

# Limits on Firms' Political Activities

Elizabeth Pollman

University of Pennsylvania Carey Law School

*Sir Oliver Hart Conference on*

*New Frontiers in Corporate Governance:*

*Corporate Governance with Externalities*

London School of Economics, October 2023

# Motivating Questions

What are the limits  
on corporate political activity?

How do legal regimes  
(such as corporate law and constitutional law)  
interact on these questions?

Implications for regulating corporate externalities?

# Overview / Argument

- Answering these questions requires a more rigorous analytical framework:
  1. What constitutes corporate political activity?
  2. Who determines if something is “political”? How?
  3. What are the limits on firms’ political activities?
  4. What are the limits on limits?
- → There is no defined rule or limiting principle to #1 & #2 that transcends specific legal regimes (e.g., campaign finance, corporate law, 1st Amendment law, etc.).
- → Further, #3 and #4 are murky, contested, and subject to significant change through a dynamic process.
- *[Caveat – U.S.-focused exploration for discussion]*

# What constitutes political activity for corporations?

- Lobbying?
- Expenditures on political nature?
- Contributions to politicians? Trade associations or nonprofits? Charitable organizations?
- Public statements on socially or politically tinged topics? (But what determines whether tinged?)
- ESG?
- Climate disclosures?
- Managing geopolitical risk?
- Share buybacks?

# Why does it matter if a corporation's activity is “political”?

- Potentially implicates 1<sup>st</sup> Amendment & standard of review/scrutiny → limits government sphere to regulate corporate activity
  - securities regulation (“historical” approach? financial v. nonfinancial?)
  - “purely factual and uncontroversial” commercial disclosure (*Zauderer, NIFLA v. Becerra*)
  - commercial speech / disclosure (*Central Hudson Gas & Electric Corporation* & progeny)
  - campaign finance disclosure (*Buckley v. Valeo* & progeny)
  - content-based or political disclosure
- Categories in flux & unraveling? (see, e.g., *Americans for Prosperity v. Bonta*)
- **And that's just one example!** It can matter for other areas of law (e.g., campaign finance, corporate law, etc.) and for other reasons (e.g., business risk, legitimacy, etc.).

# US Chamber Urges 5th Circ. To Vacate SEC Buyback Rule

By **Tom Zanki**

Law360 (July 5, 2023, 6:06 PM EDT) -- The U.S. Chamber of Commerce and two business groups are urging the Fifth Circuit to toss the Securities and Exchange Commission's new rules on buyback disclosures, or at least vacate key elements of the rules, alleging regulators are unconstitutionally compelling speech from companies without benefiting investors.

The U.S. Chamber, joined by Longview Chamber of Commerce and the Texas Association of Business, ticked off a list of alleged violations by the SEC in an 82-page brief filed Monday to support an **earlier petition** with the Fifth Circuit.

The business groups allege the SEC violated the First Amendment by requiring companies to explain their rationale for buyback strategy, which the business advocates claim is a subjective matter that should not be compelled through disclosure.

The SEC **approved new disclosures** regarding stock buybacks in May on grounds investors would benefit from more information explaining why companies repurchase their own shares. Buybacks, which rose to \$1.25 trillion in 2022, have become a political flashpoint as critics and proponents argue over appropriate uses of corporate cash.

The U.S. Chamber also alleged the SEC failed to adequately consider the costs and benefits of its rules and did not allow the public sufficient time to comment.

requirements. First, the “rationale-disclosure requirement” will compel companies to publicly justify their rationale for each individual repurchase—a topic that has recently become among the most controversial and politicized decisions a company makes. Second, the “daily-data requirement” will force companies to disclose granular data aggregated on a day-by-day basis—data unusable to the average retail investor whom the SEC is supposed to protect.

Both of these requirements are unlawful and should be vacated. Foremost, the rationale-disclosure requirement violates the First Amendment. While the Constitution may permit the government to require that businesses disclose objective, uncontroversial facts in a commercial setting, it has never allowed the government to compel private parties to disclose their subjective reasons for business decisions, especially ones the government deems “controversial.” And because the SEC concedes that the daily-data requirement is intertwined with this unconstitutional compulsion of speech, it should be vacated too.

