Fordham Law Review

Volume 85 | Issue 6 Article 13

2017

Political Insider Trading

Michael R. Siebecker
University of Denver, Sturm College of Law

POLITICAL INSIDER TRADING

*Michael R. Siebecker**

Should the same legal principles that prohibit insider trading require corporations to disclose their political spending as well? The question seems particularly important in light of the increasing dominance of corporations in the political realm, the lack of transparency regarding corporate political activity, and the inherently suspicious motives of corporate executives who use corporate treasuries to advance their personal political preferences. This Article examines how the fiduciary principles of trust that underpin prohibitions on insider trading could inform and enhance the content of the general fiduciary duties that corporate officers and directors owe to their shareholders. Although insider trading prohibitions rest on the statutory foundation of federal securities law, the U.S. Supreme Court extrapolates the content of insider trading doctrine from the overarching common law fiduciary duties that govern the daily decisions of corporate managers. In the insider trading context, however, the Supreme Court has articulated a special disclosure obligation based on those fiduciary duties that is not currently recognized in other areas of corporate law. In particular, the Supreme Court requires that to avoid liability for illicit insider trading, a corporate insider who possesses material nonpublic information must either disclose that information to shareholders prior to trading or abstain from trading altogether.

A fiduciary breach due to secret use of corporate assets for personal gain marks the essential concern in both the insider trading realm and in the context of corporate political spending. Therefore, adopting a similar common law fiduciary rule that corporate managers must disclose the amount and target of political expenditures or refrain from engaging in political activity does not seem like much of an intellectual leap. Not only would such a common law disclosure duty fit neatly within existing corporate governance principles, but the compelled transparency would not offend corporations' First Amendment rights. In the end, prohibiting political insider trading through a "disclose or abstain" rule for corporate political spending would promote greater efficiency in the capital markets, ensure corporate accountability and political legitimacy, and sustain the growing market for corporate social responsibility.

---

* Professor of Law, University of Denver, Sturm College of Law. B.A., Yale; J.D., LL.M., Ph.D., Columbia. For helpful insights and suggestions, I express special thanks to Bernard Chao, Kevin Lynch, Justin Pidot, and Tim Thein.

INTRODUCTION

Should the same legal principles that prohibit insider trading require corporations to disclose their political spending as well? The question seems particularly important in light of the increasing dominance of corporations in the political realm, the lack of transparency regarding corporate political activity, and the inherently suspicious motives of corporate executives who use corporate treasuries to advance their personal political preferences.

This Article intends to examine how the fiduciary principles of trust that underpin prohibitions on insider trading could inform and enhance the content of the general fiduciary duties that corporate officers and directors owe to their shareholders. Although insider trading prohibitions rest on the statutory foundation of federal securities law,[1] the U.S. Supreme Court extrapolates the content of insider trading doctrine from the overarching common law fiduciary duties that govern the daily decisions of corporate managers.[2] In the insider trading context, however, the Supreme Court has articulated a special disclosure obligation based on those fiduciary duties that are not currently recognized in other areas of corporate law. In particular, the Supreme Court requires that to avoid liability for illicit insider trading, a corporate insider who possesses material nonpublic information must either disclose that information to shareholders prior to trading or abstain from trading altogether.[3] That disclosure requirement arises from the basic notion that corporate insiders cannot use company assets (i.e., information) for personal gain at the expense of shareholders to whom corporate insiders owe a duty of trust.[4] Only through disclosure of the material nonpublic information prior to trading with existing or potential shareholders could corporate insiders ensure a level playing field and avoid upending their fundamental fiduciary obligations.

With that in mind, might the same fiduciary-based disclosure duty articulated in the context of insider trading be applied in the context of corporate political spending? Answering that question depends on whether trading based on material nonpublic information represents a sufficiently similar breach of trust as failing to disclose corporate political spending. Obviously, using the corporate treasury for political spending certainly does not involve trading in company securities. But in light of the rather tenuous connection between corporate profitability and political spending,[5] using corporate funds to affect elections raises the specter of corporate insiders using company assets to advance their own personal interests, potentially to

1. *See* Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 854–56 (2013).

2. *See* Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1317–22 (2009).

3. *See* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 734–35 (2006).

4. The fiduciary relationship exists not just between the insider and existing shareholders but to potential shareholders as well. *See* Chiarella v. United States, 445 U.S. 222, 227 n.8 (1980) (quoting Judge Learned Hand's statement in Gratz v. Claughton, 187 F.2d 46, 49 (2d Cir. 1951)); *see also* Nagy, *supra* note 2, at 1338 ("*Chiarella* maintained, however, that it would be a 'sorry distinction' to recognize fiduciary duties between a shareholder and an insider but not to recognize such duties in the very transaction where the person became a shareholder. As Professor Victor Brudney observed, it is more than a little ironic 'that the Supreme Court, in its efforts to narrow the scope of the disclosure requirements of Section 10(b), assumed, and in some sense may have furthered, broad local fiduciary law disclosure obligations of management and controllers.'" (quoting Victor Brudney, O'Hagan*'s Problems*, 1997 SUP. CT. REV. 249, 255 n.15)).

5. *See* John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 658 (2012); Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12 CONN. PUB. INT. L.J. 361, 392–94 (2013); Alison Frankel, *Why Shield Corporations from Disclosing Political Spending?*, REUTERS (Dec. 16, 2013), http://blogs.reuters.com/alison-frankel/2013/12/16/why-shield-corporations-from-disclosing-political-spending/ [https://perma.cc/7R58-YM3C].

the detriment of the corporation.[6] Although corporate managers could easily claim that political spending advances the interests of the company rather than their own predilections, there is simply no way for shareholders to assess the existence of a breach of trust without disclosure.[7] As some of the most important political decisions get made behind corporate boardroom doors, ensuring that managers cannot co-opt corporate coffers for illicit personal benefit seems of paramount importance.

To assess the feasibility and desirability of incorporating the disclosure obligation from insider trading doctrine into the fiduciary duties governing corporate political spending, Part I describes the hostile acquisition of American politics by corporations. Part II explicates the doctrine and fiduciary foundations that gave rise to an affirmative disclosure duty on the part of corporate insiders interested in trading based on material nonpublic information. Moving from the problem to a potential solution, Part III discusses how a fiduciary-based disclosure obligation in the context of political spending might prevent managers from using the corporate treasury to promote their own personal interests at the expense of the company. Part IV addresses any constitutional impediments to adopting a common law disclosure rule for corporate political spending. Part V explores a variety of potential advantages and drawbacks to extending insider trading principles to corporate spending practices. Finally, this Article concludes that extending a fiduciary-based disclosure obligation from insider trading doctrine to the context of corporate political spending would promote efficiency in the capital markets, ensure corporate accountability and political legitimacy, and sustain the growing market for corporate social responsibility.

I. THE POLITICAL CORPORATION

The practical impetus for considering a corporate political spending disclosure rule based on insider trading principles stems from the dominance of corporations in the political realm. The concentration of political power in the hands of corporate boards makes the potential for corruption through secret use of corporate assets of paramount concern. Although concerted efforts on a variety of fronts have tried to stem the opportunities for deceit, corporate managers remain largely free to use corporate coffers to advance secret political agendas.

A. The Hostile Acquisition of American Politics

In the early part of the twentieth century, Adolph Berle and Gardiner Means predicted in *The Modern Corporation and Private Property* that the

6. James Kwak, Citizens United v. FEC *Turns 2—And It's Still Wrong*, ATLANTIC (Jan. 20, 2012), https://www.theatlantic.com/business/archive/2012/01/citizens-united-v-fec-turns-2-and-its-still-wrong/251706/ ("[I]f corporations' political spending were left up to individuals, like executives or directors, those individuals could advance their personal interests by directing money to their preferred political organizations.") [https://perma.cc/R2JQ-PCBM].

7. *See* Editorial, *Keeping Shareholders in the Dark*, N.Y. TIMES, Dec. 4, 2013, at A32.

corporation would evolve to surpass government as the most powerful institution in society.[8] Indeed, the political influence of corporations and their control over important facets of our daily lives[9] grew rapidly as corporations amassed vast amounts of capital.[10] The potential for political control of our collective lives under an unaccountable cloak of anonymity frames the problem of political insider trading.

1. Monopolizing the Market

With respect to the growing political influence of corporations, the Supreme Court gave big business a new type of jurisprudential rocket fuel with its decision in *Citizens United v. FEC*.[11] In that landmark case, the Court gave corporations essentially the same political speech rights as human beings[12] and held unconstitutional any limits on the amount of independent political expenditures[13] that corporations could make in an election.[14] In the immediate aftermath of *Citizens United*, many predicted that corporate dominance of the political arena would infect irreparably American democratic processes.[15] At the time, President Barack Obama warned that "a new stampede of special interest money in our politics"

---

8. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 357 (1932).

9. *See* Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 179–80 (2005).

10. *See* Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2354–55, 2361–64 (2007); Arthur S. Miller, *Corporations and Our Two Constitutions*, *in* CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 241, 242 (Warren J. Samuels & Arthur S. Miller eds., 1987) (stating that corporations' "power and influence, both externally in the national political order and internally in the so-called corporate community, make them a true form of governance").

11. 558 U.S. 310 (2010).

12. *Id.* at 319.

13. According to the Federal Election Commission, "[A]n independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is made independently from the candidate's campaign." *The FEC and the Federal Campaign Finance Law*, FEC, http://www.fec.gov/pages/brochures/fecfeca.shtml#Independent_Expenditures (last updated Feb. 2017) [https://perma.cc/UJA2-RQ58].

14. *See Citizens United*, 558 U.S. at 342–46.

15. *See* Gabrielle Levy, *How* Citizens United *Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015, 12:26 PM), http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics ("In its Citizens United v. Federal Election Commission decision, the court opened the campaign spending floodgates.") [https://perma.cc/6NFD-TWSJ]; Christopher P. Skroupa, *Investors Want Disclosure of Corporate Political Contributions and Lobbying Expenditures*, FORBES (Apr. 20, 2012, 1:04 PM), http://www.forbes.com/sites/christopherskroupa/2012/04/20/investors-want-disclosure-of-corporate-political-contributions-and-lobbying-expenditures-2/print/ (quoting the ALF-CIO counsel, who said that "*Citizens United* opened the floodgates for the U.S. Chamber of Commerce, ALEC and super-PACs that serve as a direct threat to shareholder rights, economic growth and free enterprise") [https://perma.cc/6SW9-XA33]; Kenneth P. Vogel, *Court Decision Opens Floodgates for Corporate Cash*, POLITICO (Jan. 21, 2010, 10:25 AM), http://www.politico.com/story/2010/01/court-decision-opens-floodgates-for-corporate-cash-031786 [https://perma.cc/R4AA-6QKT]; *see also* Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161, 193–95 (2010).

would enable corporations to "marshal their power every day in Washington to drown out the voices of everyday Americans."[16] In his 2010 State of the Union address, President Obama added that the ruling would "open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."[17]

To the extent that *Citizens United* provided corporations with doctrinal rocket fuel, the more recent decision in *McCutcheon v. FEC*[18] offered corporations a political jet pack. In *McCutcheon*, after determining that spending large sums of money on elections did not corrupt the political process, the Court eliminated the prior cap[19] on the total amount of spending by one individual (or corporation) on all federal candidates and political parties in an election cycle.[20] Although the contribution limits per candidate and party committee remain in place,[21] corporations may now give directly to as many political candidates and party organizations as desired.[22] With the number of candidates and committees extant in the 2016 election cycle, a corporation will therefore be able to increase its aggregate direct candidate and party contributions from $123,000 to $5,135,800.[23] Working in tandem with the elimination of independent political spending limits in *Citizens United*, the removal of aggregate caps on direct candidate and political party spending in *McCutcheon* arms corporations with a much more powerful political arsenal than average citizens possess.[24]

---

16. Vogel, *supra* note 15; *see also* Siebecker, *supra* note 15, at 193–95.

17. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html [https://perma.cc/N3ME-ZBZR].

18. 134 S. Ct. 1434 (2014).

19. Prior to the rule, the limit per election cycle was approximately $123,000 per person. *See* LAWRENCE NORDEN ET AL., BRENNAN CTR. FOR JUSTICE, FIVE TO FOUR 9 (2016), https://www.brennancenter.org/sites/default/files/publications/Five_to_Four_Final.pdf [https://perma.cc/M55H-Y7D4].

20. *See McCutcheon*, 134 S. Ct. at 1438 ("Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." (quoting Citizens United v. FEC 558 U.S. 310, 359 (2010))).

21. *See* Marc E. Elias & Jonathan S. Berkon, *After* McCutcheon, 127 HARV. L. REV. F. 373, 377 (2016) ("The impact of the *McCutcheon* holding itself is relatively straightforward. At the federal level, individuals may now donate the maximum amount to each candidate ($2,600 per election), political committee ($5,000 per year), state party ($10,000 per year), and national party committee ($32,400 per year) without having to stay within aggregate limits. The party committees are most likely to benefit from this change.").

22. *See* NORDEN ET AL., *supra* note 19, at 10.

23. *See id.*

24. Elias & Berkon, *supra* note 21, at 374 ("Critics of the plurality view lament that it will further empower wealthy individuals and large corporations at the expense of average Americans. There is some truth to that contention. But under the current system, where contributions to political parties are strictly limited but contributions to so-called 'Super PACs' are not, wealthy individuals and large corporations already enjoy an outsized role.").

Obviously emboldened by the Supreme Court's rulings, corporations increasingly engage in massive amounts of political spending.[25] Corporations currently spend approximately $2.6 billion per year on political lobbying and "the biggest companies have upwards of 100 lobbyists representing them, allowing them to be everywhere, all the time. . . . Of the 100 organizations that spend the most on lobbying, 95 consistently represent business."[26] A recent report by the Sunlight Foundation[27] revealed that 200 of the most politically active for-profit corporations spent approximately $5.8 billion in lobbying and campaign contributions during the six-year period comprising the 2008, 2010, and 2012 election cycles.[28] In the 2014 election cycle alone, corporations spent over $1.1 billion just on state candidates and committees.[29] Estimates for political advertising in the 2016 elections exceed $6 billion, with a vast majority of those funds coming from corporate coffers.[30] For those who contend corporate involvement in politics sullies public discourse and perverts political outcomes,[31] the increasingly dominant presence of

---

25. Bill Allison & Sarah Harkins, *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions*, SUNLIGHT FOUND. (Nov. 17, 2014, 9:26 AM), http://sunlightfoundation.com/blog/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/ ("Between 2007 and 2012, 200 of America's most politically active corporations spent a combined $5.8 billion on federal lobbying and campaign contributions.") [https://perma.cc/G8QB-WLVS]; *see also* Michael Beckel, *Top U.S. Corporations Funneled $173 Million to Political Nonprofits*, CTR. FOR PUB. INTEGRITY (Jan. 16, 2014, 12:01 AM), https://www.publicintegrity.org/2014/01/16/14107/top-us-corporations-funneled-173-million-political-nonprofits ("The U.S. Supreme Court's *Citizens United v. Federal Election Commission* ruling in 2010 did not, as some warned, unleash a flood of corporate money directly into elections. But since then, scores of blue-chip U.S. companies quietly bankrolled politically active nonprofits to the tune of at least $173 million in roughly a single year, according to a new Center for Public Integrity investigation.") [https://perma.cc/784D-JM64].

26. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), http://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [https://perma.cc/4T2G-3S4J].

27. According to its mission statement, "The Sunlight Foundation is a national, nonpartisan, nonprofit organization that uses technology, open data, policy analysis and journalism to make our government and politics more accountable and transparent to all." *Our Mission*, SUNLIGHT FOUND., http://sunlightfoundation.com/about/ (last visited Apr. 14, 2017) [https://perma.cc/N5GE-P7H4].

28. *See* Allison & Harkins, *supra* note 25.

29. Bruce F. Freed & Marian Currinder, *Do Political Business in the Daylight*, NEWSWEEK (Apr. 6, 2016, 6:00 AM), http://www.usnews.com/news/the-report/articles/2016-04-06/corporate-money-is-playing-a-shadowy-role-in-2016-politics [https://perma.cc/2ZDC-E97T].

30. Meg James, *Political Ad Spending Estimated at $6 Billion in 2016*, L.A. TIMES (Nov. 18, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-political-ad-spending-6-billion-dollars-in-2016-20151117-story.html [https://perma.cc/C9L5-GD3E].

