BUSINESS ROUNDTABLE: A NEW LEVEL OF JUDICIAL SCRUTINY AND ITS IMPLICATIONS IN A POST-DODD-FRANK WORLD

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Questions regarding the appropriate bounds of judicial review have recently intensified in the wake of President Obama's controversial comments concerning the Supreme Court's pending ruling on the constitutionality of the Affordable Care Act. A similar debate, however, has been raging in the securities law community since July 2011, when the D.C. Circuit vacated Exchange Act Rule 14a-11, the so-called "proxy access rule," in Business Roundtable v. SEC. *Throughout this scathing opinion, the court condemns the SEC for failing to adequately consider the costs and benefits of Rule 14a-11 in promulgating the regulation, as commanded by the National Securities Markets Improvement Act of 1996 ("NSMIA"). Although the extent of cost-benefit analysis contemplated by the NSMIA—and thus how strictly the court should scrutinize the conclusions arrived at by the SEC through this analysis—is by the statute's plain terms ambiguous, the court erroneously failed to examine the NSMIA's legislative history, instead applying an unprecedented level of de novo-like scrutiny. This Note argues that the correct standard of judicial review envisioned by Congress in enacting the NSMIA, which such an examination would have revealed, is far more deferential to the agency's determinations than the nearly insurmountable standard applied by the D.C. Circuit, rendering some of its holdings utterly incorrect.* Business Roundtable *scrutiny,*

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this Note argues, has the potential to eliminate SEC rulemaking and undo Dodd-Frank's sweeping financial reforms to the detriment of the national economy, absolutely demanding clarification by either Congress or the Supreme Court of the appropriate standard of judicial review by which the court is to evaluate SEC rules.

I. INTRODUCTION

Securities and Exchange Commission ("SEC") Rule 14a-11,[1] the so-called "proxy access rule," did not stand a chance. Investors had long advocated, over the objections of issuers, for an SEC-promulgated rule demanding proxy access, the "right of shareholders to nominate directors and to have

[1] 17 C.F.R. § 240.14a–11 (2012).

their nominees included in the company's proxy statement."[2] This struggle culminated in an apparent victory for shareholder rights with the SEC's August 2010 adoption of Rule 14a-11, which allowed certain shareholders to solicit proxies for their own board candidates in the corporation's proxy materials.[3] The victory, however, was to be short-lived.

Within a year, the U.S. Court of Appeals for the D.C. Circuit, in a highly controversial opinion, struck down the proxy access rule in *Business Roundtable v. SEC*,[4] a scathing criticism of the SEC's rulemaking process. In particular, the court lambasted the agency for failing to adequately "consider" the economic consequences of Rule 14a-11 in promulgating the regulation, as commanded by the National Securities Markets Improvement Act of 1996 ("NSMIA"),[5] which added to the Securities Exchange Act of 1934 ("Exchange Act")[6] a requirement that the SEC perform a cost-benefit analysis whenever it exercises its rulemaking authority. Although the level of "consideration" demanded by the NSMIA's enigmatic cost-benefit provision—and thus how strictly the court should scrutinize the agency's resulting determinations—is by the statute's plain terms ambiguous, the court erroneously failed to examine the NSMIA's legislative history, beginning with the basic standard for judicial review established by the Administrative Procedure Act ("APA")[7] upon which it builds

[2] Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1347 (2011).

[3] *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,674 (Sept. 16, 2010) [hereinafter *Adopting Release*].

[4] 647 F.3d 1144 (D.C. Cir. 2011).

[5] Pub. L. No. 104-132, 110 Stat. 3416, 3425 (1996) (codified in scattered sections of 15 U.S.C.).

[6] 15 U.S.C. § 78a *et seq.* (2012).

[7] 5 U.S.C. § 551 *et seq.* (2012).

its decision.[8] As a result, at least some of the court's holdings are utterly incorrect.

This Note argues that the correct level of judicial scrutiny that the court should have applied is far more deferential than the nearly insurmountable de novo-like review it employed throughout the decision. Part II details the functions of the SEC and its rulemaking authority, as well as the history of the fight for proxy access. Part III summarizes the *Business Roundtable* court's scathing conclusions. Part IV argues that many of the SEC's determinations would have fully survived the correct *moderate* level of scrutiny, as revealed by an examination of the NSMIA's legislative history, starting with the long and tumultuous history of the APA. In drawing this conclusion, this Note utilizes Professor George B. Shepherd's methodology in *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*,[9] which assigns a Congressional or judicial action a control rating of one to ten based on its level of "intrusion into agency activities," measured in this context by the standard of judicial review prescribed, with ten being the most intrusive.[10] The appropriate standard that the court should have applied, this Note argues, rates six or seven on Professor Shepherd's scale, far less demanding than the extreme level of scrutiny it actually employed, which easily earns the maximum rating of ten. The *Business Roundtable* standard of review, similar to the standard applied by the D.C. Circuit in striking down SEC rules in the previous two such challenges,[11] is a potential death-knell for the SEC and

[8] *Cf.* Zedner v. United States, 547 U.S. 489 (2006) (examining the legislative history of the Speedy Trial Act to determine the meaning of an ambiguous clause).

[9] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal* Politics, 90 NW. U. L. REV. 1557, 1567 (1996). This article outlines the long and tumultuous legislative history of the APA in extensive detail.

[10] *Id.*

[11] *See* Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010) (striking down rules classifying fixed indexed annuities as "securities" subject to the Securities Act of 1933 as enacted in violation of the APA); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005)

the sweeping financial reforms of the Dodd-Frank Wall Street Reform and Consumer Protection Act[12] for two reasons, discussed in Part V: (1) no SEC rule could ever withstand challenge under the standard's insurmountable scrutiny; which (2) could allow business interests, given the distribution of resources in our current system of corporate governance, to strike down only those rules that impinge on management discretion in order to effectuate a reversion of the regulatory regime back to the pre-financial crisis rules that imposed minimal accountability on management. To prevent these disastrous consequences, it is absolutely imperative either that Congress clarify the actual level of judicial scrutiny contemplated by Section 106(b) of the NSMIA or that the SEC take its next inevitable opportunity to seek such clarification by the U.S. Supreme Court.

II. THE SEC AND PROXY ACCESS

A. Creation of the SEC and Its Rulemaking Authority

The origins of the SEC trace back to President Franklin D. Roosevelt's New Deal, the same period from which the APA emerged.[13] In order to address the causes and combat the devastating effects of the Great Depression, Roosevelt set out to "accelerate[ ] a trend that had begun in the late nineteenth century toward greater control of the economy by federal commissions and agencies."[14] The newly inaugurated President accomplished this goal almost immediately, pushing through Congress "sweeping legislation that established many administrative agencies."[15] By the end of

(striking down a rule on investment company board governance as promulgated in violation of the APA).

[12] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[13] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited Apr. 27, 2012) [hereinafter *The Investor's Advocate*].

[14] Shepherd, *supra* note 9, at 1561.

[15] *Id.* at 1568.

Roosevelt's famous first 100 days in office, "[a]n avalanche of new federal agencies and commissions . . . reached ever more broadly into a free market that appeared to have failed."[16] As the American Bar Association's Special Committee on Administrative Law ("ABA Committee"), an entity that would play a critical role in the eventual passage of the APA, observed in its 1933 annual report, the first Congressional session of Roosevelt's presidency represented "an advance of federal administrative machinery, on a scale and to an extent never before attempted, into fields not heretofore brought under federal regulation."[17]

The SEC was an integral component of this advance. Prior to the stock market crash of 1929, there was little federal regulation of the nation's securities markets.[18] After the crash, however, "public confidence in the markets plummeted. Investors large and small . . . lost great sums of money in the ensuing Great Depression," spurring agreement that in order for the economy to recover, "the public's faith in the capital markets needed to be restored."[19] Roosevelt and his supporters in Congress swiftly stepped in to effectuate this restoration through expansive government regulation.[20] After rounds of comprehensive investigative hearings, Congress passed the Securities Act of 1933[21] and

[16] *Id.* at 1562.

[17] Report of the Special Committee on Administrative Law, 1933 A.B.A. ANN. REP. 408 (1933); *see also* Polly J. Price, *Federalization Of The Mosquito: Structural Innovation In The New Deal Administrative State*, 60 EMORY L.J. 325 (2010) (studying federal efforts to combat malaria in the southern United States as a good example of the grand level of structural experimentation and innovation of the New Deal administrative state); ADAM S. COHEN, NOTHING TO FEAR: FDR'S INNER CIRCLE AND THE HUNDRED DAYS THAT CREATED MODERN AMERICA (Penguin Press 1st ed. 2009) (detailing the transformation of the federal government during Roosevelt's first 100 days in office).

[18] *The Investor's Advocate*, *supra* note 13.

[19] *Id.*

[20] *See id.*

[21] 15 U.S.C. § 77a *et seq.* (2012).

the Exchange Act,[22] the latter of which created the SEC as an independent executive agency.

With its expansive mission of "protect[ing] investors, maintain[ing] fair, orderly, and efficient markets, and facilitat[ing] capital formation,"[23] the SEC was among the most powerful—if not *the* most powerful—of all New Deal agencies. Authorized to reach into every corner of the securities markets and exert near absolute control, the SEC was compared to "the tyrannies of the Gestapo of Germany, or the Russian Ogpu" by big business interests and their proponents.[24] In order to achieve this comprehensive scope, the original Exchange Act granted the SEC nearly unbridled authority to promulgate rules and regulations governing the securities markets.[25] The statute was "broadly drafted, establishing basic principles and objectives" that prohibited little out of fear of constraining the SEC from carrying out Congress' intent as the markets evolved technologically and expanded both in size and range of products offered.[26] As expected, rulemaking quickly became the "category of agency activity by which [the SEC] had the greatest impact" on the national economy.[27]

The SEC's rulemaking authority is significantly more constrained today. In promulgating rules, the agency must follow a plethora of requirements instituted by various statutes, regulations, and policies.[28] The modern rulemaking

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[22] 15 U.S.C. § 78d (2012).

[23] *See The Investor's Advocate*, *supra* note 13.

[24] 86 CONG. REC. 4533, 4603 (1940) (statement of Rep. Hawks).

[25] *See The Investor's Advocate*, *supra* note 13.

[26] *See id.*; *see e.g.*, Exchange Act § 10(b), 15 U.S.C. § 78j (2012) (blanket prohibition against the "use or employ [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

[27] Shepherd, *supra* note 9, at 1583.

[28] *See* Securities & Exchange Commission, Audit No. 347, Rulemaking Process (July 12, 2002), http://www.sec.gov/about/oig/audit/347fin.htm (discussing the SEC's rulemaking process) [hereinafter Rulemaking Audit]. The SEC is subject to extensive reporting and procedural requirements under the APA, 5 U.S.C. §§ 551–559 (2012), the Paperwork

process typically begins with a detailed rule proposal outlining the rule's provisions and the specific objectives each achieves,[29] in accordance with the APA.[30] However, "if an issue is unique or complicated, the [SEC] may first seek out public input on which, if any, regulatory approach is appropriate."[31] In such common instances, the SEC issues a concept release that describes the area of interest and the agency's concerns.[32] This release also frequently includes a discussion of the different approaches to addressing the problem conceptualized by the SEC, followed by a series of questions aimed at soliciting the public's views on the issue.[33] The SEC considers this solicited feedback, as well as input obtained through roundtable discussions and public hearings, as it decides which approach to take.[34] Once this initial comment stage is complete, SEC staff members draft the rule proposal, present it to the full panel of commissioners,[35] and, if the proposal receives approval, "present[ ] [it] to the public (through publication in the *Federal Register* and on the Commission's website) for a specified period of time, typically between 30 and 60 days, for review and comment."[36] The staff once again considers

Reduction Act of 1995, 44 U.S.C. §§ 3501–3520 (2012), the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601–612 (2012), and the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), 5 U.S.C. §§ 657, 801–808 (2012).

[29] Rulemaking Audit, *supra* note 28.

[30] *See supra* note 28.

