

## INSTITUTIONS IN THE MARKETPLACE OF IDEAS

JOSEPH BLOCHER<sup>†</sup>

### ABSTRACT

*If any area of constitutional law has been defined by a metaphor, the First Amendment is the area, and the “marketplace of ideas” is the metaphor. Ever since Justice Holmes invoked the concept in his Abrams dissent, academic and popular understandings of the First Amendment have embraced the notion that free speech, like the free market, creates a competitive environment in which the best ideas ultimately prevail. But as with the free market for goods and services, there are discontents who point to the market failures that make the marketplace metaphor aspirational at best, and inequitable at worst.*

*Defenders of the free economic market have responded to these criticisms by developing a thicker understanding of how the market actually functions. Their most successful model is the New Institutional Economics, which incorporates and explains the transaction costs and institutions that populate and effectively regulate that market. The marketplace of ideas model, however, remains faithfully wedded to a neoclassical view that depends on a perfectly costless and efficient exchange of ideas. It is thus vulnerable to the*

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<sup>†</sup> Yale Law School, J.D. 2006; University of Cambridge, M.Phil. 2003; Rice University, B.A. 2001. Many thanks to Paul Horwitz, Marin K. Levy, Scott Moss, Neil Richards, Bertrall Ross, Michael Siebecker, and Nat Stern for their invaluable feedback on earlier drafts of this Article, and to Jonathan Pahl and Kish Vinayagamoorthy for exceptional editorial assistance.

*same criticisms economists answered decades ago, and it fails to take into account the rich view of market mechanisms and institutions they have developed since. First Amendment scholars led by Frederick Schauer have begun to lay the groundwork for a solution by describing an “Institutional First Amendment” that would accord special treatment to certain institutions like schools and the press.*

*But just as the marketplace of ideas fails to account for institutions, the Institutional First Amendment fails to account for the marketplace of ideas. As it turns out, the two theories are not only reconcilable but complementary. This Article brings them together, using the New Institutional Economics to describe the “speech institutions”—such as schools and universities—that play the same cost-reducing role in the marketplace of ideas as other institutions do in the market for goods and services. Courts should defer to the speech rules of marketplace-of-ideas-enhancing institutions for the same reason and to the same degree that economists defer to the private norms of market-enhancing institutions. The Article then tests the descriptive and normative validity of this “New Institutional First Amendment,” finding that it both explains and justifies much of the Court’s school speech doctrine, including its 2007 ruling in *Morse v. Frederick*. It also justifies the special status of universities as speech institutions, and suggests an explanation for some of the current weaknesses in commercial speech doctrine. By addressing the “economic” objections to the marketplace metaphor, the Article attempts to better describe, explain, and rehabilitate the marketplace of ideas.*

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## INTRODUCTION

In a single passage of his dissenting opinion in *Abrams v. United States*,<sup>1</sup> Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic

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1. *Abrams v. United States*, 250 U.S. 616 (1919).

understandings of free speech.<sup>2</sup> The metaphor he employed was the “marketplace of ideas.”<sup>3</sup> In Holmes’s words:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct 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, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>4</sup>

Free speech, in Holmes’s framework, is worthy of constitutional protection precisely because—like the free flow of goods and services—it creates a competitive environment in which good ideas flourish and bad ideas fail.<sup>5</sup> This theory provided the first justification for a broad freedom of expression commensurate with the sweeping language of the First Amendment itself.<sup>6</sup> Never before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of

2. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 n.97 (2005) (suggesting that the popular view—though “crude” and not endorsed by Schauer himself—is that “the First Amendment started in 1919” when *Abrams* was penned).

3. The phrase “marketplace of ideas” was not actually Holmes’s. Trade imperfections being what they are, the marketplace of ideas has accorded Holmes credit for what was in fact Justice Brennan’s turn of phrase. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”); see also *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 199 (1973) (Brennan, J., joined by Marshall, J., dissenting) (“I can only conclude that there is simply no overriding First Amendment interest of broadcasters that can justify the absolute exclusion of virtually all of our citizens from the most effective ‘marketplace of ideas’ ever devised.”).

4. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

5. R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 27 (1977) (“The rationale of the First Amendment is that only if an idea is subject to competition in the marketplace can it be discovered (through acceptance or rejection) whether it is false or not.”).

6. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the Freedom of Speech . . .”); see Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justification for Free Speech*, 4 J.L. & POL. 451, 454 (1988) (“This dissent for the first time attached a theory of freedom of expression to the language of the first amendment.”); see also Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 704 n.206 (1987) (including *Abrams* among the cases that laid the foundation for “today’s accepted free speech doctrine”).

constitutional law.<sup>7</sup> Its influence has been both descriptive and normative, dominating the explanation of and the justification for free speech in the United States.

But while First Amendment doctrine has carried Holmes's laissez-faire marketplace banner more or less faithfully since *Abrams*, economic theory has not. Holmes's metaphor describes the marketplace as an atomistic place where individuals costlessly compete to their mutual benefit.<sup>8</sup> This simplistic view of the market

7. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73 (1960) (arguing that establishing truth through a marketplace of ideas "is not merely the 'best' test. There is no other."); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) ("In Speech Clause jurisprudence, for example, the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.").

In an attempt to chart the degree to which "[t]he marketplace of ideas permeates the Supreme Court's first amendment jurisprudence," Stanley Ingber listed the following cases, all of them major landmarks in the doctrine:

Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537–38 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 248 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967).

Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 n.2. The list has grown since Ingber compiled it. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons . . . will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." (citation omitted)); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[A] more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace." (quoting *Simon & Shuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))); *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (discussing "[t]he dramatic expansion of this new marketplace of ideas"); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) ("[W]e held that it was error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas." (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975))); *Simon & Schuster*, 502 U.S. at 116 ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." (citing *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991))).

8. Describing the legal ideology that guided Holmes's dissent, Pnina Lahav has explained that "[s]ociety, in turn, was conceived not as organic but rather as atomistic—made of many autonomous individuals." Lahav, *supra* note 6, at 455; see also Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1653 (1998) ("Despite its frequent individualist rhetoric—including depictions of lone speakers on soapboxes and of buyers and sellers in a marketplace of ideas—First Amendment law must regularly take account of organizations engaged in speech activity that stand somewhere between the individual and the state."). The First Amendment has also come to be associated

has fallen out of favor with economists, who realized long ago what critics of the marketplace of ideas metaphor have argued: The market is an imperfect and frequently malfunctioning machine, and the costs of exchange add friction to its gears. This friction, which economists call “transaction costs,” includes the time and expenditure needed to find, evaluate, and obtain good ideas or products.<sup>9</sup> And although Holmes’s metaphor does not account for them, these costs exist in the marketplace of ideas just as surely as they do in the economic market.

But rather than defending a view of the idealized, neoclassical market—as Holmes’s supporters have—economists responded by creating a new model, one that accounts for transaction costs. Led by Ronald Coase,<sup>10</sup> Douglass North,<sup>11</sup> and Oliver Williamson,<sup>12</sup> among others,<sup>13</sup> many economists have embraced a richer understanding of

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not just with an atomistic marketplace of ideas, but with support for *individual* rights and a profound distrust of social institutions. Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 686; Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Context*, 69 TEX. L. REV. 1, 5 (1990).

9. R.H. COASE, *The Problem of Social Cost*, in *THE FIRM, THE MARKET, AND THE LAW* 95, 114 (1988).

10. See generally Ronald Coase, *The New Institutional Economics*, 88 AM. ECON. REV. 72, 72 (1998) (“It is commonly said, and it may be true, that the new institutional economics started with my article, ‘The Nature of the Firm’ (1937) with its explicit introduction of transaction costs into economic analysis.”).

11. See generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990) (analyzing how institutions contribute to long-term economic performance and providing a “framework to integrate institutional analysis into economics and economic history”).

12. See generally Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 601 (2000) (discussing the development of the New Institutional Economics and proposing the “remediableness criterion” as an alternative formulation of efficiency under which “an extant mode of organization for which no superior *feasible* alternative can be described and *implemented* with expected net gains is *presumed* to be efficient”).

13. See generally THRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 6–7 (1990) (construing the Neoinstitutional Economics approach under which certain neoclassical assumptions are relaxed, and distinguishing this approach from New Institutional Economics, under which certain neoclassical assumptions are rejected); *THE FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS* (John N. Drobak & John V.C. Nye eds., 1997) (compiling a series of articles by scholars of New Institutional Economics, including John V.C. Nye and John N. Drobak, written for a conference held at Washington University in March 1995 to mark Douglass North’s win of the 1993 Nobel Prize in Economics); *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* (John Harris et al. eds., 1995) (compiling a series of articles by scholars of New Institutional Economics, including John Toye and Robert H. Bates, written for a conference organized by the Third World Economic History and Development Group to analyze the movement’s application to development economics).

the *institutions*—not just individuals—that make the market economy work. Though diverse in their interests and approaches, these economists gather under the flag of the New Institutional Economics (NIE), which has become a preferred framework for analyzing economic development.<sup>14</sup> NIE analysis focuses not just on individuals' attempts to maximize their own utility in an idealized market—the Holmesian view of the marketplace—but also on understanding how transaction costs make the market malfunction, and how institutions help or hinder individuals' attempts to overcome those costs.<sup>15</sup> Bolstered by empirical and social science evidence, NIE scholars have argued persuasively that many institutions lower the costs of exchange, and that such institutions should be entitled to deference from would-be regulators.

Meanwhile, as part of a revival of interest in institutional context in constitutional law,<sup>16</sup> First Amendment scholarship has taken an interest in institutions as well, albeit without reference to institutional economics. Some First Amendment scholars—most notably and most successfully Frederick Schauer<sup>17</sup>—have begun to sketch the contours of an “Institutional First Amendment” that would be better attuned to certain speech-enhancing social institutions. Under Schauer's

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14. Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT'L L. 229, 239 (1999) (“Across the variety of social sciences, the theoretical approach that possibly has the most currency is institutionalism.”).

15. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 375 (2001) (noting that the New Institutional Economics “is united by its concern with transaction costs in understanding economic phenomena”).

16. See generally Symposium, *Constitutional “Niches”: The Role of Institutional Context in Constitutional Law*, 54 UCLA L. REV. 1463 (2007) (collecting articles addressing educational institutions, the institutions of federalism, national security institutions, and the workplace). Legal scholars often use the word “institution” to refer to large categories such as the market, courts, or the legislature. See, e.g., NEAL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994) (focusing on how society allocates governance authority across the political process, the market, and courts); ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* (2007) (describing how law can promote democratic institutions); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 (2003) (arguing for greater attention to the respective interpretive capacities of courts and the legislature); see also Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005) (arguing that constitutional principles should apply differently to federal, state, and local governments, rather than a one-size-fits-all approach).

17. See Schauer, *supra* note 2, at 1259–60 (arguing that as institutional differentiation advances, First Amendment doctrine should develop a capacity to distinguish among institutions).

approach, courts should (and arguably do<sup>18</sup>) accord First Amendment protection to institutions depending on the degree to which those institutions serve important First Amendment values.<sup>19</sup> Thus, institutions that advance the First Amendment's underlying values are entitled to some deference when engaging in speech conduct. Schools and the institutional press, for example, might be given increased speech protection as compared to prisons or the military.

But just as the marketplace of ideas lacks an understanding of institutions, the Institutional First Amendment lacks an understanding of the marketplace. The institutional approach draws its strength from a nuanced approach to the role of institutions, not just individuals, in free speech. It offers a rich understanding of institutions, but fails to account for the marketplace metaphor that has guided free speech analysis for nearly a century. As a result, the Institutional First Amendment is largely divorced from the dominant First Amendment framework.

Considered in tandem, however, the institutional and marketplace conceptions of the First Amendment provide a holistic descriptive and normative conception of the practice and purpose of free speech, one that rehabilitates Holmes's doctrine-changing metaphor and simultaneously incorporates a richer view of the marketplace and the institutions that make it work. This Article brings the theories together.

Part I begins by revisiting Holmes's conception of the marketplace of ideas, describing its power and influence and the understanding of the market on which it relies. The second Section of Part I then demonstrates how the economic understanding of the "marketplace" has evolved since Holmes invoked it, thanks largely to the contributions of the New Institutional Economics.

