NOTE

TARGETING CORPORATE POLITICAL ACTIVITY THROUGH *CAREMARK*

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Corporations are increasingly active in the political realm. This is due in part to the strong First Amendment protections that corporations enjoy. This political activity, however, can also incur material risk; when corporations endorse political stances that their shareholder and consumer bases disagree with, they are often met with fallout that can impact their bottom line. Corporate political risk, as defined in this Note, is a meaningful threat to shareholders, who can experience material harm resulting from the corporation's political activity. But the traditional corporate law remedy which relates to risk management—the fiduciary duty of good faith oversight as articulated by Caremark*—is fairly narrow, and the burden on plaintiffs is heavy. It is unlikely that shareholders could bring a successful claim under* Caremark *for political risk management because of the limited doctrine. Therefore, this Note advocates for an expanded Caremark regime to address the harms of corporate political risk. A new* Caremark *framework for corporate political risk will advance two goals: (1) to better protect shareholders from material losses; and (2) to minimize the impact of corporate intervention in the American political process. Through shareholder protection, an expanded* Caremark *doctrine for political risk could serve to defang corporate political power in American democracy.*

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I. INTRODUCTION

In May 2023, Target Corporation (Target) released its Pride Collection, an assortment of products to celebrate LGBTQ+ Pride Month in June. The retailer faced extreme backlash from conservative customers, ranging from boycotts of their stores to confrontations with Target employees over the content of the collection.[1] Target ultimately removed the products at the center of the controversy, citing concerns for the safety of its workforce,[2] and suffered sales losses due to the ordeal.[3] Some shareholders filed suit against Target, alleging the company breached federal securities laws by misrepresenting their risk management procedures regarding social and political risks.[4]

This is not the first time Target has faced fallout from its customers and shareholders in connection with a social or political issue. In August 2010, the same year *Citizens United* authorized unlimited corporate political expenditures,[5] Target contributed $150,000 to an organization backing the gubernatorial campaign of Tom Emmer, a Republican candidate who opposed same-sex marriage.[6] This sparked

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[1] Jordyn Holman & Julie Creswell, *Brands Embracing Pride Month Confront a Volatile Political Climate*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/25/business/target-pride-lgbtq-companies-backlash.html (on file with the Columbia Business Law Review).

[2] *Target Statement on 2023 Pride Collection*, TARGET (May 24, 2023), https://corporate.target.com/press/statement/2023/05/target-statement-on-2023-pride-collection [https://perma.cc/PR72-ALFJ].

[3] Nathaniel Meyersohn, *Pride Month Backlash Hurt Target's Sales. They Fell for the First Time in Six Years*, CNN BUS. (Aug. 16, 2023), https://www.cnn.com/2023/08/16/investing/target-stock-earnings/index.html [https://perma.cc/WT6R-RAU5].

[4] *See* Judy Godoy, *Target Sued by Investor Over Backlash to LGBTQ Merchandise*, REUTERS (Aug. 9, 2023), https://www.reuters.com/legal/target-sued-by-investor-over-backlash-lgbtq-merchandise-2023-08-09/ [https://perma.cc/4MPS-5KYC]; *see also* Complaint at 2, Craig v. Target Corp., No. 2:23-cv-00559 (M.D. Fla. Dec. 4, 2023).

[5] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 310 (2010).

[6] Lydia Dishman, *Target's $150,000 Mistake -- or, Why Corporations Should Avoid Politics*, CBS NEWS (Apr. 11, 2011),

similar fallout and boycotts, this time from Target's liberal customer base. Shareholders also expressed their discontent, bringing forward a proposal to change the company's policy regarding political expenditures.[7] In response, Target put together a committee—a subset of its leadership team—that reviews its political contributions and reports to the board of directors at least twice annually.[8] Target also began publicly disclosing its political expenditures that derive from its treasury funds in an effort to promote transparency about its political activities.

Given the blowback Target experienced in 2010, and the subsequent effort by the company to create sufficient controls and oversight of political-related risks, one might assume Target was prepared to face political backlash[9] from the Pride Collection. So what happened?

Target provides an excellent case study of the need for political risk management. Most corporations engage in political activities, ranging from direct political contributions, to business branding decisions, to express statements regarding current social and political issues.[10] In fact, corporations are entitled to political speech and expenditures, with protection under the First Amendment that cannot be limited due to their corporate identity.[11] The Supreme Court

https://www.cbsnews.com/news/targets-150000-mistake-or-why-corporations-should-avoid-politics [https://perma.cc/6ET4-3BSM].

[7] Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending is Bad Business*, HARV. BUS. REV., Jan.–Feb. 2022, https://hbr.org/2022/01/corporate-political-spending-is-bad-business [https://perma.cc/87EM-NLR9].

[8] *Political Engagement*, TARGET, https://corporate.target.com/sustainability-governance/operating-ethically/public-policy-civic-engagement/political-engagement [https://perma.cc/4PHK-P7J3] (last visited Oct. 18, 2024).

[9] Commentators have noted that the current political climate, particularly regarding transgender issues, has led to the greater negative response from consumers on Pride products. Target has offered Pride-related merchandise for the last 10 years without fanfare or threats to their workforce. *See* Holman & Creswell, *supra* note 1.

[10] Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 711 (2023).

[11] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

has continued to uphold and expand corporate personhood rights despite the outsized influence corporations have in the political process, which has eroded the voting power of the individual.[12] These corporate political freedoms come at the cost of the American public, and they can also result in significant harms to shareholders. Target is not the only corporation to have suffered boycotts and business losses from political activity in recent years,[13] and the highly polarized state of the nation suggests that political risk is only growing.[14] Corporations like Target need to implement a system of controls for political risk management to appropriately protect themselves and their shareholders, even though their political activity is sanctioned by the Supreme Court.

In this same vein, corporate directors owe a fiduciary duty of good faith oversight to their shareholders as first established by *Caremark*.[15] A *Caremark* claim relies on the principle that a corporation's directors are acting in bad faith

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[12] *See infra* Section II.A; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 712–14 (2014); 303 Creative LLC v. Elenis, 600 U.S. 570, 588 (2023).

[13] For example, Anheuser-Busch faced similar fallout for its Bud Light collaboration with a transgender influencer in 2023, and Goya Foods experienced boycotts following its statements supporting President Donald Trump. Julie Creswell, *Anheuser-Busch Changes Beer Marketing Focus After Transgender Promotion*, N.Y. TIMES (May 4, 2023), https://www.nytimes.com/2023/05/04/business/bud-light-transgender-promotion.html (on file with the Columbia Business Law Review); Derrick Bryson Taylor, *Goya Foods Boycott Takes Off After its President Praises Trump*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/business/goya-boycott.html (on file with the Columbia Business Law Review); Andrea Salcedo, *Goya's CEO Falsely Claims Trump is the 'Real,' 'Legitimate' President. Critics Call for a Boycott*, WASH. POST (Mar. 1, 2021), https://www.washingtonpost.com/nation/2021/03/01/goya-ceo-cpac-trump-boycott/ (on file with the Columbia Business Law Review).

[14] *See, e.g.*, Ron Carucci & Caroline Mehl, *Preparing Your Team for a Year of Intense Political Polarization*, HARV. BUS. REV. (Feb. 21, 2024), https://hbr.org/2024/02/preparing-your-team-for-a-year-of-intense-political-polarization [https://perma.cc/27AZ-PZ36].

[15] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

if they fail to monitor mission critical risks.[16] This fiduciary duty pertains to the directors' ability to successfully manage the risks the corporation faces. This Note explores the use of *Caremark* liability for failure to monitor political risks. Without sufficient controls in place, political risks can lead to significant losses in sales and diminution in firm value. *Caremark* provides a remedy for shareholders who suffer losses related to these risks.

However, the burden to plaintiffs in bringing a *Caremark* claim is steep; the doctrine is rather limited, with few cases passing the motion to dismiss stage.[17] For instance, the Target shareholders shied away from bringing a *Caremark* claim, focusing on securities violations instead.[18] Given these constraints, this Note advocates for the expansion of the *Caremark* doctrine to cover political risks. To adequately enforce political risk management, Delaware courts could find directors liable for failure to monitor material risks, rather than the higher bar of mission critical, in the political realm. Holding directors liable for failure to sufficiently monitor political risks will advance two normative aims: first, to protect shareholders from material harm, and second, to minimize the impact of corporate intervention in the American political process. As highlighted above, corporations have the power to manipulate voting in the United States due to the large-scale advantages that corporations experience, including the ability to amass wealth and make unlimited political expenditures. Through shareholder protection, an expanded *Caremark* doctrine for political risk could serve to defang corporate political power in American democracy.

This Note proceeds according to the following: Part II provides background on corporate political and personhood rights, corporate political activity and the accompanying risk, and the corporate fiduciary duty of good faith oversight. Part III outlines the *Caremark* claim for political risk management

[16] *See* Marchand v. Barnhill, 212 A.3d 805, 820–21, 824 (Del. 2019).

[17] JOHN C. COFFEE, RONALD J. GILSON & BRIAN JM QUINN, CASES AND MATERIALS ON CORPORATIONS 130–31 (9th ed. 2021).

[18] Complaint at 2, Craig v. Target Corp., No. 2:23-cv-00559 (M.D. Fla. Dec. 4, 2023).

under the current doctrine and evaluates its limitations. Because of the high barriers to such a claim, Part IV advocates for the expansion of *Caremark* to address political risk management, walks through the functionality of that expanded *Caremark* doctrine, clarifies the constraints of Delaware law, and provides a real-world example of appropriate political risk management under this framework with Dick's Sporting Goods (Dick's). Part IV goes on to discuss the two normative goals of the expanded *Caremark* framework—to address the harms to shareholders and to serve as a deterrent against corporate political activity and spending—as well as the potential drawbacks, but ultimately finds the benefits outweigh the costs. Many scholars argue that the *Citizens United* holding was fundamentally flawed, as it relies on inaccurate descriptions of both corporate political spending and shareholder democracy;[19] however, the majority opinion in that case noted that corporate law remedies can serve to protect shareholder interests, and the expansion of *Caremark* is within that spirit.

II. CORPORATE POLITICAL RIGHTS, RISKS, AND RESPONSIBILITIES

A. Corporate Political and Personhood Rights

Corporations have not always had the strong First Amendment and other personhood rights they enjoy today. The expansion of corporate political and personhood rights has accelerated in recent years, with the Supreme Court rulings of *Citizens United*,[20] *Hobby Lobby*,[21] and *303*

[19] Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 501 (2010); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 89 (2010).

[20] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

[21] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 712–14 (2014).

Creative.[22] These holdings suggest that corporate rights to speech and some forms of religious expression cannot be burdened, even where the rights of natural persons are at stake.

1. Citizens United and the Impact of an Illimitable Right to Political Speech

Corporations were first treated as persons for the purposes of contract and property law, enabling them to enforce their contracts and own real estate.[23] In the mid-nineteenth century, Chief Justice Waite declared corporations to be persons under the Equal Protection Clause of the Fourteenth Amendment, granting them their first constitutional protections.[24] Corporations did not receive First Amendment speech rights until almost a century later, and those rights were qualified on account of the corporate form.[25] In fact, commercial speech was widely regulated until the late 1900s.[26]

In the realm of political speech, the Court first found such protections for corporations under the First Amendment in

[22] 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[23] Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CTR. FOR JUST. (Apr. 8, 2014), https://www.brennancenter.org/our-work/analysis-opinion/history-corporate-personhood [https://perma.cc/7PXM-RF6D].

