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## Corporate Political Power: The Politics of Reputation & Traceability

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# CORPORATE POLITICAL POWER: THE POLITICS OF REPUTATION & TRACEABILITY

*Amanda Shanor*  
*Mary-Hunter McDonnell*  
*Timothy Werner\**

## ABSTRACT

*We live, it is said, in a second Gilded Age, in which politics is dominated by corporate power and elite business interests. But how does corporate money flow into politics? This Article provides an original empirical analysis of when and why corporations engage in particular forms of political activity and uses those findings to develop a novel, empirically-grounded approach to the First Amendment's treatment of traceability mandates in politics.*

*We analyze the conditions under which firms shift between (1) using their political action committees (PACs) to contribute to candidates and political parties, and (2) engaging in less traceable forms of political activity, like lobbying, in which the specific targets of firms' influence efforts are unknown. This Article identifies a key variable that explains when and why corporations shift from lighter (more traceable and direct) to darker (less traceable and more indirect) channels of political engagement. We demonstrate that corporate political activity grows darker as a firm's reputation grows more negative. This dynamic produces the disquieting result that the corporate political interventions that are likely to be the most controversial are also those most likely to be deployed in ways the public is least able to monitor.*

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*Our findings indicate that the traceability of money creates a concrete limit on the ability of corporate actors to influence politics—a limit which plausibly applies to political giving more broadly. Corporate donors who are seen as political liabilities find it increasingly difficult to locate politicians who will openly take their money or accept other support. Politicians refuse or return traceable donations from disreputable donors. Our research thus demonstrates that the power of business in politics is more conditional than generally appreciated.*

*This Article uses these empirical findings to interrogate the relationship between traceability mandates in politics and theories of the First Amendment. While the Supreme Court has prominently struck down restrictions on money in politics in cases like *Citizens United v. Federal Election Commission*, it has repeatedly upheld a variety of disclosure requirements. For a range of reasons, including the Supreme Court's decision in *Americans for Prosperity Foundation v. Bonta*, however, disclosure mandates are likely to become an increasingly important site of conflict in both policy and litigation, making it ever more important to assess and theorize the justifications for them.*

*Our research suggests an empirically-grounded justification: traceability alters politicians' behavior, causing them to act more consistently with public opinion. In other words, traceability mandates make politicians more accountable to the people. At the same time, there is evidence that traceability policies, and the reduction of darker corporate money in politics they produce, promote the public's belief that their views shape the political system. Traceability mandates, in sort, advance both objective and subjective forms of democratic accountability. We thus argue that policies that advance the traceability of corporate money in politics not only further core First Amendment values but may be required by them.*

*By identifying how and why corporate money flows into politics at a fine level of detail, this Article also provides important information that policy makers can use to craft campaign finance and lobbying reforms. Our empirical findings and theoretical analysis support policy changes that increase the traceability of corporate money in politics, including broader and more robust disclosure requirements for corporate lobbying and individual donations made by corporate executives and directors.*

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## INTRODUCTION

If you have paid any attention to American politics in the last ten years, you have heard that the political system is broken, awash in corporate money. The public is increasingly wary of corporate power and money in politics,<sup>1</sup> and polling suggests that an overwhelming majority of Americans support the reduction of corporate influence in the political system.<sup>2</sup>

The storming and siege of the U.S. Capitol on January 6, 2021—and the spotlight it cast on the gravity of threats to American democracy—sent shockwaves through the world of corporate political giving. Many prominent firms, including Morgan Stanley, Walmart, Disney, and Amazon, publicly committed to not make donations to the Republican lawmakers who opposed the certification of the Electoral College votes making Joe Biden the 46th President.<sup>3</sup> Others, such as Goldman Sachs, Facebook, McDonald’s, and Visa, paused all political giving.<sup>4</sup> The U.S. Chamber of Commerce—“the nation’s largest business lobbying group”—strongly “condemned President Trump’s conduct that led to” the insurrection, and vowed that politicians who “backed his efforts

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<sup>1</sup> MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* 101 (2000).

<sup>2</sup> See, e.g., Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/> (“77% of the public says ‘there should be limits on the amount of money individuals and organizations’ can spend on political campaigns . . . .”); Steven Kull, Evan Fehsenfeld, Francesca Martens & Evan Charles Lewitus, *Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide*, PROGRAM FOR PUB. CONSULTATION 3, 7–8 (May 2018), [https://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign\\_Finance\\_Report.pdf](https://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign_Finance_Report.pdf) (showing “large [bipartisan] majorit[ies] favor[] a Constitutional amendment to overturn . . . *Citizens United*” and support greater mandatory disclosure of campaign donations); Daniel Hensel, *New Poll Shows Money in Politics Is a Top Voting Concern*, ISSUE ONE (June 29, 2016), <https://www.issueone.org/new-poll-shows-money-in-politics-is-a-top-voting-concern/> (noting 78% of respondents say sweeping new laws are “need[ed] . . . to reduce the influence of money in politics”); *New Poll: Americans Condemn High Levels of Corporate Political Spending, Overwhelmingly Support Strong Transparency and Accountability Reforms*, PUB. CITIZEN (Oct. 25, 2012), <https://www.citizen.org/news/new-poll-americans-condemn-high-levels-of-corporate-political-spending-overwhelmingly-support-strong-transparency-and-accountability-reforms/> (citing surveys in which 90% of respondents say “there is . . . too much corporate money in politics” and 81% think firms should have to disclose political spending).

<sup>3</sup> Judd Legum & Tesnim Zekeria, *Major Corporations Say They Will Stop Donating to Members of Congress Who Tried to Overtake the Election*, POPULAR INFO. (Jan. 10, 2021), <https://popular.info/p/three-major-corporations-say-they/>; see also Lucas Manfredi, *McDonald’s, Nike, Boeing, Wells Fargo Latest to Share Stance on Pausing Political Donations After Capitol Riots*, FOX BUS. (Jan. 10, 2021), <https://www.foxbusiness.com/money/capitol-riot-pause-political-giving-pac> (listing companies that suspended political giving).

<sup>4</sup> Manfredi, *supra* note 3. A number of firms also announced they would suspend donations to the Republican Attorney General’s Association. Judd Legum & Tesnim Zekeria, *After Riot, Major Corporations Suspend Donations to the Republican Attorneys General Association*, POPULAR INFO. (Jan. 13, 2021), <https://popular.info/p/after-riot-major-corporations-suspend>.

to discredit the election would no longer receive the [Chamber's] financial backing."<sup>5</sup> As said by Morgan Stanley and Merck board member Thomas Glocer,<sup>6</sup> "[w]e have to create some level of cost" for supporting acts that threaten our democracy, explaining that "[m]oney is the key way" to do that.<sup>7</sup>

It is too early to tell whether the corporate world's political rebuke will last or have a meaningful effect on the future trajectory of the Republican Party, which is now roiled by internal conflict. In the wake of the events of January 6, Chairman and CEO of JPMorgan Chase Jamie Dimon asserted with regard to corporate political giving that "[n]o one thought they were giving money to people who supported sedition."<sup>8</sup> Regardless of whether that is true, it is difficult to deny the significant role of corporate money in the arc of American politics—and the increasingly loud calls to regulate it.

Prominent candidates have long called for sweeping reforms to take the political process away from corporations and the ultra-wealthy and put it back in the hands of the people—including dramatically increasing disclosure around lobbying and other corporate political activity, requiring all lobbyists to register, and limiting the ability of lobbyists to move in and out of government jobs.<sup>9</sup> Democrats introduced a constitutional amendment to overturn *Citizens United v. Federal Election Committee*, with the 2016 Democratic party platform asserting, "We need to end secret, unaccountable money in politics by requiring, through executive order or legislation, significantly more disclosure and transparency—by outside groups, federal contractors, and public corporations to their shareholders."<sup>10</sup> By 2020, every Democratic presidential candidate in the election vowed to turn down donations from corporate political action committees (PACs), and many pledged to refuse support from federal lobbyists

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<sup>5</sup> Alan Rappeport, *Chamber of Commerce Calls Trump's Conduct 'Inexcusable' and Vows to Curb Certain Donations*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/chamber-of-commerce-trump.html?searchResultPosition=8>.

<sup>6</sup> Emily Glazer & Chip Cutter, *CEOs Consider Ways to Smooth Biden's Presidential Transition, Including Holding Back Campaign Money*, WALL ST. J. (Jan. 6, 2021, 9:34 AM), <https://www.wsj.com/articles/ceos-consider-ways-to-smooth-the-presidential-transition-including-holding-back-campaign-money-11609943649>; David Leonhardt, *A Corporate Backlash*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/briefing/trump-mob-impeachment-gorillas-san-diego-zoo.html?searchResultPosition=15>.

<sup>7</sup> Leonhardt, *supra* note 6.

<sup>8</sup> David Gelles, *'We Need to Stabilize': Big Business Breaks with Republicans*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/business/republicans-business-trump.html?searchResultPosition=23>.

<sup>9</sup> See, e.g., Kenneth P. Vogel & Glenn Thrush, *Biden Faces Pressure from Left Over Influence Industry Ties*, N.Y. TIMES (Aug. 1, 2020), <https://www.nytimes.com/2020/08/01/us/politics/biden-lobbyist-ties.html>.

<sup>10</sup> DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM 23 (July 8–9, 2016), [https://democrats.org/wp-content/uploads/sites/2/2019/07/2016\\_DNC\\_Platform.pdf](https://democrats.org/wp-content/uploads/sites/2/2019/07/2016_DNC_Platform.pdf).

as well.<sup>11</sup> Several, including Elizabeth Warren and Bernie Sanders, ran on platforms focused on getting corporate money out of politics.<sup>12</sup>

Oversight and disclosure of political spending and lobbying activity is now the most common issue in shareholder proposals.<sup>13</sup> In the last decade, over 500 such proposals were filed among Fortune 250 companies, and those proposals averaged shareholder support of 23.4%—significantly higher than the 15% average garnered by other social proposals.<sup>14</sup>

At the same time, robust political science research has shown that the influence of corporate money in politics is a significant driver of economic inequality,<sup>15</sup> with the gap between the rich and the rest reaching proportions not

<sup>11</sup> Hailey Fuchs & Michelle Ye Hee Lee, *Democrats Swore Off Donations from Lobbyists and Fossil Fuel Execs. But Some Are Skirting Their Own Rules*, WASH. POST (July 29, 2019), [https://www.washingtonpost.com/politics/democrats-swore-off-donations-from-lobbyists-and-fossil-fuel-execs-but-some-are-skirting-their-own-rules/2019/07/29/7ac49a3c-ac14-11e9-b071-94a3f4d59021\\_story.html](https://www.washingtonpost.com/politics/democrats-swore-off-donations-from-lobbyists-and-fossil-fuel-execs-but-some-are-skirting-their-own-rules/2019/07/29/7ac49a3c-ac14-11e9-b071-94a3f4d59021_story.html).

<sup>12</sup> *Breaking the Political Influence of Market-Dominant Companies*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/break-monopoly-influence> (last visited Nov. 16, 2021); *Get Big Money Out of Politics and Restore Democracy*, BERNIE, <https://bernieanders.com/issues/free-and-fair-elections/> (last visited Nov. 16, 2021); see Aiden Smith, *The Overlooked Difference Between Bernie Sanders and Elizabeth Warren*, NATION (July 23, 2019), <https://www.thenation.com/article/archive/the-overlooked-difference-between-bernie-sanders-and-elizabeth-warren/>; Osita Nwanevu, *Elizabeth Warren, Bernie Sanders, and Two Paths for the American Left*, NEW YORKER (June 18, 2019), <https://www.newyorker.com/news/our-columnists/elizabeth-warren-bernie-sanders-and-two-paths-for-the-american-left>.

<sup>13</sup> See Heidi Welsh & Michael Passoff, *ProxyPreview 2021, AS YOU SOW*, <https://www.proxypreview.org/2021/report> (last visited Nov. 16, 2021).

<sup>14</sup> Data provided by Manhattan Inst., *Proxy Monitor: Shedding Light on the Influence of Shareholder Proposals on Corporations*, PROXY MONITOR, <https://www.proxymonitor.org/> (last visited Nov. 16, 2021). Averages were obtained by the authors by using the “Search Fortune 250 Shareholders Proposals” query search, exporting search results for proposals filed between 2011 and 2021, and averaging shareholder approvals in Microsoft Excel. These calculations for political spending and lobbying activity were derived from examining the average shareholder approval vote for all proposals categorized as “Lobbying,” “Lobbying and Political Spending,” and “Political Spending.” The average support of “other social proposals” was derived by averaging the support of all “Social Policy” proposals submitted over this period, excluding “Lobbying,” “Lobbying and Political Spending,” and “Political Spending.”

<sup>15</sup> See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 75–78 (2010) [hereinafter HACKER & PIERSON, HOW WASHINGTON MADE THE RICH RICHER]; Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC’Y 152, 154 (2010) [hereinafter Hacker & Pierson, *Public Policy*]; Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. POL. 564, 566, 576 (2014) [hereinafter Gilens & Page, *Testing Theories*]; Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSPS. POL. 51, 51, 63 (2013); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 793–94 (2005); Matthew Luttg, *The Structure of Inequality and Americans’ Attitudes Toward Redistribution*, 77 PUB. OP. Q. 811, 811–12 (2013); Nathan J. Kelly & Peter K. Enns, *Inequality and the Dynamics of Public Opinion: The Self-Reinforcing Link Between Economic Inequality and Mass Preferences*, 54 AM. J. POL. SCI. 855, 867, 869 (2010); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in NEGOTIATING AGREEMENT IN POLICY 19, 30 (Jane

seen since the first Gilded Age.<sup>16</sup> As Rick Hasen has explored, lobbying in particular threatens national economic welfare by facilitating rent-seeking, namely when individuals or groups, such as corporations, use lobbyists to capture government transfers.<sup>17</sup> We are, many have observed, in a second Gilded Age in which corporate power and elite business interests dominate our political system.<sup>18</sup>

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Mansbridge & Cathie Jo Martin eds., 2013); Martin Gilens & Benjamin I. Page, *Critics Argued with Our Analysis of U.S. Political Inequality. Here Are 5 Ways They're Wrong.*, WASH. POST (May 23, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-american-political-inequality-heres-5-ways-they-are-wrong/>; see also Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 80, 83 (2014) (observing that organizations like the American Legislative Exchange Council (ALEC) have stepped into the gap created by lack of information and funding for research faced by lawmakers, “resulting in a multimillion dollar [lobbying] industry funded largely by corporate dollars,” such that legislators “depend on private actors to do their job, thus introducing concerns about corruption, equality, and the like”). But see Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSPS. POL. 1053, 1054 (2015); Omar S. Bashir, *Testing Inferences About American Politics: A Review of the “Oligarchy” Result*, 2 RSCH. & POL. 1, 5 (2015); J. Alexander Branham, Stuart N. Soroka & Christopher Wlezien, *When Do the Rich Win?*, 132 POL. SCI. Q. 43, 51–52 (2017).

<sup>16</sup> See, e.g., *Share of the Nation’s Income Earned by the Top 1 Percent*, N.Y. TIMES (Oct. 25, 2011), <http://www.nytimes.com/interactive/2011/10/26/nyregion/the-new-gilded-age.html> (reporting “[i]n 1928, the top 1% earned 23.94% of the nation’s income,” a percentage not rivaled until 2007, when “[t]he top 1% earned 23.5% of the nation’s income”); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 331–32 (Arthur Goldhammer trans., 2017) [hereinafter PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY*]; Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCI. 838, 838 (2014); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q.J. ECON. 1, 1–2 (2003) [hereinafter Piketty & Saez, *Income Inequality in the United States*].

That graph of income moderated to some extent after the 2008 market crash, with the top 1% receiving 22.5% of the nation’s income in 2012, while the bottom 90% received less than half. See Drew Desilver, *5 Facts About Economic Inequality in 2014*, PEW RSCH. CTR. (Jan. 7, 2014), <http://www.pewresearch.org/fact-tank/2014/01/07/5-facts-about-economic-inequality/> (explaining “U.S. income inequality is the highest [it has] been since 1928”).

The COVID-19 pandemic has fueled even more entrenched inequality, including along race lines. See, e.g., Aaron van Dorn, Rebecca E. Cooney & Miriam L. Sabin, *COVID-19 Exacerbating Inequalities in the U.S.*, 395 LANCET 1243, 1243 (2020).

<sup>17</sup> See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 229 (2012). John Coates has similarly explored how corporate First Amendment litigation may act “as a form of rent seeking.” John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 224, 271 (2015).

<sup>18</sup> See Joseph Fishkin, *Courts and Constitutional Political Economy*, LPE PROJECT (July 24, 2021), <https://lpeproject.org/blog/courts-and-constitutional-political-economy/>; GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 242–43 (2017); Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 6 (2018); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1456, 1461 (2016) [hereinafter Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*]; Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1287–88 (2016); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 166, 178 (2016); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 690 (2014); David Singh Grewal & Jedediah

One reason why corporate money in politics has increased inequality, as political scientists Martin Gilens and Benjamin I. Page have demonstrated, is because “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”<sup>19</sup> Critically, this includes influence on “large-scale public policies that mediate distributional outcomes,”<sup>20</sup> such as tax policy and financial regulation.

This development has taken place over roughly the last forty years, as business interests have become increasingly politically active. As Jacob Hacker and Paul Pierson have described, the organized ability of business interests to influence distributional laws and policies has dramatically increased since the 1970s, while the political power of middle-class interests, key among them unions, has sharply declined.<sup>21</sup> Because law and policy shape and structure markets in ways that influence distributional outcomes, this shift has enhanced the political power of groups that favor policies that fuel windfalls for the elite and thereby inequality itself. The result has been the now defining feature of the U.S. economy: the hyper-concentration of wealth and income among a small fraction of the elite, which has been maintained and increased since approximately 1980 despite recessions, booms, and repeated shifts in the partisan control of Congress and the presidency.<sup>22</sup> The political influence of economic elites, in other words, has been central to the advent of the second Gilded Age.

But how do corporate money and influence flow into politics? Earlier work on corporate political activity has focused on its antecedents, tactics, and effects.<sup>23</sup> The circumstances in which firms engage in particular forms of

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Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 3, 21 (2014); Jack Balkin, *The First Amendment in the Second Gilded Age*, 66 *BUFF. L. REV.* 979, 979, 980 (2018). For work in political science and economics on this point, see *supra* note 15 and *infra* note 23.

<sup>19</sup> Gilens & Page, *Testing Theories*, *supra* note 15, at 565.

<sup>20</sup> Hacker & Pierson, *Public Policy*, *supra* note 15, at 154.

<sup>21</sup> *Id.* at 171–82.