Part II advances a new theory of the First Amendment—the New Institutional First Amendment—which integrates Justice Holmes's marketplace metaphor with the lessons of institutional economics. This theory justifies the special treatment of certain speech institutions, and does so by reference to the marketplace metaphor that has guided First Amendment theory and jurisprudence for

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18. See Scott A. Moss, *Prisoners and Students and Workers—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1639 (2007) (arguing that courts are overly sensitive to tailoring when it comes to certain institutions such as prisons and schools).

19. Schauer, *supra* note 2, at 1270.

almost a century. It argues that “speech institutions” deserve deference by lawmakers because, and only to the extent that, they improve the marketplace of ideas. It is this principle—use of the marketplace metaphor to separate good speech institutions from bad—that separates the “New” Institutional First Amendment approach from that advocated by Professor Schauer. Part II begins by describing Schauer’s Institutional First Amendment, then carries Schauer’s theory forward by joining it with the insights of the New Institutional Economics. The final Sections of Part II suggest ways to identify and encourage market-enhancing speech institutions, again drawing on the lessons of NIE.

Part III then tests the descriptive accuracy of the New Institutional First Amendment theory by applying it to the Supreme Court’s treatment of First Amendment claims involving schools and universities, two of the most important speech institutions. Measured against the Court’s institutional free speech jurisprudence, including its 2007 decision in *Morse v. Frederick*,<sup>20</sup> the New Institutional First Amendment performs well as a descriptive and analytic tool. The theory also helps explain—although cannot fully resolve—many of the problems with contemporary commercial speech doctrine.

## I. THE MARKETPLACE OF IDEAS AND NEW INSTITUTIONAL ECONOMICS

### A. *The Marketplace of Ideas*

Holmes’s invocation of the “marketplace of ideas” metaphor, though it came in a dissent, has had as major an impact as any Supreme Court decision on popular and academic thinking about the First Amendment. Indeed, “[i]t is almost impossible to overstate the importance of Justice Holmes’s dissent in shaping American law and society.”<sup>21</sup>

Scholars and commentators have generally conceptualized the metaphor as invoking the perfect competition of an idealized neoclassical free market. Bad ideas should be no more feared than bad products or services; they will simply lose out to better

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20. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

21. Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1314 (2005).

competitors, so long as all are freely available.<sup>22</sup> As John Milton—whose *Areopagitica*<sup>23</sup> was an intellectual predecessor to Holmes's *Abrams* dissent<sup>24</sup>—wrote, in a style only slightly more literary than Holmes's, “Let [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?”<sup>25</sup> In Holmes and Milton's view, the “truth” should emerge from the free and competitive exchange of ideas.<sup>26</sup>

Soon after its initial appearance in 1919, the marketplace metaphor came to dominate the Court's First Amendment jurisprudence. In 1927, Justice Brandeis—who had joined Holmes's *Abrams* dissent—revisited and re-endorsed the marketplace metaphor from a slightly different angle. Concurring in *Whitney v. California*,<sup>27</sup> Brandeis wrote that “freedom to think as you will and to speak as you think are means indispensable to the discovery and

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22. See, e.g., RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 115 (1990) (praising a “Darwinian test” for ideas as producing better results than a “centrally managed” economy); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 8 (1964) (“The traditional defense of the free market as a method of organizing economic life has been utilitarian or instrumental. . . . The traditional defense of the free market in ideas has in the main also been utilitarian.”).

23. JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* (H.B. Cotterill ed., MacMillan & Co. 1959) (1644).

24. *Areopagitica* has spawned a rich literature as well, frequently as a sibling to Holmes's *Abrams* dissent and John Stuart Mill's theory that human ideas and opinions prove themselves only when challenged and only over time. See JOHN STUART MILL, *On Liberty*, reprinted in *THE SIX GREAT HUMANISTIC ESSAYS OF JOHN STUART MILL* 143 (Albert William Levi ed., Washington Square Press 1963) (1859) (“Yet it is evidence in itself. . . . that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.”); see also ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 509 (1941) (grouping Holmes with Mill and Milton as leading opponents of censorship in favor of open discussion).

25. MILTON, *supra* note 23, at 45. Thomas Jefferson expressed similar sentiments:

[T]ruth is great and will prevail, if left to herself; . . . she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

Thomas Jefferson, *A Bill for Establishing Religious Freedom*, reprinted in 2 *THE PAPERS OF THOMAS JEFFERSON* 545, 546 (Julian P. Boyd ed., Princeton Univ. Press 1950)

26. Other scholars, pursuing a slightly more nuanced view of the marketplace, have argued that the “value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself.” Marshall, *supra* note 7, at 4. *But see* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 724 (1991) (arguing that the search for truth has no intrinsic value).

27. *Whitney v. California*, 274 U.S. 357 (1927).

spread of political truth,”<sup>28</sup> and that in the case of bad ideas or falsehoods, “the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”<sup>29</sup> Brandeis’s conception of the First Amendment has been described as depending on the pursuit of self-rule, or self-fulfillment, or civic virtue, rather than simply truth.<sup>30</sup> But whether justified in terms of truth or virtue, the marketplace was the animating metaphor for both Holmes and Brandeis. Since 1919, when *Abrams* was decided, in a variety of majority,<sup>31</sup> concurring,<sup>32</sup> and dissenting<sup>33</sup> opinions, Justices have repeatedly returned to Holmes’s basic idea that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>34</sup>

For all of its power, the marketplace of ideas metaphor also has explanatory weaknesses and normative difficulties, almost all of which track the shortcomings of its idealized view of an uninhibited, costless, and perfectly efficient free market.<sup>35</sup> Although this idealized conception of the marketplace may have held sway in 1919,<sup>36</sup> economists have long since realized that the “neoclassical” view, though useful as an analytic tool, is far from descriptively accurate. In Professor Coase’s estimation, the neoclassical approach “is a view disdainful of what happens in the real world, but it is one to which

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28. *Id.* at 375 (Brandeis, J., concurring).

29. *Id.* at 377.

30. Lahav, *supra* note 6, at 453.

31. *See* cases cited *supra* note 7.

32. *E.g.*, *McCormack v. FEC*, 540 U.S. 93, 265 (2003) (Thomas, J., concurring in part and dissenting in part) (“The very ‘purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” (alteration in original) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))).

33. *E.g.*, *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (“When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. . . . Full and free discussion has indeed been the first article of our faith.”); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (arguing that an idea “offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth”).

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

35. *See* Ingber, *supra* note 7, at 16–17 (“[T]he marketplace of ideas is as flawed as the economic market.”).

36. Professor Coase’s *The Nature of the Firm* is credited with introducing the concept of transaction costs and thus exposing the flawed assumptions underlying the neoclassical model. It did not appear until 1937. *See* Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

[neoclassical] economists have become accustomed, and they live in their world without discomfort.”<sup>37</sup> So it is with the “marketplace of ideas” conception. As Paul Brietzke puts it, both models ignore

a host of factors that make us human, including altruism, habit, bigotry, panic, genius, luck or its absence, and factors such as peer pressures, institutions, and cultures that turn us into social animals. A dehumanized, desocialized, and often sexist ‘economic man’ [or ‘speech man’] supposedly goes through life as if it were one long series of analogies to isolated transactions on the New York Stock Exchange.<sup>38</sup>

Professor Brietzke and other critics of the marketplace of ideas metaphor have frequently drawn parallels between failures in the real-world market and failures in the marketplace of ideas.<sup>39</sup> Perhaps the most frequently identified failures are those caused by resource inequalities and disparities in communicative power and ability.<sup>40</sup> The marketplace of ideas, these critics argue, is likely to reflect and justify

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37. Coase, *supra* note 10, at 72.

38. Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962–63 (1997) (alteration in original) (citation omitted).

39. See, e.g., Ingber, *supra* note 7, at 49–55. Whereas failures in the real world marketplace have been used to justify state intervention in the market, failures in the marketplace of ideas are generally used to criticize the theory and to argue that some other justification for free speech should be pursued in its stead. Economists have noted this unequal treatment with frustration. See Coase, *supra* note 5, at 4 (discussing the dichotomy between the assumptions of the marketplace of ideas and those of the traditional marketplace); Director, *supra* note 22, at 6 (arguing that the distinction between the marketplace of ideas and the economic marketplace is incorrect).

40. The Supreme Court has repeatedly noted in its campaign finance jurisprudence that resource disparities can threaten the marketplace of political ideas. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (finding that the government has a compelling interest in preventing corporations from using their resources “to obtain ‘an unfair advantage in the political marketplace’” (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986))); see also CATHERINE A. MACKINNON, *ONLY WORDS 77–78* (1993) (arguing that First Amendment doctrine, even when it nominally protects the marketplace of ideas, has not “guaranteed free and equal speech” because of imbalances in speakers’ power); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 673–96 (2006) (describing perceptual biases that complicate the acquisition and processing of information); Darren Bush, *The “Marketplace of Ideas”: Is Judge Posner Chasing Don Quixote’s Windmills?*, 32 ARIZ. ST. L.J. 1107, 1114–16 (2000) (noting the possibility of monopolies in the marketplace of ideas).

Similar arguments could be made—though they rarely are—about the ability of *listeners* to absorb and comprehend speech. Critics of the marketplace of ideas tend to focus on the ability of speakers to dominate, and regard a speaker’s inability to effectively express a viewpoint as a harm to the speaker, rather than to the listener who cannot hear or understand the viewpoint. A rich view of the market should consider both harms.

the positions of powerful speakers, rather than the merit or “truth” of the ideas they express. A related criticism suggests that even if the expression of ideas could be equalized, perhaps through government action,<sup>41</sup> the efficiency of the marketplace of ideas would still be strictly limited by participants’ imperfect ability to reason.<sup>42</sup> And even if people could reason perfectly, the market *still* might not function as Holmes envisioned, so long as their preferences are too unstable to permit the pursuit of a single “truth.”<sup>43</sup> Competition in such an imperfect marketplace of ideas will not lead to ideal results, critics allege, so long as the participants disagree about what good ideas are, or cannot identify good ideas when they see them. Just as economists argue that regulation of real-world markets is desirable when and only when the market fails—because of fraud or monopoly, for example—proponents of the marketplace of ideas theory can argue that regulations of speech are permissible only when there are market failures in the marketplace of ideas.<sup>44</sup> As in the economic market, such failures are likely to occur when circumstances make open competition impossible.

Although generally avoiding the rhetoric of “market failure,” the Supreme Court has long been attuned to the possibility of certain speech-related market failures, such as the “emergency” situation to which Justice Brandeis alluded in *Whitney*. One easy example—also a brainchild of Justice Holmes and also born in 1919—is the clear and

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41. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 16 (1993) (arguing for a “New Deal for speech”). Daniel Farber has also used the market failure argument to suggest greater government involvement in speech, arguing that speech may be an underproduced public good that the government should, if anything, subsidize. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558–61 (1991).

42. For an explanation of this objection as applied to the marketplace of ideas, see Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 9 (1996) (explaining the criticism but not endorsing it). Behavioral economics, with its recognition of the mental biases that can interfere with accurate information processing, is an important source on this point. See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998) (describing a “more accurate conception of choice” based on actual human behavior and relating this behavior to prescriptive and normative ideas about the law).

43. Goldman & Cox, *supra* note 42, at 9 (explaining but disclaiming the notion that the “mutability of beliefs undercuts objective truth”).

44. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 592–94 (1980) (Rehnquist, J., dissenting); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-19, at 946 (2d ed. 1988) (“[G]overnment, while it may not close the market, may move to correct its defects and regulate its incidental consequences.”).

present danger test announced in *Schenck v. United States*.<sup>45</sup> The *Schenck* test denies constitutional protection to speech that creates a “clear and present danger that it will bring about the substantive evils that Congress has a right to prevent.”<sup>46</sup> Fifty years later, *Brandenburg v. Ohio*<sup>47</sup> refined that test, holding that the First Amendment protects even subversive speech unless that speech is intended to produce, and is likely to produce, imminent serious violence.<sup>48</sup> The mob scenes contemplated in *Brandenburg*, like the clearly and presently dangerous situations described in *Schenck*, represent a kind of market failure. When hateful or provocative speech is delivered to an angry and potentially violent group of listeners, realistically there is little room for “good ideas”—such as pleas for calm or peace—to win out. Even if the provocative speech is “true,” and violence warranted, it will prevail not on its merits but because it has faced no true competition. In such emergency situations, the usual costs of communication—the cost and time needed to consider other messages, for example—become prohibitive because of the threat of immediate violence. This makes market failures likely and the cost of such failures high.