[24] Santa Clara Cnty. v. S. Pac. R. Co., 118 U.S. 394, 394 (1886) ("The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does.").

[25] Coates provides a comprehensive historical overview on the evolution of corporate speech rights, finding that the current doctrine is a marked departure from the regulation of corporate speech prior to the late twentieth century. John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 240–41 (2015).

[26] *Id.* at 234 ("[C]ommercial and corporate speech—in the most important activities of every business, including contract formation, retention and regulation of agents, and engaging in risk-taking activities—was pervasively regulated and structured by law long before the modern, expansive version of the First Amendment").

First National Bank of Boston v. Bellotti, in 1978.[27] This case outlined much of the rationale behind *Citizens United*, finding the government's interest in both protecting shareholders and preserving the power of individual citizens in the political process to be insufficient to place limitations on corporate First Amendment rights.[28] However, the Court walked back this broad holding just over ten years later in *Austin v. Michigan Chamber of Commerce*.[29] In *Austin*, the Court upheld restrictions on corporate political speech due to the advantages afforded to the corporate structure, which differentiate corporate speech from that of individuals.[30] Benefits of the corporate structure include "favorable treatment of the accumulation and distribution of assets," which enable corporations to have undue influence in the political process.[31] The Court found this anti-distortion concern to be a form of corruption sufficient to justify incursion on corporate political speech rights, citing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[32]

In 2010, however, the Supreme Court overruled *Austin*, holding that a corporation's First Amendment right to political speech could not be circumscribed due to its corporate identity.[33] The Court was unpersuaded that the *Austin* anti-distortion rationale presented a compelling state interest,

[27] First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978). Note that political expenditures are considered speech. Austin v. Michigan Chamber of Com., 494 US. 652, 657 (1990) ("Certainly, the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression at the core of our electoral process and of the First Amendment freedoms.'"), *rev'd on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

[28] *Bellotti*, 435 U.S. at 787–88.

[29] 494 U.S. at 652.

[30] *Id.* at 657–59.

[31] *Id.* at 659 (citing Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

[32] *Id.* at 660.

[33] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

stating that only true quid-pro-quo corruption would be sufficient to burden corporate speech rights.[34] The Court also rejected any compelling interest in protecting the rights of shareholders, finding that these concerns could "be corrected by shareholders 'through the procedures of corporate democracy.'"[35] In result, corporations today have First Amendment protections to make political expenditures out of their treasury funds, and the government has few means to regulate them.

Many scholars argue that this decision was wrongly decided, based on a flawed understanding of the mechanics of political expenditures and the features of corporate law. As a threshold matter, corporate speech is fundamentally different from individual speech. Anne Tucker highlights five key areas where corporate speech is distinct: "the economic motivation of corporate speech, the lack of a single corporate voice, the threat of compelled speech, the prevalence of existing regulation of corporate speech, and the applicability of the equalization [or anti-distortion] rationale to corporate speech."[36] Further, the Court misunderstood the utility of corporate democracy, as it did not account for the deference afforded to corporations and directors as to their political speech decisions.[37] Corporate law has developed means to safeguard the rights of shareholders regarding business decisions which implicate a divergence of interest between shareholders and directors, such as executive compensation, audit, and charter amendments.[38] *Citizens United* fails to

[34] *Id.* at 362–365; *see also* Tucker, *supra* note 19, at 501.

[35] *Citizens United*, 558 U.S. at 362 (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).

[36] Tucker, *supra* note 19, at 519.

[37] As Justice Stevens put it:

> By 'corporate democracy,' presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that these rights are so limited as to be almost nonexistent, given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.

Citizens United, 558 U.S. at 477 (Stevens, J., dissenting).

[38] Bebchuk & Jackson, *supra* note 19, at 89.

provide such protections in the context of political speech, despite the concerns of compelled speech and misappropriation of corporate funds.[39]

The majority also relied on the notion that shareholders would be aware of the political expenditures of the corporations they own, such that they could respond through measures of corporate democracy. However, this construct has been disproven. Many corporations today create foundations through which they can channel political expenditures without scrutiny.[40] Some companies use these private funnels to make expenditures which expressly contradict their public statements on political issues.[41] Even former Justice Kennedy acknowledged that disclosure of political expenditures is not functioning as the Court had envisioned.[42]

In dissent, Justice Stevens highlighted the implications of *Citizens United*, stating "[t]he Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve."[43] Over a decade later, it is clear that *Citizens United* has transformed the landscape of corporate political spending[44] and significantly broadened the First Amendment speech rights of corporations in the political context.[45]

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[39] *Id.* at 89–97.

[40] Paul S. Miller, *Shareholder Rights:* Citizens United *and Delaware Corporate Governance Law*, 53 J.L. & POL. 53, 80 (2019); Taylor Lincoln, *Ten Years After* Citizens United, PUB. CITIZEN (Jan. 15, 2020), https://www.citizen.org/article/ten-years-after-citizens-united/ [https://perma.cc/MNR4-2NL7].

[41] CONFLICTED CONSEQUENCES, CTR. FOR POL. ACCOUNTABILITY (2020), https://politicalaccountability.net/hifi/files/Conflicted-Consequences.pdf [https://perma.cc/733N-L5XM].

[42] Lincoln, *supra* note 40.

[43] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 475 (2010) (Stevens, J., dissenting).

[44] In the ten years following *Citizens United*, corporations have spent over half a billion dollars in political contributions, with much of it undisclosed. Lincoln, *supra* note 40.

[45] Coates, *supra* note 25, at 265 ("[T]he corporate takeover of the First Amendment represents a pure redistribution of power over law with no

2. Hobby Lobby and its Lasting Significance

The Supreme Court further expanded the scope of corporate personhood rights in *Hobby Lobby*, holding that the Religious Freedom Restoration Act (RFRA) protects the religious exercise of closely held corporations.[46] This landmark decision marked the first acknowledgment of religious exercise by for-profit corporations. The holding itself was narrow; the majority specifically noted that such protections only extended to closely held corporations like Hobby Lobby, where a single family controls the business.[47] However, the case's significance for corporate religious rights was broad, as Justice Ginsburg discussed in her dissent: "[t]he Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private."[48]

Justice Ginsburg also warned that corporations could seek religious exceptions from generally applicable regulations under the reasoning of *Hobby Lobby*,[49] and her premonition proved true. In 2022, the Supreme Court heard from Lorie Smith, a website designer who alleged that the Colorado Anti-Discrimination Act (CADA) violated her First Amendment rights of speech and religious exercise by compelling her to create websites contrary to her religious beliefs.[50] The Supreme Court ruled in Smith's favor regarding

efficiency gain . . . . That power is taken from ordinary individuals with identities and interests as voters, owners and employees, and transferred to corporate bureaucrats pursuing narrowly framed goals with other people's money.").

[46] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014).

[47] *Id.* at 717.

[48] *Id.* at 756–57 (Ginsburg, J., dissenting).

[49] *Id.* at 757 (Ginsburg, J., dissenting).

[50] *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 580; Brief for Petitioners at 9, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (filed Dec. 22, 2021).

her speech rights,[51] finding that Smith's wedding websites serve as speech and expression covered by the First Amendment, and that CADA cannot compel Smith to engage in speech which contradicts her sincerely held beliefs.[52]

In its opinion, the majority paid little attention to the business nature of Smith's work, simply noting that "speakers [do not] shed their First Amendment protections by employing the corporate form to disseminate their speech."[53] In her dissent, however, Justice Sotomayor underscored the corporate identity of the plaintiff, stating that "[t]oday, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[54] Sotomayor further argued that the majority allowed businesses to define the expressive quality of their products, which can enable companies to bypass public accommodation laws altogether.[55] Importantly, the majority found that while the government has a compelling interest in eliminating discrimination, this purpose does not justify burdening the corporate First Amendment right to speech.[56] As such, Sotomayor flagged that this ruling furthers the corporate personhood interest, even when it comes at the expense of the real persons in the communities these businesses serve.[57]

[51] Smith dropped the claim regarding First Amendment religious exercise rights before oral argument at the Supreme Court. *See* Brief for Petitioners at 3, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (filed Sept. 12, 2022).

[52] *303 Creative*, 600 U.S. at 588.

[53] *Id.* at 594.

[54] *Id.* at 603 (Sotomayor, J., dissenting).

[55] *Id.* at 633 (Sotomayor, J., dissenting) ("To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell 'passport photos for white people.'").

[56] *Id.* at 591–92.

[57] *Id.* at 636–37 (Sotomayor, J., dissenting) ("By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status.").

This holding follows *Citizens United* and *Hobby Lobby* in finding vastly broad First Amendment and personhood rights for corporations. *303 Creative* further expands the illimitable speech rights of corporations, as declared in *Citizens United*, but also echoes the theory behind *Hobby Lobby*: that corporations can engage in religious exercise. Though the *303 Creative* holding was cabined to speech rights, its basis lay in Smith's (and thereby the business's) religious beliefs.[58] While both *Hobby Lobby* and *303 Creative* specifically discussed small companies, where the sincerity of the beliefs espoused by the corporations could be validated, scholars and the dissenting Justices themselves highlighted that the reasoning of these cases could be extended to any corporation, regardless of size. Further, the unclear definition of expressive speech in *303 Creative* may enable a much broader range of companies to invoke these First Amendment rights.[59] *303 Creative* has broken new barriers in the realm of corporate personhood, augmenting the similarly unprecedented holdings in *Citizens United* and *Hobby Lobby*, and furthering the construct that corporate constitutional rights cannot be limited, even where the rights of living persons may be implicated.

B. Corporate Political Activity and Risks Incurred

The expansion of First Amendment and personhood rights for corporations enables businesses to engage in the political process and hampers the ability for the government to regulate this activity. Consequently, corporations participate in political activity in many forms. While there may be few legal restrictions to corporate political activity, there is a powerful limitation: the court of public opinion. Corporations may face serious consequences on account of their political

[58] *Id.* at 579–80.

[59] Kevin Goldberg, 303 Creative LLC v. Elenis: *A First Amendment Analysis*, FREEDOM F., https://www.freedomforum.org/303-creative-llc-v-elenis/ (last visited Oct. 17, 2024) [https://perma.cc/RA8S-NXBW] ("Others expressed concern that the decision could open the door to business owners finding new ways to discriminate because the court did not define what business activities would constitute expression.").

activities, which harm the business and its stakeholders. For this reason, scholars and industry experts advise corporations to employ measures of political risk management.