<sup>22</sup> See, e.g., *id.* at 155–59; PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY*, *supra* note 16, at 439 fig.10.5; Piketty & Saez, *Income Inequality in the United States*, *supra* note 16.

<sup>23</sup> For work on the effects of corporate political activity on economic inequality, see HACKER & PIERSON, *HOW WASHINGTON MADE THE RICH RICHER*, *supra* note 15; on lobbying, see Jason W. Ridge, Amy Ingram & Aaron D. Hill, *Beyond Lobbying Expenditures: How Lobbying Breadth and Political Connectedness Affect Firm Outcomes*, 60 *ACAD. MGMT. J.* 1138, 1139 (2017); Sean Lux, T. Russel Crook & David J. Woehr, *Mixing Business with Politics: A Meta-Analysis of the Antecedents and Outcomes of Corporate Political Activity*, 37 *J. MANAGEMENT* 223, 223–25 (2011); on campaign contributions, see Rajesh K. Aggarwal, Felix Meschke & Tracey Yue Wang, *Corporate Political Donations: Investment or Agency?*, 14 *BUS. & POL.* 1 (2012); Joshua L.

political activity—for example, when and why they spend treasury funds to lobby, use their PACs to make contributions, or engage in other, less traceable, forms of politics—has received relatively little academic attention.<sup>24</sup>

Despite prominent calls by politicians, shareholders, and the public for policies to rein in, expose, and democratize corporate political activity, it remains unclear how campaign finance regulations—whether imposed formally by governments or shareholders, or informally by other corporate stakeholders—affect corporate political practices.

This Article fills that gap by contributing an original empirical assessment of when and why corporations deploy different methods of political influence. It identifies a key reason why corporate donations shift from more transparent and direct (“lighter”) channels to less traceable and more indirect (“darker”) channels of political engagement. We find that corporate political activity grows darker—that is, shifts towards less traceable forms of activities that are subject to less rigorous or no forms of public disclosure—as a firm’s public reputation falls. The disquieting result is that the corporate political interventions that are likely to be the most controversial are also those most likely to be deployed in ways the public is least able to monitor.

In so finding, this Article identifies a novel limit on the flow of corporate money into the political process. In *The Hydraulics of Campaign Finance Reform*, Sam Issacharoff and Pam Karlan argued that “money, like water, has to go somewhere. It never really disappears into thin air.”<sup>25</sup> That is, they maintained that money, like water, will find a path around potential obstacles. Our findings point to a limitation on that seeming inevitability. We provide new empirical detail on both *when* and *why* corporate money flows into politics, providing important information that policy makers can use to craft effective campaign finance reforms. Further, our research indicates that requiring public disclosure creates concrete limits on the ability of corporate actors to influence politics—limits which plausibly attend to political giving more broadly. As the

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Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 545–56 (2016); on covert grassroots mobilization, see EDWARD T. WALKER, GRASSROOTS FOR HIRE: PUBLIC AFFAIRS CONSULTANTS IN AMERICAN DEMOCRACY 109, 129 (2014); Thomas P. Lyon & John M. Maxwell, *Astroturf: Interest Group Lobbying and Corporate Strategy*, 13 J. ECON. & MGMT. STRATEGY 561, 563–64 (2004).

<sup>24</sup> *But see* Werner, *supra* note 13; Micky Tripathi, Stephen Ansolabehere & James M. Snyder, Jr., *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobbying Disclosure Act*, 4 BUS. & POL. 131 (2002).

<sup>25</sup> Sam Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

reputation of corporate contributors falls (consider, for example, the toxic reputation of Enron), politicians who would otherwise accept their donations, lobbying support, or other support begin to view association with such distasteful donors as a political liability. Donors who are seen as political liabilities have increasing difficulty finding politicians who will take their money, as long as that money can be traced—just as corporate backlash in the post-insurrection period suggests the reverse to be true.

Consider the case of British Petroleum and the Deepwater Horizon disaster, which killed eleven people and created the largest oil spill in U.S. history.<sup>26</sup> Less than one month after BP's platform exploded in the Gulf of Mexico in April 2010, U.S. Representative Charles Gonzalez returned a campaign contribution from the firm, arguing that "it makes good sense on everyone's part for a company PAC to suspend campaign money during a period of scrutiny."<sup>27</sup> A corporate donor's bad reputation, or politicians' belief that the donor's reputation is politically harmful, constrains traceable corporate political activity. Politicians, in other words, want to avoid traceable associations with publicly unpopular firms. In this way, the power of a business in politics is conditional on its public reputation.

Taking Issacharoff and Karlan's insight seriously—that "political money, like water, is part of a broader ecosystem" and "[u]nderstanding why [money] flows where it does . . . requires thinking about the system as a whole"<sup>28</sup>—we conclude that broader and more rigorous disclosure requirements would limit the absolute amount of corporate money in politics. Our research thus identifies a meaningful limit to Issacharoff and Karlan's analogy. Money will indeed go *somewhere*, but, unlike water, *traceable* money will not go around all obstacles. Rather, traceable money will stay in the pocket of a corporate donor with whom no politician is willing to be seen.

Our findings support broader and more robust disclosure requirements, including with regard to corporate lobbying and individual donations by CEOs, C-suite executives, and directors. The latter recommendation is responsive to

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<sup>26</sup> See, e.g., *Deep Water Horizon—BP Gulf of Mexico Oil Spill*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> (Dec. 4, 2020); Darryl Fears, *The Toxic Reach of Deepwater Horizon's Oil Spill Was Much Larger—And Deadlier—Than Previous Estimates, a New Study Says*, WASH. POST (Feb. 12, 2020, 4:53 PM), <https://www.washingtonpost.com/climate-environment/2020/02/12/toxic-reach-deepwater-horizons-oil-spill-was-much-larger-deadlier-than-previous-estimates-new-study-says/>.

<sup>27</sup> Dave Levinthal, *How Corporate PACs Handle Bad PR*, POLITICO (July 30, 2012), <https://www.politico.com/story/2012/07/how-corporate-pacs-deal-with-bad-pr-079161>.

<sup>28</sup> See Issacharoff & Karlan, *supra* note 24, at 1708.

firms' use of their CEOs to make less traceable donations through the obfuscation of employer relationships in disclosures. To give two notable examples from our research, Jamie Dimon, Chairman and CEO of JPMorgan Chase—the largest and most valuable bank in the United States—made one campaign contribution in relation to which his occupation was listed merely as “Investor.” Microsoft’s then-CEO Steve Ballmer made a contribution related to which his employment information was undisclosed—described only as “requested.”<sup>29</sup> The key ingredient to effective reforms, our research demonstrates, is *traceability*—that is, the extent to which political spending creates an easily observable tie between the spender (the firm) and the recipient (the politician or regulator).

The Article proceeds in two parts. Part I details why firms shift to darker channels of political engagement. It provides new and needed empirical details about the hydraulics of corporate political activity. We begin by cataloguing the tactics of corporate political activity and detailing the underlying variance in the traceability of the dominant tactics in firms' political repertoires. We then describe two empirical investigations into how corporate reputation drives firms and campaigns to interact through darker (less traceable) tactics. The first demonstrates that firms adjust their political spending to favor less traceable political tactics as their reputation falls. The second demonstrates that campaigns are more likely to obfuscate the employer of CEOs that represent less reputable firms. Together, these studies support our claim that political spending tends to flow through less traceable channels as a firm's reputation falls.

Part II uses these empirical findings to interrogate the relationship between traceability mandates of money in politics and theories of the First Amendment. While the Supreme Court has prominently struck down restrictions on money in politics in cases such as *Citizens United v. Federal Election Commission*,<sup>30</sup> it has repeatedly upheld a variety of disclosure requirements. The Court has said, for example, that disclosure requirements are less constitutionally problematic than restrictions on political spending because disclosures “may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ . . . and ‘do not prevent anyone from speaking.’”<sup>31</sup> Transparency, the Court has explained, helps citizens “make informed choices in the political marketplace”<sup>32</sup> and can deter donors from “hiding behind dubious and misleading names.”<sup>33</sup>

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<sup>29</sup> See *infra* Part I.C.3.

<sup>30</sup> 558 U.S. 310 (2010).

<sup>31</sup> *Id.* at 366 (citation omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)).

<sup>32</sup> *McConnell*, 540 U.S. at 197 (citation omitted).

<sup>33</sup> *Id.*

The Court's support for mandated disclosures, however, is changing. At the same time, in part because the courts have so aggressively struck down substantive campaign finance regulations, policy makers are increasingly turning to disclosures, which have in turn become a growing target of First Amendment litigation. In *Americans for Prosperity Foundation v. Bonta*, the Court held facially unconstitutional a California law that required non-profit organizations to disclose their major donors to state officials.<sup>34</sup> In so doing, the Court both increased the "exacting scrutiny" that has typically applied to politics-related disclosures and expanded the scope of the types of disclosures subject to narrow tailoring.<sup>35</sup> How far will the Court extend exacting scrutiny or the narrow tailoring requirement? To mandated disclosures about the political activity of for-profit corporations? To disclosure requirements outside of the donor or political sphere? To intermediate scrutiny more broadly? We will have to wait and see. Regardless, Justice Sotomayor's comment in her dissent that the decision "marks reporting and disclosure requirements with a bull's-eye" appears apt.<sup>36</sup> And as E.J. Dionne observed in response to the decision, "the world of dark-money politics is poised to become darker still."<sup>37</sup> These developments make it ever more important to assess and theorize the justifications for campaign finance related disclosures.

Responding to this need, our research suggests an empirically grounded justification for traceability mandates that is consonant with the deep logic of the First Amendment: traceability alters politicians' behavior, causing them to act more consistently with public opinion. Traceability mandates make politicians more accountable to the people in the very way that the Supreme Court has maintained that, in an objective sense, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."<sup>38</sup> Moreover, our data demonstrates that this accountability operates through politician, rather than donor, action—thus decreasing fears of chilling donor speech. At the same time, we document evidence that traceability policies, and the reduction of darker corporate money in politics they produce, promote the public's *belief* that their views shape the political system in the subjective

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<sup>34</sup> 141 S. Ct. 2373, 2389 (2021).

<sup>35</sup> The Court held that "exacting scrutiny" now requires not only a "substantial relation" between the mandated disclosure and a "sufficiently important governmental interest," as it has historically, but also "narrow tailoring." *Id.* at 2383; see Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 224, 229–33 (2021).

<sup>36</sup> *Ams. for Prosperity Found.*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

<sup>37</sup> E.J. Dionne, Jr., *Oligarchy Day at the Supreme Court*, WASH. POST (July 1, 2021, 5:51 PM), <https://www.washingtonpost.com/opinions/2021/07/01/oligarchy-day-supreme-court/>.

<sup>38</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010).

sense that Robert Post has theorized acts as the basis of the First Amendment's democratic purpose.<sup>39</sup>

Traceability mandates, in short, advance both objective and subjective forms of democratic accountability. We therefore argue that such policies not only further core First Amendment values but also should be required by the First Amendment itself. By connecting empirical research to First Amendment theory, we hope to expand the scope of reasonable views of what the freedom of speech allows and requires—or, in the words of Jack Balkin, to broaden what counts as “on-the-wall” interpretations of the reach and meaning of the Speech Clause.<sup>40</sup>

This Article additionally brings empirical work to bear on central questions of the growing literature on law and political economy<sup>41</sup> and the First Amendment's libertarian turn.<sup>42</sup> In Part II.A, we focus First Amendment theory

<sup>39</sup> ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 62 (2014).

<sup>40</sup> JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 179–82 (2011).

<sup>41</sup> See *supra* note 18; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *CARDOZO L. REV.* 1621, 1672–73, 1687 (2018); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 716–17 (2017); Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, *supra* note 18, at 1447–55; Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 *U. PA. J. CONST. L.* 419, 421–23 (2015); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 *YALE L.J.* 616, 619–30 (2019); JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 119–41 (2017).

<sup>42</sup> See, e.g., Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 *COLUM. L. REV.* 2161, 2165–66 (2018); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 *COLUM. L. REV. ONLINE* 179, 182 (2018); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 *STAN. L. REV.* 1389, 1392–93 (2017); Amanda Shanor, *The New Lochner*, 2016 *WIS. L. REV.* 133, 139–40 (2016); Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 *SUP. CT. REV.* 233, 235–36 (2016); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 *HARV. L. REV. F.* 165, 166–67 (2015); Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 *NOTRE DAME L. REV.* 381, 382 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 *WM. & MARY L. REV.* 1199, 1218 (2015); Julie E. Cohen, *The Zombie First Amendment*, 56 *WM. & MARY L. REV.* 1119, 1120 (2015); Coates, *supra* note 17, at 223–24; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *COLUM. L. REV.* 1453, 1464 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *LAW & CONTEMP. PROBS.* 195, 208 (2014); Tamara R. Piety, *Commentary, Citizens United and the Threat to the Regulatory State*, 109 *MICH. L. REV. FIRST IMPRESSIONS* 16, 22 (2010); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, *NEW REPUBLIC* (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-firstamendmentevade-regulation>. For important early work, see Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 *VA. L. REV.* 1, 2 (1979); Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1386–88 (1984); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 378–79 (1990); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 *U. COLO. L. REV.* 935, 955 (1993). But see Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 *CALIF. L. REV.* 335, 354 (2017).

on questions of economic power and develop a theory of how the First Amendment might be reconceived to further democratic and egalitarian ends, acting not only as a right *from* government intervention but also as a right *to* accountable democratic government.

Part II.B provides concrete policy reforms that would increase the traceability of corporate political activity, including strengthening existing lobbying disclosures by requiring a firm to identify the specific legislators and regulators that it meets with, as well as enhancing campaign finance disclosures for key individuals associated with the firm by requiring these individuals to include a standard firm identifier in their individual-level disclosures. We additionally recommend that firms be required to disclose their contributions to non-profit 501(c) corporations, so as to put an end to truly dark corporate money.

We conclude that adopting reforms to increase the traceability of corporate political activity would further the First Amendment goal of ensuring public officials are accountable to the people.

## I. WHY FIRMS SHIFT TO DARKER MONEY: THE EMPIRICS OF CORPORATE POLITICAL ACTIVITY

To engage their political environments, firms draw upon a rich tactical repertoire, including campaign contributions, lobbying, and grassroots mobilization. We begin this Part by describing firm strategies and detailing the disclosure regimes governing each in order to illustrate how they vary in terms of traceability. Next, we present our theoretical argument as to why corporate reputation drives firms toward less traceable options for political engagement. We end this section with a set of empirical investigations that test our arguments.

### A. *Unpacking the Repertoire of Corporate Political Activity*

Amy Hillman and Michael Hitt have described firms' corporate political activity as comprised of three underlying "generic" strategies: financial, informational, and constituency.<sup>43</sup> The first category, financial strategies, occurs when firms build connections to public policymakers by hiring former politicians or by providing assistance to active politicians' electoral

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(arguing in favor of forms of First Amendment libertarianism); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60–61 (2014).

<sup>43</sup> Amy J. Hillman & Michael A. Hitt, *Corporate Political Strategy Formulation: A Model of Approach, Participation, and Strategy Decisions*, 24 ACAD. MGMT. REV. 825, 834–35 (1999).

campaigns.<sup>44</sup> The best-known vehicle for financial corporate political activity is the corporate-linked PAC. PACs deploy funds that are segregated from the corporate treasury to support political agendas by making contributions to political candidates or parties.<sup>45</sup> Firms can create and control the giving of a PAC, which typically takes the firm's name (for example, the Exxon Mobil Corporation Political Action Committee), as well as pay its operating costs, but firms are not allowed to contribute treasury resources directly to the PAC.<sup>46</sup> Rather, firm-linked PACs can only raise funds from a restricted class of individuals related to the firm such as executives, managers, shareholders, and their families.<sup>47</sup> PACs can contribute up to \$5,000 per candidate per election and face no limit on their overall giving.<sup>48</sup> PACs can also contribute similarly limited amounts to political parties and other political committees aiming to influence electoral outcomes.<sup>49</sup>

Since January 2010, as a result of *Citizens United*, firms have been able to use money from their treasuries to make independent political expenditures and donate to committees—including “Super PACs” and 501(c) non-profit organizations—that make independent political expenditures.<sup>50</sup> If a firm donates to a 501(c) organization, such as a 501(c)(6) trade association, disclosure of the firm's contribution is only required if specifically earmarked for electoral activity.<sup>51</sup> By allowing this extremely covert form of financial engagement, in which traceability is effectively eliminated, *Citizens United* produced truly dark corporate money in the electoral context.<sup>52</sup>

The second generic category of corporate political activity, informational strategies, principally revolves around the lobbying of government officials, including legislators and regulators. Lobbying is the process by which firms share policy and politically relevant information with officials to encourage them to take actions consistent with the firms' goals. Prior research highlights the strategic value of lobbying by evincing its association with stronger accounting-based measures of firm performance and awarded government contracts.<sup>53</sup> There are no limits on the amount firms can spend on lobbying and,

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<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g.,* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 321 (2010).

<sup>46</sup> 52 U.S.C. § 30118 (2002).

<sup>47</sup> *Citizens United*, 558 U.S. at 321.

<sup>48</sup> 52 U.S.C. § 30116 (2002).

<sup>49</sup> *Id.*

<sup>50</sup> *Citizens United*, 558 U.S. at 365.

<sup>51</sup> Werner, *supra* note 13, at 2429.

<sup>52</sup> For further discussion on the use and value of this tactic, see *id.* at 2432, 2439.

<sup>53</sup> Matthew D. Hill, G. Wayne Kelly, G. Brandon Lockhart & Robert A. Van Ness, *Determinants and*

as we discuss below, the disclosure regime governing lobbying is quite weak compared to campaign contributions.

The third and final category of corporate political action, constituency strategies, involves firms exploiting connections between their operations and public policymakers' electoral constituencies.<sup>54</sup> For example, firms can leverage geographic coverage of electoral districts through the location of plants and employees in an attempt to gain influence over policymakers.<sup>55</sup> Firms can also engage in "astroturfing," wherein they hire public relations firms to assist in the construction of a grassroots campaign to lobby public policymakers indirectly through ostensibly disinterested citizens or shell corporations.<sup>56</sup> In general, constituency-based political strategies are far less regulated than either financial or informational strategies. Firms can spend unlimited amounts from their treasuries on such campaigns, which tend to be expensive (limiting their attractiveness as a tactic). Firms are not obligated to disclose either their engagement in these activities or the amount they spend. Thus, these campaigns, like trade association activity, can be extremely difficult to observe and trace.<sup>57</sup>

Firms can also engage in politics individually or collectively.<sup>58</sup> On this front, we recognize that less reputable firms might shift to more collective informational lobbying via an industry trade association (a 501(c)(6) business league) or on *ad hoc* coalition to limit the traceability of their political activity. Much like the "dark money" created by *Citizens United*, as well as constituency strategies, shifts toward collective strategies are so untraceable as to be unobservable. That is to say, regulations of corporate political action neither require firms to disclose formal or informal coalitions they join nor require trade associations to report their members.

