REGULATING CONGRESSIONAL INSIDER TRADING: THE ROTTEN EGG APPROACH

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A 2004 study revealed that the stock portfolios of members of Congress were consistently outperforming those of the investing public. The financial success of federal lawmakers was statistically correlated to the use of nonpublic information obtained while performing legislative responsibilities—reasonably characterizable as insider trading. Cries of dismay over such profiteering by lawmakers have been echoing in the public domain since Samuel Chase, Maryland's representative in the Continental Congress, directed colleagues to corner the flour market in 1778 after learning that copious quantities of it would be purchased by the government to support the Continental Army. Notwithstanding efforts to apply insider trading law to curb this behavior and the enactment of the Stop Trading on Congressional Knowledge ("STOCK") Act, fortuitous securities transactions by members of Congress continue to occur in connection with headlining national events; it was recently observed with respect to news of the financial collapse of certain regional banks.

While there is scholarly and political support for laws that would effectively ban such rotten egg behavior, this Article proposes that the conduct be regulated under the statute created with rotten eggs in mind—the Securities Act of 1933. The Securities Act creates speedbumps for persons in a control relationship with issuers who want to sell the issuer's securities in the secondary market. The speedbumps

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require both public disclosure and broker inquiry. This Article asserts that senators and representatives are in a control relationship with issuers such that they transcend the status of ordinary investor in the securities law regime. As control persons, federal lawmakers must navigate the obligations established under the Securities Act for such persons before selling their securities in the secondary market. This approach eliminates the legal and evidentiary challenges of insider trading theory, provides a disclosure mechanism that is vastly more effective than that provided by the STOCK Act, and deploys broker-dealers as gatekeepers to ensure that such trades do not undermine the maintenance of fair markets.

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INTRODUCTION

Research studies in 2004 and 2011 found that stock portfolios of members of Congress were outperforming the markets.[1] These results have been attributed to the use by these lawmakers of nonpublic

[1] *See* Shivaram Rajgopal & Roger M. White, *Stock Trades of Securities and Exchange Commission Employees*, 60 J.L. & ECON. 441, 444 (2017) ("While evidence of profitable trading by corporate insiders is perhaps unsurprising, Ziobrowski et al. (2004, 2011) find that a hedge portfolio mimicking the transactions of members of the U.S. Senate and the House of Representatives beats the market by about 10 percent per year.").

information obtained by virtue of their position as public servants.[2] News that federal legislators were taking advantage of information gained from official duties spurred allegations of insider trading and questions of whether case law prohibiting insider trading was applicable to these holders of public office.[3] Determined to demonstrate that the legislative body was not above the law, Congress passed the STOCK Act in 2012.[4] The purpose of the legislation was to close perceived loopholes that purportedly protected these lawmakers from prosecution under the antifraud provisions of the securities laws.[5] The STOCK Act also mandated disclosures of securities trades by members of Congress and others.[6]

Fast forward to 2020—"It's déjà vu all over again."[7] News stories appeared reporting stock trades by members of Congress made after the receipt of information about the impact of COVID-19 on the economy.[8] In 2023, after the failure of regional banks, trading by lawmakers again stirred discontent about the investment activities of lawmakers and the impotence of the STOCK Act.[9] The frustration over these behaviors was exacerbated by revelations that a number of lawmakers were not even

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2 Jonathan Klick, *The Wealth of Congress*, 40 HARV. J.L. & PUB. POL'Y 603, 618 (2017) (discussing anecdotal evidence suggesting the use of nonpublic information by lawmakers to achieve beneficial trading outcomes).

3 *See, e.g.*, Jonathan Macey, *Congress's Phony Insider-Trading Reform*, WALL ST. J. (Dec. 13, 2011), https://www.wsj.com/articles/SB10001424052970203413304577088881987346976 [https://perma.cc/XKM6-YV63].

4 Spencer K. Schneider, *Money, Power, and Radical Honesty: A Look at Members of Congress' Use of Information for Financial Gain*, 14 J. BUS. ENTREPRENEURSHIP & L. 295, 297 (2021) ("However, the broad consensus in political and academic spheres has been that the STOCK Act was passed merely to appease the public in the wake of the damning '60 Minutes' report regarding insider information used by members of Congress for personal gain.").

5 Donna M. Nagy & Richard W. Painter, *Selective Disclosure by Federal Officials and the Case for an FGD (Fairer Government Disclosure) Regime*, 2012 WIS. L. REV. 1285, 1289–90 (2012).

6 Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 390–91 (2013) (describing the STOCK Act's disclosure provisions and its coverage to include members of Congress).

7 *Yogi-isms*, YOGI BERRA MUSEUM & LEARNING CTR. (2024), https://yogiberramuseum.org/about-yogi/yogisms [http://perma.cc/6GRM-WHD3].

8 *See, e.g.*, James V. Grimaldi & Andrea Fuller, *Burr, Senate Colleagues Sold Stock After Coronavirus Briefings*, WALL ST. J. (Mar. 20, 2020, 4:32 PM), https://www.wsj.com/articles/burr-senate-colleagues-sold-stock-after-coronavirus-briefings-11584715866 [https://perma.cc/AJ5F-PS4E].

9 Rebecca Ballhaus, *Lawmakers Trade Bank Stocks While Working on U.S. Bank-Failure Fallout*, WALL ST. J. (Apr. 10, 2023, 4:59 PM), https://www.wsj.com/articles/lawmakers-trade-bank-stocks-while-working-on-u-s-bank-failure-fallout-b4ccbf5 [https://perma.cc/7LKW-FU8X].

complying with the reporting requirements of the STOCK Act.[10] Despite the STOCK Act, convenient trading by members of Congress continues to occur without repercussions or accountability.

American government is at a crossroads of ethical expectations generally, with concerns mounting about personal profiteering based on positions of power.[11] However, when abuses of position impact the integrity of the U.S. securities markets, the regulatory machine should kick in to address them. Insider trading theory has been the typical "go to" solution to create liability for legislators who trade in securities after receiving nonpublic information in the course of their public service.[12] Despite the passage of the STOCK Act, thorny factual and legal questions continue to turn pathways of insider trading liability into dead-end streets where members of Congress are concerned.[13]

Effectively addressing the issue of personal trading by federal lawmakers requires confronting the reality that members of Congress influence the policy decisions, strategic approach, and performance results of corporate entities.[14] Public choice theory and rent-seeking

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10 Dave Levinthal & Madison Hall, *78 Members of Congress Have Violated a Law Designed to Prevent Insider Trading and Stop Conflicts-Of-Interest*, BUS. INSIDER (Jan. 3, 2023, 11:29 AM), https://www.businessinsider.com/congress-stock-act-violations-senate-house-trading-2021-9 [https://perma.cc/3NYW-PN34].

11 *See, e.g.*, Charles Gardner Geyh, *Judicial Ethics and Identity*, 36 GEO. J. LEGAL ETHICS 233, 235 (2023) (reciting the recent domination in news headlines of instances of potentially unethical conduct by members of the judiciary); Emily Washburn, *Lindsey Graham Sanctioned by Senate: Becomes 1 of These 13 in Congress Admonished in Past 20 Years*, FORBES (Mar. 24, 2023, 4:31 PM), https://www.forbes.com/sites/emilywashburn/2023/03/24/lindsey-graham-sanctioned-by-senate-becomes-1-of-these-13-in-congress-admonished-in-past-20-years [https://perma.cc/Q5VK-B5J8] (discussing sanctions imposed upon members of Congress by Congressional Ethics Committees for such conduct as improperly accepting gifts and sharing information about congressional matters).

12 *See, e.g.*, Jeanne L. Schroeder, *Taking Misappropriation Seriously: State Common Law Disgorgement Actions for Insider Trading*, 11 AM. U. BUS. L. REV. 97, 117 n.105 (2022) (indicating that the STOCK Act was intended to address congressional transactions that could constitute insider trading).

13 *See, e.g.*, Kate Kelly, *S.E.C. Inquiry into Former Senator's Stock Sales Is Closed Without Charges*, N.Y. TIMES (Jan. 6, 2023), https://www.nytimes.com/2023/01/06/us/politics/burr-sec-inquiry-closed.html [https://perma.cc/2P2C-Y7HY] (describing the closure of investigations by the SEC and the Department of Justice into allegations of insider trading by a U.S. Senator based on information received in Congressional briefings regarding the COVID-19 pandemic).

14 *See, e.g.*, Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 CHI.-KENT L. REV. 165, 168–170 (2018) (explaining that politicians adopt regulations on behalf of entities and representatives thereof who seek anticompetitive rules for financial gain); *see also* Lisa M. Fairfax, *Sarbanes-Oxley, Corporate Federalism, and the Declining Significance of Federal Reforms on State Director Independence Standards*, 31 OHIO N.U. L. REV. 381, 381–82, 387 (2005) (describing how Congress, through passage of the Sarbanes-Oxley Act, imposed requirements on the manner in which corporations composed their audit committees).

conduct lend strong evidential support to this observation.[15] Lawmakers are vulnerable to the influence of corporations, who deploy a powerful lobbying presence in American politics. The full extent of the control exercised by and upon members of Congress is shrouded in undocumented, yet ofttimes legitimate, activities of our public representatives.[16] The control relationship between lawmakers and public companies, this Article asserts, raises implications under the Securities Act of 1933. The Securities Act is said to tolerate and regulate "rotten egg" investments by leveraging a regime that is grounded in disclosure.[17]

In this spirit, the Securities Act recognizes that persons in a control relationship with issuers require special treatment with respect to their transactions in the issuers' securities to protect the fairness of U.S. markets through disclosure.[18] This Article maintains that legislators should be treated as persons in a control relationship with the issuers of the securities in which they trade; they should receive treatment on par with that accorded to other control persons under the registration provisions of the securities statutes. This Article proposes an amendment to the Securities Act of 1933 to explicitly include members of Congress as control persons under the statute, pushing them to demonstrate, when selling their securities, that their transactions raise no concern and they are behaving like ordinary investors in these transactions. Such an amendment would motivate members of Congress to seek the safe harbor typically used by control persons, thereby producing enhanced

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15 Roger D. Congleton, *The Political Economy of Rent Creation and Rent Extraction*, *in* 1 OXFORD HANDBOOK OF PUBLIC CHOICE 533, 534 (Roger D. Congleton, Bernard Grofman & Stefan Voight eds., 2019) (explaining that rent seekers lobby government officials for policies that protect or advance their ability to profit financially).

16 Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241, 285 (2015) (noting that Congress, like the Executive Branch, often carries out its responsibilities by "informal behind closed doors" processes); *see also* Ashley Deeks, *Secrecy Surrogates*, 106 VA. L. REV. 1395, 1476 (2020) (discussing the ability of Congress to secure information from technology companies through informal communications); Richard R. Carlson, Note, *Accountability and the Foreign Commerce Power: A Case Study of the Regulation of Exports*, 9 GA. J. INT'L & COMPAR. L. 577, 605 (1979) (observing the use of informal communications by exporters seeking congressional intercession in regulatory matters).

17 *See, e.g.*, Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023, 2047 (2005) ("Although the federal securities laws are designed to protect investors and maintain the integrity of the securities markets . . . federal law applicable to issuers is generally not paternalistic in the same way that state law is. The federal securities laws generally applicable to issuers have sometimes been termed 'rotten egg' rules." (footnote omitted)).

18 Therese Maynard, *The Future of Securities Act Section 12(2)*, 45 ALA. L. REV. 817, 853 (1994) (explaining that the Securities Act considers control persons to be in a position to provide the disclosures mandated under the registration provisions of the statute).

transparency of their sales through disclosure requirements and increased scrutiny of their transactions by securities brokers.[19]

For purposes of articulating this statutory antidote, the Article proceeds in three parts. Part I describes the ongoing ability of members of Congress to make beneficial securities transactions in public markets in tandem with communications made in the course of their public service relating to the securities in which they trade without legal repercussions. Part I explains the challenges to imposing accountability upon lawmakers engaged in such activities through the insider trading paradigm of federal securities law. Part II describes the "nonprofessional exemption" of the Securities Act, which permits ordinary investors (including members of Congress) to sell their securities in the secondary market without triggering the registration requirement of the securities laws. This Part explains the unavailability of that exemption for transactions involving the sales of securities by persons who are in a control relationship with an issuer. Part II makes the case that members of Congress should be recognized as falling within the category of persons in a control relationship with the issuers of securities in which they trade, instead of permitting these legislators to masquerade as ordinary investors when selling their securities in the secondary market. Part III articulates the import of recognizing the specialized nature of control with respect to legislators trading in publicly held securities; it describes the additional requirements that lawmakers would have to satisfy to ensure their stock sales would not violate registration requirements, and the benefits of those requirements to the investing public.