31. *See, e.g.*, Liz Kennedy, *10 Ways Citizens United Endangers Democracy*, DEMOS (Jan. 19, 2012), http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy [https://perma.cc/6HML-WNG4]; Mimi Murray Digby Marziani, *Money in Politics After* Citizens United*: Troubling Trends & Possible Solutions*, BRENNAN CTR. FOR JUST. (Apr. 18, 2012), https://www.brennancenter.org/analysis/money-politics-after-citizens-united-troubling-trends-possible-solutions [https://perma.cc/D8X6-EUL8].

business interests in public elections risks a hostile corporate takeover of American politics.[32]

2. Clandestine Corporate Spending

Perhaps animated by the hope of returns on political investment,[33] yet fearful of potential harm to their reputations from disclosing unpopular political activity, many corporate executives find solace in secrecy. According to some estimates, during the 2012 presidential election over $300 million in political expenditures came from "dark money,"[34] where the source of the funds remains clandestine as a result of various regulatory loopholes.[35] Some estimate the amount of dark money in the 2016 election cycle will exceed $600 million.[36] The *New York Times* asserts that as of May 2016, "two-thirds of political advertising dollars [in the 2016 election] have largely come from anonymous corporate donations, funneled through what have been referred to as 'dark money' nonprofit groups that freely engage in electoral and legislative politics, but don't have to disclose their donors, expenditures or even their members."[37] While a recent study by the

---

32. Some suggest corporate political spending might actually enhance public discourse. *See* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to the Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 589–90 (1991) (opposing prohibition of corporate political speech and emphasizing "the rationale that corporate political speech adds to the open marketplace of ideas protected by the first amendment").

33. *See* Allison & Harkins, *supra* note 25.

34. *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Apr. 14, 2017) ("The term 'dark money' is applied to this category of political spender because these groups do not have to disclose the sources of their funding . . . .") [https://perma.cc/2LGH-ACFH].

35. *Id.* (noting that the amount of dark money "[p]artly as a result [of] spending by organizations that do not disclose their donors has increased from less than $5.2 million in 2006 to well over $300 million in the 2012 presidential cycle and more than $174 million in the 2014 midterms").

36. Albert R. Hunt, *How Record Spending Will Affect 2016 Election*, BLOOMBERG: VIEW (Apr. 26, 2015, 10:56 AM), http://www.bloombergview.com/articles/2015-04-26/how-record-spending-will-affect-2016-election ("There was $300 million in dark money spent in the last presidential race; there may be twice as much for 2016. These donors often are looking for special favors or access, which wouldn't be as easy to do if the spending were reported openly.") [https://perma.cc/QN74-5YKX]; *see also* Michael Beckel, *What Is Political "Dark Money"—And Is It Bad?*, CTR. FOR PUB. INTEGRITY (Jan. 2, 2016, 3:00 AM), https://www.publicintegrity.org/2016/01/20/19156/what-political-dark-money-and-it-bad ("During the 2012 election cycle—the last time the presidency was at stake—dark money groups pumped about $300 million into political messages that called for the election or defeat of federal candidates, according to the nonpartisan Center for Responsive Politics. Additionally, dark money groups spent hundreds of millions of dollars on political advertisements that focused more on issues than candidates.") [https://perma.cc/K4HY-8Q5E].

37. Kathleen M. Donovan-Maher & Steven L. Groopman, *Why Dark Money Is Bad Business*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/10/opinion/why-dark-money-is-bad-business.html [https://perma.cc/3T73-EW3F]; *see also* CTR. FOR POLITICAL ACCOUNTABILITY & ZICKLIN CTR. FOR BUS. ETHICS RESEARCH, THE 2015 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 9 (2015) [hereinafter 2015 CPA-ZICKLIN INDEX], http://files.politicalaccountability.net/index/CPA-Zicklin_Index_Final_with_links.pdf ("Despite popular concern, secret political spending

Center for Public Accountability found that 9 of the S&P 500 companies prohibit any kind of political spending, "there continues to be resistance to disclosing payments to (c)(4) nonprofit organizations that are permitted to conceal their donors."[38] Of course, the very nature of dark money, and the convoluted political loopholes through which such funds are disseminated, makes identifying the corporate source difficult to discern. Regardless of that difficulty in detection, the point remains that to the extent corporations remain free to skulk about the political arena injecting dark money into campaigns under a cloak of anonymity, the electorate cannot effectively assess whether politicians remain in the pocket of corporate interests and shareholders cannot determine whether corporate managers use the corporate treasury to advance personal political interests.[39]

Thus, even if participation by corporations in the political process might produce some public benefits rather than civic harms,[40] the lack of transparency regarding corporate political activity presents a separate, especially significant problem for shareholders,[41] consumers,[42] and other

---

continues to expand. 'Dark money,' referring to political funding that cannot be tracked back to its first source, is expected to shatter prior records in the 2015–16 election cycle.") [https://perma.cc/TZE8-EQ6E].

38. 2015 CPA-ZICKLIN INDEX, *supra* note 37, at 14.

39. *See How Companies Spend*, CTR. FOR POL. ACCOUNTABILITY, http://politicalaccountability.net/political-spending-information/how-do-companies-spend (last visited Apr. 14, 2017) ("Companies may also give unlimited sums to trade associations (called 501(c)(6) groups for their tax code classification) and 'social welfare' organizations (called 501(c)(4) groups). These tax-exempt groups must have a 'primary purpose' other than elections. Unlike most political committees regulated by federal election law, they don't have to disclose their donors. Accordingly, corporate donors that wish to remain anonymous in their giving may find these organizations appealing. The money these groups spend is often referred to as 'dark money' because the funding sources are unknown. Much of this dark money shapes both the political agenda and the making of policy. Its impact is seen on climate change, tax breaks, redistricting, and growing income equality. 'Such organizations have spent hundreds of millions of dollars on campaign activities in recent elections while declining to disclose their donors,' noted Ken Doyle of BNA's Money and Politics Report. The bottom line: Dark money not only hurts our democracy; it also poses serious legal, reputational and business risks to companies.") [https://perma.cc/Q9WR-N27G].

40. *See, e.g.*, *Corporate Political Spending: A Resource*, CONF. BOARD, https://www.conference-board.org/politicalspending/ (last updated Jan. 6, 2016) ("[C]orporate participation in the political process can be an important, and even essential, means of enhancing shareholder value, strengthening corporate reputation and goodwill, and engaging in good corporate citizenship.") [https://perma.cc/SVV3-X86D].

41. John Coates, *SEC Non-Decision Decision on Corporate Political Activity a Policy and Political Mistake*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 13, 2013, 8:51 AM), https://corpgov.law.harvard.edu/2013/12/13/secs-non-decision-decision-on-corporate-political-activity-a-policy-and-political-mistake/ ("Dozens of studies . . . support the view that political activity can harm shareholder interests. These harms can flow through many channels—from reputational harm to dilution of strategic focus, from politically risky acquisition bets or capital investments to state laws deterring takeovers. To adequately assess those risks, shareholders need basic, standardized information about political activity—before investing, and afterwards, to monitor corporate performance and make informed decisions.") [https://perma.cc/85D5-QYER]; Lisa Gilbert, *SEC Can Still Work on a Corporate Political Disclosure Rule*, HILL (Dec. 22, 2015, 3:00 PM), http://thehill.com/blogs/pundits-blog/finance/264036-sec-can-still-work-on-a-corporate-political-disclosure-rule ("The fact that corporate executives can spend company resources for political purposes without shareholders' knowledge raises significant investor protection and

corporate constituencies.[43] Essentially acknowledging the problems with secret political activity by corporations, Justice Kennedy revealed an appreciation for corporate transparency in his majority opinion in *Citizens United*:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests.[44]

Whether in the context of securities sales or proxy statements to solicit shareholder votes, transparency remains the primary tool employed by the securities laws to combat corporate fraud.[45] But without effective transparency, "shareholders have no way to assess whether corporate political spending benefits them, and [have] every reason to believe it is fraught with risks to the corporate brand, business reputation, the bottom line and, by extension, shareholder returns."[46]

Notwithstanding Justice Kennedy's hope for corporate transparency and numerous concerted efforts to require corporations to disclose their political spending,[47] corporations currently face no such requirement under federal

---

corporate governance concerns. Investors should not be left in the dark as to whether executives are spending funds on political causes that may run counter to shareholders' interests.") [https://perma.cc/EP6N-9JLF].

42. *See infra* Part I.B.2.

43. *See* IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 15–17 (2015), https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf [https://perma.cc/QU43-RFM9].

44. Citizens United v. FEC, 558 U.S. 310, 370 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 128 (2003)).

45. Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 117–18 (2009); *see also What We Do*, SEC, https://www.sec.gov/about/whatwedo.shtml (last modified June 10, 2013) ("Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions. The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation's economy.") [https://perma.cc/ZDR2-T4N4].

46. *See* Editorial, *Keeping Shareholders in the Dark*, *supra* note 7.

47. *See generally* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013); Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593; Rebecca Ballhaus, *Former SEC Officials Want Disclosure of Corporate Political Donations*, WALL ST. J.: WASH. WIRE (May 28, 2015, 6:10 PM), http://blogs.wsj.com/washwire/2015/05/28/former-sec-officials-want-disclosure-of-corporate-political-donations/ [https://perma.cc/CLH8-UPF7]; *see also* Will Ardinger, *Firms Should Disclose Political Donations, CFA Says*, CQ ROLL CALL, Sept. 5, 2014, 2014 WL 4377996 (discussing national accounting organization calls for political disclosure rule); Peter Feltman, *SEC Faces Calls to Boost Political Spending Disclosure*, CQ ROLL CALL, Apr. 25, 2015, 2015 WL 1652881 (regarding interest group pressure); Alexandra Higgins, *Congressional Democrats Urge SEC to Adopt Political Disclosure Rules*, CQ ROLL CALL, Jan. 14, 2014, 2014 WL 128193 (regarding pressure from Congress for SEC disclosure rule); Sean McElwee & Liz Kennedy,

or state law.[48] To the contrary, current election law and securities regulations permit corporations to engage in undisclosed political spending in a variety of ways.[49] As Professors Lucian Bebchuk and Robert Jackson detailed in their seminal article "Shining Light on Corporate Political Spending," "public companies can, and do, engage in political spending that is never disclosed by channeling that spending through intermediaries."[50] Even when some corporate spending is disclosed at the federal level—for instance when the Federal Election Commission reports donors who make direct contributions to particular candidates—the corporation itself does not need to disclose direct political spending to shareholders.[51] Although academics,[52] investors,[53] market professionals,[54] regulators,[55] politicians,[56]

The SEC Should Shine a Light on Dark Political Donations from Corporations, WEEK (July 24, 2014), http://theweek.com/articles/445073/sec-should-shine-light-dark-political-donations-from-corporations [https://perma.cc/C34K-DGYH]; Pamela Park, *Former SEC Leaders Push for Political Disclosure Rulemaking*, WESTLAW CORP. GOVERNANCE DAILY BRIEFING, 2015 WL 3403248 (mentioning a petition signed by 1.2 million people urging the SEC to adopt a disclosure rule). *But see* Paul Atkins, *Materiality: A Bedrock Principle Protecting Legitimate Shareholder Interests Against Disguised Political Agendas*, 3 HARV. BUS. L. REV. 363 (2013); Matthew Lepore, *A Case for the Status Quo: Voluntary Disclosure*, 3 HARV. BUS. L. REV. 413 (2013); J.W. Verret, *The Securities Exchange Act Is a Material Girl, Living in a Material World: A Response to Bebchuk and Jackson's "Shining Light on Corporate Political Spending,"* 3 HARV. BUS. L. REV. 453 (2013); Eric Hammesfahr, *House Bill Protects Corporate Political Donations*, CQ ROLL CALL, June 10, 2015, 2015 WL 3606637; Sean Parnell, *Attacks on Political Donors Demonstrate Dangers of Excessive Disclosure*, CTR. FOR COMPETITIVE POL. (July 28, 2011), http://www.campaignfreedom.org/2011/07/28/attacks-on-political-donors-demonstrate-dangers-of-excessive-disclosure/ [https://perma.cc/9JVY-HHJG].

48. *See* Steven Zuckerman, *Disclosure of Corporate Political Spending: Problematic or Pragmatic?*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 89, 89 (2014).

49. Bebchuk & Jackson, *supra* note 47, at 930–38.

50. *Id.* at 930; *see also* Gilbert, *supra* note 41 ("Since the U.S. Supreme Court's 2010 *Citizens United v. Federal Election Commission* ruling, corporate political spending has exploded—and much of it has been channeled through dark money conduits like nonprofits and trade associations.").

51. Bebchuk & Jackson, *supra* note 47, at 935 ("Existing election-law rules, such as regulations promulgated by the Federal Election Commission (FEC), may require that information about this type of corporate political spending be available in the public domain. These rules, however, are designed to provide the public with information about the funding sources for particular politicians—not to allow investors to assess whether public companies are using shareholder money to advance political causes.").

52. *See* Amy Biegelsen, *Law Professors Ask SEC to Write New Political Donation Disclosure Rules for Business*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), https://www.publicintegrity.org/2011/08/05/5583/law-professors-ask-sec-write-new-political-donation-disclosure-rules-business [https://perma.cc/XV9P-YKC7].

53. *See* Tim Devaney, *Investors Urge Corporate Political Spending Disclosure*, HILL (May 20, 2015, 11:37 AM), http://thehill.com/regulation/business/242655-investors-push-sec-to-disclose-dark-money-in-politics [https://perma.cc/2H3U-6YKQ].

54. *See* Ardinger, *supra* note 47 (describing the national accounting organization's support).

55. Park, *supra* note 47 (regarding three former SEC leaders who urge adopting a political disclosure rule).

56. *See* Andrew Ackerman, *Senate Democrats Renew Push for Corporate Disclosure of Political Spending*, WALL ST. J.: WASH. WIRE (Jan. 21, 2016, 5:35 PM), http://blogs.wsj.com/washwire/2016/01/21/senate-democrats-renew-push-for-corporate-disclosure-of-political-spending/ [https://perma.cc/7MMF-NVST].

interest groups,[57] and regular citizens[58] have pressed the Securities and Exchange Commission (SEC) to adopt a mandatory disclosure rule for corporations, the SEC has resisted[59] and only recently asked for commentary on a potential new political disclosure rule.[60] To thwart any progress the SEC might achieve, however, Congress passed an appropriations bill in 2015 explicitly prohibiting the SEC from using funds to "finalize, issue, or implement" a corporate political disclosure rule during the upcoming year.[61] In the absence of greater transparency regarding corporate political activity, disdain from a variety of corporate and stakeholder constituencies continues to grow.

B. Political Antitakeover Defenses and Failures

Despite a host of regulatory and grassroots efforts to require disclosure of corporate political spending, corporations remain largely free to keep their political activities closeted from public view. Nonetheless, the ardor with which investors, consumers, and other corporate stakeholders clamor for greater transparency makes the popular support for a corporate political disclosure rule seem incredibly strong and the failure to implement that will particularly problematic.

---

57. *See* Ben Goad, *New Push for Disclosures on Corporate Giving*, HILL (Sept. 4, 2014, 7:02 AM), http://thehill.com/regulation/finance/216736-new-push-for-corporate-giving-disclosure [https://perma.cc/NX7V-WRAA].

58. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Hindering the SEC from Shining a Light on Political Spending*, N.Y. TIMES (Dec. 21, 2015), http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html (describing over 1.2 million comments received by the SEC regarding a proposed political disclosure rule) [https://perma.cc/3VSM-D82Y].

59. Zach Carter, *Congress Is About to Make* Citizens United *Even Worse*, HUFFINGTON POST (Dec. 16, 2015, 11:17 AM), http://www.huffingtonpost.com/entry/sec-disclosure-political-spending_us_56717f55e4b0648fe301a84c ("'[SEC Chairman] Mary Jo White has spent more than two years alternatively throwing shade at political disclosure rules and actively hindering their completion,' said Jeff Hauser, who runs the Revolving Door Project at the Center for Effective Government. 'Mary Jo White gave Congressional Republicans an opportunity to give corporate America a free pass to buy elections and public policy discreetly.'") [https://perma.cc/83T4-T8L9]; Sarah Schweppe, *How Are Big Businesses Buying U.S. Elections?*, CHEAT SHEET (Apr. 27, 2015), http://www.cheatsheet.com/politics/how-is-big-business-buying-u-s-elections.html ("At a recent congressional hearing, SEC Chair Mary Jo White responded to a legislator who asked why the SEC had not made disclosing this kind of political spending a law with her usual rhetoric that it's not the most important issue to the commission, according to the New York Times. According to Reuters, in the past, she has said she opposes writing rules to exert 'societal pressures on companies.'") [https://perma.cc/86KX-M4QY]; *see also* Matthew Garza, *SEC Rulemaking: Light at the End of the Mandated Tunnels*, *in* 2015 YEAR IN REVIEW: TRENDS AND DEVELOPMENTS IN SECURITIES LAW 1, 3–4 (Wolters Kluwer ed., 2016).

60. Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23,916 (Apr. 22, 2016).

