POLITICAL INSIDER TRADING

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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.

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INTRODUCTION

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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
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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, using corporate funds to affect elections raises the specter of corporate insiders using company assets to advance their own personal interests, potentially to

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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. Clauthon, 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)).
the detriment of the corporation. 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. 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/ (“If 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].

corporation would evolve to surpass government as the most powerful institution in society.\textsuperscript{8} Indeed, the political influence of corporations and their control over important facets of our daily lives\textsuperscript{9} grew rapidly as corporations amassed vast amounts of capital.\textsuperscript{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 \textit{Citizens United v. FEC}.\textsuperscript{11} In that landmark case, the Court gave corporations essentially the same political speech rights as human beings\textsuperscript{12} and held unconstitutional any limits on the amount of independent political expenditures\textsuperscript{13} that corporations could make in an election.\textsuperscript{14} In the immediate aftermath of \textit{Citizens United}, many predicted that corporate dominance of the political arena would infect irreparably American democratic processes.\textsuperscript{15} At the time, President Barack Obama warned that “a new stampede of special interest money in our politics”

\begin{itemize}
  \item \textsuperscript{8} ADOLF A. BERLE, JR. & GARDINER C. MEANS, \textit{THE MODERN CORPORATION AND PRIVATE PROPERTY} 357 (1932).
  \item \textsuperscript{11} 558 U.S. 310 (2010).
  \item \textsuperscript{12} Id. at 319.
  \item \textsuperscript{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.” \textit{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].
  \item \textsuperscript{14} See \textit{Citizens United}, 558 U.S. at 342–46.
\end{itemize}
would enable corporations to “marshal their power every day in Washington to drown out the voices of everyday Americans.”

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.”

To the extent that *Citizens United* provided corporations with doctrinal rocket fuel, the more recent decision in *McCutcheon v. FEC* 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 on the total amount of spending by one individual (or corporation) on all federal candidates and political parties in an election cycle. Although the contribution limits per candidate and party committee remain in place, corporations may now give directly to as many political candidates and party organizations as desired. 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. 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.

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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.”).
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


\(^{27}\) 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.


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

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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-SYKK]; 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-8QSE].

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

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. 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.

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. 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.”

Notwithstanding Justice Kennedy’s hope for corporate transparency and numerous concerted efforts to require corporations to disclose their political spending, corporations currently face no such requirement under federal 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.”

42. See infra Part I.B.2.


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].


or state law.\textsuperscript{48} To the contrary, current election law and securities regulations permit corporations to engage in undisclosed political spending in a variety of ways.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{51} Although academics,\textsuperscript{52} investors,\textsuperscript{53} market professionals,\textsuperscript{54} regulators,\textsuperscript{55} politicians,\textsuperscript{56}
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.

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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).


1. Shareholder Activism

Because a corporation’s political activity remains a material consideration to many investors in making their purchasing decisions, shareholders get particularly piqued when corporations keep their political activity closeted. 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. Investors remain concerned that corporate assets are being used to advance the personal interests of corporate managers rather than the interests of shareholders. Perhaps as a result, in the last proxy season, the most common shareholder proposals targeted corporate lobbying and political spending. Especially in light of recent academic studies demonstrating that corporate political spending does not enhance shareholder wealth, shareholders demand that managers account for how

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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.proxyview.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/ShareholderProposal-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. Moreover, when corporations engage in unwanted or indefensible political activity, shareholder hackles quickly get raised. 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. 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. 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.” When corporate politics fail to align with investor preferences, investors properly fault the board, and corporate profitability hangs precariously in the balance. 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). Although the definition of SRI remains


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 shareholder 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/5EF6-MSJJ]; 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. Id. (quoting AFL-CIO counsel Robert E. McGarrah).


71. Skroupa, supra note 15.

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


somewhat protean, the desire “to achieve long-term competitive financial
returns together with positive societal impact” 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. 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. 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. 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. 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,

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75. USSIF FOUND., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING
[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/16030
9960/socially-responsible-investing-is-coming-of-age [https://perma.cc/G8K7-NENU].

77. UNITED NATIONS GLOBAL COMPACT, IMPACT: TRANSFORMING BUSINESS, CHANGING
GlobalCompact2015.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
(“[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 responsibility86 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

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].
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.
apologized to placate disgruntled consumers.\textsuperscript{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.\textsuperscript{90} Of course, Target is not the only company to face threats to profitability due to unwanted corporate activity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{94} Perhaps as a result, some corporations have embraced voluntary disclosure protocols for corporate political spending.\textsuperscript{95} A 2015 amid-confusion-about-protest-goals/19584033/; 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/XQ05-VCAE].


\textsuperscript{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).


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

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 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


\(^{97}\) See 2015 CPA-ZICKLIN INDEX, supra note 37, at 23.

\(^{98}\) Id. at 18.

\(^{99}\) \textit{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.


