

Oklahoma Law Review

Volume 65 | Number 4

2013

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Recommended Citation

Loren F. Selznick, *Walking the Executive Speech Tightrope: From Starbucks to Chick-Fil-A*, 65 OKLA. L. REV. 573 (2013),
<https://digitalcommons.law.ou.edu/olr/vol65/iss4/1>

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OKLAHOMA LAW REVIEW

VOLUME 65

SUMMER 2013

NUMBER 4

WALKING THE EXECUTIVE SPEECH TIGHTROPE: FROM STARBUCKS TO CHICK-FIL-A

LOREN F. SELZNICK*

Introduction

Recently, corporate executives have taken public stands on both ends of the political spectrum on a variety of social issues. In the past year, a number of chief executives weighed in on the issue of same-sex marriage.¹ Starbucks, in January 2012, announced its support.² CEOs began lining up on both sides of the issue.³ The national controversy reached a new pitch when Chick-fil-A CEO Dan Cathy pronounced himself “guilty as charged” for supporting the “biblical definition of the family unit.”⁴ In response, supporters of same-sex marriage announced boycotts, and big city politicians proclaimed they would refuse permits to the chicken chain.⁵

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1. Laura Petrecca, *In Gay Marriage Fight, Some Companies Take a Stand*, USA TODAY (July 29, 2012, 2:01 PM), <http://usatoday30.usatoday.com/money/companies/management/story/2012-07-27/gay-marriage-corporations/56544826/1>.

2. Andrew Garber, *Starbucks Supports Gay Marriage Legislation*, SEATTLE TIMES (Jan. 24, 2012, 5:42 PM), http://seattletimes.com/html/politicsnorthwest/2017323520_starbucks_supports_gay_marriag.html.

3. Petrecca, *supra* note 1.

4. K. Allan Blume, *'Guilty as Charged,' Dan Cathy Says of Chick-fil-A's Stand on Faith, Family Values*, BIBLICAL RECORDER, July 7, 2012, at 16 (internal quotation marks omitted).

5. See Leon Stafford & Katie Leslie, *Fast-food Company Deals with Firestorm*, ATLANTA JOURNAL-CONST. (July 26, 2012, 9:36 AM), <http://www.ajc.com/news/business/fast-food-company-deals-with-firestorm/nQXXz/>.

While much has been written about the First Amendment rights of public and private employees, the speech of top corporate executives, on- or off-duty, raises special concerns. The CEO is the voice and face of the company. Because his or her speech, unlike expression by other employees, will be associated with the company, it warrants separate analysis. This article reviews the interplay among the expressive rights of executives, the rights of dissenting shareholders, and the powers and fiduciary obligations of corporate boards.

I. Executive and Corporate Speech

Top executives from many well-known corporations have taken public stands on controversial matters, raising concerns among investors and customers and requiring awkward explanations from public relations departments. The Cathy comments, however, led to an unprecedented firestorm of retaliation by public officials.⁶ Executives may be stepping into the public fray, but conventional wisdom still holds that businesspeople should steer clear of religion and politics.

A. The Rise of Partisanship

In recent decades, there has been “a marked increase in political partisanship by corporations, including involvement in hot-button issues that play to social, cultural, and political divisions in society.”⁷ In some cases, the company takes positions through political donations;⁸ in others, the top executive, the personification of the corporation,⁹ makes controversial public remarks.¹⁰

6. *See id.*

7. BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* 22 (2007).

8. Abby Ellin, *Chick-fil-A and Six Other Companies That Have Taken a Political Stand*, ABC NEWS (Aug. 6, 2012), <http://abcnews.go.com/Business/chick-fil-company-political-leanings/story?id=16925613>.

9. According to one research group:

In the last two decades, corporate CEOs have becoming [sic] increasingly more visible to investors, and since the 1980s the business press has lionized such outsized personalities as Lee Iacocca, Rupert Murdoch, and John Reed. CEOs such as Steve Jobs, Lou Gerstner, and Michael Eisner have become bigger than their companies in the public’s mind. Not only has the CEO become the public face of the company but in some cases he is now regarded as its actual embodiment.

Ray Fisman et al., *Governance and CEO Turnover: Do Something or Do the Right Thing?* 4 (European Fin. Assoc. 2005 Moscow Meetings, Working Paper, 2005) (footnote omitted),

Because political contributions tend to make less of a splash, opposing political operatives and issue organizations research and publicize them in the hope of inspiring boycotts. Companies and corporate leaders with political donations that made the news in 2012 included: Koch Industries (makers of Angel Soft toilet tissue, Brawny paper towels, and Dixie cups, among other products) for plans to donate to the National Rifle Association and tax reform, pro-life, and faith groups; Robert Rowling, president and CEO of the parent company of Omni Hotels and Gold's Gym International, for donating to conservative political groups; and Forever 21 and an associated foundation for supporting churches and faith-based organizations.¹¹ On the other side, Costco's founder donated to the Obama campaign, DreamWorks Animation's employees contributed overwhelmingly to Democrats,¹² and Best Buy supported the Council on American-Islamic Relations.¹³

In addition, a number of top executives have used their offices as bully pulpits, realizing that their public statements would be connected with their companies. Bill Marriott, Executive Chairman of Marriott International, Inc., has written or recorded over 250 blog posts in the past five years, recognizing that "[w]hen your family's name is above the door, you are the person clearly identified with the company."¹⁴

The views of a company and the views of its upper management are likely to be as one in an organization that has had the same top officers for many years. However, new executive talent may not agree with the old guard and can cause a conflict within the corporation or public confusion. When a *New York Times* article linked J. Joseph Ricketts, the retired founder of TD Ameritrade, to a plan to run advertisements highlighting President Barack Obama's connection to the incendiary Reverend Jeremiah Wright, the company began taking flak on Twitter, Facebook, and in its call centers.¹⁵ A spokeswoman for the company said, "There is confusion

available at http://papers.ssrn.com/Sol3/papers.cfm?abstract_id=656085.

10. Blume, *supra* note 4, at 16.

11. Ellin, *supra* note 8.

12. Amy Bingham, *Partisan Brands: Starbucks, Celtics Pick Sides in Presidential Race*, ABC NEWS (Nov. 2, 2012), <http://abcnews.go.com/Politics/OTUS/partisan-brands-sports-teams-companies-pick-sides-presidential/story?id=16845671>.

13. Ryan Mauro, *'Boycott Best Buy' Movement Takes Off*, PJ MEDIA (May 2, 2012, 6:35 PM), <http://pjmedia.com/blog/boycott-best-buy-movement-takes-off/>.

14. *Bill Marriott's Blog Turns Five*, MARRIOTT INT'L (June 12, 2012, 2:10 PM), <http://news.marriott.com/2012/06/bill-marriotts-blog-turns-five.html>.

15. Sean Sposito, *TD Ameritrade Takes Heat for Founder's Foibles*, ON WALL STREET (May 18, 2012), <http://www.onwallstreet.com/news/ricketts-td-ameritrade-2678951-1.html>.

because [Ricketts] is the founder of the company So there are people who have said because it's him we are, as a company, involved in this."¹⁶ This, she said, was "certainly a difficult situation."¹⁷

B. Same-Sex Marriage

In 2012, a number of well-known companies and their CEOs publicly expressed views about same-sex marriage. In January, Starbucks announced that same-sex marriage "is core to who we are and what we value as a company."¹⁸ With this statement, management put the company on the firing line as its position was unpopular in many parts of the country where it did business.¹⁹

At the time, a national drama was unfolding. Three state courts had declared laws barring same-sex marriage unconstitutional—the Supreme Judicial Court of Massachusetts in 2003,²⁰ the Supreme Court of Connecticut in 2008,²¹ and the Supreme Court of Iowa in 2009.²² Following the Massachusetts court ruling, voters in twenty-three states approved constitutional bans on same-sex marriage, while three states and the District of Columbia legalized same-sex marriage by statute prior to Starbucks's statement.²³ No state had yet legalized same-sex marriage by popular vote.²⁴

16. *Id.* For more information on the Joe Ricketts story, see Jake Tapper, *Joe Ricketts Drags TD Ameritrade into the Political World. Much to the Company's Chagrin*, ABC NEWS (May 17, 2012, 1:42 PM), <http://abcnews.go.com/blogs/politics/2012/05/joe-ricketts-drags-td-ameritrade-into-the-political-world-much-to-the-companys-chagrin/>; Jeff Zeleny & Jim Rutenberg, *G.O.P. 'Super PAC' Weighs Hard-Line Attack on Obama*, N.Y. TIMES (May 17, 2012), http://www.nytimes.com/2012/05/17/us/politics/gop-super-pac-weighs-hard-line-attack-on-obama.html?_r=2.

17. Tapper, *supra* note 16.

18. Garber, *supra* note 2.

19. At the time, voters in twenty-six states had approved constitutional bans on same-sex marriage. See Megan Garvey et al., *Gay Marriage Chronology*, L.A. TIMES (May 15, 2013, 5:36 PM), <http://graphics.latimes.com/usmap-gay-marriage-chronology/> (move timeline cursor to show the status of state laws as of Jan. 1, 2012). Starbucks has stores in all fifty states. See *Starbucks Stores (Per Capita) (Most Recent) By State*, STATEMASTER, http://www.statemaster.com/graph/lif_sta_sto_percap-lifestyle-starbucks-stores-per-capita (last visited May 22, 2013). In 2012, 80% of the United States population lived within twenty miles of a Starbucks stand-alone location. *Starbucks Map: You Can't Get More Than 170 Miles Away from a Location in U.S.*, HUFFINGTON POST (Oct. 4, 2012, 5:35 PM), http://www.huffingtonpost.com/2012/10/04/starbucks-locations_n_1940891.html.

20. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

21. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008).

22. *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).

23. See Garvey et al., *supra* note 19 (move timeline cursor to show the status of state laws as of Nov. 18, 2003; then compare by moving timeline cursor to show the status of

The State of Washington, where Starbucks is headquartered,²⁵ was considering legislation legalizing same-sex marriage at the time.²⁶

At the annual meeting in March 2012, most of the attending shareholders in Seattle applauded the position taken by the company despite resulting boycotts, but dissenters grilled CEO Howard Schultz.²⁷ The dissenting shareholders wanted to know whether this was a board of directors decision, what the impact would be on international markets where the company was expanding, and whether it was “prudent to risk the economic interests of all the shareholders” with boycotts, lower earnings, and reduced share value.²⁸ Schultz responded that the decision was made by the “senior team” and was shared “with some members of the board.”²⁹ He said that they looked “at the history of the company, what we stand for, and what we believe in. . . . The company is not a political organization, but clearly Starbucks has become part of a culture in a number of cities and now

state laws as of Jan. 1, 2012); *see also* Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, WASH. POST (Apr. 7, 2009, 2:23 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html>; Ian Urbina, *Gay Marriage Is Legal in U.S. Capital*, N.Y. TIMES (Mar. 3, 2010), <http://www.nytimes.com/2010/03/04/us/04marriage.html>.

24. *See* Garvey et al., *supra* note 19 (move timeline cursor to show the status of state laws as of Jan. 1, 2012).

25. *See Welcome to Our Hometown*, STARBUCKS, <http://www.starbucks.com/assets/dc4dc75922034083aa69ea5c7218a83c.pdf> (last visited May 24, 2013).

26. *See Voters in Washington State Approve Gay Marriage*, FOX NEWS (Nov. 8, 2012), <http://www.foxnews.com/politics/2012/11/08/voters-in-washington-state-approve-gay-marriage/>. Governor Christine Gregoire signed a bill legalizing same-sex marriage in Washington in February 2012. *Id.* Then, in November 2012, Washington became one of the first three states to legalize same-sex marriage by popular vote (along with Maryland and Maine) and Minnesota voters rejected a “constitutional amendment to ban same-sex marriage.” *Id.*

27. nomvideofeed, *Starbucks Shareholders Ask CEO Schultz About Controversial Gay Marriage Stance*, YOUTUBE (Mar. 21, 2012), <http://www.youtube.com/watch?v=UnNphL-fHoM>; *see also* King 5 News, *Another Starbucks Boycott Campaign Launched over Same Sex Marriage*, KHOU (Mar. 24, 2012, 6:24 PM), <http://www.khou.com/news/national/144106566.html>. Opponents of Starbucks, spearheaded by the National Organization for Marriage, launched a website—dumpstarbucks.com—that accused the company of declaring a “culture war.” *Why Dump Starbucks?*, DUMP STARBUCKS (last visited May 22, 2013), <http://www.dumpstarbucks.com/>; *see also* King 5 News, *supra*.

28. nomvideofeed, *supra* note 27.

29. *Id.*

countries.”³⁰ He urged the dissenters to recognize that shareholder value had increased since the decision.³¹

Additional executives and companies entered the same-sex marriage debate. Amazon CEO Jeff Bezos and Microsoft executives Bill Gates and Steve Ballmer all donated significant sums to pro-gay marriage organizations³² and, in February 2012, the CEO of Goldman Sachs, Lloyd Blankfein, agreed to become the first Human Rights Campaign “national corporate spokesman for same-sex marriage.”³³ Target advertised a wedding registry program specifically to gay couples.³⁴ Amway was boycotted because it had “been affiliated with a Christian conservative ideology for years[,]” and “[t]he company donated \$500,000 to the National Organization for Marriage (NOM) in 2009.”³⁵

As each of these companies took its stand, members of the public reacted according to their convictions with boycotts or praise.³⁶ Government officials, however, stayed out of the fray. That all changed with Chick-fil-A.

C. Chick-fil-A

On July 16, 2012, the *Biblical Recorder* published an interview with Chick-fil-A CEO Dan Cathy.³⁷ The thrust of the article was that his success had “not erased the biblical values he learned as a child in a Baptist church” and that he was “a warm, common man . . . deeply committed to being a faithful Christian witness.”³⁸ In demonstrating his religious commitment, the article ignited a firestorm with the following passage:

30. *Id.*

31. *Id.*

32. Ellin, *supra* note 8.

33. Susanne Craig, *Blankfein to Speak Out for Same-Sex Marriage*, N.Y. TIMES (Feb. 5, 2012, 8:02 PM), <http://dealbook.nytimes.com/2012/02/05/blankfein-to-speak-out-for-same-sex-marriage/>.

34. Amy Bingham, *Target and Amazon Are the Opposites of Chick-fil-A on Gay Marriage*, ABC NEWS (July 27, 2012, 11:21 AM), <http://abcnews.go.com/blogs/politics/2012/07/target-and-amazon-are-the-opposites-of-chick-fil-a-on-gay-marriage/>.

35. *Amway Linked to Anti-Gay Marriage Group; Fred Karger, LGBT Activist, Calls for Boycott*, HUFFINGTON POST (Aug. 7, 2012, 3:46 PM), http://www.huffingtonpost.com/2012/08/07/amway-anti-gay-marriage-lgbt-boycott-_n_1752674.html; *see also* Ellin, *supra* note 8.

36. *See, e.g.*, King 5 News, *supra* note 27.

37. Blume, *supra* note 4, at 16.

38. *Id.*

Some have opposed the company's support of the traditional family. "Well, guilty as charged," said Cathy when asked about this opposition.

"We are very much supportive of the family—the biblical definition of the family unit. We are a family-owned business, a family-led business, and we are married to our first wives. We give God thanks for that.

"We operate as a family business . . . our restaurants are typically led by families—some are single. We want to do anything we possibly can to strengthen families. We are very much committed to that," Cathy emphasized.³⁹

Within days the comments spread from the original *Biblical Reporter* puff piece to the domestic and overseas secular press. The *Los Angeles Times* stoked the fire by adding: "A report from LGBT advocacy group Equality Matters concluded that Chick-fil-A donated more than \$3 million between 2003 and 2009 to Christian groups that oppose homosexuality. In 2010 alone, the company gave nearly \$2 million to such causes . . ." ⁴⁰ The story was picked up by the *Daily Mail* in Great Britain.⁴¹ In addition, the *Atlanta Journal-Constitution* printed comments that Cathy had made on a radio program a month before:

As it relates to society in general, I think we are inviting God's judgment on our nation when we shake our fist at him and say, We know better than you as to what constitutes a marriage. I pray God's mercy on our generation that has such a prideful, arrogant attitude to think that we would have the audacity to try to redefine what marriage is all about.⁴²

39. *Id.* (alteration in original).

40. Tiffany Hsu, *Is Chick-fil-A Anti-Gay Marriage? 'Guilty as Charged,' Leader Says*, L.A. TIMES (July 18, 2012), <http://articles.latimes.com/2012/jul/18/business/la-fi-mo-chick-fil-a-gay-20120718>.

41. Snejana Farberov & Beth Stebner, *'Guilty as Charged': President of Fast Food Chain Chick-fil-A OUTS His Company as ANTI-GAY Marriage ... and He's Proud of It*, MAIL ONLINE (July 18, 2012, 5:09 AM), <http://www.dailymail.co.uk/news/article-2175587/Chick-fil-A-President-fast-food-chain-Dan-Cathy-OUTS-company-ANTI-GAY--proud-it.html>.

42. *What Dan Cathy Said*, ATLANTA JOURNAL-CONST. (July 26, 2012, 6:01 AM), <http://www.ajc.com/news/business/what-dan-cathy-said/nQXXx/> (internal quotation marks omitted).

Chick-fil-A, in the meantime, issued a statement stressing that “its employees abide by a service tradition to ‘treat every person with honor, dignity and respect—regardless of their belief, race, creed, sexual orientation or gender.’”⁴³ Some commentators also noted that “the company [was] not facing allegations that it discriminates against gay customers or employees.”⁴⁴ Critics, however, pointed to company support through its philanthropic arm of organizations that lobby against gay marriage.⁴⁵

A week later, officials in at least four American cities weighed in with threats to deny permits to the chicken chain.⁴⁶ Boston Mayor Thomas Menino said that it would be “very difficult” for Chick-fil-A to get licenses for additional restaurants in Boston.⁴⁷ He continued: “‘Chick-fil-A doesn’t belong in Boston. You can’t have a business in the city of Boston that discriminates against a population. We’re an open city, we’re a city that’s at the forefront of inclusion.’”⁴⁸ He subsequently fired off a letter to Cathy, stating:

I was angry to learn on the heels of your prejudiced statements about your search for a site to locate in Boston There is no place for discrimination on Boston’s Freedom Trail and no place for your company alongside it.

I urge you to back out of your plans to locate in Boston.⁴⁹

43. Rene Lynch, *Chick-fil-A ‘Appreciation’ Day: Frenzied Sales Set Record*, L.A. TIMES (Aug. 2, 2012), <http://articles.latimes.com/2012/aug/02/nation/la-na-nn-chick-fil-a-sales-a-world-record-20120802>.

