See* 156 CONG. REC. S5916 (daily ed. July 15, 2010) (statement of Sen. Jack Reed) ("[A]fter much dispute, the bill makes it clear that the SEC has the authority to grant shareholders proxy access to nominate directors."); 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Paul Kanjorski) ("[The Dodd-Frank Act] clarifies the ability of the SEC to issue rules regarding the nomination by shareholders of individuals to serve on the boards of public companies. These provisions regarding proxy access will enhance democratic participation in corporate governance and give investors a greater voice in the companies that they own.").

63 Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,025 (proposed June 18, 2009) ("Regulation of the proxy process and disclosure is a core function of the Commission . . . . Section 14(a) of the Exchange Act stemmed from a Congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'" (second alteration in original) (footnote omitted) (quoting H.R. REP. NO. 73-1383, at 14 (1934))).

64 *See, e.g.*, Ben Protess, *Court Ruling Offers Path to Challenge Dodd-Frank*, N.Y. TIMES DEALBOOK, Aug. 17, 2011, http://dealbook.nytimes.com/2011/08/17/court-ruling-offers-path-to-challenge-dodd-frank.

65 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 41 (2009) (arguing that considering political factors during arbitrary and capricious review would help to mitigate the "ossification" problem); *cf.* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 492 (1997) ("From the agency's perspective, hard look review has become an icy stare that freezes action; no matter how much care the agency believes it has given to a decision, the agency faces uncertainty about whether the reviewing court will find that the agency performed its decisionmaking task adequately.").