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19 In April 2022, Congress conducted a legislative hearing on the topic of financial conflicts of interest, including trading in securities, by its members and others in the federal government. *See Examining Stock Trading Reforms for Congress: Hearing Before the H. Comm. on H. Admin.*, 117th Cong. 4 (2022) (statement of Hon. Zoe Lofgren, Chairperson, H. Comm. on H. Admin.). A number of legislative solutions were introduced in Congress during 2023 that were intended to reach beyond the narrow topic of insider trading. These bills responded to the broader concern that stock ownership might present conflicts of interest between the legislator's personal financial interest and its professional obligations by, for example, imposing general bans on stock ownership and stocking trading, see, e.g., Bipartisan Ban on Congressional Stock Ownership Act, H.R. 1679, 118th Cong. § 2(b) (2023), permitting the use of blind trusts to hold investments in lieu of divestiture, see, e.g., Ban Congressional Stock Trading Act, S. 2773, 118th Cong. § 2 (2023), and banning members of the House of Representatives from serving on boards of for-profit entities, see, e.g., Halt Unchecked Member Benefits with Lobbying Elimination Act of 2023, H.R. 507, 118th Cong. § 7 (2023). While worthy of attention, this Article does not address the ethical concerns raised when members of Congress hold a financial interest in an entity that is impacted by their legislative work.

I. CONGRESSIONAL IMPERVIOUSNESS TO INSIDER TRADING ALLEGATIONS

A. *Historical Imperviousness*

Members of Congress have a long history of using information gleaned in their official capacities for personal gain. In 1778, Samuel Chase, while serving as a member of the Continental Congress, learned that the government planned to buy flour to supply to military forces.[20] Soon thereafter, Chase directed his associates to stockpile grain so that it could be sold to the government at inflated prices[21] Chase was publicly chastised by Alexander Hamilton, who wrote the critique under the pen name Publius.[22] Other members of the Continental Congress later mimicked Chase's behavior; they purchased discounted government bonds in 1789, after learning that the government intended to redeem the bonds at full face value.[23]

In 2004, a team of researchers published findings revealing that stock trades by politicians on Capitol Hill between 1993 and 1998 outperformed the stock market.[24] Those findings raised suspicions that members of Congress had been trading on nonpublic information received in connection with their legislative duties.[25] Publication of those

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20 Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1121 (2009) (relating the history of judges, including Chase, who were appointed to the judiciary in the late 1700s despite displays of behaviors indicating ethical, mental, or other challenges).

21 David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 767 (2001) (discussing the Supreme Court's treatment of essays written by Alexander Hamilton as part of the Federalist Papers, including Hamilton's censure of Chase for profiteering on information received in his capacity as a member of the Continental Congress).

22 Michael A. Perino, *A Scandalous Perversion of Trust: Modern Lessons from the Early History of Congressional Insider Trading*, 67 RUTGERS U. L. REV 335, 360–64 (2015). Reflective of the cultural norms of Congress at the time of Chase's conduct, Perino notes, "What is noteworthy about Chase's defense, at least from the perspective of determining the institutional norms that prevailed in Congress at the time, is his admission that the charged conduct constituted a significant breach of trust." *Id.* at 371.

23 Nagy & Painter, *supra* note 5, at 1288 (recounting the purchase of bonds trading at a discount by Federalists in power and their friends in advance of the planned government redemption of such bonds at full face value).

24 Matthew Barbabella, Daniel Cohen, Alex Kardon & Peter Molk, *Insider Trading in Congress: The Need for Regulation*, 9 J. BUS. & SEC. L. 199, 204 (2008) (discussing the 2004 study as background information on the adoption of the STOCK Act).

25 Kristen Kelbon, *Creating an Effective Vaccine to Prevent Congressional Insider Trading: Legislation Is Needed to Cure Deficiencies of the STOCK Act*, 55 CREIGHTON L. REV. 145, 150 (2022) (discussing the lack of prosecution of members of Congress for insider trading prior to 2012 despite the 2004 study suggesting that federal lawmakers use their inside information to make beneficial transactions in the market).

findings, combined with news reports of potential insider trading by Representative Tom DeLay, led to a 2006 proposal in Congress to prohibit advantageous trading by its members based on nonpublic information.[26] The legislation failed, and failed again upon its reintroduction in 2007.[27] The sponsors of the failed bills introduced a new version of the legislation in 2009,[28] to no avail.[29] In 2011, the team of researchers that did the 2004 study of congressional trading performed a more extensive study, examining a composite of trades by members of the House of Representatives for the period 1985 to 2001.[30] The academics again found that these market transactions outperformed the market.[31] A subsequent *60 Minutes* episode connected legislative activities of members of Congress during the financial crisis of 2008 to profitable stock trades.[32] Even worse, the news segment suggested that such profiteering was legal, sparking widespread public outrage.[33]

Researchers had effectively established the correlation between the impressive performance of stock portfolios of federal lawmakers and their legislative activities. More recent research on the beneficial trading of legislators suggests that the behavior has slowed,[34] yet instances of members of Congress trading in securities at times that coincide with their receipt of material information impacting the traded stock continue

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26 Barbabella, Cohen, Kardon & Molk, *supra* note 24, at 203–04 ("Finally, the most notable public outcry over Congressional insider trading was prompted by the activities of Representative Tom DeLay and a DeLay staffer named Tony Rudy. Indeed, Rudy's activities have been cited by [the sponsors of the legislation] as one of the primary motivations for the STOCK Act.").

27 Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1131 (2011) (describing the legislative history of the STOCK Act).

28 Stephen M. Bainbridge, *The Stop Trading on Congressional Knowledge Act*, 10 ENGAGE: J FEDERALIST SOC'Y PRAC. GRPS. 59, 62 (2009) ("Congressmen Brian and Slaughter introduced versions of the STOCK Act in the 109th, 110th, and now the 111th Congresses.").

29 Andrew Krueger, Note, *The STOCK Act Ten Years Later: The Need for a New Congressional Insider Trading Regulatory Scheme*, 100 WASH. U. L. REV. 545, 554 (2022) (explaining that the 2007 and 2009 legislation failed to leave committee).

30 Paul D. Brachman, Note, *Outlawing Honest Graft*, 16 NYU J. LEGIS. & PUB. POL'Y 261, 264 n.9 (2013).

31 Rajgopal & White, *supra* note 1, at 444.

32 Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 847 (2013).

33 Kevin W. Fritz, Comment, *The STOCK Act Is Inadequate: U.S. Index Funds Are the Solution to Political Insider Trading*, 7 LIBERTY U. L. REV. 275, 275 (2013) ("The [*60 Minutes*] report detailed several accounts of congressional insider trading, illustrating how—under current insider-trading laws—members of Congress are permitted to trade on insider information.").

34 A 2020 study by researchers at Dartmouth College indicates that federal legislators are no longer outperforming the market in their trading activities. William Belmont, Maxwell Grozovsky, Bruce Sacerdote, Ranjan Sehgal & Ian Van Hoek, *Senators vs Santa's Reindeer: 2020 Stock Picking Roundup* 8–9 (Dec. 15, 2020) (unpublished manuscript) (on file with SSRN).

to occur.[35] Certain members of Congress received briefings on the detrimental impact of the looming coronavirus pandemic on the markets and unceremoniously dumped various stock holdings soon thereafter, but before the impact of the virus on investor portfolios was publicly disseminated.[36] Lawmakers also traded securities that had a relation to the regional bank crises occurring in early 2023.[37] Discussions of such fortuitous profiteering consistently trigger negative reactions and a scholarly regurgitation of the state of the law regarding insider trading.[38] This consistent and ineffective cycle of discourse reveals the inadequacy of insider trading theory to address the unsavory stock trading executed by some federal lawmakers.

In addition to insider trading theory, the Speech or Debate Clause of the U.S. Constitution has been cited as a potential impediment to the imposition of liability on members of Congress suspected of insider trading.[39] The Speech or Debate Clause is based on the concept that activities interfering with the legislative freedom of representatives of the people undermine the public good by impeding the rights of constituents to receive representation.[40] Scholars have asserted that the Speech or Debate Clause is limited in scope to legislative acts because its intent is to protect lawmakers from inquiries designed to block their ability to represent their constituents, and therefore does not extend to insider

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35 *See, e.g.*, Charles L. Slamowitz, *Profiteering Off Public Health Crises: The Viable Cure for Congressional Insider Trading*, 77 WASH. & LEE. L. REV. ONLINE 31, 33 (2020) (observing, in connection with reported sales of stock by members of Congress after briefings on the coronavirus, that "crises inherently offer opportunities for the government to abuse power or profiteer").

36 *See* Schneider, *supra* note 4, at 308–10 (discussing sales of stock by Senator Richard Burr, Senator Diane Feinstein, and Senator Kelly Loeffler in early 2020 after receiving information about the coronavirus pandemic in their roles as members of Congress).

37 *See* Ballhaus, *supra* note 9 (reporting suspicious trades by certain lawmakers in bank stocks while the legislators were working on matters related to the 2023 failures of First Republic Bank, Silicon Valley Bank, and Signature Bank).

38 *See* Barbabella, Cohen, Kardon & Molk, *supra* note 24, at 200–01; Stephen M. Bainbridge, *Insider Trading Inside the Beltway*, 36 J. CORP. L. 281, 282, 285 (2011); Nagy, *supra* note 27, at 1106–107, 1110–111; Kim, *supra* note 32, at 849–50, 852; Perino, *supra* note 22, at 342–43.

39 JOHN C. COFFEE, JR., HILLARY A. SALE & CHARLES K. WHITEHEAD, SECURITIES REGULATION 1234 (14th ed. 2021) (observing that the Speech or Debate Clause of the Constitution protects members of Congress from inquiry for legislative activities occurring in the House and Senate, and is interpreted broadly to include activities incidental to the creation of legislation).

40 Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1408 n.448 (1991) (noting a Supreme Court decision finding that, although a contempt order against council members for refusing to vote for legislation is not subject to the Speech or Debate Clause, the protection offered by the Clause should influence district courts in deciding whether to impose such orders).

trading.[41] This view was supported by the Southern District of New York in *Securities and Exchange Commission v. Committee on Ways & Means of the U.S. House of Representatives*, in which the Speech or Debate Clause was raised to block Securities and Exchange Commission (SEC) subpoenas regarding communications between a Hill staffer and a lobbyist concerning Medicare reimbursement rates.[42] The court found that the Speech or Debate Clause extends to congressional staffers,[43] and Congress was involved in legislative activities regarding changes to Medicare reimbursement rates formulas at the time of the communications at issue.[44] However, the court held that the staffer's communications to the lobbyist firm were outside of the scope of legislative acts and therefore not protected by the Speech or Debate Clause.[45]

B. *Insider Trading Imperviousness*

Prior to the adoption of the STOCK Act, both scholars and regulators expressed skepticism about the ability to prosecute legislators for insider trading.[46] Without reciting the entire tortured history, suffice it to say that prohibitions against insider trading under the federal securities laws developed through case law sprouting from a rule invented by the SEC in 1942 to activate the core antifraud provision of the

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41 *See, e.g.*, Bainbridge, *supra* note 38, at 302–03 (asserting that the Speech or Debate Clause is limited to activities integral to legislative activities to prevent indirect interference with lawmakers' representation of constituents; therefore, prohibiting Congressional members from engaging in insider trading would not constitute interference with their legislative duties).

42 161 F. Supp. 3d 199, 209–14 (S.D.N.Y. 2015).

43 *Id.* at 233.

44 *Id.* at 230–31.

45 *Id.* at 237–38 ("'The Speech or Debate Clause [likewise] does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions.' Moreover, the Clause 'does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but . . . not a part of the legislative process itself.' The Clause also does not protect the dissemination of information outside of Congress." (first alteration in original) (citations omitted) (quoting United States v. Brewster, 408 U.S. 501, 528 (1972))). The court concluded that the staffer's communications to the analyst firm were statements to the public and therefore unprotected from disclosure to the SEC under the Speech or Debate Clause. *Id.* at 245.