[31] Rulemaking Audit, *supra* note 28.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] The SEC is governed by a board of "five presidentially-appointed [c]ommissioners, with staggered five-year terms," one of whom is designated by the President as Chairman of the Commission—the agency's chief executive." *The Investor's Advocate*, *supra* note 13. It is the responsibility of this panel, commonly referred to as "the Commission," to approve all major SEC action, including proposed rules, during regularly convened meetings. *Id.*

[36] Rulemaking Audit, *supra* note 28.

the public's input as it crafts a final rule, which must be "adopted by a vote of the full Commission."[37]

But perhaps the most important consideration the SEC makes throughout this process—especially for the purposes of this Note—is the cost-benefit analysis mandated by the NSMIA. "As an independent regulatory agency, the SEC is *not* required under the [APA] to conduct a 'cost-benefit analysis' when it adopts rules."[38] Although Executive Orders 12,291 and 12,498, issued by President Reagan in the 1980s, require federal agencies to conduct a cost-benefit analysis when promulgating rules, "these orders and their subsequent replacements, Executive Orders 12,866 and 13,258, specifically exempted independent regulatory agencies, such as the SEC, from this requirement."[39] Section 106(b) of the NSMIA, however, effectually brings the SEC under the umbrella of these executive orders by mandating that the agency "consider, in addition to the protection of investors, whether [a proposed rule] will promote efficiency,

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[37] *Id.*

[38] David S. Ruder, *Balancing Investor Protection with Capital Formation Needs After the SEC* Chamber Of Commerce *Case*, 26 PACE L. REV. 39, 43 (2005) (emphasis added).

[39] *Id.* at 43–44 (footnote omitted) (citing Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (mandating a Regulatory Impact Analysis discussing a rule's potential costs, benefits, and possible alternative approaches); Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (specifically excluding independent agencies from the order's strictures by defining "Agency" as "any authority of the United States that is an 'agency' under 44 U.S.C. § 3502(1), *other than those considered to be independent regulatory agencies*, as defined in 44 U.S.C. § 3502(10)") (emphasis added). According to Professor Ruder, "President Bill Clinton issued Executive Order 12,866 in 1993 to replace Executive Orders 12,291 and 12,498. President George W. Bush later made minor changes to Executive Order 12,866 with the issuance of Executive Order 13,258. Both revisions essentially adopted the main features of the original orders." Ruder, *supra* note 39, at 44 (citing Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn From American Experience*, 11 COLUM. J. EUR. L. 1, 44–45 (Winter 2004/2005); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1393, 1447 n.28 (2004)).

competition, and capital formation."[40] The statute's legislative history makes clear that this enigmatic clause actually commands the SEC to perform a traditional cost-benefit analysis whenever it engages in rulemaking.[41]

Accordingly, the SEC acknowledges that "the cost-benefit analysis section of a rule is . . . increasingly significant" and has expressed its intention to follow the principles established by Executive Orders 12,866 and 13,258 by "assess[ing] costs and benefits of regulatory alternatives . . . and request[ing] comments" on these potential impacts.[42] This analysis is typically performed by SEC staff in conjunction with the agency's Office of Economic Analysis ("OEA"), which employs a team of financial economists to ensure that the cost-benefit analysis sections of final rules comply with the aforementioned statutes and regulations.[43]

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[40] Securities Exchange Act of 1934, 15 U.S.C. § 78c(f) (2012).

[41] *See* Opening Statement of Rep. Thomas J. Bliley, Jr., 1996 WL 270857 (F.D.C.H. May 15, 1996) ("The substitute [NSMIA] maintains the provision *requiring cost benefit analysis in SEC rulemaking*, which we think is very important in light of the enhanced Congressional role mandated for SEC and SRO rules under the Small Business Regulatory Enforcement Act of 1996.") (emphasis added); Opening Statement of Rep. Jack Fields, 1995 WL 706020 (F.D.C.H. Nov. 30, 1995) ("On the subject of capital formation: my bill calls for the SEC to consider the promotion of efficiency, competition and capital formation when it makes rules. This is an important provision of the bill because *it will introduce an element of explicit cost benefit analysis into SEC rule making*. We want to encourage the SEC to take efficiency, competition, and capital formation into account in its rulemaking. We view these goals as complementary to the important goal of investor protection.") (emphasis added); *Securities and Exchange Commission: Market Issues Weighed in Rulemaking; Investor Protection is First, Levitt States*, 29 S.R.L.R. 297 (Mar. 7, 1997) (reporting on then-SEC Chairman Arthur Levitt's remarks regarding the NSMIA's explicit requirement of cost-benefit analysis). The extent of this analysis, as envisioned by Congress, is discussed *infra* Part IV.A.

[42] Rulemaking Audit, *supra* note 28.

[43] In particular, OEA staff members "provide[ ] advice and technical assistance on the likely economic impacts of rules, on whether the proposed regulatory approach makes economic sense, and on whether proposals and determinations are supported by sound economic reasoning and relevant empirical data." *Id.*

However, the SEC, joined by the courts, has also expressed concerns that fully expounded cost-benefit analysis is in many cases nearly impossible to achieve due to a lack of definitive or readily quantifiable empirical data and the unpredictable nature of certain costs.[44] In particular, some agency officials cautioned that "additional analyses could delay rulemakings without corresponding benefits and [ ] requiring a rigorous qualitative analysis where data are not available could even preclude necessary rule changes."[45] The D.C. Circuit agreed in *Chamber of Commerce v. SEC*,[46] a business challenge to an SEC rule requiring that 75% of a registered investment company's board of directors, and its chairman, be independent of its investment adviser.[47] Recognizing "that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA," the court nonetheless held that the SEC's decision not to perform its own empirical study does not *necessarily* render the agency's conclusions unreasoned.[48] The courts are "acutely aware that an agency need not—indeed cannot—base its every action upon empirical data," Judge Ginsburg explained, as such data is not always available or particularly definitive.[49] Moreover, "a federal agency can readily contact no more than nine members of the public for cost estimates."[50] Thus, the

[44] *Id.*

[45] *Id.*

[46] 412 F.3d 133 (D.C. Cir. 2005) (striking down a rule on investment company board governance as promulgated in violation of the APA).

[47] *Id.*

[48] *Id.* at 142.

[49] *Id.*

[50] Rulemaking Audit, *supra* note 28. "Under the Paperwork Reduction Act, Federal agencies are not allowed to contact more than nine members of the public for information about a particular matter, unless they have obtained OMB's approval. The approval process can be time-consuming." *Id.*

SEC "may be 'entitled to conduct . . . a general analysis based upon informed conjecture.'"[51]

B. The Fight for Proxy Access

The SEC engaged in this comprehensive modern rulemaking process in enacting Rule 14a-11, although the problem the rule seeks to remedy is a longstanding one. Since the beginnings of modern corporate law, a corporation's board of directors has been entrusted with the responsibility of making nearly all decisions relevant to shareholder interests (i.e., those that effect share price).[52] Accordingly, it is in the interest of shareholders, as residual owners of the corporation, to exercise their fundamental right to nominate and elect to the board individuals who will execute this responsibility in a manner the shareholders deem most beneficial to them.[53] Shareholders, however, are greatly hindered in their exercise of this franchise.[54]

Despite the ability of shareholders to oust inept or self-serving incumbent directors—a seemingly monumental power in theory—in practice this power is trivial at best due to the staggering economic cost of waging such a campaign.[55] Shareholder voting, including voting in director elections, is conducted almost entirely through the proxy process.[56] Pursuant to this process, incumbent directors nominate

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[51] *Chamber of Commerce*, 412 F.3d at 142 (citing Melcher v. FCC, 134 F.3d 1143, 1158 (D.C. Cir. 1998)). *See also infra* note 183 and accompanying text.

[52] *See, e.g.*, DEL. CODE ANN. tit. 8, § 144(a) (2012) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."). Shareholder approval, however, is required for fundamental corporate transactions, including economically significant mergers, *id.* § 251(c), sales of substantially all of a corporation's property and assets, *id.* § 271(a), and dissolutions, *id.* § 275, as well as for any amendment to the corporation's articles of incorporation, *id.* § 242.

[53] *See* Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29024, 29024 (June 18, 2009) [hereinafter *Proposing Release*].

[54] *See infra* notes 60–67 and accompanying text.

[55] *Id.*

[56] Bus. Roundtable v. SEC, 647 F.3d 1144, 1147 (D.C. Cir. 2011).

either themselves or an ally as candidates for each board seat up for election, and place endorsements for each nominee in the set of proxy materials sent to shareholders.[57] Shortly before the election, held at the company's annual shareholder meeting, the company distributes this set, which comprises a proxy voting card "enabl[ing] shareholders to vote for or against the nominee(s) without attending the meeting" and a proxy statement outlining "voting procedures and background information about the board's nominee(s)," to every shareholder.[58] Any "shareholder who wishes to nominate a different candidate may separately file his *own* proxy statement and solicit votes from shareholders, thereby initiating a 'proxy contest.'"[59]

However, unlike incumbent directors, who can "spend freely from the corporate treasury to put on lavish campaigns for their own reelection,"[60] the shareholder-wagers of a proxy contest must *personally* bear the enormous cost of soliciting proxies, overwhelmingly discouraging such contests in the first place.[61] Most significantly, the shareholder-challengers must "pay for lawyers to make various disclosures and for the dissemination of their proxy statements to eligible shareholder-voters" in compliance with the SEC-promulgated proxy rules, as well as the "great deal

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[57] *Id.*

[58] *Id.*

[59] *Id.* (emphasis added).

[60] Lee Harris, *Shareholder Campaign Funds: A Campaign Subsidy Scheme for Corporate Elections*, 58 UCLA L. REV. 167, 168 (2010) (observing that incumbent directors, like sitting politicians, have at their disposal a "large war chest meant to scare off potential rivals"). *See also* Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 293 (N.Y. 1955) ("In a contest over policy, as compared to a purely personal power contest, corporate directors have the right to make reasonable and proper expenditures, subject to the scrutiny of the courts when duly challenged, from the corporate treasury for the purpose of persuading the stockholders of the correctness of their position and soliciting their support for policies which the directors believe, in all good faith, are in the best interests of the corporation.").

[61] *Rosenfeld*, 128 N.E.2d at 293 (holding that only successful challengers can award themselves reasonable reimbursement and even then such awards are subject to shareholder approval).

of time and money" contestants typically spend persuading voting shareholders.[62] Shareholder-challengers can obtain reimbursement for these massive expenditures only if they are successful in their contest (i.e., win election to the board).[63] Because the average shareholder "own[s] only a small fraction of the company's shares"[64]—a stake that typically makes up a small portion of the shareholder's own portfolio—"the risk of not being reimbursed" will in many cases outweigh the small increase to his own investment that could result from a change in management.[65] Thus, proxy contests are virtually nonexistent in our current system of corporate governance.[66]

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[62] Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1774 (2010). Professor Harris found that from 2006 to 2008, the cost to shareholder-challengers of waging a proxy contest averaged over $650K, totaling nearly $10M in one instance. Harris, *supra* note 60, at 210.

[63] *See supra* note 60.

[64] Lucian Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1071, 1080 (1990).

[65] *Id.* at 1181 ("[G]ood contestants are not always compensated for the costs of leading control contests. If so, they bear all the costs of waging a contest but must share proportionally with all other shareholders any increase in company value resulting from a successful contest."). This problem is commonly referred to as the "collective action" problem.