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*Effects of Corporate Lobbying*, 42 FIN. MGMT. 931, 933, 944 (2013); see also Ridge et al., *supra* note 23, at 1140–42 (finding that lobbying assists in the procurement of government contracts).

<sup>54</sup> Hillman & Hitt, *supra* note 43, at 834–35.

<sup>55</sup> See, e.g., ALEX HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS 18–20 (2018); Matilde Bombardini & Francesco Trebbi, *Votes or Money? Theory and Evidence from the US Congress*, 95 J. PUB. ECON. 587, 588 (2011); Barry D. Baysinger, Gerald D. Keim & Carl P. Zeithaml, *An Empirical Evaluation of the Potential for Including Shareholders in Corporate Constituency Programs*, 28 ACAD. MGMT. J. 180, 184–85, 197 (1985).

<sup>56</sup> Lyon & Maxwell, *supra* note 23, at 563; WALKER, *supra* note 23, at 108–22; Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 203–04 (2017).

<sup>57</sup> It is not possible to systematically examine constituency-based strategies since they are not subject to disclosure. However, due to their costs (whether moving facilities or employees to relevant constituencies or building a grassroots organization with the aid of a public relations consultancy), we believe that they are employed more as a tactic of last resort than a regular form of core political action. For information on the characteristics of firms that employ grassroots campaigns, as well as information on the effectiveness and costs of these campaigns, see WALKER, *supra* note 23.

<sup>58</sup> See Hillman & Hitt, *supra* note 43, at 831.

However, in the U.S. context, it is important to note that collective forms of political engagement are unlikely to play a central role in firms' political repertoire for three reasons. First, the vast majority of corporate political action occurs at the firm level and not the industry level.<sup>59</sup> Second, most trade associations are composed of market rivals, limiting their ability to "speak with one voice" politically.<sup>60</sup> And third, most industry-level trade associations do not focus on political activity.<sup>61</sup>

### *B. The Role of Corporate Reputation in the Selection of Political Tactics*

Research has to date been largely agnostic about how firms select between the different forms of political activity available to them. Instead, research typically defers to an assumption that a firm is free, within the limits of the law and the demands of market and nonmarket competition, to select which tactics to employ and the degree of resources to dedicate to each according to its own strategic needs and priorities.<sup>62</sup> We argue, however, that this understanding of corporate political strategy overestimates the degree of agency and latitude that many firms enjoy. An emerging body of work suggests that political access and influence disproportionately accrue to firms with a strong reputation, defined here as the public's general perception of a firm's social performance. For example, Timothy Werner has empirically demonstrated that firms with better reputations are more likely to be invited to participate in the policymaking process by giving testimony in Congressional hearings.<sup>63</sup> And Caroline Flammer

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<sup>59</sup> Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. POL. 1191, 1194–95, 1197 (2001).

<sup>60</sup> See Michael L. Barnett, *One Voice, But Whose Voice? Exploring What Drives Trade Association Activity*, 52 BUS. & SOC'Y 213, 214 (2012).

<sup>61</sup> See LYN SPILLMAN, *SOLIDARITY IN STRATEGY: MAKING BUSINESS MEANINGFUL IN AMERICAN TRADE ASSOCIATIONS* 195 (2012). Umbrella groups, such as the U.S. Chamber of Commerce or the National Small Business Association, are active and influential both in politics and constitutional litigation and have been for decades. See, e.g., Shanor, *supra* note 42, at 144, 158 (discussing the role of umbrella groups in First Amendment litigation); ALYSSA KATZ, *THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE* (2015); Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, U.S. Chamber of Commerce (Aug. 23, 1971), <https://scholarlycommons.law.wlu.edu/powellmemo/1>; Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS INVESTIGATES (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus/>. Their relative share of business political activity, however, is smaller than that of firms in aggregate. See generally OPENSECRETS, *infra* note 93 (presenting collected data on the contributions of various groups to PACs and lobbying, including those made by trade associations).

<sup>62</sup> See, e.g., Jean Philippe Bonardi, Amy Hillman & Gerald Keim, *The Attractiveness of Political Markets: Implications for Firm Strategy*, 30 ACAD. MGMT. REV. 397, (2005).

<sup>63</sup> Timothy Werner, *Gaining Access by Doing Good: The Effect of Sociopolitical Reputation on Firm Participation in Public Policymaking*, 61 MGMT. SCI. 1989, 1996, 2008 (2015); see also Heli Wang & Cuili Qian, *Corporate Philanthropy and Corporate Financial Performance: The Roles of Stakeholder Response and*

offers complementary evidence that reputable firms are systematically given preference in the federal government's allocation of procurement contracts, a critical source of income for many firms.<sup>64</sup>

Other recent research suggests that events that bring an organization's reputation into question can constrain targeted firms' engagement in politics because of politicians' reticence to associate with a compromised firm. Evidencing this, Mary-Hunter McDonnell and Timothy Werner have demonstrated that firms that experience a reputational shock in the form of a consumer boycott are less likely to be awarded government procurement contracts or invited to participate in congressional hearings.<sup>65</sup> They argue that politicians become less receptive to firms experiencing reputational threats because of an increase in perceived associative risk, or the "politicians' perceived likelihood of accruing incidental damage by virtue of their mere association" to the compromised firm.<sup>66</sup>

Taken together, this research suggests that the political marketplace is more constrained for less reputable firms. Political stakeholders are warier to associate with these firms because of perceived associative risk, or the risk that the politician's own reputation and prospects could suffer through an open association. The operative mechanism at play, stigma by association, is supported by a broad body of research demonstrating that stigma can travel through social networks, producing adverse effects for actors who are connected to a compromised organization, regardless of their innocence or complicity.<sup>67</sup> Critically, however, the spread of stigma by association depends on an association being open and observable. Accordingly, to avoid stigma by association, actors endeavor to limit their overt associations with disreputable entities, eschewing affiliations with entities deemed deviant or illegitimate. In

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*Political Access*, 54 ACAD. MGMT. J. 1159, 1150, 1178 (2011) (providing evidence in a sample of Chinese firms that philanthropic activities translate to greater performance benefits for firms that have a greater need for political support, implying that enhanced public approval engendered by corporate charity affords firms with greater access to political resources they require for superior performance).

<sup>64</sup> Caroline Flammer, *Competing for Government Procurement Contracts: The Role of Corporate Social Responsibility*, 39 STRATEGIC MGMT. J. 1299, 1316–17 (2018).

<sup>65</sup> Mary-Hunter McDonnell & Timothy Werner, *Blacklisted Businesses: Social Activists' Challenges and the Disruption of Corporate Political Activity*, 61 ADMIN. SCI. Q. 584, 586–87 (2016).

<sup>66</sup> *Id.* at 587.

<sup>67</sup> See, e.g., Stefan Jonsson, Henrich R. Greve & Takako Fujiwara-Greve, *Undeserved Loss: The Spread of Legitimacy Loss to Innocent Organizations in Response to Reported Corporate Deviance*, 54 ADMIN. SCI. Q. 195, 223–24 (2009); Mary-Hunter McDonnell, Kate Odziemkowska & Elizabeth Pontikes, *Bad Company: Shifts in Social Activists' Tactics and Resources after Industry Crises*, 32 ORG. SCI. 1033, 1034, 1047 (2021) (finding that NGOs that had openly collaborated with British Petroleum prior to the 2010 Deepwater Horizon oil spill suffered from significantly decreased contributions after the spill).

the context of corporate political activity, politicians' demonstrated preference for associations with reputable firms is, we contend, an instantiation of this broader phenomenon.

In theorizing how firms might strategize around reputational constraints on their political strategies, we begin with the assumption that, all else equal, firms would like to engage in overt, traceable forms of political activity, either for benefits gained from these tactics on their own or because these tactics can augment the effectiveness of more indirect forms of political activity.<sup>68</sup> Traceable political activity is beneficial on its own because, by demonstrating a firm's clear linkage to political stakeholders, it sends valuable signals to political and market participants. For example, political science research shows that disclosed campaign contributions produce greater access to legislators.<sup>69</sup> Corporate political activity that creates a readily observable tie between a firm and a politician or party also demonstrates to the market that political stakeholders are willing to openly engage with the firm, providing a valuable signal of the firm's capability to minimize political risk. Evidencing this, one study found that financial market participants bid up the share prices of firms that support Congressional candidates via their PACs.<sup>70</sup>

Traceable corporate political activity is also valuable insofar as it may augment the efficacy of other tactics. For example, campaign contributions are recognized to function as an entry fee that opens the doors necessary for the effective administration of less traceable tactics like lobbying.<sup>71</sup> Further,

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<sup>68</sup> We focus on the benefits of traceable political activity from the firm's perspective. From the politician's perspective, all else equal, traceable corporate political action is also preferred for two reasons. First, contributions to the politicians' campaign coffers are under the control of his or her campaign and not that of a third party. Second, spending from a politician's own campaign account on political advertising goes further than that from a third party, as media companies are required to sell airtime to a candidate at the lowest available rate but are allowed to charge third-party actors whatever they choose. See Melissa Yeager, *The High Cost of Television Ads for Super PACs*, SUNLIGHT FOUND. (Dec. 22, 2015, 2:52 PM), <https://sunlightfoundation.com/2015/12/22/the-high-cost-of-television-ads-for-super-pac/>.

<sup>69</sup> Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 554 (2016); see also Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 810 (1990) (finding that legislators pay increased attention to their contributors' priorities).

<sup>70</sup> Michael J. Cooper, Huseyin Gulen & Alexei V. Ovtchinnikov, *Corporate Political Contributions and Stock Returns*, 65 J. FIN. 687, 718–19 (2010); see also Pat Akey, *Valuing Changes in Political Networks: Evidence from Campaign Contributions to Close Congressional Elections*, 28 REV. FIN. STUD. 3188, 3190 (2015) (finding, in a regression discontinuity design employed on a sample of close, off-cycle congressional elections, that firms that supported winning candidates through PAC contributions experienced a three percent higher abnormal return than those that had backed the losers).

<sup>71</sup> Gerald Keim & Asghar Zardkoohi, *Looking for Leverage in PAC Markets: Corporate and Labor Contributions Considered*, 58 PUB. CHOICE 21, 21–28 (1988).

traceable tactics provide the firm with optimal control over its political strategy, in contrast to tactics that involve third parties such as social welfare organizations, trade associations, or so-called “Super PACs,” all of which introduce limits on firm-level control of political spending.<sup>72</sup>

While we see traceable forms of corporate political activity as most beneficial to firms, we expect that these tactics are less available to disreputable firms, given politicians’ reticence to associate with them. Instead, to the degree that politicians will engage with such firms, it will be through less traceable forms of political activity that allow for the obfuscation of the politician or party being influenced. Given varying disclosure requirements, the tactics within a firm’s political repertoire vary considerably in their traceability, or the extent to which they produce observable ties between the firm and the politicians or parties it seeks to support and influence. Tactics that do not create an observable tie between a firm and a particular politician or political party are “darker” in the sense that they obfuscate relationships between firms and the politicians with whom they associate, ameliorating the associative risks involved in the interaction. Politicians are likely to be more open to interacting with a less reputable firm through tactics that do not publicly tie them to the firm. We therefore hypothesized that firms with weaker reputations will favor less traceable forms of political activity.

In testing this hypothesis, we assume that, to some degree, more covert forms of corporate political activity (i.e., lobbying) can act as a substitute for, not just as a complement to, more overt forms of political action (i.e., campaign contributions). Although lobbying is typically viewed as the provision of information to incumbent legislators designed to shape public policy outcomes, much of the information shared with these incumbents is relevant to *politics* and not just policy.<sup>73</sup> As the co-editor of the American Bar Association’s *Lobbying Manual* notes, this politically relevant information can include the results of research reports and public opinion polling related to the political consequences of different policy options,<sup>74</sup> and theoretical models of the lobbying process view this information as a part of a “legislative subsidy” or a “matching grant of costly

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<sup>72</sup> Barnett, *supra* note 60; Werner, *supra* note 13, at 2430–31.

<sup>73</sup> ANTHONY J. NOWNES, TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT) 26–28 (2006); FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 124 (2009).

<sup>74</sup> Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL’Y REV. 10, 11–12 (2008); see THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE (Rebecca H. Gordon & Thomas M. Susman eds., 5th ed. 2016) (noting Thomas M. Susman as a co-editor).

policy information, *political intelligence*, and labor to the enterprises of strategically selected legislators.”<sup>75</sup> Importantly, historical research on the farm lobby reveals that politically relevant information provided interest groups with a competitive advantage in terms of drawing legislators’ attention that they could not gain with policy relevant information alone.<sup>76</sup> And, as Cary Coglianese and Alex Acs argue, business groups can employ the provision of political information, as opposed to policy information, to persuade via intimidation even unelected policymakers to enact policies friendly to firms.<sup>77</sup> Finally, recent empirical work suggests that when firms hit the statutory caps on campaign contributions from their affiliated PACs, large spillovers occur into other forms of political activity, including lobbying.<sup>78</sup>

*C. Testing the Proposition That as a Firm’s Reputation Falls, It Will Shift Towards Darker, Less Traceable Political Tactics*

In the section that follows, we elaborate on the variation in the traceability of the two dominant tactics in firms’ political repertoire: PAC contributions and lobbying. Though firms have a number of other, less traceable forms of political activity available to them post-*Citizens United*, we focus on the pre-*Citizens United* period when these two systematically observable tactics were the primary ones available to firms. Rather than presenting a limit on our analysis, this time restriction allows us to make more solid inferences with regard to firms’ behavior, as there are no truly dark or completely untraceable electoral tactics that we are unable to observe prior to 2010.

*I. Variance in the Traceability of Common Political Tactics*

Corporate PAC contributions, compared to lobbying, are subject to a more stringent disclosure regime. The Federal Election Campaign Act of 1971 and its 1976 Amendments govern PACs and set their contribution limits.<sup>79</sup> The names and occupations of all individuals who contribute more than \$200 in a year to a

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<sup>75</sup> Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006) (emphasis added).

<sup>76</sup> See JOHN MARK HANSEN, GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919-1981, at 13-17 (Benjamin I. Paige ed., 1991).

<sup>77</sup> Cary Coglianese & Alex Acs, *Influence Through Intimidation: Evidence from Business Lobbying and the Regulatory Process 4* (July 19, 2021) (unpublished manuscript) (on file at Penn Law: Legal Scholarship Repository).

<sup>78</sup> Adam Fremeth, Brian Kelleher Richter & Brandon Schaufele, *Spillovers from Regulating Corporate Campaign Contributions*, 54 J. REG. ECON. 244, 245, 247 (2018).

<sup>79</sup> Fed. Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. § 302 (1972); Fed. Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 486 § 112 (1976).

PAC (along with their total contribution amount) must be disclosed quarterly to the Federal Election Commission (FEC), and PACs must also report all of their contributions.<sup>80</sup> Although funds for corporate PACs must be raised from a restricted class of individual donors with ties to the firm, the PAC, once funded, takes on the corporate organizational identity, and PAC officers who are determined by the firm have full control over which candidates and party organizations receive its contributions.<sup>81</sup> Information about which politicians and party groups receive which firm-affiliated PAC contributions is publicly available through the FEC.<sup>82</sup>

As a result of this fairly stringent disclosure regime, PAC contributions forge especially clear ties between firms and the politicians they seek to influence. PAC contributions are also often taken by critics to imply some degree of actual influence, insofar as they are perceived to establish a *quid pro quo* relationship between a firm and a political candidate.<sup>83</sup> For example, Senate Majority Leader Mitch McConnell's most significant campaign contributor is AT&T.<sup>84</sup> When McConnell cast his vote in favor of a landmark telecommunications deregulation bill, pro-democracy organization Common Cause protested by pointing to AT&T's political support as evidence that the industry was "'buying' the legislation."<sup>85</sup> Because PAC contributions create such clear links between companies and the individual politicians who they support, we expect PAC contributions to be especially conducive to stigma-by-association, making them less available to firms with compromised reputations.

Compared to PAC contributions, lobbying efforts are subject to a disclosure framework that reflects a relative lack of transparency and traceability. Since 1995, lobbyists have been required to disclose information such as their employer, the identity of their clients (if different from their employer), how much their clients spend in the aggregate (if more than \$10,000), and the general target and objective of their lobbying efforts.<sup>86</sup> However, lobbyists tend to

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<sup>80</sup> *Individual Contributions: Reporting on Candidate Forms*, U.S. FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/filing-reports/individual-contributions/> (last visited Nov. 16, 2021).

<sup>81</sup> See Fed. Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. § 302 (1972) (governing the organization of political committees).

<sup>82</sup> See *Committees*, U.S. FED. ELECTION COMM'N, <https://www.fec.gov/data/browse-data/?tab=committees> (last visited Nov. 16, 2021).

<sup>83</sup> See Randall Kroszner & Thomas S. Stratmann, *Congressional Committees as Reputation-Building Mechanisms*, 2 BUS. & POL. 35, 36-37 (2000).

<sup>84</sup> Josh Israel, Aaron Mehta & Caitlin Ginley, *Mitch McConnell: Fueled by Tobacco and Whiskey*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2010/06/08/4016/mitch-mcconnell-fueled-tobacco-and-whiskey>.

<sup>85</sup> *Id.*

<sup>86</sup> Lobbying Disclosure Act of 1995, Pub. L. No. 104-65 109 Stat. 691 § 4.

disclose this information in extremely simplistic terms (for example, “target: U.S. Senate; issue: tax”), such that it is virtually impossible to pinpoint with certainty the specific politicians with whom firms are interacting through lobbying.<sup>87</sup> Thus, the disclosures identifying which politicians the firms are lobbying and what specific issues or policy provisions they are pursuing is far from transparent.

The regulatory structure for lobbying makes it less traceable. While one can ascertain which firms are attempting to influence political constituencies, given they must report total monies spent, lobbying does not establish observable connections between a firm and the specific politicians it is attempting to influence. We accordingly anticipated that politicians would be more receptive to engaging with less reputable firms via lobbying than campaign finance, especially given that politicians may still benefit from hearing policy and politically relevant information from less reputable firms.<sup>88</sup> At the same time, more reputable firms may have less need for lobbying given that they can make campaign contributions without tarring politicians via guilt by association and are endowed with greater opportunities to share policy-relevant information through open channels, such as invited appearances in Congressional hearings.<sup>89</sup> Applying our primary hypothesis to firms’ selection from among their two most fundamental tactics of political action, we accordingly expected that as a firm’s reputation increases, it will rely less heavily on lobbying as compared to PAC contributions, and vice versa.