44. *Id.*

45. John Roberts, *Chick-fil-A Appreciation Day Brings Out Supporters, Protesters*, FOX NEWS (Aug. 1, 2012), <http://www.foxnews.com/politics/2012/08/01/chick-fil-appreciation-day-brings-out-supporters-more-protestors/>.

46. Tim Craig, *Gray Opposes Chick-fil-A Expansion; Calls It ‘Hate Chicken’*, WASH. POST (July 28, 2012, 8:20 AM), http://www.washingtonpost.com/blogs/dc-wire/post/gray-opposes-chick-fil-a-expansion-calls-it-hate-chicken/2012/07/27/gJQA8SIREX_blog.html. District of Columbia Mayor Vincent C. Gray said “he would not support an expansion of Chick-fil-A in the District, referring to it as ‘hate chicken,’” but his spokesman said, “We will not support and don’t want them here, but if they are legally entitled to a permit, they are legally entitled to a permit.” *Id.*

47. Greg Turner, *Mayor Menino on Chick-fil-A: Stuff It*, BOS. HERALD (July 20, 2012), http://bostonherald.com/news/regional/view/20120720menino_on_chick-fil-a_stuff_it_vows_to_block_eatery_over_anti-gay_attitude.

48. *Id.*; see also Dave Wedge, *Chick-fil-A Beef Puts Mayor in Pressure Cooker*, BOS. HERALD (July 27, 2012), http://bostonherald.com/news/regional/view/20120727chick-fil-a-beef_puts_mayor_in_pressure_cooker.

49. Andrew Ryan & Martine Powers, *Boston’s Mayor Menino Clarifies Chick-fil-A*

In a Chicago newspaper opinion piece, Alderman Proco Moreno wrote: “There are consequences for one’s actions, statements and beliefs. Because of this man’s ignorance, I will deny Chick-fil-A a permit to open a restaurant in my ward.”⁵⁰ This was not an idle threat; the city council had a tradition of following an alderman’s lead in his or her own ward.⁵¹ Chicago Mayor Rahm Emanuel expressed his support of Alderman Moreno, as did Alderman Daniel Solis, the zoning committee chairman.⁵² According to the *Chicago Sun-Times*, Emanuel said:

Chick-fil-A’s values are not Chicago values. They’re not respectful of our residents, our neighbors and our family members. And if you’re gonna be part of the Chicago community, you should reflect Chicago values

What the CEO has said as it relates to gay marriage and gay couples is not what I believe, but more importantly, it’s not what the people of Chicago believe. We just passed legislation as it relates to civil union and my goal and my hope . . . is that we now move on recognizing gay marriage. I do not believe that the CEO’s comments . . . reflect[] who we are as a city.⁵³

San Francisco was next. According to the *Los Angeles Times*:

Edwin M. Lee, mayor of the progressive city, tweeted Thursday night: “Very disappointed #ChickFilA doesn’t share San Francisco’s values & strong commitment to equality for everyone.”

Stance, BOS. GLOBE (July 27, 2012), http://articles.boston.com/2012-07-27/metro/32869124_1_political-science-gay-marriage-chick-fil-a-stance (internal quotation marks omitted).

50. Proco “Joe” Moreno, Op-Ed., *Why I Won’t Let Chick-fil-A in My Ward*, CHI. TRIB. (July 26, 2012), http://articles.chicagotribune.com/2012-07-26/news/ct-perspec-0726-moreno-20120726_1_anti-gay-comments-1st-ward-homophobic-comments; see also Debra Cassens Weiss, *Legal Experts Raise First Amendment Concerns with Alderman’s Plan to Block Chick-fil-A*, A.B.A. J. (July 30, 2012, 5:58 AM), http://www.abajournal.com/news/article/legal_experts_raise_first_amendment_concerns_with_aldermans_plan_to_block_cf/.

51. Hal Dardick, *Moreno Takes Fire on Chick-fil-A, Stands Firm*, CHI. TRIB. (July 25, 2012), http://articles.chicagotribune.com/2012-07-25/news/ct-met-chicago-chick-fil-a-0726-20120726_1_gay-marriage-legal-challenge-open-arms.

52. *Id.*

53. Fran Spielman, *Emanuel Goes After Chick-fil-A for Boss’ Anti-Gay Views*, CHI. SUN-TIMES (Aug. 27, 2012, 11:09 AM), <http://www.suntimes.com/news/cityhall/13988905-418/ald-moreno-trying-to-block-new-chick-fil-a-over-boss-stance-on-gay-marriage.html> (second and third alterations in original) (internal quotation marks omitted).

He also added a warning to his subsequent tweet: “Closest #ChickFilA to San Francisco is 40 miles away & I strongly recommend that they not try to come any closer.”⁵⁴

Christine Quinn, the speaker of the New York City Council, took a different approach. She sent a letter on her official stationery to the president of New York University, home of the city’s only Chick-fil-A restaurant,⁵⁵ urging him to sever the relationship:

I write as the speaker of the NYC Council, and on behalf of my family. . . .

. . .

Let me be clear—I do not want establishments in my city that hold such discriminatory views. . . .

. . .

As such I urge you to sever your relationship with the Chick-fil-A establishment that exists on your campus. This establishment should be replaced with an establishment where the ownership does not denigrate a portion of our population.

. . .

Again, I appreciate your university’s long history of celebrating diversity. I urge you to join with me in ensuring that our city does not become a place where those who do not share our commitment, have any place to espouse those views.⁵⁶

As one local newspaper pointed out, this letter was not something the university could “take lightly.”⁵⁷ The city council had just approved a “massive expansion plan” for the university a week before and, given the

54. Ricardo Lopez & Tiffany Hsu, *San Francisco Is the Third City to Tell Chick-fil-A: Keep Out*, L.A. TIMES (July 26, 2012), <http://articles.latimes.com/2012/jul/26/business/la-fi-mo-san-francisco-mayor-to-chickfila-keep-out-20120726>.

55. Erin Durkin, *Christine Quinn Wants Chick-Fil-A to Quit New York, but Won’t Take Action*, N.Y. DAILY NEWS (Aug. 1, 2012, 1:42 AM), <http://www.nydailynews.com/news/national/christine-quinn-chick-fil-a-quit-new-york-won-action-article-1.1126381>.

56. Letter from Christine C. Quinn, Speaker, New York City Council, to John Sexton, President, New York University (July 28, 2012), available at <http://www.scribd.com/doc/102050324/2012-07-28-Christine-Quinn-Letter-to-John-Sexton-Chick-Fil-A>.

57. Editorial, *Chris Quinn, Silly Person*, N.Y. POST (July 31, 2012, 12:27 AM), http://www.nypost.com/p/news/opinion/editorials/chris_quinn_silly_person_tJmEhexRidwFjtOyvOcuL.

Council's power, the speaker's letter "could reasonably be seen as extortionate."⁵⁸

Concerned about the First Amendment implications, the press weighed in against the local officials. Columnist Michael Barone wrote: "[E]ven many supporters of same-sex marriage like me were appalled at the spectacle of public officials barring businesses because of the religious or political beliefs of their owners."⁵⁹ Major newspapers and commentators of all political stripes criticized the threats against the restaurant:

The Los Angeles Times condemned the decision, calling it far more troubling than Chick-fil-A's support of traditional marriage.

"Public officials have a responsibility to carry out their ministerial tasks fairly and evenhandedly—and to uphold the principle of free speech—whether or not they like a business executive's social or political stances," the Times opined.

The Boston Globe wondered "which part of the First Amendment does Menino not understand? A business owner's political or religious beliefs should not be a test for the worthiness of his or her application for a business license.["]

. . .

"When an elected public official wields the club of government against a Christian business in the name of 'tolerance,' it's not harmless kid stuff," [columnist Michelle] Malkin wrote. "It's chilling."⁶⁰

Almost immediately, city officials began backpedaling. Boston Mayor Menino called his statement "a 'mistake' and a 'Menino-ism,'" adding, "'I

58. *Id.*; see also Sally Goldenberg, *Quinn 'Chick' Chuck Put on Back Burner*, N.Y. POST (Aug. 2, 2012, 6:07 AM), http://www.nypost.com/p/news/local/manhattan/quinn_chick_chuck_put_on_back_burner_kDg5DjLlySSPREWKSNYOYJ.

59. Michael Barone, *Barone: Supporters of Ted Cruz and Chick-fil-A Break News*, WASH. EXAMINER (Aug. 4, 2012, 8:00 PM), <http://washingtonexaminer.com/barone-supporters-of-ted-cruz-and-chick-fil-a-break-news/article/2503879#.UEuWbo7R3Hg>.

60. Todd Starnes, *Rahm: "Chick-fil-A Values Are Not Chicago Values"*, FOX NEWS (July 25, 2012), <http://radio.foxnews.com/toddstarnes/top-stories/cities-move-to-ban-chick-fil-a-supporters-launch-day-of-support.html>. See generally Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012).

sent (the landlord) a letter, but that's all. There's no pressure by me.”⁶¹ After claiming that “she was just speaking as a private citizen,” New York City Council Speaker Quinn declared: “I support businesses that are open and inclusive—that reflect the viewpoint of New York City, the most diverse city in the world. That said, businesses that follow our laws have a right to open here.”⁶² In Chicago, Mayor Emanuel said, “If they meet all the usual requirements, then they can open their restaurant,” but the Chicago Republican party filed a complaint with the state attorney general alleging violation of state human rights laws by Alderman Moreno anyway.⁶³ After all, Alderman Moreno had referred to the “ace in his back pocket if he [ran] into legal trouble: traffic and congestion issues caused by the store.”⁶⁴

By mid-August the firestorm died down, and there was little press activity until the *Washington Times* reported in September that Chick-fil-A had agreed in a letter to Alderman Moreno to stop funding traditional marriage groups so it could open its new Chicago restaurant.⁶⁵ Initially, the company would not permit the letter to be publicized, but it ultimately

61. Wedge, *supra* note 48; see also Greg Turner, *Menino Says He Can't Actively Block Chick-fil-A*, BOS. HERALD (July 26, 2012), http://bostonherald.com/business/general/view/20220726menino_says_he_cant_actively_block_chick-fil-a.