Other free speech “exceptions” can also be explained as failures in the marketplace of ideas. Writing for the majority in *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>49</sup> Justice Brennan cited *Abrams* and noted that its “market metaphor has guided congressional regulation in the area of campaign activity.”<sup>50</sup> Invoking the concept of “[p]olitical ‘free trade,’” Justice Brennan noted that “[d]irect 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.”<sup>51</sup> Of course, the precise degree to which Congress can constitutionally address that

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45. *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also Ingber, *supra* note 7, at 17–22 (describing the clear and present danger test as related to the failures of the marketplace of ideas).

46. *Schenck*, 249 U.S. at 52.

47. *Brandenburg v. Ohio*, 395 U.S. 447 (1969) (per curiam).

48. *Id.* at 447–48.

49. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986) (holding that the Federal Election Campaign Act was unconstitutional as applied to a nonprofit group, in part because—unlike a for-profit corporation—the nonprofit group “was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.”).

50. *Id.* at 257 & n.10.

51. *Id.* at 257.

fair trade remains a hotly contested issue whose ultimate resolution is anything but clear.<sup>52</sup> “Fighting words” doctrine<sup>53</sup> and hate speech also find themselves grouped into the “market failure” category; they arguably cause harms that cannot be remedied by more speech.<sup>54</sup> Because hate speech disempowers those at whom it is directed, the argument goes, anti-hate and anti-fighting speech has no real chance to “compete.”<sup>55</sup> The Court has endorsed other exceptions to the marketplace of ideas based on the supposed failure of certain kinds of speech to advance it. In *Miller v. California*,<sup>56</sup> for example, the Court declared that comparing the exchange of political ideas “with commercial exploitation of obscene material demeans the grand conception of the First Amendment.”<sup>57</sup> *Miller* explicitly denied obscenity any First Amendment protection for the same reason that fighting words receive none: “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>58</sup> The Court thus found that obscenity has no place in the market, and that it may be regulated by reference to social institutions like order and morality.<sup>59</sup>

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52. In *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), a majority of Justices agreed that the Bipartisan Campaign Reform Act of 2002 (BCRA) unconstitutionally forbade certain issue advertisements, but could not agree as to why. *See id.* at 2673 (opinion of Roberts, C.J., joined by Alito, J.) (finding that the BCRA was unconstitutional as applied because the campaign ads were not “express advocacy or its functional equivalent”); *id.* at 2675, 2686 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment) (stating that the test for reviewing as-applied challenges to the relevant section of the BCRA was unconstitutionally unclear, and that therefore the statute should not be enforced).

53. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

54. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 177 (1982); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) (“[A]n opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood.”).

55. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385–86 (1991) (arguing that racist speech distorts discourse by disempowering minority rebuttal, “a result at odds, certainly, with marketplace theories of the first amendment”).

56. *Miller v. California*, 413 U.S. 15 (1973).

57. *Id.* at 34; *see also* *Roth v. United States*, 354 U.S. 476, 484 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”).

58. *Miller*, 413 U.S. at 20–21 (quoting *Chaplinsky*, 315 U.S. at 571–72); *see also* *Roth*, 354 U.S. at 485 (same).

59. *See infra* note 180 and accompanying text.

Despite the power of the market failure critique, and notwithstanding the exceptions announced in *Schenck*, *Brandenburg*, *Miller*, and other cases, the Court continues to invoke the marketplace of ideas metaphor as generally justifying broad speech protections, not limitations.<sup>60</sup> Thus although market failure rhetoric has often been employed to justify government involvement in the real-world market, it has not had a similar impact on First Amendment doctrine or theory. This differential treatment is as old as the marketplace of ideas metaphor. As many critics have pointed out, Holmes himself was no staunch defender of the laissez-faire economic market,<sup>61</sup> and the Court has generally followed his lead by treating the two markets differently. Justice Douglas, in *Beauharnais v. Illinois*,<sup>62</sup> made the point explicitly: “Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.”<sup>63</sup>

Courts have clung to an idealized, neoclassical view of the marketplace of ideas far more tenaciously than economists have, or than courts themselves have, when it comes to the “real-world” market. As Ronald Coase, Aaron Director, and other economists have pointed out, the marketplace of ideas is far *more* free from state regulation than the economic marketplace, despite the acknowledged

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60. See cases cited *supra* note 7.

61. Ingber, *supra* note 7, at 5 n.14 (comparing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), with Holmes’s dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)); see also Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 949 (1995) (“Now contrast Holmes with—well, Holmes. . . . Government attempts at regulating free trade in labor were permissible; government attempts at regulating free trade of ideas were not.”).

62. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

63. *Id.* at 286 (Douglas, J., dissenting). Justice Black, who was famous for his dogged commitment to an absolutist First Amendment, was untroubled by government regulation of the economic marketplace. Compare *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (“I read ‘no law . . . abridging’ to mean *no law abridging*.”) (alteration in original), with *Cities Serv. Co. v. Peerless Co.*, 340 U.S. 179, 189 (1950) (Black, J., concurring) (stating that “the alleged federal constitutional questions are frivolous” when it comes to federal regulation of natural gas prices). But because Justice Black’s reading of the First Amendment was based more on his reading of the words of the First Amendment and less on support for the “marketplace of ideas” metaphor, the comparison to Holmes is more interesting than fair.

market failures in both.<sup>64</sup> Frustrated by this unequal treatment, Coase and Director have criticized “intellectuals [who] have shown a tendency to exalt the market for ideas and to depreciate the market for goods.”<sup>65</sup> This inequality, Coase has argued, is utterly indefensible, particularly because the market of ideas is no more important—and, for most people, quite a bit less important—than the market for goods, and is not necessarily any more entitled to freedom from government regulation.<sup>66</sup> Director, also a leading figure in the Chicago School of Economics, argued the same thing a decade earlier,<sup>67</sup> but with a similarly negligible impact.

Criticisms of the idealized neoclassical market have thus had a very different impact on economics than on First Amendment doctrine. As far as the latter is concerned, the deconstruction of the marketplace of ideas as a “legitimizing myth”<sup>68</sup> has not yet given rise to an improved economic metaphor. Scholars and courts continue to see the marketplace of ideas in neoclassical terms, debating its merits as if the only alternative would be to adopt a theory of the First Amendment based on the value of speech to democracy,<sup>69</sup> or the

64. See, e.g., Coase, *supra* note 5, at 2; R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1964) [hereinafter Coase, *The Market for Goods*]; Director, *supra* note 22, at 8.

65. Coase, *The Market for Goods*, *supra* note 64, at 385; see also Director, *supra* note 22, at 9 (“[P]roponents of the priority of the market place for ideas. . . must of necessity rely on exhortation and on the fragile support of self-denying ordinances in constitutions.”).

66. Coase, *supra* note 5, at 4 (“There is simply no reason to suppose that for the great mass of people the market for ideas is more important than the market for goods. But even if the market for ideas were more important, it does not follow that the two markets should be treated differently.”).

67. Director, *supra* note 22, at 6 (“[For] the bulk of mankind . . . freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.”). See generally Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992) (arguing the distrust directed toward the government in speech regulation should apply with equal force in regulation of property rights).

68. See generally Ingber, *supra* note 7 (discussing the marketplace of ideas as a “legitimizing myth”).

69. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring) (“[T]he First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government. . . . The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* 88 (1948) (arguing that Holmes’s individualistic marketplace theory of free speech misses the true purpose of the First Amendment, which is to protect the public freedom necessary for self-government); SUNSTEIN, *supra* note 41, at 22–

intrinsic value of speech to self-realization,<sup>70</sup> or some other non-“economic” value. Economists, however, have responded to the deconstruction of the neoclassical economic model by replacing it with more nuanced competitors, including most notably the New Institutional Economics.

*B. New Institutional Economics*

Holmes’s marketplace metaphor invokes a place where individuals (speakers) trade goods and services (ideas) in a competitive environment where the good ideas are destined to beat out the bad. It is, in essence, a neoclassical view of the economy. But since at least the 1930s, economists—led by Nobel laureates Ronald Coase and Douglass North, and also by Oliver Williamson, who coined the term New Institutional Economics<sup>71</sup>—have increasingly abandoned that neoclassical view in favor of a thickened understanding of the market. Far from being a place where individuals costlessly and perfectly pursue their self-interest, the marketplace turns out to be populated with institutions that regularize interactions and lower transaction costs. NIE scholars have argued persuasively that many of these institutions improve the market more than government regulation would, and that such institutions (and their internal norms) should thus receive substantial deference from the government.

1. *Transaction Costs and Institutions.* In the neoclassical view of the market, self-interested individuals work to perfectly maximize their happiness through a series of costless transactions. This is the view of the economy familiar to many economics students. But in Professor Coase’s blunt assessment, “[The neoclassical economy] lives in the minds of economists but not on earth.”<sup>72</sup>

Coase’s key insight, which destroyed the practical applicability of the neoclassical model and spurred the growth of the NIE, was the

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23 (arguing that Madisonian ideas of democracy, rather than free market principles, should shape First Amendment theory).

70. Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 79–81 (1988) (describing and criticizing this argument).

71. Coase, *supra* note 10, at 72 (crediting Williamson).

72. R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992).

realization that the gears of the economic machine are not free from friction. Any time people transact, they must pay not only the price of the goods or services exchanged, but also the price of finding the good in the first place, evaluating its worth, and so on. This process costs time, energy, and money. Economists have dubbed these expenses “transaction costs”—the costs of measuring resources or claims, understanding and utilizing rights, and negotiating and enforcing transactions.<sup>73</sup> Coase—who has acknowledged, though not exactly claimed, paternity of NIE<sup>74</sup>—divided transaction costs into four categories: search, information, negotiation, and enforcement.<sup>75</sup> Contrary to the neoclassical model’s assumptions of perfect information and costless exchange, Coase recognized that these costs distort the market, making the mathematical predictions of neoclassical models largely inapplicable in the real world. Every transaction cost, he realized, is a small market failure.

But rather than simply pointing out that transaction costs create market failures, as critics of the marketplace of ideas metaphor have essentially done, NIE scholars took the additional step of incorporating those costs into a new economic model. In doing so, they connected theoretical neoclassical economics with the insights of empirical social sciences. In his Nobel Prize acceptance speech, Professor North sketched the general structure of the NIE: “The analytical framework is a modification of neo-classical theory. What it retains is the fundamental assumption of scarcity and hence competition and the analytical tools of micro-economic theory. What it modifies is the rationality assumption. What it adds is the dimension of time.”<sup>76</sup> The NIE thus preserves the market metaphor,

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73. See EIRIK G. FURUBOTN & RUDOLF RICHTER, *INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS* 40 (1997).

74. Coase, *supra* note 10, at 72 (“It is commonly said, and it may be true, that the new institutional economics started with my article, ‘The Nature of the Firm’ (1937) with its explicit introduction of transaction costs into economic analysis.” (referencing Coase, *The Nature of the Firm*, *supra* note 36)).

75. Coase, *The Nature of the Firm*, *supra* note 36, at 390–92. Ironically, the theorem that bears Coase’s name suggests just the opposite—that, so long as property rights are well-defined, individuals will always negotiate their way to an optimal allocation of resources, no matter how those resources are initially allocated. Coase himself pointed out—repeatedly and to no avail—that this theorem did *not* represent his view of the real-world market, and that in fact the existence of transactions costs rendered it little more than a thought experiment. See Coase, *supra* note 72, at 714.

76. Douglass C. North, *Economic Performance Through Time*, 84 *AM. ECON. REV.* 359, 359 (1994) (reprinting North’s 1993 Nobel Prize acceptance speech) [hereinafter North, Nobel Prize Lecture].

at least as an aspiration and the motor of competition, but incorporates a more realistic view of the market's functioning. As Professor Williamson puts it, "Students of the NIE eschew hypothetical ideals—which work off of omniscience, benevolence, zero transaction costs, full credibility, and the like—and deal instead with feasible organizational alternatives, all of which are flawed."<sup>77</sup>

Just as transaction costs highlight the shortcomings of neoclassical theory, they also explain the existence and functioning of institutions, which are the protagonists of the NIE story. Coase summarizes the need for a new institutional approach by pointing to the essential role of institutions in exchange: "It makes little sense for economists to discuss the process of exchange without specifying the institutional setting within which the trading takes place, since this affects the incentives to produce and the costs of transacting."<sup>78</sup> North simplifies the equation: "When it is costly to transact, then institutions matter. And it is costly to transact."<sup>79</sup> He goes on to define "institutions":

Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics.<sup>80</sup>

Institutions include not just law, but also social norms, mores, and other private rules of conduct. Together these institutions direct the functioning of an economy to a far greater degree than state regulation alone. According to Coase,

[T]he costs of exchange depend on the institutions of a country: its legal system, its political system, its social system, its educational system, its culture, and so on. In effect it is the institutions that

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77. Williamson, *supra* note 12, at 601.