## 2. *Study 1: The Relationship Between Corporate Reputation and the Traceability of Political Activity*

We began exploring the relationship between corporate reputation and the traceability of political activity using a longitudinal panel that tracked all members of the S&P 500 from 1999 to 2009. This sample includes a diverse representation of the largest firms within different major industries in the United States. Members of the S&P 500 are leaders within their respective fields and tend to be publicized heavily by the media, such that they have attained the level of public recognition necessary for reputation to be meaningful. Our sample period is informed by data limitations. We began the panel in 1999 because firm-

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<sup>87</sup> For example, in a fourth quarter 2019 lobbying report, Alpine Group Partners, LLC reported receiving an income of \$30,000 from Facebook, Inc. to lobby the “U.S. Senate [and] U.S. House of Representatives” on “spectrum issues.” Lobbying Report from Alpine Group Inc. (2019) (on file with the Clerk of the U.S. H.R.), <https://disclosurespreview.house.gov/ld/ldxmlrelease/2019/4A/301129950.xml>.

<sup>88</sup> NOWNES, *supra* note 73, at 26–28.

<sup>89</sup> Werner, *supra* note 63, at 1992, 1996.

level lobbying expenditures were not reliably reported prior to 1998 due to the passage of the Lobbying Disclosure Act (LDA) in 1995.<sup>90</sup> We ended our panel in 2009 because the data source we used to construct our measure of reputation—the Kinder, Lydenberg, Domini & Co. (KLD) Statistical Tool for Analysis of Trends (STATS) ratings—underwent a significant reformation of its reporting and measurement practices in 2010.

In 2010, *Citizens United* introduced a significant shock to corporate political activity by opening up the availability of a number of previously illegal, covert pathways to political influence. Most importantly, firms can now make unlimited, untraceable, and indirect expenditures to political campaigns through 501(c) organizations. Ending our sample period prior to the passage of *Citizens United* allows us to examine the relative traceability of firms' political activities during a period in which their primary electoral tactics were systematically observable. As we discuss below, by analyzing two significant accidental disclosures of secret corporate donations—to the American Legislative Exchange Council in 2011 and the Republican Governors Association in 2014—we were able to test whether the findings we observed for systematically observable tactics from 1999 to 2009 are likely to apply to dark corporate money after *Citizens United*.

*a. Dependent Variable: Tactical Traceability*

The data for our dependent variable come from two sources. First, data on campaign contributions come from the FEC, which collects transaction-level data on contributions to federal elections in the United States.<sup>91</sup> Second, data on lobbying are sourced from the Center for Responsive Politics' OpenSecrets database, which collects information from mandatory lobbying disclosures filed with the U.S. Senate and executive agencies.<sup>92</sup>

To determine firm PAC contributions, we hand-matched firms to their linked PACs and then summed all the contributions made by the PAC in each year. Although the FEC requires corporate-linked PACs to list the corporations they are connected to, the FEC does not provide a link between their data sets and any standard unique firm identifier. In the few cases in which a firm had multiple linked PACs, we aggregated contributions across all these PACs in each year. We collected data on lobbying by similarly hand-matching OpenSecrets's lobbying data to the firms in our sample.

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<sup>90</sup> See *id.* at 1995.

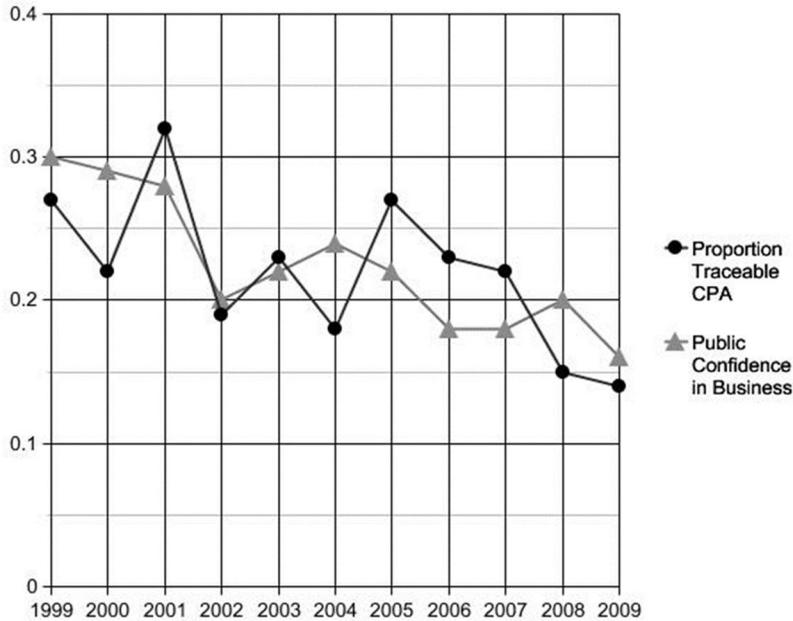
<sup>91</sup> See U.S. FED. ELECTION COMM'N, <http://www.fec.gov> (last visited Nov. 16, 2021).

<sup>92</sup> See OPENSECRETS, <http://www.OpenSecrets.org> (last visited Nov. 16, 2021).

Our dependent variable approximates firms' balancing of more and less traceable political tactics by examining each firm's relative reliance on PAC contributions (which are more traceable) as compared to lobbying expenditures (which are less traceable). The variable is constructed as total annual PAC contributions divided by the sum of annual PAC contributions and annual lobbying expenditures. Given the construction of our dependent variable, our model excludes firm-years in which a firm had no reported political activity in terms of either PAC contributions or lobbying ( $n=381$ , comprising roughly 15% of firm-years in the sample for which data is otherwise complete).

To provide more context around our dependent variable, it is instructive to consider trends in firms' historic balance of lobbying and PAC contributions within their overall strategic implementation of political action. Below, Figure 1 depicts historic trends in the traceability of the political activity of our sample members across the full period of our study. The figure also depicts trends in public approval of big business, as reported in Gallup's annual poll measuring confidence in institutions.

Figure 1. Historical Trends in the Proportion of Traceable Corporate Political Activity (CPA) Employed by the S&P 500, and General Public Confidence in Business<sup>93</sup>



As the figure shows, firms have always spent more money on lobbying relative to PAC contributions. In Figure 1, the Proportion Traceable CPA line captures the proportion of traceable political activity (lobbying and PAC contributions) that comprised of PAC contributions. That line reaches its peak in the figure in 2001, at a proportion of traceable CPA of just over 0.3, at which point lobbying expenditures would be just under 0.7. However, the emphasis on lobbying in the average firm's political portfolio has increased over time, suggesting a general trend toward less traceable political activity. In 2009, at the end of the decade of data tracked in the figure, the Proportion Traceable CPA was just under 0.15, indicating that the approximate remaining 0.85 was spent on lobbying. This trend corresponds closely with falling levels of public approval of business over the period of our study. These trends provide

<sup>93</sup> Our sample only includes politically active firms that had observable lobbying or PAC expenditures in a given year. The public confidence in business figures reflect the percentage of people who answered "Great Deal" or "Quite a Lot" in the annual Gallup Poll of public confidence in big business. *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Nov. 16, 2021).

anecdotal evidence of our theory, insofar as we would expect political markets to become less receptive to traceable corporate political activity as public approval of business decreases.

Our proxy for traceability rests on an assumption that firms' relative reliance on lobbying versus PAC contributions—two tactics that vary in traceability and can be observed—reliably corresponds with their likely reliance on less traceable political tactics that cannot be observed (such as contributions made through 501(c)(4) or 501(c)(6) non-profits or employee or constituency campaigns). As a validity check of this assumption, we explored whether firms that were recently exposed as contributors to 501(c) organizations post-*Citizens United* did in fact vary significantly along our traceability measure. Using recently published lists of accidental disclosures of corporations that had secretly given to the American Legislative Exchange Council (ALEC) in 2011 and Republican Governors Association (RGA) in 2014,<sup>94</sup> we can compare whether these truly “dark money” contributors also favored lobbying relative to PAC contributions in their observable political expenditures.

In simple *t*-tests comparing the mean levels of our measure of traceability across all public companies at the time of each of these incidents, we found that non-contributors (those firms that were not exposed in the accidental disclosures as employing dark money) had substantially higher levels of traceable political activity. Disclosed sponsors of ALEC had a traceability score that was 50% lower than non-sponsors ( $p=0.002$ ); the traceability of disclosed RGA sponsors was 32% lower than for non-sponsors ( $p=0.034$ ).

These tests provide additional evidence that our proxy for the traceability of corporate political activity is a valid indicator of firms' reliance on truly dark political action and that the measure has continuing validity in the post-*Citizens United* era, when more options for truly dark corporate political action exist.

#### *b. Independent Variables*

Following prior research, we create a proxy for corporate reputation using the annual domain-specific ratings reported in the KLD Statistical Tool for Analysis of Trends (STATS).<sup>95</sup> KLD is an independent social research firm that

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<sup>94</sup> Werner, *supra* note 13, at 2425 (listing RGA sponsors); Ishva Minefee, Mary-Hunter McDonnell & Timothy Werner, *Reexamining Investor Reaction to Corporate Political Activity: A Replication and Extension of Werner (2017)*, 42 STRATEGIC MGMT. J. 1139, 1142 (2020) (noting ALEC sponsors).

<sup>95</sup> See, e.g., Mary-Hunter McDonnell, Brayden G. King & Sarah A. Soule, *A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges*, 80 AM. SOC. REV. 654, 663 (2015).

relies on various internal and external sources, including corporate disclosures and media reports, to assess and numerically score sampled firms' performance along seven social dimensions: (1) community, (2) corporate governance, (3) diversity, (4) employee relations, (5) environment, (6) human rights, and (7) product.<sup>96</sup> This proxy aligns well with common conceptions of corporate reputation as a construct rooted in generalized perceptions of a firm's past performance along various dimensions.<sup>97</sup>

Our proxy for a firm's overall *reputation* is the net KLD score, constructed by subtracting the total number of reported "concerns" for a firm in the seven rated dimensions in a given year from the total number of reported "strengths." To separately assess the extent to which the relationship between reputation and corporate political activity is driven by *reputational concerns* and *reputational strengths*, we also run models that include the sum of concerns and strengths as separate variables.<sup>98</sup>

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<sup>96</sup> MCSJ, MSCI KLD 400 SOCIAL INDEX METHODOLOGY (May 2018), [https://www.msci.com/eqb/methodology/meth\\_docs/MSCI\\_KLD\\_400\\_Social\\_Index\\_Methodology\\_May2018.pdf](https://www.msci.com/eqb/methodology/meth_docs/MSCI_KLD_400_Social_Index_Methodology_May2018.pdf).

<sup>97</sup> See, e.g., Alex Bitektine, *Toward a Theory of Social Judgments of Organizations: The Case of Legitimacy, Reputation and Status*, 36 ACAD. MGMT. REV. 151, 160–61 (2011); Brayden G. King & David A. Whetten, *Rethinking the Relationship Between Reputation and Legitimacy: A Social Actor Conceptualization*, 11 CORP. REPUTATION REV. 192, 197 (2008); Donald Lange, Peggy M. Lee & Ye Dai, *Organizational Reputation: A Review*, 37 J. MGMT. 153, 159 (2011).

We acknowledge that many critics raise concerns regarding KLD's precision, subjectivity, and transparency, as well as the use of individual subcategory ratings from the KLD database. See, e.g., Sana Shihchi Chiu & Mark Sharfman, *Legitimacy, Visibility, and the Antecedents of Corporate Social Performance: An Investigation of the Instrumental Perspective*, 37 J. MGMT. 1558, 1569–70 (2011); Aaron K. Chatterji, David I. Levine & Michael W. Toffel, *How Well Do Social Ratings Actually Measure Corporate Social Responsibility?*, 18 J. ECON. & MGMT. STRAT. 125, 127 (2009). However, these criticisms focus on the use of KLD data as an *objective* or *precise* measure of corporate social performance and not as a proxy measure of firm reputation among stakeholders. KLD scores also have demonstrated practical relevance to a wide variety of non-market strategic domains; evidence exists of (1) the ratings' predictive power in understanding outcomes like the extent of corporate political access, see Werner, *supra* note 63; (2) the severity of corporate punishment in civil lawsuits, see Mary-Hunter McDonnell & Brayden G. King, *Order in the Court: How Firm Status and Reputation Shape the Outcomes of Employment Discrimination Suits*, 83 AM. SOC. REV. 61, 63 (2018); and (3) the likelihood of winning government procurement contracts, see Flammer, *supra* note 64. Compared to other commonly used proxies for firms' overall reputations (especially rankings based on Fortune's most admired companies), our use of KLD's dataset (1) decreases the possibility that firms' economic performances will dominate other dimensions of their reputations, see Y. Sekou Bermis, Edward J. Zajac & Brayden G. King, *Under Construction: How Commensuration and Management Fashion Affect Corporate Reputation Rankings*, 25 ORG. SCI. 591, 591–92 (2014); and (2) limits the mismatch that exists between intra-industry peers' evaluations of firms and the general public's views of firms, see Brad Brown & Susan Perry, *Removing the Financial Performance Halo from Fortune's "Most Admired" Companies*, 37 ACAD. MGMT. J. 1347, 1350 (1994).

<sup>98</sup> See Werner, *supra* note 63, at 1996; Caroline Flammer & Pratima Bansal, *Does a Long-Term Orientation Create Value? Evidence from a Regression Discontinuity*, 38 STRATEGIC MGMT. J. 1827, 1834 (2017).

*c. Controls*

Across all models, we include a battery of control variables that are likely to be associated with the form or extent of a firm's political activity. All variables are lagged unless otherwise noted. First, insofar as traceable tactics are dangerous because of their visibility, firms may be more likely to rely on less traceable tactics when they are monitored more heavily by stakeholders, which increases the likelihood that any visible corporate political activity will be noticed. We account for this possibility by including separate proxies for public attention and shareholder-specific monitoring. To capture the former, we control for *media prominence*, which is the number of times the firm's name appeared in the headline or first paragraph of articles in the *New York Times* or *Wall Street Journal* in a given year. To capture variance in shareholder attention to social issues, we include the number of *social-issue proxy proposals* submitted at the firm in a given year.<sup>99</sup>

The political tactics that a company uses are likely affected by the party that it seeks to influence. Republicans are generally perceived as being friendlier to business interests and may face less political ramifications for associating with less reputable firms.<sup>100</sup> This suggests that firms may face less constraints in using traceable tactics to influence their legislative environment during periods in which the government is more heavily controlled by Republicans. To control for this possibility, we include a variable, *Republican control*, that is coded "0" during years when Democrats controlled both the House and Senate, 0.5 during years when the Republicans controlled either the House or Senate, and 1 during years when the Republicans controlled both the House and Senate.

Politicians are more likely to be wary of the associative risk attached to traceable corporate political activity during election years, when the adverse electoral ramifications of an observable association with a compromised firm are likely to be more salient and consequential. Accordingly, firms' ability to use traceable tactics may be more constrained during election years. We account for this possibility with a binary control, *election year*, that is coded "1" during years with regularly scheduled elections.

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<sup>99</sup> This variable is characterized by a natural lag because proxy proposals must be submitted to a firm 180 days in advance of its annual meeting (typically held in the first or second quarter of a calendar year). Accordingly, we use the number of proposals that appear on the firm's proxy in the same year as that in which the dependent variable is measured.

<sup>100</sup> McDonnell & Werner, *supra* note 66, at 601 (finding that boycotts result in a smaller increase in refunded campaign contributions if they target firms that primarily support Republican candidates).

We controlled for varying firm performance by including *return on assets (ROA)*. As proxies for corporate size, we include the *logged number of employees* as well as *logged assets*. Associations with larger firms are likely to be more visible, which might affect politicians' receptivity to traceable tactics. Controlling for the number of employees is especially important in this context because, as members of the restricted class allowed to make contributions to a firm's PAC, employees represent the likeliest correlate with total campaign contributions. Further, insofar as employees represent meaningful voting constituencies, a firm's employee base may serve as a proxy for a firm's ability to pursue a constituency strategy in lieu of either a financial or informational strategy.<sup>101</sup>

Firms vary in the extent to which their performance is directly affected by the formal political environment, as well as the extent to which they are at risk of governmental intervention. Each of these considerations is likely to affect whether firms engage in political activity and the likelihood that a firm will respond to constraints on its political actions with tactical adjustments. We control for this in two ways. First, we include a fixed effect for industry (using the Fama-French 12 industry classification).<sup>102</sup> Second, recognizing that firms that sell goods or services to the government are more dependent on governmental relationships, we include a binary control that is coded "1" if the firm is among the top 100 *federal contractors* in a given year, as per the government's annual Federal Procurement Report.<sup>103</sup>

Companies are generally creatures of strategic habit and routine, so a firm's present political tactics are, in part, a function of the tactics it has historically favored. To account for this, we include controls capturing the firm's previous *PAC contributions* and *lobbying expenditures*, averaged across the prior three years. Finally, to account for systematic temporal patterns in giving across years that result from the increasing cost of lobbying and elections (and legal changes to contribution limits), we include fixed effects for each *year*. The inclusion of annual fixed effects also helps to account for unobserved shifts in perceptions of corporate social responsibility that might affect the construction of KLD's reputation scoring system over time.

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<sup>101</sup> See Bombardini & Trebbi, *supra* note 55, at 588 (describing the relationship between campaign contributions and "the number of employees [with]in a [given] sector").

<sup>102</sup> See *Data Library: Current Research Returns*, KENNETH R. FRENCH, [https://mba.tuck.dartmouth.edu/pages/faculty/ken.french/data\\_library.html](https://mba.tuck.dartmouth.edu/pages/faculty/ken.french/data_library.html) (last visited Nov. 16, 2021).

<sup>103</sup> *Data Bank: Federal Procurement Reports*, SAM.GOV, <https://sam.gov/reports/awards/static> (last visited Nov. 16, 2021).

Descriptive statistics and correlations for all variables are displayed in Table 1.