46 *See* Nagy, *supra* note 27, at 1108 & n.14 (citing statements made by former SEC Chairman Arthur Levitt and former SEC Associate Director Thomas Newkirk describing the difficulties of bringing an insider trading case against a member of Congress); PETER SCHWEIZER, THROW THEM ALL OUT: HOW POLITICIANS AND THEIR FRIENDS GET RICH OFF INSIDER STOCK TIPS, LAND DEALS, AND CRONYISM THAT WOULD SEND THE REST OF US TO PRISON 170 (2011) ("When it comes to current SEC insider trading laws, there is a spirited debate going on among legal scholars as to whether current laws actually apply to Congress. Many contend that they don't, because our legislators are not fiduciaries . . . .").

Exchange Act.[47] The term "insider trading" is not statutorily defined; its contours and boundaries have been crafted by the SEC and the courts over decades.[48] This piecemeal evolution is a source of criticism of the doctrine of insider trading.[49] Nonetheless, the SEC's use of Rule 10b-5 to address trading in the securities markets based on material nonpublic information has developed into two fundamental theories of liability under the federal securities law.[50] Under the classical theory, corporate insiders have a fiduciary duty of trust and confidence to their corporate entity that requires them to either disclose material nonpublic information in their possession at the time of the trade, or abstain from trading.[51] Are members of Congress immune from insider trading liability under the classical theory? One might think the answer is yes because these legislators face legal restrictions that prohibit them from serving as officers or directors; in fact, members of Congress are permitted to serve on corporate boards as long as they receive no compensation.[52] Federal lawmakers have been convicted of insider trading under the classical theory because they used nonpublic

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47 Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 292 (2009). Poser generally discusses the reputational demise of the SEC over its first seventy-five years in existence. In recounting the agency's history, Poser's article explains that the SEC staff drafted Rule 10b-5—the rule cited for insider trading violations—in 1942 because the staff encountered a situation where a company president was buying the company's shares from shareholders without disclosing to them that the company was about to announce increased earnings. The staff needed a rule to allege a violation of the Exchange Act's antifraud provision of Section 10(b), as the statute required that the SEC adopt rules to implement it and the SEC had not yet done so.

48 Cindy A. Schipani & H. Nejat Seyhun, *Defining "Material, Nonpublic": What Should Constitute Illegal Insider Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 333 (2016).

49 *See, e.g.*, Schroeder, *supra* note 17, at 2043 ("Consequently, in the absence of Congressional action, if the SEC, the DOJ, plaintiffs, and the courts believe that trading on the basis of material non-public information should be unlawful, they must imply appropriate rules from the general language and policy of the statutes, combined with case law developed under the very different legal regimes of state corporate and trade secrets law. Indeed, this is the single most disturbing aspect of insider trading law—it is essentially a common law federal crime.").

50 Robert Steinbuch, *Mere Thieves*, 67 MD. L. REV. 570, 571 (2008) (describing the classical and misappropriation theories of insider trading law as its "fundamental theories of liability").

51 Schroeder, *supra* note 12, at 118 ("'Classic insider trading' involves the purchase or sale of equity securities (or options on equity securities) by traditional insiders owing a fiduciary duty to the issuer—directors, officers and perhaps employees and major stockholders—based on material nonpublic information learned from the issuer.").

52 5 U.S.C. § 13144(a)(4) (providing that a member of Congress shall not "serve for compensation as an officer or member of the board of any association, corporation, or other entity"). As indicated *supra* note 15, legislation has been proposed that would ban such members from serving on the board of any for-profit entity.

information received in connection with their roles as board members for financial gain in the stock market.[53]

The second path of liability for insider trading is by way of the misappropriation theory. This theory, articulated by the Supreme Court in *United States v. O'Hagan*,[54] establishes liability under Rule 10b-5 for persons who are not corporate insiders, but who trade on nonpublic information received from a source to whom they owed a duty of trust and confidence.[55] Rules 10b5-1 and 10b5-2 put some regulatory flesh on the judicial skeleton of insider trading theory.[56] Rule 10b5-1 articulates the circumstances under which one trading while in possession of inside information could be deemed to have used such information in making the transaction(s) at issue.[57] Rule 10b5-2 describes the circumstances under which the duty of trust and confidence described in *O'Hagan* may be found to exist, such as where the person trading agreed to keep the information confidential, had a history of receiving such confidential information such that confidentiality was reasonably expected, or the information came from a spouse, child, or sibling.[58] The misappropriation theory might be better suited to hold members of

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53 *See, e.g.*, Michael D. Guttentag, *"Huh?" Insider Trading: The Chris Collins Story*, 15 TENN. J.L. & POL'Y 95, 102–05 (2020) (describing the insider trading activities of former Senator Chris Collins with respect to shares of a publicly held corporation in which he served as a member of its board of directors).

54 521 U.S. 642 (1997).

55 Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 GEO. L.J. 1225, 1229–30 ("[T]he misappropriation theory . . . provides that it is illegal to trade in securities while in possession of material, nonpublic information acquired from a person or entity to whom the trader owes a duty of loyalty and confidentiality . . . . Under the misappropriation theory, there is liability only if the trader breaches a duty of loyalty by failing to disclose to the source of the information that he is engaged in insider trading.").

56 Thomas M. Madden, *Section 10(b) and the Fiduciary Conundrum*, 18 HASTINGS BUS. L.J. 29, 30–31 (2021) ("No such theory has been more contentious than the misappropriation theory as codified by the Commission in Rules 10b5-1 and 10b5-2 subsequent to the Supreme Court's adoption of fraud-on-the-source misappropriation in the 1997 *O'Hagan* decision." (footnotes omitted) (first citing 17 C.F.R. § 240.10b5-1 (2021); and then citing 17 C.F.R. § 240.10b5-2 (2021))).

57 John P. Anderson, *Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform*, 2015 UTAH L. REV. 339, 343. In noting the challenges of closing the loopholes inherent in permitting trading plans to serve as an affirmative defense to trading while in possession of material nonpublic information, Anderson observes,

> This leaves actual revision of the relevant statutes and/or rules as the only viable option. But Rule 10b5-1 was adopted to effect a delicate compromise between the SEC and the courts on the issue of whether actual 'use' or mere 'knowing possession' of material nonpublic information is necessary to establish liability for insider trading under Rule 10b-5.

Id.

58 Joan MacLeod Heminway, *Women Should Not Need to Watch Their Husbands Like [a] Hawk: Misappropriation Insider Trading in Spousal Relationships*, 15 TENN. J.L. & POL'Y 162, 179–80 (2020).

Congress accountable for trading based on nonpublic information received through legislative duties than the classical theory, but that path is not without obstacles because the misappropriation theory requires a duty to another, and it has been unclear as to the party or parties to whom federal legislators owe such a duty.[59]

The tether that keeps insider trading theory from touching folks like members of Congress is the American legal construct that profit based on nonpublic information is fair game as long as it breaches no fiduciary duty; trading based on a confidential memo randomly found on a city street, or news of an impending merger discerned from an innocuous newspaper announcement of an engagement is permitted in the U.S. despite the resulting information asymmetry.[60] The complexities of leveraging insider trading theories to impose liability on lawmakers for using nonpublic information obtained in the course of performing their congressional obligations are amplified when the Congress member trades in securities impacted by, but not directly related to, the nonpublic information received.[61] The potential to skirt insider trading prohibitions by trading in securities that are economically related to the security about which the trader has nonpublic information was first articulated as "substitute trading" and was accompanied by suggestions that the practice was being utilized by corporate employees.[62] The challenges of substitute trading were also identified in response to the Dodd-Frank Act's extension of insider trading prohibitions under Rule 10b-5 to trading in credit derivatives.[63] The SEC recently tested the waters

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59 Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1162 (2014) ("For whom is a congressional representative a fiduciary? The voters who elected her? Everyone who resides within her district? We the People?").

60 *See* John P. Anderson, *Regulatory Ritualism and Other Lessons from the Global Experience of Insider Trading Law*, 24 U. PA. J. BUS. L. 25, 31, 76 (2021) (labeling the American approach to insider trading as a "fiduciary-cum-fraud regime" and ranking it as more permissive than both the "parity" regimes adopted in Australia, Europe, India, and Russia, which deem trading by anyone in possession of nonpublic information as illegal, and the "equal-access" regimes of China, Japan, and Canada, which prohibit trading by persons deemed insiders, regardless of whether they are independently deemed to have a fiduciary obligation to the traded company).

61 *See* Ballhaus, *supra* note 9. One member of the House met with financial regulators to discuss the failure of Signature Bank, then purchased stock in a separate regional bank. Two days after the purchase, the FDIC announced that a subsidiary of the bank whose stock was purchased had won the bid to take over Signature Bank's assets. The Representative denied knowing that the bank in which she had invested had an interest in the assets of Signature Bank. *Id.*

62 Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 242 (2001) (defining substitute trading as securities transactions by one with nonpublic information about a particular security who uses that knowledge with respect to a "substitute" security that is predictably affected by the knowledge).

63 Yesha Yadav, *Insider Trading in Derivatives Markets*, 103 GEO. L.J. 381, 416–17 (2015) (observing that an agreement between a lender and a borrower to maintain confidentiality may be

regarding substitute (later described as "shadow") trading.[64] It filed a complaint alleging that an employee of a pharmaceutical company violated Rule 10b-5 by purchasing options in an unrelated corporation in the same line of business as its employer based on information from its employer about a pending merger between the employer and another pharmaceutical company.[65] It takes no stretch of the imagination to presume that members of Congress are leveraging material nonpublic information in their possession about a particular issuer by engaging in trades of similarly situated securities, yet the lack of legal precedent declaring the practice illegal is further evidence of the unsuitability of insider trading theory to address the informational advantages being enjoyed by federal legislators.

Beyond legal challenges, establishing evidence of insider trading can prove daunting. Direct evidence of insider trading (i.e., a smoking gun or a confession) is infrequent, but the SEC is entitled to rely on circumstantial evidence in establishing its cause of action.[66] However, the strength of circumstantial evidence is highly debatable.[67] For example, in December 2020, the SEC filed a complaint in the Eastern District of Virginia alleging that a person violated Rule 10b-5 by trading based on material nonpublic information about a pending merger from his brother-in-law, who worked at one of the companies involved in the merger.[68] The trial court granted the defendant's motion to dismiss, finding no circumstantial evidence giving rise to an inference that the defendant received inside information, while the Fourth Circuit reversed, finding that a jury could have concluded the defendant possessed inside

sufficient under Rule 10b5-2 to prohibit the lender from using that nonpublic information in trading credit derivative swaps involving the borrower, but does not preclude the lender from engaging in substitute trading through transactions involving companies that are tied to the borrower).

64 Yoon-Ho Alex Lee & Alessandro Romano, *Shadow Trading and Macroeconomic Risk*, 13 HARV. BUS. L. REV. 393, 395 & n.6 (2023) (acknowledging early scholarship discussing the concept of "substitute" trading, and the introduction of the term "shadow" trading in 2021).

65 Tanner Gattuso, *The Panuwat Snowball: Correlation Does Not Equal Materiality*, 72 CATH. U.L. REV. 415, 419 (2023).

66 *See* SEC v. Horn, 10-cv-955, 2010 WL 5370988, at *4 (N.D. Ill. Dec. 16, 2010) ("Direct evidence of insider trading is, indeed, rare; and the SEC is entitled to prove its case through circumstantial evidence.").

67 *See, e.g.*, Bradley J. Bondi & Michael D. Wheatley, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance*, 19 N.Y.U. J.L. & BUS. 339, 370–71 (2023) (discussing SEC litigation losses resulting from an inability to establish either direct or circumstantial evidence that the defendants had received material nonpublic information).

68 SEC Charges Corporate Controller and His Brother-In-Law with Insider Trading Ahead of Merger Announcement, Litigation Release No. 24982, 2020 WL 7350748 (Dec. 11, 2020).

information prior to trading.[69] These challenges are likely a contributing factor to the dearth of insider trading cases against federal legislators.[70] Private litigants have the ability to bring causes of action alleging insider trading[71] but face similar roadblocks with respect to evidentiary support. It is worth noting in this vein that gathering evidence against members of Congress is further frustrated by their immunity from the Freedom of Information Act.[72] It is also understandable that an agency like the SEC might be unenthusiastic about amassing a case of supposition to allege wrongdoing by a member of Congress, given the role Congress plays in determining the agency's funding.[73] Evidentiary issues, manufactured pretexts, and fear of tit-for-tat retribution are all effective deterrents against regulatory inquiry into potentially illegal trading activity by members of Congress. For the host of reasons described above, applying insider trading theory is a fool's errand in attempting to hold political figures accountable for the personal fortunes they are able to amass by trading on information received about the economy, a specific industry, or a particular publicly traded corporation.

