# BUILDING A "NEW INSTITUTIONAL" APPROACH TO CORPORATE SPEECH

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## I. INTRODUCTION

Is there a way to prevent the impending train wreck involving the Supreme Court's corporate speech jurisprudence? This Article represents the second installment in a three-part series designed to articulate a New Institutional approach to corporate speech that could foil the otherwise inevitable collision between the commercial speech doctrine and the Supreme Court's disparate approach to corporate political speech.

The problem arises because corporations are attempting to escape regulation or liability in a variety of settings by investing commercial messages with just enough political content to render the amalgam of politically tinged corporate speech fully protected under the First Amendment. Why would this strategy work? If corporate speech is political, existing Supreme Court jurisprudence suggests that government should play almost no role in regulating the speech, regardless of its truth or falsity. In contrast, if the corporate speech is commercial, the commercial speech doctrine permits governmental regulation to ensure consumers and investors receive truthful information. This dichotomy in the Supreme Court's approach creates a perverse incentive for corporations to engage in an artful alchemy of mixing just enough political content with otherwise commercial speech to garner the most stringent constitutional protection. As corporations practice that

alchemy with increasing frequency and sophistication, a wide array of regulatory regimes face potential constitutional attack.

The first article in the series, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment,*[1] brought to light the impending jurisprudential train wreck in the realm of securities regulation and suggested that an institutional analysis of speech rights might prevent the collision. That particular regulatory context provided an especially fertile point of analysis, considering that securities laws entail content-based restrictions on compelled speech that often touch upon inherently political matters.[2] Since the Supreme Court has never clearly articulated any reasons for carving out the securities laws from the protective reach of the First Amendment,[3] affording politically tinged corporate speech full First Amendment protection would cast doubt on the continued viability of the securities regulation regime itself. Advancing an institutional theory recently developed by Frederick Schauer,[4] however, the article concluded that the institutional importance of the securities regulation regime to American society and the essential role that speech restrictions play in furthering the basic function of the regulatory institution combined to provide sufficient grounds for insulating the securities laws from constitutional attack.[5]

In this second work of the series, the project is to construct a comprehensive philosophical and methodological framework for a New Institutional approach to corporate speech jurisprudence that courts could actually adopt and apply as cases of politically tinged corporate speech arise in other contexts. The project emphasizes a multidisciplinary approach to institutional theory, utilizing concepts culled from works in political science, sociology, economics, and the law. The third article in the series will demonstrate how to implement the analytical construct and methodologies described here by marshalling fresh empirical data and arguments to solve a pressing corporate speech problem.

Regarding the task at hand, Part II excavates the incoherence of current First Amendment corporate speech jurisprudence, paying particular attention to the incompatibility between the commercial speech doctrine and the Court's disparate approach to corporate political speech. Part III then establishes the multidisciplinary foundation for a New Institutional speech approach by discussing various strands of New Institutional theory across academic disciplines and identifying some important common themes. Turning to current institutional approaches, Part IV surveys the landscape of existing institutional speech theories and assesses some of the shortcomings from which each suffers. Part V crafts the architectural plans for a New Institu-

1. Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006).

2. *Id.* at 613–14.

3. *Id.* at 642.

4. *See* Frederick Schauer, *Towards an Institutional First Amendment,* 89 MINN. L. REV. 1256 (2005).

5. Siebecker, *supra* note 1, at 672.

tional approach to corporate speech, providing specific guidelines to courts regarding the structure of the analytical framework and methods for assessing new corporate speech claims. Finally, Part VI concludes that a robust New Institutional analysis provides a way to escape the impending train wreck facing the Supreme Court's corporate speech jurisprudence and may even provide a platform for adopting an institutional outlook in other rights contexts as well.

## II. EXCAVATING THE INCOHERENCE OF FIRST AMENDMENT JURISPRUDENCE

The incoherence in existing First Amendment jurisprudence arises out of a growing incompatibility between the commercial speech doctrine and the Supreme Court's approach to corporate political speech. While the Supreme Court permits governmental regulation of commercial speech to ensure the market receives accurate information about products and companies,[6] the Supreme Court strictly scrutinizes governmental regulation of corporate political speech,[7] except in limited circumstances.[8] The core of the problem lies in the Supreme Court's failure to define adequately what constitutes commercial speech, political speech, or the boundary between them. For when corporate speech includes a mix of commercial and political speech, knowing which branch of corporate speech jurisprudence to apply becomes difficult, if not impossible, to discern.

As corporations exploit that glaring definitional defect, the entire analytical framework becomes unstable. For example, in *Nike, Inc. v. Kasky*,[9] a case fully argued before the Supreme Court prior to being remanded for additional fact finding, Nike claimed that its allegedly false and misleading statements made to the press about its overseas labor practices were immune from liability under a California consumer fraud statute because the statements about company practices were part of an ongoing political debate over international labor standards.[10] In order to elevate the level of protection afforded its public comments, Nike essentially asked the Supreme

6. *See* Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 802 (1998) ("[U]nlike the complex dignitary justifications underlying First Amendment protection of political speech, First Amendment protection of commercial speech exists for only one reason—to assure a flow of accurate information to consumers necessary to the functioning of efficient markets."); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.").

7. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990).

8. *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003) (upholding a federal regulation that effectively barred a corporation from using treasury funds to produce advertisements that merely mention a candidate's name within sixty days of an election). *See generally infra* Subpart II.B (discussing the Supreme Court's approach to corporate political speech).

9. 539 U.S. 654 (2003) (per curiam).

10. Brief for Petitioners at 21–24, Nike, Inc. v. Kasky, 593 U.S. 654 (2003) (No. 02-575), 2003 WL 898993; *see also* David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1049–50 (2004).

Court to collapse the distinct analytical frameworks for corporate speech and commercial speech and to provide full First Amendment protection whenever a corporate statement touches a matter of public concern.[11] With increasing regularity, corporations like Nike engage in an artful alchemy of mixing just enough political commentary with commercial messages to create an amalgam deserving the most stringent constitutional protection.[12] To the extent corporations enjoy success in manipulating the defects in existing corporate speech jurisprudence to avoid public regulations, adherence to the Supreme Court's flawed framework threatens the viability of some of the most socially important regulatory regimes.[13]

Understanding why current First Amendment jurisprudence remains incapable of addressing important corporate speech questions requires some explanation of the current state of the commercial speech doctrine and the Supreme Court's approach to corporate political speech. Because the first article in this series fully detailed the historical evolution and defects of each branch,[14] only a short recapitulation follows. Even a brief summary, however, reveals that each strand of existing corporate speech jurisprudence suffers from serious defects. Of course, the difficulty in determining which

11. *See* Siebecker, *supra* note 1, at 617–18.

12. *See, e.g.*, Sosa v. DirecTV, Inc., 437 F.3d 923, 927, 929–32, 942 (9th Cir. 2006) (accepting satellite television company's claim that it could not be subject to RICO liability for sending thousands of demand letters to individuals who allegedly accessed the satellite signal without authorization because those letters constituted protected speech under the First Amendment); Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 585-86 (2d Cir. 2000) (noting that, although the plaintiff corporation's Internet domain names did not constitute speech immune from antitrust regulation, "domain names may be employed for a variety of communicative purposes with both functional and expressive elements, ranging from the truly mundane . . . to commercial speech and even core political speech squarely implicating First Amendment concerns. . . . [W]e do not preclude the possibility that certain domain names and new gTLDs, could indeed amount to protected speech"); New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1110–11 (C.D. Cal. 2004) (holding that defendant Lavasoft was immune from liability under a deceptive trade practices statute for statements about plaintiff's software on Lavasoft's Web site and in code embedded in Lavasoft's Ad-Aware detection software because those statements were not commercial speech); Bernardo v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197, 215–21 (Cal. Ct. App. 2004) (granting charitable organization's motion to dismiss under anti-SLAPP (strategic lawsuit against public participation) statute where court accepted charitable organization's claim that its publications containing allegedly false statements about the safety of abortions were noncommercial speech); DuPont Merck Pharm. Co. v. Super. Court, 92 Cal. Rptr. 2d 755, 759–60 (Cal. Ct. App. 2000) (granting corporation's motion to dismiss under anti-SLAPP statute because court accepted corporation's claim that its allegedly false statements in lobbying and public relations represented political speech); Brief of Appellants at 18–19, CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456 (4th Cir. 2000) (No. 99-2318), 1999 WL 33613989 (claiming that corporations Web postings describing a protracted trademark and copyright dispute could not be subjected to an injunction as false and misleading speech because the Web postings were a form of "parochial" speech deserving full First Amendment protection); *see also* Tamara R. Piety, *Grounding* Nike*: Exposing* Nike*'s Quest for a Constitutional Right To Lie*, 78 TEMP. L. REV. 151, 188–99 (2005) (describing a variety of contexts in which corporations could claim political speech rights to evade regulation or liability).

13. Siebecker, *supra* note 1, 656–71 (discussing how granting full First Amendment protection to politically tinged commercial speech would unravel some of the most important provisions of the securities laws); *cf.* Jacob Bunge, *Goldstein Presses Free Speech Argument; Others Uncertain*, HEDGEWORLD DAILY NEWS, Feb. 22, 2007, *available at* 2007 WLNR 3505612 (describing a hedge fund manager's claim that certain investor solicitation rules under the securities laws unconstitutionally implicate political speech rights).

14. *See* Siebecker, *supra* note 1, at 629–45.

analytical framework applies only compounds those defects. In the end, awareness of the incoherence from which current jurisprudence suffers suggests looking for a more sensible, institutionally sensitive analytical framework.

### *A. Commercial Speech Doctrine*

The Supreme Court announced the controlling standard governing commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[15] Using a four-part test to assess whether commercial speech deserves constitutional protection, the Court struck down a regulation that banned advertising by a utility company.[16] As applied by the Supreme Court, however, the *Central Hudson* test has produced highly inconsistent levels of protection for commercial speech and garnered sharp criticism for that inconsistency as well.[17] At some times, the test affords significant protection to commercial speech even when significant governmental interests are at stake; at others, the test permits significant regulation even when the governmental interests seem slight.[18]

Surveying just a few cases sufficiently demonstrates the grounds for frustration. Fluctuating toward greater protection for commercial speech, the Court struck down a prohibition on advertising liquor prices in *44 Liquormart, Inc. v. Rhode Island*.[19] Later, in *Lorillard Tobacco Co. v. Reilly*,[20] the Court considered the constitutionality of restrictions on tobacco sales in close proximity to schools and playgrounds. Although accepting the strong governmental interest in curtailing underage tobacco use, the Court struck down the statute because the regulation did not narrowly target the government's interest in protecting minors.[21] Applying the test in the context of politically tinged commercial speech in *Bolger v. Youngs Drug Products Corp.*,[22] the Court struck down a federal statute prohibiting unsolicited mail-

15. 447 U.S. 557 (1980).

16. *Id.* at 566, 571. As the Court stated:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566.

17. For general criticism of the vagueness of the *Central Hudson* framework, see Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) (asserting the test fails to embody any discernable constitutional values). *See also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630–31 (1990) (criticizing the lack of a principled framework to understand or apply *Central Hudson*); Alex Kozinski & Eugene Volokh, Commentary, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1645 (1993) (describing the test's vagueness and the difficulty in ensuring its consistent application).

18. *See* Kozinski & Banner, *supra* note 17, at 631.

19. 517 U.S. 484, 534 (1996).

20. 533 U.S. 525 (2001).

21. *Id.* at 561–67.

22. 463 U.S. 60, 69 (1983).

ing of contraceptive advertisements. The Court found that the pamphlets at issue, which described how the drug manufacturer's condoms prevented unwanted pregnancies, contained commercial messages along with "discussions of important public issues."[23] Absent a clear definition of commercial speech to control the analysis, the Court simply announced that taken as a whole the pamphlets constituted commercial speech.[24] Although government may play a greater role in regulating commercial speech, the Court nonetheless struck down the statute after determining it was not narrowly tailored to the governmental interest in promoting parental counseling on birth control issues.[25]

In contrast, fluctuating toward greater regulation of commercial speech, the Court upheld a ban on advertisements for casino gambling in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[26] The Court found a sufficiently tight fit between the statute and the governmental interest in curtailing gambling, even though the only form of gambling targeted was betting in casinos.[27] The Supreme Court effectively repudiated *Posadas* just a few years later in *44 Liquormart*,[28] but it is the very fluctuation in applying the *Central Hudson* test which underscores the vagueness of the doctrinal framework. Moreover, in *Board of Trustees v. Fox*,[29] the Court upheld a statute prohibiting private companies from selling products on a state college campus. Acknowledging the potential vagueness of the intermediate scrutiny applied,[30] the Court stated "we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.'"[31] Taking that leeway to heart, the Court upheld the commercial speech restriction.[32]

For some scholars, the variance in decisions rendered under the *Central Hudson* framework seems ad hoc and without a consistent definition of commercial speech or a unifying speech principle to explain the extant shape of commercial speech rights.[33] To the extent corporations succeed in blurring the definitional boundary between commercial and political speech, however, a new set of potentially relevant standards governing corporate political speech will only compound any frustration.

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23. *Id.* at 67–68.
24. *See id.* at 67.
25. *See id.* at 72–75.
26. 478 U.S. 328, 341–44 (1986).
27. *See id.* at 341–42.
28. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509 (1996).
29. 492 U.S. 469, 485–86 (1989).
30. *See id.* at 480. For a description of the *Central Hudson* framework as applying an intermediate level of scrutiny, see also Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1178–79 (2005).
31. 492 U.S. at 480–81 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).
32. *See id.* at 485–86.
33. *See, e.g.*, Kozinski & Volokh, *supra* note 17, at 1645; Post, *supra* note 17, at 5.

### *B. Corporate Political Speech*

With respect to corporate political speech, the level of constitutional protection depends on the context in which the speech occurs. Although, outside the confines of an upcoming election for political office, the First Amendment deems irrelevant the identity of the speaker as a corporation or a person, when an election draws near, the political speech of corporations may face greater regulation.

Outside the restricted context of an election for office, corporations enjoy robust political speech rights. In *First National Bank of Boston v. Bellotti*,[34] the Supreme Court addressed a Massachusetts criminal statute prohibiting a corporation from contributing to ballot initiatives unrelated to its business. Because fostering debate about governmental policies represents the primary focus of the First Amendment, the Court noted that "[i]t is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[35] Using strict scrutiny to strike down the statute, the Court concluded that regardless of whether political speech comes from a person or business entity, the value in informing public discourse remains constant.[36]

With similarly broad statements about the protection corporate political speech enjoys, in *Pacific Gas & Electric Co. v. Public Utilities Commission*[37] the Court held unconstitutional a state commission's order requiring public utilities to include third party newsletters along with the monthly bills sent to customers. In striking down the statute, the Court stated that "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[38] Outside the context of an election for public office, then, corporations seemingly enjoy the same political speech rights as individuals.

Corporations sacrifice that sense of equality within the context of an election. The justification for that disparate treatment appears in a long line of cases[39] that track the evolution of campaign finance restrictions first considered in *Buckley v. Valeo*.[40] Although the contours of the Court's jurispru-

34. 435 U.S. 765 (1978).
35. *Id.* at 777 (footnotes omitted).
36. *Id.* at 777, 786.
37. 475 U.S. 1, 8–9 (1986) (plurality opinion).
38. *Id.* at 8 (quoting *Bellotti*, 435 U.S. at 783).
39. *See generally* FEC v. Beaumont, 539 U.S. 146, 152–56 (2003) (discussing the growth and evolution of this line of cases).
40. 424 U.S. 1 (1976) (upholding campaign restrictions contained in the Federal Election Campaign Act of 1971, which limited campaign contributions to $1,000 by any person or corporation, after interpreting the limitation to apply to instances of "express advocacy" mentioning a clearly identified candidate in an upcoming election); *see also* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C.A. §§ 431–456 (West 1999 & Supp. 2007)).

dence in this area of corporate speech certainly evolve,[41] a rather consistent theme justifying restrictions on corporate political speech stresses the host of ills resulting from excessive corporate spending and the corrosive control of corporations over the electoral process.[42] In *McConnell v. FEC*,[43] the Court upheld a federal regulation effectively barring a corporation from using treasury funds to produce advertisements that even mention a candidate's name within sixty days of an election.[44] In its decision, the Court echoed its prior sentiments about corporate political speech rights, stating "[w]e have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[45]

More recently, however, in *FEC v. Wisconsin Right to Life, Inc.*,[46] the Court struck down a part of the Bipartisan Campaign Reform Act of 2002[47] that prohibited advertisements funded by corporations or unions if the ads mentioned particular candidates for office and appeared sixty days before the election.[48] The majority opinion held that a corporately funded political

41. *See* Siebecker, *supra* note 1, at 636–41 (describing in greater detail the evolving treatment of corporate political speech jurisprudence within the context of an election for office); *see also infra* notes 46–51 and accompanying text (discussing the most recent change in the Supreme Court's test for permissible regulation of corporate political speech in FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007)).

42. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256–57 (1986). The Court stated:

> We have described that rationale in recent opinions as the need to restrict 'the influence of political war chests funneled through the corporate form,' [quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 501 (1985)]; to 'eliminate the effect of aggregated wealth on federal elections,' [quoting Pipefitters v. United States, 407 U.S. 385, 416 (1972)]; to curb the political influence of 'those who exercise control over large aggregations of capital,' [quoting United States v. Automobile Workers, 352 U.S. 567, 585 (1957)]; and to regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization,' [quoting FEC v. National Right to Work Committee, 459 U.S. 197, 207 (1982)]. This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes' observation that 'the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .' ([quoting] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."

*Id.* at 257.

43. 540 U.S. 93 (2003).

44. *See id.* at 189–90, 203–09 (upholding the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b (2000))).

45. *McConnell*, 540 U.S. at 205 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)); *see also* Lyrissa Barnett Lidsky, Brandenburg *and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1025–26 (2002) (asserting that media corporations set the agenda for public debates based on what enhances profits); Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1554–55 (2007) (explaining that under *McConnell*, avoiding undue corporate influence over the electoral process provides a legitimate basis for regulating political speech of corporations and unions).

46. 127 S. Ct. 2652 (2007).

47. *See* Pub. L. No. 107-155, §§ 203–204, 116 Stat. 91, 92 (codified at 2 U.S.C. § 441b (2000)).

48. *Wis. Right to Life*, 127 S. Ct. at 2671.

advertisement opposing a Senate filibuster of judicial nominees deserved constitutional protection despite naming in the ad a particular senator who was running for re-election.[49] Without overruling the decision in *McConnell*, Chief Justice Roberts crafted a more protective standard for corporate speech that permitted banning corporately funded ads only if "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[50] Even with the heightened protection accorded to corporate speech under *Wisconsin Right to Life*, the Court continues to recognize that corporate speech may face legitimate governmental regulation to protect the political process.[51] So, in contrast to the parity corporations enjoy with other political speakers outside the context of an election, corporations must find solace in a lower level of constitutional protection when speaking on political matters too close to election day.

This analysis, which demonstrates the different levels of protection accorded to corporate political speech in different contexts, does not seek to uncover some fundamental flaw in how the Supreme Court selects among various speech norms to decide particular cases.[52] Instead, the goal is merely to reveal that the speech rights vary *because* the Supreme Court simply selects different norms depending on the context. That awareness actually makes the next step towards a New Institutional analysis much easier to take.

What connects the Court's jurisprudence in the area of corporate political speech to commercial speech doctrine is the dogged aversion to articulating any clear definition of political speech itself. We may easily count sixty days backwards from election day to determine when a corporation loses its broad political speech protections. But such a clear temporal trigger for permitting regulation of corporate political speech simply does not help determine the threshold question of whether the Court's political speech jurisprudence should even be the relevant framework for assessing the constitutionality of any instance of corporate speech. Without clear definitions of commercial speech, political speech, and the boundaries between them, it simply becomes impossible to know whether the commercial speech doctrine or the Court's approach to corporate political speech should determine the speech rights corporations enjoy, at least when instances of politically tinged corporate speech arise. Thus, the Court's apathy towards establishing definitional boundaries not only renders incoherent its corporate speech jurisprudence but makes a collision between the commercial speech doc-

49. *Id.* at 2659–61.
50. *Id.* at 2667.
51. *See id.* at 2672–73.
52. For criticisms of the Supreme Court as selecting arbitrarily among competing speech norms, see Samuel A. Terilli, Nike v. Kasky *and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383 (2005); David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651 (2005); William Warner Eldridge IV, Note, *Just Do It:* Kasky v. Nike, Inc. *Illustrates That It Is Time to Abandon the Commercial Speech Doctrine*, 12 GEO. MASON L. REV. 179 (2003).

trine and the Supreme Court's approach to corporate political speech all but imminent in any number of regulatory settings.

## III. ESTABLISHING THE FOUNDATION FOR A NEW INSTITUTIONAL SPEECH THEORY

Establishing the foundation for a New Institutional speech theory requires a brief recapitulation of the evolution of institutionalism from its "old" into its "new" form, as well as discussion of variations in how different academic disciplines embrace New Institutional theory. While institutional analysis possesses a somewhat malleable nature, some important considerations cut across the spectrum of approaches. Understanding those considerations provides a firm footing upon which to build a New Institutional approach to corporate speech rights under the First Amendment.

### *A. The Evolution of New Institutionalism*

New Institutionalism emerged as a rejection of a much more static treatment of institutions associated with the legal formalism that dominated the first half of the twentieth century.[53] In contrast, "Old Institutionalism" attempted simply to describe human behavior as a product of formal structures and rules rather than to explain a dynamic relationship between norms and practices or a dialectic exchange between law and institutional structures.[54] Focusing on group conflict and organizational strategy, Old Institutionalism looked to those formal structures to explain in broad terms various aspects of social, political, and economic life.[55] A lack of attention to what animated individual behavior and the inability to divine a more general theory that could apply across institutional settings limited the attractiveness of

53. *See* B. GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE "NEW INSTITUTIONALISM" 6–7 (1999); André Lecours, *New Institutionalism: Issues and Questions*, *in* NEW INSTITUTIONALISM: THEORY AND ANALYSIS 1, 3 (André Lecours ed., 2005) [herinafter NEW INSTITUTIONALISM] (referring to "a formal-legal style of scholarship, retrospectively dubbed 'old institutionalism,' which was criticized for being descriptive, a-theoretical and parochial"); *see also* Keith E. Whittington, *Once More unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 613 (2000) (book review) (describing "the supposed arid formalism of the 'old' institutionalism of the early twentieth century, which sought to understand politics by examining the law on the books—constitutions, statutes, or administrative procedures"). For a detailed description of the fall of the legal formalism, see Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–1402 (1996).

54. *See* Paul J. DiMaggio & Walter W. Powell, *Introduction*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, at 1, 2–3 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (stating that the old institutionalism "focused on . . . mechanisms through which social and economic action occurred . . . . These older lineages fell into disfavor not because they asked the wrong questions, but because they provided answers that were either largely descriptive and historically specific or so abstract as to lack explanatory punch"); *see also* PETERS, *supra* note 53, at 2 ("[T]he methodology employed by the old institutionalism is largely that of the intelligent observer attempting to describe and understand the political world around him or her in non-abstract terms.").

55. For a detailed descriptions of the distinctions between "old" and "new" institutional theory, see DiMaggio & Powell, *supra* note 54, at 1–15; and PETERS, *supra* note 53, at 1–17.

the Old Institutional approach.[56] Moreover, the formalistic approach failed to account for important cultural and political developments actually observed, such as the social and political upheaval of the 1960s.[57]

In contrast, New Institutionalism embraces a more dynamic outlook. The growing interest in behavioral and rational choice theory in the latter part of the twentieth century had a significant impact on the shape of institutional analysis.[58] Those particular schools emphasized the need to move beyond parochial descriptive projects towards greater theoretical constructs that could help understand and predict behavior in a variety of settings. Moreover, the behavioral and rational choice movements promoted discrete methodologies that provided a more consistent framework for investigating and discussing social problems.[59] From that platform, a New Institutional scholarship began to emerge that focused on problems of collective action, the dialectic interplay between contexts and values, layered relationships among actors and institutional settings over periods of time, and empirical methods for determining what animates individual and social action.[60]

In some sense, the very breadth of the analytical framework may do little to provide an appropriately cabined sense of exactly what a New Institutional approach entails. To the extent that initial confusion exists, it may grow even more intense in the next section with a description of the various strands of New Institutional analysis across academic disciplines.[61] But understanding that the movement originated as a somewhat reactionary and organic analytical framework not only makes the existence of disparate approaches less unsettling but also facilitates acceptance of the rather flexible New Institutional approach to corporate speech ultimately advocated in this project.

### *B. Schools of Thought*

At present, New Institutional theory has branched out in a variety of different directions, and a diversity of opinion abounds regarding the proper shape the theoretical construct should take. As one New Institutional scholar noted, "New institutionalists have made the case for giving institutions analytical primacy, but substantial disagreements remain over how institutional analysis should be carried out."[62] Indeed, scholars apply different strands of

56. *See* John L. Campbell & Ove K. Pedersen, *The Rise of Neoliberalism and Institutional Analysis*, *in* THE RISE OF NEOLIBERALISM AND INSTITUTIONAL ANALYSIS 1, 13–14 (2001) [hereinafter NEOLIBERALISM AND INSTITUTIONAL ANALYSIS].

57. *See id.* (arguing that the structural formalists' predictions made in the 1950s were not borne out due in part to the failure to anticipate the social turmoil of the 1960s).

58. *See* PETERS, *supra* note 53, at 13; Karol Soltan et al., *New Institutionalism: Institutions and Social Order*, *in* INSTITUTIONS AND SOCIAL ORDER 3, 5 (1998).

59. *See* PETERS, *supra* note 53, at 15–17.

60. *See id.*; James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life,* 78 AM. POL. SCI. REV. 734, 738–43 (1984); Soltan et al., *supra* note 58, at 5–9.

61. *See infra* Subpart III.B.

62. Lecours, *supra* note 53, at 3.

New Institutional theory in a variety of academic fields, including political science, sociology, economics, history, and law.[63] Even within those disciplines, the selection of which particular strand of New Institutional theory to apply remains contested.[64] No consensus even exists about the number of extant branches of institutional theory, with scholars recognizing between three and seven versions.[65] Disagreement over some of the most basic concerns, such as what constitutes an institution, runs through the literature.[66] The tenets of the analytical approaches vary so significantly that some even question whether a coherent core to New Institutionalism actually exists.[67] By surveying some of the more commonly accepted strands of New Institutionalism, the aim is certainly not to undermine confidence in the integrity of the framework. Instead, the goal is to demonstrate that the predictive value of the analytical framework remains sufficiently flexible to apply in a variety of contexts.

*1. Normative*

Normative institutionalism focuses on the internal values that define institutional functions as well as shape the preferences of those who act within any given institutional setting.[68] While the notion of "institution" varies, a typical definition treats institutions simply as bundles of commonly accepted norms and understandings that organize behavior in any given setting over time.[69] According to the approach, understanding why institutions embrace norms leads to a better sense of why individuals act in certain

63. *See* Soltan et al., *supra* note 58, at 6–9.

64. *See id.* at 4–9 (discussing the differences between the institutional theories both within and accross disciplines).

65. *See, e.g.*, PETERS, *supra* note 53, at 19–20 (presenting six strands); Campbell & Pedersen, *supra* note 56, at 2–3 (articulating four versions); Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, *in* INSTITUTIONS AND SOCIAL ORDER, *supra* note 58, at 15, 15–27 (Karol Soltan et al. eds., 1998) (suggesting three strands exist); Hudson Meadwell, *Institutions and Political Rationality, in* NEW INSTITUTIONALISM, *supra* note 53, at 80, 82 (describing three branches); Karol Soltan, *Institutions as Products of Politics*, *in* INSTITUTIONS AND SOCIAL ORDER, *supra* note 58, at 45, 45 (listing seven variations and noting the existence of "others").

66. *See* Tom Ginsburg & Robert A. Kagan, *Institutionalist Approaches to Courts as Political Actors*, *in* INSTITUTIONS AND PUBLIC LAW 1, 1–2 (Tom Ginsburg & Robert A. Kagan eds., 2005) (detailing the various interpretations of institutions and institutionalism across academic disciplines); W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493 (1987) ("The concepts of institution and institutionalization have been defined in diverse ways, with substantial variation among approaches."); Martin Shapiro, *Law, Courts and Politics*, *in* INSTITUTIONS AND PUBLIC LAW, *supra*, at 275, 292 (discussing the ambiguity in the definition of "institution" among different strands of new institutional scholarship). *But see* Philip Selznick, *Institutionalism "Old" and "New*,*"* 41 ADMIN. SCI. Q. 270, 273 (1996) ("Nor do significant differences appear in the way 'institution' and 'institutionalization' are defined.").

67. *See* Soltan et al., *supra* note 58, at 5–6; *see also* Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC'Y 5 (1998).

68. *See* PETERS, *supra* note 53, at 19; *see also* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989) (providing an early example of a normative New Institutional theory).

69. *See* MARCH & OLSEN, *supra* note 68, at 21–23.

ways, both inside and outside the institutional framework.[70] Casting aside rational choice or utilitarian models of behavior as incapable of attending to arguably non-rational values that affect people's lives, the normative institutional approach instead focuses on the mechanisms for forming and changing values.[71]

For some, normative institutionalism too closely resembles the type of institutional analysis associated with legal formalism.[72] The criticism targets the attention paid to clashes among different organizational structures (e.g., unions, the local political party, environmental action groups, etc.) that might affect the norms within a particular institutional structure (e.g., a company).[73] Still, normative institutionalism properly finds a place in New Institutional theory if for no other reason than this particular strand sparked the resurgence in institutional analysis in social and political science.[74]

*2. Historical*

Historical institutionalism begins by conceiving institutions as important organizational structures of political and economic life.[75] Within the approach, however, the definition of "institution" remains a bit nebulous, running the gamut from formal governmental structures, such as legislatures, to more malleable constructs, such as social classes and legal values.[76] Despite the breadth in defining what constitutes an appropriate institution for analysis, what links the various applications of historical institutionalism is the common question of "how variations in political or other institutions shape actors' capacities for action, policy making, and institution building."[77] According to the approach, the policy choices made when institutions are formed or when rules are promulgated endure and constrain the ability of individuals to change those initial commitments.[78] The goal of the approach is to explain why policies exist and endure, especially in terms of comparing political commitments across different political, social, or economic communities.[79]

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70. *See* PETERS, *supra* note 53, at 19.

71. *See id.* at 25 (explaining that March's and Olsen's normative approach criticized utilitarian and rational choice theories).

72. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 909–10 (1996); *see also* PETERS, *supra* note 53, at 26–27 (acknowledging that this early strand of New Institutional theory has clear roots in the "old" institutional framework).

73. PETERS, *supra* note 53, at 25–27.

74. *See id.* at 25.

75. *See* Hall & Taylor, *supra* note 65, at 17.

76. *See* PETERS, *supra* note 53, at 65.

77. Campbell & Pedersen, *supra* note 56, at 9 (footnote omitted). *See generally* Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, *in* STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 1, 1–3 (Steinmo et al. eds., 1992).

78. PETERS, *supra* note 53, at 63; John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, *in* NEOLIBERALISM AND INSTITUTIONAL ANALYSIS, *supra* note 56, at 159, 160.

79. *See* PETERS, *supra* note 53, at 73 (noting that the fundamental purpose of the approach is to explain the persistence of institutions and their policies).

*3. Rational Choice*

Rational choice institutionalism typically relies on economic principles and game theory to investigate why institutions emerge, what controls institutional action, and what accounts for strategic interaction among institutions and actors within institutional settings.[80] Central to rational choice institutionalism is the assumption that individuals act rationally to maximize their self-interested sense of utility.[81] Within that framework, institutions represent collective mechanisms to facilitate exchange and reduce costs that impair efficient bargaining.[82] Thus, the analysis can focus on rules of the game or on formal organizational structures that constrain or affect choice.[83]

More nuanced applications of rational choice institutionalism incorporate historical narratives as constraints to gain a better understanding of the choices individuals make within any organizational structure.[84] Still, rational choice institutionalism does not focus on the formation of norms or cultural values themselves.[85] Instead, the basic project remains an investigation into how individual rationality affects institutional design, function, and change.[86]

*4. Sociological*

Sociological institutionalism targets the uncertainty within organizational structures by suggesting that interests and actions of individuals are determined not by historical constraints or rational choices but instead by habitual adherence to certain cultural values, routines, or patterns.[87] A problem vexing this brand of institutional analysis is a failure to provide any consistent definition of what an institution entails. Definitions can range from entities defined by symbolic attitudes to formal organizational structures.[88] Regardless of the definitional schizophrenia, what remains at the forefront from a sociological institutional analysis is the question of how institutions are culturally constituted and justified. Put another way, how does discourse involving our cultural values define the function, purpose, and legitimacy of an institutional setting?[89] Through an examination of discourse surrounding different cultural values and attitudes, sociological insti-

80. *See, e.g.*, *id.* at 51–52 (discussing one variant of rational choice institutionalism that relies on game theory).

81. *See id.* at 44; Hall & Taylor, *supra* note 65, at 22.

82. Campbell & Pedersen, *supra* note 56, at 9.

83. *See* Soltan et al., *supra* note 58, at 11 (discussing these variations in rational choice theory).