61. Consolidated Appropriations Act of 2016, Pub. L. No. 114-13, § 707, 129 Stat. 2242, 2273–74. The bill includes a ban on the Internal Revenue Service (IRS) issuing disclosure rules affecting 501(c)(4) nonprofit groups. *See id.*

1. Shareholder Activism

Because a corporation's political activity remains a material consideration to many investors in making their purchasing decisions,[62] shareholders get particularly piqued when corporations keep their political activity closeted.[63] In light of the fundamental duty of loyalty that corporate managers owe to shareholders, disclosure of political contributions represents an essential mechanism to ensure board accountability.[64] Investors remain concerned that corporate assets are being used to advance the personal interests of corporate managers rather than the interests of shareholders.[65] Perhaps as a result, in the last proxy season, the most common shareholder proposals targeted corporate lobbying and political spending.[66] Especially in light of recent academic studies demonstrating that corporate political spending does not enhance shareholder wealth,[67] shareholders demand that managers account for how

62. *See Corporate Political Spending: Shareholder Activity*, CONF. BOARD (Oct. 30, 2014), https://www.conference-board.org/politicalspending/index.cfm?id=6256 ("Shareholders continue to seek increased transparency with respect to a company's political activities and the potential legal and reputational risks such activities may create. Additionally, shareholders want to ensure that decisions regarding corporate political activity have strong board oversight. Therefore, shareholder proposals calling for corporate political spending transparency allow the shareholder to monitor and hold executives accountable and ensure that a nexus exists between the political activity and the shareholders' interests.") [https://perma.cc/K2HN-XJUA].

63. *See* MARC GOLDSTEIN, INV'R RESPONSIBILITY RESEARCH INST., DEFINING ENGAGEMENT: AN UPDATE ON THE EVOLVING RELATIONSHIP BETWEEN SHAREHOLDERS, DIRECTORS AND EXECUTIVES (2014), https://irrcinstitute.org/wp-content/uploads/2015/09/engagement-between-corporations-and-investors-at-all-time-high1.pdf [https://perma.cc/TM3K-6FTM]; Robert Kelner et al., *Responding to Corporate Political Disclosure Initiatives: Guide for In-House Counsel*, 23 CORP. GOVERNANCE ADVISOR, Mar.–Apr. 2015, 2015 WL 5616354 ("A company that has received a political spending shareholder proposal also should consider initiating a dialogue with the shareholder regarding the proposal. This would demonstrate that the company is focused on enhancing shareholder value and maintaining an open dialogue with shareholders.").

64. Mara Lemos Stein & Maxwell Murphy, *Investors Push for Fuller Picture of Corporate Political Contributions*, WALL ST. J. (Apr. 4, 2016, 9:38 PM), http://www.wsj.com/articles/investors-push-for-fuller-picture-of-corporate-political-contributions-1459820285 ("Investors, however, are demanding a fuller picture of companies' political giving and lobbying efforts. . . . Investors aren't necessarily looking to end corporate involvement in politics, but some of them want to make sure it is aligned with a company's stated goals, and say disclosure will bolster accountability.") [https://perma.cc/R3BT-VR8H]; Skroupa, *supra* note 15; *see also* HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW, PROXY PREVIEW 2016: HELPING SHAREHOLDERS VOTE THEIR VALUES 35–42 (2016), www.proxypreview.org/Proxy-Preview-2016.pdf (describing the high number of shareholder proxy resolutions dedicated to disclosure of corporate political activity) [https://perma.cc/HU4K-UZ67].

65. *See* Kwak, *supra* note 6; *see also* Coates, *supra* note 41.

66. *See* GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2015 PROXY SEASON 1 (2015), http://www.gibsondunn.com/publications/documents/Shareholder-Proposal-Developments-During-the-2015-Proxy-Season.pdf (stating that the most common 2015 shareholder proposal topics, along with the approximate number of proposals submitted were political and lobbying activities (110 proposals), proxy access (108 proposals), and independent chair (76 proposals)) [https://perma.cc/SCK8-2YJN].

67. *See, e.g.*, Coates, *supra* note 5, at 658; Michael Hadani, Comment Letter on Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources

political spending promotes stated corporate values and business goals.[68] Moreover, when corporations engage in unwanted or indefensible political activity, shareholder hackles quickly get raised.[69] For instance, CVS was accused of proxy fraud by one of its largest institutional investors based on a purported gross incongruity between the company's publicly espoused values in its proxy statement and the company's political expenditures.[70] To take another example, a coalition of investors recently demanded the resignation of two board members of WellPoint, a health insurance company, for its funding of "Stand Your Ground" legislation.[71] As one prominent investor advocate commented, "Not only is this a reputational risk but a financial calamity—imagine paying for the health costs from gun injuries and deaths."[72] When corporate politics fail to align with investor preferences, investors properly fault the board, and corporate profitability hangs precariously in the balance.[73] Without adequate political disclosure of political activity, however, it remains impossible to hold corporate managers accountable for any transgressions of their fundamental fiduciary duties.

Clandestine corporate political spending not only undermines board accountability but also threatens the quickly burgeoning market in socially responsible investing (SRI).[74] Although the definition of SRI remains

for Political Activities 2–3 (Oct. 13, 2011), https://www.sec.gov/comments/4-637/4637-8.pdf [https://perma.cc/CF7M-9NHV].

68. *See* Mara Lemos Stein, *Corporate Political Spending Becomes Compliance Issue*, WALL ST. J.: RISK & COMPLIANCE J. (Mar. 3, 2016, 11:29 AM), http://blogs.wsj.com/riskandcompliance/2016/03/03/corporate-political-spending-becomes-compliance-issue/ ("'What we are asking for in disclosure is that a company be upfront and explain why such spending is important' for the company's strategy, said Timothy Smith, director of environmental social and governance shareowner engagement at Walden Asset Management, a part of Boston Trust & Investment Management Co., which has approximately $2.7 billion of assets under management.") [https://perma.cc/5EFC-MSJW]; *see also* Eduardo Porter, *Corporations Open Up About Political Spending*, N.Y. TIMES (June 9, 2015), http://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html (quoting the New York State Comptroller, stating that "[s]hareholders need transparency in order to determine whether corporate political spending benefits the company's long-term value") [https://perma.cc/TTD8-XA3D].

69. *See* Lemos Stein, *supra* note 68 ("'Companies need to think strategically about these issues,' said Zachary Parks, special counsel in Covington & Burling's Washington D.C. office. 'Companies that ignore disclosure initiatives have been the target of shareholder resolutions, bad press and lawsuits. But kitchen-sink disclosure isn't risk free.' In an email, Mr. Parks said that at times, disclosure also can lead to litigation or negative 'name-and-shame' publicity. Establishing disclosure processes can be expensive, so companies need to weigh their particular risks and 'see around the corner as to where this process is going.'").

70. Pamela Park, *Shareholder Calls CVS Political Spending Incongruent with Values*, WESTLAW CORP. GOVERNANCE DAILY BRIEFING, Apr. 3, 2015, 2015 WL 1487121.

71. Skroupa, *supra* note 15.

72. *Id.* (quoting AFL-CIO counsel Robert E. McGarrah).

73. Adam Skaggs, Brennan Center for Justice, Comment Letter on Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities (Dec. 21, 2011), https://www.sec.gov/comments/4-637/4637-20.pdf [https://perma.cc/TB4R-CFQL].

74. *See* Jennifer Woods, *Doing Well While Doing Good: Socially Responsible Investing*, CNBC (Sept. 24, 2015, 9:00 AM), http://www.cnbc.com/2015/09/24/doing-well-while-doing-good-socially-responsible-investing.html [https://perma.cc/3NHP-GHTC].

somewhat protean, the desire "to achieve long-term competitive financial returns together with positive societal impact"[75] reflects a typical strategy. Regardless of the definitional imprecision, investors increasingly make their stock purchasing decisions based in part on a variety of social, environmental, governance, and political criteria.[76] As of 2015, investment managers of assets valued at over $45 trillion have signed the United Nations Principles for Responsible Investment, an international compact whereby signatories pledge to screen investments based on various environmental, social, and governance issues.[77] In the United States alone, the amount of assets under management employing SRI strategies increased 76 percent from 2012 to 2014, representing over $6.5 trillion under professional management.[78] Although the SEC has traditionally held the view that mandatory disclosure of social data (including corporate political spending) remains outside the bailiwick of appropriate rulemaking, the agency recently acknowledged that investors pay increasing attention to social data in determining whether to buy or sell a company's stock.[79] One recent study from BlackRock, the largest investment manager, with over $4.6 trillion in assets under management, concluded an inextricable link exists between social responsibility and financial performance:

> ESG [(environmental, social, and governance)] factors cannot be divorced from financial analysis. We view a strong ESG record as a mark of operational and management excellence. Companies that score high on ESG measures tend to quickly adapt to changing environmental and social trends, use resources efficiently, have engaged (and, therefore,

75. USSIF FOUND., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 2014, at 12, http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf [https://perma.cc/7EAT-X9ZF].

76. Jeff Benjamin, *Socially Responsible Investing Is Coming of Age*, INVESTMENTNEWS (Mar. 6, 2016, 12:01 AM), http://www.investmentnews.com/article/20160306/FREE/160309960/socially-responsible-investing-is-coming-of-age [https://perma.cc/G8K7-NENU].

77. UNITED NATIONS GLOBAL COMPACT, IMPACT: TRANSFORMING BUSINESS, CHANGING THE WORLD 40 (2015), https://www.unglobalcompact.org/docs/publications/ImpactUNGlobalCompact2015.pdf ("The PRI is a global network of investors working together to put six principles for responsible investment into practice . . . . The PRI commits signatories to incorporate environmental, social and governance issues into investment decision-making and ownership practices. It has 1,325 signatories representing 45 trillion USD assets under management.") [https://perma.cc/MSP4-YKJ9].

78. USSIF FOUND., *supra* note 75, at 12.

79. *See* Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23,916 (Apr. 22, 2016) ("[T]he Commission has recognized that the task of identifying what information is material to an investment and voting decision is a continuing one in the field of securities regulation. The role of sustainability and public policy information in investors' voting and investment decisions may be evolving as some investors are increasingly engaging on certain ESG [(environmental, social, or governance)] matters. According to one study, investors are more likely to engage registrants on sustainability issues than on financial results or transactions and corporate strategy. One observer expressed the view that ESG is not only a public policy issue but also a financial issue, noting a positive correlation between a 'strong ESG record' and excellence in operations and management.").

> productive) employees, and face lower risks of regulatory fines or reputational damage.[80]

To the extent investors deem corporate political activity material to a decision to purchase or sell a company's stock, disclosure of political spending seems necessary to provide adequate information to the public.

The lack of transparency in corporate political activity presents a significant threat to the basic viability of the market for SRI.[81] In an efficient market, investors should reward companies that embrace desired socially responsible business practices by paying a premium in stock price or offering cheaper access to capital.[82] To the extent the premium exceeds the cost of compliance, both corporations and the SRI community gain.[83] Sustaining the market for SRI necessarily requires transparency in corporate practices and communications,[84] for it would be wholly irrational for investors to pay a premium for stock in purportedly socially responsible companies if corporations conceal their actual business practices or actively dissemble.[85] Thus, regardless of the incentives for invisibility corporations might perceive, permitting corporations to conceal political activities that investors deem material to their purchasing decisions threatens the viability of the $45 trillion market for corporate social responsibility[86] and ineluctably undermines the efficient operation of the capital markets.[87]

2. Consumer and Community Retaliation

In addition to shareholders, consumers and other stakeholders take seriously a corporation's political spending and activities. When Target faced a consumer boycott by nearly a quarter million consumers following the company's $150,000 contribution to MN Forward, a group supporting a gubernatorial candidate opposed to same-sex marriage,[88] Target quickly

---

80. BLACKROCK INV. INST., THE PRICE OF CLIMATE CHANGE 7 (2015), https://www.blackrock.com/corporate/en-us/literature/whitepaper/bii-pricing-climate-risk-us.pdf [https://perma.cc/KWD4-E3CY].

81. *See* Siebecker, *supra* note 15, at 185–89; *see also* Alex Edmans & David J. Vogel, *Does Socially Responsible Investing Make Financial Sense?*, WALL ST. J. (Feb. 28, 2016, 10:18 PM), http://www.wsj.com/articles/does-socially-responsible-investing-make-financial-sense-1456715888 ("For many investors, socially responsible investing is now a guiding principle. The number of mutual funds and exchange-traded funds catering to those investors has mushroomed in recent years, with industry heavyweights BlackRock Inc. and Goldman Sachs Group Inc. prominent among those launching funds last year.") [https://perma.cc/TXL6-C9NB].

82. *See* Michael R. Siebecker, *Bridging Troubled Waters: Linking Corporate Efficiency and Political Legitimacy Through a Discourse Theory of the Firm*, 75 OHIO ST. L.J. 103, 106 (2014).

83. *Id.*

84. *See* Siebecker, *supra* note 45, at 117–18.

85. *See generally* James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251 (2013) (arguing that investors should file shareholder derivative suits to challenge political spending allegedly harmful to the corporation).

86. *See* UNITED NATIONS GLOBAL COMPACT, *supra* note 77, at 40.

87. *See* Siebecker, *supra* note 45, at 117–18.

88. Bruce Watson, *Target Boycott Expands Amid Confusion About Protest Goals*, AOL (Aug. 6, 2010, 7:16 PM), https://www.aol.com/article/2010/08/06/target-boycott-expands-

apologized to placate disgruntled consumers.[89] Perhaps proving that no good deed goes unpunished, four years later when Target filed briefs supporting same-sex marriage in various court cases, the company faced a boycott from consumers on the opposite end of the political spectrum.[90] Of course, Target is not the only company to face threats to profitability due to unwanted corporate activity.[91] A 2010 Harris poll revealed that almost half of those surveyed would not purchase products or services from a business that contributed to a political candidate or cause they opposed.[92] More generally, a 2013 study of American consumers revealed that 42 percent had boycotted in the past year a company's products or services based on corporate misconduct and that 88 percent of consumers suggested they would boycott a company's products if they learned the company had engaged in irresponsible or deceptive behavior.[93]

Although directors and officers owe no fiduciary duties to nonshareholders, corporate managers cannot rationally fulfill their fiduciary duties without taking into account the effects business decisions might have on consumers and other corporate constituencies (e.g., employees, suppliers, and members of the community in which a corporation operates) whose reactions to instances of corporate political activity might threaten profitability.[94] Perhaps as a result, some corporations have embraced voluntary disclosure protocols for corporate political spending.[95] A 2015

amid-confusion-about-protest-goals/19584033/ [https://perma.cc/EGT7-VWXW]; *see* Sara Yin, *MoveOn.Org Calls for Target Boycott in New Ad (VIDEO)*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2010/08/17/boycott-target-commercial_n_684815.html [https://perma.cc/XQQ5-VCAE].

89. Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J. (Aug. 7, 2010, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703988304575413650676561696 [https://perma.cc/QW9V-ZQG3].

90. Charlie Butts, *Target Customers Can Prove the Cost of Attacking Marriage*, ONENEWSNOW (Aug. 8, 2014), http://www.onenewsnow.com/culture/2014/08/08/target-customers-can-prove-the-cost-of-attacking-marriage#.U-TZ3vldWbM [https://perma.cc/HBD3-FHV2]; *see also* Brian Tashman, *For Conservatives, Boycotts Are Noble Efforts When They Support Them, Otherwise It's 'Economic Terrorism,'* RIGHTWINGWATCH (Aug. 8, 2014, 11:00 AM), http://www.rightwingwatch.org/content/conservatives-boycotts-are-noble-efforts-when-they-support-them-otherwise-its-economic-terro#sthash.I9nJRruK.dpuf (describing various boycott movements following political positions taken by corporations) [https://perma.cc/877R-CNUX].

91. For another example involving shareholders, see Mallory E. Mendrala, *Citizens Divided by* Citizens United*: How the Recent Supreme Court Decisions Affects Small Business in Politics*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 253, 277–79 (2012).

92. *See* AS YOU SOW, 2014 SHAREHOLDER RESOLUTION: DOW CHEMICAL CORPORATE POLITICAL SPENDING (2014), http://www.asyousow.org/wp-content/uploads/2014/03/dow2014gmos.pdf [https://perma.cc/8RME-8N6X].

93. CONE COMMC'NS, 2013 CONE COMMUNICATIONS SOCIAL IMPACT STUDY: THE NEXT CAUSE EVOLUTION 18–19 (2013), https://static1.squarespace.com/static/56b4a7472b8dde3df5b7013f/t/5742663b60b5e9c9768217c6/1463969372013/100113_CauseEvolution_small.pdf [https://perma.cc/559T-CNHC].

94. *See* Siebecker, *supra* note 82, at 148–51 (2014); *see also* Siebecker, *supra* note 15, at 224.