C. *STOCK Act Imperviousness*

Legislation to address concerns about members of Congress trading securities to take advantage of nonpublic information shared in

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69 Dave Michaels, *SEC Takes Rare Court Loss in Insider-Trading Case*, WALL ST. J. (Dec. 14, 2021, 4:04 PM), https://www.wsj.com/articles/sec-takes-rare-court-loss-in-insider-trading-case-11639515867 [https://perma.cc/U9GF-EUXN]. SEC v. Clark, 60 F.4th 807 (4th Cir. 2023).

70 Gregory H. Shill, *Congressional Securities Trading*, 96 IND. L.J. 313, 317 (2020) (indicating that two Senators facing allegations of insider trading in connection with COVID-19 briefings denied using nonpublic information; one Senator claimed his trades were made based on publicly available information while the other indicated the trades were made by advisors without her involvement).

71 Marc I. Steinberg & Abel Ramirez, Jr., *The SEC's Neglected Weapon: A Proposed Amendment to Section 17(a)(3) and the Application of Negligent Insider Trading*, 19 U. PA. J. BUS. L. 239, 274 (2017) (noting that the Insider Trading and Securities Fraud Enforcement Act of 1988 provided a private right of action for insider trading where the plaintiff was trading in the market at the same time the insider was trading based on nonpublic information).

72 David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1102 (2017) ("In contrast to many state [freedom of information] laws, [the federal Freedom of Information Act] applies only to executive agencies and does not reach Congress, the courts, private entities, or the President's inner circle.").

73 *See, e.g.*, Bainbridge, *supra* note 38, at 304 ("To be sure, as already noted, the SEC to date has been 'unwilling to take any sort of initiative against insider trading by senators and other congressional officers.' It is plausible that this failure is an intractable one. Any government agency is likely to be reluctant to bite the budgetary hand that feeds it." (footnote omitted) (quoting Jonathan R. Macey & Maureen O'Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?,* 26 YALE J. ON REG. 89, 108 (2009))).

connection with their public duties was contemplated for over five years before it became law in 2012.[74] The first bill, proposed in 2006, required the SEC to adopt rules prohibiting members of Congress from trading in a security as to which the member had material, nonpublic information about legislation relevant to that security, where such information was obtained by virtue of the lawmaker's occupation.[75] The bill also required each member of Congress to report transactions in securities within thirty days after occurrence. Bills proposed in 2007 and 2009 were substantially similar to the 2006 legislation with respect to lawmaker trading but lengthened the time within which trades had to be reported to ninety days.[76]

It was only after a *60 Minutes* episode aired in 2011 suggesting that it was legal for Congress to trade based on nonpublic information obtained through their positions that the legislation gained meaningful traction.[77] The STOCK Act was introduced in Congress in January of 2012, and was signed into law in April of that year.[78] The enacted statute discarded the concept that the SEC would be responsible for rulemaking to curb the unsavory practice of congressional insider trading. Instead, the law declares members of Congress to have a duty to the federal government, U.S. citizens, and the legislative body with respect to material, nonpublic information obtained by virtue of their positions.[79] The STOCK Act made it clear that members of Congress have a fiduciary duty to the people they serve.[80] It also confirmed that the legislators are not exempt from insider trading law. The Act provided a forty-five-day deadline to report securities transactions and also provided for an electronic reporting system to facilitate transparency.[81] The Act was amended the following year to repeal the electronic filing mandate.[82] In short, the STOCK Act was intended to close the perceived gap between

74 Robert Pear, *Obama Signs Ban on Insider Trading*, N.Y. TIMES: THE CAUCUS (Apr. 5, 2012, 1:38 PM), https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2012/04/04/obama-signs-bill-banning-insider-trading-by-federal-lawmakers [https://perma.cc/K3CY-WV5C].

75 Stop Trading on Congressional Knowledge Act, H.R. 5015, 109th Cong. § 2 (2006).

76 Stop Trading on Congressional Knowledge Act, H.R. 2341, 110th Cong. § 1 (2007); Stop Trading on Congressional Knowledge Act, H.R. 682, 111th Cong. § 1 (2009).

77 Donna M. Nagy, *Beyond Dirks: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 34 (2016) ("The momentum that fueled the STOCK Act's landslide votes of 96-3 in the Senate and 417-2 in the House grew out of a claim in a *60 Minutes* broadcast that congressional insider trading was 'perfectly legal.'" (footnote omitted) (quoting *Congress: Trading Stock on Inside Information*, CBS NEWS (June 11, 2012, 1:32 PM), https://www.cbsnews.com/news/congress-trading-stock-on-inside-information [https://perma.cc/W6BU-23PU])).

78 Pear, *supra* note 74.

79 Nagy & Painter, *supra* note 5, at 1312–13.

80 Kim, *supra* note 32, at 850.

81 Kelbon, *supra* note 25, at 163 n.127.

82 Slamowitz, *supra* note 35, at 34.

insider trading theory and the obligations of members of Congress.[83] It does so by manifesting legislators' fiduciary duty of trust and confidentiality,[84] the existence of which was previously the subject of scholarly debate.[85] Unsurprisingly, it merits criticism.

First, the Act is a placebo to cure insider trading on the Hill, as academics, students, and news reporters have observed that members of Congress continue to trade in particular securities in tandem with national crises that garner legislative attention.[86] Moreover, despite passage of the Act, no charges have been filed against federal lawmakers.[87] That is due in no small part to the fact that the STOCK Act does not address the intrinsic difficulties in proving insider trading—that the

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83 Shill, *supra* note 70, at 320 ("In 2012, to eliminate any possibility of a fiduciary-duty gap, Congress enacted the Stop Trading on Congressional Knowledge Act . . . which expressly extended federal insider trading prohibitions to trades by lawmakers and their staff . . . ." (footnotes omitted)).

84 *See* Davis, *supra* note 59, at 1150 (describing the STOCK Act as an "experiment[] with fiduciary analogies").

85 Perino, *supra* note 22, at 342–43 ("Donna Nagy, for example, has argued that members of Congress occupy a position of 'public trust,' and that their behavior should be governed by the fiduciary standards that govern their relationship with 'citizen-investors.' Sung Hui Kim takes a similar position, arguing that at its core fiduciary duty articulates an anti-corruption norm that should prevent public officials from exploiting their offices for private gain." (footnote omitted) (quoting Nagy, *supra* note 27, at 1141–42)). *But see* Roberta S. Karmel, *The Fiduciary Principle of Insider Trading Needs Revision*, 56 WASH. U. J.L. & POL'Y 121, 132 (2018) ("It is highly unlikely that the Supreme Court will delete the fiduciary principle from insider trading 10(b)(5) cases, even though it is theoretically unsatisfactory and has been undermined by [SEC Rule 14e-3 regarding trading during the tender offer process, case law implying that persons trading based on information gained by computer hacking are fiduciaries, and] the STOCK Act.").

86 *See e.g.*, Kelbon, *supra* note 25, at 163–64 ("While the Act perpetuated a sense of unity among members of Congress and its constituents, there are still lawmakers who remain 'prolific traders' and are seemingly unbothered by the appearance of any conflicts of interest."(quoting CRAIG HOLMAN, PUBLIC CITIZEN, THE IMPACT OF THE STOCK ACT ON STOCK TRADING ACTIVITY BY U.S. SENATORS, 2009–2015, at 5 (2017), https://www.citizen.org/wp-content/uploads/2017_stock_act_report.pdf [https://perma.cc/Z25L-DVFM])); Aaron Kane, Comment, *Congressional Insider Trading Lives On: Not Even a Global Pandemic Could Stop It*, 15 GOV'T L. REV. 101, 119 (2022) ("These stock trades around COVID-19 illustrate why the STOCK Act has failed to serve its purpose of preventing insider trading. Despite the bipartisan push in 2012 to end congressional insider trading, the current STOCK Act is not strong enough to prevent instances such as these."); Brian Canfield, Comment, *Banning Congressmembers from Buying Individual Stocks Does Not Go Far Enough*, 2020 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 179, 180 (noting difficulty of proving insider trader against members of Congress); Ballhaus, *supra* note 9 (reporting disclosure of trades by two members of the House of Representatives potentially related to information received in connection with the failures of Signature Bank and Silicon Valley Bank; the article noted that the disclosures mandated by the STOCK Act do not include the date of the transactions, making it more difficult to detect instances of insider trading by members of Congress).

87 Nicholas Gervasi, Note, *Blacking Out Congressional Insider Trading: Overlaying a Corporate Mechanism Upon Members of Congress and Their Staff to Curtail Illegal Profiting*, 28 FORDHAM J. CORP. & FIN. L. 223, 260 (2023).

information used in the trade must be nonpublic and material, and further that the person conducting the trade acted with scienter.[88] One might wonder if the lack of an established fiduciary duty was an excuse, rather than an impediment, regarding prosecution. In any event, insider trading doctrine focuses on promoting trust and confidence in the stock market, while the STOCK Act was intended to promote trust and confidence of our political leaders.[89] As such, the legislation has proven inadequate to defend against the public repulsion associated with personal profiteering by legislators and an unsatisfactory framework for a discussion that has morphed from a securities law issue to a moral crisis involving conflicts of interest between personal financial interests and legislative obligations. Solutions ranging from participation recusals to bans on stock trading are currently being considered.[90] Finally, fundamental questions remain about whether insider trading is intrinsically harmful, with some scholars asserting that the activity serves a legitimate, informational function in American markets.[91] Before abandoning the applicability of the federal securities laws to transactions by members of Congress in the secondary market, additional exploration is necessary. Specifically, the implications of that trading under the Securities Act of 1933 should be investigated.

II. CONGRESSIONAL STATUS AS EXTRAORDINARY INVESTORS

A. *Protections from Registration for Ordinary Investors*

The earliest federal securities regulation statute, the Securities Act of 1933, was born out of concern about the lack of information available to public investors prior to purchasing an ownership interest in a business enterprise.[92] Section 5 of the Securities Act, the foundational pillar of the

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88 Schneider, *supra* note 4, at 303.

89 Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159, 163 (2014).

90 *See Examining Stock Trading Reforms for Congress: Hearing on H.R. Before the Comm. On H. Administration*, 117th Cong. 84, 89 (2022) (providing testimony by the Senior Vice President and Chief Counsel of Citizens for Responsibility and Ethics in Washington that congressional recusal would deprive constituents of representation; and trading bans are a simple solution).

91 John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 16 (observing that insider trading improves market efficiency by putting additional information into the public domain and also serves as a source of executive compensation that does not impact the issuer's coffers).

92 Brent J. Horton, *In Defense of a Federally Mandated Disclosure System: Observing Pre-Securities Act Prospectuses*, 54 AM. BUS. L. J. 743, 797 (2017) ("The Securities Act created a federally

legislation, requires that every offer or sale of a security be registered with the SEC, or covered by an applicable exemption from the registration requirement.[93] Registration is a complex process by which information about offered securities is delivered to investors in a regimented fashion to ensure their protection.[94] The mandate of registration in connection with offers and sales of securities is not met with excitement by those seeking to enterprise funding; it has generally been regarded as so burdensome that it impedes capital raising through the securities markets.[95]

Drafters of the 1933 Act were primarily concerned with the initial offer and sale of securities by issuers, through intermediaries, into the hands of the investing public.[96] However, the statute applies the registration requirement of Section 5 to resales of securities that occur in the secondary market, as well as primary offerings of securities by the issuer.[97] As a result, all sales of a security in the secondary market must be registered with the SEC or covered by an exemption.[98] While the

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mandated disclosure system in response to a congressional finding that during the years before the 1929 stock market crash, corporate issuers had failed to provide investors with information necessary to determine the worth of the securities they were offering, or more to the point, whether the security was worthless.").

93 Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 209 (1996) (describing Section 5 as the "lynch-pin of the Securities Act," and noting the exemption from the provision under Section 4(1) (now Section 4(a)(1)) of the statute).