84. *See, e.g.*, Margaret Levi, *Producing an Analytic Narrative*, *in* CRITICAL COMPARISONS IN POLITICS AND CULTURE 152 (John R. Bowen & Roger Petersen eds., 1999).

85. PETERS, *supra* note 53, at 54–56.

86. *Id.* at 52–61.

87. Campbell, *supra* note 78, at 163. Campbell refers to this variety of institutionalism as organizational institutionalism, a branch of organizational sociology. *Id.*

88. *See* PETERS, *supra* note 53, at 97–98, 105–07.

89. *See* Campbell & Pedersen, *supra* note 56, at 9–11.

tutionalism attempts to discern not just how institutions function but also to determine the appropriateness of institutional constraints.[90]

Clearly, the brief treatment of some common versions of New Institutional theory does not intend to capture fully the extraordinary nuances of continuing scholarship in each field. Moreover, the litany does not even cover many other brands of institutional analysis considered by some to fall under the New Institutional umbrella.[91] What the discussion hopes to demonstrate is the accommodating nature of New Institutional analysis that remains capable not only of cutting across diverse disciplines but also diverse methodologies as well. Of course, to the extent the theory becomes so expansive that it excludes very little, New Institutionalism loses some appeal as a distinct approach. But in the section that follows, some important elements of New Institutional theory, even if not uniformly embraced, mark important conceptual moves that define a coherent and useful framework for taking institutions more seriously.

### *B. Important Considerations*

Considering the range of New Institutional approaches, culling from the discourse all the elements of each analytical framework would present an incredibly difficult task. Moreover, the value of such an effort would seem minimal, unless the goal would be simply to display with utmost clarity every potential point of variation. In addition, the goal is not to provide a list of considerations common across the spectrum of analytical approaches. In light of the diverse frameworks and targets of analysis, reciting those common elements would at most fuel the debate about defining the core of the overarching discipline. Because the ultimate aim of this project is to build a coherent New Institutional approach to corporate speech that courts and litigants could actually adopt, the facets of New Institutional theory selected necessarily support that end. With that caveat in mind, the discussion nonetheless targets some of the more important analytical elements within New Institutional theory.

#### *1. Definition*

Arguably pervading all New Institutional theories is the importance placed on defining what constitutes a relevant institution subject to the analysis. It simply becomes rather difficult to get the analytical ball rolling without knowing where to start.[92] After all, a basic precept of New Institu-

90. *See* PETERS, *supra* note 53, at 98.

91. *See* Soltan, *supra* note 65, at 45 (listing "new statism," "new constitutionalism," and others as forms of New Institutional analysis).

92. *See* Paul Ingram & Brian S. Silverman, *Introduction: The New Institutionalism in Strategic Management*, *in* THE NEW INSTITUTIONALISM IN STRATEGIC MANAGEMENT 1, 7 (Paul Ingram & Brian S. Silverman eds., 2002) ("There are a number of variants of 'new-institutional theory,' so it is important to be clear just what we mean by institutions, and how we understand them to operate.") (citation omit-

tional theory remains the notion that institutions should occupy a central place in social, political, and economic analysis.[93] So, without a sense of what constitutes an institution—whether a loose bundle of symbolic attitudes, a group of principles, a set of rules and processes, or formal organizational structures—the basic project seems doomed at the outset.

Moreover, the essential need for definitional clarity relates to an ancillary point regarding overlapping institutional claims. The existence of multiple institutional sites for analysis creates a complexity that potentially undermines the analytical project.[94] The more a definition of institution targets a formally structured organization, such as a legislative body, the less likely an analysis will have to cope with overlapping institutional claims. In contrast, the more a definition of institution attaches to ambiguous concepts, such as symbols or norms, the more likely the analytical project will contend with competing institutional interests. Why? If the definition of institution relies on the existence of structural organizational boundaries, those structural barriers—sometimes literally physical—necessarily serve to separate the institutional site from others. While for a sociological institutional project the need to define the institutional setting amidst competing cultural habits or rituals represents the primary task,[95] for a rational choice institutional analysis a discrete organizational setting within which to assess individual action represents an essential precondition.[96] Thus the problem of overlapping institutional claims provides a critical connection between the scope of the definition of an institution and the feasible parameters of the analytical project.

A couple of examples might help illustrate the point. If an institutional analysis attempts to analyze the Supreme Court,[97] the institutional setting becomes rather easily defined. An organizational structure provided in the U.S. Constitution, formal rules of legal and administrative procedure, a finite physical space, clearly discernable institutional actors (including justices, clerks, litigants, and judges in lower courts), and a discrete mandate for the judiciary as a distinct branch of government help make the task of defining the Supreme Court fairly manageable. Because the Court embodies a somewhat formal organizational structure, the task of defining the starting point for any institutional analysis of the Supreme Court seems fairly uncomplicated. That definitional task becomes much more difficult if the institutional setting is an abstract social value. As an example, in *Leveling and*

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ted).

93. *See* PETERS, *supra* note 53, at 17.

94. *See* Ryan Fujikawa, Note, *Federal Funding of Human Embryonic Stem Cell Research: An Institutional Examination*, 78 S. CAL. L. REV. 1075, 1099 (2005) ("[C]onstant conflict, over time, leads to conflicting overlapping institutional arrangements that then create an organized chaos, frustrating interested parties and leading to often contradictory and inefficient policy outcomes.").

95. *See* Campbell, *supra* note 78, at 163.

96. *See* PETERS, *supra* note 53, at 54.

97. *See, e.g.*, Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives*, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 63 (Howard Gillman & Cornell Clayton eds., 1999).

*Leadership: Hierarchy and Social Order*,[98] Gary Miller and Kathleen Cook examine how the social institution of "hierarchy" sustains or undermines social order. At the outset of the piece, the pair address the particular challenge of defining the institution of hierarchy, stating "the degree of overt conflict and the degree of hierarchy are highly variable. From the tension surrounding social dominance may emerge quite different institutional forms—ranging from egalitarian communities to totalitarian states, from atomistic markets to coercive hierarchies."[99] The point is not to suggest anything about the success of the authors' analytical project but simply to highlight the increasing challenge that defining an institutional setting poses as the structural boundaries of the institution examined become less definite.

*2. Perspective*

Identifying the proper perspective from which to understand an institutional framework marks an essential element of a New Institutional project. Without doubt, perspective affects interpretation.[100] The difficulty in selecting the appropriate interpretive perspective from which to assess institutional structures, functions, and effects varies depending upon the particular strand of New Institutionalism considered. For some types of New Institutionalism, such as rational choice institutionalism, the analytical perspective is fairly clear from the outset. Within the rational choice branch of institutional theory, the rational mind of a self-interested, utility- maximizing individual represents the relevant perspective.[101] Although identifying the proper interpretive perspective might not seem like a terribly difficult hurdle to surmount for rational choice institutionalism, the task becomes more difficult—and arguably important—for the remaining institutional analyses that focus on the manner in which the institution both reflects and defines individual preferences.

To the extent that understanding an institution from within its own boundaries makes a difference, attending to the challenge might require adopting a hermeneutic sensitivity. Essentially, a hermeneutic understanding attempts to garner meaning about the institution from the perspective of those operating within the institutional setting and from those naturally affected by their actions.[102] The interpretive position recognizes that every

98. Gary Miller & Kathleen Cook, *Leveling and Leadership: Hierarchy and Social Order*, *in* INSTITUTIONS AND SOCIAL ORDER, *supra* note 58, at 67.

99. *Id.* at 68.

100. For general discussions of how interpretative perspective affects an understanding of law and legal institutions, see Dale A. Nance, *Rules, Standards, and the Internal Point of View,* 75 FORDHAM L. REV. 1287 (2006), applying H.L.A. Hart's interpretive theory to the distinction between legal rules and standards, and Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006), analyzing H.L.A. Hart's concept of the "internal point of view" in relation to other interpretive perspectives.

101. *See* Hall & Taylor, *supra* note 65, at 22–23; Immergut, *supra* note 67, at 12–14.

102. *See* Charles W. Collier, *Law as Interpretation*, 76 CHI.-KENT L. REV. 779 (2000) (discussing the intellectual origins of hermeneutic theory and the role a hermeneutic approach plays in understanding

perspective remains contingent and contextually defined.[103] Rather than cast aside perspective as inappropriately infecting the analysis, a hermeneutic sensitivity makes an awareness of perspective central to understanding.[104] In practical terms, the outlook focuses an exploration of meaning initially from within the institution, from the perspective of those who operate within the framed setting, and takes the meaning garnered from that perspective in light of the institutional role the institutional actors actually play.

*3. Dialectic Exchange*

One of the most analytically attractive aspects of New Institutional theory lies in its approach to understanding institutions as engaged in a continual dialectic exchange with the surroundings they inhabit. For example, in the context of formal organizations, the purpose and function of the organization might be defined significantly by external laws or norms, yet the manner in which the organization instantiates those laws and norms might affect our understanding of what those norms and rules actually entail.[105] Taking the norms or legal rules as static, defined at an instant, and untouched by the organizational structures they form simply misses an essential aspect of what those norms and laws mean in daily life.[106] Understanding how we instantiate and respect rules in formal structures (or even less formal institutional settings) allows us to paint a more detailed and accurate portrait of those rules than what a simple snap shot at the moment of rule formation might reveal.

In some important ways, this facet of New Institutionalism touches upon the importance of attending to institutional definitional concerns and institutional perspective. Each of those components of institutional theory targets the method of gathering meaning. With respect to defining institutions at the outset, meaning comes initially from the frame placed around the analytical project. That frame allows a determination of the relevant participants in the discourse. Similarly, paying adequate attention to perspective provides a more nuanced understanding of the means and motiva-

law); Neil MacCormick, *On Analytical Jurisprudence*, *in* AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM 93, 102–07 (Neil MacCormick & Ota Weinberger eds., 1986).

103. See Jonathan Turley, Introduction: The Hitchhiker's Guide to CLS, Unger, and Deep Thought, 81 NW. U.L. REV. 593, 605 (1987).

104. *See* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 101–02 (2005).

105. Suchman & Edelman, *supra* note 72, at 939 ("At the organizational level of analysis, organizations reciprocally define the law through their practices regarding compliance. Responsive to their cultural environments, organizations often voluntarily seek to comply with legal change. However, the socially constructed nature of legal constraint implies that these efforts, themselves, can mold the meaning of the mandate."); *see also* Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, *in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 19, 30–37 (Mary C. Brinton & Victor Nee eds., 1998) (describing the dialectic exchange between institutions and norms); Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 105–06 (1988) (discussing how organizational structures can shape the law).

106. *See, e.g.*, Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 241 (2003).

tions for the dialectic discourse. It provides a better sense of the substance of the conversation and the effects that discourse might have on institutions, actors, and external environments.

*4. Empirical Methods*

New Institutional theory relies heavily on empirical methods.[107] This is both a blessing and a curse. The blessing comes from an attempt at enhanced clarity regarding the basis for conclusions drawn and the ability to verify propositions through repeated study. The curse comes from the difficulty in prescribing appropriate methods for collecting and interpreting relevant data. Within New Institutional theory, a wide range of analytical methods and strategies exist.[108] Such diversity in techniques for investigation does not necessarily indicate the discipline as a whole suffers from some analytical dysfunction. It does, however, lead to continual debates about the quality and integrity of methods and, more commonly, the relevance of the data.[109] Most certainly, defining the relevant locus of the institutional investigation, deciding what data appropriately targets the questions posed, and settling on a robust method for interpreting the results present difficult empirical challenges.[110] But while the empirical component of New Institutional theory may seem like a terribly imposing wall to scale, the clarity of the view from the top makes the climb seem well worth the effort.

*5. Stability*

Institutional stability represents a threshold consideration in taking up the analytical project at the outset. Although seemingly related to the need for adequate definition of what constitutes an institution, the concept of stability tracks whether or not the analysis can succeed, regardless of the theoretical position on what an institution entails.[111] Quite simply, regardless of the strand of New Institutional analysis attempted, the project simply cannot achieve closure without some continuity of the institutional setting, however defined.[112] The need for data collection, hypothesis testing, and

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107. *See* PETERS, *supra* note 53, at 145.

108. John L. Campbell & Ove K. Pedersen, *The Second Movement in Institutional Analysis*, *in* NEOLIBERALISM AND INSTITUTIONAL ANALYSIS, *supra* note 56, at 249, 251.

109. *See id.* at 251–56 (evaluating the various methods in the preceding chapters of their book).

110. *See* Schauer, *supra* note 4, at 1273.

111. *See* Siobhán Harty, *Theorizing Institutional Change*, *in* NEW INSTITUTIONALISM, *supra* note 53, at 51, 52.

112. *See id.*

> Out of these earliest debates about the merits of new institutionalism emerged one clear point: it would not be possible to study the influence of institutions on preference formation, identity construction, strategic action, and decision-making unless institutions themselves were stable and durable. Whether one is engaged in a longitudinal, cross-national comparison of the evolution of workers' rights or a detailed examination of the role played by legislative rules on the voting patterns of parliamentarians, one assumes institutional continuity.

*Id.*

potential verification of conclusions through replication are just some of the essential tasks of New Institutional analysis that cannot effectively occur without a sufficiently stable institutional site for analysis.[113] Moreover, absent some institutional durability, the predictive value of the analysis shrinks substantially.[114] This consideration applies whether the study examines preference formation, rational decision making, or any other relationship within an institutional construct.[115]

## IV. SURVEYING THE LANDSCAPE OF CURRENT INSTITUTIONAL APPROACHES TO CORPORATE SPEECH

With respect to current institutional approaches to corporate speech, the intellectual terrain may seem somewhat arid. Although some important oases exist, even the most well developed current institutional theory suffers from some theoretical and methodological shortcomings. Surveying the landscape of extant approaches not only provides a stable footing for critical analysis of defects in existing institutional theories but also establishes a springboard for leaping to a more robust New Institutional analysis.[116] Why? If current institutional theories leave important questions unanswered or, perhaps, unanswerable, the need for a new ideational model becomes clearly evident. As a result, the task of this section remains not just descriptive. Instead, the critical analysis intends to inspire awareness that different intellectual tools may be necessary to repair defects in current corporate speech jurisprudence.

### *A. Existing Institutional Speech Theories*

An essential caveat must begin this critical survey. Each of the following approaches represents an incredibly thoughtful attempt to integrate an institutional sensitivity into an understanding of rights discourse generally or speech rights in particular. Noting the ways in which those approaches do not attend to some important aspects of more highly defined institutional theories culled from scholarship in various academic disciplines might seem

113. *See id.*
114. *See* PETERS, *supra* note 53, at 18.
115. *See id.* at 18–20.
116. The survey intends to provide a fully adequate understanding of important efforts to understand corporate speech from an institutional perspective. While comprehensive, the description that follows may not capture every contribution to the development of this new branch of speech jurisprudence. Even if not absolutely complete in that sense, the account of extant institutional theories provides a solid foundation for understanding the current state of institutional analysis and its limitations in solving pressing speech problems that remain. For additional works that might relate more tangentially to an institutional approach to speech, see Howard Gillman, *First Amendment Doctrine as Regime Politics*, 14 THE GOOD SOC'Y 59, 60 (2005), which suggests that First Amendment law should be "understood as serving partisan agendas and sometimes serving broader regime agendas"; and Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989), which discusses how an institutional perspective shapes the development of federal common law generally.

somewhat unfair at the outset. After all, some of the projects discussed do not really intend to advance a grand institutional theory or to comport with scholarship in other academic realms that focus more heavily on institutional concerns. Still, critically examining how each of the existing institutional theories falls short of a sufficiently robust institutional analysis represents an essential step in building a New Institutional approach to corporate speech. For without an understanding of current theoretical imperfections, no incentive for improvement would exist.