Table 1. Descriptive Statistics and Correlation Matrix

	Mean	S.D.	Min	Max	1	2	3	4	5	6	7	8	9	10	11	12	13	
1 Traceability	0.187	0.271	0	1														
2 Reputation Score (Composite)	-0.161	3.589	-11	15	-0.06													
3 Reputation Strengths	3.950	3.384	0	22	-0.18	0.65												
4 Reputation Concerns	4.111	2.922	0	18	-0.13	-0.48	0.36											
5 Social-Issue Shareholder Proposals	0.594	1.089	0	12	-0.07	-0.14	0.26	0.48										
6 Media Attention (Logged)	1.097	0.600	0	2.811	-0.13	0.18	0.45	0.30	0.29									
7 Past PAC Giving	683803	1082832	0	1.17E+07	0.04	-0.06	0.26	0.38	0.28	0.31								
8 Past Lobbying Expenditures	6248850	10300000	0	9.56E+07	-0.21	0.01	0.40	0.46	0.40	0.41	0.61							
9 Federal Contractor	0.091	0.288	0	1	-0.06	-0.04	0.15	0.22	0.18	0.20	0.28	0.33						
10 Logged Assets	4.239	0.552	2.974	6.340	-0.01	-0.01	0.40	0.48	0.31	0.44	0.47	0.51	0.14					
11 Logged Employees	1.523	0.487	0	3.279	0.01	0.09	0.37	0.32	0.32	0.52	0.35	0.34	0.28	0.43				
12 ROA	0.041	0.066	-0.653	0.467	-0.01	0.15	0.08	-0.09	0.12	0.03	0.01	0.04	-0.02	-0.11	0.01			
13 Election Year	0.548	0.498	0	1	-0.03	0.00	-0.01	-0.02	0.03	-0.03	0.03	0.00	-0.01	-0.02	0.00	0.02		
14 Republican Control	0.688	0.401	0	1	0.08	-0.01	-0.11	-0.12	-0.10	0.12	-0.07	-0.10	0.01	-0.05	0.03	-0.06	0.09	

#### d. *Methods and Results*

We test our models using a longitudinal panel generalized least squares regression with a firm-year level of analysis. We replicate all models using both fixed-effects and random-effects estimations. The random-effects estimation can be interpreted as a between-firm comparison of the relationship between reputation and tactical traceability; the fixed-effects approximation captures the extent to which within-firm changes in reputation affect the traceability of political activity. The fixed-effects model has the added benefit of reducing concerns about endogeneity by controlling for all time-invariant firm characteristics that might be driving the observed relationship between reputation and tactical traceability.<sup>104</sup> Unless otherwise noted, all independent and control variables are lagged one year to ensure temporal precedence to mitigate concerns of reverse causality. Across all models, we accounted for the non-independence of observations by clustering standard errors by firm.

Results are provided in Table 2. The models show a number of interesting findings among our control variables that warrant mentioning. We find some evidence that firms that are more heavily monitored will turn to more covert strategies in formulating their political activity, as media attention shows a negative relationship with the traceability of political activity across our random-effects models. This finding has particularly interesting policy implications, as it suggests that firms whose behaviors are more closely monitored will opt for less traceable tactics that frustrate monitors' capacity to follow their political activity. Insofar as the transparency of corporate interactions with politicians is a policy priority, this finding highlights the need for disclosure to be mandated through formal, regulatory means, given that informal monitoring appears to exacerbate the opacity of ties between firms and political constituencies.

Our controls for *election year* and *Republican control* also have particularly interesting implications. Across all models, we find that corporate political activity tends to manifest in less traceable tactics during election years. This aligns with our theory, insofar as politicians would naturally be more cautious of the reputational risks inherent in visible corporate ties when they are actively

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<sup>104</sup> Though our primary models provide evidence of the hypothesized relationship between reputation and the traceability of CPA, these models are ultimately only correlational. Recognizing that the relationship between tactical traceability and reputation might be endogenous, we sought to increase confidence in the causal role of reputation through a variety of robustness analyses, including an instrumental variables analysis and a supplemental differences-in-differences analysis that exploits consumer boycotts as a plausibly exogenous shock to corporate reputation. Given space considerations, we do not describe these analyses here, but provide full descriptions of them in an online appendix, which can be accessed at *Online Appendix*, <https://docs.google.com/document/d/1JkVNga4Q1pLHVCNxAcHII4mAkI0B0Wumec7zJfVpc7A/edit?usp=sharing> (February 5, 2021).

running for office, and problematic ties could be used to their opponents' political advantage. We also find that firms tend to prioritize traceable tactics during years in which the Republican Party is in control of Congress. This again accords with our theory, as we expect Republicans to be less wary of traceable ties to corporations given that the party is generally perceived to be friendlier to business interests. Accordingly, ties with businesses—especially less wholesome businesses—are likely to raise fewer eyebrows among Republicans' core constituencies, as compared to Democrats' core constituencies.

We test for a general relationship between a firm's reputation and the traceability of its political activity in Models 1 and 2, which implement random-effects and fixed-effects specifications, respectively. Across both specifications, we find a significant and positive relationship between a firm's composite reputation and the traceability of its political activity. Post-estimation margins analyses<sup>105</sup> of Model 1 reveal that the political traceability is roughly 25% higher for firms with a reputation score at one standard deviation above the mean, as compared to those at one standard deviation below the mean. Within the fixed-effects model, a firm that enjoys a one-standard deviation increase from the mean reputation score is predicted to increase its political traceability by roughly 14%.

To unpack these initial results with more granularity, we break KLD reputation rankings into separate scores of reputational strengths and concerns in Models 3 and 4. While we find no significant relationship between reputational strengths and political traceability in either model, we find a significant negative relationship between reputational concerns and traceability across both random- and fixed-effects models. Post-estimation margins analysis of Model 3 reveals that the traceability score of firms with reputational concerns at one standard deviation below the mean is 40% higher than that of firms with reputational concerns at one standard deviation above the mean. Within the fixed-effects model, a one standard deviation increase from the mean reputational concerns score corresponds to a roughly 17% decrease the traceability of political activity.

These initial models support our proposition that a firm's reputation predicts the relative traceability of its political spending. Further, the results show that this relationship is principally driven by firms with *negative* reputations that introduce more associative risk to the politicians that they seek to influence.

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<sup>105</sup> All reported post-estimation margins analyses are conducted with all control variables set to their mean.

Table 2. Longitudinal Panel Regressions Predicting the Proportion of Traceable Corporate Political Activity (CPA) Used by Members of the S&amp;P 500

VARIABLES	Model 1	Model 2	Model 3	Model 4
	CPA Traceability (Random Effects)	CPA Traceability (Fixed Effects)	CPA Traceability (Random Effects)	CPA Traceability (Fixed Effects)
Reputation Score (Composite)	0.006 (0.003)	0.007 (0.003)		
Reputation Strengths			0.003 (0.003)	0.004 (0.004)
Reputation Concerns			-0.010 (0.004)	-0.011 (0.004)
Social-Issue Shareholder Proposals	-0.006 (0.005)	-0.008 (0.006)	-0.006 (0.005)	-0.008 (0.006)
Media Attention	-0.028 (0.014)	-0.019 (0.015)	-0.024 (0.014)	-0.017 (0.015)
Average Past PAC Giving	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
Average Past Lobbying Expenditures	-0.000 (0.000)	-0.000 (0.000)	-0.000 (0.000)	-0.000 (0.000)
Federal Contractor	0.016 (0.018)	0.022 (0.015)	0.017 (0.018)	0.022 (0.016)
Logged Assets	0.014 (0.033)	-0.062 (0.066)	0.022 (0.035)	-0.065 (0.066)
Logged Employees	-0.035 (0.029)	0.048 (0.063)	-0.028 (0.029)	0.054 (0.063)
ROA	0.015 (0.052)	0.035 (0.053)	0.006 (0.054)	0.028 (0.054)
Election Year	-0.033 (0.013)	-0.033 (0.013)	-0.031 (0.013)	-0.031 (0.013)
Republican Control	0.084 (0.021)	0.065 (0.024)	0.068 (0.021)	0.047 (0.024)
Fixed Effects for Year	YES	YES	YES	YES
Fixed Effects for Industry	YES	NO	YES	NO
Constant	0.175 (0.123)	0.388 (0.241)	0.164 (0.124)	0.424 (0.239)
Observations	2,232	2,232	2,232	2,232

### 3. *Study 2: The Relationship Between Corporate Reputation and Obfuscation of Employer Relationships in Disclosures*

Corporate political activity is the product of a function with a supply side (the corporate giver) and a demand side (the political receiver). We have theorized that less reputable firms turn to darker political activity because of changes in the demand side: politicians are less receptive to observable ties with

disreputable firms, and therefore less reputable firms favor less traceable political tactics that do not produce observable ties. While our first empirical investigation focused on the firm-side adjustments to political traceability made in response to changes in reputation, our theory would also predict that political campaigns would avail themselves of opportunities to obfuscate ties to disreputable firms when possible. We explore this by examining the quality of political campaigns' disclosure of the employment information of CEOs from whom they accept direct political contributions. By demonstrating that contributors and campaigns exploit within-tactic opportunities to obfuscate ties to problematic firms, this second study also helps to alleviate concerns that the results obtained in Study 1 might be due to other differences in the specific tactics we observe (for example, that PAC contributions are perceived as more corrupt than lobbying).

In addition to corporate-affiliated PACs, a firm's agents, such as individual executives, can also contribute to candidates, and such contributions may be in the service of their employers even though employees cannot be legally reimbursed for (nor legally pressured into) such activity. Prior to 2003 and the implementation of the Bipartisan Campaign Reform Act (BCRA), individuals could contribute a maximum of \$1,000 to any one candidate in an election cycle.<sup>106</sup> In January 2003, the contribution limit doubled to \$2,000 and was indexed to inflation going forward.<sup>107</sup> Concurrently, the amount an individual could give to a national political party in a year increased from \$20,000 to \$25,000 and the aggregate amount that any one individual could contribute across all counterparties was also increased from \$25,000 to \$95,000 per election cycle.<sup>108</sup> Both of these new limits were also indexed to inflation.<sup>109</sup>

The regulatory regime governing the disclosure of campaign contributions from individuals (and hence the tactic's traceability) is, at first glance, fairly similar to the regime governing contributions from corporate-affiliated PACs. Individual contributors must disclose the names and employment information of individuals making contributions, and campaigns are required to make their best efforts to verify this information, which ostensibly creates a public record of an association between a politician and the employers of individual donors (if one

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<sup>106</sup> Pub. L. 107-155, title III, § 307.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> On April 2, 2014 (after the end of our sample period), the Supreme Court in *McCutcheon v. Federal Election Commission* struck down biannual aggregate caps on individuals giving to candidates, PACs, and political parties. However, limits on individuals' contributions to any one counterparty remain in place. 572 U.S. 185, 192-93 (2014).

step removed from the firm itself).<sup>110</sup> However, both contributors and campaigns often obfuscate firm connections when disclosing individuals' contributions, ostensibly in an effort to decrease their traceability.

In approximately 13% of the 17,314 discreet campaign contributions that we identified in the FEC data as coming from the CEOs of firms appearing in our panel, disclosures either provided no employment information for the contributor or identified a different job title and employer than the CEO or firm. Some accomplished this by disclosing a vague occupational title for a CEO in lieu of providing the firm's name, even for prominent CEOs. For example, one campaign listed the occupation of Michael Eisner of Disney as "Business Executive" in the 2004 election cycle, and another reported that of Steve Ballmer as the CEO of the Business Software Alliance, a trade association, rather than as CEO of Microsoft in both the 2006 and 2010 cycles. One CEO in our sample is referenced in a 2006 disclosure as principally employed as a "Race Car Owner," despite his position at the helm of a \$7 billion-dollar company by market capitalization. Similarly, rather than providing the names of their contributors' employers, campaigns often disclose only that the employment information has been "requested." This tactic is used in the case of prominent CEOs that appear in our data (e.g., Microsoft's Steve Ballmer in 2006) and less well-known CEOs (e.g., Monster Worldwide's Andrew McKelvey in 2006).<sup>111</sup> As an additional check on our claim that associative risk and traceability drive the relationship between reputation and tactical selection, we argue that campaigns are more likely to obfuscate the employment information of individual contributions from CEOs that represent less reputable firms.

*a. Sample Construction and Measures*

To conduct this analysis, we began by identifying the CEO of each firm in our sample as reported in the Compustat and Execucomp datasets. If the name of a firm's CEO was unavailable in these datasets in a given year, we identified its CEO by relying on archival materials, including its annual report and coverage in the financial press. We then searched the FEC's transaction-level data of contributions made by individuals to political parties and candidates for the names of the identified CEOs. We corroborated our name-based matching by relying on the reported home address of a CEO, as provided to the FEC by

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<sup>110</sup> 11 C.F.R. § 104.8 (2021).

<sup>111</sup> See U.S. Federal Communications Commission, *Campaign Finance Data: Individual Contributions*, U.S. FED. ELECTION COMM'N, <https://www.fec.gov/data/receipts/individual-contributions/> (last visited Nov. 16, 2021).

the party receiving the contribution. We then created variables capturing the total amount of campaign contributions that a CEO made in a given year, as well as the total amount of disclosed contributions in which the CEO's employer was not accurately named in the employment field.

The dependent variable in these analyses, *CEO Contributions Obfuscated*, captures the proportion of a CEO's total contributions that were obfuscated as disclosed by the recipient campaign.

In Model 5 and Model 6 of Table 3, we reproduce the models from Table 2 with this dependent variable. All control variables are the same as in our primary models, with the addition of a lagged dependent variable to capture trends in obfuscation rates over time.

#### *b. Results*

As predicted, the results indicate that a firm's reputation significantly predicts the likelihood that a campaign will obfuscate the employment information of a CEO when accepting a personal contribution. Model 5 demonstrates that a firm's net reputation score predicts employment obfuscation. In Model 6, we break reputation into separate measures of strengths and concerns. We find that a firm's reputational concerns make employment obfuscation significantly more likely in campaign disclosures, while reputational strengths make obfuscation significantly less likely. Thus, in this setting, obfuscation that renders firm-campaign ties less traceable appears to be driven by both positive and negative cues of corporate reputation. These results provide additional support for our hypothesized mechanism, insofar as they evidence that campaigns are warier to disclose ties to disreputable firms.

Table 3. Firm Reputation and Obfuscation of Employer Ties in Disclosed Contributions from Corporate CEOs

VARIABLES	1. Proportion of CEO Contributions Obfuscated	2. Proportion of CEO Contributions Obfuscated
Reputation Score (Composite)	-0.008 (0.003)	
Reputation Strengths		-0.008 (0.004)
Reputation Concerns		0.009 (0.004)
Lagged Proportion Obfuscated	0.094 (0.044)	0.093 (0.044)
Social-Issue Shareholder Proposals	0.004 (0.009)	0.004 (0.009)
Media Attention	-0.025 (0.021)	-0.026 (0.022)
3-Year PAC Giving	-0.000 (0.000)	-0.000 (0.000)
3-Year Lobbying Expenditures	0.000 (0.000)	0.000 (0.000)
Federal Contractor	-0.074 (0.034)	-0.074 (0.034)
Logged Assets	0.030 (0.036)	0.029 (0.037)
Logged Employees	0.044 (0.037)	0.043 (0.039)
ROA	0.420 (0.136)	0.422 (0.138)
Election Year	0.005 (0.027)	0.005 (0.027)
Republican Control	0.062 (0.036)	0.064 (0.040)
Fixed Effects for Year	YES	YES
Fixed Effects for Industry	YES	YES
Constant	-0.114 (0.128)	-0.110 (0.127)
Observations	1,030	1,030

## II. THE CASE FOR MORE RIGOROUS TRACEABILITY OF CORPORATE POLITICAL ACTIVITY

Our findings demonstrate that corporate political activity grows darker—that is, shifts towards less traceable forms of activities—as firm public reputation falls. The result is that the firms whose political interventions are likely to be most controversial among the public are also those most likely to deploy their political giving in ways the public cannot monitor. In so finding, we identify limits to the hydraulics of corporate money based on firm reputation—limits which plausibly attend to political giving more broadly. These empirical findings support broader and more robust disclosure requirements of corporate political activity, including with regard to corporate lobbying and individual donations by CEOs and executives. Our findings demonstrate that the key ingredient to effective reforms is *traceability*. Absolute levels of traceable money in politics are limited by donor reputation. This is because open association with disreputable donors is seen by fundraising *politicians* as a liability, and so politicians reject or avoid those donations. As light is shed on channels of darker money, and links to donors can be traced, donor reputation limits the donations that politicians will accept.

There are, moreover, only so many things that are of potential value to politicians (money donations, in-kind donations, donations of information, and useful labor in the context of lobbying, such as running a study or drafting a bill that the politician would otherwise pay for or staff herself). As methods of contribution become less traceable, they become more expensive to the donor. Consider contributions made by a firm via its PAC to a politician directly versus contributions made by a firm via its treasury to a Super PAC that then spends indirectly on behalf of the firm's favored candidate. The former activity allows the politician to buy advertising at a discounted rate, while the latter activity is subject to market rates—thus, the cost of this form of political engagement increases as the method becomes less direct.<sup>112</sup> The firm in this example gets more bang for its buck with more direct forms of contribution. Because the funds of contributing firms are limited, reducing un- and less-traceable avenues of contribution through rigorous disclosure requirements meaningfully constrains corporate donations. Greater and more rigorous disclosure of campaign contributions thus has the potential to limit the absolute amount of corporate money in politics.

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<sup>112</sup> Yeager, *supra* note 68.

A. *Greater Traceability of Corporate Political Activity Would Enhance Democratic Accountability*

This section addresses the significance of our findings for First Amendment theory and practice. First, it explains how the reforms articulated in Part II.B are consistent with existing precedent on political process-related disclosures and disclaimers and the “informational function” that they serve—if critically operating by way of politician, not citizen or donor, action. Second, this Part details how greater traceability of corporate political activity would enhance democratic accountability in the very way that the Supreme Court has long heralded as a, if not the, central goal of the First Amendment’s protection of political speech. That is, we argue that increasing the traceability of corporate political activity advances the *reason* the Court has previously found information provided by election-related disclosures to be important and constitutionally valuable: because they provide a mechanism by which representatives are held accountable to the people. Third, this Part discusses evidence that suggests increased traceability and the resultant decrease in absolute levels of corporate money in politics would likely foster the public’s belief that officials are accountable to the people, theorized by Robert Post to be the meaning of the First Amendment’s accountability goal. Finally, we begin to develop a theory of how the First Amendment might be reconceived to further democratic and egalitarian ends, and act not only as a right *from* government intervention but a right *to* accountably democratic government. For these reasons, we argue that reforms detailed in Part II.B would not only further First Amendment values, but are also required by them.

In this analysis, we stack the deck against ourselves. We assume for present purposes that the freedom of speech protects lobbying in a manner analogous to political spending. Although the Supreme Court has not yet reached the question, some lower courts,<sup>113</sup> scholars, and court watchers have made such an assumption. Elizabeth Garrett, Ronald Levin, and Theodore Ruger have argued, for example, that the Lobbying Disclosure Act of 1995 is “primarily justified on the ground that it combats political corruption” and is questionable under the Supreme Court’s campaign finance jurisprudence.<sup>114</sup> Rick Hasen has developed

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<sup>113</sup> See, e.g., *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir. 2010) (holding that the right to spend personal funds for campaign speech is not limited to candidates and applies equally “to individuals and organizations who are not themselves candidates”); *Brinkman v. Budish*, 692 F. Supp. 2d 855, 863–64 (S.D. Ohio 2010) (applying the reasoning in *Citizens United*, which held limits on corporate donations to political campaigns unconstitutional, in holding that a statute that prohibited uncompensated lobbying was unconstitutional).