1. Political Activity of Corporations

Corporations engage with the political process in a variety of ways.[60] Omari Scott Simmons categorizes corporate political activity as proactive and reactive.[61] Proactive measures include lobbying efforts as to corporate political interests, political expenditures, and even charitable donations.[62] Reactive activity, on the other hand, refers to responding to political outcry from investors, consumers, and other political actors.[63] This includes what Simmons deems the "revolving door," the substantial overlap between business professionals and political actors which occurs when executives take on government roles and collaborate and interact with regulatory bodies on the issues of the day.[64]

Scholars have found that reactive political activity has increased as the expectations of corporate stakeholders have evolved.[65] Some point to the rise of populism and the social reckoning during the COVID-19 pandemic as forces generating greater interest in corporations making political stances.[66] During this period, consumers and shareholders alike demanded corporations take stands on hot button social and political issues, and recent technological advancements like social media have given such stakeholders more access to corporations than ever before.[67] Corporations have responded

[60] Simmons, *supra* note 10, at 715–18.

[61] *Id.* at 757.

[62] *Id.* at 758–63.

[63] *Id.* at 771.

[64] *Id.* at 763–66.

[65] *Id.* at 718.

[66] Lucy Colback, *The Role of the Corporation in Society*, FIN. TIMES FUTURE F. (July 10, 2020), https://www.ft.com/content/482a8435-c04c-4be8-9856-941e7ecf128a [https://perma.cc/QVX2-P7TE]; Simmons, *supra* note 10, at 722–23.

[67] Simmons, *supra* note 10, at 718.

in kind by making statements regarding political issues, increasing their repertoire of political activity.[68]

However, corporate political activity can have repercussions—public response to corporate political statements, expenditures, lobbying efforts, and other engagement can result in losses to the company. This is especially true given the highly polarized political environment in the United States; some stakeholders may push for a corporate statement regarding a certain issue which others may severely oppose.[69] In fact, the most recent polls have found that consumers today are less supportive of corporate political statements or expression than during the height of the pandemic.[70] Further, multiple studies show that corporate political spending can result in financial losses, with scholars Dorothy Lund and former Delaware Chief Justice Leo Strine Jr. naming them "bad business."[71] As such, corporate political activity can result in a variety of negative consequences for the company and its stakeholders.

[68] For an example, see Disney's statement against Florida's "Don't Say Gay" bill. *Statement From the Walt Disney Company on Signing of Florida Legislation*, WALT DISNEY CO. (Mar. 28, 2022), https://thewaltdisneycompany.com/statement-from-the-walt-disney-company-on-signing-of-florida-legislation/ [https://perma.cc/86LE-268X].

[69] Carucci & Mehl, *supra* note 14.

[70] 2023 PUBLIC AFFAIRS PULSE SURVEY REPORT, PUB. AFFS. COUNCIL 5 (2023), https://pac.org/wp-content/uploads/2023/10/Pulse_2023_Report.pdf [https://perma.cc/ND2Y-PK6D] ("Overall, support for corporate engagement in social issues declined in intensity in 2023."); *see also* Patrick Coffee, *Consumers are Less Interested in Brands Taking Stances on Sociopolitical Issues, Survey Finds*, WALL ST. J. (Oct. 10, 2023), https://www.wsj.com/articles/consumers-are-less-interested-in-brands-taking-stances-on-sociopolitical-issues-survey-finds-2211e1ed (on file with the Columbia Business Law Review).

[71] Lund & Strine, *supra* note 7; John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* 16 (Harv. John M. Olin Discussion Paper Series, No. 684, 2010); Hollis A. Skaife & Timothy Werner, *Changes in Firms' Political Investment Opportunities, Managerial Accountability, and Reputational Risk*, 163 J. BUS. ETHICS 239, 257 (2020).

2. Corporate Political Activity Begets Corporate Political Risk

Political risk is a broad term which is difficult to define.[72] Industry experts describe political risk as "the probability that political decisions, events or conditions at the geopolitical, country, regulatory or societal level will impact the performance of a company, market or economy."[73] They isolate different forms of political risk, looking at transnational risks, national or country-level risks, and societal political risks.[74] Prior to the twenty-first century, the bulk of political risk research for corporate entities focused on the first two forms, assessing exposure to political institutions when monitoring risk-taking.[75] However, the modern era requires a more comprehensive evaluation of political risks,[76] including those that can arise from the communities a business serves.[77]

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[72] Simmons, *supra* note 10, at 728 ("Political risk has no consensus definition.").

[73] Courtney Rickert McCaffrey, Jon Shames & Oliver Jones, *Geostrategy in Practice 2021*, EY PARTHENON (2021), at 30, https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/geostrategy/ey-ceo-imperative-geostrategy-in-practice-2021.pdf [https://perma.cc/LVV2-VN6S].

[74] MARY K. CLINE & WITOLD J. HENISZ, POLITICAL RISK AND CORPORATE PERFORMANCE: MAPPING IMPACT 7 (Aug. 2019), https://esg.wharton.upenn.edu/wp-content/uploads/2022/06/ey-political-risk-and-corporate-performance-mapping-impact-final.pdf [https://perma.cc/3H6G-ECJB]; Simmons, *supra* note 10, at 732 tbl.1.

[75] For a comprehensive overview of political risk research in international business over the last fifty years, see Christopher A. Hartwell & Timothy Devinney, *Populism, Political Risk, and Pandemics: The Challenges of Political Leadership for Business in a Post-COVID World*, 56 J. WORLD BUS., June 2021, at 1, 2.

[76] Hartwell & Devinney argue that the institution-based political risk literature fails to account for the impact of individual leadership, as highlighted by the rise of populism and the disparate response of politicians during the COVID-19 pandemic. *See id.* at 6–7.

[77] *See* Cline & Henisz, *supra* note 74, at 7; *see also* David F. Larcker & Brian Tayan, *Blindsided by Social Risk: How Do Companies Survive a Storm of Their Own Making?* (Stan. Closer Look Series, No. CGRP-85,

This Note specifically contemplates societal political risks, which relate directly to a corporation's political engagement and activities. Social or reputational risk can be defined as "events that impair a company's social capital."[78] In the political sphere, social risks can be understood as responses to a corporation's political stance, either made explicitly through a statement or political expenditure (e.g., Target's 2010 contribution to Tom Emmer), or implicitly regarding a business decision (e.g., Target's 2023 Pride Collection). This definition of social risk pairs well with the scholarly definition of societal political risks, which arise when groups "develop a collective political identity [which] drive[s] their public activism" and can result in losses.[79]

As corporate political activity rises, so too does political risk, with many of the same forces driving the two. Stakeholders are paying rapt attention to the political activity and statements of corporations,[80] and in result, the incidence of political risk has surged. In their survey, EY Parthenon found that over "90% of executives [evaluated] say their company has been impacted by unexpected political risks in the last 12 months."[81] These unmanaged political risks have resulted in losses and negatively impacted revenue, growth, and investment.[82]

Most corporations are not adequately equipped to manage the political risks they face.[83] Many companies fail to take proactive measures to monitor political risks, which leaves them vulnerable to "unexpected" shocks. Further, those companies that do manage political risks typically do not integrate such controls across every level of business.[84] Accordingly, companies can be left blindsided by political risks

2020). Larcker & Tayan focus on the rising incidence of social risk, though without a sole emphasis on political risk.

[78] Larcker & Tayan, *supra* note 77, at 1.

[79] Cline & Henisz, *supra* note 74, at 7.

[80] Simmons, *supra* note 10, at 723.

[81] McCaffrey, Shames & Jones, *supra* note 73, at 5.

[82] *Id.* at 4.

[83] *Id.* at 8; Larcker & Tayan, *supra* note 77, at 1.

[84] McCaffrey, Shames & Jones, *supra* note 73, at 11–13, 15.

even when they have protocols in place. This shortcoming arises due to several factors, including the wide range of political risks and the challenge of predicting which will catch the attention of the public, which each contribute to the complexity of political risk management.[85]

For these reasons, scholars and industry experts recommend taking a holistic approach to address political risk, incorporating it into enterprise risk management to sufficiently protect the corporation from losses.[86] This method enables a corporation to account for the impact of political risk across business functions. Companies should also engage proactively with political risks, with procedures in place to identify possible issues, which can empower corporations to have greater confidence in their strategic planning and make bolder business decisions.[87]

C. Corporate Fiduciary Duties under Delaware Law

1. Fiduciary Duties of Care, Loyalty, and Oversight

Corporate directors owe fiduciary duties of care and loyalty to the corporation and its shareholders, as imposed by Delaware law.[88] The duty of care mandates that directors act with the care of a reasonably prudent person, which includes making themselves aware of all reasonably available material information.[89] The duty of loyalty asserts that directors are

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[85] Simmons, *supra* note 10, at 730; Larcker & Tayan, *supra* note 77, at 1.

[86] Simmons, *supra* note 10, at 735; McCaffrey, Shames & Jones, *supra* note 73, at 16.

[87] McCaffrey, Shames & Jones, *supra* note 73, at 29 ("As seen by the strategic choices that proactive companies are making in the current volatile political risk environment, this increased confidence is likely to motivate executives to pursue bolder, political risk-informed, growth-oriented strategies.").

[88] Coffee, Gilson & Quinn, *supra* note 17, at 57.

[89] *Directors' Fiduciary Duties: Back to Delaware Law Basics*, SKADDEN (Feb. 19, 2020), https://www.skadden.com/-/media/files/publications/2020/02/directorsfiduciarydutiesbacktodelawarelawbasics.pdf [https://perma.cc/XYX5-UYVM].

independent and disinterested, ensuring directors do not face conflicts of interest which prevent them from acting in the best interests of the company.[90] These duties generally require directors to act on an informed basis, in good faith, and in their honest belief of the best interests of the corporation; where these conditions are met, the business decisions of directors are afforded deference by the court under the business judgment rule.[91] The business judgment rule holds that decisions of directors will be respected by courts unless there is incidence of fraud, illegality, or a conflict of interest. In situations where there is a conflict of interest, however, the director's duty of loyalty is implicated, and the court will examine directors' decisions through the more exacting standard of entire fairness.[92]

One circumstance which implicates directors' duty of loyalty is the duty of good faith oversight. This directorial responsibility, first articulated by the court in *Caremark*,[93] states that by failing to oversee certain business operations, directors can be found liable for acting in bad faith and exposing the corporation to liability.[94] Shareholders must allege that the board of directors acted in conscious disregard of their duty to remain informed of mission critical risks to the business.[95] This claim, deemed a *Caremark* claim following

[90] *Id.*

[91] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *abrogated on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *see also* Shlensky v. Wrigley, 95 Ill. App. 2d 173, 181 (Ill. App. Ct. 1968).

[92] Coffee, Gilson & Quinn, *supra* note 17, at 85.

[93] *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

[94] Coffee, Gilson & Quinn, *supra* note 17, at 130.

[95] Vice Chancellor Laster noted that only a prong one claim requires the risk be mission critical, and that prong two claims can arise from any issue provided red flags have been made clear to the directors. However, Vice Chancellor Laster acknowledged that the directors' response to a potential red flag is traditionally subject to business judgment deference, and plaintiffs must successfully show that a failure to respond to the flag was done in bad faith. The Vice Chancellor stated, "an inference of bad faith is more likely when a red flag concerns an essential or mission critical risk." *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 677–80

the seminal case, can take one of two forms: a prong one claim, where directors "utterly failed to implement any reporting or information system or controls,"[96] or a prong two claim, where directors, with a system of controls in place, "consciously failed to monitor or oversee its operations."[97] The prong two claim requires that the board of directors was aware of the misconduct and elected not to address it—this evidence of delinquency, deemed a "red flag," must be so overt that it was effectively "waived [sic] in [the] face [of the directors]," or would be visible to the "careful observer," defined as one who actively monitors a company's "mission critical regulatory issues."[98] To successfully plead either *Caremark* claim, shareholders carry the burden of showing that directors acted in bad faith.