With that caveat in mind, precious little connects the various institutional approaches to speech rights. Some of the theories use institutions as contexts for analyzing speech rights while others focus on the speech rights of institutions themselves. While certain speech theorists embrace a broad understanding of institutions, others limit the scope of their project to a few bureaucratic settings.[117] The somewhat schizophrenic discourse regarding institutions and speech makes it rather difficult to nail down a particular state of the art. Recognizing that difficulty in itself provides a first step in moving toward a more robust New Institutional analysis. Nonetheless, guided by the notion that organizational clarity enhances understanding, the following descriptive litany progresses from institutional approaches that connect institutions somewhat tangentially to speech rights and those that consider institutions as central to the analysis. Although some initial critical insights accompany each individual description, a battery of shortcomings shared by the extant institutional approaches appears in the next section.[118]

*1. Personal Liberty and Institutional Speech*

In *Institutional Speech*,[119] Randall Bezanson provides an elaborate defense of free speech based on a respect for human agency. According to Bezanson, only speech traceable to an individual should be protected under the "principal, liberty-based focus of the First Amendment."[120] In the context of institutions, which Bezanson seems to use interchangeably with organizations (e.g., corporations), the First Amendment should afford protection only if it is possible to trace the speech directly to the communicative intent of the individuals who comprise the organization.[121] An organization essentially functions as "a megaphone, a medium, through which individuals have chosen to speak."[122] But speaking, rather than speech, represents the primary concern of the First Amendment.[123] As a result, the primary

117. *See infra* Subpart IV.B.1.
118. *See infra* Subpart IV.B.
119. Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735 (1995).
120. *Id.* at 740.
121. *Id.* at 803 ("In the context of organizations such as corporations, this implies that the speech be traceable to, and therefore attributable to, those individuals who constitute the organization, for the question is one of their intention to join with others to use the greater resources of the organization or the greater strength of a collective voice to express their own views through their own speech.").
122. *Id.*
123. *Id.* at 802.

inquiry focuses on identifying a human speaker whose "own expressive intentions are manifest in the speech and . . . whose authority the speech is a product."[124] Because institutional speech typically cannot be traced to the expressive intentions of every individual who constitutes the institution (whether a corporation or other organizational body), the speech falls outside the protective umbrella of the First Amendment.[125]

Although Bezanson carefully defends a respect for human agency as the hallmark of the First Amendment, he does not embrace a particularly strong sensitivity to institutional contexts or structures. Instead, he separates individual action from collective action and equates institutions, or organizations, with collective action. While individual speakers deserve protection, collective speakers do not unless the speech can be traced to each participant in the collective project. Beyond a determination of whether an organization can effectively act as a "megaphone" that projects the shared yet univocal intentions of its members,[126] Bezanson does not address the reciprocal relationship between institutions and principles, or how context might shape understanding.[127] Although offering a strong defense regarding the nexus between speech rights and human autonomy, he does not adequately attend to the equally important and deeper connection between principles and social practices.

*2. Rights in Authoritarian Institutions*

Utilizing a somewhat upside-down institutional approach, Erwin Chemerinsky argues that institutional settings should not matter in determining the scope of speech rights and other civil liberties. In *The Constitution in Authoritarian Institutions*,[128] Chemerinsky criticizes the Supreme Court for its continual deference to institutional authority and professional expertise in certain authoritarian institutions, such as prisons, schools, and the military.[129] Concerned about the sacrifice of civil liberties in those peculiar institutional settings, he claims that "usual constitutional principles" should be followed to determine the scope of individual rights.[130]

The approach is only *somewhat* upside-down, however, because Chemerinsky soon changes course to advance a heightened sensitivity to those special institutional settings. Based on a presumption that society does not enjoy adequate protection from authoritarian institutions generally, and

124. *Id.* at 803.
125. *See id.*
126. *Id.*
127. For a general discussion of how context affects interpretation of First Amendment principles, see Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623 (2005).
128. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999).
129. *Id.* at 441–42. Although not providing a definition of institution, Chemerinsky offers criteria for defining when other institutions might be properly classified as "authoritarian." *See id.* at 442 n.1.
130. *Id.* at 441.

with the "great likelihood of serious rights violations" in these institutions, Chemerinsky argues that the Supreme Court should afford greater judicial protection of our civil rights in these contexts.[131] Chemerinsky certainly recognizes that the authoritarian institutions he targets "cannot operate consistent with their missions" without a good degree of authority and reliance upon professional expertise.[132] Yet he still urges the Supreme Court to scrutinize more heavily the need for rights restrictions to fulfill the organizational project.[133]

Although Chemerinsky promotes greater civil rights in the face of perceived authoritarian abuses, he does not advocate a theory about the nature of institutions or the dynamic relationship between speech rights and institutional design, structure, and function. What animates his approach is a fear of authority without adequate checking by the courts.[134] He does not, however, provide a detailed analysis of the role structural settings should play in determining rights or of the role that rights should play in defining the proper function of any institution. Of course, those tasks simply could not be undertaken without a workable definition of an institution, which Chemerinsky does not attempt. Chemerinsky's call for greater circumspection regarding the claims for authority and stability in circumstances where civil rights seem less valued remains consonant with an institutional approach to the law. But without adequate guidance on how to discern the basic role and importance of certain institutions in society, in addition to determining the value those institutions place on certain civil rights, Chemerinsky's analysis seems more like a general admonition against blind deference to authority than a call for a new institutional sensitivity to constitutional rights in general.

*3. Institutions as Rights Bearers*

One rather early institutional approach to the First Amendment addressed the structural relationship between the media and the government. In *Journalistic Silence and Governmental Speech: Can Institutions Have Rights?*,[135] Robert Meister suggests looking beyond what he deems the "conventional approach" to First Amendment jurisprudence that pits the state and the individual in constant opposition.[136] At least in the contexts of governmental speech and media communication, Meister suggests that the

131. *Id.* at 458.
132. *Id.* at 460.
133. *Id.* at 461.
134. *See id.* at 441–42, 458.
135. Robert Meister, *Journalistic Silence and Governmental Speech: Can Institutions Have Rights?*, 16 HARV. C.R.-C.L. L. REV. 319 (1981).
136. *See id.* at 342, 375. In a rather unconventional manner, however, Meister explains the "conventional approach" through an analogy to a "generic lawsuit," philosophical distinctions between the "whole" and the "part," and exhortations from various moral theorists. *See id.* at 328–41. Nonetheless, the crux of the "conventional approach" seems to be a simple balancing between individual and state interests to resolve any pressing speech claim. *See id.*

interests of individuals and collective society are mediated in different institutional settings.[137] Without defining what constitutes an institution or the nature of the relationship between individuals, institutions, and the state, Meister argues that individuals necessarily realize their atomistic and collective identities through institutions.[138] Personified in that way, institutions, which Meister presumes to include the media and the government,[139] become rights bearers. A consideration of institutional rights might cause courts to draw different conclusions about the proper resolution of rights contests than those otherwise derived from a conventional balancing of individual and public interests.[140] In an important sense, then, institutions become a proper locus of rights analysis because only through institutions in society can we properly understand the meaning of our atomized and collective identities.[141]

Moreover, Meister suggests that in contrast to levels of speech protection provided under conventional First Amendment jurisprudence, an institutional sensitivity might permit different levels of speech protection depending on the values promoted by the institutional setting.[142] For example, while a white supremacist group might enjoy the right to parade down the streets of Harlem under current speech standards, an institutional approach "would enable us to ask whether the use of state power to enforce these claimed rights would reinforce or offset the pre-existing relations of political power in society."[143] Thus, Meister's approach requires evaluating within a particular institutional setting the legitimacy of the purposes of communication.[144]

But why are political parades and rights of association relevant institutions under Meister's approach? Unfortunately, the definitions of institution and institutional setting remain unclear. What remains more troublesome about Meister's suggestion, however, is his failure to provide any mechanism for assessing the normative claims for legitimate speech protection or regulation in any institutional setting. At some point, the criterion of legitimacy, which could have been tied to assessment of the basic function of any institution, simply requires selecting among competing speech norms.[145] Without more guidance on the method for discerning legitimacy, the institutional analysis devolves into a much more basic debate about value preferences. Thus, while Meister makes some potentially useful claims about the

137. *See id.* at 342.
138. *See id.* at 375.
139. *Id.* at 342, 375.
140. *See id.* at 375–76.
141. *See id.*
142. *See id.* at 373–74.
143. *Id.* at 373.
144. *See id.* at 346.
145. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–87 (1963) (discussing various normative speech theories potentially underpinning First Amendment speech rights).

role of institutions in defining values, his approach remains far too opaque for effective implementation.

*4. Institutions as Enforcers of Rights*

Without focusing specifically on speech rights, Frank Cross suggests in *Institutions and Enforcement of the Bill of Rights*[146] that institutions play an essential role in constitutional interpretation. In particular, Cross argues that, embedded in the American structure of government, a continual institutional battle rages among Congress, the Courts, the Executive, and the states over what rights the U.S. Constitution affords.[147] Claiming that the Bill of Rights embraces a "libertarian presumption"[148] for enforcing rights, a determination of which institution provides the better interpretation of constitutional rights simply depends on "whatever institution extends the greatest protection to these freedoms. Thus, the institution that provides more protection is the better institution."[149] That institutional measuring stick does not, however, lead Cross to draw the conclusion that any single institution should possess supreme authority to interpret constitutional rights.[150] Instead, determining which institution deserves to control the level of civil rights enjoyed in society depends on the willingness of the institution in any particular situation to embrace the broadest scope of rights possible.[151]

The institutional treatment Cross provides reveals a continuing definitional problem from which many institutional approaches to speech rights suffer. Cross neatly constrains the institutional analysis to the three branches of the federal government and state government.[152] Focusing on those discrete bodies certainly eliminates questions about institutional boundaries and overlapping institutions.[153] But in the realm of speech rights, the simplicity of the focus ignores other important settings and actors. Most notably, bureaucratic agencies fall outside the analysis, as do distinctions in regulatory contexts (e.g., between the securities regulation regime and copyright law). Thus, in the name of simplicity, Cross sacrifices an interpretive vigor that can only come from a more comprehensive treatment.

The main drawback to Cross's theory as an institutional construct, however, lies in its reliance on "libertarian presumption" for enforcement of rights. By embracing that "libertarian presumption" to drive his analysis, Cross seems to ignore the dialectic exchange between norms and practices that marks one of the most important advantages of an institutional ap-

146. Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000).
147. *See id.* at 1595–96.
148. *Id.* at 1595.
149. *Id.* at 1588.
150. *Id.* at 1608.
151. *Id.* at 1607–08. Cross does note that when certain rights conflict, the legislature represents the best institution to mediate and define the rights at stake. *See id*. at 1604–08.
152. *See id.* at 1535.
153. *See infra* Subpart IV.B.1.

proach at the outset.[154] An institutional understanding of rights would seem to attend to how those rights are instantiated in the different contexts of our economic, social, and political lives. In that way, we could begin to understand not only how rights might shape any institutional or organizational construct, but also how the treatment of rights claims in various institutional or organizational settings influences our understanding of the rights themselves.[155] By announcing a normative presumption for rights enforcement, Cross seems to cast aside the possibility of taking a more tempered view, namely that our notion of what a right really entails depends on the context. In essence, he seems to favor a singular notion of what any right might mean by setting the definitional threshold at its highest substantive perch. That normative assumption seems to ignore the reality that we seem to respect rights differently in different settings. It is an understanding of that reality that an institutional approach should attempt to tackle rather than to ignore.

*5. Cultural Institutions and Speech Rights*

Eschewing an elaborate discussion about the general relationship between institutions and speech rights, Lee Bollinger argues more narrowly that public institutions of culture should enjoy significant First Amendment protection.[156] Describing First Amendment jurisprudence over the last century,[157] Bollinger argues that certain cultural institutions, such as the National Endowment for the Arts, deserve a sort of "constitutional autonomy."[158] According to Bollinger, cultural institutions by their nature "transgress the constitutional principle of freedom of speech," because they must operate as an arm of government while simultaneously requiring freedom from governmental control in order to act effectively.[159] This hybrid existence necessarily requires insulating the cultural institution from governmental censorship, yet the "constitutional autonomy" would still allow governmental sponsorship of cultural expression.[160] Bollinger admits that a determination of which institutions to protect and what expression to subsidize must inevitably involve content-based choices—a type of favoritism typi-

154. *See supra* Subpart III.C.3.

155. McCann, *supra* note 97, at 78–80.

156. *See* Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103 (1995) [hereinafter Bollinger, *Public Institutions*]. For a more subtle institutional analysis in which Bollinger argues that the First Amendment should treat print media differently that electronic media, see Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

157. *See* Bollinger, *Public Institutions*, *supra* note 156, at 1110 ("[T]his century has been one of denying the government the authority to control the marketplace of ideas through the tool of censorship.").

158. *See id.* at 1115.

159. *Id.* at 1117.

160. *See id.* at 1116–17; *see also* Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 303–06 (2005) (arguing that the government should not have the power to censor art it sponsors).

cally considered at odds with basic First Amendment principles.[161] Still, he contends that the First Amendment embodies a "deep respect for cultural expression,"[162] which necessarily enhances the quality of public debate.[163]

The main problem with Bollinger's institutional approach lies in defining what constitutes a public institution of culture worthy of constitutional respect. As Bollinger concedes, "[t]he problem is in carving out the kinds of public programs and institutions that are entitled to this autonomy."[164] Bollinger collapses, however, the tasks of defining what qualifies as a cultural institution and determining what expression possesses sufficient value for governmental promotion by stating that the "value of expression emanating from these institutions" determines whether constitutional autonomy attaches.[165] Thus, while great importance seems to be placed on the nature of the institution, Bollinger does not provide sufficient insights into how to separate an appropriate level of institutional sensitivity from bald content-based judgments about the value of speech.

The definitional problem bleeds into the more vexing defect regarding the absence of a sound justification for taking institutions seriously at all. If the value of the speech provides the lynchpin for awarding "constitutional autonomy," why should the setting in which the speech arises matter? While Bollinger announces that public cultural institutions possess a hybrid nature that requires special constitutional attention, he fails to describe and defend adequately that observation. A claim that organizations and settings shape our understanding of constitutional values seems quite plausible. Indeed, that awareness of a dialectic exchange between norms and the settings in which they are practiced provides a fundamental building block of a well conceived institutional approach.[166] Unadorned by a principled discussion of the general meaningfulness of institutions to legal theory, Bollinger's call for special treatment of public cultural institutions falls somewhat flat.

*6. Speech and Institutional Choice*

Thomas Nachbar provides only brief hints about the role that institutions might play in determining speech rights under the First Amendment in *Speech and Institutional Choice.*[167] Nachbar looks to Supreme Court speech decisions during the Rehnquist era to portend a judicial framework for assessing regulation of digital technology.[168] Moreover, Nachbar focuses particularly on the development of Internet infrastructure by a "group of technophiles whose only motivation to serve is the strength of their own beliefs

161. *See* Bollinger*, Public Institutions*, *supra* note 156, at 1116–17.
162. *Id.* at 1116.
163. *See id.*
164. *Id.*
165. *Id.* at 1117.
166. *See supra* Subpart III.C.3.
167. Thomas B. Nachbar, *Speech and Institutional Choice*, 21 WASH U. J.L. & POL'Y 67 (2006).
168. *See id.* at 73–79.

(and perhaps interests)" rather than by regulators.[169] With the role of those institutional actors in mind, Nachbar examines what constitutional significance institutions might have in defining First Amendment rights that inevitably arise as new media develop.[170]

In contrast to some other institutional theorists,[171] Nachbar suggests that at least some Supreme Court speech decisions reveal an institutional sensitivity to context rather than a simple application of libertarian speech principles.[172] Rather than engaging in a comprehensive review of First Amendment cases, Nachbar surveys just a few that ostensibly reflect the institutional awareness he describes. For instance, Nachbar claims that in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[173] and in *Boy Scouts of America v. Dale*[174] the Court's emphasis on the right of association rather than the right of expression recognized an awareness of the important roles those institutions (although not defined by Nachbar, arguably scouting and parading) play in American life.[175] Without building any further his analytical framework, Nachbar warns that because the Supreme Court has previously recognized the "institutional dimensions of speech regulation," if private entities act like government regulators, an institutional basis exists for regulating those entities.[176]

The extraordinary brevity of Nachbar's analysis makes it difficult to discern what he means by urging "that we should take the roles of regulatory institutions seriously."[177] No concrete sense of what constitutes an institution for courts to take seriously or how to attend to overlapping institutional interests (or regulatory interests) is provided. Moreover, he offers no framework for analyzing the importance of institutions or what regulations remain essential for institutional effectiveness. At best, Nachbar pushes in the direction of looking beyond normative speech theory to a more interactive and contextual approach to understanding speech rights. That push may be useful, but it does not provide intelligible guidance for courts in attending to institutional claims.

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169. *Id.* at 73.
170. *Id.* at 79.
171. *See*, *e.g.*, Schauer, *supra* note 4, at 1263.
172. Nachbar, *supra* note 167, at 73–74. According to Nachbar:

> Most free-speech cases do not present such stark institutional choices. Instead, they raise questions that go to the substance of the regulation and its validity in light of traditional, familiar free-speech tests . . . . But many free speech cases do present institutional dimensions, and the Court has been ready and willing to engage those institutional questions over the last two decades.

*Id.* at 75.
173. 515 U.S. 557 (1995).
174. 530 U.S. 640 (2000).
175. *See* Nachbar, *supra* note 167, at 75–76.
176. *Id.* at 77.
177. *Id.* at 77.