78. Coase, *supra* note 72, at 718.

79. North, Nobel Prize Lecture, *supra* note 76, at 360; *see also* NORTH, *supra* note 11, at 12 ("The most important message, one with profound implications for restructuring economic theory, is that when it is costly to transact, institutions matter. And as Wallis and North (1986) have demonstrated in their measurement of the transaction costs going through the market (the transaction sector) in the U.S. economy, it is costly to transact."); Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1758 (1996) (arguing that the "real lesson of the Coase theorem" is "that private lawmaking is as important as public lawmaking, if not more so").

80. *See* North, Nobel Prize Lecture, *supra* note 76, at 360.

govern the performance of an economy, and it is this that gives the 'new institutional economics' its importance for economists.<sup>81</sup>

In addition to governing private conduct, institutions often help overcome transaction costs. Institutions' internal rules (which, as North suggests, may themselves be "institutions") aid in this function. A strongly held norm of fair dealing, for example, reduces transaction costs by lessening the need for formal contracting and enforcement mechanisms. When levels of trust in a society are high, transactions are cheaper because information and negotiation costs are lower—transacting individuals do not have to spend as much time or money investigating the background of their trading partners.<sup>82</sup> Similarly, as Robert Ellickson stressed in *Order Without Law*, social norms are generally easier and cheaper to enforce than "formal" legal sanctions.<sup>83</sup>

Despite the general support that their theory has attracted, NIE theorists have not yet reached any solid conclusions about what counts as an "institution" in the first place.<sup>84</sup> Williamson, himself a father of the NIE movement, opened a 2000 article with the "confession . . . that we are still very ignorant about institutions" and the "recommendation . . . that, awaiting a unified theory, we should be accepting of pluralism."<sup>85</sup> Although its precise definition is unresolved, "institution" is a term of art for NIE theorists. It excludes many entities that are commonly referred to as "institutions." In the NIE framework, entities such as the Brookings Institution or the Smithsonian Institution are not actually institutions, but rather *organizations*—representatives of the broader institutional categories of think tanks and museums. North defines organizations thus:

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81. Coase, *supra* note 10, at 73.

82. Ekkehart Schlicht, *On Custom*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 178, 180 (1993) (arguing that a strongly held norm of transparent land dealings "may render many economic transactions possible without a need to rely on elaborate and costly safeguards. In this, custom may contribute to economic efficiency.").

83. ROBERT C. ELICKSON, *ORDER WITHOUT LAW* 282 (1991).

84. Nor, it should be noted, is the definition of "transaction costs" completely clear. Oliver E. Williamson, Book Review, 77 CAL. L. REV. 223, 229 (1989) (reviewing R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988)) ("A chronic problem with Coase's work has been that the concept of transaction costs is vague. Being very elastic, transaction costs can be—and sometimes are—used to rationalize any outcome whatsoever.").

85. Williamson, *supra* note 12, at 595. Williamson does, however, offer a helpful framework for separating four "levels" of institutions. *See id.* at 596–600.

Organizations are made up of groups of individuals bound together by some common purpose to achieve certain objectives. Organizations include political bodies (e.g., political parties, the Senate, a city council, regulatory bodies), economic bodies (e.g., firms, trade unions, family farms, cooperatives), social bodies (e.g., churches, clubs, athletic associations), and educational bodies (e.g., schools, universities, vocational training centers).<sup>86</sup>

To simplify slightly: “If institutions are the rules of the game, organizations and their entrepreneurs are the players.”<sup>87</sup> There is thus a difference between academia, which is an institution, and Duke University, which is an organization. The relationship between the two is close, of course, and is built on mutual dependence. Organizations occupy and “reflect the opportunities provided by the institutional matrix. . . . [I]f the institutional matrix rewards productive activities then organizations—firms—will come into existence to engage in productive activities.”<sup>88</sup> Institutions set the rules. Organizations follow and—crucially for the First Amendment analysis here—apply them.

2. *Separating Good Institutions from Bad.* In addition to its descriptive advantage over neoclassical analysis, the NIE also has a normative component. To oversimplify slightly, the theory suggests—and its devotees argue—that institutions are often better market regulators than the government and that state-centered reforms should often defer to private institutions and their norms.

NIE scholars themselves are somewhat divided about whether institutions exist for the *purpose* of reducing transaction costs, or whether they simply do so as a by-product of whatever other need they fill. Professor Williamson has suggested that NIE still lacks a good account of institutional formation, but that the evolution of some institutions may be “spontaneous.”<sup>89</sup> Professor North, too, writes that “[i]nstitutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to

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86. North, Nobel Prize Lecture, *supra* note 76, at 361.

87. *Id.*

88. *Id.*

89. Williamson, *supra* note 12, at 597 (adding that “deliberative choice of a calculative kind is minimally implicated”).

create new rules.”<sup>90</sup> North, however, has also argued that “measurement and enforcement costs are the sources of social, political, and economic institutions.”<sup>91</sup> Professor Ellickson’s account suggests that certain institutions may have evolved as a method of lowering transaction costs.<sup>92</sup>

Whether it exists by design or as a fortuitous side effect, the role of institutions in promoting economic growth has earned the endorsement of economic development theorists,<sup>93</sup> especially those who study property law.<sup>94</sup> These theorists’ guiding principle is that to enable economic development, structural change must focus on effectively integrating embedded institutions with state-driven reforms, and on designing institutions that lower transaction costs.<sup>95</sup> In Williamson’s framework, this means crafting legal institutions that interact well with embedded institutions, rather than trying to simply impose the former on the latter. Following these economic insights, some legal scholars have suggested that reliance on social norms, rather than formal legal rules, is both widespread<sup>96</sup> and generally

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90. North, Nobel Prize Lecture, *supra* note 76, at 360–61.

91. NORTH, *supra* note 11, at 27.

92. See ELLICKSON, *supra* note 83, at 167, 170–81; see also Robert Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 43 (2001) (“[P]resent[ing] a semirigorous model in which a new norm arises out of the workings of a market for norms. . . . The model incorporates numerous simplifying assumptions. . . . [Including] that members of a social audience selflessly prefer utilitarian outcomes and that they can successfully coordinate the aggregate rewards that they confer.”).

93. See, e.g., Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 988 (2005) (“[W]e found robust evidence that property rights institutions have a major influence on long-run economic growth . . . while contracting institutions appear to affect the form of financial intermediation but have a more limited impact on growth . . .”); see also Williamson, *supra* note 12, at 597 (describing property rights as part of the Level 2 “institutional environment,” the “fomal rules of the game,” and contracts as part of Level 3, “the play of the game”).

94. See, e.g., Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions Over Integration and Geography in Economic Development*, 9 J. ECON. GROWTH 131, 132–35 (2004) (discussing three main explanations for the difference in the income levels of the world’s richest and poorest nations and “find[ing] that the quality of institutions trumps everything else”).

95. See generally NORTH, *supra* note 11, at 3 (“That institutions affect the performance of economies is hardly controversial. That the differential performance of economies over time is fundamentally influenced by the way institutions evolve is also not controversial. . . . The primary objective of [this] study is to achieve an understanding of the differential performance of economies through time . . .”).

96. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 133 (1996) (“Most people do not take

efficient.<sup>97</sup> The best-known such work in legal circles is Ellickson's *Order Without Law*, which chronicles the resolution of disputes between ranchers in Shasta County, California, detailing their preference for social norms and sanctions rather than formal legal rules and litigation.<sup>98</sup> Other seminal works include Robert Cooter's analysis of customary land courts in Papua New Guinea<sup>99</sup> and Clifford Geertz's study of bazaars in North Africa.<sup>100</sup>

These scholars generally see legal reform as an exogenous change, and they analyze the degree to which efficiency demands that preexisting institutions be preserved or accommodated rather than be replaced.<sup>101</sup> In terms of property, for example, this may mean giving special attention and respect to preexisting property norms such as customary easements and dispute resolution rather than implementing "top-down" legal change such as formal title registration or new land courts.<sup>102</sup> According to the theory, where efficient customs and norms—institutions, that is—are in place, they

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their disputes to lawyers and judges. Norms, rather than laws, provide the rules of conduct . . .").

97. See generally AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE 21–23, 152 (2004) (describing the literature of some institutions, organizations, and surveys from the study of alternative institutions for the protection of property rights and developing theoretical models of some of the same).

98. ELLICKSON, *supra* note 83, at 4. One of Professor Ellickson's more recent contributions applies a similar analysis to the "order without law" in the household. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 297 (2006); Robert C. Ellickson, *Unpacking the Household*, 116 YALE L.J. POCKET PART 336, 340 (2007), <http://thepocketpart.org/2007/04/16/ellickson.html>. For a sample of Ellickson's intellectual ancestry, see JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* 151 (1988).

99. Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 LAW & SOC'Y REV. 759 (1991).

100. Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 AM. ECON. REV. 28 (1978). For other examples of works that explore the relationship between legal rules and social norms, see generally Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). For my own very modest contribution to the discussion, see Joseph Blocher, Note, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L.J. 166 (2006).

101. See, e.g., Cooter, *supra* note 99, at 794 ("Legislation that disrupts customs, whether in the name of capitalism or socialism, may create inefficiency where there is none.").

102. *Id.* ("Replacing customary land law with freehold substitutes markets for kin organization. If imposed by legislative fiat, the freehold solution will disrupt the customary economy by displacing its incentive system.").

should be entitled to deference as against strictly legal reforms.<sup>103</sup> The goal for development theorists who embrace NIE is generally to conceptualize ways for these institutions, many of which are “customary,” to become part of a “modern” legal system. These theorists commonly argue that many economic reforms—establishment of statutory property rights and a free market in which to trade them, for example—are likely to fail if they are not attuned to preexisting embedded institutions.<sup>104</sup> In his 1992 Nobel Prize acceptance speech, Professor Coase said presciently:

The value of including . . . institutional factors in the corpus of mainstream economics is made clear by recent events in Eastern Europe. These ex-communist countries are advised to move to a market economy, and their leaders wish to do so, but without the appropriate institutions no market economy of any significance is possible.<sup>105</sup>

This economic development rhetoric has an analogue in discussions of free speech in emerging democracies, as scholars of the latter often stress the need for speech-protective “institutions” such as the press and a culture of dissent.<sup>106</sup> When these institutions are absent, a constitutional guarantee of free speech is unlikely to create a vibrant marketplace of ideas.

But although institutions are generally the heroes in the NIE story, not all of them live up to expectations,<sup>107</sup> and some are market

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103. See *id.* For an interesting and somewhat contrasting viewpoint, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1766–68 (1996). Professor Bernstein's target is the premise, expressed in the Uniform Commercial Code and by its main drafter, Karl Llewellyn, that courts should try to determine “immanent business norms” and apply them in deciding cases. *Id.* For Llewellyn's view, see K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 903–04 (1939).

104. O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 441–42 (2001); Blocher, *supra* note 100, at 171–80.

105. Coase, *supra* note 72, at 714. In his own Nobel Prize speech a few years later, Professor North hit the same note: “Neoclassical theory is simply an inappropriate tool to analyze and prescribe policies that will induce development. It is concerned with the operation of markets, not with how markets develop.” North, Nobel Prize Lecture, *supra* note 76, at 359.

106. See, e.g., Lawrence B. Solum, Book Review, *The Value of Dissent*, 85 CORNELL L. REV. 859, 863 (2000) (reviewing STEVEN H. SHIFFRIN, *DISSIDENT INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)) (describing the effects of culture and political life on the meaning of free speech in the United States).