95. Charles Nathan, *Communicating Voluntary Disclosure of Corporate Political Spending*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 28, 2014), https://corpgov.law.harvard.edu/2014/07/28/communicating-voluntary-disclosure-of-corporate-political-spending/ [https://perma.cc/395S-HCMV].

joint study by the Center for Political Accountability and the Wharton School of Business found that 126 companies in the S&P 500[96] have adopted some meaningful political activity disclosure and accountability policies,[97] including 9 companies that impose outright bans on engaging in any sort of political spending.[98] The driving force for that that transparency (and bans on corporate spending for a very few companies) is effective risk management, whether through diminished threat of litigation, consumer ire, or investor agitation.[99] Engaging consumers and other stakeholders through effective discourse prior to pursuing any particular political activity can work to prevent deleterious market effects from corporate managers who blithely advance unpopular political commitments.[100]

Even as more companies embrace the benefits of voluntary transparency, however, a mandatory disclosure rule remains necessary to eradicate the perverse incentives for corporations to pursue duplicitous branding. The basic concern lies in the ability of corporations to curry consumer favor for some purported values without actually embracing those commitments. The Volkswagen defeat device scandal provides a helpful example.[101] Although Volkswagen purported to market "clean diesel" automobiles that appealed to consumers concerned about the environment,[102] Volkswagen installed a carbon-detection cheating device in eleven million of its vehicles.[103] With those defeat devices in place, the company could conceal that its purportedly environmentally friendly vehicles emitted far more pollution than claimed.[104] When this cheating device was eventually discovered, Volkswagen suffered greatly for its dissembling,[105] with some

---

96. For a description of the S&P 500 Index, see *S&P 500*, S&P DOW JONES INDICES, http://us.spindices.com/indices/equity/sp-500 (last visited Apr. 14, 2017) [https://perma.cc/RAG7-JETY].

97. *See* 2015 CPA-ZICKLIN INDEX, *supra* note 37, at 23.

98. *Id.* at 18.

99. CONFERENCE BD., HANDBOOK ON CORPORATE POLITICAL ACTIVITY: EMERGING CORPORATE GOVERNANCE ISSUES 21–24 (2010), http://files.cfpa.gethifi.com/reports/cpa-reports/handbook-on-corporate-political-activity-emerging-governance-issues/Handbook_FINAL_Version.pdf [https://perma.cc/85R2-7LZQ]; Lemos Stein & Murphy, *supra* note 64 ("'Disclosure, board oversight and robust compliance are intertwined and an integral part of enterprise risk management of political spending,' said Bruce Freed, president and founder of the CPA, which advocates greater disclosure of such spending.").

100. For a detailed discussion of the advantages of robust dialogue among corporate managers, consumers, and other corporate stakeholders, see Siebecker, *supra* note 15, at 224–25.

101. Guilbert Gates et al., *How Volkswagen Has Grappled with Its Diesel Scandal*, N.Y. TIMES (Jan. 11, 2017), http://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html [https://perma.cc/PW6U-J73R].

102. Jeff S. Bartlett et al., *Guide to the Volkswagen Emissions Recall*, CONSUMER REP. (Jan. 6, 2017), http://www.consumerreports.org/cro/cars/guide-to-the-volkswagen-dieselgate-emissions-recall- ("Volkswagen lied to us. Its 11 million 'clean diesel' cars have been polluting the air at up to 40 times the federal standard for years.") [https://perma.cc/YTM8-J3EL].

103. *Id.*

104. *Id.*

105. Marta Tellado, *Will Volkswagen's Penalty Be High Enough?*, CNN (Sept. 24, 2015, 6:32 PM), http://www.cnn.com/2015/09/24/opinions/tellado-volkswagen-scandal/ ("Let's be clear—not every violation of consumers' rights is perfectly black and white, but this one

current estimates of total liability for the company exceeding $35 billion.[106] Some might argue that the punishment Volkswagen continues to endure reflects proper functioning of market forces. When the fraud was discovered, consumers, investors, regulators, and law enforcement officials responded with swift rebuke.[107] But that insight misses the basic point that it is the very ability to detect the fraud—even if only after elaborate study[108] in the case of the Volkswagen cheat device—that allows market forces to work at all.

In the context of corporate dark money, the inability to detect the source of the contributions makes it extraordinarily difficult, if not impossible, for the market to detect when corporations behave in a way wholly inconsistent with their purported values.[109] That inability to verify the cohesion between the projected brand image and actual corporate action provides companies with a perverse incentive to play both sides of the fence. For instance, when North Carolina passed House Bill 2, prohibiting transgender individuals from using a bathroom designated for the gender other than found on their birth certificate,[110] thirty-six corporate executives from S&P 500 companies spoke out against the measure as contrary their corporation's core values.[111] Yet according to the Center for Political Accountability, those same corporations contributed heavily to a powerful political committee that helped elect the very same legislature responsible for the transgender bathroom law.[112] Although that example marks an

---

clearly is. The emissions manipulation was intentional. The advertising was false. The scope of the fraud was profound.") [https://perma.cc/YJ54-GD8X].

106. Ross Kaplan, *"Told 'Ya So" on VW's Projected Liability from Emissions Scandal*, CITY LAKES REAL EST. BLOG (Jan. 5, 2016), http://rosskaplan.com/2016/01/told-ya-so-on-vws-projected-liability-from-emissions-scandal/ [https://perma.cc/CH49-YLJD]. *But see* Kalina Oroschakoff & Nicholas Hirst, *VW Is Winning, at Least in Europe*, POLITICO (July 27, 2016, 6:19 AM), http://www.politico.eu/article/vw-is-winning-at-least-in-europe-brussels-cars-emissions-tests-cheat/ (providing an even higher estimate and stating, "Some 8.4 million diesel cars in Europe are affected by the scandal, compared to fewer than half a million in the U.S., putting the total cost of a similar deal at well more than $250 billion, roughly twice the GDP of the city of Berlin") [https://perma.cc/9PJK-3B3Z].

107. Geoffrey Smith & Roger Parloff, *Hoaxwagen*, FORTUNE (Mar. 7, 2016, 6:30 AM), http://fortune.com/inside-volkswagen-emissions-scandal/ [https://perma.cc/ZAG5-7JL2].

108. Sonari Glinton, *How a Little Lab in West Virginia Caught Volkswagen's Big Cheat*, NPR (Sept. 24, 2015, 5:04 AM), http://www.npr.org/2015/09/24/443053672/how-a-little-lab-in-west-virginia-caught-volkswagens-big-cheat [https://perma.cc/EG5K-YK38].

109. *See* Nathan, *supra* note 95 ("A patchwork of laws and regulations currently exists that require public disclosure of only certain kinds of corporate political contributions. This system is not only unwieldy to access, but also fails to account for political contributions made to 501(c)(4) and 527 organizations and to third parties such as trade associations, for which no contribution limits exist and no company disclosure is legally required. The lack of mandatory disclosure of these types of contributions have led many critics to characterize the recipients as 'black money pools,' that operate in the shadows of the political process and keep investors and the public in the dark about how corporate funds are being used and which candidates and issues are being supported.").

110. H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016).

111. *See Political Spending and Unintended Consequences*, CTR. FOR POL. ACCOUNTABILITY, http://politicalaccountability.net/reports/political-spending-and-unintended-consequences (last visited Apr. 14, 2017) [https://perma.cc/W7QG-H9YQ].

112. *Id.*

instance of corporate hypocrisy that eventually came to light, not all corporate political contributions remain traceable or subject to public reporting.[113] As a result, corporations face an incentive to project political images that appeal to consumers while taking wholly contrary political actions, perhaps simply to advance the personal interest of corporate managers.[114] That incentive only exists, however, if corporate political spending remains secret. Shedding light on corporate political activity would prevent corporations from engaging in false political branding by allowing the market to punish hypocrisy wherever it arises.

3. Democratic Discontent

Clandestine corporate political spending flies in the face of popular will and signals a corruption of politics that is well underway. A September 2015 Bloomberg poll revealed that 80 percent of Republicans and 83 percent of Democrats believe *Citizens United* should be overturned.[115] Although the Supreme Court remains insulated from popular opinion, the poll reflects widespread discontent with the ability of corporations to dominate the political process. Along those lines, a 2015 Public Policy Polling survey of primary voters reported that 88 percent of Democrats as well as 88 percent of Republicans want the SEC to promulgate a rule requiring corporations to disclose their political spending.[116] Despite the concerted efforts of academics, advocacy groups, nonprofit organizations, and ordinary citizens,[117] the SEC has to date resisted issuing a disclosure rule targeting corporate political spending.[118] And even if the SEC were otherwise inclined, Congress included a provision in the Consolidated Appropriations Act prohibiting the SEC from promulgating any disclosure requirement on corporate political activities in 2016.[119] What seems so

113. *See* Nathan, *supra* note 95.

114. Liz Kennedy, *Top 5 Ways Citizens United Harms Democracy & Top 5 Ways We're Fighting to Take Democracy Back*, DEMOS (Jan. 15, 2015), http://www.demos.org/publication/top-5-ways-citizens-united-harms-democracy-top-5-ways-we%E2%80%99re-fighting-take-democracy-back ("When political spenders can hide behind meaningless—or worse, misleading—names, it robs voters of information they need to assess political messages. Corporate donors can prevent 'citizens and shareholders [from reacting] to the speech of corporate entities in a proper way' by cloaking their political spending through conduit organizations that disguise their true identity and agendas.") [https://perma.cc/YRX7-D6RB].

115. Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG: POLITICS (Sept. 28, 2015, 5:00 AM), http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot [https://perma.cc/3N9G-C8NS].

116. Lydia Wheeler, *Poll Shows Bipartisan Voter Support for Corporate Giving Rule*, HILL (Sept. 28, 2015, 10:27 AM), http://thehill.com/regulation/255128-poll-shows-bipartisan-voter-support-for-corporate-giving-rule [https://perma.cc/K8ZZ-75W7].

117. *See supra* notes 52–58 and accompanying text.

118. *See supra* note 59 and accompanying text.

119. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242, 2273–74. The bill also includes a ban on the IRS issuing disclosure rules affecting 501(c)(4) nonprofit groups. *See id.*; *see also* R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR

odd—if not overtly suspicious—is that despite widespread popular discontent with corporate involvement in the political process and enormous support for imposing on corporations a disclosure obligation regarding their political activities, elected officials seem dedicated to protecting corporate secrecy. Such gross incongruity between clearly expressed popular will and the actions of our elected representatives over the issue of corporate transparency suggests our political processes might already suffer corporate corruption at the core. At the very least, corporate influences seem to have muted millions of voices screaming to be heard.

As some of the most important decisions affecting our daily lives get made behind boardroom doors rather than in the public sphere, secret political spending exacerbates the problem of ignoring popular will by turning notions of robust democratic accountability into a delusional dream.[120] The largest 100 public companies in the world have a combined market capitalization in excess of $16 trillion,[121] with 53 of those companies located in the United States.[122] The economic power under the control of just those fifty-three domestic companies trumps the economic influence of many nation-states.[123] With that great economic might, giant corporations have supplanted traditional governmental institutions in providing some of the most important rulemaking, adjudicative, and security functions.[124] Moreover, with the advent of the corporate social responsibility movement and the need to develop new markets to expand productivity,[125] corporations have also become more deeply engaged in shaping public mores and social attitudes as well.[126] Because corporations take such a proactive role in molding our collective identities, "[c]orporate internal governance issues, once considered strictly economic and confined to internal corporate stakeholders, have been broadened to include social and political issues and the concerns of outside stakeholders beyond the

---

CONGRESS 14 (2016), https://www.fas.org/sgp/crs/misc/R41542.pdf [https://perma.cc/V356-3ZJQ].

120. For a full discussion of the growing influence of corporations in our economic, political, and social lives, see Siebecker, *supra* note 15, at 169–79.

121. PRICEWATERHOUSECOOPERS, GLOBAL TOP 100 COMPANIES BY MARKET CAPITALISATION 6 (2015), https://www.pwc.com/gx/en/audit-services/capital-market/publications/assets/document/pwc-global-top-100-march-update.pdf [https://perma.cc/Y3UZ-TGQA].

122. *Id.* at 7.

123. *See* Siebecker, *supra* note 15 at 171.

124. *See* Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 132 (2008) ("[T]he distinction between corporations and the state is blurring, not only internationally, but also domestically, as corporations act in ways that make them similar to nation-states. The nation-state is not dead, but it is evolving. A pivotal factor in this evolution is the power of the world's largest corporations. Like the vassal whose power overshadows the king's, these companies act similarly to traditional nation-states in some ways. They have tremendous economic power, establish security forces, engage in diplomatic, adjudicatory and 'legislative' activities, and influence monetary policy."); *see also* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1308–09 (2003).

125. Trevor Goddard, *Corporate Citizenship: Creating Social Capacity in Developing Countries*, 15 DEV. PRAC. 433, 433 (2005).

126. *Id.*

regulatory authority of the chartering state."[127] Quite simply, democratic legitimacy of our polity remains inextricably linked to the legitimacy of corporate governance mechanisms. Without adequate transparency, we cannot begin to hold corporations accountable in any of the economic, social, and political realms they increasingly dominate. Thus, especially in light of the enormous influence of corporations in all aspects of our daily lives, if corporations remain capable of operating in the shadows, the bedrock principle of democratic accountability becomes severely jeopardized.[128]

In addition to threatening important notions of democratic and political accountability, clandestine corporate spending undermines effective discourse. In *Doe v. Reed*,[129] a case in which the Supreme Court denied the claim of political petition signatories to remain anonymous, Justice Antonin Scalia noted:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously[,] . . . hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[130]

Although the Supreme Court has protected the right to anonymous political speech in certain circumstances, the justifications for anonymity typically center on the speaker's fear of repression, retribution, or harassment.[131] No such concerns would seem plausible for the increasingly powerful modern corporation. Although in *Citizens United* the Supreme Court rejected the notion that the extreme wealth of corporations necessarily corrupts the political process, transparency provided the essential justification for unfettered corporate spending.[132] Quite simply, we cannot trust the motivations of corporations engaging in political discourse without transparency. In an organizational structure governed by fiduciary duties, trust and transparency go hand in hand.[133] Moreover, without knowing the identity of the corporate speaker, we cannot engage in the meaningful dialectic discourse necessary to sustain the trust that arguably provides the sole motivation for corporations to engage in political speech on shareholders' behalf.

---

127. Larry Cata Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801, 1807 (2008).

128. *See* Ian Vandewalker, *Scalia on Democracy Without Disclosure*, BRENNAN CTR. FOR JUST. (Feb. 18, 2016), https://www.brennancenter.org/blog/scalia-democracy-without-disclosure [https://perma.cc/4P5B-KDFF].

129. 561 U.S. 186 (2010).

130. *Id.* at 228 (Scalia, J., concurring).

131. *See, e.g.*, *Anonymity*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/anonymity (last visited Apr. 14, 2017) [https://perma.cc/QQ6F-JJRZ].

132. Citizens United v. FEC, 558 U.S. 310, 370 (2010).

133. For an elaborate defense of the need for transparent discourse among corporate managers, shareholders, consumers, and other stakeholders, see Siebecker, *supra* note 45.

Thus, with the growing dominance of corporations in the political sphere, the lack of adequate transparency regarding corporate political activity necessary to satisfy investors and consumers, and inherent suspicions about the motives of corporate executives in using corporate treasuries to advance their personal political preferences, a robust political spending disclosure rule seems essential to ensure the integrity of the capital markets and the legitimacy of democratic processes. Congress, state governments, and federal agencies, however, have failed to articulate a coherent disclosure rule and corporations have not sufficiently embraced disclosure voluntarily. Nonetheless, existing disclosure principles embedded within insider trading law could offer a solution. Just as the basic fiduciary principles of trust that animate insider trading doctrine require corporate insiders either to disclose to the market material nonpublic information prior to trading or abstain from trading altogether, those same basic fiduciary principles could require corporate managers to disclose to the market material political spending or abstain from political activity altogether. At its root, the fiduciary duty of trust binding officers and directors to the company and its shareholders remains the same regardless of whether the context of its application is insider trading or some other area of corporate governance. The only question is whether the disclosure obligation that the Supreme Court recognized as an essential component of the fiduciary duty of trust in the context of insider trading would apply equally well to the context of political spending.

II. THE FIDUCIARY FRAMEWORK OF INSIDER TRADING

Understanding whether the disclosure obligation embedded in the Supreme Court's insider trading doctrine should similarly compel corporations to disclose their political spending requires a brief explication of the evolution of the basic fiduciary framework for insider trading prohibitions. Of course, this examination does not delve deeply into every facet of insider trading because the point is simply to ascertain how transferrable the basic disclosure obligation within the insider trading context might be to instances of corporate political spending.