[66] Indeed, Professor Harris observed that from 2006 to 2008, only 133 of the thousands of publicly traded companies "received an election challenge, on average [forty-four] contested corporate elections per year." Harris, *supra* note 60, at 210. Thus, "the safety valve of potential ouster via the ballot box" is missing in our corporate governance system. Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43, 45 (2003). As Professor Bebchuk concluded, "[a]lthough shareholder power to replace directors is supposed to be an important element of [this] system, it is largely a myth. Attempts to replace directors are extremely rare, even in firms that systematically under perform over a long period of time. By and large, directors nominated by the company run unopposed and their election is thus guaranteed." *Id.* As in the typical political election, "[t]he key for a director's re-election is [simply] remaining on the firm's slate." *Id.*; *see also* Harris, *supra* note 60, at 168–69 ("[I]n reality, the vast majority of corporate elections are ho-hum affairs . . . . [Incumbent] board members are mostly reelected without opposition . . . . [A]nnual corporate meetings to hold elections are dull affairs, held in front of tame audiences in quiet auditoriums. Election outcomes are predictable."); Harris, *supra* note 62, at 1761 ("Skill at enhancing firm

value has less to do with whether directors win votes and stay at the helm of public companies than previous commentators have presumed. Instead, like incumbent politicians, managers of some of the largest U.S. firms tend to stay in charge of firms because they understand—and take advantage of—the political dynamics of corporate voting."). Shareholders' ability to include self-generated proposals in company proxy materials was similarly unworkable in the context of director elections until 2010, when the SEC, alongside its adoption of Rule 14a-11, amended Rule 14a-8 to allow shareholders to include proposals relating to the nomination of directors. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668 (Sept. 16, 2010). This rule "provides shareholders with an opportunity to place a proposal in a company's proxy materials for a vote at an annual or special meeting of shareholders." 17 C.F.R. § 240.14a–8 (2012). Before the amendments took effect in September 2011, however, a company was *not* required to include any proposal concerning director elections, which could be excluded under the rule's longstanding "election exclusion." *Proposing Release*, *supra* note 53, at 29,030 (citing 17 C.F.R. § 240.14a–8(i)(8)). In interpreting this exclusion, the SEC "took the position . . . that Rule 14a-8(i)(8) permits exclusion of a proposal that would establish a procedure that may" in any way result in contested board elections. *Proposing Release*, *supra* note 53, at 29,030. Despite the agency's position, the U.S. Court of Appeals for the Second Circuit held in *AFSCME v. AIG*, 462 F.3d 121, 127 (2d Cir. 2006), that a corporation "could *not* rely on Rule 14a-8(i)(8) to exclude a shareholder proposal that, if adopted, would have amended [the company's] bylaws to require the company, under specified circumstances, to include shareholder nominees for director in the company's proxy materials at subsequent meetings," interpreting the language of the rule as instead "limiting the election exclusion 'to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the [SEC's] broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely.'" *Proposing Release*, *supra* note 53, at 29,030 (emphasis added) (quoting *AFSCME*, 462 F.3d at 125, 128). The effect of this decision "was to permit [a] bylaw proposal to be included in company proxy materials and, had the bylaw been approved by shareholders, for subsequent election contests conducted under it to take place in the company's proxy materials without compliance with the disclosure requirements applicable to election contests under the Commission's other proxy rules." *Proposing Release*, *supra* note 53, at 29,030. However, concerned that the opinion "resulted in uncertainty and confusion with respect to the appropriate application of Rule 14a-8(i)(8), and that it could lead to contested elections for directors without the disclosure otherwise required under the proxy rules for contested elections," the SEC in November 2007 amended the language of the election exclusion to

The SEC recognized this deficiency in 2003, paving the way for the proxy access rule. That year, SEC staff proposed an earlier version of Rule 14a-11, then dubbed the "Security Holder Director Nomination Rule" ("2003 Proposal"),[67] which extended to any "security holder or group of security holders [who] . . . own[ed], either individually or in the aggregate, more than 5% of the company's [voting] securities . . . continuously for at least two years"[68] the right to nominate candidates for board seats up for election after the occurrence of one of two possible triggering events: (1) "a 35% or more 'withhold' in a director election;"[69] or (2) "a majority vote by shareholders electing to make the company subject to proxy access."[70] This rule would have applied to "all companies that [were] subject to the Exchange Act proxy

explicitly achieve the purposes of its original interpretation—the exclusion of any proposal "that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings." *Id.* at 29,030, 29,055. The SEC reversed its stance in 2010, adopting amendments to Rule 14a-8 that eliminate the election exclusion and require corporations to include election-related proposals in their proxy materials. *Id.* at 29,056. Reporting companies will be required to comply with the rule's new shareholder-friendly requirements this coming proxy season. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668.

[67] Security Holder Director Nominations, 68 Fed. Reg. 60,784 (Oct. 23, 2003).

[68] *Id.* at 60,794.

[69] When a corporation uses plurality voting in director elections, "security holders may vote for or withhold authority to vote for each nominee rather than vote for, against or abstain, as is the case for other matters to be voted on by security holders[,]" *id.* at 60,789 n.72, an ability that is often used to express dissatisfaction with the incumbent board. *See* Kahan & Rock, *supra* note 2, at 1357–60 (discussing shareholder "just vote no" campaigns). The most notable such incident occurred in 2004 when shareholders of The Walt Disney Company withheld the votes of 45% of the shares from the election of CEO Michael Eisner as a director. *Id.* at 1359. Although Eisner still "received a majority of the votes cast, the board of Disney immediately stripped him of his position as chairman and Eisner resigned as CEO the following year." *Id.* (footnotes omitted).

[70] Security Holder Director Nominations, 68 Fed. Reg. at 60,791.

rules, including investment companies registered under Section 8 of the Investment Company Act," such as mutual funds.[71] The SEC had expressed some interest in providing shareholders the power to utilize corporate proxy materials to solicit votes for their own board candidates in 1942 and again in 1977, but failed to adopt any rule relating to proxy access in either year.[72] Although the 2003 Proposal was "initially adopted by a vote of 3-2, with the Republican Chairman Donaldson siding with the two Democratic commissioners, . . . Donaldson ended up not pushing for an adoption of the proxy rules" due to vehement opposition of the rule by the Chamber of Commerce and Business Roundtable, the plaintiffs in both *Chamber of Commerce* and *Business Roundtable*, and resigned in 2005.[73] "His successor, Christopher Cox, was not regarded as a champion of proxy access, and proxy access was considered dead."[74]

Indeed, it was during Chairman Cox's tenure that the SEC expanded Rule 14a-8's election exclusion to allow

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[71] *Id.* at 60,787 (footnotes omitted).

[72] Kahan & Rock, *supra* note 2, at 1353 (citing *Security and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate and Foreign Commerce*, 78th Cong. 17–19 (1943) (testimony of Chairman Ganson Purcell that the SEC solicited comments on a staff proposal to revise the proxy rules to provide minority shareholders an opportunity to use corporate proxy materials to support their own board nominees); SEC Release No. 34-3347 (1942) (stating that "[a] number of the suggestions proposed by the staff were not adopted," including a proposal regarding shareholder access to company proxy materials)); *see also* U.S. SECURITIES AND EXCHANGE COMMISSION, STAFF REPORT: REVIEW OF THE PROXY PROCESS REGARDING THE NOMINATION AND ELECTION OF DIRECTORS (July 15, 2003), *available at* http://www.sec.gov/news/studies /proxyrpt.htm.

[73] Kahan & Rock, *supra* note 2, at 1353–54 (citing Bill Baue, *Opening Up Pandora's Box: SEC Proxy Roundtable Questions Role of Non-Binding Resolutions*, SOCIALFUNDS (May 15, 2007), http://www.socialfunds.com /news/article.cgi/2293.html ("The SEC allowed the rule it proposed in October 2003, allowing shareowners proxy access to nominate directors in certain circumstances, to die on the vine due to opposition by the Business Roundtable and the US Chamber of Commerce, which threatened a lawsuit.")).

[74] Kahan & Rock, *supra* note 2, at 1354.

corporations to exclude from their proxy materials any election-related shareholder proposal, rejecting an alternative proposal recommending a proxy access rule similar to the one proposed in 2003, after the court in *AFSCME* struck down this broad interpretation of the rule's previous language.[75] Once Cox resigned, however, his Democratic replacement Mary Schapiro pushed for a revitalization of proxy access after the financial crisis wreaked havoc on the markets, leading "many to raise serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders" and resulting in an erosion of investor confidence.[76] To combat these debilitating market effects, the SEC staff in June 2009 proposed a variant of the 2003 Proposal ("2009 Proposal") that would become the Rule 14a-11 struck down in *Business Roundtable*.[77]

The 2009 Proposal provided shareholders with even greater proxy access than its 2003 counterpart. Under the proposed new Rule 14a-11, qualifying shareholders of any company subject to the SEC's proxy rules were *not* required to wait for a triggering event to access the company's proxy statement.[78] Instead, a shareholder or group of shareholders needed simply to own 3% of the corporation's voting securities, as opposed to the 2003 Proposal's 5% ownership threshold, for at least three years prior to the date the nominating shareholder or group submits a notice of its intention to use the rule, and could include in the company's proxy materials a number of board nominees representing up to 25% of its entire board, with a minimum of one nominee.[79]

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[75] *See supra* note 66; 17 C.F.R. § 240.14a–8(i)(8) (2012).

[76] *Proposing Release*, *supra* note 53, at 29,025. In particular, investors began to question "whether boards are exercising appropriate oversight of management, whether boards are appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding such issues as compensation structures and risk management." *Id.*

[77] Kahan & Rock, *supra* note 2, at 1355.

[78] *Adopting Release*, *supra* note 3, at 56,680–81.

[79] *Id.* at 56,674–75.

The rule required the nominating shareholder or group of shareholders to submit this notice, "which may include a statement of up to five-hundred words in support of each of its nominees, to the [SEC] and to the company," which was then obliged to "include the proffered information about the shareholder(s) and his nominee(s) in its proxy statement and include the nominee(s) on the proxy voting card."[80] The SEC adopted the rule by a vote of 3-2 on August 25, 2010, an action championed as a victory for shareholder rights.[81] The victory, however, was short-lived.

III. THE SCATHING OPINION

Within little over a month of its adoption, the Business Roundtable and Chamber of Commerce jointly petitioned the D.C. Circuit for review of Rule 14a-11, and the court of appeals decided in their favor in July 2011.[82] Writing for the majority, Judge Ginsburg began by outlining the standard against which it will judge the SEC's rulemaking process.[83] Under the APA, the court "will set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[84] Agency rulemaking avoids these fatal classifications when the agency has both "examin[ed] the relevant data," which, in the SEC's case, involves considering the consequences of a new rule on efficiency, competition, and capital formation, as required by the NSMIA,[85] and "articulate[d] a satisfactory explanation for its action including a rational connection between the

[80] *Id.* at 56,675–76. Only one nominating shareholder or group of shareholders was to be able to utilize Rule 14a-11 in each election. Thus, when more than one nominating shareholder or group of shareholders is eligible to use Rule 14a-11, "the nominating shareholder or group with the highest percentage of the company's voting power would have its nominees included in the company's proxy materials." *Id.* at 56,675.

[81] Kahan & Rock, *supra* note 2, at 1351.

[82] *See* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

[83] *See id.* at 1148.

[84] *Id.* (quoting APA, 5 U.S.C. § 706(2)(A) (2012)).

[85] *Id.* (quoting Exchange Act, 15 U.S.C. § 78c(f) (2012)).

facts found and the choices made.'"[86] Only if the SEC failed to adequately "consider" the economic impacts of a newly enacted regulation will the regulation be arbitrary and capricious under the APA.[87] The petitioners argued that the SEC did just this: neglected its NSMIA-mandated "responsibility to determine the likely economic consequences of Rule 14a-11 and to connect those consequences to efficiency, competition, and capital formation," making the rule arbitrary and capricious in violation of the APA.[88]

The court agreed with the petitioners, holding that the SEC failed to "adequately assess the economic effects of [the] new rule"[89] and chastising the agency for having "inconsistently and opportunistically framed the costs and benefits of the rule; failed [ ] 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."[90] The court attacked the SEC's cost-benefit analysis, through which the agency had concluded that new Rule 14a-11's potential benefits would justify its costs.[91] In adopting the rule, the SEC predicted that it "would lead to '[d]irect cost savings' for shareholders in part due to 'reduced printing and postage costs' and reduced expenditures for advertising compared to those of a 'traditional' proxy

[86] *Id.* (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[87] *Id.* (citing Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005)).