62. Perry Chiramonte, *Powerful NYC Pol Says She Blasted Chick-fil-A as a Citizen—But She Used Official Letterhead*, FOX NEWS (Aug. 1, 2012), <http://www.foxnews.com/us/2012/08/01/nyc-council-speaker-christine-quinn-asks-nyu-to-evict-chick-fil/>.

63. Fran Spielman, *GOP Wants Probe of Attempts to Block 2nd City Chick-fil-A*, CHI. SUN-TIMES (Aug. 1, 2012, 12:32 PM), <http://www.suntimes.com/news/politics/14154509-418/gop-wants-probe-of-attempts-to-block-2nd-city-chick-fil-a.html>. One party official said:

“Some have said Ald[erman] Moreno and the mayor have dialed back on this. Well, the truth is, if you catch a mugger and the mugger apologizes and gives the money back, you still don't decline to prosecute. The crime has occurred”

“If aldermen do this and they get away with it, it has a chilling effect. Businessmen get the message and they don't make the campaign contributions that they want to If you disagree with the power structure, they will prevent you from doing business here.”

Id. (second alteration in original). The city party chairman said, “Zoning doesn't need to actually be denied. . . . [J]ust the statement that it would be” is enough to violate state law. *Id.*

64. Spielman, *supra* note 53.

65. Tim Devaney, *Chick-fil-A No Longer Will Fund Traditional-Marriage Groups*, WASH. TIMES (Sept. 19, 2012), <http://www.washingtontimes.com/news/2012/sep/19/chick-fil-a-no-longer-will-fund-traditional-marria/>.

relented because “the alderman needed to clarify why he was changing his stance on them opening a restaurant within his ward.”⁶⁶

D. Public Relations

Should companies take positions on controversial subjects? The message to corporations and their executives has been mixed. On the one hand, modern corporations are expected to be “socially responsible.” On the other hand, they are supposed to stay away from public controversy.

Business schools teach students that corporations have a “social responsibility,” that is, an “obligation . . . to contribute to society.”⁶⁷ In the current economic climate, “companies of all shapes and sizes have stepped up their efforts to show a more caring, compassionate side by expanding their charitable activities.”⁶⁸ It is even said by some that CEOs owe their personal time to their communities.⁶⁹

However, social issues are different. It has long been accepted for a corporation to take controversial positions on issues that touch the business.⁷⁰ Public relations professionals are trained to communicate about subjects like “profits, inflation, automation, [and] strikes.”⁷¹ Experts agree, however, that it is best for businesspeople to stay away from controversial subjects that have nothing to do with their businesses. One expert advised: “In general, it’s still good business to avoid talking about religion, politics and moral beliefs. You don’t have to compromise yourself, but why alienate a business relationship?”⁷² In the words of another: “Some topics

66. *Id.*; see also Rene Lynch, *Chick-fil-A Flap: Is the Boycott Over?*, L.A. TIMES (Sept. 19, 2012), <http://www.latimes.com/news/nation/nationnow/la-na-nn-chick-fil-a-gay-marriage-20120919,0,2032634.story>; Michael Winter, *Chick-fil-A Says It Will Stop Funding Antigay Groups*, DETROIT FREE PRESS (Sept. 20, 2012, 9:47 AM), <http://www.freep.com/article/20120920/NEWS07/120920020/Reports-Chick-fil-A-to-stop-funding-anti-gay-groups>.

67. MARCE KELLY & JIM MCGOWEN, BUSN 58 (5th ed. 2013).

68. *Philanthropists Come Bearing Corporate Gifts*, MARKETING WK., Sept. 6, 2012, available at 2012 WLNR 18981154.

69. Keith Crain, Editorial, *CEOs Owe Community Their Personal Involvement*, CRAIN’S DETROIT BUS., Oct. 20, 1997, available at 1997 WLNR 1327718 (“We should have some sort of rule for admission into the ‘CEO club’ that says if you get to a certain level of management, you’re required to become involved personally with several nonprofits and spend a certain amount of your own time on some real projects.”).

70. See C. J. DOVER, MANAGEMENT COMMUNICATION ON CONTROVERSIAL ISSUES 16-29 (BNA Inc. 1965).

71. R.D. Gieselman, Book Review, 4 J. BUS. COMM. 74, 74 (1967) (reviewing DOVER, *supra* note 70).

72. *Keep Your (Controversial) Opinions to Yourself*, MANTA (Feb. 26, 2012, 9:23 PM),

are too hot—and too toxic—for a business setting. . . . [W]e know that a business blog pushing a political or religious agenda is almost always a terrible idea. Very few marketers are foolish enough to make a mistake like that.”⁷³

In the view of one consultant, executives have an obligation to their employees to keep such opinions to themselves because they can actually be dangerous to the workers:

When businesses and business owners become openly political, they force their workers to deal with the brunt of the criticism. I worked with a local client a few years ago who contacted me for help after he posted political signs outside of his building. His workers were scared to come to work because of the amount of harassment they were getting due to the owner’s views. Rude phone calls and threats from customers were placing an undue strain on the workforce. The first step I took was to convince the owner of how his personal views were being taken out on his workers and how unfair this was to them.

. . . An owner is responsible for his or her bottom line, but is also responsible for the safety of the workers. One of the ways a business owner can do this is to keep his or her political issue opinions private. An owner, for example, could state who he or she is voting for, but once stances on specific issues are mentioned, the owner has crossed into a realm which could endanger the workers.⁷⁴

In addition, when companies or their executives publicly take sides on controversial issues, the inevitable boycotts that result can cost employees their jobs.⁷⁵

Owners also have the responsibility to ensure the job security of the work force. I have worked with companies facing boycotts for various reasons and have almost always been forced to

<http://connect.manta.com/t/keep-your-controversial-opinions-to-your?uid=27600&f=12&t=12720&start=0&referid=11189>.

73. Matthew McKenzie, *Courting Controversy: Should Your B2B Content Touch Hot Topics?*, CONTENT 4 DEMAND (May 29, 2012), <http://www.content4demand.com/blog/courting-controversy-should-your-b2b-content-touch-hot-topics/>.

74. L. Vincent Poupard, *Gay Marriage and Business: Owners Endanger Workers*, YAHOO! VOICES (July 27, 2012), <http://voices.yahoo.com/gay-marriage-business-owners-endanger-workers-11615474.html>.

75. *Id.*

suggest layoffs until the boycott has subsided. With boycotts being called against Chick-fil-A and JCPenney over views about gay marriage, I can foresee more boycotts being called across the country against companies which voice their opinions on controversial topics. These boycotts could [be] cause for the limiting of the job force in a down economy and could result in violence—all started because business owners attempted to vocally enter the political arena without considering the outcomes.⁷⁶

The Chick-fil-A commotion left experts scratching their heads; they wondered why Cathy stirred up the controversy in the first place. One public relations executive could not understand how Cathy had gotten his company into such a position:

You have to wonder sometimes why people don't keep their opinions to themselves, and do what they do best

The advice we give [to clients] in advance and to avoid this problem is to keep the focus on your business and do not allow your personal views to interfere with it. . . . You don't see people from [General Electric], as an example, making those kinds of mistakes.⁷⁷

76. *Id.*

77. Linda Moss, *Chick-fil-A Courts Controversy*, RECORD (Aug. 2, 2012, 12:21 PM), http://www.northjersey.com/news/164700986_Chick-fil-A_courts_controversy_may_hurt_expansion_plans_observers_say.html?c=y?page=2 (second and third alterations in original) (internal quotation marks omitted). One professor of management communication hypothesized that “[b]ecause Chick-fil-A has a strong presence in the South, Cathy may have misjudged the reaction his comments would generate.” *Id.* Likewise, because Starbucks is headquartered in Seattle it might not have anticipated boycotts in other parts of the country due to its stance on same-sex marriage. *See* King 5 News, *supra* note 27. When Washington state legislators debated permitting same-sex marriage, local corporate heavyweights Microsoft, Starbucks, and Nike openly supported the measure. Ken Otterbourg, *Two of a Kind Make a Pair?*, BUS. N.C. (Mar. 2012), <http://www.businessnc.com/articles/2012-03/two-of-a-kind-make-a-pair-category/>. In contrast, North Carolina’s most prominent businesses stayed away from a referendum on a constitutional amendment to ban gay marriage. *Id.* As a spokesman for North Carolina-based Reynolds American Inc. said, “A referendum on an amendment to the state constitution addressing marriage and legal unions is not a matter that is related to the manufacture and marketing of tobacco products.” *Id.* Starbucks profits were up after the company took its stand. *See supra* note 31 and accompanying text. Cathy may not have hurt his business either. “[F]ormer Arkansas Governor Mike Huckabee declared [August 1, 2012] to be Chick-fil-A

II. Free Speech

The wisdom of businesspeople expressing lightning rod opinions can be debated, as they risk alienating customers, suppliers, and employees, but the First Amendment prevents the government from stepping in. Federal, state, and local officials may not punish or withhold benefits from individuals or businesses because of the content of their speech.⁷⁸ The First Amendment offers no protection, however, to an employee, including an executive, from retaliation by a private employer.⁷⁹

A. First Amendment

The public is free to punish a business or an executive for expressing controversial views, but the government is not. Consumers can elect not to patronize a business because they are offended by what the company or its leaders have said. Boycotts are part of the American historical fabric, from the 1768 non-importation agreement against the British⁸⁰ to the 1830 “pledge[] to abstain from the use of slave-produced commodities.”⁸¹ People who disagree with Cathy are free to abstain from eating his chicken and to encourage like-minded others to do the same.