2. Evolution of Caremark

Shareholders seeking to enforce violations of directors' duty of good faith oversight initially faced an incredibly high bar to succeed.[99] Those claims that passed the pleading stage traditionally alleged that by a failure of directorial oversight, the corporation had violated state or federal regulation. However, the Supreme Court of Delaware expanded its doctrine in the landmark case *Marchand v. Barnhill*.[100] The Chancery Court of Delaware had dismissed the shareholders' claim on the grounds that the complaint did not allege any violation of requirements by the Food and Drug Association or

(Del. Ch. 2023). As such, the analysis for either form of *Caremark* claim likely requires that the risk be deemed mission critical to succeed, and this Note presumes the mission critical element to be a prerequisite for all *Caremark* claims.

[96] Stone *ex rel.* AmSouth Bancorp. v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[97] *Id.*

[98] Teamsters Loc. 443 Health Serv. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020).

[99] Coffee, Gilson & Quinn, *supra* note 17, at 130–31.

[100] 212 A.3d 805, 824 (Del. 2019)

state statutes.[101] The Delaware Supreme Court reversed, finding the board of directors has an obligation to instate a system of controls pertaining to any mission critical risk of the corporation, even where this practice is outside the scope of regulatory requirements.[102] Further, the board's general discussion of operational issues is not sufficient to meet this fiduciary mandate; the board must "make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks."[103]

Commentators have suggested that *Marchand* marks a major expansion in the doctrine, enabling shareholders to bring *Caremark* claims for mission critical risks that do not arise from a legal or regulatory basis.[104] Roy Shapira maps the Delaware court's decisions in cases following *Marchand* to show that the mission critical designation enables oversight liability for reputational risks, rather than just illegalities.[105] In the recent case *Marriott*,[106] the court specifically acknowledged its historic unwillingness to extend the *Caremark* doctrine to business decisions,[107] but found that the issue at hand, cybersecurity, was too great to ignore.[108] The court recognized that this mission critical problem lacks an appropriately strict accompanying regulatory framework, but held Marriott liable regardless, asserting that "meeting the

[101] *Id.* at 817.

[102] *Id.* at 823–24.

[103] *Id.* at 824.

[104] Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 745–47 (2022); Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1897 (2021).

[105] Shapira, *supra* note 104, at 752–58.

[106] Firemen's Ret. Sys. of St. Louis *ex rel* Marriott Int'l Inc. v. Sorenson, C.A. No. 2019-0965-LWW, 2021 WL 4593777 (Del. Ch. Oct. 5, 2021).

[107] *Id.* at *12 ("Delaware courts have not broadened a board's *Caremark* duties to include monitoring risk in the context of business decisions.").

[108] *Id.* ("The corporate harms presented by non-compliance with cybersecurity safeguards increasingly call upon directors to ensure that companies have appropriate oversight systems in place.").

minimum legal requirements may not be enough."[109] The court even cited former Delaware Chief Justice Strine's work, which advocates for incorporating non-legal risks into the existing board oversight function mandated by *Caremark*, to establish that in certain circumstances, directors must act in advance of regulatory bodies to adequately monitor the mission critical risks their corporation faces.[110]

Shapira views this case as an extension of the holdings in *Marchand* and *Boeing*,[111] stating that *Caremark* liability can therefore be imposed for the reputational risks a company may suffer if it fails to monitor its business activities, even where the corporation does not run afoul of regulatory requirements.[112] Further, Shapira notes that at its inception, *Caremark* was a groundbreaking, novel legal solution created to meet the changing needs of the time.[113] In today's environment, with the rapid speed of information and engaged stakeholder base, an expansive reading of *Caremark* liability to include reputational risk is within this same spirit.[114]

III. THE CAREMARK CLAIM FOR FAILURE TO MANAGE POLITICAL RISKS

Directors of corporations owe a fiduciary duty of good faith oversight to their shareholders, as first established in the

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[109] Shapira, *supra* note 104, at 756.

[110] *Marriott*, C.A. No. 2019-0965-LWW, 2021 WL 4593777, at *12 n.142 (citing Strine, Smith & Steel, *supra* note 104, at 1893).

[111] *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934 (Sept. 7, 2021).

[112] Shapira, *supra* note 104, at 756 ("Following *Marriott*, one can now say that the courts may actually apply *heightened* scrutiny of reputational risk oversight.").

[113] *Id.* at 756–57.

[114] *Id.* at 757 ("Just like how *Caremark* reflected and intensified the rise of compliance risk oversight in corporate boardrooms in the 1990s, decisions like *Marriott* reflect (and will likely intensify) a change that is already underway in corporate boardrooms today: the rise of reputational risk oversight.").

seminal case *Caremark*.[115] A *Caremark* claim relies on the principle that a corporation's directors are acting in bad faith if they fail to monitor mission critical risks to the business.[116] When a corporation has engaged in political activity and incurred political risk, shareholders could bring a *Caremark* claim against the corporation's directors, alleging they failed to manage these political risks in breach of their duty of good faith oversight. Shareholders would struggle to bring a claim for unmanaged political risks, however, as the burden to plaintiffs in bringing a *Caremark* claim is steep. In order to bring the claim, shareholders must assert that political risk is mission critical, which is a challenging case to make. Further, even when each element of the claim is met, the shareholders' *Caremark* claim would still likely fail due to the exceedingly narrow doctrine and the broad and varied definition of political risk, which is not backed or specified by any regulatory framework.

A. Structure of the Claim

A *Caremark* claim for breach of good faith oversight of corporate political risk could be brought as either a prong one or prong two claim. As noted above, a prong one claim must allege that political risk is mission critical and altogether unmanaged by the board of directors. A prong two claim would enable shareholders to bring a cause of action against directors even where the corporation has a system of controls in place to monitor political risks, and instead alleges that the directors consciously disregarded red flags of which they should have been aware. For each claim, the biggest obstacle to shareholders would be to establish that political risk is mission critical, as required by *Caremark*. Shareholders could link political risk to corporate reputation, which plays a key role for a corporation and has been increasingly acknowledged as important by Delaware courts. Even this argument,

[115] *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

[116] *See* Marchand v. Barnhill, 212 A.3d 805, 820–21, 824 (Del. 2019).

though, is likely to fail due to the narrow holdings in the existing jurisprudence.

Looking to the recent example of Target, shareholders could bring a prong one claim alleging that the company failed to put a system of controls in place to monitor political risks. In result, the company suffered material losses and "corporate trauma"[117] because of the negative response to the Pride Collection from the conservative customer base. Target had experienced the consequences of political risk in the past, as customers boycotted the company in 2010 following Target's donations to Tom Emmer due to his anti-LGBTQ+ rhetoric,[118] but had knowingly failed to implement a sufficient set of controls. Target's directors "did not undertake good faith efforts to put a board-level system of monitoring and reporting in place,"[119] meeting the knowledge or scienter element required of *Caremark*.[120]

Alternatively, shareholders could bring a prong two claim. This claim would acknowledge any existing risk management program that Target has in place, such as the committee overseeing political contributions.[121] In this case, plaintiffs would allege that Target's directors failed to respond appropriately to clear indications of risk. The red flags at issue here could include new and pending legislation regarding transgender rights in states where Target operates, such as restrictions on performances in drag, transgender children on sports teams, use of gendered bathrooms, and access to gender-affirming healthcare.[122] The bad faith element must be asserted by showing that the Target directors "consciously disregard[ed]" these red flags which "came to their attention"

[117] *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *24 (Sept. 7, 2021).

[118] Dishman, *supra* note 6.

[119] *Marchand*, 212 A.3d at 821.

[120] *Boeing*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *32 (discussing *Marchand*, 212 A.3d at 822).

[121] *See* TARGET, *supra* note 8.

[122] *See 2023 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ [https://perma.cc/QVL6-3XWM] (last visited Oct. 19, 2024).

or would have been visible to the "careful observer," defined as one who actively monitors a company's "mission critical regulatory issues."[123]

The first headwind that shareholders would face is establishing that political risk is mission critical to the business of Target, and thereby should have been monitored by its directors. In order to make this argument, shareholders could classify political risk as a form of reputational risk, stating that a corporation's reputation is essential to its success. Scholars have found that corporate reputation can be one of the most important assets of a company.[124] Better reputation is strongly correlated with greater performance, and reputational damage can result in devastating financial consequences.[125] As with political risk generally, industry specialists recommend proactive management and mitigation as to reputational risks, given the possibility of fallout.[126]

Delaware courts have also recognized the negative impact of reputational harm.[127] In *Marchand*, the court acknowledged that lack of consumer confidence in the safety of a company's products can be harmful to the business' operations.[128] Consumer confidence is directly related to the corporation's reputation, and the court expressed concern for both real and perceived issues with a company's products in this case. Roy Shapira makes a persuasive argument that in recent cases where plaintiffs have successfully pleaded a

[123] *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 677, 680 (Del. Ch. 2023); Teamsters Loc. 443 Health Serv. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020).

[124] Nadine Gatzert, *The Impact of Corporate Reputation and Reputation Damaging Events on Financial Performance: Empirical Evidence from the Literature* 10 (Working Paper, Sept. 4, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576627 [https://perma.cc/DXD8-VHD3].

[125] *Id.* at 13–14.

[126] Larcker & Tayan, *supra* note 77, at 3; McCaffrey, Shames & Jones, *supra* note 73, at 8.

[127] Shapira, *supra* note 104, at 752–57.

[128] Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019) ("Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat.").

Caremark allegation, the risks incurred are not legal but rather reputational, as they center on loss of customer trust and the associated financial costs.[129]

However, Delaware courts have not yet adopted Shapira's reading of the case law; to date, there has been no express finding that corporate reputation is categorically "mission critical." Despite its importance, shareholders would still struggle to persuade the Delaware court that corporate reputation is on par with operational risks such as food safety for an ice cream company,[130] or airplane safety for a firm which manufactures aircrafts.[131] Of note, the Target shareholders suing the company have alleged securities violations but have not brought any *Caremark* claim,[132] likely due to its difficult nature. Though shareholders could make a persuasive argument regarding political and reputational risk, the Delaware court is unlikely to find that such risk is mission critical for all companies, making it particularly challenging for shareholders to bring a *Caremark* claim for political risk management.

B. Limitations of the Caremark Doctrine

The narrow *Caremark* jurisprudence further hinders shareholders bringing an oversight claim for political risk management, in addition to the challenges in asserting a mission critical designation. Most *Caremark* claims are dismissed at the pleading stage because of the strong headwinds to bringing such cases. Further, political risk is not backed by any regulatory regime, like food or airplane safety, which gives rise to even greater scrutiny by judges. Finally, political risk is difficult to define; without clear standards, it is challenging to determine what form of risk management or

[129] Shapira, *supra* note 104, at 753–54 (describing *Marchand*, 212 A.3d at 809; *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *80 (Sept. 7, 2021)).