[88] *Id.* The challengers also "maintain[ed] the Commission's decision to apply Rule 14a-11 to investment companies is arbitrary and capricious." *Id.* However, since the bulk of the court's opinion is dedicated to the SEC's *general* economic conclusions and *not* to its industry-specific cost-benefit analysis, this Note does not address the court's analysis of this argument here. As the court itself acknowledges, "[b]ecause the rule is arbitrary and capricious on its face, it is assuredly invalid as applied specifically to investment companies." *Id.* at 1154.

[89] *Id.* at 1148.

[90] *Id.* at 1148–49.

[91] *Id.* at 1149 (citing *Adopting Release*, *supra* note 3, at 56,771).

contest,"[92] as well as "some intangible, or at least less readily quantifiable, benefits," including: (1) mitigation of "'collective action and free-rider concerns,' which can discourage a shareholder from exercising his right to nominate a director in a traditional proxy contest;" (2) potentially "improved board performance and enhanced shareholder value;'" and (3) greater "efficiency of the economy on the whole."[93] Although the SEC also recognized that the rule could potentially "impose costs upon companies and shareholders related to 'the preparation of required disclosure, printing and mailing . . . , and [to] additional solicitations,' and could have 'adverse effects on company and board performance,' for example, by distracting management,"[94] the court lambasted the agency for predicting that these costs would be minimized by the possibility of directors deciding *not* to oppose shareholder nominees consistent with their fiduciary duty.[95] According to the SEC, this duty prevents directors "from using corporate funds to resist shareholder director nominations for no good-faith corporate purpose."[96] The court, on the other hand, rejected this conclusion as having "*no* basis beyond mere speculation" since the SEC "presented no evidence that such forbearance is ever seen in practice."[97] The court also chastised the agency for "say[ing] nothing about the amount a company will spend on [these] solicitation and campaign costs" and doing "nothing to estimate and quantify the costs it expected companies to incur" despite the ready availability of "empirical evidence about expenditures in traditional proxy contests."[98]

The opinion similarly condemns other parts of the SEC's cost-benefit analysis. Turning to the rule's potential

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[92] *See supra* Part II.A.

[93] *Bus. Roundtable*, 647 F.3d at 1149 (quoting *Adopting Release*, *supra* note 3, at 56,756, 56,761, 56,771).

[94] *Id.* (quoting *Adopting Release*, *supra* note 3, at 56,768, 56,764, 56,765).

[95] *Id.* (quoting *Adopting Release*, *supra* note 3, at 56,770).

[96] *Id.*

[97] *Id.* at 1150 (emphasis added).

[98] *Id.*

benefits, the court found that the SEC "relied upon insufficient empirical data when it concluded that Rule 14a-11 will improve board performance and increase shareholder value by facilitating the election of dissident shareholder nominees."[99] In drawing this conclusion, the court claims that the SEC "relied exclusively and heavily upon two relatively unpersuasive studies, one concerning the effect of 'hybrid boards' (which include some dissident directors) and the other concerning the effect of proxy contests in general, upon shareholder value,"[100] despite the availability of "numerous studies submitted by commenters that reached the opposite result,"[101] which the agency "discounted 'because of questions raised by subsequent studies, limitations acknowledged by the studies' authors, or [its] own concerns about the studies' methodology or scope.'"[102] Because of its reliance on these sources, according to the court, the SEC did *not* "sufficiently support[ ] its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value."[103] The court also concluded that the SEC erroneously "discounted the costs of Rule 14a-11 . . . as a mere artifact of the state law right of shareholders to elect directors," which, according to the SEC, result in boards incurring the same costs, such as management distraction and reduction in the time boards spend on long-term planning, as they typically would in including shareholder nominations in corporate proxy materials.[104] Additionally, the court faulted the agency for failing to adequately address the consequences of institutional investors using the rule to further individual interests when it reasoned that "these potential costs 'may be limited' because the ownership and holding requirements would 'allow the use of the rule by only holders who demonstrated a significant, long-term

[99] *Id.* (citing *Adopting Release*, *supra* note 3, at 56,761–62).

[100] *Id.* at 1151.

[101] *Id.* at 1150.

[102] *Id.* at 1151 (quoting *Adopting Release*, *supra* note 3, at 56,762–63).

[103] *Id.*

[104] *Id.*

commitment to the company,' . . . who would therefore be less likely to act in a way that would diminish shareholder value" because such action would surely incur the opposition of other shareholders.[105] Lastly, the court attacked the SEC for "arbitrarily ignoring the effect of the final rule upon the total number of election contests" in balancing the rule's costs and benefits by "not address[ing] whether and to what extent Rule 14a-11 will take the place of traditional proxy contests," without which, according to the court, "the SEC has no way of knowing whether the rule will facilitate enough election contests to be of net benefit."[106]

IV. THE COURT'S FLAWED METHODOLOGY REVEALED BY THE NSMIA'S LEGISLATIVE HISTORY

The *Business Roundtable* court's review of the SEC's NSMIA-mandated cost-benefit analysis would have undoubtedly been assigned the maximum rating of ten on Professor Shepherd's scale due to its probing intrusiveness and skepticism.[107] The court, however, strictly scrutinized the SEC's methodology and reached all of its drastic conclusions without engaging in a statutory interpretation analysis with respect to the actual level of agency "consideration"[108]—and thus the extent to which the court must scrutinize the SEC's analysis—demanded by the NSMIA.[109] Had the court determined what the statute's enigmatic cost-benefit clause actually mandated, as required by longstanding Supreme Court precedent, it would have realized that entire portions of its opinion, namely its conclusions that the SEC failed to adequately consider the economic consequences of Rule 14a-11 on board performance and shareholder value, and of institutional investors using the rule to further individual interests, are themselves

[105] *Id.* at 1152 (quoting *Adopting Release*, *supra* note 3, at 56,766).

[106] *Id.* at 1153.

[107] *See infra* Part IV.B.

[108] *See* Exchange Act, 15 U.S.C. § 78c(f) (2012).

[109] *See Bus. Roundtable*, 647 F.3d at 1144.

seriously erroneous.[110] The regulatory climate at the time of the NSMIA's enactment, in fact, called for much more deference to agency rulemaking than the court afforded the SEC, as demonstrated by the legislative history of the APA, explored in Part A.1, below, and its subsequent modifications by Congress and the courts, examined in Parts A.2 and A.3, below.[111] Applying the correct level of deference, the court would have found that many of the agency conclusions that it chastised would have fully passed muster.

A. Interpreting the Level of "Consideration" Demanded by the NSMIA

Section 106(b) of the NSMIA[112] is, by its terms, ambiguous, a crucial point completely overlooked by the court in *Business Roundtable*. The plain language of the clause instructs only that the SEC must "*consider*" the protection of investors and "whether the [proposed rule] will promote efficiency, competition, and capital formation" in promulgating rules.[113] For the last thirty years, the Supreme Court has subscribed to the approach, championed by Justice Breyer, that where the language of a statute is ambiguous, the court will examine the legislative history to determine it meaning.[114] Although Justice Scalia vehemently opposes the use of legislative history to go beyond statutory words themselves, a majority of the court as recently as 2006 has supported Justice Breyer's approach where the plain language of the statute in question is ambiguous.[115] Because

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[110] *See infra* Part IV.A.

[111] *Id.*

[112] National Securities Market Improvement Act of 1996, Pub. L. No. 104-132, § 106(b), 110 Stat. 3416, 3425 (codified in scattered sections of 15 U.S.C.).

[113] Exchange Act § 78c(f) (2012) (emphasis added).

[114] *See, e.g.*, Zedner v. United States, 547 U.S. 489 (2006) (examining legislative history of the Speedy Trial Act to determine the meaning of an ambiguous clause).

[115] *Compare id.*, *with* United States v. Gonzales, 520 U.S. 1 (1997) (declining to examine legislative history of a federal gun statute where the statute's plain language was unambiguous); *see also* Conn. Nat'l Bank v.

the language of the NSMIA itself provides absolutely no instruction as to what "consider" entails, or to what extent the SEC must "consider" the enumerated factors, the court should have looked to the statute's legislative history.[116] This examination would have revealed the error of the court's conclusions regarding (1) the SEC's analysis of the economic consequences of the rule's costs on board performance and shareholder value; and (2) costs related to institutional investors using the rule to further individual interests.[117]

1. The Tumultuous Legislative History of the APA

Because Section 106(b) of the NSMIA is by its plain terms ambiguous and the court builds its opinion upon the framework for judicial review of agency action established by the APA, it is first necessary to examine the regulatory climate from which the APA emerged. During the few years following Roosevelt's historic first 100 days, the Supreme Court, by a narrowly liberal 5-4 margin, upheld every New Deal and equivalent state initiative,[118] "[w]ith one minor

Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are *unambiguous*, then, this first canon is also the last: judicial inquiry is complete.") (emphasis added); Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis,* 22 JURIMETRICS J. 294 (1982) (documenting the Supreme Court's ever-increasing willingness to examine legislative histories). *But see* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 370 (2000) (concluding "that there has been a significant decrease in the Supreme Court's reliance on legislative histor[ies]").

[116] *See* Exchange Act, 15 U.S.C. § 78c(f) (2012).

[117] *See infra* Part IV.A.

[118] Shepherd, *supra* note 9, at 1562 (citing Perry v. United States, 294 U.S. 330 (1935), Nebbia v. New York, 291 U.S. 502 (1934) and Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)).

exception."[119] Although Justice Roberts in May 1935 defected from the this liberal majority and joined the Court's conservative faction, spurring "a lethal march through New Deal programs,"[120] Roberts soon "switched sides again—this time permanently" after Roosevelt won reelection in 1936 in a landslide victory and began preparing constitutional amendments to severely limit the Court's power to nullify legislation.[121] This "new Court, which soon became known as the 'Roosevelt Court,' subsequently approved every New Deal law that faced challenge."[122] The entire proxy access rule, like any other Congressional or agency legislation, would have undoubtedly been upheld during this period.

With Roosevelt's conservative opponents' only footing in the Court now eliminated, their only opening to challenge the administrative state "lay in Congress."[123] Thus, conservatives formulated an "alternate attack plan: legislation to control New Deal agencies and commissions."[124] Proposals advocating for stricter judicial review soon began to appear.

Conservatives had attempted several times before to limit the overwhelming power afforded newly created New Deal agencies like the SEC, but had failed miserably in each

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[119] Shepherd, *supra* note 9, at 1562 (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down sections of the National Industrial Recovery Act and executive orders restricting interstate and foreign trade in petroleum products promulgated thereunder)).

[120] *Id.* at 1562. According to Professor Shepherd, "[t]he Court first killed a rail pension law" in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), followed by the "the National Industrial Recovery Act—one of the Roosevelt administration's two major legislative achievements during Roosevelt's first term" in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), "Roosevelt's other major legislative accomplishment, the Agricultural Adjustment Act," in *United States v. Butler*, 297 U.S. 1 (1936), and finally the Guffey Coal Act in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Shepherd, *supra* note 9, at 1562–63.

[121] *Id.* at 1562 (citing WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 91–130 (1995)).

[122] *Id.* at 1563 (emphasis added).

[123] *Id.*

[124] *Id.* at 1566.

effort. The first such attempt was the 1929 Norris Bill,[125] which, despite its proposing "to establish a Court of Administrative Justice, which would hear all appeals of, and challenges to, agency conduct . . . created no new *substantive* constraints on agency action."[126] Congress took no action on even this extremely weak bill, which would have done little to restrain agency power.[127] The next effort, the 1933 Logan Bill,[128] eliminated the Norris Bill's weaknesses by seeking to impose "strict court-like procedures on agencies and to permit the judiciary to conduct sweeping appellate review of agency decisions," which would have significantly limited agency authority.[129] As it did with the Norris Bill, Congress ignored the Logan Bill.[130] Again, due to overwhelming support for "Roosevelt and his New Deal agencies as the country's saviors . . . [o]nly a bill that appealed to New Deal" supporters, who "would not accept a stricter bill that impeded the New Deal agencies that they believed were saving the nation," could succeed.[131] Despite the failure of these two bills, New Deal opponents in 1936 introduced a *harsher* version of the Logan Bill, the Logan-Celler Administrative Court Bill.[132] In addition to proposing a new administrative court that would usurp all agency adjudicatory power, the bill allowed for Article III courts to closely review agency actions,[133] which "would have restricted agencies substantially," earning the bill a control rating of six.[134] This stringent proposal died in committee in both the House and Senate, as Roosevelt still enjoyed extraordinary public support, demonstrated by his 1936 landslide reelection, during which Democrats won an unprecedented

[125] S. 5154, 70th Cong., 2d Sess. (1929).