*7. Bounded Institutional Speech*

In a rather short work, *The Supreme Court and Free Speech: Love and a Question*,[178] Burt Neuborne thoughtfully accounts for why certain "bounded institutions" might matter in determining the scope of the First Amendment. Because the First Amendment requires balancing the strength of the governmental interest in regulation against a fundamental commitment to free speech, the institutional context within which regulation occurs inevitably affects each side of the scale.[179]

In an effort to describe existing speech cases, Neuborne posits four discrete factors that explain when regulation of speech seems permissible in any particular institutional setting.[180] In essence Neuborne suggests that only "[i]n settings where the negative impact of the speech on the institution is deemed clear, where dignitary concerns are minimal, where the efficient functioning of the institution is deemed very important, and where the risk of government abuse is deemed tolerable, the weighted balance generally goes against speech."[181] Where speech occurs in any bounded institution, which Neuborne fails to define, it often simply makes sense to permit governmental regulation in order to ensure the proper functioning of the institution.[182] While Neuborne primarily attempts to tackle speech questions within the bounded institution of an electoral campaign, he suggests that the four factors add some predictive clarity when confronting new speech claims in any institutional setting.[183]

Given the importance of the insights Neuborne offers regarding the need to ensure the proper functioning of important bounded institutions, the failure to define what a bounded institution entails seems particularly frustrating. More than other institutional speech theorists, however, Neuborne provides a variety of anecdotal examples to clarify the locus of the analysis. In addition to an electoral campaign, bounded institutions include "the rules of civil and criminal procedure,"[184] the "due process clause,"[185] "litigation,"[186] a "classroom,"[187] "rules of parliamentary procedure,"[188] the "union

178. Neuborne, *supra* note 6.
179. *Id.* at 799.
180. *See id.* The four factors are:

> (1) the relative strength of the claim that the speech at issue hurts or helps a discrete institution to perform its social function; (2) the relative importance of dignitary concerns in the particular institutional setting; (3) our willingness to tolerate inefficiency in particular contexts; and (4) the strength of the fear that government will abuse its power.

*Id.*
181. *Id.*
182. *See id.*
183. *See id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 800.
188. *Id.*

hall,"[189] the "boardroom,"[190] and the "capital markets."[191] While each of the contexts certainly possesses boundaries of some sort or another, the examples do not adequately provide guidance for determining what constitutes an institution or when an institution might be sufficiently defined and constrained by internal or external rules, practices, or expectations to become "bounded." After all, in any society governed by laws, it would seem that every institution, however defined, would be bounded in some sense. If the definition of a bounded institution captures all contexts, the definition of an institution, let alone a bounded institution, means little.

That defect matters quite a bit in Neuborne's institutional theory because the test for determining whether government should play a role in regulating speech depends on an analysis of the basic function of the institution itself.[192] Without knowing when a relevant institution exists, it becomes impossible to determine institutional function at all. Moreover, the absence of a clear definitional hurdle causes a problem regarding overlapping institutional concerns. Consider a potential speech case involving a claim that a university student has violated the copyright laws by sharing a single purchased electronic music file with millions of other students as part of an "ongoing collaborative experiential art project" conducted to pass a class on "major works of public art." How many bounded institutions are relevant to the analysis? It seems the copyright laws, the music industry, the classroom, academic freedom, the university, the Internet, and a host of other potential bounded institutions might be implicated. Mediating among those institutional claims would be essential if institutions are to be taken seriously, yet Neuborne's failure to provide sufficient definitional guidance makes that mediating task unworkable, if not impossible to start.

The next most significant shortcoming of Neuborne's very interesting theory is the lack of attention paid to the relationship between speech principles and institutional settings. Neuborne focuses on how speech regulation affects the basic function of the institution, but he does not examine what the basic function of the institution might say about the speech principles. Neuborne clears an important path, but he builds a one-way street that looks only at the role speech principles play within any institutional setting. To understand more fully the relationship between speech rights and the contexts within which discourse occurs, the continual exchange between principle and practice remains essential. Surely, Neuborne takes a step in the right direction towards developing a greater institutional sensitivity in speech jurisprudence. But rather than marching in a straight line, rights and institutions engage in a much more elaborate dance.[193]

189. *Id.* at 801.
190. *Id.*
191. *Id.*
192. *See id.* at 799.
193. *See infra* Section V.

*8. Institutional Speech and Communal Worth*

With a normative goal of cultivating greater civic virtue leading the way, Stanley Ingber argues that First Amendment jurisprudence must consider the relationship between government and citizens in different institutional settings rather than pander to individual autonomy.[194] In *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*,[195] Ingber laments the atomization of the American population created by the promotion of speech rights as purely individualistic concerns.[196] Focusing on the communal value in "character building"[197] that necessarily accompanies interpersonal discourse, Ingber argues that we can better understand what speech rights should entail by looking at intermediary institutions through which people interact.[198] Because individuals remain inextricably linked to, and defined by, the social circumstances within which they find themselves, an investigation into those social contexts should matter in determining the shape speech rights should take.[199] Without adequate attention to how those intermediate institutional settings affect human character, the ultimate goal of speech jurisprudence, which Ingber claims is "developing a virtuous, democratic citizenry," escapes our grasp.[200]

After examining how a respect for communal values in public education,[201] the workplace,[202] and the military[203] might enhance the worth of discourse in those settings, Ingber concludes that "[i]nstitutions must be able to constrain communication that significantly interferes with their functioning."[204] To protect the role of institutions in advancing the goals of the First Amendment, Ingber articulates a three part test. A speech regulation should only pass constitutional muster if the government can demonstrate that the restriction "materially and substantially" supports a "compelling" governmental interest and there are not means "other than suppression,

194. *See* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts,* 69 TEX. L. REV. 1 (1990).
195. *Id.*
196. *See id.* at 9–11.
197. *Id.* at 33–42.
198. *Id.* at 50–52.
199. *Id.* at 50–51. According to Ingber:

> It is by the structure societally imposed upon day-to-day intercourse that we set habits of interaction, socialize proper role expectations, and communicate subtly but powerfully the values for which the community stands. We each are constructed, therefore, by the social setting in which we find ourselves, and this setting determines our attitudes towards such factors as hierarchy, expertise, creativity, and independence.
>
> Consequently, the vital lessons learned in institutional contexts deserve considerable attention.

*Id.* at 50-51 (footnotes omitted).
200. *Id.* at 50.
201. *Id.* at 73–86.
202. *Id.* at 53–73.
203. *Id.* at 86–93.
204. *Id.* at 102.

more consistent with the communal values of the First Amendment whereby government could realize its legitimate concerns of institutional effectiveness."[205] According to Ingber, using this tripartite standard would promote the communal values embedded in the First Amendment by balancing individualism with the social goals that define important institutions.[206]

While Ingber provides a wonderfully detailed account of how individual identity and collective values remain inextricably bound to social practices within important institutional settings, his theory suffers from a number of failings. On the definitional front, it seems especially disappointing given the extraordinary importance placed on the interaction between individuals and intermediary institutions that Ingber failed to define what constitutes an institution. At one point, he provides oblique hints that such entities "govern all aspects of communal lives"[207] or structure "day-to-day intercourse."[208] At another point, when Ingber intends to criticize existing republican scholarship rather than define institutions, he refers to "'intermediate organizations, often nominally private, that serve both as checks on government and as arenas for the cultivation and expression of republican virtues.'"[209] Given Ingber's treatment of the military, public schools, and the workplace, it appears that those particular settings cross any definitional threshold.[210] Absent more detailed guidance on what an institution entails, however, courts would seem hard pressed to embrace his construct.

A less common but arguably more significant problem that troubles Ingber's approach lies in his singular focus on promoting the normative goals of civic virtue. The criticism here does not target republican theory, but instead focuses on an essential limitation that Ingber places on his approach. Ingber suggests that institutions matter in defining our lives and that how we live affects the meaning and purpose of any institution itself. Recognizing that organic, dialectic relationship between individual and organizational life remains an important part of any institutional theory.

Ingber imposes on that dialectic relationship the normative constraint of civic virtue, a move wholly at odds with an understanding that values remain contextually defined. While many First Amendment scholars advance particular normative theories for determining the proper scope of speech rights,[211] as Ingber asserts at the outset of his article,[212] no single normative

205. *Id.* at 103–04 (emphasis removed).
206. *See id.* at 108.
207. *Id.* at 51.
208. *Id.* at 50.
209. *Id.* at 51 (quoting Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1572–73 (1988)).
210. *See id.* at 53–93; *see also id.* at 51 n.279 ("[I]ntermediate institutions such as the workplace, civic and social organizations, and schools are 'all arenas of potentially transformative dialogue'" (quoting Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1531 (1988))).
211. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (advocating a liberty theory of speech rights); Emerson, *supra* note 145; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.
212. *See* Ingber, *supra* note 194, at 3–5 (discussing two strands of free speech jurisprudence, each justified by a different normative conception).

theory seems capable of explaining adequately the shape First Amendment jurisprudence has actually taken.[213] Indeed, the justification for embracing any institutional approach loses force when normative goals color a disinterested analysis of the interaction among individuals within any institutional setting or between individuals and organizations. Why? The goal of institutional analysis remains obtaining a clearer understanding of the values that we actually embrace and the manner in which we embrace them, rather than forcing a construct that might misapprehend our individual or collective sensibilities. To the extent Ingber directs his institutional theory towards advancing certain communitarian values, the utility of his theory becomes rather limited in investigating what other values our institutional interactions might reveal.

*9. Social Institutions and Constitutional Status*

In *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*,[214] Daniel Halberstam suggests that an institutional understanding of speech rights not only explains Supreme Court decisions in commercial and professional speech cases but provides the proper framework for adjudicating speech rights within any social or bounded speech institutions. In contrast to Frederick Schauer's position that the Supreme Court does not take institutions seriously,[215] Halberstam argues that the Supreme Court actually embraces an institutional sensitivity that accounts for social relationships between speakers in any institutional setting and makes "contextual judgments about the extent of government intervention that is both necessary for and compatible with the preservation of the particular institution."[216] In that sense, no normative speech principle dominates Supreme Court decisions. Instead, the Court looks into the nature of the relationships within a particular context and assesses the need for speech regulations, or speech rights, to support those relationships and the goals of the institutional framework.[217] Invoking Robert Post's analysis of constitutional law as systematic social ordering, Halberstam argues that in the realm

213. *See* Schauer, *supra* note 4, at 1273; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785-86 [hereinafter Schauer, *The Boundaries*].

214. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999).

215. *See* Schauer, *supra* note 4, at 1263 (discussing the historical practice of courts to interpret First Amendment rights based on types of speech rather than different kinds of institutional settings). *But see id.* at 1263 n.43 (acknowledging that in broadcasting and military speech cases, the Supreme Court has embraced a somewhat context-centered approach).

216. Halberstam, *supra* note 214, at 778.

217. *See id*. at 828 ("On the one hand, the Court welcomes government regulation as partially constitutive of the communicative interaction, that is, as assuring that communications that are dependent on predefined communicative goals remain within the boundaries of that discourse. On the other hand, the Court rejects government prescriptions as unconstitutional when they infringe on the integrity of an established framework for discourse.").

of commercial and professional speech, the Court resorts to a basic sociological examination of practices and purposes surrounding discourse.[218]

Undertaking that sociological interpretation, however, depends on the existence of a social institution or a bounded speech practice. While Halberstam acknowledges the importance of focusing on the specific purposes and practices within a particular social institution or a bounded speech practice, he does not provide a working definition for identifying either institutional setting.[219] Presumably because Halberstam addresses commercial and professional speech, a certain organizational structure must frame the discourse. But he does not provide guidance on how courts might identify when a sufficiently organized setting exists that requires a sociological outlook. Without the ability to detect if some institutional threshold has been crossed regarding instances of discourse, courts cannot know when to rely on a deeper institutional analysis rather than on some normative speech principle selected independently of the purposes of an institutional setting.

That definitional defect triggers another problem regarding the treatment of overlapping institutional concerns. The issue centers on the ability to discern which bounded speech practice or social institution should dominate if multiple institutional sites exist. Halberstam confronts the problem in the context of a doctor-patient dialogue when he notes that individual autonomy within the intimate professional relationship might require freedom from regulation in some circumstances while the importance of patients receiving truthful information might provide a strong reason for governmental regulation.[220] It cannot be readily determined if the social institution for consideration is consumer protection or patient confidentiality. Both of those institutional concerns or bounded speech practices arguably exist when a doctor conveys information to a patient (e.g., risks associated with medical procedures), yet it remains wholly unclear how to mediate between the competing institutional claims regarding the need for speech regulation or freedom from regulation.[221] Without any guidance regarding what constitutes a social institution or bounded speech practice, it simply becomes all but impossible to sift through all the various institutional constructs that a creative mind might identify for any instance of discourse or common patterns of discourse.

At the end of his analysis, however, Halberstam identifies some lingering issues that suggest a framework for beginning a more robust institu-

218. *Id.* at 832–33 (citing Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 200).

219. *See* Halberstam, *supra* note 214, at 851–52.

220. *Id.* at 867.

221. Although not identifying how to mediate between competing institutional concerns, Halberstam suggests simple awareness of the competition leads to an understanding that "government regulation is not invariably destructive of communicative interests, but may indeed foster the communicative relationship and assist in institutionalizing the bounded discourse." *Id.* at 869. To the extent a strong presumption against governmental regulation exists, this insight might prove useful. Absent such a jurisprudential bias against governmental regulation, noting the existence of competing institutional claims without providing a mechanism for mediating the tension might frustrate rather than clarify the analytical project.

tional approach. From a theoretical standing, he notes that "the justifications for taking into account existing social institutions merit exploration."[222] Quite clearly, absent that foundation, encouraging courts to respect institutions would seem arbitrary if not wholly nonsensical. Moreover, Halberstam posits that "the interaction and relative pull of the legal norm and the existing social institution warrants examination."[223] This too remains an essential undertaking, for without a sufficient nexus between a dedication to free speech (or to speech regulation) and the basic functioning of any institution, the claim that an institutional framework should affect speech rights rings rather hollow. Thus, despite some methodological shortcomings, Halberstam touches some important themes in institutional theory and targets essential goals for establishing a coherent analytical framework for New Institutional corporate speech jurisprudence.

*10. First Amendment Institutions*

Frederick Schauer offers the most comprehensive institutional approach, which he developed in a series of works.[224] Based on the failure of any normative speech theory to describe accurately the shape the First Amendment has actually taken,[225] Schauer advocates an institutional approach that not only provides greater descriptive clarity of existing speech jurisprudence, but also provides a useful analytical tool for determining the proper scope of the First Amendment in new cases and contexts.[226]

Rather than simply musing about philosophical principles, Schauer attempts to provide a useful framework for courts to take institutions seriously when determining the scope of speech rights.[227] Within a complex society, various contexts for discourse exist and the degree to which those institutional contexts embrace speech rights necessarily differs depending on the goals of the particular setting.[228] For Schauer, the determination of whether to respect the level of speech regulation (or speech freedoms) within an institutional setting should depend on an assessment of the importance of the institution to American social, economic, and political life as well as a determination of the importance of speech regulations (or speech rights) to the basic functioning of the institution.[229] In that sense, the institutional sen-

222. *Id.* at 873.
223. *Id.*
224. *See* Schauer, *supra* note 4; Schauer, *The Boundaries*, *supra* note 213; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999); Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).
225. *See* Schauer, *The Boundaries*, *supra* note 213, at 1766–67 (discussing the inability of any normative speech theory to explain why certain regulatory regimes, such as copyright, antitrust, and securities regulation, rarely face constitutional challenges).
226. *See* Schauer, *supra* note 4, at 1273–77; *see also* Siebecker, *supra* note 1, at 646–51 (discussing more fully the nature of the problem addressed by Schauer and the tenets of his institutional solution).
227. *See* Schauer, *supra* note 4, at 1274; Schauer, *The Boundaries*, *supra* note 213, at 1807-09.
228. Schauer, *supra* note 4, at 1274.
229. *See id.* at 1275.

sitivity should go beyond application of normative speech principles and look to the connections between a particular institution and society as well as between the institution and speech.[230]

In implementing that construct, courts should afford protection to discourse in some institutional settings and permit regulation of speech in others. With respect to the universities, for example, Schauer suggests an appropriate institutional sensitivity would favor a highly unregulated environment in light of the great social importance of universities and the essential role that academic freedom places in achieving a university's basic goal.[231] Consistent with Neuborne's approach, Schauer posits that greater speech regulation might be necessary in the institutional context of an election campaign.[232] Because elections play such an obviously important role in political life, and based on an assumption that speech regulation remains necessary to achieve a sense of fairness and equality essential to the goals of the electoral process, courts should respect the need for greater regulation in that special institutional setting.[233]

Instead of wholly supplanting existing speech jurisprudence, Schauer's institutional construct provides an extra layer of analysis for courts to consider when addressing pressing speech claims.[234] Schauer does not exclude normative speech theory from playing a role in a well conceived constitutional analysis. Instead, he simply asks for consideration of those norms within a more parochial setting.[235] In essence, he calls for tethering normative speech theory to practices and organizational settings in which we actually engage in discourse. According to Schauer, that sensitivity would not only help explain why, under current First Amendment jurisprudence, various pockets seem to exist where the First Amendment seems not to reach,[236] but also provide a better sense of how to shape First Amendment rights going forward.[237] Especially when normative speech theories conflict or fail to provide clear answers when difficult speech questions arise (e.g., questions regarding politically tinged corporate speech), an institutional analysis might help lead us down the path more consistent with the values and practices we actually embrace.