[130] *Marchand*, 212 A.3d at 809.

[131] *Boeing*, No. 2019-0907-MTZ, 2021 WL 4059934, at *1.

[132] Complaint at 12, Craig v. Target Corp., No. 2:23-cv-00559 (M.D. Fla. Dec. 4, 2023).

controls is required of a corporation, and whether its directors were delinquent of that duty.

In first establishing the duty of good faith oversight, Chancellor Allen noted that "[t]he theory here advanced is possibly the most difficult theory in corporate law upon which a plaintiff might hope to win a judgment."[133] Plaintiffs must show that the directors were not merely negligent but rather acted in bad faith by failing to manage certain risks that the corporation faces.[134] While not quite to the level of subjective bad intent, shareholders must plead facts showing "intentional dereliction of duty, a conscious disregard for one's responsibilities."[135] *Caremark* liability does not include risks incurred in the regular course of business—its emphasis on bad faith underscores the fact that the doctrine is designed to "address the extraordinary case" where fiduciaries have acted in "conscious disregard" of their duties.[136]

Further, the business decisions of directors are generally subject to business judgment deference; this includes how to structure risk management and whether to respond to potential risks or red flags the company may face.[137] Delaware courts have repeatedly found sufficient controls systems in place where the board received periodic reports as to the risk function in question, or hired external auditors or consultants to monitor the mission critical risks.[138] Courts have noted that "there is a vast difference between an inadequate or flawed

[133] *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

[134] *Boeing*, No. 2019-0907-MTZ, 2021 WL 4059934, at *25 ("Because [t]he test is rooted in concepts of bad faith, a showing of bad faith is a *necessary condition* to director oversight liability." (internal quotation marks omitted) (emphasis in original)).

[135] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006).

[136] Segway Inc. v. Cai, C.A. No. 2022-1110-LWW, 2023 WL 8643017, at *5 (Del. Ch. Dec. 14, 2023) ("The *Caremark* doctrine is not a tool to hold fiduciaries liable for everyday business problems.").

[137] *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 679–80 (Del. Ch. 2023); Marchand v. Barnhill, 212 A.3d 805, 821 (Del. 2019).

[138] *Marchand*, 212 A.3d at 823 n.112 ("In decisions dismissing *Caremark* claims, the plaintiffs usually lose because they must concede the existences of board-level systems of monitoring and oversight.").

effort to carry out fiduciary duties and a conscious disregard for those duties."[139] As to red flags, while in certain cases the court has recognized a "single, striking"[140] red flag to be sufficient, successful claims typically include many such risk markers.[141] For instance, the court found the initiation of an FTC investigation to be insufficient,[142] and noted that issues raised pertaining to "generic financial matters" are also inadequate to serve as red flags.[143] Despite the expansive holdings in *Marchand* and *Boeing*,[144] the majority of claims still fail at early stages due to the limited doctrine.

In result, most successful *Caremark* claims stem from allegations of conduct which violates regulatory requirements. Even the recent cases largely fall within "the shadow of essential and mission critical regulatory compliance risk," as the court clarified in *Boeing*.[145] And *Marriott*, though cited by scholars for its expansive rationale, centered its argument around the existing and evolving regulatory requirements around cybersecurity.[146] Political risk as defined in this Note exists outside the scope of such requirements.[147] While there are certain disclosure requirements imposed regarding corporate political spending, these are insufficient and do not address the underlying political risk.[148] The Securities and Exchange Commission has

[139] Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009).

[140] *McDonald's*, 291 A.3d at 677.

[141] *See id.* at 681; *see also In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *26 (Sept. 7, 2021).

[142] Fisher v. Sanborn, C.A. No. 2019-0631-AGB, 2021 WL 1197577, at *12–13, 16 (Del. Ch. Mar. 30, 2021).

[143] Segway Inc. v. Cai, C.A. No. 2022-1110-LWW, 2023 WL 8643017, at *4 n.55 (Del. Ch. Dec. 14, 2023).

[144] Marchand v. Barnhill, 212 A.3d 805, 823–24 (Del. 2019); *Boeing*, No. 2019-0907-MTZ, 2021 WL 4059934, at * 26.

[145] *Boeing*, No. 2019-0907-MTZ, 2021 WL 4059934, at *26 (internal quotation marks omitted) (discussing *Marchand*, 212 A.3d at 805).

[146] Firemen's Ret. Sys. of St. Louis *ex rel* Marriott Int'l Inc. v. Sorenson, C.A. No. 2019-0965-LWW, 2021 WL 4593777, at *12 (Del. Ch. Oct. 5, 2021).

[147] *See supra* Section II.B.

[148] See *supra* Section II.A.1 on the insufficiency of the lasting disclosure requirements of the Bipartisan Campaign Reform Act.

also proposed and enacted disclosure regulations for other similar risks, such as climate[149] and cybersecurity,[150] indicating possible regulatory trends to which political risks may attach. But as state and federal regulations currently sit, societal political risk is not covered or even in the "shadow" of such requirements, making this *Caremark* claim challenging.

Finally, political risk is exceedingly broad and has no defined standards by which to measure appropriate risk management.[151] Even those scholars who advocate the use of *Caremark* for other non-operational or reputational risks—such as Environmental, Social, and Governance (ESG) risks—note that only some risks will be considered "mission critical" for certain companies, depending on the industry, geographical presence, and other company-specific factors.[152] This limitation cuts away at the broad imposition of political risk management through a *Caremark* scheme of liability. A *Caremark* claim for political risk could perhaps survive for certain media companies, whose business line has to do with reporting on politics, or otherwise politically connected businesses, but it would be more difficult to assert this type of claim for diversified and consumer-facing companies such as Target.

In addition, societal political risk as defined within this Note is not the only definition of political risk. Scholars studying political risk also monitor geopolitical risks, having to do with international relations and foreign affairs, and country-level political risks, which focus on "the stability of

[149] Press Release, Sec. Exch. Comm'n, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/news/press-release/2024-31 [https://perma.cc/5NZJ-DFSX].

[150] Press Release, Sec. Exch. Comm'n, SEC Adopts New Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies (July 26, 2023), https://www.sec.gov/news/press-release/2023-139 [https://perma.cc/3UEB-25UU].

[151] Simmons, *supra* note 10, at 728.

[152] Shapira, *supra* note 104, at 766–67.

the government and institutions" within a nation.[153] The wide-ranging definition of political risk underscores the difficulty that shareholders would face in attempting to establish that political risk is per se mission critical, and further, that directors acted in bad faith by failing to monitor it.

The limitations of the *Caremark* doctrine would likely bar shareholders' claims for failure of political risk oversight. Though shareholders may experience real harm, the high-water mark of success, the lack of regulation regarding political risk, and the absence of a clear definition or set of standards for political risk would likely present too great a burden for the shareholders. As such, there likely exists today no successful mechanism to enforce political risk management.

IV. THE CASE FOR EXPANDING CAREMARK TO MEET POLITICAL RISKS

Under the present *Caremark* jurisprudence, shareholders would likely fail to successfully plead a *Caremark* claim for political risk management, despite the significant harms that these unmanaged risks can cause. In addition, the Supreme Court has bolstered corporations' personhood rights, which has enabled companies to engage in even more political activity, putting shareholders at greater risk while also diluting the voting power of the individual. For these reasons, this Note proposes an expanded *Caremark* doctrine that addresses the issue of political risk. Specifically, *Caremark* claims should be upheld for any material political risk which directors fail to manage appropriately, a lower standard than the mission critical designation that the current framework mandates.

Though this expansion is meaningful, it is tempered by the limitations on the other elements of a Caremark claim, and it could even be further constrained under the contractarian nature of Delaware law. As to implementation, Dick's

[153] Simmons, *supra* note 10, at 731 (quoting McCaffrey, Shames & Jones, *supra* note 73, at 7).

provides a strong example of appropriate political risk management under this regime. While this expansion could raise some issues, such as diverting a corporation from profit-seeking, impacting corporate First Amendment rights, or complicating judicial application, these problems could be mitigated with care. Most importantly, these concerns are outweighed by the significance of protecting shareholders and re-prioritizing the people in the American political system.

A. *Mechanics of an Expanded* Caremark

1. The New Caremark Functionality

In order to effectively monitor political risk management, the *Caremark* framework must be broadened. One manner to do so is to enable *Caremark* claims for material risks, rather than mission critical, in the political risk realm. This expansion helps to cure the issues with the potential *Caremark* claims from Target shareholders discussed previously. While political risk would likely fail to be mission critical for Target, the risks Target faced were material and resulted in significant harm to shareholders. The materiality definition extends a *Caremark* claim to include risks beyond those at the center of the business, which enables enforcement of political risk management for diversified corporations. This expansion ensures that political risk does not fall through the cracks of the *Caremark* jurisprudence just because it is outside the operational focus of a given company.

A successful expansion of *Caremark* would require a legally applicable definition of political risk, to empower the Delaware courts to apply the newly formulated test evenly. Political risk for this claim should be defined as the risk of societal response to activity that adopts an ideology which is the subject of existing or pending legislation or policy in the states in which a company operates. This includes national policies as well. Looking again to Target, for example, the company faced political risk by introducing its Pride Collection given increasing legislation in states where it operates regarding the rights of transgender individuals.[154] Anheuser-Busch faced political risk by marketing with a transgender influencer for the same reason,[155] as did Disney by making statements regarding Florida's Parental Rights in Education Act.[156] On the other side of the political spectrum, Target faced political risk by contributing to Tom Emmer in 2010, as did Goya by advocating for former President Trump and claiming the 2020 election was fraudulent, relating to national-level political issues.[157]

2. Boundaries of the New Caremark

This method of expanding *Caremark* is rather broad, which runs contrary to the narrow doctrine. However, the breadth of even this expanded framework is tempered by two tenets of *Caremark* functionality: (1) the business judgment deference afforded to director's decisions; and (2) the high standards of bad faith. In addition, under certain circumstances, corporate directors could potentially work directly with sophisticated shareholders to contract out of the expanded *Caremark* regime, which would help minimize the impact for those corporations where this liability framework could do more harm than good.

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[154] Holman & Creswell, *supra* note 1 ("[B]rands and marketers say the country's current political environment – especially around transgender issues – has made this year's [Pride] campaigns more complicated.").

[155] As was reported in the *New York Times*,

> The criticism of Bud Light, amid other complaints about brand partnerships with transgender people, comes as Republican state lawmakers are proposing legislation that seeks to regulate the lives of young transgender people, restrict drag shows in a way that could include performances by transgender people and require schools to out transgender students to their parents.

Amanda Holpuch, *Behind the Backlash Against Bud Light*, N.Y. TIMES (Sept. 18, 2023), https://www.nytimes.com/article/bud-light-boycott.html (on file with the Columbia Business Law Review).

[156] WALT DISNEY CO., *supra* note 68.