[126] Shepherd, *supra* note 9, at 1566 (emphasis added).

[127] *Id.*

[128] S. 1835, 73d Cong., 1st Sess. (1933).

[129] Shepherd, *supra* note 9, at 1569.

[130] *Id.*

[131] *Id.*

[132] S. 3787, 74th Cong., 2d Sess. (1936).

[133] *Id.* § 5.

[134] Shepherd, *supra* note 9, at 1578.

majority in both houses.[135] The Logan-Celler Bill's "failure demonstrated that only a bill that appealed to the administration" (i.e., one that would minimally limit agency action) would succeed.[136]

However, as Roosevelt's domination began to dwindle with Congress' rejection of his court-packing plan out of fear of an American dictatorship like the ones rising in Europe and the emergence of a recession, ardent New Deal opponents proposed even heavier constraints on agency activity.[137] In its 1937 summer report, the ABA Committee "offered a much stricter bill" that "proposed to reform agency procedure"[138] by "impos[ing] controls on agency rulemaking," particularly a requirement that agencies provide notice and public hearings before promulgating rules and regulations.[139] These constraints alone warranted a control rating of eight on Professor Shepherd's scale.[140] The bill did, however, also call for very mild expansion of judicial review, proposing that agency actions be reviewed under the so-called "scintilla rule"—the "relatively unintrusive standard with which appeals courts normally reviewed trial court decisions." Under this rule, "[a]gency decisions would be reversed only if 'unsupported by evidence,' regardless of how little evidence."[141]

The SEC's conclusions regarding the economic consequences of Rule 14a-11 on board performance and shareholder value, and of institutional investors using the rule to further individual interests, which the court struck down in *Business Roundtable*, would have easily passed this unintrusive level of judicial scrutiny, "a standard that critics asserted permitted almost *all* agency decisions to survive

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[135] *Id.* at 1579 (citing Report of the Special Committee on Administrative Law, 1936 A.B.A. ANN. REP. 759 (1936)).

[136] *Id.* at 1579.

[137] *Id.* at 1581–82.

[138] *Id.* at 1582.

[139] *Id.*

[140] *Id.*

[141] *Id.* (quoting Report of the Special Committee on Administrative Law, 1937 A.B.A. ANN. REP. 849 (1937)).

judicial scrutiny."[142] Some of the SEC's conclusions—namely that the costs imposed by the rule would have been minimized because "directors might choose not to oppose shareholder nominees . . . consistent with" their fiduciary duty,[143] that such costs were "mere artifact[s] of the state law right of shareholders to elect directors,"[144] and that Rule 14a-11 would be used so frequently that its costs would outweigh its benefits[145]—would not have passed any standard other than that employed by the Roosevelt Court because they are naked assertions supported by no evidence. However, unlike these conclusions, the SEC's determinations regarding shareholder value and use of the rule by institutional investors to further individual interests *were* supported by *significant* evidence, much of which the court ignored in its analysis. For example, in support of its conclusion that Rule 14a-11 could positively impact board performance and shareholder value, the SEC cites at least eight sources, including four widely cited academic papers written by prominent business school professors,[146] two reports prepared by major financial institutions,[147] a voluminous study of the

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[142] *Id.* at 1602 (emphasis added).

[143] Bus. Roundtable v. SEC, 647 F.3d 1144, 1150 (D.C. Cir. 2011).

[144] *Id.* at 1151.

[145] *Id.* at 1153.

[146] *See* Brad M. Barber, *Monitoring the Monitor: Evaluating CalPERS' Activism* (Nov. 2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890321 (cited in *Adopting Release*, *supra* note 3, at 56,762 n.918); Benjamin E. Hermalin & Michael S. Weisbach, *Endogenously Chosen Board of Directors and Their Monitoring of the Board*, 88 AM. ECON. REV. 96 (1998), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=121263 (cited in *Adopting Release*, *supra* note 3, at 56,761 n.915); Milton Harris & Artur Raviv, *Control of Corporate Decisions: Shareholders vs. Management* (May 29, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965559 (cited in *Adopting Release*, *supra* note 3, at 56,761 n.915); Anil Shivdasani & David Yermack, *CEO Involvement in the Selection of New Board Members: An Empirical Analysis*, 54 J. FIN. 1829 (1999) (cited in *Proposing Release*, *supra* note 53, at 29,074 n.351).

[147] *See* Fitch Ratings, Evaluating Corporate Governance (Dec. 12, 2007), *available at* http://www.fitchratings.com; Deutsche Bank, Global

performance of 120 "hybrid" boards headed by Wall Street's leading proxy-contest researcher,[148] and a comprehensive analysis of whether proxy contests result in increased shareholder value.[149] Despite this plethora of sources, the court credits the SEC with considering just "two relatively unpersuasive studies."[150] The SEC's determination that institutional investors would not abuse the rule for their own personal benefit is also supported by a flood of comment letters from investment advisers of institutional investors,[151] nearly 100 business and law professors,[152] state regulatory entities,[153] and institutional investors themselves.[154]

Equity Research, Beyond the Numbers: Corporate Governance in Europe (Mar. 5, 2005) (cited in *Proposing Release*, *supra* note 53, at 29,074 n.348).

[148] *See* Chris Cernich et al., *Effectiveness of Hybrid Boards*, IRRC INSTITUTE FOR CORPORATE RESPONSIBILITY (May 2009), *available at* http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf (finding that in a study of 120 companies with "hybrid" boards—boards formed when activist shareholders, through actual or threatened proxy contests, were able to elect dissident directors but not gain control of the entire board—such companies experienced an average increase in share price of 19.1%, 16.6 percentage points better than peer companies with non-hybrid boards, from the contest period through the board's one-year anniversary) (cited in *Adopting Release*, *supra* note 3, at 56,761 n.911); Gina Chon, *Wall Street's New, Unknown Power Broker*, WALL ST. J. (Sept. 3, 2010), http://online.wsj.com/article/SB10001424052748704855104575470024231652304.html (featuring study author Chris Cernich).

[149] J. Harold Mulherin & Annette B. Poulsen, *Proxy Contests & Corporate Change: Implications for Shareholder Wealth,* 47 J. FIN. ECON. 279 (1998), *available at* http://myweb.clemson.edu/~maloney/855/proxys.pdf (finding that in a sample of 270 proxy contests from 1979–94, such contests resulted in an average increase in shareholder value of more than 3% in the one year following the contest) (cited in *Adopting Release*, *supra* note 3, at 56,761 n.911)

[150] Bus. Roundtable v. SEC, 647 F.3d 1144, 1151 (D.C. Cir. 2011).

[151] *See Adopting Release*, *supra* note 3, at 56,767 n.969 (citing letters from Blue Collar Investment Advisers, the Council of Institutional Investors, Governance for Owners, and the Social Investment Forum).

[152] *See id.* (citing letters from a Group of 80 Professors of Business, Law, Economics, & Finance).

[153] *See id.* (citing letters from Thomas DiNapoli, New York State Comptroller, the Florida State Board of Administration, and the New Jersey State Investment Council).

Although the ABA's 1937 bill was struck down, it "led, after nine years of debate and modification, to the" APA's minor agency control through notice and less intrusive public comment and mild judicial review.[155]

Facing a constant barrage of reform proposals, "[l]iberal Democrats now also began to argue that the administrative system required modification."[156] Even Mr. New Deal conceded "that the sprawling administrative bureaucracy was out of control," arguing in his "Brownlow Report" to Congress that Roosevelt himself was the only solution.[157] "[T]o execute his constitutional authority" and reign in the executive branch, Roosevelt maintained, *he*, not the courts or Congress, "needed greater control over the agencies."[158] Congress swiftly rejected the President's plan, with many members "compar[ing] the administration's proposal to Hitler's recent Austrian Anschluss."[159]

Despite this criticism by Congress, Roosevelt still remained enormously popular, evidenced by the failure of the next two conservative efforts to curb administrative power. "On January 5, 1938, Senator Mills Logan, now with the Roosevelt administration's" blessing, introduced a bill "to create an administrative court."[160] Although Roosevelt supported and had a hand in drafting the relatively timid

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[154] *See id.* (citing Letters from Relational Investors LLC and Shamrock Capital Advisors).

[155] Shepherd, *supra* note 9, at 1582.

[156] *Id.* at 1584.

[157] *Id.* This report, issued by the Roosevelt-commissioned President's Committee on Administrative Management, outlined Roosevelt's proposal for reorganizing his executive branch. *See id.* Focusing on reorganization rather than procedural reform, the report proposed "consolidating the more than [one hundred] administrative agencies in order to increase their responsiveness to Congress and the executive" by placing them directly under Roosevelt's total control. *Id.*

[158] *Id.*

[159] *Id.* at 1585 (citing JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 125 (1967)). This term refers to Nazi Germany's 1938 occupation and annexation of Austria. *See* Altmann v. Republic of Austria, 317 F.3d 954, 959 (9th Cir. 2002).

[160] Shepherd, *supra* note 9, at 1588.

bill, which Professor Shepherd assigned a control rating of four based on its imposition of little restraint on agency activity, the Judiciary Committee, "apparently deferring to the conservative ABA, took no further action on the bill,"[161] instead supporting reintroduction of the ABA's failed 1937 bill as the Walter-Logan Bill.[162] The two main goals of the "new" bill were to "constrain disfavored New Deal agencies [like the SEC] and to prevent the country from drifting into totalitarianism," indicating the Judiciary Committee's "opposition to New Deal agencies and . . . the committee's intent that the bill limit the agencies' authority."[163] Like the 1937 bill, however, the Walter-Logan Bill, aimed specifically at the powerful and loathed SEC, did *not* make strong judicial review a priority, ratcheting up the scintilla rule only slightly to the "substantial evidence" standard under which an agency decision would survive scrutiny if it "rested upon substantial evidence."[164] This standard afforded agencies broad discretion by requiring that courts look *only* to the evidence supporting the agency's conclusions in making this determination.[165] The empirical evidence and commentary supporting the SEC's conclusions that Rule 14a-11 would result in increased board performance and shareholder value and minimal costs imposed by institutional investors using the rule to further individual interests, as discussed, would have also easily satisfied this

[161] *Id.* at 1590.

[162] H.R. 6324, 76th Cong., 3d Sess. (1939).

[163] Shepherd, *supra* note 9, at 1601.

[164] 84 CONG. REC. 7075 (1939).

[165] N.L.R.B. v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940) ("[T]his is not to say that much of what has been related [by the Board] was uncontradicted and undenied by evidence offered by the [petitioner]. . . . We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings . . . are supported by evidence which is substantial."); United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. 210–11 (1941) ("Under this interpretation, the courts need to read only one side of the case and, if they find [substantial] evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored.").

lax standard due to its sheer magnitude, despite the existence of contrary evidence.[166] Although the bill narrowly passed by a 282-92 margin in the House and a 27-25 margin in the Senate, Roosevelt quickly vetoed the legislation as he had promised.[167] "The House sustained the veto, 127-153,"[168] after Roosevelt won reelection in November 1940, the Battle of Britain continued to rage, and France fell to the Nazis, "suggest[ing] that [then] was not the best moment to limit the president's power and flexibility.... Roosevelt threw himself into the pitched political battle, marshaled his liberal Democrat troops, and ... prevailed."[169] Indeed, this lax standard of judicial review would make its way into the APA.[170]

To appease his critics, Roosevelt's Attorney General's Committee issued a report on administrative reform proposing three bills.[171] According to Professor Shepherd, the "liberal [committee] members' [proposed] majority bill imposed little restraint on agencies. It receives a control rating of [three]—near the administration's ideal point."[172] The bill's principal feature was the establishment of a Federal Office of Administrative Procedure ("FOAP") to "investigate and make reports about complaints [it] received about agencies, and to examine agency procedure and suggest improvements. However, the bill granted the FOAP *no* authority to compel agencies to implement its recommendations."[173] The bill also neither imposed any additional procedural requirements on agencies other than making rules "'available to the public'"[174] nor "permit[ted]

[166] *See supra* pp. 759–61.