OFFICE OF THE ATTORNEY GENERAL  
STATE OF INDIANA



302 W. WASHINGTON ST. IGCS 5TH FLOOR  
INDIANAPOLIS, IN 46204-2770

**TODD ROKITA**  
ATTORNEY GENERAL

July 5, 2023

Brian C. Cornell  
Chairman and CEO  
Target Corporation  
50 S. 10th Street  
Minneapolis, MN 55402

Dear Mr. Cornell:

As Attorneys General committed to enforcing our States' child-protection and parental-rights laws and our States' economic interests as Target shareholders, we are concerned by recent events involving the company's "Pride" campaign. Our concerns entail the company's promotion and sale of potentially harmful products to minors, related potential interference with parental authority in matters of sex and gender identity, and possible violation of fiduciary duties by the company's directors and officers.

Corporations are expected to pursue excellence in their chartered purposes, including, where applicable, by retailing goods and earning robust profits along the way.<sup>16</sup> Though a company's board of directors and its management have the discretion to make business decisions for how to best achieve those purposes, it is emphatically beyond the power of a corporate fiduciary to effectuate "a change in the end itself, to the reduction of profits . . . in order to devote them to other purposes"—social, political, or otherwise.<sup>17</sup>

Respectfully,

Handwritten signature of Todd Rokita in blue ink.

TODD ROKITA  
ATTORNEY GENERAL OF INDIANA

Handwritten signature of Tim Griffin in blue ink.

Tim Griffin  
Arkansas Attorney General

Handwritten signature of Daniel Cameron in blue ink.

Daniel Cameron  
Kentucky Attorney General

Handwritten signature of Andrew Bailey in blue ink.

Andrew Bailey  
Missouri Attorney General

Handwritten signature of Raul Labrador in blue ink.

Raul Labrador  
Idaho Attorney General

Handwritten signature of Lynn Fitch in blue ink.

Lynn Fitch  
Mississippi Attorney General

Handwritten signature of Alan Wilson in blue ink.

Alan Wilson  
South Carolina Attorney General



# Who determines if activity is “political”? How?

- Laws & regulations?
  - Congress?
  - Courts?
  - Agencies?
  - Attorneys general?
- Politicians? Political parties?
- Boards?
- Shareholders?
- Stakeholders?

By Mike Pence  
May 26, 2022 1:50 pm ET

Gift unlocked article Listen (5 min)



Tesla CEO Elon Musk leaves federal court in New York, April 4, 2019. PHOTO: SHANNON STAPLETON/REUTERS

I'm old enough to remember when liberals accused big business of consistently being on the side of Republicans. But in 2022 the woke left is poised to conquer corporate America and has set in motion a strategy to enforce their radical environmental and social agenda on publicly traded corporations.

# BlackRock's Fink says he's stopped using 'weaponised' term ESG

By Isla Binnie  
June 26, 2023 10:19 PM GMT+2 · Updated 14 days ago

Bookmark Font Share



The New York Times

## By Calling Climate Change 'Controversial,' Barrett Created Controversy

Judge Amy Coney Barrett refused to answer numerous questions, but it was her avoidance of acknowledging climate change that particularly resonated.

Give this article Share Bookmark



# Limits on firms' political activities?

- Legal:
  - Campaign finance law, lobbying rules, etc.
  - Antitrust, acting in concert rules, etc.
  - Employment law, anti-discrimination law, etc.
- Market / governance:
  - Shareholder pressure
    - Shareholder proposals for board oversight/disclosures
    - Shareholder election of board, proxy fights, etc.
    - Shareholder requests and litigation for books and records
    - Shareholder divestment
  - Stakeholder pressure
    - Social media campaigns, boycotts, etc.

# Limits on limits?

- Constitutional: e.g., 1<sup>st</sup> Amendment (sword & shield)
- Statutory: e.g., RFRA (religious), anti-discrimination
- State corporate law: e.g., limiting how shareholders can exert/initiate power/voice (itself subject to constitutional and statutory limits)

# SUPREME COURT OF THE UNITED STATES

No. 21-476

303 CREATIVE LLC, ET AL., PETITIONERS *v.*  
AUBREY ELENIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

[June 30, 2023]

JUSTICE GORSUCH delivered the opinion of the Court.

Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA

WALT DISNEY PARKS AND RESORTS U.S., INC.,

Plaintiff,

v.