Schauer certainly presents a convincing argument that an institutional approach remains essential to understanding the shape the First Amendment has, and should, take in American society, but his design lacks some essential theoretical components.[238] In the same vein as other institutional theorists previously discussed, Schauer does not define what constitutes an insti-

230. *See id.*
231. *See id.* at 1274–75.
232. *See id.* at 1276.
233. *See id.*
234. *See id.* at 1278–79.
235. *See id.*
236. *See* Schauer, *The Boundaries*, *supra* note 213, at 1769-74; Schauer, *supra* note 4, at 1270.
237. *See* Schauer, *supra* note 4, at 1278-79.
238. For general criticism of Schauer's emphasis on institutions in speech jurisprudence, see Dale Carpenter, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407 (2005).

tution. Without that clarity, it simply remains impossible to determine when courts should engage in the inquiry Schauer suggests. Because even loosely connected principles might be considered institutions—and are considered institutions by academics in other disciplines—courts and litigants would be left foundering without a sense of the social conditions that trigger Schauer's analytical construct.

Moreover, Schauer does not provide a method for determining the role that speech plays in the basic functioning of the institution or for determining the social, political, or economic importance of any institution in American life. While it may seem obvious in certain settings that an institution plays an important role in society,[239] or that speech regulation (or free speech) plays an essential role in that setting,[240] Schauer does not offer a discrete method that courts might employ.[241] Quite simply, a consistent inquiry cannot be undertaken by courts as cases arise without a discrete mechanism to guide the analysis. Absent consistency in application, the inquiry seems prone to producing conflicting ad hoc statements about the importance (or lack thereof) of certain institutions. Thus, while Schauer provides a giant leap forward in advancing an institutional approach to speech rights, he still leaves some work to be done.

### *B. Common Defects*

Even though a brief assessment of some philosophical or methodological problems accompanied each extant institutional theory described, providing a battery of important common defects helps set the stage for a more robust, New Institutional approach. In some sense, the defects represent a series of cascading events, with each affecting, if not causing, the others. To get a better handle on how a New Institutional approach might improve on the current state of the art in institutional speech theory, the existing analytical defects are divided into theoretical and methodological problems.

#### *1. Theory*

As a matter of first principles, none of the existing speech theories adequately advances an argument for why an institutional perspective *must* be adopted to understand the proper scope of speech rights. Some certainly suggest that an awareness of institutional settings provides greater descrip-

239. *See, e.g.*, Siebecker, *supra* note 1, at 651–54 (discussing various political, economic, and social grounds for qualifying securities ownership and the securities regulation regime as important institutions in American life).

240. *See id.* at 655–71 (discussing the myriad ways in which the securities regulation regime relies upon heavy-handed, content based restrictions of compelled speech).

241. *See* Schauer, *The Boundaries*, *supra* note 213, at 1786 (acknowledging the empirical challenges in assessing institutional functions and social importance, but nonetheless urging an institutional sensitivity that attempts to take institutional importance and function into account).

tive clarity regarding the shape of existing speech rights,[242] and that a better understanding of the current shape informs how courts might address speech rights in hard cases and new contexts.[243]

But the essential missing building block is why we simply cannot understand speech principles without taking institutions into account. The crux of the criticism focuses on the dialectic nature of institutional analysis. A primary proposition of institutional theory is that not only do norms define institutional settings but also that institutional settings define and shape those norms.[244] Many existing speech theorists seem to take First Amendment values as somewhat static.[245] The role of institutional analysis then simply becomes interpretation—a more sensitive method for understanding why the "real" meaning of existing First Amendment values requires disparate speech rights depending on the setting.

What the existing theorists seem to miss, or perhaps gloss over, is the reciprocal relationship that institutional settings and principles share. From a properly conceived institutional perspective, our daily discourse, in each of the manifold contexts we speak, affects in some way the meaning we attach to speech rights. Conceived in that way, speech rights do not simply remain tethered to some ethereal and unmovable ideal, but instead get bumped and bothered by the contexts and practices we embrace in our evolving lives.

So why is building a foundation for that dynamic sensibility so important? It moves institutional theory from a limited interpretive trick to an essential aspect of understanding speech principles at the outset.[246] And from a practical standpoint, unless the undertaking is essential, the motivation for courts to engage in such a sophisticated additional inquiry rather than rely on a simple normative shortcut appears slim.

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242. *See supra* notes 224–241 and accompanying text (discussing Schauer); *supra* notes 214–223 and accompanying text (addressing Halberstam); *supra* notes 167–177 and accompanying text (describing Nachbar).

243. *See supra* notes 178–93 and accompanying text (addressing Neuborne); *supra* notes 224–241 and accompanying text (discussing Schauer).

244. *See* PETER MORTON, AN INSTITUTIONAL THEORY OF LAW: KEEPING LAW IN ITS PLACE 1 (1998) ("[L]aws have meaningful existence only insofar as they are recursively recreated within specific practices and activities"); Samantha Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HUM. RTS. L. REV. 323, 340 (2006) ("Institutional design is best understood as a reflexive and dialectical exercise. It anticipates, first of all, what protected interests might generally require in order to increase the capacities of institutions to protect those interests and try to comply in advance with what might be demanded of these institutions. In a second stage, it looks back to the enforcement of the duties generated in concrete circumstances, to improve future designs. It amounts, in other words, to a 'back and forth' exercise between institutional practice and normative theory; the former influences the latter, but the latter should also condition the former."); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231–32 (1995) (discussing in context of environmental regulation a theory of laws as a reflexive exchange between the institutional settings and the rules governing them); *see also supra* note 105 and accompanying text.

245. *See infra* note 272 and accompanying text.

246. Of course, with this building block in place, an institutional analysis remains essential for understanding not just speech rights but rights generally. That project remains ahead, but the implication of a robust institutional analysis suggests that an understanding of shared principles remains necessarily affected by how we actually embrace those principles in our daily lives.

The point here is not to suggest that a robust institutional theory requires scrapping existing First Amending jurisprudence. While it may be a philosophical mistake to construe an institutional approach to speech rights merely as an interpretive mechanism rather than as a springboard for understanding the dynamic interplay between institutional settings and speech principles, we may only in fact realize the difference such an institutional approach makes in hard cases. That limitation is not due to any defect in institutional theory, however, but rather a product of what constitutes relevant institutions and institutional settings in the realm of speech rights.[247]

If that is the case, why bother? An analogy to property law might help understanding what is at stake. Consider owning a vast piece of property and granting a temporary easement on most of the land to someone else while keeping some smaller parcels for yourself. Now consider simply owning only the smaller parcels without any ability to reclaim the vast landscape if needed. When built upon a foundation that speech principles cannot be understood without taking institutions into account, the case for courts to take institutions seriously becomes much stronger, even if the approach might be workable or make a difference only in hard cases. That institutional approach always has a case for reclaiming the land previously surrendered. In contrast, an institutional approach conceived as an interpretive device limited to solving hard cases at the outset might be difficult to convince courts to embrace, especially if following a simple normative path might make the case not so hard in the first place. For an institutional approach to be worth the effort, a philosophical case must be made for the necessity of taking institutions into account in order to understand properly the shape that speech rights should take in society.

The next major philosophical shortcoming relates to the failure to define adequately what counts as a relevant institution or institutional setting. At best, existing theorists have offered limited anecdotal definitions that do not provide sufficient guidance for when courts should undertake an institutional inquiry.[248] Considering the ambiguity in academic scholarship regarding what an institution entails[249] and the full spectrum of possible definitions of institutions ranging from basic norms[250] (e.g., the right to free speech) to formal organizations[251] (e.g., Congress), that definitional failure poses a significant barrier. No matter what steps follow in an institutional analysis, unless the initial definitional step rests on a firm foundation, the rest of the project remains unstable.

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247. *See infra* Subpart V.A.2.

248. *See, e.g.*, *supra* notes 128–34 and accompanying text (discussing Chemerinsky); *supra* notes 156–66 and accompanying text (discussing Bollinger); *supra* notes 178–93 and accompanying text (discussing Neuborne).

249. *See* Lecours, *supra* note 53, at 7 ("The meaning of institutions was, therefore, contested from the very first days of the new institutionalist movement, and it still is."); *see also supra* note 66 and accompanying text.

250. *See* Lecours, *supra* note 53, at 7.

251. *See id.*; Thelen & Steinmo, *supra* note 77, at 2.

The definitional problem cascades into the concern regarding overlapping institutional boundaries. Even if it were clear what an institution entails, sorting out the various potentially relevant institutional interests remains necessary to make a sensible determination of what shape speech rights should take in any controversy facing a court. Especially if institutions are defined loosely to include basic norms of behavior, it would seem quite easy to identify conflicting norms that immobilize the institutional analysis or at least render the institutional analysis no different than a simple choice among competing norms.[252] For instance, in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* discussed by Nachbar,[253] a right to association of the parade organizers and a right to expression claimed by the gay plaintiffs each represent relevant institutions (to the extent institutions are defined to include basic norms) that a court would have to consider. Framing that conflict in terms of an institutional analysis does not seem to help solve the problem presented without more to say about how to attend to conflicting institutional concerns. And of course, the more encompassing the definition of "institution" employed, the more opportunities for institutional overlap exist. None of the existing speech theorists even attempts to tackle this potentially debilitating problem.[254]

A final philosophical defect relates to the perspective from which to understand an institution and its project.[255] This might seem like a methodological criticism more aptly relegated to the following section. While certainly central to the methods employed to understand an institutional setting, the issue attends more to a frame of mind than an empirical measurement.

In essence, none of the existing speech theorists suggests whose opinion matters when courts attempt to understand an institution. Taking the example of the classroom described by Chemerinsky as an authoritarian institution,[256] should the basic purpose and meaning of the project of the classroom be determined from the perspective of the students, teachers, administrators, parents, residents of the community in which a school sits, residents of the state, citizens of the United States or members of the world community, economists, political scientists, psychologists, sociologists, or legal scholars? Without describing what viewpoint(s) to consider, this problem seems similar to the problem of overlapping institutional concerns. Except in this case, the problem comes from confusion about how to locate meaning within a single institution based on the potential, if not inevitability, of competing perspectives. Solutions to this problem exist, as they do for the

252. *See* W. Richard Scott, *Unpacking Institutional Arguments*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 54, at 164, 172–73 (discussing the need for definitional boundaries to focus institutional analysis).

253. *See supra* notes 172–177 and accompanying text.

254. *See supra* Subpart IV.A.

255. *See* John Brigham, *The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies*, 10 YALE J.L. & HUMAN. 421, 433–37 (1998).

256. Chemerinsky, *supra* note 128, at 441.

problem of overlapping institutional concerns.[257] But at least with respect to current speech theorists, these vulnerabilities remain exposed.

*2. Method*

None of the existing institutional speech theories focuses on empirical methodologies for implementation or testing. In the absence of any robust discussion of how courts or litigants might go about answering some of the rather sophisticated questions that each of the institutional speech theories poses, the purpose here is simply to make clear the essential nexus between institutional theory and empirical methodology.

To be fair, some theorists, like Schauer, Neuborne, and Ingber, articulate tests to determine when an institutional interest deserves accommodation against the backdrop of a presumption favoring free speech.[258] Those tests, however, actually reveal the existence of a problem rather than adequate attention to methodological concerns. For none of those three, let alone any of the other theorists, provides adequate insights into how courts might assess the institutional interests concerned. Who are the qualified witnesses or experts that could testify, and what are the relevant facts upon which to base a legal determination? And of course, the absence of instruction on how to discern institutional functions and purposes gets compounded by the lack of any definition of what constitutes an institution or institutional setting in the first place. Some methodological guidance remains essential to begin framing what evidence might be considered.[259]

But why is this really a problem? After all, courts continually apply even terribly vague standards and tests without explicit guidance on the particular evidence necessary to establish a claim or defense.[260] Of course, a lack of consistency in applying standards or in determining what evidence might satisfy particular legal tests can become quite unsettling, as the growing dissatisfaction with the Court's commercial speech jurisprudence seems to establish.[261]

In the case of institutional speech theory, however, the special methodological challenge lies in the unique nature of the required inquiry and the utter lack of familiarity of judges and lawyers with the types of evidence potentially relevant to answering the important questions posed. Taking the

257. *See infra* Part V.

258. *See supra* notes 224–241 and accompanying text (discussing Schauer's bifurcated test); *supra* notes 194–213 and accompanying text (discussing Ingber's tripartite test); *supra* notes 178–93 and accompanying text (discussing Neuborne's four-part test).

259. Some sort of guidance to courts seems imperative considering that even among academics, the projects and methods of New Institutional empirical research remain contested. *See* Lecours, *supra* note 53, at 14–16; Smith, *supra* note 105, at 92, 101–05

260. *See supra* Subpart II.A (discussing the vague standards connected to the commercial speech doctrine and the indeterminate results the doctrine produces); *see also* Rodney A. Smolla, *What Passes for Policy and Proof in First Amendment Litigation?*, 34 U. RICH. L. REV. 1095 (2001) (addressing the arguments and evidence courts and litigants consider in various speech cases).

261. *See* Siebecker, *supra* note 1, at 635.

first part of Schauer's two-part test as an example,[262] what evidence might courts gather to determine if a particular institution is sufficiently important to economic, political, and social life? Should a court look to economists, historians, sociologists, public opinion surveys, political scientists, or simply take anecdotal testimony from the litigants in the case at hand? Regarding the second part of Schauer's test,[263] to determine if speech remains essential to the basic functioning of the institution, should courts consider the rationality of organizational structure, economic theories, the opinions of managers, sentiments of employees, public perceptions of effectiveness, governmental policies affecting internal institutional structure, or religious values of the community within which the institution sits or some other data?

Developing the skill to overcome those methodological hurdles creates a substantial task for courts that should not be underestimated. Schauer himself acknowledges the potential empirical challenges courts might face in implementing the test he proposes,[264] but without providing sufficient direction, he steadfastly urges courts to push ahead.[265] Such confidence in the ability of courts to navigate the new waters of institutional analysis seems unwarranted without discrete methodological guidance to help steer the way.

In the end, although each of the extant institutional approaches surveyed represents a thoughtful attempt to advance an institutional sensitivity in determining the proper scope of the First Amendment, each falls short of providing a workable theory that courts might actually implement as cases of politically tinged corporate speech continue to arise.

## V. THE ARCHITECTURE OF A NEW INSTITUTIONAL APPROACH TO CORPORATE SPEECH

Designing the architecture of a New Institutional approach to corporate speech jurisprudence requires a certain balancing between pragmatism and philosophy. If the goal is to construct a philosophical and methodological framework that courts could actually adopt in resolving difficult corporate speech claims, drifting too far into the ether of philosophical discourse could undermine the project. On the other hand, failing to establish a sufficiently broad philosophical foundation for the approach would make the New Institutional framework seem unstable.[266]

What follows, then, is a blueprint for a discrete approach that courts could implement, using the tools suggested, at certain sites of analysis. The

262. *See supra* notes 224–233 and accompanying text.
263. *See supra* notes 234–237 and accompanying text.
264. Schauer, *supra* note 4, at 1273.
265. *See id.* at 1270–73, 1278–79.
266. *See* William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 231 (1997) (asserting that institutional understanding requires a theoretical grounding to avoid ad hoc descriptions of human behavior).

New Institutional approach proposed does not intend to supplant existing speech jurisprudence or to solve every pressing corporate speech problem. Instead, the approach hopes to provide additional guidance for resolving corporate speech questions, in certain settings, that existing speech jurisprudence simply cannot answer.

Moreover, the New Institutional approach to corporate speech remains necessarily limited in its reach. Certainly where an institutional pull towards speech regulation or free speech remains sufficiently strong, a New Institutional approach helps resolve a core set of speech claims within the particular institutional setting considered. But determining effectively whether speech values become a constitutive part of the institution requires cabining off types of institutional settings especially amenable to the analysis. In particular, in order to make a New Institutional approach to corporate speech manageable and consistently informative, the analysis focuses on the role speech plays in formal organizational structures.