[167] Shepherd, *supra* note 9, at 1619–25.

[168] *Id.* at 1630.

[169] *Id.* at 1631.

[170] *See infra* note 213 and accompanying text.

[171] Shepherd, *supra* note 9, at 1632.

[172] *Id.* at 1633.

[173] *Id.* (emphasis added).

[174] *Id.* at 1634 (quoting United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. at 195 (1941)).

increased judicial review of agency decisions."[175] The minority bill, on the other hand, "would have controlled agencies substantially," although not as greatly as the Walter-Logan Bill, warranting a control rating of seven.[176] The bill would have also established the FOAP, added notice and comment solicitation and consideration requirements to agency rulemaking,[177] "and provided for a stricter standard of judicial review: reviewing courts would affirm only those agency decisions that were supported '*upon the whole record*, by substantial evidence.'"[178] This standard essentially commands courts to set aside agency conclusions that are "*clearly* contrary to the *manifest* weight of the evidence."[179] The overabundance of evidence supporting the SEC's conclusions that Rule 14a-11 would result in increased board performance and shareholder value and would impose minimal costs as a result of institutional investors using the rule to further individual interests, including dozens of studies and opinions by leading academics, financial institutions, and investors, meets even this stricter level of review, despite the existence of contrary evidence.[180] Although this standard enlarges judicial review, the minority committee also cautioned that "the courts, of course, should not weigh meticulously every bit of evidence," exhibiting significant deference to agency policy decisions.[181] Thus, conflicting evidence does not necessarily undermine the substantiality of corroborating evidence, due in part to the lack of definitive or readily quantifiable empirical data in many instances, as long as the contrary evidence does not *definitely* disprove the mass of evidence supporting an

[175] *Id.*

[176] *Id.*

[177] *Id.* at 1635.

[178] *Id.* at 1636 (emphasis added).

[179] United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. 211 (1941) (emphasis in original).

[180] *See supra* Part IV.A.1.

[181] United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. 211.

agency determination.[182] The SEC fully complied with this standard by acknowledging the limitations inherent in some of its own evidence while explaining why contradictory evidence did not irrefutably invalidate its conclusions.[183]

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[182] *See id.*; discussion of *Chamber of Commerce* at *supra* Part II.A; Commissioner Kathleen L. Casey, Statement at Open Meeting to Adopt Amendments Regarding "Proxy Access" (Aug. 25, 2010), *available at* http://www.sec.gov/news/speech/2010/spch082510klc.htm (expressing concern that "the anticipated benefits [of Rule 14a-11] . . . appear to be speculative at best and to depend largely on the inestimable benefits of improved 'investor confidence'"); Commissioner Troy A. Paredes, Statement at Open Meeting to Adopt the Final Rule Regarding "Proxy Access" (Aug. 25, 2010), *available at* http://www.sec.gov/news/speech/2010/spch082510tap.htm ("[Because of] [t]he mixed empirical results . . . , what the Commission properly can infer from these data is limited . . . . Recent economic work examining proxy access specifically is of particular interest in that the findings suggest that the costs of proxy access may outweigh the potential benefits, although the results are not uniform. . . . [T]he most the Commission can justifiably claim is that proxy access *may* improve a company's performance. This empirical basis is too infirm to support the Commission's decision to adopt Rule 14a-11.") (emphasis in original); *Hearing on Pay For Performance: Incentive Compensation at Large Financial Institutions Before the S. Comm. on Banking*, 112th Cong., 1st Sess. (2012) (statement of Professor Robert J. Jackson, Jr.) ("The question is the level of precision with respect to which the court should demand the SEC to undertake . . . . I would expect over time the courts to recognize the necessary imprecision of the study of costs and benefits and to accommodate the SEC's best efforts to undertake that work . . . . [T]his kind of work [envisioned by the court] would be very difficult."); *Id.* (statement of Professor Lucian A. Bebchuck) ("I hope that the courts going forward will recognize that this is an area of the law where some predictions are just impossible to make with precision, and this wouldn't be an issue that can be solved by diligence and good faith effort because as financial economists we know that if you have an arrangement that is new, hasn't happened, your ability to predict with precision its future consequences is just going to be limited . . . . This is an area where we want regulators to do the best job they can but in the end we will have to count on them making some policy judgments that are not going to be able to rely on perfectly precise predictions.").

[183] For example, in concluding that Rule 14a-11 would result in increased shareholder value, the SEC "recognize[d] the limitations of the Cernich (2009) study," noting that "its long-term findings on shareholder value creation are difficult to interpret," *Adopting Release*, *supra* note 3, at 56,761 n.911, but also explained that the "studies that reached conclusions

This enhanced judicial review, however, would not "find its way into the APA," although the NSMIA would prescribe a comparable standard.[184] The minority bill's notice and comment requirements would find their way into the final bill, making them "the most important change that the APA imposes on agency practice."[185]

Both the majority and minority bills were introduced in the Senate,[186] along with a third bill, S. 918,[187] "which combined the most restrictive sections of the Walter-Logan bill and the minority bill," namely the restriction of agencies by means of "adjudication rules, rulemaking requirements, information requirements, and intrusive judicial review."[188] In particular, "the bill permitted a reviewing court to reject an agency's . . . findings that were 'unsupported, upon the whole record, by substantial evidence having probative value.' Neither a scintilla of evidence nor substantial evidence would have been sufficient to support an agency's decision."[189] This stringent standard, similar to the de novo-like review applied by the *Business Roundtable* court, contributed to the bill's control rating of nine and was criticized by opponents of the bill as having the potential effect of "establish[ing] the courts as full supervisors over all matters of executive policy and discretion," for which "the courts are not equipped by experience," and leading to "delays in administrative action which may be expected to

contrary to those" the SEC ultimately reached are questionable due to concerns "raised by subsequent studies, limitations acknowledged by the studies' authors, or [its] own concerns about the studies' methodology or scope." *Adopting Release*, *supra* note 3, at 56,762. Thus, the agency "ha[d] a reasonable basis for expecting the benefits" of increased board performance and shareholder value that satisfied the "substantial evidence, upon the whole record" standard. *Id.*

[184] *See infra* Part IV.A.3.

[185] Shepherd, *supra* note 9, at 1635.

[186] *Id.* at 1636 (citing S. 675, 77th Cong., 1st Sess. (1941); S. 674, 77th Cong., 1st Sess. (1941)).

[187] S. 918, 77th Cong., 1st Sess. (1941)

[188] Shepherd, *supra* note 9, at 1636.

[189] *Id.* at 1637 (quoting S. 918, 77th Cong., 1st Sess. 707 (1941)).

result from congested court calendars."[190] Instructively, the APA would reject this nearly insurmountable standard.[191] Although the Senate conducted hearings on all three bills, Congress took no further action, as "[s]oon after the hearings, Roosevelt declared a national emergency as war grasped the country. For the next two years, Congress and the nation fought foreign enemies rather than native administrative bureaucracy."[192]

Despite Congress' indifference to administrative reform during World War II, "the period created [five] conditions that paved the path to the APA."[193] First, the public for the first time desired reform after agencies, entrusted with increased authority "[i]n order to administer the war effort," caused pervasive material shortages and rationing, soaring inflation, and widely unpopular agricultural price controls by botching this effort and abusing their new authority.[194] According to Professor Shepherd, "[t]he country's faith in the competence of administrative agencies faltered . . . . The war demonstrated to many people for the first time the abuses and irritations that agencies could cause . . . . The public recognized that administrative reform would be necessary at some point."[195] Second, the Democratic stranglehold on Congress started to weaken as the public began to express frustration with the administration at the ballot box.[196] After a landslide Republican victory in the 1942 midterm election, which gained the party forty-seven seats in the House and nine in the Senate, the Democrats "held only a nine-vote House majority and a twenty-one-vote Senate majority," suggesting "that a coalition of Republicans and Southern Democrats could now defeat the administration and perhaps

[190] Subcomm. of the Senate Comm. on the Judiciary, 77th Cong., 1st Sess. 201 (1941) (testimony of C.E. Rhetts, Associate Solicitor, Department of Labor).

[191] *See infra* note 213 and accompanying text.

[192] Shepherd, *supra* note 9, at 1641.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 1641–42.

[196] *See id.* at 1643.

even override a presidential veto."[197] Third, Roosevelt, realizing "that he could not win two wars at once . . . retreated in the domestic political battle over the New Deal" to ensure support for his war campaign.[198] Fourth, and most important for the purposes of this Note, "conservatives became willing to accept less-strict administrative reform than before because Roosevelt," given his ability to appoint judges for over a decade, had transformed the courts into a liberal bastion.[199] "Judicial review might [have] delay[ed] agency action, but courts would [have] no longer so surely [struck] down the agency action," prompting conservatives "to focus on *procedural* reform rather than on judicial review"[200] and making "[t]he APA's provisions for judicial review [ ] little more than an afterthought."[201] Lastly, the "ABA abandoned its combative approach," realizing that it "needed agreement with the president," who still enjoyed enormous popularity after easily winning reelection to a fourth term in 1944 despite the landslide 1942 Republican victory.[202] As such, '[i]gnoring its most-conservative members, the ABA began to support less intrusive reforms."[203] Both camps, appreciating the strengths of the other, recognized that they had to make accommodations.

Thus, in 1943 the ABA introduced the McCarran-Summer Bill,[204] a reform bill "intended to be a basis for a compromise with the administration."[205] The bill sought to constrain agencies in many of the same ways the minority bill had, particularly through notice and comment rulemaking,[206] and the heightened "'substantial evidence, upon the whole

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[197] *Id.*

[198] *Id.*

[199] *Id.* (emphasis added).

[200] *Id.* at 1644 (emphasis added).

[201] *Id.* at 1645.

[202] *Id.*

[203] *Id.*

[204] S. 2030, 78th Cong., 2d Sess. (1944); H.R. 5081, 78th Cong., 2d Sess. (1944).

[205] Shepherd, *supra* note 9, at 1649.

[206] *Id.* at 1650.

record'" standard of judicial review first proposed in the minority bill, earning it a control rating of seven.[207]

As expected, the Democratic caucus opposed the bill, demanding more moderate legislation.[208] The bill's provision of extreme judicial scrutiny of agency activity was a particular bone of contention for the Democratic Congress, which had taken no action on two other bills introduced around the same time as the McCarran-Summer Bill that provided for much more intrusive standards of judicial review.[209] Both the Democratic caucus and agencies themselves, whose approval was needed in order for newly inaugurated-President Harry Truman to sign the bill, also demanded more relaxed forms of procedural constraint than those proposed in the McCarran-Summer Bill.[210] Accordingly, the ABA acceded to the Democrats and introduced a revised, softer McCarran-Summer Bill[211] that exempted numerous New Deal agencies from the bill's procedural strictures[212] and "retreated from its demand for broad judicial review" by substituting the bill's former "substantial evidence upon the whole record" standard for the much more lenient "substantial evidence" rule, demonstrating that only a slight deviation from the near complete deference afforded agencies by the Roosevelt Court was all that the APA could accomplish.[213] As discussed, the SEC's determinations regarding the economic consequences of Rule 14a-11 on board performance and shareholder value, and of institutional investors using the rule to further individual interests, would have easily survived this "substantial evidence" standard.[214] Renamed the Administrative Procedure Act, the final bill, which Professor Shepherd assigns a modest control rating of six, primarily

[207] *Id.* at 1652 (quoting S. 2030, 78th Cong., 2d Sess. § 9(f)).

[208] *See id.* at 1653–56.

[209] *See id.* at 1653.

[210] *Id.* at 1654–56.

[211] S. 7, 79th Cong., 1st Sess. (1945).