94 Theodore Weitz & Thomas D. Halket, *State Crowdfunding and the Intrastate Exemption Under Federal Securities Laws—Less Than Meets the Eye?*, 34 REV. BANKING & FIN. L. 521, 530–31 (2015) ("The registration statement, and indeed the registration process as a whole, is burdensome, very expensive, and not useful for smaller issuances. But there is a succinct, oft-repeated statement of the law that there are only three ways to issue securities in the United States: first, by registration, second, under an exemption, or third, illegally.").

95 Daniel J. Morrissey, *The Road Not Taken: Rethinking Securities Regulation and the Case for Federal Merit Review*, 44 U. RICH. L. REV. 647, 652 (2010) ("For the last several decades, the SEC has been sensitive to charges that the process of registration is unduly costly and burdensome on issuers, inhibiting the formation of capital and even discouraging entrepreneurship.").

96 James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 36 (1959) ("Throughout, [the bill proposing the 1933 Act's] patent concern was primarily with the flow of securities from the issuer through underwriters to the public rather than with the subsequent buying and selling of these securities by the public."). James Landis was one of the drafters of the Securities Act. *See* A.C. PRITCHARD & ROBERT B. THOMPSON, A HISTORY OF SECURITIES LAW IN THE SUPREME COURT 20 (2023).

97 STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 775 (5th ed. 2019) ("Thus, no transactions may occur even after the effective date of a registration statement without complying with § 5.").

98 Frederick H.C. Mazando, *The Taxonomy of Global Securities: Is the U.S. Definition of a Security Too Broad?*, 33 NW. J. INT'L L. & BUS. 121, 145 (2012) ("Unlike exempted securities, the Securities Act excepts exempted transactions from its registration requirements for only one specific transaction. Accordingly, a buyer of an exempted transaction who intends to resell must find another transaction exemption, otherwise the securities must be registered.").

requirement is intended to target offers and sales of securities, those involved in drafting the Securities Act recognized that other market participants in a relationship with the issuer could serve as a conduit through which issuers could effectuate offerings, both in the initial offering and through transactions in the secondary market. They created a statutory solution in the Securities Act to close that loophole.[99]

Specifically, Section 4(a)(1) of the Securities Act provides an exemption from Section 5 for those transactions "by any person other than an issuer, an underwriter or a dealer."[100] By its terms, the exemption is not available for any seller of the security, including an ordinary person, if an issuer, underwriter, or dealer is involved in the transaction.[101] "Underwriter," in relevant part, is defined in Section 2(a)(11) to include "any person who . . . offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking."[102] However, without more, Section 4(a)(1) would leave an open door for persons in a control relationship with the issuer to effectuate a sale of securities on behalf of the issuer by serving as a conduit for sales of the issuer's securities in the secondary market without registration.[103] The drafters of the Securities Act addressed this possibility by adding the following proviso to the definition of underwriter: "As used in this paragraph, the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling, controlled by the issuer, or . . . under . . . common control with, the issuer."[104] As a result, anyone purchasing from the control person, as well as anyone facilitating the purchase of a security from a control person, could be deemed to be an underwriter, in which case the

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99 Landis, *supra* note 96, at 41.

100 J. William Hicks, *The Concept of Transaction as a Restraint on Resale Limitations*, 49 OHIO ST. L.J. 417, 423–24 (1988) ("Without the presence of a qualifying provision, section 5 would encompass all securities transactions by 'any person' . . . . However, section 4(1) of the Act effects the distinction that Congress intended between distribution of securities and trading in securities by removing the application of section 5 from any securities transaction 'by any person other than an issuer, underwriter, or dealer.'" (footnote omitted) (first quoting 15 U.S.C. § 77e(c) (1981); and then quoting *id.* § 77d(1))).

101 *See* THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 4:93 (8th ed. 2023).

102 15 U.S.C. § 77b(a)(11).

103 DAN L. GOLDWASSER, THE PRACTITIONER'S COMPREHENSIVE GUIDE TO RULE 144, at 26 (1975) ("[A] controlling shareholder, who is often the alter ego of the issuer, might effect sales which would require registration if made by the issuer itself.").

104 15 U.S.C. § 77b(a)(11); *see* Landis, *supra* note 96, at 37–38 ("There was also the problem of secondary distributions, which had to be split as between distributions by controlling and non-controlling persons. The former was the only transaction that could be controlled through registration requirements . . . . The definition of 'underwriter' in section 2(11) of the act proved to afford a solution to this problem.").

transaction is no longer one "by persons other than an issuer, underwriter, or dealer," destroying the availability of Section 4(a)(1) as an exemption.[105]

The risk of earning underwriter status is not negligible for those involved in a transaction with a person who has a control relationship with the issuer, due to the imprecision of key terms within the definition of underwriter. Specifically, there is no way to determine with real certainty whether a "distribution" is occurring.[106] Further, the definition of control is not clearly articulated under the Securities Act.[107] As discussed further in Part II.B, the legislative history of the Securities Act and certain court decisions support the view that control is determined by the ability of a person to force the issuer to file a registration statement with the SEC.[108] However, the SEC and other courts take the view that control is determined by the ability to direct the management and policies of another.[109] The concept of control encompasses both actual and potential ability.[110] In sum, the Securities Act uses a broad brush to define the parameters of the resale exemption of Section 4(a)(1), and introduces significant uncertainty about its availability for transactions involving those who might be deemed to be in a control relationship with an issuer.[111]

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105 MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 190 (7th ed. 2018) ("An examination of Section 2(a)(11) reveals that a person can become an underwriter in the following ways: . . . (4) By selling securities of the issuer on behalf of a control person in connection with the distribution of any security; and (5) by purchasing securities of the issuer from a control person with a view towards distribution."); *see also* John F. Griffee IV, *Guide to Structuring Resales of Restricted Securities Held by Control and Non-Control Holders Under Federal and Arkansas Law*, 38 U. ARK. LITTLE ROCK L. REV. 1, 11 (2015) ("Under Section 2(a)(11), a person who purchases securities from the [control person] . . . could be deemed an underwriter.").

106 Rutheford B. Campbell, Jr., *Resales of Securities Under the Securities Act of 1933*, 52 WASH. & LEE L. REV. 1333, 1338 (1995) ("The term 'distribution' is understood to have the same meaning as 'public offering,' which in turn is defined under the broad definition that traces its roots back through the U.S. Supreme Court's decision in SEC v. Ralston Purina Co." (footnote omitted)).

107 James D. Cox, *The Fundamentals of an Electronic-Based Federal Securities Act*, 75 WASH. U. L.Q. 857, 863 (1997) ("[A] good deal of ambiguity surrounds the meaning of 'control person' when defining the scope of secondary distributions.").

108 J. William Hicks, *The Concept of Transaction as a Restraint on Resale Limitations*, 49 OHIO ST. L.J. 417, 425 (1988).

109 Rutheford B. Campbell, Jr., *Defining Control in Secondary Distributions*, 18 B.C. INDUS. & COM. L. REV. 37, 38 (1976) (explaining that some courts define control as the ability to effectuate the registration of securities by the issuer, while other courts and the SEC, through Rule 405 of the Exchange Act, define control as the power to direct the management and policies of the issuer).

110 LARRY A. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION, 246 (9th ed. 2018) (describing the concepts of control as encompassing both participation in a group that exercises control and "the unexercised ability to control.").

111 Cox, *supra* note 107, at 863.

As the result of a study commissioned by the SEC in the 1960s,[112] the agency determined to address the ambiguities of the Section 4(a)(1) exemption by adopting a rule creating additional guidance.[113] The SEC adopted Rule 144 in 1972.[114] Rule 144 of the Securities Act provides a safe harbor that delivers certainty to those—including persons involved in a transaction with one in a control relationship with an issuer (defined as affiliates in the rule)—who want to rely on Section 4(a)(1) to exempt their secondary market transactions in the issuer's securities.[115] Rule 144 removes the risk that these affiliates will be deemed to be engaged in a distribution of securities on behalf of an issuer by: (1) limiting the amount of the issuer's securities that the affiliates may sell in the transaction, (2) requiring that current information exist as to the securities, and (3) ensuring that no undue influence is being exerted in connection with the sale.[116] Returning to the topic of members of Congress trading in the securities of issuers in the secondary market, one should wonder whether these legislators are in a control relationship with issuers such that the protection of Rule 144 must be sought in connection with the sale of their shares in the secondary market.

B. *Congressional Control Meriting Unordinary, Unprotected Status*

As indicated above, the Securities Act places additional concerns on persons with a close relationship to issuers who attempt to sell the issuers' securities in the secondary market.[117] Specifically, such transactions could

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112 *See* Stephen J. Choi, *Company Registration: Toward a Status-Based Antifraud Regime*, 64 U. CHI. L. REV. 567, 568 n.9 (1997) (describing the creation of the Wheat Report in 1969, after a study of the feasibility of moving from the bifurcated securities regime of being transaction-based for initial offerings under the 1933 Act and issuer-based for ongoing regulation under the 1934 Act, to a unified issuer-based regime).

113 *See* Michael Occhiolini, *Where to Draw the Line: Distinguishing Between Restricted and Publicly Registered Securities in an Era of Equity Swaps*, 1 STAN. J.L. BUS. & FIN. 209, 216 (1995) (describing the adoption of Rule 144 after recommendations in the Wheat Report regarding treatment of the resale of unregistered securities and securities held by persons in a control relationship with the issuer).

114 Marc I. Steinberg & Joseph P. Kempler, *The Application and Effectiveness of SEC Rule 144*, 49 OHIO ST. L.J. 473, 477 (1988).

115 MARC I. STEINBERG, RETHINKING SECURITIES LAW, 78 n.155 (2021) ("Rule 144 under the Securities Act of 1933 creates a safe harbor for the sale of securities under the exemption set forth in Section 4(1) [now § 4(a)(1)] of the Securities Act." (alteration in original) (quoting Revisions to Rules 144 and 145, Securities Act Release No. 33-8869, 72 Fed. Reg. 71546 (Dec. 17, 2007))).

116 Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573, 1594–95 (2013).

117 *See* David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312, 1351 n.134 (2001) ("Section 5 of the Securities Act generally requires every offer and sale of a

be deemed ineligible for the Section 4(a)(1) exemption because the affiliate could be deemed an issuer for purposes of the definition of "underwriter," rendering the purchaser of the affiliate's security, as well as one who facilitated the sale as underwriters for purposes of the exemption. This begs the question: Are members of Congress "controlling" or "controlled by" issuers such that their sales of a security in the secondary market require an assessment of whether the transaction requires registration with the SEC?

Whether a member of Congress meets the definition of control for purposes of Section 2(a)(11) of the Securities Act is a question of fact, as the definition in the statute and accompanying rule is "both broad and vague."[118] While the test of control undoubtedly involves the power to direct management and policies of the corporation, whether such power actually exists is difficult to discern. It can be found to exist based on an ownership interest, a contractual relationship, a familial relationship, personal relationship, or managerial position.[119] The vagueness of the concept of control under the 1933 Act was an intentional effort by its adopters to ensure the flexibility to identify the presence of control as merited by presented facts. Rule 405 of the Securities Act defines the term "control," (which includes the terms "controlling" and "controlled by") to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[120] In essence, courts and the Commission will know it when they see it.[121] In ascertaining the existence of a control person, one is looking for

security to be 'registered,' such that adequate disclosure about the security is available. There is an exception in section 4(1) for ordinary trading, so the average investor does not have to provide disclosure. Yet to keep this exception from swallowing the rule, this relief does not apply to the issuer or to an 'underwriter.' . . . Similar conditions also apply to persons with a sufficiently close relationship to the issuer, including senior officers, directors, and shareholders who own more than 10% of the firm. These 'affiliates' also cannot sell in the public markets without satisfying the requirements spelled out in Rule 144." (citations omitted) (first citing 15 U.S.C. § 77e (1994); then citing *id.* § 77d(1); and then citing 17 C.F.R. § 230.144 (2001))).

118 John C. Coffee, Jr., *The SEC and the Institutional Investor: A Half-Time Report*, 15 CARDOZO L. REV. 837, 898 (1994).

119 Campbell, Jr., *supra* note 109, at 41–49 (describing the bases for finding that an individual was in a control relationship with an issuer for purposes of the Section 2(a)(11) definition of underwriter).