107. Katz, *supra* note 79, at 1749 (“[P]rivate groups and communities are subject to the same kinds of qualitative failures as are market and governmental institutions, and . . . there is little theoretical reason to presume that private community norms will tend toward complete

inhibiting rather than market improving. Even the most devoted followers of the NIE do not support “deference” to corrupt institutions or those, like slavery, set up to favor an oppressive minority.<sup>108</sup> NIE theorists recognize that some institutions are controlled by elites who have self-interested reasons for maintaining an inefficient system.<sup>109</sup> Other scholars stress that group norms may be unable to keep pace with legal and technological change, and that state action may be justified in the case of such entrenched, inefficient customs.<sup>110</sup>

The institutions that are entitled to deference—the institutions the state should try to accommodate rather than change—are those that contribute to the free flow of goods and services.<sup>111</sup> Separating “good” from “bad” institutions is a difficult task demanding not just a jeweler’s eye for detail (a role traditionally played by economists), but a prospector’s ability to discover and describe institutions in the first place.<sup>112</sup> In keeping with the NIE’s holistic view of markets and

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efficiency.”); North, Nobel Prize Lecture, *supra* note 76, at 363 (“There is no guarantee that the beliefs and institutions that evolve through time will produce economic growth.”).

108. See, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1684 (1996) (arguing that some customary norms such as racial discrimination are not entitled to legal deference).

109. See EGGERTSSON, *supra* note 13, at 275–76 (1990) (“Property Rights, [sometimes] serve the narrow self-interest of a special-interest group but cause substantial output losses to the community as a whole . . .”); NORTH, *supra* note 11, at 48 (“[T]here is nothing in my argument so far about rules that implies efficiency. . . . [R]ules are, at least in good part, devised in the interests of private well-being rather than social well-being.”); Douglass C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 17, 20 (John Harris et al. eds., 1995) (“Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules.”).

110. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1697–98 (1996) (criticizing the widespread law and economics view that the social norms of close-knit groups should be expected to be efficient, and arguing that the state may under some conditions be better at producing efficient rules).

111. As Aaron Director put it with regard to the real world market, “Some institutions are more flexible than others. We must choose those which minimize the risks of undesirable consequences.” Director, *supra* note 22, at 10.

112. See ELLICKSON, *supra* note 83, at 254–55, 283–86 (suggesting when courts should and should not defer to group norms). In addition to some modern scholarship such as Professor Ellickson’s, which is commonly considered part of the law and economics movement, the law and society movement demonstrated a commitment to “methods that come from outside the discipline [of law] itself” and to “explain[ing] legal phenomena (though not necessarily all legal phenomena) in terms of their social setting.” Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763 (1986); see also David M. Trubek, *Back to the Future: The*

social institutions, this latter task—the gritty, detail-oriented job of identifying institutions and explaining their inner workings—has generally been performed by social scientists, including anthropologists,<sup>113</sup> political scientists,<sup>114</sup> and some economically inclined legal scholars.<sup>115</sup> Williamson describes their work as “modest, slow, molecular, [and] definitive.”<sup>116</sup> Nevertheless, he justifiably has “no hesitation” in “declaring that the NIE is an empirical success story.”<sup>117</sup> The following Part considers whether and how that success might rehabilitate popular and academic understanding of the marketplace of ideas.

## II. INSTITUTIONS IN THE MARKETPLACE OF IDEAS

### A. *The Institutional First Amendment*

Although the marketplace metaphor remains the reigning (if somewhat embattled) justification for free speech, it has yet to fully incorporate an understanding of institutions.<sup>118</sup> Nevertheless,

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*Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 6 (1990) (“[T]he ‘law and society idea’ mean[s] the reconceptualization of law in ways that make it amenable to study by the social science. . . . [To do so] [w]e have to think of law as a social institution, as interacting behaviors, as ritual and symbol, as a reflection of interest group politics, as a form of behavior modification, or in some other way that makes it amenable to social scientific analysis.”). An institutional law and economics approach would in many ways bridge the law and economics and law and society disciplines. See Williamson, *supra* note 84, at 228–29 (arguing that Professor Coase’s work “establishes that transaction costs are central to applying a law and economics approach to the study of legal rights and economic organization”).

113. See, e.g., MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 1–2, 71 (Ian Cunnison trans., Norton 1967) (1925) (arguing that gift exchange solidifies relationships and creates responsibilities between the giver and receiver).

114. See, e.g., ROBERT DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* 315–25 (1961) (analyzing governance in New Haven, Connecticut, and arguing that a polyarchy of elite social and economic groups exert formal and informal control); G. WILLIAM DOMHOFF, *WHO REALLY RULES?: NEW HAVEN AND COMMUNITY POWER REEXAMINED* 174–75 (1978) (challenging Dahl’s central thesis and arguing *inter alia* that social and business elites overlap, and that the New Haven Chamber of Commerce, Yale University, and the largest local bank effectively ruled New Haven).

115. See, e.g., ELLICKSON, *supra* note 83, at vii (“I did not appreciate how unimportant law can be when I embarked on this project.”).

116. Williamson, *supra* note 12, at 607.

117. *Id.*

118. Some scholars wrap a tunic around the marketplace metaphor and call it the “agora,” invoking the public places in which Greeks (and later Romans) met to exchange goods and ideas. See, e.g., David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 894 (1986). The word “agora” is, in fact, Greek for marketplace or public square. A little bit of historical shading brings the agora metaphor in line with the

Frederick Schauer has begun a quest to describe and define an institutionally aware First Amendment. The fast-growing body of work he has inspired may provide the basis for a First Amendment theory that, like the NIE, accounts for the activity of institutions in the marketplace.

In Professor Schauer's conception, First Amendment doctrine should be—and perhaps has been—attuned to speech institutions, giving free speech protection to institutions according to how well they vindicate the purposes of the First Amendment.<sup>119</sup> Schauer summarizes his theory thus:

... I want to suggest that a certain number of existing social institutions in general, even if not in every particular, serve functions that the First Amendment deems especially important, or may carry risks that the First Amendment recognizes as especially dangerous. To the extent that this is so, a recast First Amendment could more consciously treat these institutions in rulelike fashion, with the institutions serving as under- and overinclusive, but not spurious markers of deeper background First Amendment values. . . . An institutional First Amendment would thus move the inquiry away from direct application of the underlying values of the First Amendment to the conduct at issue and towards the mediating determination of whether the conduct at issue was or was not the conduct of one of these institutions.<sup>120</sup>

The Institutional First Amendment thus requires courts and scholars first to identify the “existing social institutions” that either advance or threaten particular First Amendment values—certainly schools and the press would qualify—and then pay special attention to the boundaries and conduct of those institutions with the understanding that institutional features and functions may indicate important First Amendment values. Schauer recognizes that this institution-centered jurisprudence initially appears to be at odds with a strong guarantee

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institutional understanding of the marketplace, because (as any visitor to Athenian ruins can testify) the agora itself was populated not just by individuals, but by temples, stoa, and guilds. Scholars who embrace the agora metaphor should take note of its infrastructure.

119. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 925 (2006) (“An institutional understanding of the First Amendment is structured around the principle that certain institutions play special roles in serving the kinds of values that the First Amendment is most plausibly understood to protect.”); Schauer, *supra* note 2, at 1273–77.

120. Schauer, *supra* note 2, at 1274.

of free speech<sup>121</sup> because it would require courts to consider the identity of a speaker, and perhaps the content of its speech, in determining what level of protection that speaker should receive. Nevertheless, he argues persuasively that refusing to recognize institutional tailoring can also have a “highly distorting effect”:<sup>122</sup>

When the Supreme Court’s unwillingness to delineate the boundaries of the institutional press produces fewer press rights—in particular, rights of access and rights to withhold confidentially obtained information—than exist in many countries with a far more constricted view of freedom of speech and freedom of the press in general, there is some indication of a problem. When we are compelled to treat mass distribution of detailed instructions for causing harm in the same way that we treat an individual speaking to a live audience, we face a different kind of problem: too much protection rather than too little.<sup>123</sup>

Whether Institutional First Amendment scholarship is descriptive or simply normative is a matter of some debate. Schauer himself has suggested that the theory may have some descriptive accuracy,<sup>124</sup> although not as much as it should. He offers *Arkansas Educational Television Commission v. Forbes*<sup>125</sup> and *National Endowment for the Arts v. Finley*<sup>126</sup> as examples of cases in which the Supreme Court has explicitly relied on institution-specific ideas, thus “mov[ing] it closer to a workable approach to managing the free speech issues that arise within the government’s own enterprises.”<sup>127</sup> Erwin Chemerinsky and Scott Moss, among others, have argued that the Court is actually *overly* deferential to certain institutions such as schools and prisons, and that these institutions may be speech stifling

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121. Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 85–86 (1998).

122. Schauer, *supra* note 2, at 1270–71.

123. *Id.* at 1270–71 (footnotes omitted).

124. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787 (2004) (“[T]he most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, cultural, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.”).

125. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

126. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

127. Schauer, *supra* note 121, at 86.

rather than speech promoting.<sup>128</sup> Schauer's more recent work, however, suggests that the Court has generally avoided the institutional approach. He notes that the "American free speech doctrine has never been comfortable distinguishing among institutions,"<sup>129</sup> and that "[w]hile occasional exceptions undoubtedly can be found"<sup>130</sup>—Schauer counts broadcasts and speech in the military among them<sup>131</sup>—"it seems a permissible generalization to conclude that First Amendment doctrine has been hesitant to draw lines between or among speakers or between or among communicative institutions."<sup>132</sup>

Whatever its accuracy as a descriptive matter, Institutional First Amendment theory supports the normative notion that courts *should* "defer" to speech—and, perhaps more importantly, speech mediation—in certain institutional contexts. Courts should, for example, be solicitous of reporters' speech (and view with a suspicious eye any attempts by the government to restrict that speech), because the press is a recognizable "institution" whose purpose and practice is in line with the purposes of the First Amendment. On the other hand, forms of "institutional speech" like corporate disclosure statements are not entitled to the same

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128. See, e.g., Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441 (1990) ("The protections provided by the United States Constitution apply least where they are needed the most. Throughout American history . . . the Supreme Court has adopted a posture of great deference to institutions of government such as prisons, the military, schools, and the Immigration and Naturalization Service. Individuals in these institutions have little, if any, protections of their most basic civil liberties."); Ingber, *supra* note 8, at 4 (1990) ("[W]hile first amendment doctrine has developed so as to expand expressive liberty against the state acting as sovereign, Supreme Court opinions over the past decade suggest that courts are to defer to . . . the judgments of governmental decision makers when regulating expressive activity in institutional contexts such as public employment, school, and the military." (footnotes omitted)); Moss, *supra* note 18, at 1640 ("By dividing speech rights so starkly by institutional context, courts have not just recognized, but in fact overstated, the uniqueness of schools, workplaces, and prisons.").

129. Schauer, *supra* note 121, at 84.

130. Schauer, *supra* note 2, at 1263.

131. *Id.* at 1263 n.43; see also *Greer v. Spock*, 424 U.S. 828, 838 (1976) (finding no First Amendment right to distribute political literature at a military base); *Parker v. Levy*, 417 U.S. 733, 743 (1974) ("While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citation omitted)).

132. Schauer, *supra* note 2, at 1263.

deference because they do not involve the kind of “institution” the First Amendment was meant to protect.<sup>133</sup>

The following Section proposes a more nuanced and helpful conception of “institutions” for First Amendment analysis, one that connects institutions to the best-recognized purpose of free speech (the marketplace of ideas) and accords institutions First Amendment protection based on how well they serve that purpose.

### *B. The New Institutional First Amendment*

The marketplace of ideas has not caught up with the economic understanding of institutions, and the Institutional First Amendment has not incorporated the marketplace of ideas. As a result, the common conception of the marketplace of ideas relies on an unrealistic view of the market,<sup>134</sup> and the Institutional First Amendment lacks an overarching theory of which institutions should be given special treatment and why.<sup>135</sup> This Section attempts to solve both problems by proposing a “New Institutional First Amendment” that adopts the marketplace of ideas as its animating metaphor but incorporates the NIE understanding of institutions as transaction cost-reducing market enhancers.

#### *1. An Economic Approach to the Institutional First Amendment.*

The New Institutional account of the First Amendment suggests that for the same reasons that economists defer to institutions that promote the economic market, judges should defer to institutions that promote the marketplace of ideas. The New Institutional First Amendment, like the New Institutional Economics, evaluates

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133. See Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 674 (2006) (“An institutional approach seems to provide significant principled grounds for permitting greater speech regulation, at least when applied in the realm of securities litigation.”).

134. Institutions have made a few cameo appearances in earlier discussions of the marketplace of ideas. *E.g.*, Ingber, *supra* note 7, at 27 (“Conflicts in the marketplace, therefore, are not likely to lead to conclusive agreement on what is ‘true’ or ‘best.’ Rather the marketplace serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is ‘true’ or ‘best.’”); see also *id.* at 85 n.416 (describing how the social perspectives that mold free speech are themselves products of the “[e]cological setting, . . . [which] includes the concepts of history and cultural development”).