A. Foundations of the Disclosure Obligation

Although insider trading prohibitions rest upon the statutory foundation of federal securities laws,[134] the Supreme Court specifies the content of insider trading doctrine based on basic common law fiduciary principles governing the actions of corporate managers.[135] The omnibus securities fraud prohibitions contained in section 10(b) of the Securities Exchange Act of 1934[136] and the corresponding SEC Rule 10b-5[137] nonetheless provide the jurisprudential springboard for the development of insider trading

134. *See* Kim, *supra* note 1, at 854–56.
135. *See* Nagy, *supra* note 2, at 1323–33.
136. 15 U.S.C. § 78j(b) (2012).
137. 17 C.F.R. § 240.10b-5 (2016).

principles. Those provisions, which grew out of the concern for maintaining the integrity of the capital markets after the stock market crash of 1929,[138] generally prohibit the use of fraudulent or deceptive practices in the context of buying or selling securities.[139]

What constitutes a fraudulent or deceptive practice does not appear in the statute or Rule 10b-5. Instead, courts look to common law principles of fraud and deceit to define actionable behavior.[140] Under those traditional common law principles, silence typically does not provide a cause of action for deceit.[141] But in the insider trading context, the Supreme Court has articulated a special disclosure obligation based on the existence of a fiduciary relationship, either between corporate insiders and company shareholders or between traders and the source of material nonpublic information.[142] For instance, the Supreme Court requires that to avoid liability for improper insider trading, a corporate insider who possesses material nonpublic information must disclose that information or abstain from trading altogether.[143] The special obligation contained in the "disclose or abstain" rule stems from the fundamental notion that corporate insiders cannot use property belonging to the corporation (i.e., information) to deceive or gain an advantage over those to whom a fiduciary duty of trust is owed.[144] It is precisely because silence would constitute a breach of a fiduciary duty of loyalty that the Supreme Court imposes upon insiders a special disclosure duty prior to trading.

The Supreme Court currently recognizes two primary theories of insider trading liability—the classical insider theory and the misappropriation theory. Under each theory, actionable insider trading occurs when an individual trades (or tips others to trade)[145] based on material nonpublic

---

138. *See* Susan B. Heyman, *Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 CARDOZO L. REV. 1099, 1111 (2015).

139. *See* Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 HASTINGS L.J. 881, 887–89 (2010).

140. *See* Nagy, *supra* note 2, at 1323.

141. *See* Steven McNamara, *Insider Trading and Evolutionary Psychology: Strong Reciprocity, Cheater Detection, and the Expanding Boundaries of the Law*, 22 VA. J. SOC. POL'Y & L. 241, 262 (2015).

142. DONALD C. LANGEVOORT, INSIDER TRADING REGULATION, ENFORCEMENT, AND PREVENTION § 1:8 (2016).

143. *Id.*

144. Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 562 (2011) ("The seller/buyer defrauds her counterparty in a trade by not disclosing that she has advantageous inside information—and that her decision to trade is based on that information—when the information is of a type that the counterparty would not expect her to exploit. The insider trading prohibition is often described as a 'disclose or abstain' rule because there is no deception, and thus no fraud, if the seller/buyer tells her counterparty about the particular inside information she uses to trade."); *see also* Chiarella v. United States, 445 U.S. 219, 230 (1980) (holding that those "who have an obligation to place the shareholder's welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information"); Goshen & Parchomovsky, *supra* note 3, at 733–34.

145. The Supreme Court recognizes that insider trading liability can occur when an individual tips another based on material nonpublic information in breach of a fiduciary duty. *See generally* Dirks v. SEC, 463 U.S. 646 (1983). Because instances of tipper or

information in violation of a fiduciary duty.[146] The essential jurisprudential predicate of a fiduciary breach, however, must exist in order for an individual to suffer liability for illicit insider trading under both the classical and misappropriation theories. A better understanding of how disclosure relates to those fiduciary duties provides a possible bridge for applying that same "disclose or abstain" rule in the context of corporate political spending.

B. Classical Insider Theory

First, the classical theory of insider trading targets a breach of an explicit fiduciary relationship between a corporate insider and the shareholders.[147] In the first case to explicate the theory, *Chiarella v. United States*,[148] the Supreme Court reversed an insider trading conviction of an employee of a financial printing firm who traded in the stock of future acquisition targets of the firm's clients.[149] In vacating the conviction, the Supreme Court tethered the general "disclose or abstain" obligation to the existence of a "fiduciary or other similar relation of trust or confidence" with the parties on the other side of the transaction.[150] Because Chiarella was not an officer, director, or employee of the acquisition target companies, he therefore had no fiduciary obligation to the target companies' shareholders. As a result, no duty to disclose arose regarding the material nonpublic information he possessed about the impending takeovers and no fraud occurred through his silence prior to trading.[151]

The classical theory thus embraces a fiduciary breach rationale for what triggers a duty to disclose. Although previously, lower courts and the SEC advanced an "access to equal information" principle as the guiding light for prohibiting insiders from taking advantage of special access to material information,[152] the Supreme Court formally rejected that rationale.[153] What continues to remain the paramount consideration in establishing illicit insider trading under the classical theory is whether a fiduciary breach occurred.[154] And for classical insiders, it is serving as a director, officer, or

---

tippee liability remain derivative of the classical or misappropriation theories, a full discussion of details of tipper liability remain unnecessary.

146. *See* Kim, *supra* note 1, at 855.

147. Classical insiders are defined as directors, officers, or employees of the corporation. *See* John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 18.

148. 445 U.S. 222 (1980).

149. *Id.* at 227.

150. *Id.* at 228 (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (AM. LAW INST. 1976)).

151. *Id.* at 230–31.

152. *See, e.g.*, SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) ("[T]he Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information.").

153. *Chiarella*, 445 U.S. at 233 ("[N]either the Congress nor the Commission ever has adopted a parity-of-information rule.").

154. *See* McNamara, *supra* note 141, at 260–65.

employee of the corporation in which the securities are traded[155] that provides the fiduciary obligation to refrain from using the corporation's information for personal gain.[156]

C. Misappropriation Theory

The second basic theory of insider trading—the misappropriation theory—similarly requires the existence of a fiduciary breach for illicit insider trading to occur.[157] In the misappropriation context, however, the fiduciary breach does not arise in the context of a relationship with the company in which the securities are traded.[158] Instead, the fiduciary duty arises out of a relationship of trust or confidence with the source of the information.[159] In *United States v. O'Hagan*,[160] the Supreme Court upheld an insider trading conviction of a law firm partner who used material nonpublic information about a client's intended acquisition of another company to trade in the target company's stock. Although O'Hagan had no duty to the target company, as a partner in the firm he had a fiduciary duty to the firm and its clients.[161] By failing to disclose to his firm and client that he intended to trade, he breached an essential fiduciary duty of trust and confidence to the source of the information.[162]

In contrast to the classical theory's focus on the fiduciary relationship between the corporate insider and company shareholders, the misappropriation theory examines the fiduciary requirements of the relationship between the trader and the source of information.[163] Therefore, under the misappropriation theory, gaining immunity from insider trading liability does not require disclosure of material secret information to the public prior to trading.[164] As the Court explained:

155. *See* LANGEVOORT, *supra* note 142, § 3:2.

156. The Supreme Court has also recognized this fiduciary obligation in the context of temporary insiders. *See* Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983) ("Under certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.").

157. For a full explication of the misappropriation theory, see LANGEVOORT, *supra* note 142, §§ 6:1–:15.

158. *See* J. Kelly Straader, *(Re)conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOK. L. REV. 1419, 1431 (2015).

159. *Id.* at 1431–32.

160. 521 U.S. 642 (1997).

161. *Id.* at 653 ("In this case, the indictment alleged that O'Hagan, in breach of a duty of trust and confidence he owed to his law firm, Dorsey & Whitney, and to its client, Grand Met, traded on the basis of nonpublic information regarding Grand Met's planned tender offer for Pillsbury common stock.").

162. *Id.* at 654.

163. Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. REV. 928, 938–39 (2014).

164. *O'Hagan*, 521 U.S. at 654.

> Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no § 10(b) violation—although the fiduciary-turned-trader may remain liable under state law for breach of a duty of loyalty.[165]

Thus, the nature of the fiduciary duty at stake defines the ambit of the disclosure necessary to avoid liability.

The misappropriation theory extends rather than supplants the classical insider theory for illicit trading. A classical insider who trades based on material nonpublic information clearly violates a fiduciary duty of trust to the shareholders of the corporation in which the securities are traded. But that insider also misappropriates the information based on a breach of the same fiduciary duty owed to shareholders.[166] The misappropriation theory captures individuals who have no relationship with the company in which securities are traded but who nonetheless breach a similar fiduciary duty of trust by using the information for personal gain.

Regardless of the theory of insider trading considered, the breach of fiduciary duty of trust remains an essential predicate for liability. The disclose or abstain rule applies in each context to prevent the breach, although the scope of the audience for the disclosure to immunize a trader from liability changes depending upon the fiduciary relationship considered. Nonetheless, disclosure remains the essential cleansing agent for otherwise deceitful trading activity.

D. The Malleable Materiality Threshold

Insider trading liability can only arise when individuals trade on the basis of material nonpublic information. According to the Supreme Court, information is material to the extent there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[167] For contingent events, a materiality determination also takes into account the probability that an event will occur against the magnitude of its potential effect.[168]

Despite any appearance of mathematical precision, the materiality threshold remains somewhat malleable if not entirely vague.[169] Many

---

165. *Id.* at 655.

166. *See* Chiarella v. United States, 445 U.S. 219, 228–30 (1980).

167. Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); *see also* LANGEVOORT, *supra* note 142, § 5:2.

168. *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (stating that materiality involves "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity").

169. *See* Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017, 1032–33; *see also* Stephen J. Crimmins, *Insider Trading: Where Is the Line?*, 2013 COLUM. BUS. L. REV. 330, 341–42.

academics[170] and market professionals have criticized the lack of clarity in the materiality standard for insider trading, whether for inhibiting disclosure,[171] providing perverse incentives to corporate managers to seek short-term gains,[172] increasing corporate costs,[173] or ignoring prevailing investor preferences.[174] Some suggest that the purposeful vagueness of the materiality standard enables insiders to escape liability for illicit insider trading.[175] Others suggest the ambiguity injects some prosecutorial bias and arbitrariness into enforcement.[176] Irrespective of the deleterious repercussions of a loose definition, the controlling conception of materiality necessary to trigger insider trading liability remains quite capacious.

Understanding the potential breadth of materiality in the insider trading context helps inform when a disclosure obligation might be triggered in the corporate political spending context. To the extent it seems jurisprudentially reasonable to incorporate the disclose or abstain rule from insider trading into the fiduciary duty of loyalty implicated in corporate political spending, the reach of that disclosure obligation becomes more apparent. If a reasonable investor might find political spending by the corporation relevant to a determination of whether to purchase or sell company stock, then disclosure of even small levels of political spending might require public airing.

III. PROHIBITING POLITICAL INSIDER TRADING

In light of the increasing dominance of corporations in the political realm, the ability of corporations to secretly influence elections with dark money spending, and an almost deafening clamor for greater transparency regarding corporate political activity, the application of the disclose or abstain rule from insider trading to corporate political spending seems intellectually justifiable and practically necessary. Making the case for that doctrinal transfer, however, requires a greater explication of the fiduciary duties implicated in corporate political spending, the materiality of political

---

170. *See, e.g.*, John C. Coffee, Jr., *Introduction: Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies*, 2013 COLUM. BUS. L. REV. 281, 285; Joan MacLeod Heminway, *Just Do It!: Specific Rulemaking on Materiality Guidance in Insider Trading*, 72 LA. L. REV. 999, 1007–10 (2012).

171. LAURA S. UNGER, SEC, SPECIAL STUDY: REGULATION FAIR DISCLOSURE REVISITED (2001), http://www.sec.gov/news/studies/regfdstudy.htm [https://perma.cc/HGM2-24C7].

172. Steven L. Schwarcz, *Temporal Perspectives: Resolving the Conflict Between Current and Future Investors*, 89 MINN. L. REV. 1044, 1052 n.29 (2005).

173. James J. Park, *Assessing the Materiality of Financial Misstatements*, 34 J. CORP. L. 513, 531 (2009).

174. Steven Davidoff Solomon, *In Corporate Disclosure, a Murky Definition of Material*, N.Y. TIMES: DEALBOOK (Apr. 5, 2011, 5:57 PM), https://dealbook.nytimes.com/2011/04/05/in-corporate-disclosure-a-murky-definition-of-material/?_r=0 [https://perma.cc/W5CD-ULUS].

175. Cindy A. Schipani & H. Nejat Seyhun, *Defining "Material, Nonpublic": What Should Constitute Illegal Insider Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 375 (2016) ("[O]ur evidence indicates that insiders are taking advantage of this vagueness in the law to exploit their material, nonpublic information.").

176. *See* Heminway, *supra* note 170, at 1010–11.

spending to investor preferences, and the feasibility of a mandatory disclosure rule for corporate spending under existing corporate governance standards and the First Amendment.

A. Suspicious Agendas, Secret Spending, and the Business Judgment Rule

Perhaps the main jurisprudential hurdle for justifying the adoption of a disclose or abstain rule for corporate political spending is establishing the similarity of the fiduciary obligations that apply in the context of insider trading with the fiduciary duties involved in corporate political spending. The essential question is whether the concerns in each doctrinal realm are sufficiently similar so that transferring common law duties from one context to the other does not seem odd. Indeed, there are many instances in the common law when gaps in one doctrinal area look to another for guidance.[177] In both the insider trading realm and in the context of corporate political spending, a potential breach of fiduciary duty of loyalty by directors and officers secretly using the company's assets for personal gain provides a common thread.[178] And in each case, disclosure of the potentially illicit activity remains a necessary step to ensure no breach of a fiduciary duty exists.

But why doesn't the business judgment rule simply control whether corporate managers comport with their fiduciary duties in making political contributions?[179] When corporate managers face challenges to the wisdom of using the corporate treasury to engage in political activity, the broad umbrella of protection that the business judgment rule affords represents a great place to seek refuge.[180] A common law doctrine recognized in every jurisdiction,[181] the business judgment rule essentially insulates the business

177. *See generally* William W. Bratton, Jr., *Corporate Debt Relationships: Legal Theory in a Time of Restructuring*, 1989 DUKE L.J. 92; Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 497 (2011) ("Current thinking about agency law relies on the principles of tort and contract law to provide a basis for the principal's liability for her agent's contracts and torts, but those principles are unable to explain the law fully."); Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010); *see also* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 445 (2003) (applying agency principles to determine the meaning of "employee" under the Americans with Disabilities Act of 1990).

178. *See* Dirks v. SEC, 463 U.S. 646, 653–54 (1983); *see also* United States v. O'Hagan, 521 U.S. 642, 654 (1997).

179. *See* Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. COLO. L. REV. 477, 484 (2015).

180. *See id.*; *see also* Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 257–58 (1981); David Rosenberg, *Goodwill and the Excesses of Corporate Political Spending*, 11 HASTINGS BUS. L.J. 29, 31–32 (2015). For an early example of the strategy, see *Gall v. Exxon Corp.*, 418 F. Supp. 508 (S.D.N.Y. 1976) (holding that the business judgment rule insulated directors from liability even if political contributions to political parties in foreign countries were illegal).

181. For a detailed description of the evolution and application of the modern business judgment rule since its inception in the early 1800s, see D. Gordon Smith, *The Modern Business Judgment Rule*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83 (Claire A. Hill & Steven Davidoff Solomon eds., 2016); *see also* Franklin A. Gevurtz, *The*

decisions of directors and officers from reproach by courts, and from liability to shareholders, as long as those decisions were made in the absence of fraud, illegality, conflict of interest, or gross negligence.[182] No doubt, corporate managers would assert that engaging in political activity—whether through direct lobbying, participation in trade associations, issue advertising, or political contributions to committees, parties and candidates—simply represents one mundane aspect of business as usual.[183] Helping shape legislation and viewpoints in ways that increase profitability should not be considered any different than crafting an effective marketing campaign.[184] As a result, the business judgment rule should insulate decisions about corporate political spending from attack, just as decisions in the ordinary course of business remain immune from reproach. From the viewpoint of corporate managers, judges with no business acumen and nettlesome shareholders with fetish political interests should simply step aside and let business experts determine how best to pursue the interests of the company.

Despite the obvious appeal to directors and officers of invoking the business judgment rule, application of the doctrine seems inapposite in the case of secret political spending. As already discussed, a strong business case for political contributions does not exist.[185] Therefore, even if corporate political spending were public, the wisdom of such expenditures would be difficult to establish. Of course, corporate managers need not prove that any business decision maximizes shareholder wealth or enhances profits in the short term to garner the protection of the business judgment rule.[186] Quite to the contrary, the very purpose of the business judgment rule is to afford adequate leeway to managers to take risks and direct corporate affairs without undue distraction.[187] But a crucial caveat for protection is the absence of conflicts of interest infecting the managers' decisions.[188] When conflicts of interest arise, no presumption exists that managerial decisions comport with their fiduciary duties to the corporation and its shareholders.