With that essential definitional limitation, the New Institutional approach proposed here incorporates and extends some important elements of existing institutional speech theory.[267] Using the particular methods recommended, in order to determine the appropriate scope of corporate speech rights within any institutional setting, courts should employ a three-part analysis to determine whether: (1) the institution occupies a substantially important position in society; (2) speech regulation (or free speech) represents a constitutive aspect of the institutional project; and (3) affording greater (or lesser) corporate speech rights substantially affects the internal and external effectiveness of the institution. While the approach may seem at first blush to ignore the interests of the corporate speaker or the audience, the analysis actually attends to those perspectives from within the situated context of the institutional setting itself. In the end, when the analysis reveals a particularly strong institutional pull towards speech regulation or speech rights, a core set of cases within that institutional settings can be more easily resolved.

### *A. Blueprints*

The basic blueprints for building a New Institutional approach to corporate speech focus on why the project adds value, which settings to consider, and what questions to ask.

267. In particular, the New Institutional approach to corporate speech here proposed attempts to incorporate and improve essential insights provided by Schauer, see *supra* notes 224–241 and accompanying text, Neuborne, see *supra* notes 178–93 and accompanying text, and Halberstam, see *supra* notes 214–223 and accompanying text.

*1. Philosophical Justification*

Why should courts adopt a New Institutional approach to corporate speech? The approach provides greater descriptive clarity regarding the existing landscape of the First Amendment and offers an effective prescriptive mechanism for locating new claims on that terrain. In addition, the approach represents a robust normative method for articulating the value we actually ascribe to corporate speech rights.

In that straightforward way, a New Institutional approach to corporate speech adds significant value to existing speech jurisprudence by providing a coherent philosophical and methodological means for understanding more fully the scope of speech rights that corporations should enjoy. Current speech jurisprudence simply cannot attend to some incredibly difficult problems involving corporate speech, such as what level of protection the Constitution might afford politically tinged commercial speech. A New Institutional approach, however, harnesses a sensitivity to context to provide a clearer sense of why corporate speech rights might properly vary depending on the institutional setting.

The value Schauer describes when advocating his own institutional approach applies equally well to this project. In light of the failure of any extant normative speech theory to explain the shape the First Amendment has actually taken,[268] gaining a better understanding of what speech principles we actually embrace might arise not from a reliance on normative theory but instead from an investigation of "the political, sociological, cultural, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed."[269] By gaining a better sense of how to describe the existing landscape, a New Institutional approach offers an important prescriptive capability as well. For with an understanding of why certain islands of immunity from the First Amendment exist, a New Institutional approach can help navigate new cases through what might seem like uncharted constitutional waters.

Beyond providing greater descriptive and prescriptive clarity, however, a New Institutional approach entails an important normative element.[270] That normative component deals with the appropriateness of the meaning we ascribe to rights, in general, and corporate speech rights, in particular. At its core, an institutional approach suggests that meaning remains situated within context.[271] In contrast, many existing normative speech theories by their very nature treat First Amendment values as rather static.[272] A New

268. *See* Schauer, *The Boundaries*, *supra* note 213, at 1786 (discussing the inability of normative theories based on self-expression, individual autonomy, dissent, democratic deliberation, the search for the truth, tolerance, or checking governmental abuse to explain the existing state of the First Amendment).

269. *Id.* at 1787.

270. *See* Selznick, *supra* note 66, at 271.

271. *See* Harty, *supra* note 111, at 51–52; Lecours, *supra* note 53, at 8–11.

272. *See, e.g.*, Bezanson, *supra* note 119, at 802 (suggesting that a respect for human agency repre-

Institutional approach suggests such an enforced stasis actually hampers our ability to identify whatever values animate our dedication to speech rights. For absent an attempt to examine how the topsy-turvy world we actually inhabit affects our sense of who we are and what we believe, an edict about the values we embrace seems more alien than accurate. A New Institutional approach that tethers meaning to the ground where our social, economic, and political lives take shape provides a much more solid place to start building an understanding of the values that sustain us and the rights we claim.

With respect to corporate speech, we gain a superior understanding of what the First Amendment should protect by looking at the dynamic exchange between how different institutions embrace corporate speech rights and reflexively examining what the differing institutional treatments of corporate speech say about our dedication to corporate speech principles at the outset. The examination does not wholly change the nature of the speech norms considered. It does help us understand the tugging and pulling process that inevitably causes meanings to shift from time to time.[273] In that way, the New Institutional approach focuses on the organic nature of our normative commitments and of law and society itself. For when our needs and circumstances change, our values arguably evolve as well. A New Institutional approach stresses that we must capture that evolving meaning in order pay adequate fidelity to the principles we actually embrace.[274] Rather than proposing something truly new, then, a New Institutional approach simply proposes greater respect for who we are and where we wish to go.

*2. Definitions and Boundaries*

Providing a workable New Institutional theory for courts to embrace requires defining what constitutes an institution. Of course, the definition of institution varies wildly depending on the particular strand of New Institutional theory embraced.[275] The more ambitious projects define institutions rather loosely, perhaps simply encompassing bundles of symbolic attitudes,[276] in order to capture the broadest set of circumstances for consideration. Others define institutions in narrower terms, focusing on much more formal organizational structures, to facilitate a discrete analysis of particular variables.[277] The variety of definitional approaches does not mark a flaw in

sents the primary concern of the First Amendment); Cross, *supra* note 146, at 1595–96 (discussing the "libertarian presumption" embedded in the Bill of Rights generally); Ingber, *supra* note 194, at 50 (calling the promotion of a virtuous, democratic citizenry the goal of the First Amendment).

273. *See generally* Emerson, *supra* note 145 (discussing the interplay between First Amendment theory and legal institutions).

274. *See* Lecours, *supra* note 53, at 11–14 (discussing the importance of attending to changing meaning over time within institutional theory).

275. *See supra* Subpart III.C.1.

276. *See supra* Subpart III.B.4.

277. *See* Lecours, *supra* note 53, at 6–7.

New Institutional theory. Instead, the flexibility affords the opportunity to circumscribe the project through defining the relevant sites for analysis.

With that in mind, it makes sense at the early stages of promoting a New Institutional approach to constrain the analysis to formal organizational structures that regulate corporate speech.[278] Such formal settings would include, among other structures, administrative agencies (e.g., the Environmental Protection Agency, the Securities and Exchange Commission, and the Food and Drug Administration), private and public organizations (e.g., the workplace, universities, and places of public accommodation) and closely connected statutes, rules, and regulations (e.g., securities law and regulations, copyright laws, patent laws, and consumer protection statutes). Defining institutions so narrowly certainly limits the reach of the analytical project. But carving off such a discrete chunk of the universe of institutional settings facilitates a much more manageable task.[279]

Perhaps most important, proscribing the examination of corporate speech within the boundaries of formal organizational settings diminishes the likelihood that the analysis might become mired in overlapping institutional concerns. Without framing the site of institutional inquiry with formal organizational boundaries, it becomes impractically difficult to discern the societal importance of the institution, the role speech norms play in the basic functioning of the institution, and the impact of affording greater (or lesser) corporate speech rights on the internal and external effectiveness of the institution. Why? The site of analysis simply becomes too slippery and the interests become too amorphous to describe.[280]

For instance, if institutions were defined broadly to include symbolic attitudes, an institution relevant to corporate speech might include a basic norm of trust. Examining the nexus between trust and corporate speech would undoubtedly prove wonderfully edifying from an academic perspective. Indeed, volumes have been filled with attempts to describe the basic meaning of trust.[281] But that task would become horribly unmanageable for a court. If a company were to claim a political speech right in labeling its

278. Jürgen Habermas provides a robust understanding of what constitutes a "formal organization," although the New Institutional theory here additionally captures very closely connected systems of rules, such as the securities laws. *See* 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 172, 305–09, 357–66 (Thomas McCarthy trans., 1987); *see also* Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 549 (2002) ("By 'formal organizations' Habermas means, essentially, bureaucratic organizations, whether governmental agencies or business firms, with hierarchical structures of command, defined roles and tasks, and defined behavioral expectations whose fulfillment is a condition for membership. Formal organizations are first constituted in positive law. Habermas speaks also of 'formally organized domains of action [*Handlungsbereiche*],' by which he sometimes means 'formal organizations' and sometimes means entire systems of action—the economic and administrative systems. The two terms go together: he tends to conceive of the economic and administrative systems as networks of formal organizations.") (footnotes omitted).

279. *See* Lecours, *supra* note 53, at 7.

280. *See* Scott, *supra* note 252, at 172–73.

281. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); DEMOCRACY AND TRUST (Mark E. Warren ed., 1999); TRUST IN ORGANIZATIONS (Roderick M. Kramer & Tom R. Tyler eds., 1996).

produce as "organic" in violation of an environmental regulation, how would a court examine the institutional interests of trust in that context? Would the inquiry focus on the consumers' trust in the accuracy of the label, the shareholders' trust in the company to maximize profits through effective marketing, society's trust in corporations to participate equitably in political debate about the meaning of "organic," the farmers' trust that the care taken in growing produce organically would receive some recognition in the market, or the corporation's trust in government to regulate labeling of produce? Those represent just a few overlapping institutional concerns that might arise given the squirrelly nature of trust. And if a broad definition of institution were employed, the norm of trust would represent only one of the various institutions that might be relevant (e.g., wealth maximization, transparency, or efficiency) to the precise speech claim considered in organic labeling. Such a task would seem hopelessly daunting for any court to undertake.

In contrast, with a narrow definition of institution, a court might consider the restrictions on organic labeling within the institution of environmental regulation. Particular attention might be paid within that setting to the Environmental Protection Agency, which takes part in defining and enforcing those regulations.[282] There still may indeed be overlapping institutional interests. In this case, the institution of organic farming would seem relevant, at least in the form of an organized industrial association that promulgates some rules and standards governing the practice of organic farming. The point is not to suggest that a narrow definition of institution would eliminate the problem of attending to overlapping institutional interests. Instead, by limiting the definition of institution to formal organizational structures that regulate corporate speech, the severity of the problem necessarily declines. Providing that limitation seems essential to make the New Institutional approach an analytical framework that courts could actually employ.

*3. Institutional Importance*

After crossing the definitional hurdle, a New Institutional analysis must examine whether the institution occupies a substantially important position in society.[283] The notion concerns the degree of respect we should afford an institutional construct. To the extent the institution plays a central role in economic, social, or political life, it simply seems appropriate to attend to the reasons supporting that centrality.[284] Of course, determining what constitutes a sufficient degree of societal importance raises some important

282. *See* 7 U.S.C.A § 6517 (West 1999 & Supp. 2007).

283. *See* Lynne G. Zucker, *Institutional Theories of Organization*, 13 ANN. REV. SOC. 443, 451 (1987) (suggesting that institutions which do not promote sufficiently important social values do not participate effectively in a dialectic exchange about the shape the environment should take).

284. This particular prong of the test incorporates elements from the institutional approaches promoted by Schauer and Neuborne. *See supra* notes 178–93 and 224–241 and accompanying text.

questions about the points of consideration and their relative weights in the analysis. Do social concerns outweigh economic considerations? What metric captures political importance? While the methods described below provide some help, the threshold question remains open about what suffices to establish an institution or institutional setting as "substantially important" to garner respect for the basic functions of that institution.

But that degree of ambiguity should not really pose a terribly difficult problem. An institutional analysis need not progress with mathematical precision. Especially in free speech jurisprudence, courts are continually asked to employ qualitative standards regarding the relative importance of the regulations and their fit to the governmental interests at stake.[285] A New Institutional approach does not condemn that practice but instead simply shifts the locus of the analysis from governments, speakers, and audiences to the institutional settings within which discourse actually occurs.

Moreover, while the framework suggested employs a consideration of substantiality, which often accompanies intermediate levels of judicial scrutiny,[286] the purpose here is not to suggest that the same kind of middle-level scrutiny afforded under the commercial speech doctrine should continue to control.[287] The analysis simply intends to weed out from consideration those institutions that seem not to play a role in what matters to many of us in our daily lives. Why? Remember that a New Institutional analysis does not articulate new speech principles that apply in various contexts of discourse. Rather, the analysis essentially targets the tugging and pushing effect that institutions have on the meaning we ascribe to the values that otherwise define and constrain those settings. So if an institution does not occupy a position of significant societal importance, the degree of movement in our shared understanding of speech principles caused by an investigation of that setting would seem quite small.[288] Therefore, to set the bar at institutions of substantial societal importance is simply just to ask for an analysis of institutions that might actually have an effect on our understanding of what speech rights might entail.

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285. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (setting forth the four-part test for commercial speech which requires, *inter alia*, determining if the governmental interest asserted is sufficiently substantial); *see also supra* Subpart II.A.

286. *See generally* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (describing at length various contexts in which courts apply substantiality tests).

287. *See* Richards, *supra* note 30, at 1178–79 (contending the commercial speech doctrine employs a level of intermediate scrutiny).

288. Simply providing an illustrative list of institutions that pass or fail the test of substantial societal importance might seem analytically cavalier because the test intends to provoke a reasoned assessment rather than to entrench personal intuition. Nonetheless, to the extent providing a few examples of some arguably clear cases on polar ends of the spectrum of societal importance might spur a more general understanding of the task at hand, the risk seems worth taking. Therefore, possible examples of institutions that might seem substantially important under this prong of the test include, among many other candidates, the U.S. capital markets, the military, and the Environmental Protection Agency. In contrast, examples of institutions that arguably lack substantial societal importance (at least for the purpose of applying the test) include, among others, country clubs, professional bowling, the Rule Against Perpetuities, and the National Hot Dog and Sausage Council.

*4. The Constitutive Role of Speech*

The second step in the analysis requires determining if speech plays a constitutive role in the institutional structure. This part of the examination provides a truly conservative outlook that enables courts to harness the New Institutional approach more effectively. It pushes off the table for consideration institutional settings where speech regulation or speech rights do not play a sufficiently important part. Requiring speech to play a constitutive role helps target the tight nexus between speech and the institutional setting.[289] Only if speech regulation or rights remain inextricably intertwined with the basic purpose, structure, and functioning of the organizational setting would speech remain a constitutive practice of the institution.[290] Therefore, a New Institutional approach would cast aside as insufficiently instructive particular contexts where speech regulation or rights represent a merely conventional aspect of the institutional project, where the treatment of speech seems incidental, not central. Because in the same way that a rather unimportant institution might not have much to say in the ongoing dialectic exchange between practice and principle, an institution that does not treat speech as central might not have much to contribute to assessing the appropriate level of constitutional protection for corporate speech.

In determining the centrality of speech to the basic structure, function, and purpose of an institution, it remains essential to adopt a hermeneutic sensitivity. Courts should approach understanding institutions from the inside out, in a series of rippling circles beginning from the institutional center.[291] That process entails initially looking at what an institution means from the perspective of those who inhabit the institutional setting—the workers, administrators, regulators, law makers, and others who breathe life into the formal organizational structure on a daily basis.[292] From there, courts should entertain the perspectives of actors, whose lives are more immediately affected by what takes place within the institutional setting itself. That step would include attending to the perspectives of the regulated

289. For a more general "constitutive approach" to interpreting law, see JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS (1996); ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW (1993).

290. *See* Brigham, *supra* note 255, at 437 (distinguishing between conventions and constitutive practices within institutions).

291. For an early and robust philosophical discussion of the internal perspective associated with a hermeneutic interpretive approach, see JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 154 (1979). *See also* W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473 (2006) (discussing more generally the role an internal perspective plays within a hermeneutic project).

292. The process suggested attempts to target the method of how speech becomes "institutionalized" within the organizational setting. For a further discussion of methods of institutionalization, see generally John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 54, at 41, 44–45; Zucker, *supra* note 283, at 443; and Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 54, at 83, 83–106. *See also* Suchman & Edelman, *supra* note 72, at 916–17.

speakers, whether corporate or otherwise, the intended audience, and others routinely affected by the regulatory framework, among others. The final stage would involve assessing, with less emphasis, the perspective of actors most disconnected from the institutional project—people whose lives remain affected tangentially. Adopting that hermeneutic outlook more appropriately targets how speech regulation actually thrives (or not) as a constitutive practice of the institution. Why? The process pays greater fidelity to the perspectives of actors who, by regulation of speech or reaction to regulation, participate more regularly in the dialectic exchange about the values those practices instantiate.

The emphasis on a hermeneutic sensibility, however, should not be taken as simply looking to individual opinion to determine whether speech regulation (or rights) represents a constitutive practice of an institution. Most certainly, a court must attempt to understand the formal structure of the organization at its various regulatory levels as well as the incentives and instrumental effects which those structures entail for rational actors. While the tools for accomplishing that task are described more fully below, the focus here is on the need for courts to treat rationality as necessarily bounded.[293] What reason dictates depends upon the context and perspective.[294] So what may seem like an entirely disinterested assessment must be somewhat qualified by the values, expectations, preferences, and other environmental factors that necessarily affect the perspective of the person undertaking the project. To the extent rationality is not a universal constant, a hermeneutic sensitivity would first consult the perspectives of those closest to the institutional core, even on matters seemingly dictated by reason alone.