120 17 C.F.R. § 230.405 (2024).

121 Robert D. Drain & Elizabeth J. Schwartz, *Are Bankruptcy Claims Subject to the Federal Securities Laws?*, 10 AM. BANKR. INST. L. REV. 569, 595 n.160 (2002) (noting that the definition of "control" in Section 405 is typically a question of fact that depends upon the existence of actual ability to influence a corporation).

evidence of a relationship with an issuer that allows the person to wield significant power over the issuer's business.[122]

The concept of control person is not limited to the Securities Act of 1933; the federal securities laws take steps to ensure that such persons are within the scope of regulation in other contexts as well. For example, the Investment Advisers Act of 1940, as amended in response to the Bernie Madoff fraud, requires that an independent public accountant verify the existence of client funds in the custody of the adviser.[123] Custody, for this purpose, include funds in the possession of persons in a control relationship with the advisor.[124] As is true with the definition of underwriter in Section 2(a)(11), the definition of custody in the Investment Advisers Act prevents the adviser from evading the protections of the Act by placing the funds with an entity in a control relationship with the adviser.[125]

The control relationship between corporate entities and Congress has been documented in a variety of contexts, as corporations make particularly appealing partners of control in the context of lawmaking. Federal legislators have been credited with the ability to impact the performance of corporate stocks through government contracts, budget authority, and legislation.[126] Corporate wealth is also deployed to bring

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122 *See* Therese Maynard, *The Future of Securities Act Section 12(2)*, 45 ALA. L. REV. 817, 847 (1994) ("A 'control person' is one who has a relationship with an issuer that allows this person to exert substantial influence over the issuer's affairs.").

123 Felicia Smith, *Madoff Ponzi Scheme Exposes "The Myth of the Sophisticated Investor"*, 40 U. BALT. L. REV. 215, 253 n.203 (2010) (explaining that registered investment advisers who have custody of client funds, as well as investment advisers whose clients' funds are in the custody of a related entity, are subject to surprise inspections by an outside auditor).

124 Mercer Bullard, *Mandatory Third Party Compliance Examinations for Investment Advisers: An SEC Waterloo*, 11 BROOK. J. CORP. FIN. & COM. L. 107, 155 (2016) ("An adviser has custody if it or a related person holds client assets or has the authority to obtain possession of them." (footnote omitted)). "Related person means any person, directly or indirectly, controlling or controlled by [the advisers], and any person that is under common control with [the advisers]." 17 C.F.R. § 275.206(4)-2.

125 Marco Bodellini, *From Systemic Risk to Financial Scandals: The Shortcomings of U.S. Hedge Fund Regulation*, 11 BROOK. J. CORP. FIN. & COM. L. 417, 455 (2017).

126 Shill, *supra* note 70, at 317 ("Stock trading by congressional insiders has unusual potential to warp governance and markets: not only do Members of Congress enjoy *access* to material nonpublic information (MNPI) concerning moves in individual stocks and the market as a whole, they *create* it through legislation and other action . . . . [L]awmakers can create MNPI for a particular company—for example, by imposing conditions on federal contracts. But unlike executives, the powers of Members of Congress do not stop at firm-centered influence. They also exercise influence on industries writ large and the economy as a whole through the exercise of their constitutional powers of the purse, regulation, and beyond." (footnote omitted)).

about political change.[127] Lawmakers demonstrated their ability to control the financial success of tech companies in the successful passage of the Private Securities Litigation Reform Act (PSLRA), where significant lobbying efforts led to the passage of legislation placing additional burdens on shareholders commencing securities litigation against public companies.[128] Subsequent concerns that the PSLRA was driving such litigation into state courts (where the restrictions on securities litigation would not exist) spurred Silicon Valley corporations to lobby Congress for preemption of securities litigation filed in state courts.[129] Members of Congress also exercised their ability to control the policies of corporations when, in 2005, they were persuaded by business interests to oppose efforts of the Financial Accounting Standards Board (FASB) to require the mandatory expensing of stock options.[130] Corporate self-advocacy in the halls of Capitol Hill takes various forms: lobbying, campaign contributions, and the use of special interest groups.[131] Monetary resources of corporations may be used to pursue profitable political outcomes for the corporate entity, as well as more personal political views of corporate management.[132] The control relationship between issuers and members of Congress is further established by the rise of corporate participation in political affairs.[133]

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127 William S. Laufer, *Modern Forms of Corruption and Moral Stains*, 12 GEO. J.L. & PUB. POL'Y 373, 385 (2012) ("Personhood, and the rights that accompany it, allow corporate wealth to overly influence governmental policy and democratic elections. It places the government in a strange intermediary position between the will of the people and the will of the corporate body.").

128 Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 915 (noting, with respect to the congressional motivations to pass the PSLRA, that "Congress wanted to reduce litigation risk for high technology issuers, which it found were disproportionately targeted in securities class actions"); *see also* William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders—The Rise of the New Corporate Kleptocracy*, 8 STAN. J.L. BUS. & FIN. 69, 76 (2002) (attributing the successful enactment of the PSLRA to "lobbying fees and political contributions from corporate and financial interests").

129 Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 4–5 (1998).

130 Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U.L. REV. 1123, 1185 n.278 (2007) (describing how corporate lobbyists made donations to members of Congress to spur legislators to oppose the FASB proposal).

131 Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 312–15 (2005).

132 Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 177 (2016) (discussing the use of corporate funds by management to further the corporation's profitability as well as the manager's personal interests).

133 Michael R. Siebecker, *Political Insider Trading*, 85 FORDHAM L. REV. 2717, 2720 (2017) (arguing that the increase in political participation by corporations makes a strong case for mandating corporate disclosure of political spending).

The existence of the control relationship is grounded in fact as described above. It is also supported by the economic theory of public choice. Public choice theory correlates political behavior to market behavior as a mechanism to explain the rationale behind the actions of participants in the political process.[134] It characterizes legislative action as a good that can be exchanged for political support.[135] The rise of public choice theory in the 1960s eclipsed the prevailing supposition that lawmaking was driven by the identification and resolution of market failures.[136] Market failures are areas of activity that produce undesirable outputs or costs.[137] Public choice theory introduces the unsavory reality of special interest groups' control (a.k.a. capture) of Capitol Hill.[138] Modern public choice theory recognizes that in addition to supporting legislation that overtly benefits corporate constituents, legislators may deliver benefits subtly by softening the impact of unfavorable legislation.[139] The Supreme Court's 2010 decision in *Citizens United v. FEC* has only amplified concerns about corporate control over legislators and the democratic process.[140]

Congress has recognized its potential to use information gained from its position to engage in insider trading in other contexts—

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134 Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34 (1998) ("The public choice theory of regulation analogizes regulatory decisionmaking to market decisionmaking.").

135 JOHN CULLIS & PHILIP JONES, PUBLIC FINANCE AND PUBLIC CHOICE: ANALYTICAL PERSPECTIVES 129–30 (3rd ed. 2009). Cullis and Jones explain that the theory posits that government actors are driven by a desire to secure votes to stay in office. These actors get a smaller number of votes from the general public in response to lowering the cost of a particular good than they get from special interest constituents when they both support higher prices of the constituent and suppress the constituent's competition. *Id.*

136 Herbert Hovenkamp, *Regulation and the Marginalist Revolution*, 71 FLA. L. REV. 455, 488 (2019) ("Worse yet, with the rise of modern public choice theory in the 1960s, interest group capture, rather than market failure, became the dominant positive rationale for regulation.").

137 Steven L. Schwarcz, *Regulating Shadows: Financial Regulation and Responsibility Failure*, 19 WASH. & LEE L. REV. 1781, 1801 n.79 (2013).

138 Hovenkamp, *supra* note 136, at 488.

139 Davod G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1209 n.43 (2011) ("Modern public choice theory also suggests that politicians are likely to balance the interests of their non-corporate and corporate constituents by supporting ostensibly anti-corporate legislative programs that provide a salient but superficial salve to non-corporate agitators, while substantively serving corporate interests.").

140 Siebecker, *supra* note 133, 2720–21 ("With respect to the growing political influence of corporations, the Supreme Court gave big business a new type of jurisprudential rocket fuel with its decision in *Citizens United v. FEC*."). Siebecker argues that the increase in political participation by corporations makes a strong case for mandating corporate disclosure of political spending.

acknowledging its potential for abuse of the public trust.[141] Just as legislators may be controlled by corporate entities promising monetary support in return for political boons,[142] lawmakers may extract money from companies by submitting bills that threaten to have an adverse impact on the firm's business or operations.[143] While this control relationship between members of Congress and corporations whose securities are trading in the secondary markets is readily discernible, it is not yet recognized by courts or the SEC in the context of the registration obligation imposed by Section 5 of the Securities Act. This reality should be reflected in the statute.

The legislative provision linking persons in a control relationship with an issuer to that issuer for purposes of permitting access to the statutory exemption for sales involving nonprofessional distributions should be amended to clarify that any person holding the title of United States Senator, Representative in Congress, Delegate to Congress, or Resident Commissioner from Puerto Rico is deemed to control, and be controlled by, issuers such that those persons are considered issuers for purposes of the definition of underwriter. This tweak would effectively remove the registration exemption that currently allows them to sell securities in the secondary market unchecked. It would acknowledge and address the special relationship between Capitol Hill politicians and the publicly held corporations that have become so intrinsic to their roles.

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141 Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199, 235 (2009). Sullivan describes Congressional efforts during the development of processes to review the work of the Committee on Foreign Investment in the United States in determining whether to permit the foreign acquisition of U.S. companies. In determining the ability of Congress to review such determinations, the legislature recognized its ability to use confidential information regarding these acquisitions for personal profit and set limits on the timing of information it would receive about such acquisitions to curb the potential for insider trading by its members.

142 *See* Paul F. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 36 HARV. L.J. & PUB. POL'Y 209, 229 (2016) (discussing the acceptance of payments, characterized as rents, in return for economic benefits that are bestowed through regulations, such as licensing laws).

143 Jonathan R. Macey & Maureen O'Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 YALE J. ON REG. 89, 107–08 (2009) (describing the creation of "juice," "milker," and "fetcher" bills to threaten particular constituents, which bills are subsequently withdrawn after money, in the form of campaign donations and valuable information has been received).

III. RESTORATION OF CONGRESSIONAL CREDIBILITY FOR MARKET TRADING

A. *The General Allure of Rule 144*

Congressional credibility is in crisis, and Americans are clamoring for measures to curb legislators' use of information gained from their positions of influence to generate financial gain in the stock market.[144] After the embarrassing revelations of congressional insider trading following the financial crisis of 2008, Congress attempted to soothe the concerns and outrage of its constituents by passing the STOCK Act.[145] Unfortunately, only more embarrassment ensued after revelations that the disclosures mandated by the STOCK Act were often ignored by congresspersons,[146] and the disclosures that raised potential insider trading concerns were ultimately disregarded by congressional ethics committees and the SEC.[147] This utter disregard for statutory requirements led to renewed focus on the potential lack of ethical responsibility and accountability from legislators on the Hill. Bills are currently under consideration that would restrict the ability of members of Congress to own stocks.[148]

Understanding that the discussion surrounding prohibitions on congressional stock ownership is premised upon concerns that extend beyond insider trading, the sticky wicket of insider trading by federal lawmakers can be addressed effectively by leveraging Rule 144. As

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144 Danielle Caputo, Delaney Marsco & Kedric Payne, *Part 2—The STOCK Act: The Failed Effort to Stop Insider Trading in Congress*, CAMPAIGN LEGAL CTR. (Feb. 18, 2022), https://campaignlegal.org/update/part-2-stock-act-failed-effort-stop-insider-trading-congress [https://perma.cc/3MKS-AR3J] ("Voters have made it clear that they do not trust Congress to prioritize their interests and the current trend of perceived corruption and alleged insider trading will continue unless meaningful new legislation is passed.").

145 *See supra* Section I.C.

146 Kedric Payne, *Hard Lessons Learned After a Decade of the STOCK Act*, BLOOMBERG L. (Apr. 6, 2022), https://news.bloomberglaw.com/white-collar-and-criminal-law/hard-lessons-learned-after-a-decade-of-the-stock-act [https://perma.cc/CM9S-PV4B] ("Allegations of congressional insider trading and conflicts of interests have persisted over the past 10 years, but no member has been publicly disciplined for violating the STOCK Act under the self-policing mechanism. Specifically, from 2020 to 2021, over 200 lawmakers and senior staff members have allegedly violated the reporting requirements of the STOCK Act without any indication from the House and Senate ethics committees of enforcement actions.").