Business Judgment Rule: Meaningless Verbiage or Misguided Notion?, 67 S. CAL. L. REV. 287, 297–98 (1994); Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 526–31 (2013).

182. *See* Michael R. Siebecker, *The Duty of Care and Data Control Systems in the Wake of Sarbanes-Oxley*, 84 CHI.-KENT L. REV. 821, 825–26 (2010); *see also* Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 NW. U. L. REV. 1, 59–60 (1985); Edward B. Rock & Michael L. Wachter, *Islands for Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1667–69 (2001).

183. *See* Leahy, *supra* note 179, at 483 n.7.

184. *See* Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L REV. 269, 275–76 (2014).

185. *See supra* note 5 and accompanying text.

186. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 601–02 (2003).

187. *Id.* at 583–84.

188. *See* Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL'Y REV. 367, 390–91 (2008).

Clandestine political spending, however, unavoidably raises the specter of a duty of loyalty breach. Academics,[189] journalists,[190] politicians,[191] and market professionals[192] have sounded the alarm that secrecy makes it impossible to discern if corporate managers use company coffers to pursue personal interests (whether financial or moral) at the expense of shareholder wealth. With increasing pressure on companies from the private and public sectors for greater transparency,[193] and in light of the increasing number of companies voluntarily disclosing political spending policies and practices,[194] the very decision to keep corporate spending closeted creates a reasonable suspicion that there is something illicit to hide.

The potential retort that secrecy avoids potential investor and consumer backlash for unpopular political commitments rings hollow. Although discontent from those groups certainly imposes significant costs, academic and professional literature[195]—along with current market practices[196]—make clear that only through transparency about political activity can executives effectively manage the expected benefits against potential costs.[197] If secrecy does not make business sense and the market continues to embrace greater transparency, then the impetus for keeping corporate political spending secret becomes necessarily and especially suspect.[198] As a result of the inescapable questions regarding managerial motives in actively concealing corporate political activity, the conflict of interest exception to the business judgment rule should prevent officers and directors from escaping substantive review.[199]

The kind of fiduciary infidelity that triggers the exception to the business judgment rule mirrors the potential duty of loyalty breach animating the disclose or abstain rule in the insider trading context. Although some academic debate exists about the philosophical beginnings of a duty of loyalty breach in the insider trading context,[200] the Supreme Court embraces the basic agency law principle that agents cannot use the principal's property to earn secret profits.[201] Whether in the classical insider or misappropriation context, the fiduciary infidelity lies in using proprietary information without prior disclosure.[202] It might seem odd to think of the basic concern as focused on the *secrecy* of the profits rather

189. *See, e.g.*, Haan, *supra* note 184, at 275–76.
190. *See, e.g.*, Devaney, *supra* note 53.
191. *See, e.g.*, Ackerman, *supra* note 56.
192. *See, e.g.*, Ardinger, *supra* note 47.
193. *See supra* note 47 and accompanying text.
194. *See, e.g.*, Nathan, *supra* note 95.
195. *See generally* Coates, *supra* note 5.
196. *See generally* CONFERENCE BD., *supra* note 99.
197. *Id.*
198. *See* Leahy, *supra* note 179, at 484.
199. *See* Rosenberg, *supra* note 180, at 42–44.
200. *See generally* LANGEVOORT, *supra* note 142.
201. Dirks v. SEC, 463 U.S. 646, 654 (1983); *see also* Donna M. Nagy, *The "Possession vs. Use" Debate in the Context of Securities Trading by Traditional Insiders: Why Silence Can Never Be Golden*, 67 U. CIN. L. REV. 1129, 1169 (1999).
202. *See* United States v. O'Hagan, 521 U.S. 642, 654 (1997); *Dirks*, 463 U.S. at 654.

than on the profits themselves.[203] Under basic agency principles, the agent would also need to disgorge any unauthorized profits to the principal as an additional fiduciary obligation.[204] The secret use of property and profits derived from unauthorized use, however, mark two separate fiduciary breaches in the principal-agent relationship. The loyalty breach targeted in the insider trading context remains the use of property (i.e., information) obtained through a relationship of trust without disclosure to the fiduciary partner.[205] That is the precise fiduciary concern at stake in the context of corporate political spending, except that the property used is money rather than information. The disclose or abstain rule incentivizes fidelity—at least to that basic obligation of transparency. If a corporate manager used the corporate treasury to gain personal profits, agency law principles also require disgorgement to the principal.[206] But it is the potential for the initial fiduciary misstep that should cause the disclose or abstain rule to adhere in instances of corporate political spending, just as it does in the insider trading realm.

But why should secret political spending be treated any differently than managerial decisions to donate corporate funds to charities or to engage in socially responsible business practices?[207] With respect to charitable donations and corporate social responsibility (CSR), no statutory or common law rule requires disclosing a corporation's specific commitments. Instead, corporate executives remain free to direct corporate funds toward charitable ends or to embrace socially responsible behavior to promote the long-term interests of the corporation. Arguably, those activities represent ordinary tactics in an overall corporate strategy to bolster a firm's reputation and image.

Secret political spending, however, does not resemble charitable giving or socially responsible behavior. Despite the rhetoric of unity that many politicians embrace, the political process necessarily polarizes with identifiable winners and losers. For many people, politics is the quintessential dirty zero-sum game[208] with politicians and political causes competing for scarce resources and votes.[209] In contrast, charitable activity

---

203. *See* Danielle DeMasi Chattin, *The More You Gain, the More You Lose: Sentencing Insider Trading Under the U.S. Sentencing Guidelines*, 79 FORDHAM L. REV. 165, 177 (2010).

204. *See* Thomas A. Lambert, *Overvalued Equity and the Case for an Asymmetric Insider Trading Regime*, 41 WAKE FOREST L. REV. 1045, 1127 n.366 (2006).

205. *See* Nagy, *supra* note 201, at 1158–63.

206. *See* Lambert, *supra* note 204, at 1127.

207. *See* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1118 (2002).

208. *See* Leahy, *supra* note 179, at 533–36.

209. *See* Adam Nagourney, *Going Dirty*, N.Y. TIMES (June 25, 2016), http://www.nytimes.com/2016/06/26/opinion/sunday/going-dirty.html [https://perma.cc/JWY5-25MV]. *See generally* KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992).

represents a public good,[210] and as a society we provide incentives (in the form of tax deductions) for supporting charitable enterprises.[211]

Embracing CSR does not reflect charitable behavior, especially if a market for CSR exists where consumers and investors are willing pay a premium in stock or product price to companies that embrace social responsibility. But even conceived in those market terms, the advent and endurance of socially responsible business behavior results because all parties realize a win-win trade.[212] No such societal Pareto improvement exists in the world of clandestine corporate political spending where concerns of managerial duplicity and secret agendas threaten to undermine shareholder wealth.

Thus, affording unquestioning blanket protection under the business judgment rule to clandestine corporate political spending decisions would ignore the wholly reasonable suspicion that executives are using corporate assets without the knowledge of shareholders for personal gain. The disclose or abstain rule in the insider trading context targets the very same potential fiduciary breach. Applying that rule for transparency seems to be an essential first step before blithely accepting a presumption that directors and officers act in concert with their fiduciary duties.

B. The Materiality of Morality

Although the fiduciary obligations at stake seem quite similar in the insider trading and corporate political contexts, imposing a disclose or abstain rule to corporate political spending would seem warranted only if the spending were material to investors. Some scholars suggest that corporate political spending does not have a material effect on corporate profitability and thus should not be subject to disclosure.[213] Others similarly suggest that if a company engages in corporate political activity that has a material effect on business, existing securities rules and regulations already require disclosure in standard corporate filings.[214] For those antidisclosure proponents, forcing additional disclosure obligations on the corporation would only impose significant costs without any noticeable gains to shareholders.[215] What the antidisclosure approach misses, and what the shift to a consideration of corporate political spending under insider trading principles illuminates, is that materiality remains tethered to the purchasing preferences of shareholders.

---

210. *See* Bruce Chapman, *Between Markets and Politics: A Social Choice Theoretic Appreciation of the Charitable Sector*, 6 GEO. MASON L. REV. 821, 832–33 (1998).

211. Of course, no tax breaks exist for political spending.

212. *See* Siebecker, *supra* note 45, at 162–69; *see also* Siebecker, *supra* note 82, at 148–51.

213. *See* James R. Copland, *Against an SEC-Mandated Rule on Political Spending Disclosure: A Reply to Bebchuk and Jackson*, 3 HARV. BUS. L. REV. 381, 384 (2013).

214. Daniel M. Gallagher, *Disclosure Is Just a Means to a Political End*, WALL ST. J. (Apr. 4, 2016, 3:06 PM), http://www.wsj.com/articles/disclosure-is-just-a-means-to-a-political-end-1460660761?mg=id-wsj [https://perma.cc/H3N5-X5T5].

215. Copland, *supra* note 213, at 391–92.

Without doubt, a corporation's social and political viewpoints matter to investors. As detailed above, in the United States alone, more than $6.5 trillion is invested based on SRI strategies.[216] The basic viability of the almost $45 trillion worldwide market for CSR rests on the ability of investors and consumers to ascertain and reward companies that embrace socially responsible practices.[217] Large institutional investors, financial advisory firms, advocacy groups, nonprofit organizations, public policy centers, politicians, and even (reluctantly and only recently) the SEC acknowledge that investors seriously consider the environmental, social, and political commitments of a company prior to purchasing stock.[218]

The additional concerns of consumers and other stakeholders make the materiality calculation even more certain. To the extent consumers boycott company products or lose faith in a corporate brand due to unwanted corporate political activity, the profitability of the company is necessarily affected. That connection between consumer behavior and the corporate bottom line would rationally cause shareholders who have no CSR bent to find corporate positions on social and political issues material to a decision to buy or sell company stock.[219]

But how much political spending must occur to cross the materiality threshold? Quite simply, any political spending would seem to suffice. The intensity of investor preferences regarding socially responsible data, including political spending, is not easily quantifiable and may swamp other criteria in determining whether to invest. Consider how the Reform Pension Board (RPB), an institutional investor with $1.2 billion in assets focused on advancing Reform Jewish principles,[220] would react to a company in which it invested disclosing a $1,000 contribution to a senatorial candidate who was a proud member of the Ku Klux Klan. Would the RPB sell all of its shares? That is exactly the pledge of the Timothy Plan, an investment fund dedicated to "biblically responsible investing."[221] According to fund managers, "we spent countless hours investigating companies to determine if they were involved in any unbiblical practices. In 1994, we pioneered the first pro-life, pro-family screening standard. Our commitment, first to our Lord, is that we will not invest a single penny into any company that violates our screens."[222] Faith-based funds remain a significant portion of the SRI community and political commitments of corporations remain core to their concerns.[223] Of course, the existence of

216. USSIF FOUNDATION, *supra* note 75, at 12.

217. *See generally* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1197 (1999).

218. *See supra* notes 74–87 and accompanying text.

219. *See* Siebecker, *supra* note 82, at 140–51.

220. *See About the RPB*, REFORM PENSION BOARD, http://rpb.org/about-the-rpb/ (last visited Apr. 14, 2017) [https://perma.cc/CZF2-PGWN].

221. *See Timothy Plan: Investing with Biblical Principles*, TIMOTHY PLAN, http://timothyplan.com/download/Brochure.pdf (last visited Apr. 14, 2017) [https://perma.cc/23CS-QMTQ].

222. *See id.*

223. *See* David Kathman, *Getting Religion with Faith-Based Mutual Funds*, MORNINGSTAR ADVISOR (Nov. 5, 2012), http://www.morningstar.com/advisor/t/65920341/

intense faith-based investing preferences does not suggest that secular socially responsible funds respond any less emphatically to instances where corporations fail to live up to expectations.[224] The point remains that because many SRI investors possess intense preferences for socially responsible behaviors that are not easily quantifiable, even small corporate contributions to political causes remain not just material but often fully determinative of investor decisions. And since a company cannot control which investors constitute its pool of shareholders, the company's political commitments may have a great impact on the volatility of its shares.

Thus, despite the antidisclosure advocates' focus on the cost to the corporation of additional disclosure obligations, corporate political spending seems to fall squarely within the standards for materiality established by the Supreme Court.[225]

C. Fidelity in the Light of Disclosure

With the materiality of morality firmly established for the investing community, the next step involves an examination of the potential effectiveness of disclosure to prevent or expose a fiduciary breach in the context of corporate political spending. In the realm of exercising corporate fiduciary duties, trust and transparency remain inextricably linked.[226] In the case of insider trading, because the essential fiduciary breach results from the failure to disclose prior to using for personal gain information obtained in a relationship of confidence or trust, the disclose or abstain rule remains perfectly targeted at preventing a breach at the outset. In the same way, the secrecy of corporate political spending provides the focus of a fiduciary breach because of the inherent risk that corporate managers are using corporate treasuries to advance their particular beliefs to the detriment of shareholders. In both situations, a disclose or abstain rule remains the essential antiseptic for the fiduciary breach premised upon an agent's secret use of the principal's property (whether money or information) for personal gain.

The disclose or abstain rule does not target the personal gain for which the agent uses the property. As Justice Ginsburg noted in the majority opinion in *O'Hagan* regarding the breach of trust under the misappropriation theory,

---

getting-religion-with-faith-based-mutual-funds.htm [https://perma.cc/JUU9-8ZWX]; Liz Moyer, *As Funds Invoke Bible Values, Others See Intolerance*, N.Y. TIMES: DEALBOOK (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/business/dealbook/christian-investment-funds.html [https://perma.cc/W48F-KJTD].

224. *See* Thomas M. Anderson, *The 7 Top Funds for Ethical Investing*, KIPLINGER (June 30, 2010), http://www.kiplinger.com/article/investing/T041-C000-S002-the-7-top-funds-for-ethical-investing.html [https://perma.cc/BJH2-3KP5].

225. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (noting that a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (quoting TSC Indus. v. Northway, Inc. 426 U.S. 438, 449 (1976))).

226. *See generally* Siebecker, *supra* note 45.

> Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation—although the fiduciary-turned-trader may remain liable under state law for breach of a duty of loyalty.[227]

That secondary avenue for liability for using the principal's property for personal gain targets separate agency principles that require the disgorgement of any profits. The same is true in the classical insider trading context. The breach that triggers liability is the failure to disclose to company shareholders (including all potential future shareholders in the market) material nonpublic information obtained from a relationship of trust and confidence with the corporation prior to trading.[228] The fact that the insider earned profits based on trading is a secondary concern that attaches only to the amount of liability, whether under the umbrella of insider trading sanctions or under basic agency law theory requiring disgorgement.

In a similar fashion to the manner in which the disclose or abstain rule attempts to ensure individuals do not breach their essential duty of trust by trading in securities without prior disclosure of their intent to their fiduciary counterpart—whether to the source of the material nonpublic information under the misappropriation theory or to the (potential) shareholders of the company in which the securities are traded under the classical theory—a disclose or abstain rule for political corporate spending would prevent executives from being able to "feign fidelity" to the corporation and its shareholders. A rule that requires disclosure prior to using corporate information or assets provides a well-tailored mechanism to prevent corporate managers from breaching their fiduciary duties or at least exposes the breach to ensure appropriate liability.

Another important concern regarding the cleansing capabilities of common law disclosure, however, is whether recognizing a mandatory disclosure obligation in the case of corporate political spending would fit appropriately within existing common law corporate duties or conflict with federal securities laws. After all, there is no overarching federal corporate law.[229] The disclose or abstain rule articulated in the context of insider trading ultimately rests on the statutory foundation of the federal securities laws—a detailed regulatory regime focused on disclosure obligations that could possibly preempt any new state common law disclosure rule.

If federal securities laws preempt or trump more stringent common law disclosure obligations, the basic project of articulating a fiduciary duty of disclosure for corporate political speech becomes futile.[230] The federal

227. United States v. O'Hagan, 521 U.S. 642, 654 (1997).

228. Chiarella v. United States, 445 U.S. 222, 233 (1980).

229. *See* Bernard Black et al., *Legal Liability of Directors and Company Officials Part 1: Substantive Grounds for Liability (Report to the Russian Securities Agency)*, 2007 COLUM. BUS. L. REV. 614, 645.