[157] Salcedo, *supra* note 13.

a. Existing Caremark Limitations Meter Impact of New Regime

As has been discussed, directors have the benefit of business judgment deference for their decisions, including how to manage risks. This means that in practice, the remedy for *Caremark* claims is rather mild. To prevent shareholder claims and escape liability, a corporation must institute a system of controls and not "consciously disregard" any issue markers. Directors may otherwise structure their risk management as they see fit. Once the risk management function is established, directors will not face liability for losses associated with a fully informed business decision made in their honest belief of the best interests of the company.[158] Put differently, provided directors have not acted in bad faith or with gross negligence, they have acted in accordance with their fiduciary duty of oversight. The *Caremark* duty, even expanded, only requires that directors avail themselves of all material information regarding key risks to the business; it does not mandate that directors never make business decision which results in losses.[159] As courts have reiterated, "[b]ad results alone do not imply bad faith."[160]

With a system of controls in place, business judgment deference offers another protection to directors; it ensures the burden rests on the plaintiff in a prong two claim to establish

[158] *See* Marchand v. Barnhill, 212 A.3d 805, 821 n.105 (Del. 2019) ("[C]ase law gives deference to boards and has dismissed *Caremark* claims even when illegal or harmful company activities escaped detection, when the plaintiffs have been unable to plead that the board failed to make the required good faith effort to put a reasonable compliance and reporting system in place.").

[159] *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 682 n.8 (Del. Ch. 2023) (citing Pettry v. Smith, C.A. No. 2019-0795-JRS, 2021 WL 2644475, at *9 n.101 (Del. Ch. June 28, 2021)).

[160] Firemen's Ret. Sys. of St. Louis *ex rel* Marriott Int'l Inc. v. Sorenson, C.A. No. 2019-0965-LWW, 2021 WL 4593777, at *15 n.168 (Del. Ch. Oct. 5, 2021) (quoting Okla. Firefighters Pension & Ret. Sys. *ex rel* Citigroup, Inc. v. Corbat, C.A. No 12151-VCG, 2017 WL 6452240, at *24 (Del. Ch. Dec. 18, 2017)); *see also Pettry*, C.A. No. 2019-0795-JRS, 2021 WL 2644475, at *9 n.101 (Del. Ch. June 28, 2021).

that certain red flags represented material political risk for the corporation. Plaintiffs must show that these red flags pertain to relevant issues which should have been evaluated as part of the risk management process. This functionality ensures that corporations are not susceptible to lawsuits which can find a nexus to an archaic or obscure law, and further protects directors from oversight liability where they have exercised judgment over a risk management protocol.

The expanded definition of *Caremark* for political risk is further limited by the high standard of bad faith. While this Note proposes a change from "mission critical" to "material" when classifying the covered risk, it includes no change to the definition of bad faith under *Caremark* jurisprudence. The Delaware Chancery court recently underscored the exacting nature of this standard, noting that bad faith is found in the "extraordinary case," not where directors or fiduciaries fail to "properly evaluate business risk."[161] As discussed in the prior section, this limitation on the *Caremark* doctrine is meaningful, and would be in place even under an expanded definition.

To properly address the harmful impacts of political risk, Delaware courts should adopt an expanded form of *Caremark*, which asserts liability on directors for failure to monitor material political risks. Though the expansion is significant, it is limited in a number of ways: first, with the definition of political risk applied; second, due to the mild *Caremark* remedy and business judgment deference; and finally, because of the high standard to show bad faith, the burden of which rests on the plaintiff.

b. Restriction under Contractarian Theory of Corporate Law: Covenant Not to Sue

Another recent trend in Delaware law could also provide protection for corporations against liability for the expanded *Caremark* theory espoused in this paper. Delaware courts

[161] Segway Inc. v. Cai, C.A. No. 2022-1110-LWW, 2023 WL 8643017, at *5 (Del. Ch. Dec. 14, 2023).

have been increasingly willing to lend into the "contractarian nature" of corporate law, upholding contracts that waive shareholders' rights under certain circumstances.[162] As applied to *Caremark*, a corporation seeking to avoid the requirements of political risk management could incorporate a covenant not to sue for a *Caremark* claim. This provision would face steep headwinds, as the directors would be contracting out of an intentional tort executed in bad faith, but Delaware courts may find that sufficiently sophisticated parties could agree to waive this right.[163] Under these conditions, corporate directors who have a strong interest in political activity could contract with their shareholders to forego liability for political risk management failures, perhaps minimizing the bite of this regime.

There are different means by which directors and shareholders can modify the directorial responsibilities for a particular corporation. As an initial matter, Delaware law has a number of default rules, which corporations can opt out of through their corporate charter. These provisions, deemed "stock restrictions,"[164] are binding on current and future shareholders. Stock restrictions are thereby judicially constrained because of their transferable nature, and traditionally stem from statutory provisions in Delaware law. Greater discretion is offered to stockholders who contract directly with the corporation's directors regarding the waiver of certain rights. Contractual provisions that could not be upheld as a stock restriction can be enforceable against the

[162] New Enterprise Assoc. 14, L.P. v. Rich, 295 A.3d 520, 565, 589–90 (Del. Ch. May 2, 2023).

[163] Delaware contract law prohibits parties from contracting out of liability for intentional torts as a matter of public policy. However, there is case precedent where the court allowed "sophisticated parties to cabin liability for an intentional tort," specifically fraud. *See Rich*, 295 A.3d at 592 (discussing Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1062 (Del. Ch. 2006)).

[164] Stock restrictions tend to be limited by courts to those enabled by Delaware statute because they impose binding provisions on all future shareholders. Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199, 1215 (Del. 2021).

shareholder signatories under certain conditions.[165] This flexibility stems from the court's wariness in "relieving sophisticated business entities of the burden of freely negotiated contracts."[166] However, in order to offer such deference to the contractual agreement, Delaware chancellors must ensure that the parties engaged are sufficiently "sophisticated" and the outcome was reasonably foreseeable. Courts will evaluate whether the contractual provision is narrowly tailored to address a specific transaction or circumstance, with a high level of specificity required, and then ensure that the provision is reasonable, analyzing whether the contracting process was fair and the shareholders were informed, knowledgeable, and waived their rights freely.[167] In addition, the Delaware judiciary has signaled that certain contractual waivers will be particularly suspect and unlikely to be upheld, such as shareholder agreements with retail investors.[168] Of note, such agreements are only enforceable against signatories to the contracts, which means the waiver cannot be applied to subsequent investors; consequently, this doctrine is largely inapplicable to transferable securities.[169]

These broad permissions are backstopped by the principles of contract law, which generally provide that parties may not exculpate themselves of liability for intentional torts, such as a party's "own fraudulent act or bad faith."[170] In *Rich*, the contractual provisions at issue were ultimately found to be unenforceable as they relieved directors of liability for an

[165] In contrast to stock restrictions, Delaware courts have been more lenient and willing to uphold specific contractual waivers, which apply only to the instant parties in privity. *See Rich*, 295 A.3d at 570 ("DGCL demonstrates that stockholders can agree to greater constraints on their rights in a stockholder's agreement than a corporation can impose in its charter or bylaws."); *see also Manti*, 261 A.3d at 1216–18.

[166] *Rich*, 295 A.3d at 566 (citing *Abry Partners*, 891 A.2d at 1061–62).

[167] *Id.* at 589.

[168] *Id.* at 591.

[169] *Manti*, 261 A.3d at 1215 (noting that the covenant in question was not enforced against any parties who had not signed the agreement and that provisions purporting to bind successors would likely be unenforceable).

[170] *Rich*, 295 A.3d at 592.

intentional breach of fiduciary duty.[171] This holding suggests that a covenant not to sue for a *Caremark* claim may be found unenforceable as well, given *Caremark*'s basis in bad faith and "intentional dereliction of duty."[172]

However, in *Abry Partners*, the Delaware court upheld a covenant in which shareholders consented not to rely on representations made by directors outside of the instant agreement, effectively waiving their right to sue for fraud.[173] Though courts have declined to extend *Abry Partners* beyond the anti-reliance context,[174] the rationale is directly applicable to *Caremark*; sufficiently sophisticated parties can contract out of their right to sue where the provision is narrowly tailored, and signatories are informed and receive bargained-for consideration. Further, the *Abry Partners* decision stops short of exculpating the directors from their own intentional misrepresentations, noting that the contract would be unenforceable for public policy purposes to the extent it protected directors where they "acted with an illicit state of mind."[175] This distinction maps well to the *Caremark* duty, as courts have stated a *Caremark* claim requires a showing of bad faith, but need not rise to the level of subjective bad intent.[176] Under this theory, a covenant not to sue for a *Caremark* claim could be upheld under Delaware law, provided there was no "illicit state of mind" on the part of the directors in their failure to address material political risks.

A covenant not to sue for a *Caremark* claim would likely face an uphill battle in the Delaware courts, but it could enable sophisticated parties, not including retail investors or

[171] *Id.* at 593.

[172] *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *25 (Sept. 7, 2021) ("Because the test is rooted in concepts of bad faith, a showing of bad faith is a *necessary condition* to director oversight liability." (internal quotation marks omitted) (emphasis in original)).

[173] *Rich*, 295 A.3d at 592 (describing Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1062 (Del. Ch. 2006)).

[174] *Rich*, 295 A.3d at 592–93.

[175] *Abry Partners*, 891 A.2d at 1064.

[176] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006).

non-signatory shareholders, to opt out of the stricter expanded *Caremark* regime for political risk. This provides some corporations and directors a pressure valve pertaining to political risk. As discussed, companies are facing increasing political risk and conflicting demands from their stakeholders, and the expanded *Caremark* regime may amplify the impact of these trends for certain corporations. Informed, knowledgeable shareholders may find that this scheme of liability does not further the purpose of their corporation and potentially contract out of this right.

3. Implementation of the Expanded Caremark

In practice, the expanded *Caremark* regime enforces greater caretaking by directors facing political risks. One corporation recently applied these principles in making a politically charged decision and serves as a pinnacle example for the type of oversight advocated by this Note. In 2018, Dick's removed assault rifles from its stores.[177] This decision incited political ire from consumers, who called for boycotts,[178] but Dick's had properly evaluated the risk through a series of controls from management and the board, and protected its shareholders while taking a stand on a matter of importance to Dick's Chief Executive Officer (CEO).[179] The company's actions serve as a case study in political risk management, and can be evaluated through the framework outlined above.

Following the shooting at Marjorie Stoneman Douglas High School in Parkland, Florida, Ed Stack, the CEO of Dick's,

[177] Chris Isidore, *Dick's Sporting Goods Will Stop Selling Assault-Style Rifles*, CNN BUS. (Feb. 28, 2018), https://money.cnn.com/2018/02/28/news/companies/dicks-weapon-ban/index.html [https://perma.cc/8JNM-2FJZ].

[178] David Gelles, *The C.E.O. Taking on the Gun Lobby*, N.Y. TIMES (Oct. 25, 2019), https://www.nytimes.com/2019/10/25/business/ed-stack-dicks-sporting-goods-corner-office.html (on file with the Columbia Business Law Review).