<sup>114</sup> Elizabeth Garrett, Ronald M. Levin & Theodore Ruger, *Constitutional Issues Raised by the Lobbying*

an important national economic welfare rationale for lobbying regulations on the grounds that following the Supreme Court’s “deregulatory campaign finance jurisprudence culminating in *Citizens United*,” lower courts are likely to find lobbying regulations unconstitutional if justified on anti-corruption grounds.<sup>115</sup> This assumption is not unrealistic, especially in light of the Supreme Court’s current make up and the First Amendment’s larger libertarian turn.<sup>116</sup>

This Part develops an empirically grounded justification for regulations that enhance the traceability of corporate money in politics, from soup to nuts, including lobbying. These reforms take the form of disclosures that link, and make public and observable, corporate money and those to whom it flows.

*1. Traceability Mandates Are Consistent with Existing Precedent and the Reason the Court Has Found Election-Related Disclosures Constitutional*

The Supreme Court has long treated election-related disclosures, like those we recommend here, as different than limits on speech or money in politics.<sup>117</sup> It has historically applied “exacting scrutiny,” which, prior to *Americans for Prosperity*, required a “substantial relation” between a disclosure requirement and a “sufficiently important” government interest.<sup>118</sup> Now, it also requires narrow tailoring.<sup>119</sup> By contrast, the Court applies strict scrutiny, which requires the government to prove that the law “furthers a compelling interest and is narrowly tailored to achieve that interest,” to laws that burden political speech.<sup>120</sup> Disclaimer and disclosure requirements are less problematic from a First Amendment perspective, the Court has explained.<sup>121</sup> Although they “may burden the ability to speak, . . . they ‘impose no ceiling on campaign-related activities,’ and ‘do not prevent anyone from speaking.’”<sup>122</sup>

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*Disclosure Act*, in THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE 197, 201 (William V. Luneburg et al. eds., 4th ed. 2009).

<sup>115</sup> Hasen, *supra* note 17, at 195.

<sup>116</sup> Although the assumption that the Court would treat lobbying regulations in line with its campaign finance jurisprudence seems reasonable, Maggie Blackhawk (née McKinley) undertakes a historical excavation of the petition clause, which weighs against this conclusion. See McKinley, *infra* note 181, at 1136.

<sup>117</sup> See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (considering election-related disclosures and ceilings on campaign spending and affording the latter more constitutional protection).

<sup>118</sup> See *id.* at 64; *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010).

<sup>119</sup> *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021).

<sup>120</sup> *Citizens United*, 558 U.S. at 340.

<sup>121</sup> *Id.* at 366–67.

<sup>122</sup> *Id.* (citations omitted) (first quoting *Buckley*, 424 U.S. at 64, then *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 201 (2003)).

The Court has found that disclosures are justified based upon the government's "informational interest" in "provid[ing] the electorate with information' about the sources of election-related spending."<sup>123</sup> Transparency, the Court has explained, can help citizens "make informed choices in the political marketplace,"<sup>124</sup> deter donors from "hiding behind dubious and misleading names,"<sup>125</sup> and "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."<sup>126</sup> The Court notes that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information" and "minimizes the potential for abuse of the campaign finance system."<sup>127</sup>

The Supreme Court has recognized a similar asymmetry between restrictions and disclosures with regard to lobbying, observing that it "has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself."<sup>128</sup> The Court validated the disclosures required by the Federal Regulation of Lobbying Act of 1946 in *United States v. Harriss* in 1954.<sup>129</sup> In so doing, it focused on the informational function of disclosures to politicians in maintaining the integrity the political process:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . . Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how

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<sup>123</sup> *Id.* at 367, 369 (quoting *Buckley*, 424 U.S. at 66); see *McConnell*, 540 U.S. at 196; Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 665–66 (2012) (describing the Court's shift to the informational interest).

<sup>124</sup> *McConnell*, 540 U.S. at 197 (citation omitted).

<sup>125</sup> *Id.* (citation omitted).

<sup>126</sup> *Buckley*, 424 U.S. at 67.

<sup>127</sup> *McCutcheon v. FEC*, 572 U.S. 185, 223–24 (2014).

<sup>128</sup> *Citizens United*, 588 U.S. at 369.

<sup>129</sup> *United States v. Harriss*, 347 U.S. 612, 625 (1954).

much. It acted . . . to maintain the integrity of a basic governmental process.<sup>130</sup>

*Harriss* indeed analogized lobbying disclosures to “the restraint[s] resulting from criminal libel laws”<sup>131</sup> prior to *New York Times Co. v. Sullivan*<sup>132</sup>—restraints on speech, in other words, that had then long been considered constitutionally permissible.<sup>133</sup>

On these accounts, disclosures related to money in politics are constitutionally valuable and subject to laxer review than restrictions because they provide information to voters and politicians, which promotes the integrity of the political process.

The traceability mandates advocated in the next subpart are in line with those the Court has deemed permissible on this most basic (if empirically questionable) informational account. They do not limit the amount of donations that anyone can give, or that politicians can accept, and they accomplish the very sorts of informational purposes the Court has previously identified.

Even despite *Citizens United* and *Doe v. Reed*'s relatively recent approval of politics-related disclosures,<sup>134</sup> mandatory disclosures are becoming an increasingly key site of conflict in money in politics policy disputes and litigation. This is in part because litigation to strike down substantive regulations of money in politics has been so effective. Disclosure mandates remain one of

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 626.

<sup>132</sup> *N.Y. Times Co. v. Sullivan*, 378 U.S. 254, 264 (1964).

<sup>133</sup> Two years before *Harriss*, the Court in fact declared that libel was one of “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Beauharnais v. Illinois*, 343 U.S. 250, 255–56 (1952) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). See generally Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (theorizing the social foundation of the common law of defamation as a space in which civility norms are inculcated and developed—a process, Post argues, upon which democratic norms and the public sphere depend).

<sup>134</sup> Ciara Torres-Spelliscy has argued, for example, that *Citizens United* and *Doe v. Reed* create a doctrinal foundation in favor of robust disclosure measures even outside of the campaign context and into issue advocacy campaigns. Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1058 (2011); see Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS 59, 61 (2010-2011); cf. Heather K. Gerken, Wade Gibson & Webb Lyons, *Rerouting the Flow of ‘Dark Money’ into Political Campaigns*, WASH. POST (Apr. 3, 2014), [https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08\\_story.html](https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08_story.html) (observing that whenever regulations make it hard for wealthy donors to donate, they find another way, and arguing that to avoid the rerouting of money in politics, and overcome dark money’s influence, Congress should work towards transparency regulation).

the few policy tools available, and challengers and regulators alike are increasingly turning to disclosure requirements.<sup>135</sup> Similar dynamics have made disclosures in commercial speech, such as nutrition labels and health and safety warnings, one of the most hotly contested First Amendment issues today and a key front in First Amendment *Lochnerism*.<sup>136</sup>

At the same time, as Abby Wood and Daniel Ortiz have observed, mandatory disclosures may not continue to be on as safe constitutional footing as many assume.<sup>137</sup> While the Court once accepted three independent constitutional justifications for disclosure, as Ortiz has traced, it now recognizes only one: an “informational interest.”<sup>138</sup> Disclosure, as he says, “now hangs on this single thread.”<sup>139</sup> Putting more pressure on that thread, the membership of the Supreme Court has changed, perhaps in ways that will make for a more disclosure-skeptical Court.<sup>140</sup> With mandatory disclosures likely to become an increasingly critical site of conflict in money in politics policy disputes and litigation, more scholarly attention must be paid to disclosures and their constitutional justifications.

There are, in addition, deep First Amendment questions about anonymity and its constitutional value. Anonymity was, of course, central to the Federalist Papers.<sup>141</sup> Or, consider *NAACP v. Alabama ex rel. Patterson*, in which the Court prohibited Alabama, on First Amendment grounds, from requiring the NAACP to disclose the names of its members in light of the “uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of

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<sup>135</sup> See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 290 (2010) (“[F]or at least some disclosure-only proponents, their endorsement of disclosure was more tactical than sincere. . . . So, too, recent litigation challenges to campaign finance laws increasingly target disclosure requirements in addition to rules limiting or barring certain finance activities.”).

<sup>136</sup> See Shanor, *supra* note 42, at 138–76 (describing shifts in litigation and doctrine under the commercial speech doctrine and their implications). In this respect, litigation and policy disputes about money in politics appear to mirror those under the commercial speech doctrine. Corporate challengers, such as the tobacco industry, first opposed restrictions on advertising and favored disclosures as less intrusive alternatives, only to later challenge the constitutionality of disclosure mandates, including health and safety warnings. *Id.* at 169.

<sup>137</sup> Wood argues that “[c]ampaign finance disclosure is under threat.” Abbey K. Wood, *Show Me the Money: “Dark Money” and the Information Benefit of Campaign Finance Disclosure* 1, 1–4 (July 2020) (unpublished manuscript under review) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3029095](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029095)); Ortiz, *supra* note 123, at 665–66.

<sup>138</sup> Ortiz, *supra* note 123, at 665–66.

<sup>139</sup> *Id.* at 666.

<sup>140</sup> Justices Gorsuch and Kavanaugh, who have been more skeptical of disclosure, replaced Justices Scalia and Kennedy, who were proponents of disclosure.

<sup>141</sup> See, e.g., Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, The First Amendment, and Campaign Finance Disclosure*, 14 WY. L. REV. 253, 256 (2014).

physical coercion, and other manifestations of public hostility.”<sup>142</sup> While the Supreme Court has likewise linked its campaign finance disclosure jurisprudence to concerns about reprisal towards donors and the chilling of their speech, it has generally been dismissive of those concerns in the campaign finance context. In *Buckley*, for example, the Court recognized that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment,” and disclosure “undoubtedly . . . will deter some individuals who otherwise might contribute.”<sup>143</sup> But absent evidence of a “reasonable probability that compelled disclosure of . . . contributors’ names will subject them to threats, harassment, or reprisals from either [g]overnment officials or private parties,” the Court has previously found the government’s informational interest sufficient to overcome concerns of chilling speech.<sup>144</sup>

The Supreme Court’s recent decision in *Americans for Prosperity Foundation v. Bonta*, however, cut new and different ground.<sup>145</sup> The case addressed a California requirement that charitable organizations that fundraise in the state disclose the identities of their substantial contributors to the state Attorney General’s office.<sup>146</sup> While the case involved the disclosure of donors to non-profit organizations, the plurality used the “exacting scrutiny” standard pulled from campaign finance law and appeared to articulate a general rule. It added a narrow tailoring requirement, usually a feature of strict scrutiny, to the “exacting scrutiny” standard.<sup>147</sup> It now appears likely that all campaign finance disclosure requirements—not only the ones that demonstrate that the plaintiffs

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<sup>142</sup> NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462, 466 (1958); *see also* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995) (upholding the right of anonymity in political pamphleteering); Talley v. California, 362 U.S. 60, 64 (1960) (invalidating a city ordinance banning anonymous leaflets); William McGeeveran, *Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 861 (2011) (arguing anonymity promotes political participation and respects “personal interests in dignity and autonomy”). We might also reflect on the anonymous op-ed by the Trump official who famously announced that “many of the senior officials in [President Trump’s] own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations. I would know. I am one of them.” *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

<sup>143</sup> *Buckley v. Valeo*, 424 U.S. 1, 64, 68 (1976).

<sup>144</sup> *McConnell v. FEC*, 540 U.S. 93, 198 (2003) (quoting *Buckley*, 424 U.S. at 74); *cf.* Pamela S. Karlan, *The “Ambiguous Giving Out”: The Complicated Roles of Disclosure and Anonymity in Political Activity*, 27 J.L. & POL. 655 (2012) (discussing the tradeoffs between anonymity and disclosure in political activity). Justice Scalia went further in *Doe v. Reed*, in which the Court upheld a Washington statute that permitted the identities of state referendum signatories to be revealed, arguing that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).

<sup>145</sup> *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

<sup>146</sup> *Id.* at 2379.

<sup>147</sup> *Id.* at 2383.

face a threat of retaliation or chill that amounts to a restriction on association—will require narrow tailoring. It remains uncertain, however, whether or to what extent the Court will require narrow tailoring for other sorts of disclosure regimes. How far will the Court extend the narrow tailoring requirement? And how will laws supported by the informational interest that has previously supported politics-related disclosures fare? Certainly, campaign finance disclosures of business organizations will now face more First Amendment litigation.

While we will have to wait and see how significant a decision *Americans for Prosperity* will turn out to be, our research suggests that increasing the traceability of corporate political activity largely, though not entirely, sidesteps the concern of chill that was central to the Court's decision. As we have demonstrated, the hydraulics of corporate political activity centrally depend on the behavior of *politicians*—and their reluctance to take donations from unpopular entities to whom they will then be tied publicly<sup>148</sup>—not the chilling of donors' interest to contribute.<sup>149</sup>

Unlike the concerns about members at issue in *NAACP v. Alabama*,<sup>150</sup> increasing the traceability of corporate political activity in the main generates concern about political consequences for the recipient politician. And *that* sort of concern has long been recognized not to be a First Amendment problem, but to further the established First Amendment value of holding officials accountable to the people.

The Supreme Court has long celebrated the First Amendment as “the guardian of our democracy,”<sup>151</sup> saying, for example, that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>152</sup> This is because “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”<sup>153</sup> The transparency provided by election-

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<sup>148</sup> Cf. Stan Oklobdzija, *Public Positions, Private Giving, Dark Money and Political Donors in the Digital Age*, 6 RSCH. & POL. 1, 6 (2019) (finding that liberal donors gave to conservatives by way of dark money possibly out of fear of backlash against their businesses or their reputations).

<sup>149</sup> Cf. Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, 15 ELECTION L.J. 302, 303–04 (2016) (finding that the “chilling effect” of disclosure is almost non-existent in an empirical study of state-level contribution data).

<sup>150</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 466 (1958).

<sup>151</sup> *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

<sup>152</sup> *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

<sup>153</sup> *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also, e.g., Citizens United*, 558 U.S. at 339 (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”).

related disclosures “enables the electorate to make informed decisions and give proper weight to different speakers and messages,” and “can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable.”<sup>154</sup>

Why does that matter? It explains why the Court has understood the First Amendment to protect disclosures in the election context differently than restrictions on political speech. Disclosures are subject to a laxer standard of review on the grounds that they facilitate, rather than stymie, the ability of the people to hold officials accountable.<sup>155</sup>

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<sup>154</sup> *Citizens United*, 558 U.S. at 370–71. Kathleen Sullivan has accordingly described mandatory campaign-related disclosure as providing “democratic accountability” gains. Kathleen Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327 (1998). She wrote:

[Disclosure] places the question of undue influence or preferential access in the hands of voters, who, aided by the institutional press, can follow the money and hold representatives accountable for any trails they don’t like. It enables the distribution of political influence to be treated as a political rather than a constitutional question.

*Id.* at 326.

<sup>155</sup> There is a similar asymmetry between how the First Amendment treats restrictions versus disclosure in the context of commercial speech. *See, e.g.*, Shanor, *supra* note 42, at 147 (noting the “sharp asymmetry between regulations that restrict commercial speech and those that compel it”); Post & Shanor, *supra* note 42, at 173 (contrasting the “reasonably related” standard for compelled disclosures with the “intermediate scrutiny” applied to restraints on commercial speech); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 877 (2015) (“[R]estrictions on commercial speech and compulsions to engage in commercial speech are constitutionally asymmetrical.”).

In the context of commercial speech, mandated factual disclosures are constitutional as long as they are “reasonably related” to an identified governmental interest and are not so “[u]njustified or unduly burdensome” as to “chill[] protected speech.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (quoting *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)). In contrast, *restrictions* on commercial speech are subject to intermediate review. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980); *see also id.* at 573 (Blackmun, J., concurring in the judgment) (referring to the Court’s analysis as “intermediate scrutiny”); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (applying heightened scrutiny to Vermont law prohibiting dissemination of commercial information); *Zauderer*, 471 U.S. at 647, 651 (applying “reasonably related” standard to mandated disclosure but *Central Hudson* test to restrictions on advertising).

The difference between these two standards reflects the fact that the “First Amendment’s concern for commercial speech is based on [its] informational function.” *Cent. Hudson*, 447 U.S. at 563. The Court stated the following:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

*Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (citations omitted); *see also, e.g.*, *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) (“[M]andated disclosure of accurate, factual, commercial information . . . furthers, rather than hinders, the First Amendment goal of the

## 2. *Traceability Would Foster Both Objective and Subjective Forms of Democratic Accountability*

We can understand the Court's reasoning to reflect an objective account of the purpose of speech in elections and perhaps of politics more broadly. The Court imagines that information related to election spending is important because it allows voters to hold officials accountable. Such information, on this understanding, literally advances democratic accountability.<sup>156</sup> As Karlan and Issacharoff describe, there are roughly two theoretical camps that undergird this sort of objective understanding of politics: (1) the pluralist-protective view that sees "the purpose of politics as the aggregation of individual or group [either pre- or post-political] preferences to enable voters either to obtain certain benefits from the government or to prevent the government from depriving them of pre-existing rights or entitlements," and (2) the contrasting republican-communitarian view that sees politics as a process of reasoned deliberation that changes people's preferences.<sup>157</sup>

On either understanding, the policy proposals we advance in the next subsection are constitutionally valuable. We have empirically linked public opinion to the actions of politicians based upon the traceability of corporate money in politics. Put differently, disclosure appears to serve a unique role in mediating politician behavior relative to corporate political activity. Disclosure ties politicians' acceptance of corporate contributions (and firms' abilities to influence politics) more solidly to (evolving) public views of firms' reputations. Traceability allows the public to more meaningfully hold officials accountable. On this richer objective account, more rigorous disclosure is justified as a First Amendment matter because it objectively serves democratic accountability.

In important respects, too, the account we provide offers an objective account that ameliorates existing tension in the Court's disclosure jurisprudence over how it conceptualizes individual political decision-making and voter use of information. Daniel Ortiz has notably observed a "deep instability" at the heart of the "informational interest."<sup>158</sup> The Court's disclosure jurisprudence, he

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discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'").

<sup>156</sup> There is considerable criticism of the effectiveness and normative desirability of the effects of disclosures, both generally and in the campaign finance context specifically. See, e.g., David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 158–59 (2018); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 54 (2014); Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 985 (2011).

<sup>157</sup> Issacharoff & Karlan, *supra* note 25, at 1723–24.