Government officials, however, cannot deny licenses or services to citizens with opinions they do not like. Both the First Amendment to the United States Constitution⁸² and state constitutional provisions preclude governments from acting against citizens based on the content of their speech.⁸³ Government cannot interfere with speech, whether the speaker is an individual or a corporation.⁸⁴

Appreciation Day,” and the company set a sales record. Lynch, *supra* note 43.

78. See *infra* Part II.A.

79. See *infra* Part II.B.

80. See T.H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* 235-37 (2004).

81. HERBERT APTHEKER, *THE NEGRO IN THE ABOLITIONIST MOVEMENT* 36 (1st ed. 1941).

82. U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech . . .”).

83. In Illinois, Article I of its constitution is its “Bill of Rights,” which contains separate sections guaranteeing “Religious Freedom” and “Freedom of Speech.” ILL. CONST. art. I, §§ 3-4. Article I, Section 3, titled “Religious Freedom,” includes the following language: “[N]o person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions . . .” *Id.* § 3. The freedom of speech in Illinois is also guaranteed: “All persons may speak, write and publish freely, being responsible for the abuse of that liberty.” *Id.* § 4. Other state constitutions include similar provision. See, e.g., CAL. CONST. art. I, § 2(a) (“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of

“Indirect punishment of . . . free speech is as evil as direct punishment of it.”⁸⁵ There need not be a fine or penalty for the speech; refusing a benefit is punishment enough to make the action unconstitutional.⁸⁶

[The Supreme] Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which (it) could not command directly.’ Such interference with constitutional rights is impermissible.⁸⁷

Government officials are prohibited from punitive retaliation against people who exercise their First Amendment rights.⁸⁸ Federal circuit courts have held that this prohibition includes a retaliatory refusal to issue various types of permits. The First Circuit held the retaliatory denial of a land use

speech or press.”); MASS. CONST. pt.1, art. XVI (“The right of free speech shall not be abridged.”); N.Y. CONST. art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”).

84. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341-42 (2010).

85. *Williamson v. United States*, 184 F.2d 280, 283 (2d Cir. 1950); *see also Carbo v. United States*, 82 S. Ct. 662, 667 (Douglas, Circuit Justice 1962); *Planned Parenthood Ass’n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 692 F.3d 343, 348-49 (5th Cir. 2012).

86. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

87. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

88. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91-92 (2d Cir. 2002). To prevail on a First Amendment retaliation claim, a “plaintiff must prove: (1) he has an interest protected by the First Amendment; (2) defendants’ actions were motivated or substantially caused by his exercise of that right; and (3) defendants’ actions effectively chilled the exercise of his First Amendment right.” *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) (citing *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998)). The Third Circuit employs a similar three-part test. A “[p]laintiff must prove (1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation.” *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 282 (3d Cir. 2004) (citing *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997)).

permit could violate the First Amendment.⁸⁹ In *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, a property owner survived a summary judgment motion on claims that a planning board denied a residential site permit because the applicant was “an outspoken member of an opposition political party and a critic of the government’s environmental policies.”⁹⁰ In *Soranno’s Gasco, Inc. v. Morgan*, the Ninth Circuit held that the suspension of gas permits in retaliation for an exercise of First Amendment rights precluded summary judgment for the defendant officials.⁹¹ And the same court later held a claim reviewable when a county allegedly had “a ‘go tough on [the plaintiff]’ policy” because of his public criticism of the county.⁹² In particular, the county was accused of imposing unreasonable requirements for a residential building permit and insisting on an unnecessarily stringent permit for a recreational polo field.⁹³

Even if there is a legitimate reason for adverse government action, like the parking concerns Alderman Moreno mentioned for a Chick-fil-A in Chicago,⁹⁴ “[t]here is substantial case law . . . ‘clearly establishing’ that government officials may not sanction a citizen” based on his or her First Amendment expression.⁹⁵ If “the adverse action would not have been taken but for the unconstitutional motivation,” the action is impermissible, regardless of any “permissible grounds for the adverse action.”⁹⁶

89. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40-41 (1st Cir. 1992).

90. *Id.* at 41.

91. 874 F.2d 1310, 1313-16 (9th Cir. 1989) (holding that “a general issue of material fact” exists when defendants only argue that “they *could* have suspended the permits even in the absence of the protected activity” without establishing “that they *would* have suspended the permits in the absence of [plaintiffs’] protected activity”).

92. *Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d 822, 826-27 (9th Cir. 2003).

93. *Id.* at 827-29. Similarly, in *Popescu v. City of San Diego*, the plaintiff and others had parked in an alley without being ticketed for years. No. 06CV1577-LAB(LSP), 2008 WL 220281, at *1-2 (S.D. Cal. Jan. 25, 2008). After the plaintiff posted signs on his garage and bumper stickers on his car supporting a “ballot measure intended to preserve a well-known cross on top of Mt. Soledad, within the City of San Diego,” the plaintiff—and only the plaintiff—was issued a parking ticket. *Id.* at *2. The district court denied the defendant’s motion for summary judgment on the resulting First Amendment retaliation claim, determining that it could succeed if the plaintiff proved that his “overt expressions of his religious and political views were the only differences between him and the owners of similarly-parked vehicles in the same area.” *Id.* at *7-8.

94. Spielman, *supra* note 53.

95. *Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 527-28 (1st Cir. 2009).

96. *Id.* at 528.

Threats to take adverse actions because of speech, even if none are taken, can create an impermissible chilling effect on speech. When the official or agency has the power to take the unfavorable action, the mere threat to do so can discourage speech and is, therefore, impermissible.⁹⁷ Moreover, the threat need not be explicit; an implicit threat will do if it is sufficient to create a chill on speech, which is a fact-based question.⁹⁸

If the government cannot punish or threaten to punish a speaker by denying a permit, it also cannot attempt to induce a public shunning by refusing a permit to those who do business with the speaker.⁹⁹ Officials cannot advise permit seekers not to do business with people who voice certain opinions,¹⁰⁰ as New York City Council Speaker Christine Quinn did. The threat to punish the permit seeker has a chilling effect on the speech of its business partner.

In short, the threats by Mayor Menino of Boston, Alderman Moreno of Chicago, Mayor Lee of San Francisco, and Council Speaker Quinn of New York were patently unconstitutional.¹⁰¹ They were likely counterproductive as well. No one has ever won over the hearts of Americans by squelching their speech.¹⁰²

B. Private Action

The First Amendment and state constitutional free speech provisions do not cover private action.¹⁰³ In other words, a private employer is free to terminate (or not hire) an individual because of his or her speech.¹⁰⁴ Employers do this regularly for insubordination, unflattering statements to

97. See, e.g., NAACP v. Button, 371 U.S. 415, 433 (1963); G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1076 (6th Cir. 1994); Levin v. Harleston, 966 F.2d 85, 89-90 (2d Cir. 1992); Fairfield v. Patrick, No. 1:07-cv-01412-LJO-SKO PC, 2010 U.S. Dist. LEXIS 116543, at *14-15 (E.D. Cal. Nov. 1, 2010); De Leon v. Little, No. 3:94CV902 (RNC), 1999 U.S. Dist. LEXIS 23091, at *15-16 (D. Conn. Sept. 29, 1999); Fraternal Order of Police, D.C. v. Rubin, 26 F. Supp. 2d 133, 141 (D.D.C. 1998).

98. Levin, 966 F.2d at 90; De Leon, 1999 U.S. Dist. LEXIS 23091, at *16.

99. See Clairmont v. Sound Mental Health, 632 F.3d 1091, 1100 (9th Cir. 2011).

100. See *id.*

101. See *supra* Part I.C.

102. See Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 494 (2009).

103. Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state.").

104. See *infra* note 110 and accompanying text.

outsiders about the company, or the expression of morally repugnant views.¹⁰⁵

There is no constitutionally protected right to free speech in a private workplace.¹⁰⁶ Private employers have the right to control what their employees say during working hours to customers or coworkers.¹⁰⁷ No one would argue that an employee has a constitutional right to criticize the boss, tell coworkers they are fat, or greet customers with, “Welcome to McDonald’s—what the hell do you want for breakfast?”¹⁰⁸ An employer

105. See, e.g., *Griffin v. Garrison*, No. 09cv250SM, 2011 U.S. Dist. LEXIS 3631, at *3-6 (D.N.H. Jan. 13, 2011); *Durham v. Fleming Cos.*, No. 88-8672, 1989 U.S. Dist. LEXIS 4214, at *5-6 (E.D. Pa. Apr. 24, 1989).

106. See, e.g., *Hudgens*, 424 U.S. at 513; *Ryan v. Underwriters Labs., Inc.*, No. 1:06-cv-1770-JDT-TAB, 2007 U.S. Dist. LEXIS 58452, at *29-30 (S.D. Ind. Aug. 8, 2007); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985); *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629, 634 (Mich. Ct. App. 1992); *Johnson v. Mayo Yarns, Inc.*, 484 S.E.2d 840, 843 (N.C. Ct. App. 1997); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 589-91 (W. Va. 1998).