[212] Shepherd, *supra* note 9, at 1657–58.

[213] *Id.* at 1660 (emphasis added).

[214] *See supra* Part IV.A.1.

due to its moderate procedural requirements,[215] passed both houses unanimously and was signed into law by Truman on June 11, 1946.[216]

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[215] Shepherd, *supra* note 9, at 1664.

[216] *See* H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946); Arthur T. Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act*, *in* LEGISLATIVE BACKGROUND OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 1, 12 (George Warren ed., 1947). As Professor Shepherd comments,

> [i]n most respects, the administration won the battle . . . . As their comments during debates directly before the APA's passage show, [conservatives] would have preferred much stronger legislation. Nonetheless, they had no choice but to vote for the bill unanimously. To conservatives, small reform was better than no reform. But small reform was all that conservatives could hope to achieve. The administration could block stricter reform.

Shepherd, *supra* note 9, at 1681. However, in the run-up to the APA's passage, conservatives "attempted to create legislative history—to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor" their own ideologies. *Id.* at 1662–63. The APA-announced standard of judicial review was a particular point of focus for the conservatives. Senator McCarran, one of the APA's sponsors, for example, "stated that the new standard would fundamentally *expand* the existing standard of review." *Id.* at 1664 (citing 92 CONG. REC. 2158 (1946) (response of "Yes; it would change that rule" by Sen. McCarran to question asking whether the bill would change the "substantial evidence" standard of judicial review)) (emphasis added). Similarly, "the House committee report on the bill indicated that the bill would broadly expand the scope of judicial review," *id.* at 1664–65, characterizing the provision as "exceedingly important," pointing out the "[d]ifficulty [that] ha[d] come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence," and arguing that the bill imposed on courts a "duty . . . to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction." H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946). The ABA, as well, maintained that "the new statute . . . broaden[ed] . . . the scope and measure of the review which the Federal Courts are henceforth required to make of administrative action in cases where such action is reviewable at all," John Dickinson, *Administrative Procedure Acts: Scope and Ground of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947), and criticized the "'cult' of discretion"

2. *Chevron*'s Alteration of the APA's "Substantial Evidence" Standard

The APA and the regulatory landscape it created remained largely unchanged in the forty years following the legislation's enactment.[217] In the early 1980s, however, the

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that the legislation purportedly aimed to rein in. Pat McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 828 (1946). The administration's Attorney General, on the other hand, "issued a long monograph that interpreted each of the bill's provisions," Shepherd, *supra* note 9, at 1666, and argued correctly that the APA's judicial review provision simply "declare[d] the existing law concerning the scope of judicial review" and "[was] an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court," which posed little "difficulty for any agency." 92 CONG. REC. 5741 (1946). As the APA's long history demonstrates, all conservative attempts to expand judicial review had been defeated by Roosevelt and his New Deal proponents in Congress. *See* S. 918, *supra* note 187. "[C]onservatives indicated that they would have preferred a stricter bill. They had agreed to this bill only because the administration would agree to nothing stricter." Shepherd, *supra* note 9, at 1667. Accordingly, the Supreme Court correctly treats the Attorney General's Manual as "the Government's own most authoritative interpretation of the APA . . . which [the Court has] repeatedly given great weight." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring); *see also* Steadman v. SEC, 450 U.S. 91, 102–03 n.22 (1981) ("We have previously noted that the Attorney General's Manual on the [APA] has been 'given some deference by this Court because of the role played by the Department of Justice in drafting the legislation.'") (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc., 435 U.S. 519, 546 (1978)).

[217] The RFA, enacted in 1980, and SBREFA, passed the same year as the NSMIA, did amend the APA to require that federal agencies, including independent agencies such as the SEC, undertake a regulatory flexibility analysis in which they are to consider the economic impacts of a potential rule on small businesses whenever they engage in rulemaking. *See, e.g.*, Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425 (2000). However, since the petitioners in *Business Roundtable* did *not* take issue with the SEC's conclusions regarding Rule 14a-11's impact on small businesses, this Note

Supreme Court all but eliminated the already relaxed level of judicial scrutiny with which courts had been examining agency actions since the passage of the APA in its landmark *Chevron* decision.[218] The Court's analysis in *Chevron* centered on whether the agency's challenged action is a permissible choice among its available alternatives,[219] which simply entails determining whether the action is "reasonable."[220] Thus, a court reviewing a challenged agency action must determine only whether the action is reasonable and *not* "impose its own" opinion as to which possible alternative, in the court's view of the empirical data, would have been appropriate.[221]

In *Chevron*'s progeny, the Supreme Court made clear that courts owed this overwhelming deference to agencies like the SEC whenever they engage in rulemaking authorized by statute and the corresponding rules are subsequently challenged in court.[222] In particular, in *State Farm*, the Court held that the "scope of review under the [APA's] 'arbitrary and capricious' standard is *narrow*" and that an agency must show only that there is a "rational connection between the facts found and choices made" in order for the challenged rule or regulation to qualify as "reasonable"

does not consider the effect of these two statutes on the level of judicial scrutiny with which the court is to question agency decision-making.

[218] Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984).

[219] *See id.* at 843.

[220] Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 31 (2006) (quoting *Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")); *see also* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 288 (1986) ("Other parts of the [*Chevron*] opinion made it clear that the word 'permissible,' as used here, simply meant 'reasonable' . . . .").

[221] *See* Pietruszkiewicz, *supra* note 220, at 31 (citing *Chevron*, 467 U.S. at 843); Starr, *supra* note 220, at 288.

[222] *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) (collecting cases).

under *Chevron*, and thus comply with the APA.[223] As in *Chevron* itself, an agency conclusion is "reasonable," and therefore passes muster, if *some* evidence—regardless of how little—supports the conclusion, even if there is also evidence that supports a contrary conclusion.[224] In such cases, courts are to defer to the agency's determinations, even if they disagree with its choice.[225] Thus, *Chevron* and its progeny ratcheted down the level of judicial scrutiny from the APA's "substantial evidence" standard to a standard more akin to the scintilla rule, sliding the rating of judicial intrusion down to a rating of two or three on Professor Shepherd's scale.[226]

Both of the SEC's determinations regarding the economic consequences of Rule 14a-11 on board performance and shareholder value, and of institutional investors using the rule to further individual interests, would have surely been deemed "reasonable" under *Chevron* and *State Farm*. Despite the existence of evidence supporting the contrary

[223] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[224] *See id.*

[225] *See id.* ("We will . . . 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'") (quoting Bowman Transp. Inc. v. Arkansas-Best Freight Sys.,419 U.S. 281, 286 (1974)); *Chevron*, 467 U.S. at 843 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy . . . the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'") (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)). This reasoning is based, in part, on the fact that agencies, due to their greater specialized expertise than the courts, are in a better position to make such policy determinations, especially where the relevant evidence is mixed or not precisely quantifiable, *see* discussion of *Chamber of Commerce*, *supra* Part II.A, a similar concern of the proponents of the minority bill. *See supra* note 181 and accompanying text.

[226] The scintilla rule, by simply requiring *some* evidence, regardless of how little, essentially grants agencies, not courts, overwhelming discretion to choose between alternatives, despite the relative unattractiveness of the chosen alternative. *See supra* note 141 and accompanying text.

conclusion—that Rule 14a-11's costs outweigh its benefits in these areas—there *is* evidence supporting the SEC's conclusions.[227] Thus, there is a "rational connection between the facts found and choices made," even if an alternative choice is more rational.[228] This, after all, is the core rationale underlying the line of *Chevron* cases—where an agency could reasonable choose between two or more alternative conclusions, that choice is for the agency, *not* the courts, to make, and the courts must defer to whichever determination the agency settles upon.[229]

3. Congress' Re-increasing of the Appropriate Level of Judicial Scrutiny in Section 106(b)

The central issue in determining whether the *Business Roundtable* court's strict scrutiny was correct, then, is whether Congress, in enacting Section 106(b) of the NSMIA, intended to alter this extremely deferential standard of judicial review pronounced in *Chevron* and its progeny by requiring a greater agency showing. Because the legislature's command to "*consider*" efficiency, competition, capital formation, and investor protection while promulgating rules is by no means a picture of textual clarity, as discussed, an examination of the context in which the NSMIA was enacted is necessary.[230] This examination indicates that although the NSMIA likely intended to ratchet the appropriate standard of judicial review *up* to one similar to the "substantial evidence, upon the record" standard proposed in the minority and McCarran-Summer bills, some of the SEC's conclusions, contrary to *Business Roundtable* court's holdings, fully satisfy this moderate standard.

The principle purpose of the NSMIA was *not* to address judicial deference to SEC rulemaking, but rather to eliminate overlapping federal and state regulation of investment advisers and to increase regulation of the largely

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[227] *See supra* Part IV.A.1.

[228] *State Farm*, 463 U.S. at 43.

[229] *See supra* note 225.

[230] *See supra* Part IV.A.

unregulated mutual fund industry.[231] Testifying before the Senate Committee on Banking, then-SEC Chairman Arthur Levitt stated that the system of dual federal and state regulation that existed at that time was "not the system that Congress—or the Commission—would create [ ] if [they] were designing a new system. An appropriate balance can be attained in the federal-state arena that better allocates responsibilities, reduces compliance costs and facilitates capital formation, while continuing to provide for the protection of investors."[232] As such, according to the Senate Committee, the legislation's "key provisions, taken together, focus" not on reducing the level of judicial deference to agency action, but rather "on the need to delineate more clearly the securities law responsibilities of the federal and state governments."[233] At the time of the NSMIA's enactment, the report continues, the relationship [was] confusing, conflicting, and involve[d] a degree of overlap that may raise costs unnecessarily for American investors and the members of the securities industry."[234] Clearly dividing the jurisdiction of the states and federal government over investment advisers, the Committee surmised, would "enhance investor protection while reducing the costs of investing."[235] In particular, the bill's division of regulatory responsibility, with the states regulating investment advisers with less than $25 million in client assets and the federal government regulating larger advisers, would help encourage efficient "'one stop' filing,"[236] thereby "eliminat[ing] the costs and burdens of duplicative and unnecessary regulation."[237]

The NSMIA's other major focus was the country's growing mutual fund industry.[238] Specifically, Congress had grown

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[231] *See* S. REP. NO. 104-293, at 2 (1996) [hereinafter SENATE REPORT].

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 4.

[237] H.R. REP. NO. 104-622, at 16 (1996) [hereinafter HOUSE REPORT].

[238] *See* SENATE REPORT, *supra* note 231, at 5–6.

concerned that regulation of this industry had not grown at a rate commensurate with growth of the industry itself.[239] According to the Senate Committee, "[o]ver 30 million U.S. households—about one in three families—[then] own[ed] an aggregate of approximately $2.7 trillion in mutual fund assets. In [1995] alone, mutual funds assets grew by $700 billion," yet, "[j]ust ten years [prior], the entire mutual fund industry assets added up to about $700 billion."[240] In order to effectively regulate this exploding industry, the NSMIA granted the SEC extensive rulemaking authority in this area.[241]

In line with its purpose of reducing burdensome and unnecessary regulation, however, the NSMIA also addressed the "impact of SEC rulemaking on savings, investment, and capital formation in the nation," which, according to the Senate Committee, "cannot be overestimated."[242] Accordingly, the NSMIA requires "[t]he SEC [to] consider the benefit of additional regulation with the impact of that regulation on the economy, the markets, and market participants,"[243] in order to "minimize the impact of added regulation."[244] By requiring the SEC to undertake a cost-benefit analysis whenever it engages in rulemaking and providing its analysis to the public, Congress "expected[ed] that the [SEC] will engage in *rigorous*"[245] and "*serious* economic analysis throughout the process of developing regulations."[246] To this end, Congress specifically "authorize[d] $6 million in annual appropriations for the SEC's Economic Analysis Program," a grant "that represent[ed] a significant improvement from the $3 million

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[239] *Id.*

[240] *Id.*

[241] *See* HOUSE REPORT, *supra* note 237, at 17 ("[T]he legislation grants the Commission specific additional authority regarding investment company books and records, and the preparation of shareholder reports.").