230. *See* 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 57–60 (1989) (highlighting scholarly discussion of preemption spanning from the 1950s to the 1980s). *See*

securities laws purposefully aim to provide uniform and consistent standards of transparency for publicly traded companies.[231] To that end, the Securities Litigation Uniform Standards Act of 1998 ("the Uniform Standards Act") preempts many state law securities fraud provisions and requires bringing claims for securities fraud in federal court.[232] Nonetheless, even under the Uniform Standards Act, many state law claims remain valid, including derivative actions based on violations of shareholder voting and appraisal rights, as well as incomplete or deceitful communications by the company.[233] Pursuant to the widely accepted "internal affairs doctrine," issues of general corporate governance arising under state law are not preempted by federal securities laws.[234] As a result, despite the basic intent of the federal securities laws to provide a uniform disclosure regime, they do not foreclose the recognition of additional disclosure duties based on state common law principles.[235]

Delaware, the state of incorporation for more than half of all domestic public companies,[236] provides the leading example of a substantial fiduciary-based disclosure obligation that goes further than federal securities mandates.[237] For some time, Delaware common law duties of loyalty and good faith have required full and accurate communication with company stockholders on matters requiring shareholder action.[238] A much broader disclosure duty that applies to general communication with shareholders, however, was announced by the Delaware Supreme Court in *Malone v. Brincat*.[239] That common law disclosure duty applies even when the subject matter of the communication implicates areas that the federal securities laws regulate.[240]

In *Malone*, shareholders complained that company directors breached their Delaware common law duty of disclosure by filing false financial reports with the SEC and regularly conveying to stockholders inaccurate

---

generally Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998).

231. *See* Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1190 n.139 (2006).

232. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

233. 15 U.S.C. § 77p(d)(1)(B)(ii)(II) (2012).

234. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 479 (1977) (refusing to federalize all corporate law regarding transactions in securities); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 597 (2003) (describing the internal affairs doctrine that informally limits the scope of federal authority from extending to state governance issues).

235. *See* Siebecker, *supra* note 45, at 142.

236. *About the Agency*, DEL. DEP'T ST., https://corp.delaware.gov/aboutagency.shtml (last visited Apr. 14, 2017) [https://perma.cc/76RU-JMJ8].

237. Dana M. Muir & Cindy A. Schipani, *The Use of Efficient Market Hypothesis: Beyond SOX*, 105 MICH. L. REV. 1941, 1957–58 (2007).

238. *See, e.g.*, Stroud v. Grace, 606 A.2d 75 (Del. 1992); *see also* Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1174 n.394 (1996).

239. 722 A.2d 5 (Del. 1998).

240. *Id.*; *see also* Siebecker, *supra* note 45, at 143.

information about the company's finances.[241] Despite upholding the lower court's dismissal of the complaint, the Delaware Supreme Court stated that "Delaware law also protects shareholders who receive false communications from directors even in the absence of a request for shareholder action. When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, . . . there is a violation of fiduciary duty."[242] Citing the Senate committee report on the Uniform Securities Act that explicitly recognized the import of state law disclosure duties,[243] the Delaware Supreme Court couched its recognition of a fiduciary-based disclosure obligation as "complementary" to the mandatory disclosure obligations under the federal securities law regime.[244] The very persistence of such a strong state common law disclosure duty in Delaware reveals that substantial jurisprudential room exists for embracing fiduciary disclosure duties without offending federal mandates.

To be sure, a vigorous debate exists regarding the effectiveness of flexible common law principles in efficiently regulating corporate behavior.[245] Some scholars suggest that the inherent ability of organic common law standards to adapt to changing social circumstances more quickly than legislative mandates[246] necessarily leads to inconsistency and indeterminacy.[247] But in the case of a common law disclose or abstain rule for corporate political spending, no such indeterminacy should exist in light

241. *Brincat*, 722 A.2d at 8.

242. *Id.* at 14; *see also* Jackson Nat'l Life Ins. v. Kennedy, 741 A.2d 377, 390 (Del. Ch. 1999) ("It necessarily follows from *Malone* that when directors communicate with stockholders, they must recognize their duty of loyalty . . . with honesty and fairness, regardless of the stockholders' status as preferred or common, and regardless of the absence of a request for action required pursuant to a statute, the corporation's certificate of incorporation or any bylaw provision.").

243. *See Malone*, 722 A.2d at 13 n.42 ("The Committee is keenly aware of the importance of state corporate law, specifically those states that have laws that establish a fiduciary duty of disclosure." (quoting S. Rep. No. 105-182, at 11–12 (1998))).

244. *Id.* at 13.

245. *See, e.g.*, Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1 (2005); Mark Klock, *Lighthouse or Hidden Reef?: Navigating the Fiduciary Duty of Delaware Corporations' Directors in the Wake of* Malone, 6 STAN. J.L. BUS. & FIN. 1 (2000); Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475 (2002).

246. For a general discussion of the advantages of common law standards over statutory initiatives in responding to changing practices, see Michael R. Siebecker, *Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers?*, 76 S. CAL. L. REV. 893 (2003).

247. For concerns regarding deference to common law standards in corporate law, see Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 601–02 (2002); Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998); David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127 (1997).

of the ostensible materiality to politically concerned shareholders of even small amounts of political spending.[248] As a result, the rule would naturally enjoy a consistent and clear application across jurisdictions.

IV. Political Insider Trading and the First Amendment

Do corporations have a constitutional right under the First Amendment to engage in anonymous political spending? No matter how important transparency remains to the ability of corporate managers to fulfill their fiduciary obligations, the Constitution could trump and trample the rules governing the most basic organizational relationships within the modern corporation. Understanding whether a common law political spending disclosure rule might pass constitutional muster requires a brief explication of the various standards of scrutiny applied to corporate speech and the current First Amendment battleground over politically tinged corporate disclosures, as well as an assessment of the potential harm to corporate interests through disclosure.

A. Wobbly Rungs of Corporate Speech Protection

Adopting an analytical framework resembling the tripartite standards of review under the Equal Protection Clause of the Fourteenth Amendment,[249] the Supreme Court applies three distinct levels of judicial scrutiny to corporate speech. If corporate speech relates simply to a commercial transaction, the Court applies one of the two lower levels of scrutiny.[250] In contrast, regulations touching corporate political speech receive strict scrutiny. What makes the three rungs of constitutional review so wobbly is the Supreme Court's failure to articulate what constitutes commercial speech, political speech, or the boundaries between them.[251] As corporations increasingly engage in an artful alchemy of mixing just enough political content with otherwise commercial messages in order to evade regulation or liability, predicting which level of scrutiny the Supreme Court might apply poses quite a difficult task.[252]

The lowest rung of constitutional review applies when the government requires uncontroversial, purely factual commercial disclosures that promote public access to complete and accurate information.[253] In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of*

---

248. *See supra* Part II.D.

249. For a general description of the levels of protection afforded under the Equal Protection Clause, see Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011).

250. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

251. *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 616–21 (2006).

252. *See id.*

253. *See* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 218–19 (2011).

Ohio,[254] the Supreme Court considered the constitutionality of a governmental requirement that attorney advertisements disclose their fees for legal representation. After determining that the information subject to disclosure was purely factual, the Court upheld the regulation as "reasonably related to the State's interest in preventing deception of consumers."[255] Although the Constitution often abhors government-compelled speech,[256] disclosure obligations targeting purely commercial facts do not receive significant judicial scrutiny.

On the second rung of commercial speech review, the Supreme Court employs an intermediate scrutiny test when government prohibits, rather than compels, commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Services Commission*,[257] the Court struck down a regulation banning all advertising by a utility company after articulating a multipart test to assess whether commercial speech deserves protection.[258] According to the Court, governmental restriction of commercial speech that otherwise relates to a lawful activity and is not misleading will be upheld only if the regulation directly advances a substantial governmental interest and is no more extensive than necessary.[259] Although the Court asserted that commercial speech deserved less protection under the First Amendment than other forms of protected expression,[260] the intermediate level of scrutiny announced in *Central Hudson* has produced inconsistent results.[261] In some cases, substantial regulation of commercial speech is permitted, while in other contexts, courts afford broad protection to commercial speech even in the face of significant state interests.[262]

At the top of the jurisprudential ladder, the Supreme Court applies strict scrutiny to instances of compelled corporate political speech. Although Supreme Court jurisprudence regarding corporate political speech remains a bit murky, *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[263] and *Citizens United* establish in tandem that the First Amendment affords the greatest protection to political commercial speech. In *Pacific Gas*, the Supreme Court struck down a California law that required a utility company to include in its billing statements newsletters from third parties opposed to the company's viewpoints.[264] Casting aside the state's assertion that companies could be compelled to disseminate unwanted political content, the plurality opinion noted that "[t]he identity of

254. 471 U.S. 626 (1985).
255. *Id.* at 651.
256. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–79 (2007).
257. 447 U.S. 557 (1980).
258. *Id.* at 566–71.
259. *Id.* at 566.
260. *Id.* at 563; *see also* Siebecker, *supra* note 251, at 631–35 (discussing how *Central Hudson* broadened the definition of commercial speech from what *Virginia State Board* had previously established).
261. *See* Siebecker, *supra* note 251, at 631–35.
262. *Id.*
263. 475 U.S. 1 (1986).
264. *Id.* at 5–7.

the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[265] The Court found that the regulation granting third parties the right to include in the utility company's mailings unwanted political messages was not a "narrowly tailored means of serving a compelling state interest."[266] Thus, despite the otherwise clear commercial purpose of the mailings, the required inclusion of an unwanted policy statement created an amalgam of commercial and political content deserving strict scrutiny.[267]

In contrast to the compelled political speech examined in *Pacific Gas*, *Citizens United* addressed the First Amendment right of corporations to engage in voluntary political speech.[268] *Citizens United* involved a challenge to section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which banned corporate expenditures for speech that expressly advocated the election or defeat of a candidate for office within thirty days of a primary or sixty days of a general election.[269] Citizens United sought a declaratory judgment against the BCRA provisions because it intended to distribute a documentary film criticizing then-presidential candidate Hillary Clinton within the restricted time period of section 203. In determining that BCRA section 203 violated the First Amendment, the Supreme Court stated: "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[270] Emphasizing that strict scrutiny would apply to any regulation that encumbers political speech, whether by a person or a corporation,[271] the Court also overruled prior precedent in *Austin v. Michigan Chamber of Commerce*,[272] in which the Court previously embraced a concern about the deleterious effects of corporate influence over the electoral process.[273] Taken together, *Pacific Gas* and *Citizens United* suggest that strict scrutiny will apply to government regulations that prohibit or compel corporate political speech.

Most certainly, this very brief explication does not intend to provide a full or nuanced analysis of prevailing corporate speech jurisprudence. Instead, the description of the somewhat vague First Amendment standards

---

265. *Id.* at 8 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)).

266. *Id.* at 19.

267. *See* Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 874–75 n.168 (2011) (positing that *Pacific Gas* requires applying strict scrutiny in cases of compelled disclosure that involve an amalgam of "commercial and fully protected expression").

268. *See generally* Siebecker, *supra* note 15 (discussing the speech doctrine embedded in *Citizens United*).

269. *See* Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 441b (2012).

270. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

271. *Id.* at 342–45.

272. 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. at 310.

273. *Id.* at 660.

surrounding corporate political speech simply describes the basic lay of the land on the existing battleground regarding corporate political disclosures.[274]

B. The Political Disclosure Battleground

A pitched battle over corporate political disclosures has already begun, as corporations and business groups assert that the securities laws force disclosure of corporate political speech without a compelling governmental interest. After all, the securities laws require much more than disclosure of raw financial data.[275] In addition to purely factual commercial information, the securities laws compel a corporation to disclose qualitative information regarding the company's code of ethics,[276] business operations,[277] competitive risks,[278] legal proceedings,[279] internal controls over financial data,[280] executive compensation policies,[281] and management's discussion and analysis of the company's financial conditions and operations.[282] As thoroughly detailed in academic literature, many of those mandatory disclosures touch upon inherently political matters and thus provide a powerful platform for asserting First Amendment claims.[283] Describing a few recent significant cases reveals that until the Supreme Court articulates more clearly the definitions of commercial speech and political speech, and the boundaries between them, corporations will continue to attack the mandatory disclosures essential to maintain the integrity of the capital markets under the flag of the First Amendment.

First, in *Business Roundtable v. SEC*,[284] the Business Roundtable and other business groups attacked the validity of new SEC Rule 14a-11 that gave certain large shareholders the right to nominate directors on the corporation's proxy statement.[285] Prior to promulgation of Rule 14a-11, management unilaterally controlled who could stand for election for the board of directors.[286] Affording even some shareholders additional

274. For a fuller description of the cases involved in the current battle over corporate political disclosure, see Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 J.L. & POL. 535, 538–49 (2014).

275. 17 C.F.R. § 229 (2016).

276. *Id.* § 220.406.

277. *Id.* § 229.101.

278. *Id.* § 229.305.

279. *Id.* § 229.103.

280. *Id.* § 229.308.

281. *Id.* §§ 229.403–.405.

282. *Id.* § 229.303.

283. *See generally* TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012) (discussing a variety of corporate strategies to evade regulation using the First Amendment); Siebecker, *supra* note 251.

284. 647 F.3d 1144 (D.C. Cir. 2011).

285. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782–87 (Sept. 16, 2010).

286. *See* Roger Lowenstein, *A Seat at the Table*, N.Y. TIMES MAG. (June 2, 2009), http://www.nytimes.com/2009/06/07/magazine/07wwln-lede-t.html ("Only the management (or its handpicked board) chooses nominees, and it is an iron rule of American corporations that ballots should not contain more nominees than seats. In the former U.S.S.R., this style

electoral rights within the internal political workings of the corporation marked a significant step toward promoting corporate democracy and accountability.[287]

With respect to the standard of review, a jurisprudential brawl ensued. Arguing that the rule compelled content-based speech in conflict with management's commercial and noncommercial interests,[288] the Business Roundtable urged the D.C. Circuit to apply strict scrutiny under *Pacific Gas*. Under that standard, the Business Roundtable asserted that the new director-nomination Rule violated the First Amendment[289] because it was not narrowly tailored to promote a compelling state interest and because it directly conflicted with prior Supreme Court precedent invalidating compelled political speech.[290] In an amicus brief, a group of law professors argued that the intermediate scrutiny test in *Central Hudson* should apply.[291] Contending that strong policy concerns related to maintaining the integrity of the capital markets required much of the securities regulation regime to inhabit an island of immunity from First Amendment review,[292] the law professors argued that the new rule should pass constitutional muster.[293]

Considering the increasing importance of a corporation's moral, ethical, and political commitments to shareholders, the election of directors who ultimately shape those commitments certainly seemed to touch a political chord.[294] Avoiding any need to tread into the jurisprudential thicket of corporate political speech rights, however, the D.C. Circuit invalidated Rule 14a-11 based on the SEC's failure to conduct a sufficient cost-benefit analysis prior to promulgating the rule.[295] Although the SEC decided not to appeal,[296] *Business Roundtable* provides a clear indicator that business interests remain focused on using the First Amendment to rend apart any regulations that encumber corporate political speech rights.

---

of democracy endured for only 72 years. In American business it is timeless.") [https://perma.cc/LM33-TLCA].

287. *See* Siebecker, *supra* note 15, at 220–25.

288. *See* Opening Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America at 56–57, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305), 2011 WL 2014800, at *56–57.

289. *Id.* at 58–59.

290. *Id.* at 57–58.

291. Law Professors' Brief as Amici Curiae in Support of the Securities and Exchange Commission, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 496548 [hereinafter Law Professors' Brief].

292. *Id.* at 8 n.7 ("Considering the extraordinary importance of the securities regulations regime to American society and the inextricability of the link between speech regulations and the basic functioning of that institution, a strong institutional argument supports carving out from the First Amendment's reach the system of mandatory disclosure and reporting embedded in the U.S. securities laws." (quoting Siebecker, *supra* note 251, at 672)).

293. *Id.* at 8–9.

294. *See* Siebecker, *supra* note 15, at 163–69, 208–25.

295. *Bus. Roundtable*, 647 F.3d at 1155–56.

296. Press Release, SEC, Statement by SEC Chairman Mary L. Shapiro on Proxy Access Litigation (Sept. 6, 2011), https://www.sec.gov/news/press/2011/2011-179.htm [https://perma.cc/6XHS-KLE4].

Second, in *American Petroleum Institute v. SEC*,[297] the American Petroleum Institute (API) and other business associations challenged on First Amendment grounds new SEC Rule 13q that required reporting companies to disclose payments made to governmental entities in connection with the commercial development of oil, natural gas, or minerals.[298] API urged the D.C. District Court to apply strict scrutiny under *Pacific Gas*[299] because the rule was designed to promote the purely political goal of "empower[ing] citizens of . . . resource-rich countries to hold their governments accountable for the wealth generated by those resources."[300] Using that standard, API argued that the court must strike down Rule 13q because enlightening the world regarding the potential corruption of foreign governments did not advance a compelling interest of the United States and, in any event, less burdensome means to achieve that political goal were available.[301]

Once again avoiding the need to reach the roiling corporate speech claims, the Court struck down Rule 13q on the same failure to conduct an appropriate cost-benefit analysis.[302] The SEC decided not to appeal the decision.[303] Nonetheless, the case represents another clear example of corporations attempting to use the First Amendment to evade unwanted disclosures.