<sup>158</sup> Ortiz, *supra* note 123, at 680–81. Others have argued that the constitutional value of election and

points out, assumes that voters are rational and civically engaged, while its caselaw regarding other forms of campaign finance regulation rests on the contrary assumption that voters are “rationally ignorant of politics and civically disengaged.”<sup>159</sup> Increasing the traceability of corporate political activity avoids those concerns. Because the hydraulics of corporate political activity centrally depend on the behavior of politicians—behavior we have empirically traced—it does not rely on any particular account of voter behavior.

But the above objective accounts of political accountability are not the only significant theories about the First Amendment status of campaign finance regulation. Robert Post has prominently argued for a subjective, rather than objective, understanding of First Amendment accountability of the officials to the people, arguing that “[t]he point of First Amendment rights is . . . to guarantee that each person is equally entitled to the possibility of democratic legitimation.”<sup>160</sup> Democratic legitimation, as he defines it, “occurs when persons believe that government is potentially responsive to their views.”<sup>161</sup> Post contends that this process, as a social matter, operates through the public’s *belief* that elections select officials who are responsive to public opinion, a concept he terms “electoral integrity.”<sup>162</sup> Post states the following:

First Amendment rights protect the possibility of participating in the formation of public opinion. The hope is that government will be responsive to public opinion and thus to the communicative efforts of citizens. Elections are essential to the First Amendment because they are the principal mechanism by which government is made responsive to public opinion. If the public does not believe that elections choose officials who attend to public opinion, the link between public discourse and self-government is broken. . . . If the people do not believe that elected officials listen to public opinion, participation in

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lobbying-related disclosures, and the government interests that might justify disclosure mandates, are undertheorized. See Lear Jiang, *Note: Disclosure’s Last Stand? The Need to Clarify the “Informational Interest” Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 490 (2019); Katherine Shaw, *Taking Disclosure Seriously*, 34 YALE L. & POL’Y REV. INTER ALIA 18, 18 (2016); see also Hasen, *supra* note 17, at 195 (observing “the rationales for lobbying regulations remain undertheorized” in comparison to the rich literature on the anticorruption justification in the context of campaign contributions). *But see* Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 641 (2012) (articulating the value of listeners’ autonomy interests).

<sup>159</sup> Ortiz, *supra* note 123, at 679–80; see also *id.* at 681 (“These moves combine two incompatible notions of how individuals make political decisions. On the one hand, voters are civically engaged enough ‘to separate the wheat from the chaff’ in whatever speech they hear but, on the other, civically inert or incompetent enough to need the protection of disclosure.”).

<sup>160</sup> POST, *CITIZENS DIVIDED*, *supra* note 39, at 49.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 60.

public discourse, no matter how free, cannot create the experience of self-government.<sup>163</sup>

There is correlational data that suggests that increasing the traceability of corporate political activity would advance democratic accountability in this subjective dimension as well. International research by the Organisation for Economic Cooperation and Development (OECD) has shown that trust in government is significantly correlated with “one’s belief that one has a say in what the government does”<sup>164</sup>—that is, with the public’s belief that elected officials listen to public opinion. As absolute corporate political activity has increased, trust in government has plummeted, as has the belief that the government is responsive to the people. As the Pew Research Center reports, public trust in the U.S. government remains “near historic lows.”<sup>165</sup> That trust has fallen over the period in which concern about governmental corruption and corporate political activity has sharply increased, namely since the late 1960s.<sup>166</sup>

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<sup>163</sup> *Id.*; see also *id.* at 64 (“Electoral integrity depends upon how Americans believe their elections actually work.”). Post explains “[t]hat is why the First Amendment rights protect the opportunity of persons to participate in public discourse in a manner they regard as meaningful, which is to say in a manner adequate to their own convictions.” *Id.* at 50.

<sup>164</sup> ORG. FOR ECON. COOP. & DEV., GOVERNMENT AT A GLANCE 2019, PERCEPTION OF GOVERNMENT RESPONSIVENESS: EXTERNAL POLITICAL EFFICACY (2019), [https://www.oecd-ilibrary.org/sites/8ccf5c38-en/1/2/10/2/index.html?itemId=/content/publication/8ccf5c38-en&\\_csp\\_=40825562de64089b975c3e83eb3f6e04&itemIGO=oecd&itemContentType=book](https://www.oecd-ilibrary.org/sites/8ccf5c38-en/1/2/10/2/index.html?itemId=/content/publication/8ccf5c38-en&_csp_=40825562de64089b975c3e83eb3f6e04&itemIGO=oecd&itemContentType=book) (R<sup>2</sup>=0.77). The OECD report explains:

[The perception that government is responsive to the people] is important as people expect that their views and needs will affect the decisions taken by public institutions. . . . [This] is of paramount importance to democratic systems as it relates to the belief that political and social change are possible and that people can play a part in bringing about this change.

*Id.*

<sup>165</sup> *Public Trust in Government: 1958-2021*, PEW RSCH. CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/>. The American National Election Studies Guide to Public Opinion and Electoral Behavior shows a similar generally downward trend for American’s perception that people have a say in what government does. *External Political Efficacy Index, 1952-2020*, AM. NAT’L ELECTION STUD., <https://electionstudies.org/resources/anes-guide/top-tables/?id=117> (last visited Nov. 16, 2021).

<sup>166</sup> *Public Trust in Government*, *supra* note 165. The American National Election Studies Guide to Public Opinion and Electoral Behavior reflects a similar trend. *Trust in Government Index, 1958-2020*, AM. NAT’L ELECTION STUD., <https://electionstudies.org/resources/anes-guide/top-tables/?id=116> (last visited Nov. 16, 2021). For work on the increasing role of corporations in American politics since the late 1960s, see, for example, HACKER & PERSON, *supra* note 15. As Hacker and Person describe:

The organizational counterattack of business in the 1970s was swift and sweeping—a domestic version of Shock and Awe. The number of corporations with public affairs offices in Washington grew from 100 in 1968 to over 500 in 1978. In 1971, only 175 firms had registered lobbyists in Washington, but by 1982, nearly 2,500 did. The number of corporate PACs increased from under 300 in 1976 to over 1,200 by the middle of 1980. On every dimension of corporate political

Over this same period, darker corporate political activity increased. While limits on traceable corporate PAC contributions have not increased significantly since the adoption of amendments to the Federal Election Campaign Act in 1976, relatively untraceable firm-level lobbying expenditures (which have never been capped) have increased significantly over this time.<sup>167</sup> And, of course, in 2010, *Citizens United* affirmed firms' ability to spend true "dark money" by donating through non-profit corporations.<sup>168</sup>

Work by the OECD demonstrates a negative correlation between confidence in the national government and the perception of government corruption.<sup>169</sup> On the flipside, international data shows a strong correlation between transparency in public policymaking and public trust in politicians,<sup>170</sup> and a significant positive relationship between the perception that the government is responsive to the people and satisfaction with democracy.<sup>171</sup> This correlational data is consistent with the conclusion that increasing levels of corporate money in politics (and specifically darker forms of corporate money) negatively correlates with the public's perception that the government is responsive to the people. The data is likewise consistent with the conclusion that public perception of government responsiveness is positively correlated with transparency around money in politics.

Rigorous traceability of corporate political activity, our research suggests, would reduce disreputable corporate money in politics and perhaps overall corporate money in politics. By doing so, the rigorous disclosures we advance are likely to contribute to public trust in government and the belief that the people can influence the political process.

By identifying policy changes that (1) would objectively render politicians more responsive to public opinion and (2) likely increase the public's subjective

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activity, the numbers reveal a dramatic, rapid mobilization of business resources in the mid-1970s.

*Id.* at 118.

<sup>167</sup> See BENJAMIN C. WATERHOUSE, *LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA* 18 (2014) (detailing trends in lobbying); see also LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 47–71 (2015) (elaborating upon the history and growth of corporate lobbying).

<sup>168</sup> *Citizens United v. FEC*, 558 U.S. 310, 360–61 (2010).

<sup>169</sup> ORG. FOR ECON. COOP. & DEV., *GOVERNMENT AT A GLANCE 2019: TRUST IN GOVERNMENT* (2019), [https://www.oecd-ilibrary.org/sites/8ccf5c38-en/1/2/10/1/index.html?itemId=/content/publication/8ccf5c38-en&\\_csp\\_=40825562de64089b975c3e83eb3f6e04&itemIGO=oecd&itemContentType=book](https://www.oecd-ilibrary.org/sites/8ccf5c38-en/1/2/10/1/index.html?itemId=/content/publication/8ccf5c38-en&_csp_=40825562de64089b975c3e83eb3f6e04&itemIGO=oecd&itemContentType=book).

<sup>170</sup> WORLD ECON. F., *GLOBAL COMPETITIVENESS REPORT 2013-2014*, at 413 tbl.1.04, 421 tbl.1.12 (2013), <https://www.weforum.org/reports/global-competitiveness-report-2013-2014> (r=0.75).

<sup>171</sup> ORG. FOR ECON. COOP. & DEV., *supra* note 164.

belief that officials are responsive to public opinion, this Article locates reforms that, as an empirical matter, would enhance democratic accountability.

3. *The First Amendment Is Not Only a Right from Government Interference but Also to Democratic Government*

As we have argued, such reforms would be constitutional under a range of understandings of the First Amendment and normative views of how democratic politics should operate. But the ambition of this Article is to go further: Because we have identified reforms that would empirically advance democratic accountability—again, on a variety of constitutional and normative accounts—those reforms should be understood not only as constitutionally permissible but also required.<sup>172</sup>

Critics no doubt will contend that affirmative First Amendment democratic accountability obligations are unrealistic, particularly against the backdrop of our current Supreme Court and its likely shift from one conservative constitutional vision to another—be it because we are shifting between constitutional regimes (Reaganite to Trumpian), because the broader legal culture has shifted from judicial restraint to libertarianism, because the Court’s membership has changed, or some combination thereof. The Court’s partisan gerrymandering case, *Rucho*, for instance, could be read to support an argument that the Court is *not* committed to a vision of democracy that could possibly encompass affirmative constitutional obligations to democratic accountability.<sup>173</sup>

We are unmoved by this critique for several reasons.

First, as we began this section, the Court has affirmatively embraced disclosures as a favored solution to the potential ills of money in politics.<sup>174</sup> It has shown itself to be open to the idea that the First Amendment might contain affirmative governmental obligations under the religion clauses,<sup>175</sup> and the reforms we suggest here are quite moderate in comparison.

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<sup>172</sup> See generally Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1544 (2008) (dividing legal rules into those that are “constitutionally impermissible, those that are constitutionally discretionary, and those that are constitutionally mandatory”).

<sup>173</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

<sup>174</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”).

<sup>175</sup> *Espinoza v. Mont. Dep’t Revenue*, 140 S. Ct. 2246, 2262 (2020).

Congress could also adopt these reforms absent any judicially recognized First Amendment obligation. This is our hope. More important than the judiciary reconsidering the First Amendment's positive obligations is the need for Congress to understand its role in ensuring First Amendment freedoms, including through the adoption of democratic accountability measures.<sup>176</sup> While the Supreme Court over several decades has significantly diminished Congress's Section Five powers—that is, its constitutional authority to pass laws to enforce the Fourteenth Amendment—in cases such as *United States v. Morrison*<sup>177</sup> and *Shelby County*,<sup>178</sup> the First Amendment has no such baggage and holds remarkable cultural magnetism.<sup>179</sup> It is easily within the Overton window to suggest that a broad coalition might advance a positive First Amendment vision requiring campaign finance and lobbying reforms.<sup>180</sup>

In addition, growing historical work by scholars, including Maggie Blackhawk,<sup>181</sup> Nicholas Bowie,<sup>182</sup> and James Gray Pope, have documented how early constitutions were drafted “to justify exercises of popular power”<sup>183</sup> and advance “actual popular sovereignty.”<sup>184</sup> They have described in rich detail the ways in which assembly, petition, and association—particularly at the Founding, but also at key later republican moments, including during the Civil Rights revolution<sup>185</sup>—were understood to endow the people with a right to popular sovereignty. Blackhawk explains that “[a]t the Founding, and for much of this Nation's history, the right protected a form of access to Congress that more

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<sup>176</sup> Amanda Shanor is grateful to Robin West, Marty Lederman, Mike Seidman, Gerry Spann, Gary Peller, and the participants of the Georgetown University Law Center summer faculty workshop series for developing her views on this point.

<sup>177</sup> *United States v. Morrison*, 529 U.S. 598, 627 (2000).

<sup>178</sup> *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

<sup>179</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1789 (2004).

<sup>180</sup> The Overton window is the range of policies that are considered within the mainstream of political discourse. Things within that window are “on the wall” rather than off it. Organizing around the For the People Act demonstrates that a positive vision of the First Amendment and increased campaign finance and lobbying reforms are within the mainstream. That Act includes a range of voting rights and democracy reforms, from increased disclosure requirements in political advertising and of corporate money in politics to small donor public financing, to modernizing voter registration and access to the vote.

<sup>181</sup> Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1183–84 (2016).

<sup>182</sup> Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1657–58 (forthcoming 2021) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3676811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676811)).

<sup>183</sup> James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 336 (1990).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 336, 347–52; see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–10 (1982) (holding that a boycott organized by the NAACP against white merchants was a form of speech and association protected by the First Amendment).

closely resembled the formal process afforded in courts.”<sup>186</sup> Petitioning gave women, African Americans, and Native Americans access on “equal footing” to others “no matter the petition’s source and without regard to the political power of the petitioner.”<sup>187</sup> She contrasts that with today’s lobbying system in which “Congress affords individuals access to lawmakers and the lawmaking process only on an informal basis and provides preferential access, consideration, and procedure to the politically powerful.”<sup>188</sup>

In excavating the history of the Assembly Clause, Bowie likewise finds that “[f]or over one hundred years before the First Amendment was drafted, American activists advanced what they called their right to ‘assemble’ to defend their right to govern themselves.”<sup>189</sup> Bowie writes:

By the time the American colonists drafted their first assembly clauses in the 1770s, the right to assemble was thus invoked to defend not merely the act of *assembling*, but also the *assemblies* that could exercise coercive legal powers to solve their constituents’ problem. In other words, the state and federal assembly clauses were interpreted to protect a constitutional right of self-government.<sup>190</sup>

Whether we accept Blackhawk or Bowie’s view that either the Petition Clause or the Assembly Clause standing alone grants affirmative rights to participatory self-governance or the contours of what that governance entails, their work taken together demonstrates that a central goal of early American constitutionalism and of the First Amendment was popular sovereignty.

By contrast to the petition or assembly clauses, there is a dearth of historical evidence about what the Framers meant the Speech Clause to protect. The existing evidence suggests the Framers did not intend the robust libertarian approach that is the hallmark modern speech jurisprudence. The Sedition Act of 1798, for example, under which journalists and other government critics were convicted and imprisoned, was passed just seven years after the ratification of the First Amendment.<sup>191</sup> The rich histories that Blackhawk and Bowie present

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<sup>186</sup> McKinley, *supra* note 181, at 1136.

<sup>187</sup> *Id.* at 1137.

<sup>188</sup> *Id.* at 1138.

<sup>189</sup> Bowie, *supra* note 182, at 1658.

<sup>190</sup> *Id.* at 1658–59.

<sup>191</sup> The Sedition Act made it a federal crime to “write, print, utter or publish . . . any false, scandalous, and malicious writing . . . against the government of the United States.” It was never held unconstitutional by any federal court. Sedition Act of 1798, Ch. 74, §2, 1 Stat. 596 (1798) (expired 1801); see Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 59 (2000) (“Supreme Court Justices riding circuit two centuries ago cheerfully enforced a Sedition Act that made mere criticism of certain incumbents a federal offense.”).

add significant historical context about early American political practice and the Framers' constitutional and institutional aims. That history suggests that the goals of the First Amendment's constellation of protections were rooted far more deeply in goals of popular sovereignty than in the libertarian protection of speech—a conclusion that should inform the meaning of the Speech Clause at least from an originalist perspective.

For all these reasons, the First Amendment requires more robust and thoroughgoing disclosures of corporate political activity as a concrete and provable way to ensure that it can in fact be “the guardian of our democracy.”<sup>192</sup> Such reforms would promote the sort of “actual popular sovereignty”<sup>193</sup> that was central to the early—and should be to the ongoing—American project.

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The above analysis lays the beginning foundation for a freedom of speech that would act not only as a right *from* government intervention, but also as a right *to* democratic participation and accountability.

As something of a coda, we note that by focusing First Amendment theory on questions of economic power and surfacing the way in which corporate economic decisions operate politically, we aim to move beyond the twentieth-century synthesis that scholars of political economy and law have described. As Jed Britton-Purdy, David Grewal, Amy Kapczynski, and Sabeel Rahman explain, that synthesis involves two related developments:

First, some legal subfields have been reoriented around versions of economic “efficiency” . . . [including] contracts, property, antitrust, intellectual property, corporate law, and so on. Here, efficiency analysis anchors both the descriptive framing and the normative assessment of law. . . . This methodological approach offers no framework for thinking systematically about the interrelationships between political and economic power.

The second move has redefined so-called political and public legal fields, centrally constitutional law. Here, questions of coercion and legitimacy remain central but are delimited to exclude economic power and other structural forms of inequality. . . . As the economy was read out of working conceptions of constitutional equality, it was read back into constitutional law to enshrine certain forms of economic liberty through developments in free-speech law. . . . The result is a

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<sup>192</sup> *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

<sup>193</sup> Pope, *supra* note 183, at 336.

vision of constitutional equality and liberty that enshrines structural inequality and economic power.<sup>194</sup>

As they describe, as a result of the synthesis, “the economy has receded as a subject in fields now reconstituted as fundamentally political, and politics has receded as a subject in fields reconstituted as fundamentally economic.”<sup>195</sup> Part of how the synthesis operates, they and others have argued, is to render invisible the influences of economic power on politics (and the political forces that shape economic life).<sup>196</sup>

This Article pushes back against the synthesis. We seek to address the pathologies of economic power in politics by making the empirical link between corporate money, political influence, and the objective and subjective versions of First Amendment theories of democratic accountability. The reforms we suggest would make corporate money—and its influence on the political system—visible.

### *B. Policy Reforms to Enhance the Traceability of Corporate Political Activity*

Practically then, what should be done? A number of readily available policy reforms would increase the traceability of corporate political activity.<sup>197</sup> Federal statutory regulation of lobbying and campaign finance would likely be the most effective at advancing broad-based traceability—i.e., covering publicly traded and privately held for-profit corporations, as well as non-profit corporations used as conduits by for profits. But similar reforms could be adopted by state and local governments with regulatory regimes that are laxer than what we propose. Our findings should also, we hope, spur shareholders, including major institutional shareholders, to demand greater disclosure of corporate political spending. As Lucian Bebchuk, Robert Jackson Jr., James Nelson, and Roberto

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<sup>194</sup> Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1790–91 (2020).