[242] SENATE REPORT, *supra* note 231, at 16.

[243] *Id.*

[244] *Id.* at 9.

[245] HOUSE REPORT, *supra* note 237, at 39 (emphasis added).

[246] SENATE REPORT, *supra* note 231, at 16 (emphasis added).

appropriated for the Office of Economic Analysis in fiscal year 1996" and would aid the agency significantly in performing the "serious" analysis contemplated by Section 106(b).[247] Congress' command that the SEC "rigorously" and "seriously" consider the economic consequences of a proposed rule, combined with earmarking of funds specifically for this analysis, would seem to contemplate a greater showing by the SEC necessary to satisfy judicial scrutiny than that required under *Chevron*'s scintilla rule-like review.[248] A "substantial evidence, upon the whole record" standard, which itself calls for some deference by requiring an agency to show only that its conclusions are not "*clearly* contrary to the *manifest* weight of the evidence"[249] in order for there to be a "rational connection between the facts found and choices made"[250] demanding judicial deference, would likely be a

[247] *Id.* at 16. Ironically, proxy access was also a concern of the NSMIA. Section 510(b) of the legislation provides:

> (1) STUDY.—The Commission shall conduct a study of—(A) whether shareholder access to proxy statements pursuant to section 14 of the Securities Exchange Act of 1934 has been impaired by recent statutory, judicial, or regulatory changes; and (B) the ability of shareholders to have proposals relating to corporate practices and social issues included as part of proxy statements.
> (2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Commission shall submit a report to the Congress on the results of the study conducted under paragraph (1), together with any recommendations for regulatory or legislative changes that it considers necessary to improve shareholder access to proxy statements.

NSMIA, Pub. L. No. 104-132, § 510(b), 110 Stat. 3416, 3450–51 (1996).

[248] *Chevron*'s essential requirement of a scintilla of evidence presented by an agency to sustain an action can in no way be said to contemplate "serious" or "rigorous" analysis. *See supra* Part IV.A.2.

[249] United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. 211 (1941) (emphasis in original).

[250] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

sufficiently "rigorous" standard, earning the NSMIA a control rating of six or seven on Professor Shepherd's scale.[251]

B. The Court's Wrongful Application of an Even Higher Standard

The de novo-like level of scrutiny the *Business Roundtable* court applied easily earns the maximum rating of ten. Despite the existence of extensive evidence in the form of hundreds of pages of studies and reports by leading academics, financial institutions, regulators, and investors supporting the SEC's conclusions regarding the economic consequences of Rule 14a-11 on shareholder value and of institutional investors using the rule to further individual interests[252] that should have satisfied the "substantial evidence, upon the whole record" standard, as the conflicting evidence did not *definitely* refute this corroborating evidence,[253] the court refused to defer to the agency's choices among alternatives. Instead, the court scrutinized the agency's determinations under a stringent de novo-like level of review, wrongly "substitut[ing] its [own] judgment for that of the agency."[254]

V. IMPLICATIONS OF *BUSINESS ROUNDTABLE* REVIEW IN THE POST-FINANCIAL CRISIS WORLD AND THE NEED FOR CLARIFICATION

Under the erroneously demanding standard of judicial review applied by the court in *Business Roundtable*, few SEC rules stand a chance at survival. The court, in applying a

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[251] *See* discussion of standards of review proposed in the minority and McCarran-Summer bills at *supra* Part IV.A.1.

[252] *See supra* Part IV.A.1.

[253] *See supra* Part IV.A.1.

[254] *State Farm*, 463 U.S. at 43. With respect to the SEC's conclusion that Rule 14a-11 would result in improved board performance and shareholder value, the court implicitly admits as much, conceding that although the empirical evidence is "mixed," the court does not believe that that SEC's choice of one of the alternate conclusions is the correct one. Bus. Roundtable v. SEC, 647 F.3d 1144, 1151 (D.C. Cir. 2011).

standard even more stringent than those explicitly struck down in the APA's predecessors, has the potential of accomplishing exactly what Roosevelt and his New Deal proponents feared most: hamstringing the SEC to the detriment of the nation's economy. This potential is especially real in the post-financial crisis world, in which Dodd-Frank[255] requires the SEC to promulgate nearly 250 new rules in order to implement the legislation's sweeping reform.[256] In enacting Rule 14a-11 alone, the already budget-strapped SEC "produced [sixty] pages [of] cost-benefit analysis" after pouring through tens-of-thousands-of-pages of empirical evidence and public commentary, amounting to a staggering total of 21,000 staff hours spent "drafting the [ ] rule over two years."[257] That some of the rule's conclusions "still did not pass muster does not bode well for several other Dodd-Frank rules that received considerably less explication, sometimes only [twenty-five] pages, on their economic effects."[258] The SEC, under the court's drastic standard, now faces an inescapable "strait jacket"[259] that could prohibit it from creating new regulations, essentially paralyzing the agency to the detriment of the progress that Dodd-Frank represents for the national economy.

This possibility is augmented by our current system of corporate governance, which makes it extremely likely that only investor-friendly rules will be challenged in court, as evidenced by *Business Roundtable* and other recent challenges to SEC rules. Although there is no *direct* monetary benefit that stems from successfully challenging an SEC rule such as an award of damages, business interests

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[255] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[256] *See* Elaine Buckenberg, Jonathan Macey, & James Overdahl, *Will Court Short-Circuit Dodd-Frank?*, POLITICO (Aug. 15, 2011), http://www.politico.com/news/stories/0811/61363.html.

[257] Ben Protess, *Court Ruling Offers Path to Challenge Dodd-Frank*, N.Y. TIMES DEALBOOK (Aug. 17, 2011, 8:41 PM), http://dealbook.nytimes.com/2011/08/17/court-ruling-offers-path-to-challenge-dodd-frank/.

[258] *Id.*

[259] Shepherd, *supra* note 9, at 1600.

have demonstrated that they can bear the enormous litigation costs necessary to contest agency action that impinges on management and are all too willing to risk these corporate funds in order to reap the long-term benefit of securing a regulatory regime favorable to them.[260] Investors, on the other hand, often have little incentive to risk their own money to challenge management-friendly rules due to the same collective action concerns that disincentive the waging of proxy contests.[261] Even where shareholders can pool their time and money, decreasing these costs of litigation for each participating investor, it is still unlikely that the average shareholder will be willing to risk even some of these resources in order to potentially realize a small increase in his investments in the particular class of security affected by the typical SEC rule, which usually represent only a portion of the average investor's entire portfolio, that could result from a change in that rule.[262]

Accordingly, the only challenges to SEC rules since the 1996 enactment of the NSMIA have been waged by management itself.[263] Because companies will rationally only

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[260] *See infra* note 263 and accompanying text.

[261] *See supra* notes 64–65 and accompanying text.

[262] *See id.*; Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 527–28 (1990) (discussing collective action problem in context of proxy contests). Although institutional investors are less likely to be hindered by this collective action problem, the extent of their activism outside of the takeover context has been questioned. *See* Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991). *But see* Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299 (2008) (arguing that institutional investors play an active role in effecting change across a range of areas of corporate governance).

[263] The petitioners in both *Chamber of Commerce*, discussed *supra* Part II.A, and *Business Roundtable* were the two organizations after which the cases were named. The Washington, D.C.-based U.S. Chamber of Commerce "is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions." *About the U.S. Chamber of Commerce*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/about (last visited May 2, 2012). Similarly, the D.C.-based Business Roundtable "is an association of chief

challenge SEC rules that protect investors to the detriment of management, this "cherry-picking" could have the effect of over time pushing our corporate governance regime back towards the pre-financial crisis rules that imposed minimal accountability on management,[264] essentially undoing Dodd-Frank's intended reforms.[265]

Thus, in the wake of *Business Roundtable*, it is absolutely necessary that Congress clarify whether it authorized the extreme standard of review applied by the court. Puzzlingly, the SEC, after having had three of its rules stuck down by the D.C. Circuit under *Business Roundtable*-like review in the last six years, decided *not* to appeal its latest rebuke.[266] Unlike in the case of some private litigants who may forgo appealing an unfavorable ruling due to the risk of setting appellate precedent affirming that result that would then bind other courts, the rulings of the D.C. Circuit are themselves national, as the court is the exclusive arbiter of challenges to SEC rules and regulations,[267] and have in

executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees," companies that "comprise nearly a third of the total value of the U.S. stock market." About Us, Business Roundtable, http://businessroundtable.org/about-us/ (last visited May 2, 2012). The petitioners in *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), were some of the nation's leading insurance companies.

[264] *See supra* note 76 and accompanying text.

[265] Protess, *supra* note 257 ("The industry has shied from mounting a broader challenge to Dodd-Frank itself, finding it cheaper and easier to gradually chip away at the law's fiercest provisions. . . . Financial trade groups, according to several lawyers, are now considering suits against the [SEC's] corporate whistle-blower office, which opened [in August] . . . . Industry groups are also looking at claims against a few more obscure Dodd-Frank provisions.").

[266] Ben Protess, *S.E.C. Won't Fight Ruling Striking Down Proxy Access*, N.Y. TIMES DEALBOOK (Sept. 6, 2011, 8:44 PM), http://dealbook.nytimes.com/2011/09/06/s-e-c-wont-fight-ruling-striking-down-proxy-access/.

[267] *See* Exchange Act, 15 U.S.C. § 78y(b)(1) (2012) ("A person adversely affected by a rule of the [SEC] . . . may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside."). Although such

recent years shown an unwillingness to sustain agency action.[268] Thus, the SEC had nothing to lose—and everything to gain—from seeking Supreme Court review of the court's extreme rulings. While a Supreme Court affirmance of the *Business Roundtable* standard would leave the SEC—and the economy more generally—in the same dire predicament as they are without such a confirmation, a clarification on the appropriate level of judicial review to which SEC rules should be subjected favorable to the agency would solve *Business Roundtable's* debilitating consequences entirely. It is therefore imperative that the SEC appeals the next inevitable D.C. Circuit judgment vacating one of its rules.

Until then, the only hope for the agency, like that of Roosevelt's conservative opponents, now lies in Congress. If Congress, in enacting the NSMIA, did intend, as this Note argues, for a more deferential *moderate* standard that than employed throughout *Business Roundtable*, it should clarify that this is type of "consideration" the statute actually contemplates to avoid the obliteration of Dodd-Frank that the *Business Roundtable* standard could surely achieve.

VI. CONCLUSION

Under the erroneously stringent standard of judicial review applied by the court in *Business Roundtable*, nearly every SEC rule faces the same fate as Rule 14a-11. If allowed to stand, the *Business Roundtable* standard, which

"person[s] adversely affected" are not *necessarily* bound to seek review in the D.C. Circuit, the business lobbying groups most likely to challenge SEC rules are almost unfailingly based in Washington, D.C.. *See supra* note 262. Even if an adversely affected person did not have its principal place of business in D.C., like the insurance company lead petitioner in *American Equity Investment Life Insurance Co.*, based in Iowa, it would be unimaginable for such a person to choose a circuit other than the D.C. Circuit given the latter's demonstrated willingness to strike down SEC rules.

[268] *See* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

employs a level of intrusiveness far more extreme than those explicitly rejected in both the APA's predecessors and its subsequent amendments, has the potential to essentially paralyze the SEC in implementing the sweeping financial reforms introduced in Dodd-Frank,[269] which are already well behind schedule,[270] and to allow business interests to further undermine these reforms. These results could very well lead the nation and its still fragile securities markets down the path to another, more debilitating financial crisis. These results absolutely demand Congressional intervention before the SEC is given its next opportunity to seek clarification by the Supreme Court of the appropriate standard of judicial review by which the D.C. Circuit is to evaluate the agency's rules.

[269] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[270] *See* Jesse Hamilton, *Dodd-Frank Rules Slow at SEC After Cost Challenge*, BLOOMBERG (Mar. 6, 2012), http://www.bloomberg.com/news/2012-03-06/dodd-frank-rules-slow-at-sec-after-court-cost-benefit-challenge.html.