135. See Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1117 (1995) (“It is tempting to try to resolve which institutions are entitled to autonomy by using history or ‘tradition’ as the dividing line . . . . But this is just as inadequate for this purpose as it is in the public forum area.”).

institutions by how well they advance the marketplace—the underlying question that courts and scholars have asked of individual speech acts ever since *Abrams*. By adding an institutional awareness, the New Institutional First Amendment captures the descriptive and normative power of Professor Schauer’s theory and also weds it to a familiar animating principle.

New Institutional Economics scholars see institutions as social constructs that, among other things, reduce transaction costs and contribute to an efficient market. NIE theory thus demands not only that economists look to the preferences of individuals in the market, but also that they understand the institutions that shape the underlying market. When those institutions are market enhancing—and NIE theorists believe that they often are—legal reformers should treat them with deference. In other words, strong institutions may be better for the market than state-directed legal reform. The role of *speech* institutions as market enhancers provides the necessary link between the marketplace of ideas view of free speech and the Institutional First Amendment view advanced by Schauer and others.<sup>136</sup> Just as institutions in the NIE framework improve the market by facilitating the flow of goods and services, speech institutions improve the marketplace of ideas by facilitating the flow of ideas.

But of course this puts the institutional cart before the transaction cost horse. The reason the NIE accords special treatment to institutions, after all, is that they play an important role in minimizing transaction costs. It may well be that there are “institutions” in both the real-world economy and in the marketplace of ideas, but are they really parallel concepts?<sup>137</sup> Is it even possible to conceptualize “transaction costs” in the marketplace of ideas? And do speech institutions reduce transaction costs in the same way as economic institutions? Fortunately for the New Institutional First Amendment, the answer to all three of these questions is yes.

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136. Although it is possible to “embrace the First Amendment because it promotes the value of the marketplace of ideas as a facilitator of the search for truth,” Schauer, *supra* note 2, at 1268–69, Professor Schauer explicitly does *not* do so, *id.* at 1269 n.71.

137. Cf. Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223, 244–45 (2005) (identifying, without seeking to answer, the difficult question of “what societal institutions properly play a role in determining whether free speech principles are to be Tailored”).

To begin with, the concept of institutions is similar enough to enable useful comparison. In NIE theory, institutions are socially created constructs that mediate interactions between market participants by providing a background of social norms and agreements to govern transactions even in the absence of formal law. In the New Institutional First Amendment, institutions are preexisting social constructs that mediate communication even in the absence of formal speech regulation by the government. The two conceptions are nearly identical. For the most part, in fact, speech institutions are not just the equivalent of economic institutions, but a subcategory within them. Most speech institutions are embedded institutions like social norms governing public speech or educational customs and traditions, many of which lower the cost of information exchange. Journalistic norms protecting the confidentiality of sources, for example, may improve the flow and quality of ideas in the marketplace. Other speech institutions—like public schools and a state-protected or state-supported press—are perhaps more susceptible to state-centered change.

Just as the definition of institution is consistent between the NIE and New Institutional First Amendment theories, so too does the concept of transaction costs travel easily between them. The exchange of ideas is what creates the competition that makes the marketplace of ideas an attractive and effective explanatory metaphor for how good ideas win out over weak ones. But the exchange of ideas, like the exchange of goods and services, is not perfectly costless. Indeed, many basic transaction costs—those associated with the search for and understanding of information, for example—have even *more* salience in the market for ideas than they do in the market for goods. They are, in effect, transaction costs that relate *only* to information exchange.

Returning to Professor Coase's four categories of transaction costs—search, negotiation, measurement, and enforcement<sup>138</sup>—some parallels are immediately apparent. The search for good ideas, for example, can be just as costly as the search for good products and services. Both kinds of search require individuals to expend time and energy seeking the best product or idea. Sometimes these search costs are easily quantifiable. Money spent on consumer reports is a search cost, as is the cost of books or school tuition that enable individuals to

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138. See *supra* note 75 and accompanying text.

find “truth” in the marketplace of ideas. Other search costs may be both more sizeable and harder to measure. The difficulty of finding or evaluating ideas, for example, is a type of search cost, one that is pervasive and falls unequally on individuals depending on their resources and cognitive abilities. Indeed, Professor Williamson reports that “[t]here is close to unanimity within the NIE on the idea of limited cognitive competence—often referred to as bounded rationality.”<sup>139</sup> Such limited ability—whether the result of limited education, the influence of the government and elites on the market, or some other factor—makes it difficult for individuals to be good “buyers” of ideas.<sup>140</sup> And as Justice Brennan recognized, “It would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>141</sup>

Search costs are not the only kinds of transaction costs that appear both in the real-world market and in the marketplace of ideas. Negotiation and measurement costs can be usefully conceptualized as the time and energy spent debating and reaching a resolution about which of competing ideas is better. Speakers with competing conceptions of the good “negotiate” when they try to convince each other of the merits of their positions, and they “measure” when they compare the relative strength of those positions. Like search costs, measuring the quality of an idea is an exercise requiring cognitive resources—a very real cost, and one that not every market participant is equally able to pay.

A simple example, one that invokes the marketplace of ideas metaphor within a real-world market setting, may help illustrate how the concept of transaction costs applies with equal force whether one is talking about the exchange of goods or the exchange of ideas. A shopper is considering two similar products. The products are comparable, but differently priced, and the packaging of each contains various claims about the product—“Delicious!” or “Removes stains!” or “New fragrance!”—some of which are harder to verify than others. Deciding between the two products, and deciding which claims to believe, is an exercise that imposes both informational and real-world costs.

The discerning shopper, hoping to choose the product that will maximize her utility, might consult *Consumer Reports* for a review of

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139. Williamson, *supra* note 12, at 600.

140. See Ingber, *supra* note 7, at 71–84.

141. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

the products, ask friends or store employees, or spend a few moments comparing the products' ingredients and claims. These activities represent very real *costs* to the shopper. They are the sand in the gears of the supposedly frictionless economic machine. If the cost of this information exceeds the likely gain in utility from selecting the right product, the shopper will simply act on imperfect information, perhaps failing to choose the product that would make her most happy. The time and money she wastes on the wrong product is both a "real" cost and an opportunity cost. Only if she knew immediately and costlessly which product she wanted (in fact, only if she did not have to go to the store at all), would the costless, perfect market transacting of the neoclassical model play out in real life. But if she does not find the product she seeks, or cannot sort through the product claims and choose the one that will maximize her utility, then transaction costs will have prevented an otherwise efficient result. Depending on how costs fall, the best product, like the "truth" in Holmes's marketplace, will *not* always rise to the top.

For all the same reasons that the shopper's costly conundrum can be conceptualized as a consequence of transaction costs in the "real-world" economic market, it also illustrates the transaction costs that exist in the marketplace of ideas. The product's packaging claims are a form of speech<sup>142</sup>—an "idea" that Holmes imagined competing with others. The shopper pays real costs when she tries to "consume" that idea, because to assess its "truth" she must first speak to a knowledgeable friend or a store employee about the products' relative merits, or weigh the reliability of the information she receives. As her situation demonstrates, competition between ideas is rarely if ever costless, and is therefore imperfect.

*2. The Role of Institutions in the New Institutional First Amendment.* Because the concepts of "institution" and "transaction

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142. For the purposes of the present analysis, I hold aside the question of whether under contemporary doctrine the "speech" embodied in these product claims is entitled to constitutional protection. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (suggesting that commercial speech is that which does "no more than propose a commercial transaction" (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973))); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (arguing that commercial speech should receive full First Amendment protection). The relevant point here is that analyzing product claims, whether or not they are constitutionally protected, requires the expenditure of mental and sometimes "real" resources.

cost” both translate so well between NIE and the New Institutional First Amendment theory, the final question must be whether speech institutions, like their economic cousins, actually lower transaction costs.<sup>143</sup> It is this function, after all, that entitles institutions to deference from economic or legal reformers. And with one important qualification—that the answer is fundamentally an empirical one that requires a rich understanding of how institutions function in the real world—the answer to this final, crucial question also seems to be yes. The institutional approach, in both real-world economics and First Amendment “economics,” demands a thick understanding of real-world phenomena and institutions, an understanding that marketplace of ideas theorists have not developed.<sup>144</sup> The remainder of this Section, however, offers some general observations about the role of “speech institutions” in reducing the transaction costs of communication. Part III then addresses in more detail the roles of two specific speech institutions—schools and universities—in lowering transaction costs and how First Amendment doctrine accommodates those roles.

As explained in Part I.B, institutions in the NIE framework exist at least in part to lower “transaction costs,” and economists have filled bookshelves explaining how they do so. First Amendment scholars have not yet responded with a comparable theory of the role of speech institutions in mediating the “transaction costs” of information exchange. Indeed, even discussions of the marketplace of ideas generally do not characterize communication difficulties as transaction costs.<sup>145</sup> Nevertheless, it appears that some speech institutions—like their NIE counterparts—do lower the transaction

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143. One possible implication of this theory is that institutions grow in influence and utility as transaction costs rise. The higher those costs become, the more important institutions can be as mediators of transactions and contributors to overall efficiency. If true, this proposition would suggest that certain developments that have reduced the transaction costs in the marketplace for ideas—the Internet, Sullivan, *supra* note 8, at 1666 (“In cyberspace, barriers to entry are low and no greater for speakers than listeners.”), and education generally—may undermine the importance of other institutions (such as gossip and superstition) that owe their influence to the fact that they reduce the costs of information exchange.

144. Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309, 1333 (1997) (“A great deal of free speech theory and a great deal of discourse theory is marked by an admirable epistemological optimism, but whether that epistemological optimism is well-founded is in the final analysis an empirical question, as to which the resources of contemporary social science research might help to locate an answer.”).

145. See *supra* notes 39–57 and accompanying text.

costs of information exchange and are thus entitled to deference from lawmakers.

Universities and the press are perhaps the easiest examples, given their unique and well-recognized roles in the marketplace of ideas. Universities lower information search costs by making ideas and information widely available and more easily accessible. They also lower search and measurement costs for students and faculty by equipping them with better analytic tools with which to evaluate new ideas. In the marketplace of ideas, a sharp and critical mind is the equivalent of a good eye for quality goods and services in the real-world market. Both make it easier for consumers (whether of ideas or products) to determine which of many options best suits them.

Similarly, the institutional press improves the marketplace of ideas by serving as a clearinghouse for information. This, too, lowers search costs and makes ideas more easily accessible for consumption or rejection by individual idea consumers. The American press has played a particularly important role in explaining and distributing information about other institutions whose functioning would otherwise be impossible for the average citizen to follow. Without active and critical reporting about government, for example, it would be impossible for citizens to cast informed votes,<sup>146</sup> and the politicians they elect could hardly claim to be triumphant in the marketplace of ideas.

The deeper the analysis, the more obvious the parallels between speech institutions and market institutions become. In both scenarios, institutions made up of repeat players are more likely to have communication-enhancing norms.<sup>147</sup> Just like market actors, repeat speech players are less likely to violate norms, lie, or break promises, because they know that repeat interactions are inevitable. Institutions such as universities regularize these relationships, allowing individuals

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146. Whether voters actually *do* cast informed votes is a matter of some debate. Bryan Caplan has argued that rational consumers often make for irrational voters. See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 3 (2007) (“Voter irrationality is precisely what economic theory implies once we adopt introspectively plausible assumptions about human motivation. . . . [D]emocracy has a built-in *externality*. . . . Since most of the cost of voter irrationality is external . . . why not indulge?”).

147. See Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. & ECON. 1, 3 (1980). The canonical study is by Clifford Geertz. Geertz, *supra* note 100, at 30–31 (arguing that traders in a North African bazaar lessen search and negotiation costs through a process of “clientelization,” which occurs through repeated face-to-face interactions between buyer and seller).

within those institutions to “transact” ideas more cheaply. To take just one example, a professor may be a more efficient communicator of information precisely because that professor (or the institution of which the professor is a part) has a reputation for imparting accurate information. Those who hear a well-known professor give a lecture on cell biology, or President Nixon’s economy, or the First Amendment, feel less of a duty to “double-check” the information they are receiving than they would if a random person on a street corner were shouting the very same lecture. The trust the listeners place in the information they receive saves them from having to pay what could otherwise be substantial information costs.