Finally, in *National Ass'n of Manufacturers v. SEC*,[304] the D.C. Circuit announced that compelled disclosure under the securities laws of inherently ideological corporate commitments violates the First Amendment.[305] In that case, the National Association of Manufactures (NAM), along with other business groups, challenged on corporate free speech grounds new SEC Rule 13p,[306] which required companies to disclose if its products were not "DRC conflict free" (defined as "products that do not contain minerals that directly or indirectly finance or benefit armed groups" in the Democratic Republic of the Congo or an adjoining country).[307] Although the lower court determined that the regulation passed constitutional muster under *Central Hudson* because Rule 13p directly promoted Congress's

297. 953 F. Supp. 2d 5 (D.D.C. 2013).

298. *Id.* at 8–11; *see also* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012).

299. *Am. Petroleum Inst.*, 953 F. Supp. 2d at 11.

300. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 31, *Am. Petroleum Inst.*, 953 F. Supp. 2d 5 (No. 12-CV-01668) (quoting Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,366). Although API did not argue expressly that the stated purpose behind Rule 13q was "political," the only reason stated—empowering citizens of foreign countries to hold their governments accountable—is inherently political in nature. *See id.*

301. *Id.* at 33–37.

302. *Am. Petroleum Inst.*, 953 F. Supp. 2d at 22.

303. Sarah N. Lynch, *SEC Won't Appeal Ruling vs Disclosing Payments Abroad*, REUTERS (Sept. 3, 2013, 6:40 PM), http://www.reuters.com/article/2013/09/03/us-sec-resource-extraction-idUSBRE9820Z820130903 [https://perma.cc/Q8S8-Y6H6].

304. 748 F.3d 359 (D.C. Cir. 2014).

305. *Id.* at 373.

306. *See id.* at 365.

307. *See* Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012).

substantial governmental interest in promoting peace and security around the Congo,[308] the circuit court disagreed.[309] With respect to the standard of review, the court rejected the SEC's claim that the conflict mineral rule deserved the lowest level scrutiny under *Zauderer*, considering the mandated disclosure was simply factual and related to the state's interest in preventing deception of consumers.[310] Instead, the court stated that it was "far from clear that the description at issue—whether a product is 'conflict free'—is factual and non-ideological"[311] and that "[t]he label 'conflict free' is a metaphor that conveys moral responsibility for the Congo war."[312] The court avoided a determination of whether such an ideological disclosure regulation deserved strict scrutiny by determining that the regulation failed even the intermediate scrutiny test articulated under *Central Hudson*.[313] Specifically, the court determined that the SEC did not present sufficient evidence that less restrictive means than the "conflict free" description would fail to accomplish the SEC's goals underlying the regulation.[314] The SEC recently chose not to appeal the decision to the Supreme Court.[315] As a result, it remains unclear exactly what level of scrutiny might apply to the host of securities laws that compel disclosure of politically tinged corporate information.

C. Anonymous Corporate Political Activity

So what would be the likely fate of a common law disclosure rule targeting corporate political spending? Despite the ruling in *National Ass'n of Manufacturers*, strong arguments support the notion that a disclosure rule simply requiring corporations to report the identity and amount of political expenditures should easily pass First Amendment scrutiny.

Even if *Central Hudson* remains the appropriate standard of review, a common law corporate political spending disclosure rule would very likely satisfy each prong of the test. To pass constitutional muster the under *Central Hudson*, the "government must show (1) substantial government interest that is; (2) directly and materially advanced by [the] restriction; and (3) that [the] restriction is narrowly tailored."[316] Preventing executives from using corporate coffers to advance personal ends in breach of

308. Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43, 46–47 (D.D.C. 2013), *aff'd in part, rev'd in part*, 748 F.3d 359.

309. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 373.

310. *Id.* at 370–72.

311. *Id.* at 371.

312. *Id.*

313. *Id.* at 372.

314. *Id.* ("[I]ssuers could use their own language to describe their products, or the government could compile its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit to the Commission.").

315. *See* Dynda A. Thomas, *SEC Conflict Minerals Rule Legal Challenge Is Over—But Not for Good*, CONFLICT MINERALS L. (Apr. 12, 2016), http://www.conflictmineralslaw.com/2016/04/12/sec-conflict-minerals-rule-legal-challenge-is-over-but-not-for-good/ [https://perma.cc/9MGM-E9AJ].

316. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372 (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980)).

fiduciary duties to shareholders promotes corporate and democratic accountability, protects the integrity of the capital markets, and sustains the viability of the $45 trillion market for CSR.[317] Each of those interests represents a substantial—if not compelling—governmental interest.[318] Moreover, disclosure of a corporation's political spending clearly advances those interests by eliminating the ability of corporate managers to defraud or dissemble. And to the extent a common law disclosure rule simply requires disclosure of the identity and amount of corporate political expenditures, not only would the rule be narrowly tailored but it would be the *only means* that adequately advances the governmental interests at stake. Considering the intensity of consumer and investor preferences regarding a corporation's political commitments, disclosure of the recipients and amounts of corporate political spending provides the absolute minimum to ensure fiduciary accountability, trust in the capital markets, and the viability of the market for CSR.[319]

A potential counterargument might focus on the right to anonymous political speech. Although the Supreme Court has certainly embraced a right to anonymous political speech in certain contexts,[320] the mere disclosure of corporate political expenditures does not implicate the essential concerns that animate a need for anonymity. In *Doe v. Reed*,[321] a case in which individual signers of a referendum sought a preliminary injunction prohibiting the State of Washington from making referendum petitions available in response to requests under the state public records act, the Supreme Court held that the disclosure requirements survived strict scrutiny under the First Amendment because they substantially advanced the important governmental interest in preserving the integrity of the electoral process.[322] In discussing the contexts in which compelled disclosure of political support can run constitutionally aground, the Court stated, "[W]e have explained that those resisting disclosure can prevail

---

317. *See supra* notes 77–80 and accompanying text.

318. *See* Doe v. Reed, 561 U.S. 186, 198 (2010) (noting that the state interest "extends more generally to promoting transparency and accountability in the electoral process"); Bulldog Inv'rs Gen. P'ship v. Galvin, No. 07-1261-BLS2, 2007 WL 4647112, at *8 (Mass. Super. Ct. Dec. 26, 2007) ("That interest is to protect the integrity of capital markets, and thereby to preserve the overall health of the economy, by ensuring that investors make decisions based on full and accurate material information."); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1984); Paris Adult Theater I v. Slaton, 413 U.S. 49, 64 (1973); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186–87 (1963); SEC v. Ralston Purina Co., 346 U.S. 119, 124–25 (1953); Merrick v. Halsey & Co., 242 U.S. 568, 586–88 (1917); Hall v. Geiger-Jones Co., 242 U.S. 539, 552–53 (1916); SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988); Bangor & Aroostook R.R. v. ICC, 574 F.2d 1096, 1107 (1st Cir. 1978); Carl M. Loeb, Rhoades & Co., Exchange Act Release No. 5870, 38 S.E.C. 843, 844 (1959); Stewart v. Brady, 133 N.E. 310, 312 (Ill. 1921); Kneeland v. Emerton, 183 N.E. 155, 162–63 (Mass. 1932).

319. *Nat'l Ass'n of Mfrs.*, 748 F.3d at 372 ("The government cannot satisfy that standard if it presents no evidence that less restrictive means would fail.").

320. *Reed*, 561 U.S. at 200. *See generally* Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure?: Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GA. ST. U. L. REV. 1057 (2011).

321. 561 U.S. 186 (2010).

322. *Id.* at 190.

under the First Amendment if they can show 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'"[323] Citing *Citizens United*, the Court noted that that disclosure of political activity by an organization would be similarly impermissible if the *members* of the organization would face similar harm.[324]

Requiring a corporation to disclose the mere fact of its political spending will not expose the shareholders (i.e., the ultimate owners of the corporation) to threats, harassment, or reprisals by government. The only actors who might face sanctions as a result of disclosure are executives who have breached a fiduciary duty in directing for personal gain the secret political ends to which the corporate treasury might be used. That very ability to hold corporate managers accountable represents an important animating concern in affording corporations such broad political speech rights in *Citizens United*.[325] Again, as Justice Kennedy asserted:

> [P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."[326]

Such an appreciation for corporate transparency and accountability would seem bizarre at best if a constitutional right to secret corporate political spending loomed in the background.

Thus, not only does adopting a common law disclosure rule for political spending similar to the basic disclose or abstain rule in the insider trading context seem necessary and feasible within existing corporate law constructs, the rule would not adulterate the political speech rights corporations enjoy under the First Amendment.

V. IMPLICATIONS

Incorporating a disclose or abstain rule for corporate political spending into the basic common law fiduciary duties governing directors and officers would afford significant benefits to the corporation, the capital markets, and the political community.

A. Corporate and Democratic Accountability

Perhaps most obviously, requiring corporations to disclose their political spending would engender greater accountability of corporate managers to shareholder interests. As the Supreme Court and so many scholars, market professionals, policymakers, and interest groups fervently contend, only

323. *Id.* at 200 (quoting Buckley v. Valeo, 424 U.S. 1, 4 (1976)).
324. *Id.* at 201.
325. Citizens United v. FEC, 558 U.S. 310, 370 (2010).
326. *Id.* (quoting McConnell v. FEC, 540 U.S. 93, 259 (2003) (Scalia, J., concurring in part and dissenting in part)).

with disclosure of corporate political activity can shareholders ensure that executives are not using the corporate treasury for personal gain. Allowing corporate political spending to remain secret can only serve the cause of obfuscation and facilitate breaches of core fiduciary duties. Quite simply, there can be no trust without transparency.

But the corporate accountability at stake goes even further than enabling detection of culpability. The corporation itself has evolved from "a simple investment vehicle to an increasingly dominant force" in shaping some of the most important economic, social, and political aspects of our lives.[327] Indeed, corporations encroach so deeply into territory once solely occupied by government that boardroom deliberations supplant debates in the traditional public sphere as the relevant battleground for determining the path of our collective lives.[328] Although shareholders traditionally occupy passive roles in directing corporate affairs, a vital movement to enhance shareholder democracy continues to flourish so that shareholder preferences can be adequately taken into account before crafting corporate strategies and policies. Only through mechanisms that enhance discourse between corporate managers and shareholders (and arguably other relevant consumer and stakeholder constituencies that affect shareholder interests) can officers and directors ensure fidelity to the corporate interests that they are bound to represent. Secrecy necessarily undermines the accountability and attentiveness corporate managers must afford their shareholder constituents. And without the transparent discourse that enables such attentiveness, the path the corporation takes risks running far afield of shareholders' intended destination.

Moreover, in light of the great power corporations wield in the political realm, transparency regarding corporate political spending remains necessary to ensure legitimacy in the polity. *Citizens United* explicitly connected democratic accountability with the ability of citizens to determine if elected officials might be corrupted by corporate influences.[329] Because the corporation has become so institutionally important to our collective political identity, "the integrity of [the corporation's] organizational structure significantly affects, if not controls, the confidence in our democratic processes. If special interests, managerial imperialism, or other antidemocratic values dominate corporations, we will realize a diminished sense of citizenship within our polity."[330] Clandestine corporate political spending encourages corruption rather than constructive civic participation.[331] As a result, a common law disclose or abstain rule for corporate political spending could go a long way to protect the basic legitimacy and integrity of our political processes.

327. *See* Siebecker, *supra* note 15, at 169.
328. *See* Siebecker, *supra* note 82, at 151.
329. *Citizens United*, 558 U.S. at 370.
330. *See* Siebecker, *supra* note 82, at 152.
331. *See id.* at 152–53.

B. Efficiency and the Market for Corporate Social Responsibility

Without the ability of investors and consumers to trust in the accuracy of corporate disclosures regarding environmental, social, and governance matters, the market for CSR will collapse. Considering that more than $6.5 trillion in the United States currently gets invested based on socially responsible screening criteria,[332] such a market failure would cause significant economic loss. Enabling corporations to hide their political practices creates a regulatory regime fit only for charlatans and chumps. An incentive would exist for corporations to attempt to curry investor or consumer favor by publicly embracing a political position and privately supporting a contrary commitment or candidate without fear of negative repercussions.[333] But even some of the cleverest fraudulent schemes eventually come to light. And as consumers and investors become more inured to corporate greenwashing and the projection of false corporate images, the entire market for CSR will seem like nothing more than a circus sham. As the Supreme Court famously noted, "[I]t is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?"[334]

In contrast, transparency regarding corporate political spending will necessarily enhance corporate efficiency. Efficient corporate governance rules reflect what corporate managers, shareholders, and other nonshareholder constituencies would hypothetically negotiate in a world of perfect information, freedom of contract, and zero transaction costs.[335] Of course, the reality of our world prevents those conditions from obtaining. As a result, determining the content of the hypothetical bargain presents quite a challenge.

Even if the precise outcome of the bargain remains a mystery, however, transparency necessarily makes an efficient outcome more likely.[336] Why? On the one hand, if corporate managers are able to engage in political activity without any reproach from investors, they will have no incentive to take those viewpoints into account when determining what corporate path to pursue. On the other hand, the vulnerability to shareholder action made possible by disclosing corporate political spending provides the opposite incentive to consider thoughtfully actual shareholder preferences. To the extent corporate rules facilitate the consideration of actual shareholder interests (whether on corporate political commitments or any other concern), corporate managers more closely track the true preferences of

332. *See* USSIF FOUNDATION, *supra* note 75, at 12.
333. *See* Siebecker, *supra* note 45, at 134–36.
334. Basic Inc. v. Levinson, 485 U.S. 224, 246–47 (1988) (quoting Schlanger v. Four-Phase Sys. Inc., 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).
335. *See* Hamermesh, *supra* note 238, at 1152–54; Williams, *supra* note 217, at 1201–03.
336. *See* Iris H-Y Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 38 DEL. J. CORP. L. 983, 989 (2014); David A. Westbrook, *Telling All: The Sarbanes-Oxley Act and the Ideal of Transparency*, 2004 MICH. ST. L. REV. 441, 453; Williams, *supra* note 217, at 1199–200.

shareholders rather than some stilted idea of shareholders' interest only in wealth maximization.[337] Because some shareholders possess (intense) preferences for a variety of environmental, social, or other political commitments, ignoring the reality of their preferences in shaping corporate governance rules disconnects the content of the rule from what real parties to the bargain ultimately desire. A corporate political spending disclosure rule would more effectively engage corporate managers in a dialogue with shareholders about the extent to which corporations should even engage in political activity as well what political beneficiaries best advance the ultimate goals of the corporation.[338] Through enhanced discourse that pays adequate fidelity to the interests of affected corporate constituencies, an efficient outcome regarding the content of corporate governance rules becomes more likely.

CONCLUSION

A strong case seems to support using the same legal principles that prohibit insider trading to require corporations to disclose their political spending as well. The growing dominance of corporations in politics, the lack of transparency regarding corporate political activity, and inevitable suspicions about the motives of corporate executives in using corporate coffers to advance their personal interests provides the impetus for such jurisprudential action.

Using the fiduciary principles of trust that animate prohibitions on insider trading does not seem particularly odd as a tool to inform the content of the general fiduciary duties that corporate officers and directors owe to their shareholders. After all, the basic abstain or disclose rule that the Supreme Court recognizes in the context of insider trading arises from the common law fiduciary duties that govern the daily decisions of corporate managers. A fiduciary breach due to secret use of corporate assets for personal gain marks the essential concern in both the insider trading realm and in the context of corporate political spending. Thus, adopting a similar common

---

337. *See* Siebecker, *supra* note 45, at 163–64.

338. For a discussion on the need to assess the actual preferences and profiles of diverse stakeholders in corporate law, see Helen Anderson, *Creditors' Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness*, 30 MELB. U. L. REV. 1, 24 (2006).

> [T]he long-term viability of the corporate enterprise relies on the cooperation of a range of corporate stakeholders. In order to achieve this cooperation, ethics and fairness must be considered as a means of fostering trust and reducing risk and its associated costs. While directors are allowed to favour one cohort of corporate stakeholders over another, this is only permissible where this is in the long-term interests of the company.

Id.; *see also* Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 622, 635–37, 642–43 (2002) (addressing the need to take seriously all extant stakeholder interests in order to promote efficiency from a behaviorally sensitive standpoint). *See generally* Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (promoting a dedication to actual stakeholder and shareholder interests in corporate decision making).

law fiduciary rule that corporate managers must disclose the amount and target of political expenditures or refrain from engaging in political activity does not seem like much of an intellectual leap. Not only would such a common law disclosure duty fit neatly within existing corporate governance principles, but the compelled transparency would not offend corporations' First Amendment rights. In the end, prohibiting political insider trading through a disclose or abstain rule for corporate political spending would promote greater efficiency in the capital markets, ensure corporate accountability and political legitimacy, and sustain the growing market for CSR.