[179] HBR IdeaCast, *The CEO of Dick's Sporting Goods on Becoming a Gun Control Advocate*, Harv. Bus. Rev. (Oct. 8, 2019), https://hbr.org/podcast/2019/10/the-ceo-of-dicks-sporting-goods-on-becoming-a-gun-control-advocate [https://perma.cc/UL2N-H7LM].

decided he no longer wanted to sell firearms at his stores.[180] Applying the definition of political risk as advocated by this Note, the business decision to stop selling guns incurs political risk because of the contentious debate over gun control policy in the United States. The Parkland shooting in particular sparked discourse across the country, with many states enacting new legislation in response to the tragedy,[181] including some of the forty-seven states where Dick's operates.[182] Stack was mindful that Dick's could face reputational risk for continuing to sell firearms given the rising frequency of mass shootings,[183] and he was even aware of a planned consumer boycott of firearm retailers, including Dick's, in the days before he announced their new policy.[184] Stack also knew that many would be angered by this decision, including customers, suppliers, and other stakeholders such as the National Rifle Association (NRA).[185] The political risk associated with this decision came from all sides, and was certainly material to the business. Guns were a meaningful part of Dick's merchandise, so the decision to remove them did affect Dick's' bottom line significantly, separate from potential financial impact from any customer boycott.[186]

[180] George A. Riedel, *Dick's Sporting Goods: Getting Out of the Gun Business (A)* 5 (Harv. Bus. Sch., Case 321-024, Jan. 2021).

[181] Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws*, STATELINE (Aug. 2, 2018), https://stateline.org/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws/ [https://perma.cc/RF4X-7WDH].

[182] *Dick's Sporting Goods Stores*, DICK'S SPORTING GOODS, https://stores.dickssportinggoods.com/ [https://perma.cc/WF7X-5FF6] (last visited Oct. 15, 2024).

[183] George A. Riedel, *Dick's Sporting Goods: Getting Out of the Gun Business (B)* 1–5 (Harv. Bus. Sch., Supp. 321-025, Jan. 2021).

[184] *Id.* at 2.

[185] HBR IdeaCast, *supra* note 179, at 10:45–55; Jay Fitzgerald, *Dick's Sporting Goods Followed its Conscience on Guns—and It Paid Off*, HARV. BUS. SCH. WORKING KNOWLEDGE (Apr. 18, 2022), https://hbswk.hbs.edu/item/dicks-sporting-goods-followed-its-conscience-on-guns-and-it-paid-off [https://perma.cc/276B-6LCH].

[186] Riedel, *supra* note 180, at 6.

Stack knew he was facing material political risk by removing firearms from his stores and structured his approach in order to effectively manage this risk. He began by working with his management team to develop a holistic strategy.[187] Together, they evaluated the impact of the decision from both a financial and reputational standpoint and discussed the scope of the product removal.[188] After considering the ramifications, Dick's ultimately elected to limit the initial product removal to assault-style rifles, high capacity magazines, and bump stocks.[189] Next, the team put together a comprehensive communications plan, which included discussing the company's policy on national television, and providing direct notice to employees, customers, and suppliers. They created revised financial guidance, which accounted for losses related to gun sales, but also included meaningful changes to Dick's' expenses and the introduction of higher margin products to replace firearms.[190] The management team then took this initiative to the board of directors in two official meetings. They first introduced the product removal, and then gave the directors time to carefully consider the plan before holding an official vote.[191] The board was fully informed and voted unanimously in favor of the policy at the second meeting.[192]

From the expanded *Caremark* perspective, Stack and the board of directors at Dick's rigorously evaluated political risk through a system of controls and made a business decision based on this analysis. The removal of assault rifles was executed pursuant to a review procedure, on a fully informed basis, and in the best interests of the company, and the directors and executives involved thereby should receive

[187] HBR IdeaCast, *supra* note 179, at 05:15.

[188] Riedel, *supra* note 183, at 1.

[189] *Id.* The management team decided that the scope of the product withdrawal should be limited to promote education and advocacy around reasonable gun control. The team chose to highlight these products because of their dangerousness.

[190] HBR IdeaCast, *supra* note 179, at 13:50; Fitzgerald, *supra* note 185.

[191] Riedel, *supra* note 183, at 2.

[192] *Id.*

business judgment deference under Delaware law. Shareholders could not successfully allege that the directors of Dick's acted in bad faith or conscious disregard of their responsibilities, given the attention paid to risk management. The directors and executives understood the political risks involved, took a calculated path forward, and worked actively to mitigate impact to shareholders.

Though Dick's did take a financial hit from the decision, ultimately the company did not face serious political fallout. There were some calls for boycotts, particularly from the NRA, but Dick's found that its brand reputation had recovered within six months.[193] Moreover, Dick's beat its revised financial guidance within the year, and its stock price remained fairly unharmed throughout the ordeal.[194] Stack has been hailed for his effective strategy in making a challenging political decision, with experts noting his proactive risk management, effective communication strategy, and astute financial assessment.[195] Other business leaders have even reached out to Stack about different but similarly charged issues to discuss the process he undertook at Dick's.[196]

Stack and Dick's provide an example of an effective political risk management process, which utilized a series of controls to evaluate a business decision with material political risk, and protected shareholders and stakeholders from harm. This situation involved political risk from both sides of the political spectrum; the NRA and Second Amendment lobbyists on the right, and gun control activists on the left. Stack took a careful approach, and with the support of the management team and the board of directors, he made a politically charged business decision without incurring excess political risk. This is the sort of approach advocated by the expanded *Caremark* doctrine; it does not prohibit corporations from taking stances or incurring political risk, but rather encourages thoughtful risk-taking with stakeholders in mind.

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[193] Per market research. Riedel, *supra* note 183, at 3.

[194] *Id.*; HBR IdeaCast, *supra* note 179, at 13:00–13:05.

[195] Fitzgerald, *supra* note 185.

[196] HBR IdeaCast, *supra* note 179, at 19:11.

B. Normative Purposes Behind Expanding Caremark

The expansion of *Caremark* provides a solution to shareholders who feel their directors are not putting their interests at heart by taking on political risks. In particular, these harms include using business revenues for political expenditures which shareholders may not agree with and, more importantly, have little or no positive impact for the business. Further, the use of *Caremark* liability for political risk has an external benefit: as corporations take more care to examine and lessen their political activity, individuals in the United States can reclaim control of the political process.

1. Minimize Harms to Shareholders and Improve Governance

Political risk is widely acknowledged by industry experts and can result in real harm to the corporation and its shareholders. Most executives anticipate that they will suffer negative consequences from unexpected political risks, but do not necessarily know the right way to approach these concerns.[197] Scholars have noted that these types of social risks can have significant impact on a corporation, but can seem "immaterial from a financial standpoint because they lack definition [and] are difficult to capture, track, and plan for under standard risk management frameworks."[198] There is a clear need for a mechanism to monitor such risks, and *Caremark* is an effective, efficient manner to do so.

Corporate political spending in particular has been negatively correlated with firm value by multiple comprehensive studies using different methods of evaluation.[199] One such report was written by John Coates, who examined the S&P 500 over a six-year period, looking at

[197] McCaffrey, Shames & Jones, *supra* note 73, at 4–5.

[198] Larcker & Tayan, *supra* note 77, at 4.

[199] Coates, *supra* note 71, at 16; Skaife & Werner, *supra* note 71, at 239–40.

the relationship between corporate political spending, financial outcomes, and corporate governance measures. He found that greater corporate political activity is significantly positively correlated with weaker governance and shareholder rights, and negatively correlated with firm value.[200] Ultimately, Coates concluded that "corporations that engage in political activity generate lower value for their shareholders relative to the value of the assets they control."[201] There have been multiple event studies conducted as well, with Hollis Skaife and Timothy Werner finding negative abnormal returns on four dates key to the *Citizens United* decision.[202] Skaife and Werner also included a date in their event study to account for the Federal Election Commission advisory opinions on Super PACs, which further enabled corporations to engage in unchecked political spending without disclosing their contributions.[203] Like Coates, Skaife and Werner examine the relationship between corporate political activity and shareholder rights, and find that companies with higher levels of previously known political activity and concentrated control by management[204] experienced consistent negative returns below the S&P 500 for each of the dates in question.[205]

On the other hand, there have been some studies which have found no significant impact to firm value by political spending.[206] However, scholars also note that the impact of social risk can vary immensely, and part of the issue is the inability to predict which companies will be impacted.[207] As

[200] Coates, *supra* note 71, at 16.

[201] *Id.*

[202] Skaife & Werner, *supra* note 71, at 239–40.

[203] *Id.* at 247; Lincoln, *supra* note 40.

[204] Concentrated control is accounted for by evaluating firms where one person serves as the CEO and the Chair of the Board of Directors. Skaife & Werner, *supra* note 71, at 239.

[205] *Id.* at 240.

[206] *See, e.g.*, Roger Coffin, *A Responsibility to Speak:* Citizens United*, Corporate Governance and Managing Risks*, 8 HASTINGS BUS. L. J. 103 (2012).

[207] Larcker & Tayan, *supra* note 77.

such, studies which use a smaller sample of companies over a shorter period of time may be less effective in evaluating impact of political risk and spending. To this effect, the studies conducted by Coates and Skaife and Werner, which found negative correlation between corporate political activity and firm value or returns, were more comprehensive than those reports which did not find a significant relationship between the two.[208]

Because of the potential—and observed—negative impact of corporate political spending and activity, many scholars advocate for political risk management even without the imposition of legal liability.[209] The board of directors is frequently cited as the appropriate body to manage political risks.[210] Directors are charged with risk oversight for all material risks the company may face, with fiduciary responsibilities to shareholders.[211] It thereby follows that directors should have responsibility for managing political risk, giving their existing duty of oversight for risk management.[212]

However, these recommendations for risk management reform do not have real teeth without an accompanying legal mandate, and they are thereby likely to be ignored.[213] An

[208] The studies which found significant, negative correlation between value or returns and political spending are more comprehensive, both as to the sample set of companies and the time period evaluated, than the study conducted by Coffin, which found no correlation.

[209] *See, e.g.*, Simmons, *supra* note 10, at 781; Larcker & Tayan, *supra* note 77; Lund & Strine, *supra* note 7.

[210] Simmons, *supra* note 10, at 736 ("Political risk is the full board's responsibility.").

[211] Coffin, *supra* note 206, at 133–34 ("Modern boards should assess all material risks and opportunities facing the firm. Political or regulatory risks and opportunities can be as immediate, and as significant, as market or credit risks. They should be managed in similar fashion.").

[212] Strine, Smith & Steel, *supra* note 104, at 1917–18. The authors specifically contemplate EESG oversight, but the same rationale applies to political risk.

[213] Donald C. Langevoort, *Soft Law, Risk Cultures, and Law Abidingness: The* Caremark *Connection*, 24 U. PENN. J. BUS. L. 819, 829 (2022) (discussing Strine, Smith & Steel, *supra* note 104). Langevoort specifically discusses the thesis in Caremark *and ESG, Perfect Together*,

expanded *Caremark* that captures political risk combats this weakness, creating a mechanism to enforce political risk management and better protect shareholders. This framework will help corporations to address the political risks and societal demands they face,[214] though directors will still be protected by the limited scope of the *Caremark* doctrine. Shareholders and corporations alike will benefit from the broadened *Caremark* regime for political risk management.

2. Reduce Corporate Intervention in the American Political Process

In addition to improving shareholder governance, the expanded *Caremark* framework for political risk can serve to improve transparency and minimize the impact of corporations in the American political process. This scheme of liability would encourage corporations to take greater care regarding their political risk, activity, and spending—and in doing so, temper the expanded corporate personhood rights under *Citizens United*, *Hobby Lobby*, and even *303 Creative*.