<sup>195</sup> *Id.* at 1791.

<sup>196</sup> See generally Grewal & Purdy, *supra* note 18, at 18 (noting that neoliberalism couches distributive choices in “the neutral-sounding language of efficiency”); Purdy, *Beyond the Bosses’ Constitution*, *supra* note 42, at 2180 (describing “the current jurisprudence of distributional neutrality” in First Amendment law). Amanda Shanor has described how the synthesis accomplishes this by treating First Amendment coverage questions as natural questions of what is “speech.” Amanda Shanor, *First Amendment Coverage*, 93 *N.Y.U. L. REV.* 318, 331–33 (2018); Shanor, *supra* note 42.

<sup>197</sup> See generally Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 *GEO. L.J.* 1443, 1147 (2014) (finding “compliance with providing required information . . . is often both inconsistent and partial” and “[f]urther, the lack of an infrastructure to track individual contributors over time impedes identification of the most potentially influential players in the campaign finance system” based on an analysis of the Longitudinal Elite Contributor Database).

Tallarita have persuasively argued, “[t]he case against such disclosure . . . is simply untenable.”<sup>198</sup>

At the same time, while the Supreme Court has been sanguine about the ability of “prompt disclosure of expenditures [to] provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters” and the fact that shareholders can ensure “their corporation’s political speech advances the corporation’s interest in making profits,”<sup>199</sup> the reality is far different. For example, Congress has not acted in the last ten years to close the disclosure loopholes that *Citizens United* created via 501(c) non-profits that keep shareholders and the public in the dark.<sup>200</sup> Further, in continuing resolutions funding the federal government since 2015, Congress has prohibited the Securities & Exchange Commission from engaging in rulemaking designed to enhance disclosure of corporate political activity.<sup>201</sup> That prohibition may expire with unified Democratic control of the federal government, which would allow the SEC under new Chair Gary Gensler to make those disclosures a reality. SEC rules designed to increase the traceability of corporate political activity would advance the goals we identify above and may be the most politically feasibly in the short term. However, because any SEC rulemaking would not reach privately held firms, a legislative solution is ultimately needed.

We begin by addressing reforms to lobbying disclosure. The American Bar Association’s (ABA) Task Force on Federal Lobbying Laws has proposed several enhancements to lobbying disclosures that would enhance traceability of corporate political activity by deepening and broadening the current disclosure regime under the Lobbying Disclosure Act (LDA) and as amended by the Honest

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<sup>198</sup> Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 2 (2020); see CTR. FOR POL. ACCOUNTABILITY, COLLISION COURSE: THE RISKS COMPANIES FACE WHEN THEIR POLITICAL SPENDING AND CORE VALUES CONFLICT AND HOW TO ADDRESS THEM 12–14, 24, 26 (2018), <https://politicalaccountability.net/hifi/files/Collision-Course-Report.pdf>; Timothy Werner & John J. Coleman, *Citizens United, Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes*, 31 J.L. ECON. & ORG. 127 (2015).

<sup>199</sup> *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).

<sup>200</sup> As we discuss *supra* note 16, the holding in *Citizens United* allows firms to make unlimited contributions to 501(c) non-profit organizations. Contributions to 501(c)s do not need to be disclosed to the public, including the shareholders of publicly traded corporations, unless they are specifically earmarked for electoral activity. Thus, although the Court upheld campaign finance disclosure in principle in *Citizens United* by allowing corporations to contribute to 501(c)s, it created a corporate political tactic that evades existing disclosure regimes.

<sup>201</sup> Werner, *supra* note 13, at 2425.

Leadership and Open Government Act (HLOGA) of 2007.<sup>202</sup> Prior to the adoption of the LDA, corporate lobbying efforts at the federal level were not disclosed to the public in a systematic fashion. Based upon activity thresholds detailed below, the LDA introduced biannual reporting by lobbying organizations and individual lobbyists, and the HLOGA increased the frequency of this reporting to a quarterly basis.<sup>203</sup> From the perspective of traceability, the reporting requirements of the LDA and HLOGA are quite lax, as neither mandates lobbying organizations or lobbyists to report the names of the individual legislators or regulators whom they are targeting.

Importantly, the ABA's reforms would place greater disclosure burdens on organizations, including publicly traded corporations, and fewer on individuals, such as lobbyists. That burden shift would address the current incentives to evade registration as a lobbyist that were created by the HLOGA's amendments to the LDA and Obama-era rules for individuals (e.g., additional campaign finance and gift disclosure rules, and possible civil and criminal penalties for non-compliance with the LDA and HLOGA disclosure rules).<sup>204</sup> Contrary to their stated goal of enhancing disclosure to the public, the restrictions that those regulations placed on registered lobbyists have generated "shadow" lobbying activities that are not disclosed.<sup>205</sup> At the same time, there has been a drop in reported federal lobbying expenditures, leading researchers to raise significant doubts about whether these trends empirically capture the reality of lobbying in Washington, D.C.

Instead of limiting the activity of lobbying, the ABA's recommendations seek to enhance lobbying disclosure by broadening the activity covered by the LDA and deepening the level of disclosure of that activity. As Richard Briffault writes, disclosure "is particularly valuable in the lobbying context because it gives legislators a greater understanding of the pressures to which they are subject, informs individuals and interest groups of the activities of their competitors, and has the potential to improve the public's understanding of its government."<sup>206</sup>

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<sup>202</sup> See Charles Fried, Rebecca H. Gordon, Trevor Potter, Joseph E. Sandler & Robert M. Levin, *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, 63 ADMIN. L. REV. 419, 439–65 (2011).

<sup>203</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 201, 121 Stat. 735.

<sup>204</sup> See Tim LaPira, *Erring on the Side of Shady: How Calling Out "Lobbyists" Drove Them Underground*, SUNLIGHT FOUND. (Apr. 1, 2014), <https://sunlightfoundation.com/2014/04/01/erring-on-the-side-of-shady-how-calling-out-lobbyists-drove-them-underground/>.

<sup>205</sup> Hasen, *supra* note 17, at 247–49.

<sup>206</sup> Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 119 (2008); see also Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1160 (2011) (noting that after *Citizens United*, reform must "move in new directions .

In terms of breadth, the ABA's proposed reforms would require a lobbying firm (e.g., a lobbying shop acting as an agent of a publicly traded corporation) to register if its employees make two or more lobbying contacts on behalf of a client and the firm expects to receive quarterly revenue above a certain threshold for engaging in lobbying activities on behalf of that client. Similarly, a lobbying organization (e.g., a publicly traded corporation lobbying on its own behalf) would be required to register if its employees make two or more lobbying contacts and the organization has quarterly expenditures on lobbying activity above a certain threshold.<sup>207</sup> These new requirements would drop an existing second condition on an employee's time usage: currently, an employee must also spend a minimum of twenty percent of their time on lobbying activity in order for the reporting requirements for lobbying firms and organizations to be triggered in the LDA.<sup>208</sup> Thus, these changes would do much to shrink the untraceable "shadows" in which much modern, post-HLOGA lobbying seeks to hide.

In terms of the depth of lobbying, the ABA proposes two reforms that our empirical findings support. First, principal lobbying organizations and their agent lobbying firms should disclose "the bills and topics with respect to which lobbying activity was conducted." Second, these actors should list "all congressional offices, congressional committees, and federal agencies and offices contacted" as part of this lobbying activity.<sup>209</sup> This level of disclosure would not only greatly enrich all actors' understanding of the policy process by providing the exact traceability that our lobbying disclosure system currently lacks and our results suggest is needed, but it would also strike a middle ground between the current lax LDA requirements and the much more invasive lobbying reports required of foreign-owned corporations specified in the Foreign Agents Registration Act.<sup>210</sup> Second, the ABA's reforms, in light of the fact that many modern lobbying campaigns involve multiple agents (e.g., pollsters, grassroots consultants, and media strategists) coordinated by the principal lobbying organization or a key lobbying firm/agent, also would require extensive disclosure of "all other persons and entities retained by the registrant firm or

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. . . This will be particularly true as disclosure and transparency become the constitutionally safe options for reformers . . . [C]ampaign finance and lobbying, . . . connected in practice, will also grow together in theory and in policy").

<sup>207</sup> "Employee," "lobbying contacts," and "lobbying activity" are defined in 2 U.S.C. § 1602 (2006); the threshold dollar amounts are set in 2 U.S.C. § 1603(a)(3) (2006).

<sup>208</sup> Fried et al., *supra* note 202, at 439.

<sup>209</sup> *Id.* at 443.

<sup>210</sup> See Foreign Agents Registration Act, Pub. L. No. 75-583 (1938).

organization that engaged in ‘lobbying support,’<sup>211</sup> as well as details including a narrative summary of their work and their total compensation. This reform would include grassroots campaigns designed to influence specific legislation or regulation, but would exclude grassroots campaigns more broadly targeting public discourse or opinion. Most significantly, this reform would hamper distancing efforts designed to hinder traceability between a corporation’s political activity and a policymaker’s decision-making.

Beyond this, our findings support adding an already established organization-level unique identifier to firms’ quarterly lobbying disclosure reports, allowing lobbying information to be easily linked to other required firm disclosures. Such unique identifiers include the Securities and Exchange Commission’s Central Index Key (CIK) and Standard & Poor’s Committee on Uniform Securities Identification Procedures (CUSIP) number for publicly traded firms or Dun and Bradstreet’s (DUNS) number for both publicly traded and privately held firms.<sup>212</sup> This linkage would allow the general public (including academic researchers and the media) to better understand the motivations behind firms’ political activity; it would allow competing interest groups (including public interest groups) to better counteract their adversaries’ advocacy in a Madisonian faction-versus-faction sense;<sup>213</sup> and it would allow shareholders to more easily monitor management’s political activity for potential agency problems.<sup>214</sup> Further, because disclosures as a governance tool are most effective “when they provide[] facts that people wanted in times, places, and ways that enable[] them to act,”<sup>215</sup> we argue that linking firm political activity to widely used and publicly available firm identifiers is essential in enhancing the accountability of the political system to the people.<sup>216</sup>

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<sup>211</sup> Fried et al., *supra* note 202, at 443.

<sup>212</sup> More broadly, we would also endorse the call of the non-profit Data Foundation, as well as LexisNexis, for the U.S. and state governments to adopt a universal, nonproprietary unique identifier for any firm, non-profit, or other organization engaging in financial transactions. This Legal Entity Identifier (LEI) is defined by International Organization for Standardization Standard 17442. See SCOTT M. STRAUB & MATT RUMSEY, WHO IS WHO AND WHAT IS WHAT? THE NEED FOR UNIVERSAL ENTITY IDENTIFICATION IN THE UNITED STATES 1, 4 (2017).

<sup>213</sup> See generally Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group Based Approach to Lobbying Regulation*, 58 ALA. L. REV. 513 (2007) (explaining how lobbying regulations might allow interest groups to check one another in a Madisonian fashion).

<sup>214</sup> See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 104–07 (2010).

<sup>215</sup> ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TARGETED TRANSPARENCY, at xiv (2007).

<sup>216</sup> Another benefit of using a pre-existing unique identifier for disclosure of corporate political activity is that it would neither impose new administrative burdens on government agencies nor require a reordering of agency oversight of corporate political activity or campaign finance and lobbying activity more broadly, since

Turning to potential enhancements of campaign finance disclosure, our findings suggest that corporate-linked PACs should be required, as part of the quarterly disclosure of their campaign activity to the FEC, to link themselves to their corporate parents not just by identifying the parent firm's name, but also by identifying its CIK, CUSIP, or DUNS number. Such an identifier would provide not only the same benefits as discussed above with regard to lobbying, but it would also provide the same set of watchdog actors (citizens, competing interest groups, and shareholders) an easier way of tracing the phenomenon we document here: firms' campaign finance and lobbying strategies are linked and adjust in relation to one another. Further, we recommend that a similar unique identifier requirement be applied to any independent expenditures made directly from a firm's treasury and that an identical, look-through requirement be applied to any independent expenditures made indirectly through an independent expenditure-only committee (i.e., a "Super PAC"). Both activities are already subject to quarterly reporting with the FEC,<sup>217</sup> so the new reporting burden would again be *de minimis* for firms.

In a similar vein, we believe that corporate contributions to 501(c)(4) and (c)(6) non-profit corporations—social welfare organizations and business leagues (i.e., trade associations), respectively—need to be disclosed by the contributing firm to the FEC using the same unique identification number. Currently, these non-profit corporations are not required to disclose their contributors.<sup>218</sup> Since these organizations have long played a role in lobbying, and have also played a role in campaign finance post-*Citizens United*, they are another conduit through which corporate money can hydraulically flow. Additionally, because there is no public disclosure of contributors to these organizations, there is zero ability for legislators, competing interest groups, shareholders, or the public to know who is participating in the public policy process via them and thus no ability for any of these actors to hold anyone accountable.

As our study of CEO contributions reveals, firms can also employ individual employees as intermediaries in politics, and campaigns can avail themselves of

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data sets could now easily be linked across administrative bodies. Additionally, it would require minimal marginal effort on the part of firms during the disclosure process.

<sup>217</sup> 11 C.F.R. § 104.3 (2021) (codified as amended at 52 U.S.C. §§ 30104(b), 30114); 11 C.F.R. § 114.10 (2021).

<sup>218</sup> Prior to July 2018, all non-501(c) non-profit corporations were required to confidentially identify their contributors to the Internal Revenue Service (IRS); now, these corporations need only keep this information on file and subject to IRS request. See I.R.S. Rev. Proc. 2018-38 (July 16, 2018), <https://www.irs.gov/pub/irs-drop/rp-18-38.pdf>.

opportunities to obfuscate the relationships between CEOs and companies. As a result, and as perhaps a first effort at capturing firms' strategic political use of employees, we suggest that those executives of a publicly traded firm covered by Section 162(m)(3) of the U.S. tax code (e.g., the CEO, chief financial officer, and the three other most highly compensated executive officers),<sup>219</sup> along with a firm's board of directors, also be required to link their campaign contributions to their associated firm through the same unique identification number as is used in the firm's other campaign finance and lobbying disclosures.<sup>220</sup> Further, we would extend this linkage requirement with regard to personal campaign contributions to those actors at privately held firms who would be covered by the pay disclosure regulation were their firms publicly traded.

It is important to note that this enhanced disclosure would impose neither additional limits on the speech of executives or directors nor a significant reporting burden (certainly, the requirement of tying one's political activity to a firm via a unique identifier is a simple inconvenience for executives, especially considering that these individuals' compensation in the case of publicly traded companies and individual campaign contributions in the case of all companies are already public). Additionally, this enhanced disclosure would pale in comparison to the regulations put on the campaign finance activity of registered lobbyists as part of the HLOGA.<sup>221</sup> These proposed regulations on the organizational and individual intermediaries that firms can use not only will help give interested parties a fuller picture of the hydraulics of corporate political activity generally, but they will also help the public and media trace whether candidates' pledges to reject corporate support in their campaigns are more than just cheap talk that could result in additional loss of trust in the political process.<sup>222</sup>

These reforms would significantly enhance the traceability of corporate political activity. We recognize, however, that the reforms we advance are

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<sup>219</sup> See 26 U.S.C. § 162(m)(3) (1994).

<sup>220</sup> Such a form would necessarily have to account for interlocks across firms and thus require executives and directors to enter in the unique identifier of each firm to which they are connected. Unfortunately, this would be required at the time of each contribution unless the FEC were to create a unique identifier for individual contributors that could then be used to trace a contributor's behavior within and across election cycles.

<sup>221</sup> See Briffault, *supra* note 206, at 106, 119–20.

<sup>222</sup> See Brian Kelleher Richter & Timothy Werner, *Campaign Contributions from Corporate Executives in Lieu of Political Action Committees*, 33 J.L. ECON. & ORG. 443, 445–46 (2017); Karl Evers-Hillstrom, *Democrats Are Rejecting Corporate PACs: Does It Mean Anything?*, OPENSECRETS (Dec. 7, 2018, 3:14 PM), <https://www.opensecrets.org/news/2018/12/democrats-say-no-pacs/>; Lee Fang, *These House Democrats Pledged Not To Take Corporate Cash—But They're Using a Loophole To Do It Anyway*, INTERCEPT (Apr. 13, 2019), <https://theintercept.com/2019/04/13/democrats-corporate-pac-money/>.

incremental. There are limitations to our approach that might pose more difficult First Amendment issues. Principally, these relate to the disclosure of corporate contributions to grassroots campaigns that are not clearly linkable to pending elections, legislation, or regulation, as well as contributions to 501(c)(3) non-profit corporations, including charities and think tanks. Despite this latter set of organizations being prohibited from engaging in lobbying, increasing evidence suggests that corporate contributions to these entities pay political benefits.<sup>223</sup> Because such contributions may fund indirect forms of lobbying, they raise the possibility of additional untraceable avenues through which corporate money can flow; thus, reformers seeking policy interventions beyond the disclosure-based reforms advanced here may need to pay greater attention to these non-profits. That being said, because of the necessarily indirect forms of lobbying that corporations might do by way of 501(c)(3)s and such grassroots campaigns, these avenues for corporate political activity currently provide less certain political benefit to firms than the central pathways by which darker corporate money now flows: direct lobbying and contributions by CEOs and C-suite executives.<sup>224</sup>

The reforms we identify target those main arteries of corporate dark money with the aims of stemming its untraceable and influential flow and meaningfully enhancing politician accountability and public trust. But, as with any realistic regulatory change, the prospect of evasion and the exertion of power against control raise the possibility that these reforms will require periodic adjustment.

## CONCLUSION

Our empirical research identifies a key force in the hydraulics of corporate political activity: a firm's public reputation. We provide robust empirical and theoretical evidence for policy changes that would increase the traceability of corporate money in politics, including more robust and thorough disclosures of lobbying and the firm associations of corporate executives. By leveraging the desire of politicians to avoid association with publicly unpopular firms, we locate reforms that, as an empirical matter, not only run to core First Amendment values, but also should be understood as required by them. Increasing the traceability of corporate political activity would render politicians more responsive to public opinion and increase the public's perception that this is so,

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<sup>223</sup> See Marianne Bertrand, Matilde Bombardini, Raymond Fisman, Brad Hackinen & Francesco Trebbi, *Hall of Mirrors: Corporate Philanthropy and Strategic Advocacy*, 136 Q.J. ECON. 2413, 2461 (2021).

<sup>224</sup> Indirect pathways are also often both more practically difficult and expensive for firms to pursue. See Yeager, *supra* note 68.

promoting both the reality and belief that the public can hold officials accountable to We the People.