Moreover, it is important to recognize that transaction costs are paid not just by those trying to find good ideas, but by those trying to spread them. And although the cost of receiving information may be high, the cost of transmitting it is often even higher. By forming and joining groups, individuals can defray the costs of communication and more effectively direct their ideas into the marketplace.<sup>148</sup> In this way, institutions mitigate the cost of selling ideas as well as the cost of purchasing them.

Speech institutions like universities and schools can improve the marketplace of ideas by lowering the transaction costs of information exchange. Doing so may at times require them to regulate their own members’ speech, as when newspapers require reporters to back up articles with quotes and research, or when schools require teachers to cover certain subject matters. These internal restrictions, although occasionally limiting the speech of individual actors (such as journalists and teachers), preserve the ability of the institutions themselves to enhance the marketplace of ideas and their members’ ability to participate in it.<sup>149</sup> Just as economic institutions’ self-

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148. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .”). Interestingly, one can see a political predecessor of this economic theory in the writings of Alexis de Tocqueville, who noted that “nothing . . . deserves more attention” than Americans’ propensity to join “intellectual and moral associations.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 488 (J.P. Mayer & Max Jerner eds., George Lawrence trans., Harper & Row 1966) (1835). These “free institutions,” in de Tocqueville’s view, help to “combat the effects of individualism.” *Id.* at 481.

149. Hafen, *supra* note 8, at 686 (“Indeed, as the Court is beginning to note, personal rights may take ongoing sustenance from certain forms of institutional nurturing.”); see also *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342–44 (1987) (Brennan, J., concurring) (“Solicitude for a church’s ability to [engage in self-definition] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.”).

regulating norms sometimes promote overall efficiency in the marketplace for goods and services, speech institutions' internal regulation often improves the ability of the marketplace of ideas to find truth. Alvin Goldman and James Cox point out that “[d]omains of opinion where speech is totally unregulated, or is at most regulated by the market, are arguably the domains where maximum error and falsity are to be found.”<sup>150</sup> These are the domains “in which rumor, gossip, old-wives’ tales, and superstition flourish.”<sup>151</sup> On the other hand, there are “certain forums for scientific and scholarly speech that are highly regulated, and which, nonetheless, are responsible for what many people take to be the greatest amount of knowledge.”<sup>152</sup>

Other institutions, however, may not be so conducive to the transmission of ideas.<sup>153</sup> Like the economic institutions studied by NIE scholars, not all speech institutions receive special treatment, nor should they. And even those speech institutions that are accorded special status under the First Amendment can effectively forfeit that status when they—or, as explained in Section B.3,<sup>154</sup> the organizations that populate them—apply their rules capriciously or in a way that undermines the market.<sup>155</sup> After all, it is the market-enhancing quality of institutions that entitles them to deference in the first place. The difficult question is how to separate the good institutions—those that advance the market (whether it be in goods or ideas)—from the bad. That question is impossible to answer without a conception of free expression and why it is valuable. The New Institutional First Amendment provides that missing piece by wedding the Institutional First Amendment to the metaphor that has guided First Amendment jurisprudence for nearly a century: the marketplace of ideas. To the degree that speech institutions serve that market—the same question courts have been asking of individual speech regulations since 1919—they should be entitled to deference from lawmakers, just as the

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150. Goldman & Cox, *supra* note 42, at 12.

151. *Id.*

152. *Id.* at 13.

153. Dale Carpenter, Response, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407, 1407 (2005) (“Some institutions are better First Amendment citizens than others. If we want a robust First Amendment, why should we be blind to that?”).

154. See *infra* text accompanying notes 160–64.

155. Cf. Cooter, *supra* note 108, at 1684 (“The state cannot justify enforcing a norm that harms one community on the grounds that it arose from a consensual process in another community.”).

institutions in the NIE framework are entitled to deference from economists.

3. *The Crucial Difference between Speech Institutions and Speech Organizations.* The discussion thus far has focused mainly on speech institutions that advance the marketplace of ideas. There are also many institutions that do not. Perhaps the most significant criticism of the Institutional First Amendment is that it is “blind to whether the preferred institution is actually serving important free speech interests in a given case.”<sup>156</sup> What happens when otherwise “good” institutions apply their internal rules in a way that does *not* advance the marketplace of ideas? Does an educational institution—which would otherwise be entitled to great deference from courts—still get deference when it limits speech for reasons unrelated to the marketplace of ideas?

Fortunately, the New Institutional First Amendment, drawing again from NIE theory, offers an answer to that question. The key lies in the distinction between institutions—which Professor North identifies as the rules of the game, including norms and customs<sup>157</sup>—and organizations, which he identifies as the players in that game.<sup>158</sup> The problem usually arises when certain organizations fail to live up to their speech-promoting institutional norms.

Despite the usual labeling of them as such, individual universities, schools, and newspapers are not “institutions” in the NIE (and thus New Institutional First Amendment) sense. Whereas the university system is akin to an institution, individual colleges and universities are more akin to *organizations*.<sup>159</sup> To be sure, they have an especially close relationship with the larger institutional structure and are “governed” by its norms. This, after all, is what entitles organizations (like institutions) to some level of deference in their speech-related decisions. But unlike institutions—which are generally too diffuse to be subject to the whims of dominant individuals—organizations are subject to capture and may end up limiting speech

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156. Carpenter, *supra* note 153, at 1414.

157. See *supra* notes 80, 87–88 and accompanying text.

158. See *supra* notes 86–87 and accompanying text.

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

in ways that advance the interests of the individuals who control them, but do not improve the marketplace of ideas.<sup>160</sup>

More often than not, overly strict limits on speech are a result of organizations misapplying institutional norms. In such a situation, no deference is due. Take the example of a university that refuses to allow Christian speakers on campus. Such decisions, when made for “academic” reasons, generally receive broad deference from courts, a deference that can be justified by the unique role of universities as marketplace-of-ideas-enhancing institutions.<sup>161</sup> Holding aside any Free Exercise or Establishment Clause issues,<sup>162</sup> the university might try to justify the exclusion of Christian speakers by claiming that religious discourse does not contribute to the search for “truth.” The argument could even be couched in the marketplace-enhancing function that justifies universities’ special First Amendment treatment. But without more, it should—and likely would—fail under the New Institutional First Amendment, because such a broad exclusion of speakers seems on its face to limit the marketplace rather than advance it. Even giving some deference to the university’s alleged interpretation of its institutional norms, a court would likely see the appeal to the marketplace of ideas as pretextual at best. The same reasoning would probably apply if a university’s administration bowed to the wishes of rich donors who demanded, for political reasons, the firing of a certain controversial professor. Other nonacademic reasons might lead a university to ban speakers who applaud (or criticize) Israeli military policy. Such a decision, whatever its merits, would effectively limit the marketplace of ideas, which is the very concept that entitles universities to special First Amendment treatment in the first place.<sup>163</sup> When this happens—when groups flout

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160. There is perhaps a tenuous analogy here to corporate corruption, in that institutions (or organizations) can sometimes stray from the purposes for which they were established—and which their members/shareholders support—and instead pursue the interests of a few dominant elites. *See generally* Sullivan, *supra* note 8, at 1663 (“Put another way, speech intermediaries that exceed the function of norm-reflection and stray into norm-creation, on this view, cross over a public/private boundary and begin to resemble governments.”).

161. *See infra* Part III.B.

162. *E.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding on free speech grounds that a public university could not refuse to fund certain student publications that expressed belief in a deity, and that the university’s need to comply with the Establishment Clause did not cure the violation).

163. The same argument about principled distinctions applies with full force to the designation of institutions in the first place. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 294 (1981) (“The point I wish to

the rules that justify their special treatment—there is little reason for courts to defer to the misapplication of their own norms.<sup>164</sup> Determining whether an organization is misapplying its institutional norms would, of course, require courts to investigate the content and application of those norms. But that would be no more difficult a task than their responsibility to investigate, for example, whether a particular limitation on speech amounts to viewpoint discrimination.

The same questions arise in NIE scholarship, and the same solution applies. Customary law, for example, is an institution that is commonly accorded deference in property relations, and NIE theorists frequently argue that customary arrangements should not be disturbed by formal law. But when customary authorities—tribal leaders, for example<sup>165</sup>—stop living up to the market-enhancing norms they have established, or when those norms are applied to disadvantage a particular social group (often women) instead of advancing the market as a whole, no deference is due.

This distinction between organizations and institutions complicates the “deference” for which this Article has argued. Deference to institutional norms is easy enough to explain and defend, but how should courts treat *organizations’* interpretations of institutional norms? For example, if a university bars speakers who are critical (or laudatory) of the Israeli military, and the university claims that it has done so on academic grounds, how should a court respond? Such “academic” decisions are generally entitled to the special, institutional First Amendment treatment accorded to universities. But what if the would-be speakers claim that their exclusion was based not on a market-enhancing academic decision, but on nonacademic factors such as administrators’ personal preferences, or viewpoint discrimination?

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make is that the creation of a category must be justified by reasons underlying the features distinguishing that category from others. When those reasons are not applied in all cases in which they are, by their own terms, applicable, then the attempt to create a category has misfired.”); *see also id.* at 307 (“The risk of misapplication of numerous subcategories leads us to eschew subcategories within the first amendment, avoiding them even when a distinction seems justifiable.”).

164. Posner, *supra* note 96, at 160 (“In the case of groups that engage in undesirable behavior, however, courts should not use legal sanctions to promote solidarity. Courts should instead interfere so as to inhibit the group’s undesirable norms.”).

165. Blocher, *supra* note 100, at 192–201 (arguing that customary property arrangements should be respected but also shaped so as to preserve the property interests of disempowered groups such as women and migrants).

Such situations present a difficult question that might be likened to a dispute over the “standard of review” applicable to organizations’ interpretations of institutional norms. The example here involves institutional norms that are generally entitled to deference (academic decisions, which usually advance the marketplace of ideas) and the interpretation of those norms by an intermediary organization (the school’s apparent determination that academic principles bar the presence of certain speakers). Are the latter organizations’ interpretations of these norms entitled to deference as against courts’ interpretations, just as institutional norms themselves are entitled to deference as against statutory law? The answer can only be yes. As with agency interpretations of their own regulations,<sup>166</sup> organizations’ interpretations of their animating institutional norms should be entitled to deference.<sup>167</sup> The precise level of deference may vary among institutions or organizations, but in any case the burden will fall on the party challenging the norm to show that the organization has misapplied it.

4. *Apparent Weaknesses and Unexpected Strengths.* The distinction between organizations and institutions is not the only line-drawing complication raised by the New Institutional First Amendment. Separating organizations from institutions is a difficult task, to be sure, but it may be simpler than separating those that are “public” from those that are “private.”<sup>168</sup> Only those institutions that

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166. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45, 865–66 (1984) (describing the circumstances under which courts should defer to agencies’ reasonable interpretations of their own regulations).

167. Although he does not address the difference between organizations and institutions, Professor Schauer suggests that organizations are entitled to deference even when they misapply the institutional norms that justify their special treatment. See Schauer, *supra* note 2, at 1273 n.87 (“I am [concerned] with the identification of concrete and preexisting cultural institutions that might in the large serve important free speech functions, and which thus might be deserving of constitutionally guaranteed autonomy *as institutions*, even when they do not serve the purposes grounding the recognition of their institutional autonomy in the first instance.”).

168. Courts have struggled with this public/private distinction. Compare *Robins v. Pruneyard Shopping Ctr.*, 447 U.S. 74, 88 (1980) (upholding the state’s power to grant high school students the right to seek signatures for a political petition on the grounds of a private shopping center, despite the owner’s assertion of his First Amendment right to disassociate from their speech or cause), and *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968) (holding that union picketing of a private shopping center was entitled to First Amendment protection), with *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (denying First Amendment protection to employees seeking to picket inside a privately owned

have some element of state action are relevant for *constitutional* purposes, given that only they are subject to the First Amendment. But speech institutions do not respect the distinction between public and private that marks the outer edge of the First Amendment's coverage.<sup>169</sup>

Somewhat ironically, then, the New Institutional First Amendment's focus on institutions, most of which are private, highlights the fact that most speech regulation is beyond the law's reach. By doing so, the theory actually makes a far more important contribution, by highlighting the fact that institutions, rather than the state, are the primary regulators of speech. The most powerful—though perhaps not the most obvious—speech “regulations” are social norms and mores, backed by the threat of social ostracism or sanction.<sup>170</sup> Most speakers fear not prosecution nor exclusion from public forums, but approbation and ostracism from friends, family members, employers, and fellow citizens. It seems likely, for example, that more racist speech is deterred by social norms (many of them internalized) than by any formal legal rules.<sup>171</sup> By drawing attention to these speech-governing institutional norms, the New Institutional

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mall), and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (refusing to grant First Amendment protection to private parties distributing political leaflets at a private shopping center).