147 Kane, *supra* note 86, at 119 (noting that even after investigations into congressional insider trading in connection with the pandemic, no member of Congress has yet to face enforcement action based on the use of information from their congressional duties for profit in the securities market).

148 Gervasi, *supra* note 87 at 245 (describing the Ban Congressional Stock Trading Act, the Banning Insider Trading in Congress Act, and the Ban Conflicted Trading Act).

detailed above, the definition of underwriter in the Securities Act implicates federal legislators—it includes them in the category of control persons, and therefore treats them as issuers for purposes of the definition.[149] The involvement of an affiliate in the sale of a security in the secondary market leads to the possibility that an unregistered distribution is afoot, and threatens the availability of the Section 4(a)(1) exemption for those participating in the transaction.[150] Consequently, legislators selling securities in the secondary market would look to the safe harbor of Rule 144 to ensure no liability would result from their sales of securities.

Scholars have previously argued for a pre-trading disclosure rule to combat the unabated occurrence of insider trading.[151] The dearth of specific guidelines around the materiality of nonpublic information within insider trading theory has attracted scholars to a disclosure framework.[152] Rule 144 has been found lacking in its ability to combat insider trading because, for example, it discloses transactions where insider trading law focuses on disclosing information about the issuer.[153] However, the value of Rule 144 from a disclosure perspective should not be underestimated. Information about trading by members of Congress promotes market efficiency,[154] as it does with respect to trading by traditional insiders.[155] Rule 144 is not without its flaws, as it combines trading in restricted securities with trading by control persons in

149 *See supra* Section II.A.

150 J. Dormer Stephen, III, *Gustafson: One Small Step (Backward) for Private Plaintiffs, One Giant Leap (Backward) for the Securities Bar*, 49 OKLA. L. REV. 425, 449 (1996) (explaining that Rule 144 protects affiliates from being deemed underwriters, avoiding the consequence that the affiliate's transaction would involve a distribution).

151 Jesse M. Fried, *Reducing the Profitability of Corporate Insider Trading Through Pretrading Disclosure*, 71 S. CAL. L. REV. 303, 306 (1998) (recommending that insiders reveal their planned trades to the public prior to making the transaction to undercut their ability to profit from inside information).

152 *See, e.g.*, Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1139 (2003).

153 *Id.* at 1139 n.30 (noting that Rule 144 provides a disclosure framework but does not help with an assessment of materiality because the disclosures required focus on the seller of the security, and not the information relating to the issuer).

154 Bud W. Jerke, Comment, *Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit*, 158 U. PA. L. REV. 1451, 1452 (2010) (asserting that regulating insider trading by members of Congress impedes market efficiency).

155 Fried, *supra* note 151, at 330 (asserting that pre-trading disclosure, consistent with the "disclose or abstain" mandate, puts the public on notice of material nonpublic information that has not yet been introduced into the marketplace); *see also* In re Bed Bath and Beyond Corp. Sec. Litigation, 22-cv-2541, 2023 WL 4824734 , at *2 (D.D.C. July 27, 2023) (indicating that Bed Bath and Beyond received questions from the media after one of its significant shareholders filed a Form 144 disclosing plans to sell its holdings in the company).

unrestricted securities in an illogical fashion.[156] Nonetheless, Rule 144 continues to survive and its potential application to insider trading by lawmakers should be explored.

B. *Brokers as Backstops*

Unlike the STOCK Act, which has essentially operated by an honor system with respect to the reporting of transactions by lawmakers, Rule 144 designates broker-dealers as gatekeepers to confirm that sales subject to the Rule do not implicate concerns that a distribution is occurring.[157] This is not an unfamiliar role for brokers. While the federal securities laws adopt an agnostic, disclosure-based approach to the protection of investors, the laws leverage private market participants, like stock exchanges and brokers to assure the quality of investments, offered in the public markets.[158] Brokers facilitating sales of stock under Rule 144 are intrinsically invested in sales they facilitate for control persons because if the sale does not comply with the Rule, the broker effectuating the sale on behalf of the control person might be deemed to be participating in an unregistered distribution of an issuer's securities, and might have liability under Section 5.[159] As a result, brokers make effective watchpersons regarding sales of securities by persons in a control relationship with issuers. They have a duty under Rule 144(g) to make reasonable inquiry

156 *See* STEINBERG, *supra* note 105, at 78 (describing the exemption framework for resales of securities "convoluted and often nonsensical," and questioning the logic of a distinction between control persons and other shareholders for purposes of this rule); *see also* GOLDWASSER, *supra* note 103, at 72 (noting the difficulty in attempting to justify creating a separate category of restrictions for controlling persons under Rule 144).

157 In its release adopting modifications to Rule 144, the SEC acknowledged comments received on the proposed release expressing concern about reducing the role of brokers with respect to Rule 144. Revisions to Rules 144 and 145, Securities Act Release No. 33-8869, 72 Fed. Reg. 71546, 71553 (Dec. 17, 2007) ("We agree that, as financial intermediaries, brokers serve an important function as gatekeepers for promoting compliance with Rule 144.").

158 Howard M. Friedman, *On Being Rich, Accredited, and Undiversified: The Lacunae in Contemporary Securities Regulation*, 47 OKLA. L. REV. 291, 308 (1994) ("Through quasi-private self-regulatory organizations, the necessary paternalism emerged that Congress was unwilling to vest in the federal government directly.").

159 Steinberg & Kempler, *supra* note 114, at 477 ("Rule 144 consists of a Preliminary Note and eleven separate paragraphs, setting forth the terms and conditions of the rule. When a seller meets all of the conditions of the rule, he or she may dispose of securities without compliance with the Securities Act's registration requirements. Under these circumstances, a seller will not be deemed an underwriter, hence making available the section 4(1) exemption, and a broker will be able to invoke the section 4(4) exemption.").

into the circumstances of the sale to ensure that a distribution is not occurring.[160]

Brokers are well recognized in the federal scheme of securities regulation as gatekeepers in the markets.[161] Existing securities laws require brokers to collect information on clients for purposes of assessing suitability of customer investment decisions.[162] In light of the extensive regulatory scheme to which they are subject,[163] and the importance of reputation and credibility to their livelihoods,[164] brokerage professionals are well positioned to perform the task of gatekeeper with respect to the securities trades of their clients who serve as members of Congress. The role of brokers as gatekeepers in the secondary market is further illustrated by Section 12(a) of the Securities Exchange Act of 1934, which prohibits brokers from trading on a national exchange any security that is not registered with the SEC, or subject to an exemption from registration.[165] From a regulatory perspective, vesting the brokerage community with the duty to police trading by members of Congress leverages and reinforces the existing role of brokers in the marketplace, which became a matter of regulatory concern with the rise of electronic brokerage services.[166]

The membership of brokers in stock exchanges further cements their utility as gatekeepers. Brokers formed stock exchanges to formalize agreements to trade with each other exclusively with respect to listed companies, and to set the commissions that would be charged when

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160 Thomas Linden, *The Resale of Restricted and Control Securities Under SEC Rule 144: The First Five Years*, 8 SETON HALL L. REV. 157, 233–34 (1977).

161 Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan*, 28 BROOK. J. INT'L L. 319, 330–31 (2003) ("The SEC regulatory structure also increased in complexity over the years with the introduction of other entities that have now been designated 'gatekeepers,' such as the accountants that certify the financial statements of public companies and broker-dealers." (footnote omitted)).

162 Chris Brummer, *Disruptive Technology and Securities Regulation*, 84 FORDHAM L. REV. 977, 988 (2015) (describing the evolution of the "know thy customer" rule imposed upon broker-dealers by FINRA's predecessor, NASD, into the customer suitability rule that exists today).

163 Kristin N. Johnson, *Decentralized Finance: Regulating Cryptocurrency Exchanges*, 62 WM. & MARY L. REV. 1911, 1935 (2021) (describing the rulemaking and oversight functions of FINRA with respect to broker-dealers).

164 *See* Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797, 815 (2016) (identifying reputational importance as an effective tool to withstand the pressure of client demands).

165 Johnson, *supra* note 163, at 1934–35 (observing that Section 12(a) of the Exchange Act reflects the role of brokers in supporting the registration rubric of the primary securities markets).

166 Joseph A. Grundfest, *The Future of United States Securities Regulation: An Essay on Regulation in an Age of Technological Uncertainty*, 75 ST. JOHN'S L. REV. 83, 105 (2001) (noting that the SEC had expressed concern that the rise of online brokerage services would reduce the customer protections provided by brokerage professionals).

dealing with those who were not exchange members.[167] The NYSE, seeking to establish itself as the premier stock exchange, determined to list only those companies deemed to reflect quality, reliability, and the promise of growth.[168] The exchange substantively reviewed the business operation, management, and financial condition of issuers before deciding whether to approve the company for listing.[169] It mandated that all of its listed companies use a consistent method of accounting in its financial statements, and use outside auditors to opine on the reliability of the financial information presented by these companies.[170] The NYSE further determined to actively police its members' trading on the Exchange to ensure its marketplace was fair and free of fraudulent conduct, and that its members engage in conduct that would promote "just and equitable principles of trade" to protect investors.[171] These practices of policing member firms and creating listing standards for issuers were adopted by other exchanges as well, to varying degrees,[172] thus establishing standards for the industry of market trading participants that focused on substantive regulation as an effective

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167 Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1071–72 (2005).

168 John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 37 (2001) ("From well before 1900, the NYSE saw itself as the guardian of the financial quality of the issuers listed on it. Perhaps it imposed high listing standards for its own self-interested reasons, but it clearly did regularly reject issuer applications, either because the issuer lacked an adequate earnings track record, had insufficient assets, or was in a high-risk industry. In so doing, the NYSE was also able to distinguish itself from its American competitors and present an image to investors as the most reputable exchange.").

169 *See* Robert B. Thompson, *Corporate Federalism in the Administrative State: The SEC's Discretion to Move the Line Between the State and Federal Realms of Corporate Governance*, 82 NOTRE DAME L. REV. 1143, 1145–46 (2007) (observing that listing standards are a component of corporate governance under U.S. law).

170 Sarah J. Williams, *The Alchemy of Effective Auditor Regulation*, 25 LEWIS & CLARK L. REV. 1089, 1097 (2022) ("The NYSE fashioned itself as an elite market, trading only the highest quality of stocks at high volumes and high prices. Consistent with this approach, and on the heels of the stock market crash of 1929, the NYSE established a rule in 1932 that required all newly listed companies to receive independent audit reports on their financial condition." (footnote omitted)).

171 Susan L. Merrill, Matthew L. Moore & Allen D. Boyer, *Sharper and Brighter: Focusing on Sanctions at the New York Stock Exchange*, 3 N.Y.U. J.L. & BUS. 155, 162–163, 164 n.16 (2006) (quoting 15 U.S.C. § 78f(b)(5)) (indicating that NYSE's obligation to require this standard from its members dates back to its 1902 Constitution and was legally imposed upon the Exchange when it registered with the SEC pursuant to the Exchange Act).

172 *See generally* Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMU L. REV. 325 (2001) (describing the rise of stock exchanges in the U.S. and the implementation of listing standards).

complement to the disclosure-oriented approach of the federal securities laws.[173]

The Exchange Act of 1934 created federal regulation for stock exchanges but preserved the self-regulatory nature of the entities by codifying a regime of disclosure and self-policing;[174] as a result, the industry is steeped in a spirit of affirmative promotion of fairer markets for investors.[175] Brokers, in sum, are a fundamental component of the regulatory ecosystem of secondary markets, and are already equipped to promote fair and informed markets by reviewing and opining upon the sales of securities by members of Congress.

C. *An Improved Reporting Regime*

Leveraging Rule 144 for purposes of congressional trading provides a vastly more transparent system than the one created under the STOCK Act. When the STOCK Act was passed in 2012, it required members of Congress to report securities trades within forty-five days after each transaction.[176] The law also required that the disclosures be made available online, but it was amended in 2013 to eliminate that requirement.[177] The purported rationale for the repeal of the transparency provision was concern that revealing such information could expose public servants to identity theft and cybercrime.[178] As a result, members

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173 William M. Sage, *Regulating through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1805 & n.389 (1999) (attributing the successful restoration of confidence in U.S. markets after the 1929 Stock Market Crash to both the disclosure regime of federal securities laws and the substantive regulation by brokers and exchanges).