\(^{102}\) Jeff S. Bartlett et al., \textit{Guide to the Volkswagen Emissions Recall}, \textit{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, \textit{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.\textsuperscript{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.\textsuperscript{107} But that insight misses the basic point that it is the very ability to detect the fraud—even if only after elaborate study\textsuperscript{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.\textsuperscript{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,\textsuperscript{110} thirty-six corporate executives from S&P 500 companies spoke out against the measure as contrary their corporation’s core values.\textsuperscript{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.\textsuperscript{112} Although that example marks an

\textsuperscript{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].


\textsuperscript{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.”).


\textsuperscript{112} Id.
instance of corporate hypocrisy that eventually came to light, not all corporate political contributions remain traceable or subject to public reporting. 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. 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. 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. Despite the concerted efforts of academics, advocacy groups, nonprofit organizations, and ordinary citizens, the SEC has to date resisted issuing a disclosure rule targeting corporate political spending. 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. 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].
117. See supra notes 52–58 and accompanying text.
118. See supra note 59 and accompanying text.
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. The largest 100 public companies in the world have a combined market capitalization in excess of $16 trillion with 53 of those companies located in the United States. The economic power under the control of just those fifty-three domestic companies trumps the economic influence of many nation-states. With that great economic might, giant corporations have supplanted traditional governmental institutions in providing some of the most important rulemaking, adjudicative, and security functions. Moreover, with the advent of the corporate social responsibility movement and the need to develop new markets to expand productivity, corporations have also become more deeply engaged in shaping public mores and social attitudes as well. 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..."

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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.
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).
126. Id.
regulatory authority of the chartering state.”

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.

In addition to threatening important notions of democratic and political accountability, clandestine corporate spending undermines effective discourse. In Doe v. Reed, 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.

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. 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. 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. 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.

130. Id. at 228 (Scalia, J., concurring).
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, the Supreme Court specifies the content of insider trading doctrine based on basic common law fiduciary principles governing the actions of corporate managers. The omnibus securities fraud prohibitions contained in section 10(b) of the Securities Exchange Act of 1934 and the corresponding SEC Rule 10b-5 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.
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, generally prohibit the use of fraudulent or deceptive practices in the context of buying or selling securities.

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. Under those traditional common law principles, silence typically does not provide a cause of action for deceit. 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. 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. 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. 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) based on material nonpublic

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140. See Nagy, supra note 2, at 1323.
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. 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. In the first case to explicate the theory, *Chiarella v. United States*, 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. 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. 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.

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, the Supreme Court formally rejected that rationale. What continues to remain the paramount consideration in establishing illicit insider trading under the classical theory is whether a fiduciary breach occurred. And for classical insiders, it is serving as a director, officer, or tippee. Tippee liability remain derivative of the classical or misappropriation theories, a full discussion of details of tippee 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.
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 that provides the fiduciary obligation to refrain from using the corporation’s information for personal gain.

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. 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. Instead, the fiduciary duty arises out of a relationship of trust or confidence with the source of the information. In United States v. O’Hagan, 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. 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.

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. 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. As the Court explained:

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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.
159. Id. at 1431–32.
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.
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

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165. Id. at 655.
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”).
academics and market professionals have criticized the lack of clarity in the materiality standard for insider trading, whether for inhibiting disclosure, providing perverse incentives to corporate managers to seek short-term gains, increasing corporate costs, or ignoring prevailing investor preferences. Some suggest that the purposeful vagueness of the materiality standard enables insiders to escape liability for illicit insider trading. Others suggest the ambiguity injects some prosecutorial bias and arbitrariness into enforcement. 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


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

178. See Dirks v. SEC, 463 U.S. 646, 653–54 (1983); see also United States v. O’Hagan,

179. See Joseph K. Leahy, Corporate Political Contributions as Bad Faith, 86 U. COLO.

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
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.\textsuperscript{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.\textsuperscript{183} Helping shape legislation and viewpoints in ways that increase profitability should not be considered any different than crafting an effective marketing campaign.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{187} But a crucial caveat for protection is the absence of conflicts of interest infecting the managers’ decisions.\textsuperscript{188} When conflicts of interest arise, no presumption exists that managerial decisions comport with their fiduciary duties to the corporation and its shareholders.


\textsuperscript{183} See Leahy, supra note 179, at 483 n.7.


\textsuperscript{185} See supra note 5 and accompanying text.


\textsuperscript{187} \textit{Id.} at 583–84.

Clandestine political spending, however, unavoidably raises the specter of a duty of loyalty breach. Academics,189 journalists,190 politicians,191 and market professionals192 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 literature195—along with current market practices196—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.
than on the profits themselves.\textsuperscript{203} Under basic agency principles, the agent would also need to disgorge any unauthorized profits to the principal as an additional fiduciary obligation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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?\textsuperscript{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\textsuperscript{208} with politicians and political causes competing for scarce resources and votes.\textsuperscript{209} In contrast, charitable activity

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{205} See Nagy, supra note 201, at 1158–63.
  \item \textsuperscript{206} See Lambert, supra note 204, at 1127.
  \item \textsuperscript{207} See Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1118 (2002).
  \item \textsuperscript{208} See Leahy, supra note 179, at 533–36.
\end{itemize}
represents a public good, and as a society we provide incentives (in the form of tax deductions) for supporting charitable enterprises.