107. See *infra* note 111 and accompanying text.

108. *George v. Lab. Corp. of Am. Holdings*, 522 F. Supp. 2d 761, 763-64 (N.D. W. Va. 2007).

A private employer may discharge an at-will employee even for speech which is in other contexts protected by the Constitution. “Even when the Constitution allows one to speak freely, it does not forbid an employer from exercising his judgment to discharge an employee whose speech in some way offends him.”

Were this not so, an employee could virtually never be discharged for conduct, however insubordinate, insulting, unsettling or detrimental, if it took the form of speech.

Durham, 1989 U.S. Dist. LEXIS 4214, at *5-6 (citations omitted) (quoting *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 843 (Pa. Super. Ct. 1986)); see also *Truly v. Madison Gen. Hosp.*, 673 F.2d 763, 767 (5th Cir. 1982) (“One does not always insure his own retention in employment by wrapping oneself in the [F]irst [A]mendment and launching attacks on one’s employer from within its folds. At some point, while the employer has no right to control the employee’s speech, he does have the right to conclude that the employee’s exercise of his constitutional privileges has clearly over-balanced his usefulness and destroyed his value and so to discharge him.” (citations omitted)).

Imposing a different rule would upend unemployment compensation laws. *Griffin*, 2011 U.S. Dist. LEXIS 3631, at *15-16 (“Drawing too close an analogy between [the case of a private employee discharged for what he said at work] and those decided by the Supreme Court under the Free Exercise Clause to conclude that [the private employer] violated [the employee’s] constitutional rights would be problematic. To do so would, presumably, mean that an employee discharged for cause for having engaged in otherwise lawful speech (e.g., neither threatening nor defamatory) that was, say, racist, or vulgar, or sexist, or insubordinate, would, nevertheless, enjoy a constitutionally protected right to receive state unemployment benefits. An exception of that sort would substantially undermine the general rules that employees discharged ‘for cause’ are ineligible for unemployment benefits, and

may, as a condition of employment, forbid employees from discussing certain subjects, such as politics or religion, with patrons.¹⁰⁹

The First Amendment does not even prevent private employers from discharging employees for offsite and off-duty communications.¹¹⁰ A private employer may have a strong interest in regulating the out-of-work speech of its managers and supervisors to ensure that such speech does not conflict with core company values. One court held that a convenience store did not violate the First Amendment rights of a supervisor when it terminated him for operating a website on his own time that sold racist music and paraphernalia.¹¹¹ While various statutes protect limited types of speech for public policy reasons,¹¹² the First Amendment itself does not restrain private employers.

that private employers are entitled to establish standards of decorum and conduct consistent with their business interests.”).

109. *Griffin*, 2011 U.S. Dist. LEXIS 3631, at *2-4 (radiology technician discharged by private hospital after being warned repeatedly not to discuss politics with patients); *Durham*, 1989 U.S. Dist. LEXIS 4214, at *1-2 (receiving coordinator discharged for responding to a question by a supplier by stating that twenty Teamsters were picketing and “behaving in ‘an intimidating and violent fashion’”); *Johnson*, 484 S.E.2d at 841-42 (shift technician terminated for refusing to remove Confederate naval flag from his personal toolbox which he used at work).

110. *Wiegand v. Motiva Enters., LLC*, 295 F. Supp. 2d 465, 466-67 (D.N.J. 2003).

111. *Id.* It should be noted, however, that the court did not hold that out-of-work speech on a social issue would generally support termination. *Id.* at 477-78. Rather, it distinguished the speech at issue:

The Court has considered plaintiff’s argument that allowing his termination based on his speech would mean that the Court would have to allow termination of any “employee who actively speaks out on any social issue (i.e. abortion, politics, etc.) in his own home and never at work,” but finds that this situation is distinguishable. Here, plaintiff did not simply speak on a social issue; instead, he disseminated hate speech for commercial profit in circumstances where his employer had a strong interest in regulating any appearance of discrimination or racial bias toward fellow employees whom plaintiff supervised and toward customers whom he served.

Id. (citation omitted).

112. If, for example, the speech satisfied the National Labor Relations Board’s definition of “concerted activity,” which generally “requires two or more employees acting together to improve wages or working conditions,” the speech would be protected under the National Labor Relations Act. *Protected Concerted Activity*, NLRB, <http://www.nlr.gov/concerted-activity> (last visited May 23, 2013); *see also* 29 U.S.C. § 157 (2012).

III. Company Control

When executives speak out, the government must stay out of it; but what about the shareholders and the corporations that executives serve? Executive speech may go against the beliefs of individual shareholders or conflict with the corporate culture. Part *A* of this section discusses the remedies of the dissenting shareholders. Part *B* addresses what steps a corporation can take to shield or, if necessary, divorce itself from an errant executive spouting views antithetical to its core beliefs or positions.

A. Shareholders

When a corporation adopts a controversial political position, it cannot expect all its shareholders to agree. Corporate boards and the executives they hire may have unified views, but the shareholders, particularly in cases of public corporations, represent a broad spectrum of the polity with divergent beliefs. Some shareholders allow their political or religious views to dictate their investment decisions,¹¹³ but most invest based on other factors.¹¹⁴ Having purchased an ownership interest in a company, a shareholder might find management speech on social issues an offensive sideshow from the business of making money. Most of the cases exploring shareholder rights involve money—that is, use of funds the corporation raised from the shareholders for political advertising or contributions.¹¹⁵ Whether the concern is the money spent or the speech itself, if enough shareholders agree with the position taken, there is little a dissenting shareholder can do to change the corporate message.

113. A number of mutual funds target individuals of the Protestant, Catholic, or Muslim faiths. See, e.g., Beth Piskora, *Funds for Christian Investors*, BUS. WK. (Mar. 27, 2005), <http://www.businessweek.com/stories/2005-03-27/funds-for-christian-investors>; David K. Randall, *Islamic Fund Star*, FORBES (Jan. 21, 2010, 1:40 PM), <http://www.forbes.com/forbes/2010/0208/investing-mutual-funds-amana-trust-islamic-profit-principle.html>; Rob Silverblatt, *A Fresh Look at Socially Responsible Mutual Funds*, U.S. NEWS (Mar. 5, 2010), <http://money.usnews.com/money/personal-finance/investing/articles/2010/03/05/a-fresh-look-at-socially-responsible-mutual-funds>.

114. See Robert Farrington, *The Most Popular Investment Strategies*, COLLEGE INVESTOR, <http://thecollegeinvestor.com/974/most-popular-investment-strategies/> (last visited May 25, 2013).

115. E.g., *Int'l Ass'n of Machinists & Aerospace Workers v. Fed. Election Comm'n*, 678 F.2d 1092, 1115-18 (D.C. Cir. 1982) (en banc) (per curiam) (holding that shareholders' First Amendment rights are not violated by the corporation when the shareholders object to using corporate assets to support a corporate political action committee, and deciding the case before addressing whether state action occurred such that First Amendment protections applied).

Dissenting shareholders enjoy little protection from corporate speech that is contrary to their views because no one is compelled to be a shareholder.¹¹⁶ A “shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.”¹¹⁷ Accordingly, a Massachusetts statute that prohibited corporations from expressing views against a state income tax—ostensibly in part to protect minority shareholders who had different beliefs—was unconstitutional because it infringed on the First Amendment rights of the corporation.¹¹⁸ Conversely, a statute enacted to protect the First Amendment rights of a corporation did not violate the rights of dissenting shareholders to stay out of the political fray.¹¹⁹ The government cannot justify restricting what a company says by asserting an “interest in protecting dissenting shareholders from being compelled to fund corporate political speech.”¹²⁰

It has been suggested that the government could instead prohibit “all wasteful political or noncommercial [corporate] speech” under corporate waste laws.¹²¹ Or, the shareholders could make more robust use of suits based on the duty of loyalty.¹²² However, these strategies would be problematic because management has substantial latitude in deciding what is good for the corporation.¹²³

As a group, shareholders have considerable power over the direction of the corporation and its political speech. “Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.”¹²⁴ A majority of

116. First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 794-95 & n.34 (1978); *Int’l Ass’n of Machinists & Aerospace Workers*, 678 F.2d at 1117.

117. *Bellotti*, 435 U.S. at 794 n.34.

118. *Id.* at 767-68, 794-95.

119. *Int’l Ass’n of Machinists & Aerospace Workers*, 678 F.2d at 1117-18 & n.105.

120. *Citizens United v. Fed. Election Comm’n*, 58 U.S. 310, 361 (2010).

121. Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235, 251 (1981).

122. Jonathan Romiti, Note, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-Citizens United*, 53 B.C. L. REV. 737, 738-40, 769-73 (2012).

123. Brudney, *supra* note 121, at 257-58 (“Management’s use of corporate assets to express its political preferences, social views, or opinions need bear little correlation with the political or social views of stockholders. Both in theory and in practice, management is substantially free to use corporate assets to urge any political or social views it sees fit, so long as it can establish a plausible connection between those expenditures and a long term commercial benefit to the corporation. Given the looseness that is sufficient to establish the necessary connection, few managements are likely to fail to make it.” (footnotes omitted)).

124. First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978).

shareholders can influence corporate speech by electing new directors or by adopting protective bylaws.¹²⁵ Apart from these “intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.”¹²⁶ Should all “those remedies prove ineffective in persuading the corporation to endorse a particular view or to take or refrain from taking specific action, dissenting shareholders are free to sell their stock.”¹²⁷

If executive speech causes flocks of stockholders to sell and offended customers to flee, the problem will soon correct itself. The share price will drop and the executive will be terminated. Short of a mass shareholder or customer exodus, however, the market will exert little control over executive speech at a successful company.