174 Dombalagian, *supra* note 167, at 1075 (noting that the Exchange Act required exchanges to register with the SEC and adopt rules to sanction its brokerage members for violations of the federal securities laws and conduct inconsistent with "just and equitable principles of trade" (quoting 15 U.S.C. § 78f(b)(5)).

175 *See* A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 964 (1999) (observing that stock exchanges are incented to protect investors and are less vulnerable to pressure from interest groups).

176 Margaret Kwoka & Bridget DuPey, *Targeted Transparency as Regulation*, 48 FLA. ST. U. L. REV. 385, 417 n.207 (2021) (explaining that the STOCK Act required the filing of periodic transaction reports for trades in stocks and bonds by no later than forty-five days after the transaction occurred).

177 Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 390–91 (2013) (discussing the impediment to transparency resulting from this amendment).

178 *Stock Act Rules Scaled Back*, CQ ALMANAC (2013), https://library.cqpress.com/cqalmanac/document.php?id=cqal13-1634-93330-2627977 [https://perma.cc/DH6C-D9GG].

of the public seeking to view these transactional reports may be required to submit formal requests and pay processing fees.[179]

In contrast, Form 144 (the disclosure mechanism mandated by Rule 144) requires that the control person file a Form 144 with the SEC disclosing an intent to sell the securities of the issuer with whom they have a control relationship.[180] Prior to June 2022, filers had the option of submitting Form 144 via email or on paper; paper submissions were publicly available through third-party vendors or by visiting the SEC's Public Reference Room at its Washington, DC headquarters.[181] In 2022, the SEC modified its rules to mandate electronic filing via its online system, EDGAR, of Form 144 for companies subject to the reporting requirements of the Exchange Act.[182] The SEC release announcing the rule change noted the difficulty for investors, researchers, and other users of information when the form is submitted on paper.[183]

While the ethical motivations of the STOCK Act leave room for concerns about identity theft, the federal securities laws focus on the relevance of information to efficient and fair markets. The realm of securities law, into which members of Congress (like traditional insiders) enter voluntarily when they trade in the secondary market, does not offer privacy protections to those participants whose transactions provide relevant information. Disclosures of lawmakers' transactions in securities under Rule 144 are consistent with the mandates of the securities law regime and have the additional benefit of providing potentially useful information to market participants about trading.[184] Like trades by

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179 Sophia Gonsalves-Brown, *How Congress Hides Stock Holdings in Plain Sight*, CAMPAIGN L. CTR. (Apr. 1, 2022), https://campaignlegal.org/update/how-congress-hides-stock-holdings-plain-sight [https://perma.cc/XG4U-QDSW] (discussing the costs and other challenges of evaluating trades reported under the STOCK Act).

180 SEC v. Blackburn, No. 15-2451, 2020 WL 565551, at *7 (E.D. La. Feb. 5, 2020) (holding that compliance with Rule 144 requires public filing of a Form 144, even if the substantive provisions of the Rule have been satisfied). The Rule would require the filing of a Form 144 before selling shares over a minimal amount—5,000 shares or $50,000 in the aggregate over a three-month period—into the secondary market. *See* Taylan Mavruk & H. Nejat Seyhun, *Do SEC's 10b5-1 Safe Harbor Rules Need To Be Rewritten?*, 2016 COLUM. BUS. L. REV. 133, 181 ("Second, existing SEC rules already require prior public disclosure of insiders' planned sales of restricted or control shares. In this case, insiders must file a notice of proposed sale with the SEC on Form 144 if the sale involves more than 5000 shares or greater than $50,000 in any three-month period." (footnote omitted)).

181 Rule 144 Holding Period and Form 144 Filings, Securities Act Release No. 33-10911, 86 Fed. Reg. 5063, 5077 (Jan. 19, 2021).

182 Updating EDGAR Filing Requirements and Form 144 Filings, Securities Act Release No. 33-11070, 87 Fed. Reg. 35393, 35395 (June 10, 2022).

183 *Id.* at 35397.

184 Heminway, *supra* note 152, at 1198 ("Line-item disclosure rules applicable to periodic reporting and other statutory and regulatory reporting requirements (e.g., Form 144 under Rule 144 under the 1933 Act, and reports on Forms 3, 4, and 5 under Section 16(a) of the 1934 Act) also

corporate insiders, sales of securities by members of Congress, acting from a position of control as described above, provide material information.[185] Investor interest in the trading activity of members of Congress is made plain by the recent launch of exchange-traded funds that track the trading activity of members of Congress.[186] Moreover, disclosure could lead to trading abstinence, a result that would be consistent with the "disclose or abstain" mandate of insider trading theory; regulation has been deployed as a disincentive in other areas of securities regulation.[187]

Finally, Form 144 would provide information about a congressperson's transactions in securities that the periodic transaction reports mandated under the STOCK Act currently lack. The table below provides a general comparison of the content of Form 144 with the content of periodic reports required by the House and the Senate under the STOCK Act. As reflected in the table, Form 144 would require information about how the securities being sold by the reporting lawmaker were initially acquired, as well as precise information regarding the amount of securities to be sold. Concerns about insider trading could be raised more efficiently where the disclosed timing of purchases and sales spur an inquiry. Moreover, congressional trading has reportedly outperformed trading by corporate insiders trading in their companies' securities.[188] Requiring lawmakers to file Forms 144 would contribute to a more level playing field for traditional corporate control persons.

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may be instructive under certain circumstances because they are intended to effectively inform market participants of important information regarding the trading of issuers and insiders in an issuer's securities." (footnote omitted)); *see also* Fried, *supra* note 151, at 374 (proposing pre-trading disclosure to mitigate against the information asymmetry that allows classical insider traders to gain a marketplace advantage).

185 *See* Jennifer J. Schulp, *Banning Lawmakers from Trading Stocks Won't Fix Congress*, CATO INST. (Feb. 22, 2022), https://www.cato.org/commentary/banning-lawmakers-trading-stocks-wont-fix-congress [https://perma.cc/SY2G-BFWV] (asserting that proposed bans on congressional trading and ownership of stocks would deprive the market of information relevant to pricing of securities); *see also* Cox, *supra* note 107, at 864 (noting that whether a control person is selling some of their holdings in the controlled entity or ending ownership altogether, investors will likely view the sale as material).

186 Emma Boyde, *ETFs Following US Lawmakers' Stock Trades Go Live*, FIN. TIMES, (Feb. 7, 2023), https://www.ft.com/content/241d73d5-20cb-4848-8d37-053cb39bdd3d [https://perma.cc/J4AJ-YZJM] (describing the launch of two exchange-traded funds that follow the trading activity of Democratic and Republican congresspersons, respectively).

187 Peter V. Letsou, *The Changing Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments*, 46 WILLAMETTE L. REV. 149, 175–76 (2009) (noting that the SEC has adopted disclosure requirements to induce corporations to act differently rather than to deliver useful information to investors).

188 Barbabella, Cohen, Kardon & Molk, *supra* note 24, at 204 ("In 2004, Alan Ziobrowski and colleagues published an article entitled Abnormal Returns from the Common Stock Investments of

Relevant Disclosure Topic	SEC Form 144[1]	Periodic Report Senate[2]	Periodic Report - House[3]
Issuer Name and Stock Type	✓	✓	✓
Issuer Address and Tel. Number	✓	✗	✗
Reporting Person Name	✓	✓	✓
Reporting Person Address and Tel. Number	✗	✓	✓
Transacting Person's Relationship to Reporting Person	✗	✓	✓
Transacting Person's Relationship to the Issuer	✓	✗	✗
Type of Transaction	NA (sales only)	✓	✓
Reporting Person Position/Office of Employment	✗	✓	✓
Broker Effectuating Sale	✓	✗	✗
Number of Shares Sold/to be Sold	✓	✗	✗
Aggregate market value of shares sold/to be sold	✓	✓*	✓*
Number of shares currently outstanding	✓	✗	✗
Date of Actual/Intended Sale	✓	✓	✓
Exchange on which shares are/will be sold	✓	✓	✗
Information Regarding Acquisition of Securities to be Sold	✓	✗	✗

[1] https://www.sec.gov/files/form144.pdf (last visited 11/3/2023).

[2] https://www.ethics.senate.gov/public/_cache/files/312473c0-b6ca-44c9-a68f-c65fc5f0d8e9/periodic-disclosure-of-financial-transactions-form.pdf (last visited 11/3/2023).

[3] https://ethics.house.gov/sites/ethics.house.gov/files/documents/Final%20PTR%20Form%20CY%202022.pdf (last visited 11/3/2023).

* Aggregate market value reported in ranges

CONCLUSION

Insider trading by members of Congress undermines the public's faith in the morality of elected officials and the integrity of U.S. markets. Deploying the registration provisions of the Securities Act to combat trading by legislators that use nonpublic information for private gain does not offer the emotional satisfaction of calling out these public servants as immoral, but it is not intended to do so. This Article refocuses the discussion of congressional trading squarely within the disclosure regime of federal securities regulation.[189] It addresses the information asymmetry

the U.S. Senate. Using federally-mandated annual financial disclosure reports, Ziobrowski et al. reconstructed Senators' common stock portfolios and trades from 1993 to 1998. The average returns on these investments were staggering. A trade-weighted portfolio combining Senators' stock purchases and sales beat the market by 97 basis points per month, for an average annual return of 12.3 percent above the market. Lest this result be attributed to the skill of financial advisors available to Senators and others in powerful, lucrative positions, corporate insiders trading their companies' own stock received an average return of just 6.4 to 8.5 percent above the market average." (footnotes omitted) (citing Alan J. Ziobrowski, Ping Cheng, James W. Boyd & Brigitte J. Ziobrowski, *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 662 (2004))). Barbabella, Cohen, Kardon, and Molk's observation is based on an empirical study that defines "corporate insiders" to include officers with the ability to influence corporate operations, directors, and owners of over ten percent of the issuer's stock. Leslie A. Jeng, Andrew Metrick & Richard J. Zeckhauser, *Estimating the Returns to Insider Trading: A Performance-Evaluation Perspective*, 85 REV. ECON. & STAT. 453, 455 (2003).

189 Mandatory disclosure has been criticized by scholars. *See, e.g.*, Roger J. Dennis, *Mandatory Disclosure Theory and Management Projections: A Law and Economics Perspective*, 46 MD. L.

that results when members of Congress are permitted to participate in markets as ordinary investors. It spotlights the reality that federal lawmakers are in control relationships with issuers in ways that are both visible and invisible to the investing public, and suggests that this reality should be codified by an amendment to the definition of "underwriter" in the Securities Act. Such codification overcomes potential concern that the legal conclusion asserted herein that members of Congress are control persons are dismissible as mere "scholarmush"—an academic contrivance produced by combining law and social value.[190]

Articulating the power that lawmakers harness as the result of their unfettered relationships of influence and access with respect to public companies properly casts them as affiliates under federal securities law. As such, they are severely underregulated, with their only obligation to the securities markets expressed in the feeble STOCK Act. However, the Securities Act also applies, and members of Congress are not free to sell the securities of public companies in the secondary market without an exemption from the registration requirement of the statute. As affiliates, lawmakers should seek the safe harbor of Rule 144, and file Forms 144 with the SEC when required to give notice of their trades to the public. The Securities Act should be amended to unequivocally establish this expectation. This solution restores confidence in our federal legislators and sustains the reliability of our securities market.

REV. 1197, 1206 (1987) (discussing a legal theory maintaining that mandatory disclosure is unnecessary because of incentives for voluntary disclosure). However, disclosure remains at the center of the federal securities regulation regime. *See, e.g.*, Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review)*, 7 J. TRANSNAT'L L. & POL'Y 119, 123 (1998) ("The 1933 and 1934 Acts were based upon the market principle that investors are protected, with a minimum of government intervention, through an open market system that values securities at their fair price. An open market [system] was achieved by providing means to disclose material information to investors and shareholders so that they can make informed decisions.").

190 Adam J. Kolber, *How to Fix Scholarmush*, 95 IND. L.J. 1191, 1193 (2020) (defining scholarmush as "a tangled combination of claims rooted partly in law and partly in morality that are partly dependent on facts and partly dependent on values").