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. 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. 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. For those antidisclosure proponents, forcing additional disclosure obligations on the corporation would only impose significant costs without any noticeable gains to shareholders. 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.


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


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. 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. 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.

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.

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, 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.”

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.” Faith-based funds remain a significant portion of the SRI community and political commitments of corporations remain core to their concerns. Of course, the existence of

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216. USSIF FOUNDATION, supra note 75, at 12.
218. See supra notes 74–87 and accompanying text.
219. See Siebecker, supra note 82, at 140–51.
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. 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.

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. 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,
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

securities laws purposefully aim to provide uniform and consistent standards of transparency for publicly traded companies. 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. 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. Pursuant to the widely accepted "internal affairs doctrine," issues of general corporate governance arising under state law are not preempted by federal securities laws. 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.

Delaware, the state of incorporation for more than half of all domestic public companies, provides the leading example of a substantial fiduciary-based disclosure obligation that goes further than federal securities mandates. 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. A much broader disclosure duty that applies to general communication with shareholders, however, was announced by the Delaware Supreme Court in Malone v. Brincat. That common law disclosure duty applies even when the subject matter of the communication implicates areas that the federal securities laws regulate.

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

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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.


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

240. Id.; see also Siebecker, supra note 45, at 143.
information about the company’s finances.\footnote{Brincat, 722 A.2d at 8.} 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.”\footnote{Id. at 14; see also Jackson Nat’l Life Ins. v. Kennedy, 741 A.2d 377, 390 (Del. Ch. 1999) (“It necessarily follows from \textit{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.”).} Citing the Senate committee report on the Uniform Securities Act that explicitly recognized the import of state law disclosure duties,\footnote{See \textit{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))).} 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.\footnote{Id. at 13.} 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.

of the ostensible materiality to politically concerned shareholders of even small amounts of political spending. 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, 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. 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. 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.

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. 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).
252. See id.
Ohio, 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.” Although the Constitution often abhors government-compelled speech, 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, 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. 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. Although the Court asserted that commercial speech deserved less protection under the First Amendment than other forms of protected expression, the intermediate level of scrutiny announced in Central Hudson has produced inconsistent results. 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.

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 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. 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

255. Id. at 651.
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.”

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.”

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.

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. 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. 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.’”

Emphasizing that strict scrutiny would apply to any regulation that encumbers political speech, whether by a person or a corporation, the Court also overruled prior precedent in Austin v. Michigan Chamber of Commerce, in which the Court previously embraced a concern about the deleterious effects of corporate influence over the electoral process. 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.
268. See generally Siebecker, supra note 15 (discussing the speech doctrine embedded in Citizens United).
271. Id. at 342–45.
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

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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).
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).
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 Amendment289 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.
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 Manufacturers (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

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298. Id. at 8–11; see also Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012).
301. Id. at 33–37.
304. 748 F.3d 359 (D.C. Cir. 2014).
305. Id. at 373.
306. See id. at 365.
substantial governmental interest in promoting peace and security around the Congo, the circuit court disagreed. With respect to the standard of review, the court rejected the SEC’s claim that the conflict mineral rule deserved the lowest level of scrutiny under Zauderer, considering the mandated disclosure was simply factual and related to the state’s interest in preventing deception of consumers. 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” and that “[t]he label ‘conflict free’ is a metaphor that conveys moral responsibility for the Congo war.” 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. 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. The SEC recently chose not to appeal the decision to the Supreme Court. 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 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.” Preventing executives from using corporate coffers to advance personal ends in breach of

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.”).
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.\textsuperscript{317} Each of those interests represents a substantial—if not compelling—governmental interest.\textsuperscript{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 \textit{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.\textsuperscript{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,\textsuperscript{320} the mere disclosure of corporate political expenditures does not implicate the essential concerns that animate a need for anonymity. In \textit{Doe v. Reed},\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{317} See \textit{supra} notes 77–80 and accompanying text.
\item \textsuperscript{319} \textit{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.”)
\item \textsuperscript{321} 561 U.S. 186 (2010).
\item \textsuperscript{322} Id. at 190.
\end{itemize}
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.’”  

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.  

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*.  

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.”

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

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323. *Id.* at 200 (quoting *Buckley v. Valeo*, 424 U.S. 1, 4 (1976)).  
324. *Id.* at 201.  
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.

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328. See Siebecker, *supra* note 82, at 151.
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, 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. 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?”

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. 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. 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.
335. See Hamermesh, supra note 238, at 1152–54; Williams, supra note 217, at 1201–03.
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

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


[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.

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.