B. Board of Directors

It has been assumed to this point that the executive expressing an opinion agrees with the board and the company culture, but that will not always be true. “[E]xternal hiring has become more prevalent in the past three decades, especially in large organizations and for high-level positions.”¹²⁸ Outside hiring, often considered necessary to acquire top talent, comes with significant risk. Recent corporate hiring failures highlight the problem. If Yahoo! could not determine that the CEO candidate it selected listed a fictitious computer science degree,¹²⁹ could its vetting process be expected to unearth the more subtle political fit with its corporate culture?

125. *Id.* at 794-95.

126. *Id.* at 795; *see also* Romiti, *supra* note 122, at 751, 754-56.

127. *Barnes v. State Farm Mut. Auto. Ins. Co.*, 20 Cal. Rptr. 2d 87, 92 (Cal. Ct. App. 1993).

128. Rachel Emma Silverman, *Is It Better to Promote from Within?*, WALL ST. J. (Apr. 3, 2012, 7:25 PM), <http://online.wsj.com/article/SB10001424052702304750404577320000041035504.html>; *see also* Susan Adams, *More Companies Recruit Outside CEOs in 2012, and Other C-Suite News*, FORBES (Sept. 10, 2012, 4:57 PM), <http://www.forbes.com/sites/susanadams/2012/09/10/more-companies-recruit-outside-ceos-in-2012-and-other-c-suite-news/>.

129. *See* Dennis Carey et al., *How Companies Can Avoid CEO Hiring Failure*, CNNMONEY (May 10, 2012, 9:46 AM), <http://management.fortune.cnn.com/2012/05/10/how-companies-can-avoid-ceo-hiring-failure/>; Shelley DuBois, *Yahoo May Need to Go Back to the Drawing Board*, CNNMONEY (May 7, 2012, 5:30 AM), <http://management.fortune.cnn.com/2012/05/07/yahoo-scott-thompson/>.

As companies look outward and aim to hire diverse management, a necessary and in many ways desirable byproduct is a proliferation of ideas. Homogeneity of views is discouraged. The question is what can be done to ensure that there is no clash with what the corporation considers its essential values.

Starbucks provides a hypothetical example. The company has taken a strong position in favor of legalizing same-sex marriage.¹³⁰ It has publicly stated this is a core value of the company.¹³¹ If the company decided to seek a new executive, presumably it would want one who shared these beliefs. A chief executive who spoke freely, in or out of the office, about strong contrary views could change the public persona of the company. Unless a candidate had already attracted public attention on the issue before applying, however, his or her views would be unknown to a search committee.

With limited exceptions, a private employer would be permitted to fire an executive based on speech on or off the job. Generally, “[e]mployers in the private sector have no obligation to respect the expressive rights or impulses of those who work for them.”¹³² There are two key exceptions to this general rule that complicate the board’s ability to control the speech of an executive speaking out about, specifically, same-sex marriage: Title VII and state political activity protection statutes.

1. Title VII

Title VII of the Civil Rights Act of 1964 prohibits a company from discriminating against an employee based on his or her religion.¹³³ The questions that Title VII raises in the context of CEO speech are: (1) whether Title VII protects a CEO who refuses to espouse a political view he does not believe in for religious reasons, and (2) whether Title VII protects a CEO who, outside the office and during off-hours, expresses religious views that contradict the political positions of the company.¹³⁴

130. Garber, *supra* note 2.

131. *Id.*

132. BARRY, *supra* note 7, at 3.

133. 42 U.S.C. § 2000e-2(a) (2012) (“Title VII”).

134. A number of religions have publicly stated positions on same-sex marriage, many in opposition. See *Religious Groups’ Official Positions on Same-Sex Marriage*, PEW FORUM ON RELIGION & PUB. LIFE (Dec. 7, 2012), <http://www.pewforum.org/gay-marriage-and-homosexuality/religious-groups-official-positions-on-same-sex-marriage.aspx>.

Insofar as it applies to religion, Title VII has two functions.¹³⁵ First, it prohibits employers from discriminating against employees for religious beliefs.¹³⁶ Second, the statute requires employers to make reasonable accommodations for religious observances and practices.¹³⁷

In prohibiting discrimination for religious beliefs, Title VII makes one exception: a religious entity may require membership as a condition of hiring.¹³⁸ The statute would violate the First Amendment if it required acceptance of Catholic rabbis, Jewish imams, and Muslim priests, or prohibited religious discrimination in hiring parochial school teachers.¹³⁹ Otherwise, Title VII permits no discrimination in employment based on religious beliefs.

Religious observances and practices are another matter. Title VII requires employers to make reasonable accommodations when they will not cause “undue hardship” to the employer.¹⁴⁰ In accommodation cases, the “plaintiff must show that the observance or practice conflicting with an employment requirement is religious in nature, that [the plaintiff] called the religious observance or practice to [the] employer’s attention, and that the religious observance or practice was the basis for [the] discharge or other discriminatory treatment.”¹⁴¹ If the plaintiff makes that prima facie case, the burden shifts to the employer to prove it cannot reasonably accommodate the employee without “undue hardship to the conduct of its business.”¹⁴²

Title VII jurisprudence makes a distinction between expression at work and expression off the job. A business does not have to allow on-site proselytizing, even if it is required by the religion.¹⁴³ A company does not

135. *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1019 (E.D. Wis. 2002).

136. *Id.*; see 42 U.S.C. § 2000e(j); *Venters v. City of Delphi*, 123 F.3d 956, 972-73 (7th Cir. 1997).

137. *Peterson*, 205 F. Supp. 2d at 1019; see 42 U.S.C. § 2000e(j).

138. 42 U.S.C. § 2000e-1(a); see *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam); *Gellington v. Christian Methodist Episcopal Church, Inc.* 203 F.3d 1299, 1304 (11th Cir. 2000).

139. See *Gellington*, 203 F.3d at 1304.

140. *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1574-75 (7th Cir. 1996, modified on rehearing en banc 1997); see 42 U.S.C. § 2000e(j).

141. *Ilona of Hungary*, 108 F.3d at 1575.

142. *Id.* at 1574-75; see 42 U.S.C. § 2000e(j).

143. *McIntyre-Handy v. West Telemarketing Corp.*, 97 F. Supp. 2d 718, 735 (E.D. Va. 2000) (“Title VII gives plaintiff the right not to be discriminated against in employment because of her religion, it does not give her the right to proselytize on company time.”). If the religion does not compel expression at work, the accommodation analysis may not apply. *Averett v. Honda of Am. Mfg., Inc.*, No. 2:07-cv-1167, 2010 U.S. Dist. LEXIS 11307, at *28-29 n.5 (S.D. Ohio Feb. 9, 2010).

have to countenance, for example: “Thank you for calling ABC Company. My name is Herman, I am an observant Episcopalian, and I believe in female clergy. How can I help you?” Nor must it subject its employees to coworker exhortations that they are “sinful and evil persons whom God [will] one day punish.”¹⁴⁴

The converse is also true. Employers cannot require employees to pray on the job when it conflicts with the employees’ beliefs.¹⁴⁵ An employer can hold on-premises prayer meetings (deprivation of that right by the government would violate the First Amendment’s Free Exercise Clause), but employee attendance cannot be made mandatory.¹⁴⁶

Title VII protects religious observances and practices after hours and off premises. An employer cannot terminate an employee for attending a church, synagogue, or mosque, even if the preacher expresses political views or the religion itself takes political positions offensive to the employer.¹⁴⁷ Title VII offers no protection, however, for an employee who belongs to a secular group dedicated to the same political views.¹⁴⁸

Ordinarily under Title VII, employees, including managers, are free to engage in religious speech after hours no matter how much it might conflict with the values of a corporation. In an extreme case that tested the limits of this principle, the Eastern District of Wisconsin held that an employer violated Title VII by demoting a manager who allowed himself to be interviewed off-hours as a “reverend” of a white supremacist “church.”¹⁴⁹ According to the court:

[T]he World Church of the Creator . . . teaches that all people of color are “savage” and intent on “mongreliz[ing] the White Race,” that African-Americans are subhuman and should be

144. *Averett*, 2010 U.S. Dist. LEXIS 11307, at *26-27.

145. *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir. 1988); *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140, 143-44 (5th Cir. 1975).

146. *Townley Eng’g & Mfg. Co.*, 859 F.2d at 613, 620-21; *Young*, 509 F.2d at 144.

147. *See Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1019-21 (E.D. Wis. 2002).

148. *Id.* at 1022-24; *see also id.* at 1018 (“As a threshold matter, the plaintiff must show that his or her beliefs constitute a ‘religion’ under the meaning of Title VII.”).