RONALD D. DESANTIS, in his official capacity as  
Governor of Florida; MEREDITH IVEY, in her  
official capacity as Acting Secretary of the  
Florida Department of Economic Opportunity;

2. A targeted campaign of government retaliation—orchestrated at every step by Governor DeSantis as punishment for Disney’s protected speech—now threatens Disney’s business operations, jeopardizes its economic future in the region, and violates its constitutional rights.



FIRST CAUSE OF ACTION: CONTRACTS CLAUSE VIOLATION .....59  
SECOND CAUSE OF ACTION: TAKINGS CLAUSE VIOLATION.....63  
THIRD CAUSE OF ACTION: DUE PROCESS CLAUSE VIOLATION .....65

FOURTH CAUSE OF ACTION: FIRST AMENDMENT VIOLATION.....66  
FIFTH CAUSE OF ACTION: FIRST AMENDMENT VIOLATION.....69  
PRAYER FOR RELIEF .....72



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KENNETH T. SIMEONE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2022-1120-LWW
	)	
	)	
THE WALT DISNEY COMPANY,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: March 15, 2023  
Date Decided: June 27, 2023

Delaware law vests directors with significant discretion to guide corporate strategy—including on social and political issues. Given the diversity of viewpoints held by directors, management, stockholders, and other stakeholders, corporate speech on external policy matters brings both risks and opportunities. The board is empowered to weigh these competing considerations and decide whether it is in the corporation’s best interest to act (or not act).

This suit concerns such a business decision by the Disney board—a decision that cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome. There is no indication that the directors suffered from disabling conflicts. Nor is there any evidence that the directors were grossly negligent or acted in bad faith. Rather, the board held a special meeting to discuss Disney’s approach to the legislation and the employees’ negative response. Disney’s public rebuke of HB 1557 followed.

The plaintiff and his counsel may disagree with Disney’s position on HB 1557. But their disagreement is not evidence of wrongdoing. Regardless, the plaintiff has all necessary and essential documents relevant to his purpose. Judgment must be entered for Disney.





# Current Debates & Directions

- **Corporate political spending & disclosure reform**
- Proposal to change corporate law so that corporate political expenditures are not ordinary business decisions subject to business judgment rule protection (Any traction? Subject to potential challenge.)
- Potential SEC mandate for disclosure of public corporations' political expenditures (Stalled – Any likelihood of future change?)
- Voluntary pledges on a company-by-company basis: (Effective?)
  - Pledge that the corporation will make no election-related expenditures or contributions with treasury funds (~ 20 companies in the S&P 500; note such a policy does not necessarily preclude membership in trade associations or support for 501(c)(4) organizations);
  - Pledge that corporation will have board oversight of corporate political expenditures;
  - Pledge that corporation will subject a plan for corporate political spending to shareholder approval; or
  - Pledge to disclose any corporate political expenditures.



# Current Debates & Directions

- **Climate risk disclosure rule**
- SEC authority
  - Within grant of agency authority? Valid agency action?
  - Major Questions Doctrine?
- Covered vs. protected speech
  - Not covered by 1<sup>st</sup> Amendment?
  - Commercial speech → intermediate scrutiny?
  - Compelled expression → strict scrutiny?

# Current Debates & Directions

- **ESG & Anti-ESG**
- State measures
  - Restricting consideration of ESG in state investment strategies
  - Anti-boycott bills targeting companies doing business with state governmental entities
  - Promoting consideration of ESG in state investment strategies
  - Prohibiting public investment in certain industries (e.g., divest from fossil fuel companies)
  - Requiring corporations to disclose GHG emissions or climate-related risks to the state
- Litigation
  - 19 state attorneys general argued that BlackRock's pressuring companies to advance net-zero carbon emissions lowered corporate profits and violated its fiduciary obligations

# Conclusion

- A more rigorous analytical framework is needed to address questions concerning firms' political activities and their limits. I propose the following as a starting point:
  1. What constitutes corporate political activity?
  2. Who determines if something is “political”? How?
  3. What are the limits on firms' political activities?
  4. What are the limits on limits?
- There is no transcendent definition or limiting principle across legal regimes that answers the questions of what counts as political activity for corporations and who gets to decide.
- This reality makes it difficult to limit corporate political activity through legal rules, corporate governance, and markets (in addition to other challenges!).
- Furthermore, the limits to the limits murky, contested, and subject to significant change through a dynamic process.

*Thank You*