The majority of Americans are concerned by the influence of money in politics and believe that major donors have outsize influence.[215] In 2015, five years after *Citizens United*, a New York Times poll showed that 84% of individuals believed that money has too much influence in American elections, and 85% believed the system for political campaigns needed either

noting the challenge in making this construct a reality without an enforcement mechanism.

[214] Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE 662–72 (Benjamin van Rooij & D. Daniel Sokol eds., 2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3571&context=faculty_scholarship [https://perma.cc/3DUG-K7BG]. Pollman discusses the need for greater standardization in the realm of corporate social responsibility (CSR) and ESG.

[215] *Americans' Dismal Views of the Nation's Politics*, PEW RSCH. CTR. (Sept. 19, 2023), https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics/ [https://perma.cc/6XMX-5SBD].

fundamental changes or to be rebuilt altogether.[216] The benefits afforded to the corporate structure enable wealth accumulation at a greater rate than for individuals, which "can also give [corporations] the financial power to tilt the rules of the game."[217] The recent Supreme Court cases have further empowered corporate political activity by increasing protections for expressive speech, recognizing corporate religious expression, and sanctioning limitless corporate political expenditures.[218]

In the face of these rulings, consumers have recently expressed waning interest in corporate political activity.[219] Furthermore, corporations also suffer from the largely unregulated landscape regarding political spending and activity.[220] Many corporate executives have expressed frustration with the current system "because it distracts them and shifts resources away from other, value-creating activities."[221] And the lack of regulation can result in politicians and political groups pressing corporations to give funds, making corporate leaders feel the system is "pay to play."[222]

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[216] As a *New York Times* article concluded,

> With near unanimity, the public thinks that the country's campaign finance system needs significant changes. There is strong support across party lines for limiting the amount of money individuals can contribute to political campaigns, limiting the amount of money groups not affiliated with candidates can spend, and requiring unaffiliated groups to publicly disclose their donors if they spend money during a political campaign.

Americans' Views on Money in Politics, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html (on file with the Columbia Business Law Review).

[217] Binyamin Appelbaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES MAG. (July 22, 2014), https://www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html (on file with the Columbia Business Law Review).

[218] *See supra* Section II.A.

[219] Coffee, *supra* note 70.

[220] Lund & Strine, *supra* note 7.

[221] *Id.*

[222] *Id.* (citing COMM. ECON. DEV., CED'S LONGSTANDING, NONPARTISAN CALL TO ACTION ON MONEY IN POLITICS (2013)).

The Supreme Court in *Citizens United* expressly noted that "procedures of corporate democracy"[223] serve to protect the interests of shareholders in regards to corporate political spending; in result, scholars have advocated for the use of corporate law remedies to minimize the impact of *Citizens United* on shareholders and the political process as a whole.[224] Jonathan Romiti suggests using the doctrine of corporate waste to address corporate political spending, arguing that these expenditures have no rational business purpose.[225] This concept echoes the argument by Lund and Strine that there is no sound business justification for political expenditures.[226] Romiti also puts forward that shareholders could bring a breach of loyalty claim on the same grounds, alleging that the directors are not acting in the best interest of the corporation.[227] While these arguments are strong, there are exceedingly high barriers to plead these claims; for instance, the corporate waste doctrine requires a showing that the transaction "is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."[228] The duty of loyalty claim similarly requires a strong showing that the directors acted in their own interest. Because of these limitations, in conjunction with the powerful, deferential business judgment rule, existing corporate means are insufficient to effect real change regarding corporate political activity.[229]

For this reason, other scholars propose reforms within the spirit of existing corporate law to effectively combat the dilution of the American political process. Paul Miller puts

[223] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010).

[224] *See, e.g.*, Jonathan Romiti, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-*Citizens United, 53 B.C. L. REV. 737, 770–72 (2012); Miller, *supra* note 40, at 54–55; Tucker, *supra* note 19, at 498.

[225] Romiti, *supra* note 224, at 770–71.

[226] Lund & Strine, *supra* note 7.

[227] Romiti, *supra* note 224, at 771–72.

[228] *Id.* at 770 (quoting *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 748–49 (Del. Ch. 2005)).

[229] *See supra* Section II.A; *see also* Miller, *supra* note 40, at 90.

forward the concept of a political exception, where traditional business judgment deference is suspended for the purposes of evaluating political spending decisions.[230] Lucian Bebchuk and Robert Jackson, Jr. recommend legislative reform to provide sufficient transparency and shareholder advocacy, noting that political speech and activity are fundamentally different from other business activities and thereby require a novel legal approach.[231]

The expanded *Caremark* doctrine herein proposed is another manner of addressing the same root issues: shareholder and voter protection. It serves to counteract the increasing capabilities afforded to corporations by enforcing value-protecting risk management protocols, helps shareholders combat the principal-agent problem in corporate political spending, provides corporate directors with a better framework to approach political activity, and reduces the outsized impact of corporate wealth in American elections. Above all else, this corporate mechanism can put the power of American democracy back into the hands of the people and enable citizens to effectively vote for policies that impact them, without corporate dilution and distraction.

C. Potential Drawbacks of this Approach

There are some costs associated with expanding the *Caremark* doctrine, including hampering the priorities of Delaware law, burdening corporate First Amendment rights, and creating difficulties in judicial application. While these tolls are significant, they are each manageable in their own right with appropriate care.

It is true that expansion of liability for directors could serve to hinder the objectives of the corporation: calculated risk-taking and profit-seeking. As Stephen Bainbridge argues, broadening *Caremark* to ESG and other non-regulatory risks "will undermine Delaware's clear law of corporate purpose by extending director oversight duties into areas of social

[230] Miller, *supra* note 40, at 87–90.
[231] Bebchuk & Jackson, *supra* note 19, at 117.

responsibility unrelated to corporate profit."[232] Corporations are vehicles for diverting personal liability in order to promote innovation, and the expanded *Caremark* for political risk may erode some of this purpose. However, there are two strong counterarguments to this principle. First, as discussed above, corporate political spending and activity frequently lead to poorer business outcomes;[233] managing political risks, therefore, may not actually harm performance. Experts have found that unmanaged political risks can cause significant losses as well, and that corporations that proactively monitor political risk experience better strategic outcomes.[234] Second, from its inception, the *Caremark* duty of good faith oversight has served as an area where the Delaware courts recognize that changing times impose new requirements on corporations, despite the costs.[235] Political risk is material but otherwise unapproachable through means of corporate law, and this expansion is within the spirit of *Caremark* to better address the fiduciary requirements of directors.

Another possible downside of the expanded *Caremark* pertains to corporate First Amendment rights. Corporations arguably use their speech and expression rights to advocate for political outcomes that best serve their shareholders and stakeholders.[236] Roger Coffin contends that shareholders ultimately benefit from corporate political expenditures, which corporations make in an effort to further policies that maximize profits and long-term growth.[237] Coffin states there are means, such as the board of directors, which can protect shareholders' interests regarding corporate political speech.[238] However, as discussed, the existing mechanisms of corporate governance are insufficient to safeguard the interests of

[232] Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending it to ESG Oversight* 6 (UCLA Sch. L., Law-Econ. Rsch. Paper No. 21-10, Sept. 2021).

[233] *See supra* Section IV.B.1; Lund & Strine, *supra* note 7.

[234] McCaffrey, Shames & Jones, *supra* note 73, at 29.

[235] Shapira, *supra* note 104, at 756–57.

[236] Coffin, *supra* note 206, at 106–07.

[237] *Id.* at 155.

[238] *Id.* at 161–65.

shareholders in the realm of political activity.[239] Further, it has been documented that corporations do not exclusively promote political policies in the interest of their stated values; in fact, many companies support candidates or groups "even as they publicly advocate for the opposite stance."[240] Most importantly, the expanded *Caremark* doctrine does not restrict any corporate right to speech; it simply provides an incentive to evaluate the potential risk that accompanies corporate expression, which is currently borne by the shareholders alone. And the use of corporate law mechanisms to address corporate political spending is acknowledged in *Citizens United* and within its ethos.[241]

Finally, an expanded *Caremark* jurisprudence for political risk raises questions as to the efficacy of judicial application. Political risk is difficult to define, and while this Note offers one definition, it may be difficult to limit the concept to this interpretation. Literature surrounding political risk encompasses transnational and country level risks, such as government instability.[242] But these concerns, while important, do not pertain to the societal political risk that the expanded *Caremark* framework seeks to address. The lack of clear guidelines can result in other issues, such as putting undue pressure on corporate directors who can be found liable for what may be viewed as "best practices or aspirational norms."[243] Some scholars also note that the imposition of liability for prior actions under volatile circumstances can result in hindsight bias for judges.[244] Due to the unpredictable nature of reputational risks, judges could be swayed by the

[239] *See supra* Section II.A.1; Section IV.B.1; Bebchuk & Jackson, *supra* note 19, at 89–97.

[240] Lund & Strine, *supra* note 7; Ctr. for Pol. Accountability, *supra* note 41.

[241] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010) (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).

[242] McCaffrey, Shames & Jones, *supra* note 73, at 30; Cline & Henisz, *supra* note 74, at 7.

[243] Simmons, *supra* note 10, at 757.

[244] Shapira, *supra* note 104, at 798.

adverse outcome in assessing what the company should have done at the time, increasing the likelihood of liability.[245] While these concerns are valid, the adept judges in the Delaware courts can take them under advisory when applying the expanded *Caremark* doctrine for political risk oversight. The esteemed Delaware judges are experts in complex fiduciary law, and they have faced more challenging issues than those presented.

Though there are potential drawbacks of expanding the *Caremark* scheme of liability for political risk, these issues can be resolved with appropriate attention in judicial application of the doctrine, ensuring that the purposes of corporate law and corporate constitutional rights are not eroded. The expertise of the judicial bench in Delaware renders it more than capable to approach and apply the expanded *Caremark* doctrine with due care. Ultimately, these potential concerns are outweighed by the great normative importance of the expansion: shareholder protection and the sanctity of American democracy.

V. CONCLUSION

Given the growing polarization in American society and role of the corporation in politics, corporations face many forms of political risk which can harm shareholders. Corporate directors also owe their shareholders a duty of good faith oversight, to manage key risks to the business, and they face liability when they have failed to do so. However, the *Caremark* jurisprudence is presently unable to appropriately address political risk, as it is a limited doctrine with an emphasis on "mission critical" risks. Under an expanded *Caremark* framework, which allows liability for "material" political risks, shareholders can better protect their interests. In addition, this expanded *Caremark* doctrine can serve to temper corporate interference in the American political process. *Citizens United* contemplated the use of corporate law measures to counteract the impact of corporate political

[245] *Id.* at 798–99; Larcker & Tayan, *supra* note 77.

spending; an expanded *Caremark* fits within this spirit. The fourteen years since *Citizens United* have shown that corporate disclosure on political expenditures is not functioning as it should, and corporations have outsize influence in elections. This remedy introduces a different incentive to defang corporate political spending by relying on fiduciary duty to promote better risk management controls, which also serves to protect the interests of shareholders and other stakeholders.