Taking the securities regulation regime as an example might help tie these concepts together. Identifying whether speech regulation remains a constitutive practice of securities regulation would require first consulting the SEC administrators, regulators, staffers, and lawmakers regarding not their sense of the centrality of speech regulation to the basic function of the institution, but to understand what is the basic structure, function, and project of the institution itself. Answers to those same questions could then be gathered from the companies whose speech is regulated as well as from shareholders, investment bankers, and investors whose daily lives are directly affected by the regulatory project. Rather than a court simply looking dispassionately at what seem to be the rational incentives or effects flowing from the institutional structure, courts should look to those same actors, who are much more heavily situated in the institutional experience, for an appropriate understanding of what instrumental effects and enticements the struc-

293. For a description of what bounded rationality entails, see Selznick, *supra* note 66, at 273; and Ingram & Silverman, *supra* note 92, at 8–9. *See also* Herbert A. Simon, *From Substantive to Procedural Rationality*, *in* METHOD AND APPRAISAL IN ECONOMICS 129–48 (Spiro J. Latsis ed., 1976) (providing an early, foundational analysis of bounded rationality).

294. *Cf.* Campbell & Pedersen, *supra* note 56, at 13 (describing the new strands of institutionalism and their increasing awareness of the role of context).

tural setting provides. With that hermeneutic sensitivity, a court could reasonably address whether speech regulation or rights remain central to the project of the institution of securities regulation.

*5. Internal and External Effectiveness*

The third step in the New Institutional analysis asks courts to address whether affording greater (or lesser) corporate speech rights substantially affects the internal and external effectiveness of the institution.[295] Courts should essentially attempt to address how changes in the level of speech rights might alter the basic purpose, structure, and functioning of the organizational setting discerned in the prior stage of the analysis. For instance, in order to determine if corporations deserve greater speech rights within an organizational structure that relies heavily on speech regulation, such as the securities regulation regime, courts should examine the effect that affording greater corporate speech rights[296] would have on the basic purpose of securities regulation in maintaining the integrity of the capital markets, the structure of the laws in compelling periodic corporate disclosures, and the function of the institution in ensuring the investing public receives accurate information.[297] That analysis should weigh both the potential benefits and costs to increased speech protection.[298] While internal effectiveness targets the ongoing viability of the institution assuming changes in the level of speech protection, external effectiveness addresses changes in the societal impact of the institution.[299] In simple terms, at this final stage in the analy-

295. While the notion of effectiveness appears in Neuborne's theory as well, a New Institutional approach attends to both the internal and external dimensions of that effectiveness. *See supra* notes 178–93 and accompanying text (discussing Neuborne's test).

296. In a setting that relies heavily on affording broad corporate speech rights, the analysis would be inverted to examine the effect that greater speech regulation would have on internal and external institutional effectiveness.

297. *See* Siebecker, *supra* note 1, at 655–71 (discussing how granting full First Amendment protection to corporate speech could render invalid or impotent some of the most important provisions of the securities laws).

298. In hindsight, the failure to address the potential benefits of increased corporate speech rights within the securities regulation regime represents a flaw of the first article in this series. *See* Siebecker, *supra* note 1. It seems highly doubtful that those potential benefits, if any, would outweigh the extraordinary costs associated with granting full First Amendment protection to politically tinged corporate speech. Nonetheless, the integrity of the argument for permitting greater regulation of corporate speech within the institution of securities regulation would have been strengthened by paying attention to the potential benefits of greater speech rights within that setting as well.

299. For a more detailed account of how to assess organizational effectiveness in relationship to particular values, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1318–19 (1984), which states:

> To be effective, the organization must internalize as part of its collective consciousness the common purpose that unites its members; this purpose will then both define and be defined by the members' daily activities. Expertise theorists have thus focused on the sociological issue of how organizations can foster the cooperative pursuit of a common goal. In such an effort, it would obviously be a mistake to overlook any aspect of human personality, just as it would be wrong to emphasize formal organization-chart relationships among employees. People function within the bureaucracy with their whole personality and not just their rational, objective side. Indeed, organizations themselves function—and must be understood—as if they were human beings, entities not reducible to the combination of their separable

sis, courts should attempt to verify the claims regarding the institutional role played by speech regulation (or rights). That verification occurs, however, by treating the claims about the role speech plays as false and examining what would happen to the institution and the surrounding environment were corporations to enjoy greater speech rights (or regulation) than previously thought essential.

### *B. Essential Tools*

Implementing the three-part New Institutional approach to corporate speech requires a special set of analytical tools. While courts might not currently utilize the methods suggested, nothing should prevent courts from implementing these strategies. The analysis does not rely on judges gaining competence to engage the methods without assistance. Instead, the project assumes that assistance should come (and will come if courts require attention to the New Institutional framework) from experts proffered by litigants in any case and from New Institutional scholars as well. That reliance on litigants to proffer evidence should not seem odd in any sense. The very nature of litigation places a burden on one party or another to adduce a particular claim or defense. Adopting a New Institutional approach does not change the basic structure of litigation. It simply creates a more effective set of standards for courts to use in determining the proper scope of corporate speech rights.

#### *1. Historical Investigation*

Attending to the historical decisions that influence institutional formation and development seems essential to understanding the societal importance of an institution and to the role corporate speech might play in any organizational structure. While not privileging every aspect of the historical strand of New Institutional theory, it seems that a properly situated analysis of the societal importance of any institution and an assessment of whether speech plays a constitutive role in the institutional structure would require an attention to historical influences.[300] After all, the very conception of institutions as organic and evolving suggests that a momentary snap-shot cannot capture adequately the natural undulation in the relationship between norm and practice, and between institution and environment, that occur over time.[301] Capturing those historical influences certainly requires courts to rely on experts in any institutional setting. But absent an attempt to situate an understanding of institutional structure, purpose, and function within an

elements. As a consequence, organizational success depends on the creation of a successfully integrated organizational personality, not on rationalist schemes to rid the organization of subjective discretion.

300. *See* Hall & Taylor, *supra* note 65, at 19–20.

301. *See* Harty, *supra* note 111, at 51–53.

historical framework, any meaning ascribed to the societal importance of an institution or to the role speech plays within an institutional setting would become almost obsolete upon articulation. Thus, the historical analysis establishes (or not) a certain institutional stability necessary to provide courts comfort that the conclusions drawn might properly endure, at least beyond what a momentary glimpse into any institutional setting would afford.

*2. Organizational Understanding*

Organizational theory provides a particularly valuable tool in understanding the internal structures of institutions amenable to the New Institutional approach to corporate speech. In particular, organizational theory helps develop a more complete understanding of how and why speech rights become instantiated within an institutional setting.[302] Using this method almost involves a smaller institutional analysis within the New Institutional approach to corporate speech. Following the sociological strand of New Institutional theory that treats bundles of norms and attitudes as institutions,[303] the relevant institution would become a respect for free speech. The formal organization structure regulating corporate speech would cabin the analysis to prevent an unwieldy exploration.

Given that limitation, this smaller institutional project simply involves an assessment of the internal cultural justifications for the institution of speech embraced within the organizational setting. Relevant to the second and third prongs of the three-part analysis, an attention to sociological forces would help determine the internal appropriateness of the role speech rights play in any organizational setting and also enhance an understanding of the effects that changes in the respect afforded speech might have on internal effectiveness. If attention to perspective remains important, and it does, a sociological outlook provides a more disciplined way of going about attending to those perspectives. The purpose here is not to spell out exactly how a sociological analysis of internal cultural norms might affect the legitimacy of a particular statement regarding the importance of speech within an organizational structure. The point is simply that courts should seek sociological evidence to determine the internal commitment to free speech or speech regulation within any organizational setting.

*3. Rational Choice*

While not proposing an overarching economic analysis of institutions and their functions, a New Institutional approach should not ignore the in-

302. *See* Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES L. 347, 362–64 (addressing how an institutional sensitivity should incorporate an understanding of organizational structures to gather meaning about norms that affect and pervade those settings); Zucker, *supra* note 283, at 454–59 (articulating tests and methods for understanding the effect that organizational structure has on understanding institutional norms and practices).

303. *See* Lecours, *supra* note 53, at 16–17.

centives and instrumental effects that any particular organizational structure entails. Rational choice analysis need not, however, take a combative stance toward historical or sociological analysis. Instead, an examination of rational choices facing any actor can remain attentive to cultural and historical constraints. As noted earlier, rational choice theory can employ historical and cultural narratives to understand certain organic constraints on choice.[304] In that sense, rational choices remained somewhat bounded by institutional settings.[305] Moreover, especially when considering corporate actors, perhaps more intensely motivated by simple wealth-maximizing principles than individuals, a rationality-based assessment of incentives and instrumental effects seems particularly apt.

In any event, the role that rational choice could play within the New Institutional approach to corporate speech centers on the third prong of the analysis. A determination of whether affording greater (or lesser) corporate speech rights would substantially affect the internal and external effectiveness of the institution requires an assessment of how the various actors within and outside the institution might respond to such a change. Of course, the result of that determination could only be based on predictions of behaviors. Unless those predictions reflect some attention to rational choice, the results might seem somewhat arbitrary. Couching the analysis of predicted behavior in rational action affords a sense of credibility to the project. It adds a layer of confidence in the conclusions drawn from much more historically and culturally based parts of the investigation. An extraordinary level of sophistication in the analysis does not seem necessary. But given the role that economic theory currently plays in corporate law,[306] wholly ignoring rational choice would seem to undercut the attractiveness if not the relevance of the New Institution approach to corporate speech.

*4. Empirical Evidence*

Satisfying each prong of the three-part test should require empirical evidence. One of the great contributions of New Institutional theory is a reinvigorated appreciation for the role of empirical data in adducing claims.[307] Selecting the relevant variables to study, designing appropriate parameters for data collection, and obtaining the data represent just some of the difficult tasks involved.[308] But those hurdles must be overcome to make any institutional analysis sensible. And the methods (and standards) used in

304. *See supra* notes 87–88 and accompanying text.

305. *See* Rubin, *supra* note 302, at 364–65 (discussing how a New Institutional approach takes cultural norms into account when assessing rational action).

306. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 18–19 (2002) ("The law journals are filled with increasingly sophisticated economically-oriented corporate law scholarship. It has begun filtering into judicial opinions. Even those corporate law scholars critical of economic analysis necessarily spend considerable time and effort responding to those of us who practice it.") (footnote omitted).

307. *See* Lecours, *supra* note 53, at 14–16.

308. *See id.* at 14–17.

a variety of thriving academic disciplines, such as political science, sociology, and economics, provide sufficient guidance.

There are far too many empirical possibilities to describe,[309] but a few suggestions might help. Determining whether or not a particular organizational institution occupies an important role in society might rely on analyses over time of national opinion surveys; the quantity of media references; expenditures by the institution; government resources dedicated to the institution; or the amount of rules promulgated by the institution or the number of Supreme Court cases involving the organization. Assessing whether speech regulation (or free speech) represents a constitutive practice of the institution might employ analyses over time of localized opinion surveys of actors within the institution itself; opinion surveys of those directly affected by institutional action; the number of regulations affecting speech; the severity of speech regulations; or speech regulation in other institutional settings as points for comparison.

Regardless of the empirical method utilized, the essential concern is that empirical evidence gets employed to adduce the elements of the New Institutional approach to corporate speech. That evidence makes the case more convincing that a solution to the problems facing existing speech jurisprudence can be found on the ground where the details of our daily lives transpire.

### *C. Notes to Builders*

Some essential notes must accompany the architectural plans for building a New Institutional approach to corporate speech. The disclosures touch upon a need for multidisciplinary research to implement the project and the strong but limited reach of the theory.

#### *1. Multidisciplinary Collaboration*

Building a New Institutional approach to corporate speech requires a collaborative effort of sorts. Although the goal of this project is to construct a comprehensive philosophical and methodological framework that courts could actually adopt as difficult corporate speech cases arise, courts cannot simply run with the ball. Quite frankly, many courts might not without assistance know where to find the ball or in which direction to run.

Scholars who recognize the substantial overlap in fields such as law, political science, sociology, and economics occasionally lament the absence of much discourse among those branches.[310] Around a New Institutional ap-

309. *See id.*; *see also* Campbell & Pedersen, *supra* note 108, at 250–56 (surveying some of the many methodological possibilities to undertake within an New Institutional framework).

310. *See* DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 3 (2003) ("[L]aw professors and political scientists generally have neglected each other's contributions"); Eric A. Posner, *Strategies of Constitutional Scholarship*, 26 LAW & SOC. INQUIRY 529, 531 (2001) (book review) ("[E]xchange between legal scholars and political scientists has been less than one might have predicted at the dawn of

proach to corporate speech, however, these disciplines can and should converge. While this Article provides the basic philosophical and methodological architecture for such an approach, implementing the construct would require courts to rely on scholars and other experts in a variety of fields who could collect, sift, interpret, and marshal the data relevant to discrete institutional settings. Of course, while the institutional analyses may prove intellectually edifying in their own right, to the extent courts embrace the New Institutional analysis proposed, a market for that research will inevitably develop as litigants rather than courts seek to gather the evidence necessary to adduce any claim. For those especially interested in encouraging a multidisciplinary and collaborative scholarship, recognizing that market incentive remains irresistible.

*2. Limited Sites of Analysis*

Although a New Institutional approach provides a workable philosophical and methodological framework for resolving some difficult corporate speech questions, the theory remains necessarily limited in its reach. That limitation results from an essential tradeoff between constructing a grand, new theory for First Amendment jurisprudence and building a workable solution to a discrete, yet still incredibly important, problem of politically tinged corporate speech. To the extent courts begin embracing a New Institutional approach to corporate speech, the theory may find greater application in other speech (and rights) contexts. Until then, the goal remains one of incremental improvement, where improvement is desperately needed.

Before describing where the theory cannot reach, it should be noted that a New Institutional approach to corporate speech remains adequately equipped to prevent the impending collision between the Supreme Court's corporate speech jurisprudence and its disparate approach under the commercial speech doctrine. Quite simply, where existing speech principles remain wholly impotent, a New Institutional approach could offer substantial guidance. If corporate speech occurs in a vitally important American institution and the basic structure, purposes, and functions of that institution depend on speech regulation (or free speech), a New Institutional approach provides strong arguments for respecting that regulation (or freedom from regulation). To the extent the institutional analysis reveals a sufficiently strong pull towards free speech or speech regulation, a core set of cases within any institution setting can be rather easily resolved. By adopting an institutional analysis, then, courts can better understand and implement the underlying principles that actually animate our sense of what free speech entails.

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law and economics and public choice."); Shapiro, *Law, Courts and Politics*, *in* INSTITUTIONS AND PUBLIC LAW, *supra* note 66, at 276.

Because a New Institutional approach to corporate speech intends not to supplant existing speech jurisprudence but rather to provide an extra layer of analysis, the framework becomes especially instructive when the institutional pull becomes sufficiently strong in one direction. In cases where overlapping institutional concerns make the analytic results indeterminate, the societal value of the institution seems questionable, or the nexus between speech and institutional function remains unclear, the value of the approach declines rather precipitously.

Acknowledging this limitation does not betoken a lack of confidence in the integrity of the approach as a useful analytical tool for resolving some incredibly important corporate speech claims. Indeed, without a New Institutional approach, the viability of numerous regulatory regimes remains uncertain as corporations continue to use politically tinged commercial speech to evade regulation or liability. Still, claiming that a New Institutional approach could answer all difficult speech questions would be disingenuous. Definitional limitations were built into the theory in order to offer a workable construct that courts could actually embrace. While that choice might limit the reach of the New Institutional approach, it enhances the strength of the conclusions drawn in the important institutional sites amenable to the analysis.

## VI. CONCLUSION

A New Institutional approach to corporate speech provides a workable philosophical and methodological framework that courts could actually employ to avoid the impending collision between the Supreme Court's jurisprudence regarding corporate political speech and the commercial speech doctrine. That the jurisprudential train wreck will occur does not seem an open question, as corporations increasingly practice the artful alchemy of mixing just enough political content with otherwise commercial disclosures to avoid liability or regulation in a variety of settings. What does remain open, however, is whether courts (including the Supreme Court) will muddle blithely ahead under the existing corporate speech framework, an oddly forked jurisprudence with analytical tines pointing in opposite directions. Without doubt, continuing to employ such a decrepit analytical tool threatens the viability of regulatory regimes in which corporations continue to press for full First Amendment protection of politically tinged commercial speech.

A New Institutional approach to corporate speech could help put an end to the uncertainty. While some work remains to make the case for accepting a New Institutional approach even more convincing, a sufficient architectural framework for implementing the theory now exists. The task ahead remains one of construction—building a model home of sorts for the theory. The next installment of this three-part series promises to tackle that project.