149. *Id.* at 1016, 1025-26. It was important to the *Peterson* court that the plaintiff was demoted based on his religious beliefs, not based on his actions. *Id.* at 1024-25. The plaintiff, however, did more than simply attend or even preach at his church. *Id.* at 1016. He allowed himself to be interviewed by the *Milwaukee Journal Sentinel* and was photographed “holding a tee-shirt bearing a picture of Benjamin Smith, who, carrying a copy of *The White Man’s Bible*, had targeted African-American, Jewish and Asian people in a two-day shooting spree in Indiana and Illinois.” *Id.*

“ship[ped] back to Africa”; that Jews control the nation and have instigated all wars in this century and should be driven from power, and that the Holocaust never occurred, but if it had occurred, Nazi Germany “would have done the world a tremendous favor.”¹⁵⁰

The court, distinguishing the World Church of the Creator from white supremacist political groups such as the Ku Klux Klan, held that the “church” met the requirements of a religion under Title VII, and that beliefs in its tenets played an impermissible role in the demotion of the manager.¹⁵¹ That being the case, Title VII would certainly prevent a company from dismissing an employee, including a manager, for affirming the tenets of Catholicism, Islam, or Orthodox Judaism outside of work, even though the religion rejected a political position espoused by the company. The question is whether a CEO can or should be treated differently under Title VII.

A chief executive officer is unlike any other employee or manager. The CEO is the face and voice of the company. One of the primary job responsibilities is to speak for the company—to act as the company mouthpiece or spokesperson.¹⁵² A company has its own First Amendment rights,¹⁵³ and Title VII cannot handcuff the company in expressing its views. In addition, a chief executive is arguably never off-duty or off-premises for purposes of Title VII and speech.¹⁵⁴ Out-of-work statements to the press are part of the job, and the public associates a chief executive’s out-of-work statements with the company just as much as statements made from the executive suite.¹⁵⁵ Because of the unique role of the CEO, a company should be permitted to require that he or she publicly take particular political positions and not take others as a condition of employment. It would be an “undue hardship” for a company not to be able to control its own public face.

This does not mean a company favoring same-sex marriage could fire or refuse to hire a CEO because he or she was a Catholic, Baptist, Muslim,

150. *Id.* at 1015 (third and fourth alterations in original).

151. *Id.* at 1021-25.

152. Among other duties, a CEO “[s]erves as the primary spokesperson and representative for the organization” and “[a]ctively advocates for the organization, its beliefs, and its programmatic efforts.” *CEO Job Description*, INC., 2 (emphasis added), <http://www.inc.com/tools/ceo-job-description.html> (last visited May 25, 2013).

153. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010).

154. See George Anders, *For CEOs, Off-Duty Isn’t an Option*, WALL ST. J. (Nov. 7, 2007), <http://online.wsj.com/article/SB119439917334884678.html>.

155. See *supra* note 9.

Mormon, or Orthodox Jew; but it could require the CEO to take a position that a member of these faiths might find difficult to advocate. Conversely, a religiously conservative commercial company could require its CEO to take positions consistent with its views. It could not restrict hiring to its own religion, but it should be able to demand public positions that might be uncomfortable for a person of another faith. In either case, foregoing First Amendment rights to accommodate the religious objections of a CEO would be an undue hardship for the company.

A company is not just prohibited from adverse employment action for religious views; it also must beware of the disparate impact of facially neutral company rules on particular religions.¹⁵⁶ What if a company's political position has the practical effect of locking out devout Catholics, Baptists, Mormons, Muslims, or Orthodox Jews? The "mere fact that a company is involved in a business practice that an employee believes violates his religious values is insufficient to constitute" a Title VII violation.¹⁵⁷ As long as a company is able to demonstrate that the need to espouse company views is "job related for the position in question and consistent with business necessity," such a disparate impact is not actionable under Title VII.¹⁵⁸

Because Starbucks has a First Amendment right to espouse acceptance of same-sex marriage, it should be considered an "undue hardship" to require an accommodation for a CEO with religious objections to that view. Similarly, a religiously conservative company has First Amendment rights and should be allowed to seek a chief executive to present its views. "To hold otherwise would essentially turn Title VII into a tool for imposing religious values on the speech of all employers in violation of the First Amendment."¹⁵⁹

156. See 42 U.S.C. § 2000e-2(k)(1)(A) (2012) ("An unlawful employment practice based on disparate impact is established under this subchapter only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .").

157. *Brahmana v. Lembo*, No. C 09-0106 PSG, 2011 U.S. Dist. LEXIS 48585, at *17 (N.D. Cal. May 4, 2011); see also *Stolley v. Lockheed Martin Aeronautics Co.*, No. 4:04-CV-303-Y, 2006 U.S. Dist. LEXIS 67205, at *12 (N.D. Tex. Aug. 30, 2006), *aff'd* No. 06-11068, 2007 U.S. App. LEXIS 7303 (5th Cir. Mar. 28, 2007) (per curiam).

158. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

159. *Brahmana*, 2011 U.S. Dist. LEXIS 48585, at *17-18.

2. State Political Activity Protection Statutes

The second obstacle to termination based on speech arises in states where off-work speech about political beliefs is protected by statute from adverse employment action. About half of the United States population is protected by such statutes.¹⁶⁰ Like Title VII, these statutes are unlikely to protect a CEO.

Many of these statutes contain express exceptions for speech in conflict with the interests of the employer, and some courts infer such exceptions.¹⁶¹ The unique role of the CEO would likely trigger the conflict-of-interest exception included in some statutes and court rulings.¹⁶² A corporation has First Amendment rights and state statutes cannot remove its means of exercising them.

3. Policies Limiting Speech

Thus far, the focus has been on those steps a company with a firm stand on an issue can take to ensure its executive toes the company line. However, many companies, for sound business reasons such as worries about boycotts, stay away from social controversy. The final issues are: (1) what preventive steps a company can take to discourage CEO political

160. Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012); see also *id.* at 302-34 (summarizing state statutes). Volokh admits that he remains unsure whether these statutes and others protecting political activity are "a good idea." *Id.* at 301. He adds:

First, employers may have a legitimate interest in not associating themselves with people whose views they despise. Second, employees are hired to advance the employer's interests, not to undermine [them]. When an employee's speech or political activity sufficiently alienates coworkers, customers, or political figures, an employer may reasonably claim a right to sever his connection to the employee. Perhaps such statutes should not be copied by other states, and perhaps they should even be repealed, which is what happened in 1929 when Ohio repealed its "political activities" statute.

Id. (footnotes omitted).

161. *Id.* at 306-08.

162. *Id.* Colorado, for example, allows an employer to terminate an employee if its restriction on off-hours speech "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer." COLO. REV. STAT. ANN. § 24-34-402.5(1)(a) (West 2012). Because it is the responsibility of the CEO to speak for the company, it should be considered a bona fide occupational requirement for the CEO to speak in a manner consistent with the positions of the company.

expression; and (2) whether the board has any obligation to rein in an executive on an unexpected crusade.

Employers who fear that executives' off-work speech will be linked to their companies have adopted measures to prevent such occurrences. Rather than wait for the damaging speech to occur, many companies adopt proactive policies detailing what is and is not acceptable off-work speech.

A gentle and reasonable approach is found in Hewlett-Packard's Standards of Business Conduct, which asks employees to refrain from leading others to believe that their personal views are those of the firm: "While you are encouraged to participate in your community and the political process, you may not create the impression that you are speaking or acting for HP."

. . . In the gag-order category we find the policy of telecommunications company Verizon, which insists that employees "ensure that any personal political testimonials, endorsements, other statements or lobbying activities *do not reference our employment with the company* or imply its support for our position." An example of a policy that appears to mandate employee disclaimers separating personal views from those of the employer is found in the Cardinal Health Ethics Guide: "In the conduct of their personal, civic, and political affairs, employees should *at all times make clear* that their views, actions, gifts and contributions are their own and are not those of Cardinal Health." For perplexing vagueness, there is Disney's admonition to employees that they can participate as private citizens in politics unless it "would give rise to an improper appearance of partiality."¹⁶³

These policies are directed at employees generally, including supervisors and line employees.¹⁶⁴ For these employees, the admonition not to create an impression that they speak for the company is both advisable and sufficient. Such a rule would not be enough to prevent the connection when the CEO speaks because the speech would automatically be connected with the company. For a CEO, the only choice that would not interfere with the company image would be a policy prohibiting any public statements about a specified list of issues.

163. BARRY, *supra* note 7, at 202 (footnotes omitted).

164. *See id.*

One might even reason that a company board of directors has a fiduciary obligation to shareholders to avoid a firebrand in favor of a milquetoast. Certainly, companies can avoid the problems discussed by hiring executives who keep their opinions to themselves. Some boards might prefer such a course, but the business judgment rule would protect a board that opted for a more divisive character.¹⁶⁵ American business history is filled with controversial corporate leaders who produced great wealth for their shareholders.¹⁶⁶

Conclusion

The recent spate of executive and corporate expressions on controversial issues has a number of legal ramifications. Initially, when government officials threaten to refuse permits to lawful businesses or make other indirect threats based on the content of executive speech, as they did to Chick-fil-A, they run afoul of the First Amendment. The First Amendment and its state equivalents protect executives from government retaliation, but not from corporate retaliation by their own shareholders or boards of directors. Shareholders generally must gain the support of the majority to effect a change in management based on speech they deem offensive. The board of directors may fire or refuse to hire chief executives because the views they express do not mesh with “corporate culture.” The law may permit this, even if the conflicts are religiously based. State statutes shielding employee political activity and beliefs are also unlikely to protect chief executives. Corporate boards may attempt to navigate around the quagmire by requiring executives to stay out of the public square. However, the business judgment rule will likely protect a board if it declines to dismiss a controversial executive.

165. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds* by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

166. See, e.g., Hardy Green, *A Titan of Industry—and a Bigot*, BUS. WK. (Jan. 20, 2002), <http://www.businessweek.com/stories/2002-01-20/a-titan-of-industry-and-a-bigot> (reviewing HARDY GREEN, *HENRY FORD AND THE JEWS: THE MASS PRODUCTION OF HATE* (2003)).