169. This point applies mostly to what Professor Williamson refers to as Level One “embedded” institutions. See Williamson, *supra* note 12, at 596–97 (defining Level One Institutions as those in which “norms, customs, mores, traditions, etc. are located”). Level Two and Three Institutions, however, such as the government bureaucracy and court-centered dispute resolution, are products of state law and thus fall within state action doctrine. The public/private distinction—extended along the spectrum of institutions—is particularly difficult to apply in the context of colleges and universities, which I consider in more detail in Part III. Indeed, “private and public institutions of higher learning share so many characteristics that distinguishing between them threatens to be rigidly formalistic.” Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1574 (1998) (footnote omitted).

170. Ingber stresses the degree to which the government controls this “socialization,” for example, through the “indoctrination” that occurs in public schools. Ingber, *supra* note 7, at 28–29. Although not discounting the degree to which the state can influence the socialization, especially through schools, I believe that the majority of social norms and mores are beyond the reach of the state.

171. See Jon Elster, *Social Norms and Economic Theory*, J. ECON. PERSPECTIVES, Autumn 1989, at 99, 104 (arguing that internalized norms are often followed even when their violation would go undetected by society); Katz, *supra* note 79, at 1750 (“[A]n important feature of social norms is their tendency to be internalized by group members.”) (footnote omitted). Of course, not all speakers are dissuaded by social sanction, and some provocateurs may actively seek it out.

First Amendment paints a broader and more accurate picture of what “free speech” actually means.

Holmes’s theory suggests that government regulation is the only impediment to a free marketplace of ideas. But the New Institutional First Amendment demonstrates that, as in economic markets, the alternative to regulation by government is regulation by institutions.<sup>172</sup> The lawyerly obsession with the state action requirement obscures the fact that only a very small part of the marketplace of ideas is public.<sup>173</sup> Contrary to the implications of Holmes’s theory, the absence of state regulation does not automatically create a perfect free market for ideas any more than it creates a perfect, frictionless economic market. First Amendment theories that are limited to the small public corner of the market involving state action may give a full account of the Constitution’s domain, but they do not even come close to describing the marketplace of ideas. That marketplace is largely private, and it is privately regulated. It exists in homes, malls, bars, workplaces, and schools, governed by private norms and rules. And although these areas of the market are largely beyond the reach of the Constitution, they are *not* beyond—in fact they are part and parcel of—free speech institutions. A theory that recognizes this, as the New Institutional First Amendment does, paints a richer picture of the marketplace of ideas.

One might argue, however, that if institutions are entitled to deference with regard to the content of their norms, then they should also be responsible for enforcing those norms. On this reading, a university could set its own speech code, but could not call on the power of the state to expel those who violate it. But as Eric Posner points out, “[A]lthough solidary groups obtain and process most kinds of information more effectively than courts, their nonlegal sanctions are sometimes less powerful than the courts’ legal sanctions.”<sup>174</sup> Thus private institutions may be unable to enforce their own norms, even when those norms are more efficient than state-

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172. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1678 (1967) (“With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essentially rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance.”).

173. For a discussion of the pitfalls of state action doctrine, especially as it applies to the First Amendment, see Eule & Varat, *supra* note 169, at 1543–54.

174. Posner, *supra* note 96, at 157.

created alternatives. In such situations, court intervention may be necessary to maintain the efficient norms. Any awkwardness in using courts to identify and apply what are nominally the institution's own norms is no more troubling than using courts to enforce private contracts, or to determine and apply "immanent business norms."<sup>175</sup> Deference to the content of an institution's norms is justified by the efficient development of those norms. But in some circumstances the enforcement of these norms can be performed more easily by the state, just as with state-backed enforcement of other private agreements.

One might object that this demands too much of courts, which are better suited to deal with formal legal doctrine than with messy institutional realities.<sup>176</sup> As Professor Schauer puts it, "For too many judges, it seems, delineating the contours of such [speech] institutions would look like a rather unjudicial enterprise."<sup>177</sup> But even Schauer's critics allow that "the possible line-drawing difficulties do not seem that much more difficult than other line-drawing problems in the First Amendment."<sup>178</sup> Indeed, contemporary doctrine requires judges to draw difficult (and perhaps impossible) lines between government speech, commercial speech, and other judicially created categories.<sup>179</sup> The final Part of this Article considers in more detail the New Institutional First Amendment's ability to describe the doctrine surrounding two particularly important First Amendment institutions—schools and universities—and suggests how it might contribute to a more coherent commercial speech doctrine. But for now it suffices to say that one of the strengths of the theory is that it is not only coherent and normative, but that it demands no more of courts than they already do. In many cases, deferring to community norms may not even require courts to identify those norms at all. For example, First Amendment doctrine already requires courts to defer

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175. See Bernstein, *supra* note 103, at 1820 (identifying "a number of undesirable effects on commercial relationships between merchants created by the [Uniform Commercial] Code's search for immanent business norms").

176. See Schauer, *supra* note 2, at 1259 ("Much of this reluctance stems from a view about the functions and comparative advantage of the courts. If courts are thought to have little ability to fathom the changeable and empirical foundations of our institutional lives, then there is an extraordinarily strong temptation to draw doctrinal lines on the basis of 'principle' rather than 'policy.'").

177. *Id.* at 1266.

178. Carpenter, *supra* note 153, at 1408.

179. I have argued elsewhere that such line drawing is impossible. Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 57 (2007).

in a wide variety of ways to community norms, which are themselves a kind of institution. Obscenity cases are perhaps the most obvious example, as the Supreme Court has held that “obscenity is to be determined by applying ‘contemporary community standards.’”<sup>180</sup>

But even if courts are able to accurately identify and properly defer to a particular institution’s norms, giving or denying deference to those norms might have unexpected effects on the institution or on the balance of power between institutions.<sup>181</sup> Denying an institution the power to regulate its members’ speech, for example, could undermine the institution’s cohesiveness, and even limit its ability to contribute to the marketplace of ideas.<sup>182</sup> Perhaps more intriguing, however, the level of First Amendment deference institutions receive is likely to influence the institutions’ success in the marketplace of ideas. The recent controversy over commercial speech in *Kasky v. Nike*<sup>183</sup> provides an illustrative example. *Kasky* began when a number of private citizens and journalists began criticizing Nike for allegedly abusing workers in overseas sweatshops. Nike responded by publishing a series of “editorial advertisements,” press releases, and letters sent to newspapers and universities.<sup>184</sup> Mark Kasky, a private citizen, alleged that Nike’s information campaign contained false and misleading statements made “with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements.”<sup>185</sup> He also argued that Nike’s public relations campaign, even though it was a response to his own fully protected speech, was actually “commercial” speech not entitled to full First Amendment protection.<sup>186</sup> The California Supreme Court agreed.<sup>187</sup> The United

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180. See, e.g., *Miller v. California*, 413 U.S. 15, 37 (1973).

181. See Posner, *supra* note 96, at 134–35.

182. *Id.* at 136 (arguing that certain kinds of regulation can have “perverse results,” including undermining self-regulation).

183. *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003).

184. Thomas C. Goldstein, *Nike v. Kasky and the Definition of “Commercial Speech,”* 2002–2003 CATO SUP. CT. REV. 63, 65, available at [http://www.cato.org/pubs/scr/2003/commercial\\_speech.pdf](http://www.cato.org/pubs/scr/2003/commercial_speech.pdf).

185. *Kasky*, 45 P.3d at 248.

186. *Id.* at 247. There was precedent for his assertion. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) (finding a difference between “direct comments on public issues” and statements about public policy “made only in the context of commercial transactions”); see also *infra* Part III.C.

187. *Kasky*, 45 P.3d at 247. See generally Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 369 (2006) (discussing

States Supreme Court granted<sup>188</sup>—and later controversially dismissed<sup>189</sup>—certiorari, sparking two written dissents<sup>190</sup> and a collective sigh of disappointment from First Amendment scholars.<sup>191</sup> Although it was not explicitly premised on any institutional favoritism, *Kasky* illustrated the stakes. If commercial institutions are not entitled to full First Amendment protection, they are at a competitive disadvantage in the marketplace of ideas when pitted against institutions—such as political groups or universities—that do receive such protection.

Nor is the New Institutional First Amendment a perfect answer to all “economic” objections to the marketplace of ideas metaphor. The addition of institutions does not change the fact that the marketplace metaphor is particularly attractive for those with power in the real-world market, because they are more likely to have the “economic, social, political, psychological, and cultural resources” to dominate in both spheres.<sup>192</sup> Moreover, Robert Cooter has suggested that economic norms are entitled to deference only when they arise from an efficient incentive structure—open competition with few “externalities” imposed on nonmembers of the institution.<sup>193</sup> But as Professor Schauer points out, many areas of constitutionally protected speech effectively require those harmed by such speech to bear the costs (whether mental or “real,” as for therapy or to avoid hateful speakers) of benefits that accrue to the speaker.<sup>194</sup> These

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*Nike v. Kasky* and arguing that “the commercial speech doctrine would be better served by applying it to *all* marketing-related speech, including public relations”).

188. *Nike, Inc. v. Kasky*, 537 U.S. 1099, 1099 (2003).

189. *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003).

190. *Id.* at 665 (Kennedy, J., dissenting); *id.* (Breyer, J., dissenting).

191. See, e.g., Ronald K.L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 1018 (2004) (“But alas, Justice Stevens and his two colleagues could do no more than offer conflicted hints on how they might rule in a *Nike*-like case.”); Samuel A. Terilli, *Nike v. Kasky and the Running-but-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL’Y 383, 385 (2005) (noting “the absence of any meaningful consensus regarding what is or is not commercial speech or how it ought to be treated”).

192. Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 951 (1993). Professor Carpenter takes the point even further, suggesting that the very recognition of institutions that receive First Amendment treatment will be colored by the preferences of the elites with the power to make that determination. Carpenter, *supra* note 153, at 1411 (“[T]he institutions favored by courts and even academics will tend to be traditional ones.”).

193. Cooter, *supra* note 108, at 1695.

194. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321–24 (1992).

particular kinds of market failure—externalities and closed access to markets—are not necessarily corrected by an institutionally aware First Amendment any more than they are by contemporary First Amendment doctrine.

Finally, one might point to the apparent irony that under the New Institutional First Amendment, institutions such as universities that are committed to improving the marketplace of ideas may actually have *less* power to limit speech than other institutions do.<sup>195</sup> Their “special” First Amendment status can be more of a burden than a boon. In *State v. Schmid*,<sup>196</sup> the New Jersey Supreme Court reversed the convictions of two Labor Party members who had been arrested for distributing political material on the Princeton University campus without prior authorization from the university.<sup>197</sup> Commenting on the case, Sanford Levinson noted that Princeton essentially lost “only because it is otherwise such an admirable institution in terms of its own commitment to the values of liberal democracy.”<sup>198</sup> Such results might theoretically disincentivize the endorsement of speech-protecting institutions. But what such cases really highlight is not that speech institutions have less power than other institutions to regulate speech, but rather that they must justify their restrictions on speech according to how they advance the marketplace of ideas. As explained in Part III.B, universities (and, to an even greater degree, K-12 schools) actually retain broad discretion to limit speech on campus. But in keeping with academia’s marketplace-of-ideas-enhancing mission, these restrictions must be justified as academic judgments that will ultimately improve the market.

In summary, courts should (and generally do) defer to market-enhancing institutional rules when those rules are fairly applied by the institutions or organizations that developed them.<sup>199</sup>

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195. Of course, the same might be said of public forum doctrine, because it strictly limits government power over speech in forums which the state has opened for speech. See *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981).

196. *State v. Schmid*, 423 A.2d 615 (N.J. 1980).

197. *Id.* at 616, 633.

198. Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 51, 59 (1985).

199. For a “strictly pragmatic” version of this approach, see Katz, *supra* note 79, at 1752 (“[I]f public policymakers have good reason to think that a given private norm is efficient, based

Differentiating between good and bad speech institutions and organizations is a tall order, one that demands an underlying theory of free expression that allows for such sorting.<sup>200</sup> This is what the New Institutional First Amendment offers, by tying institutional free speech analysis to the marketplace of ideas metaphor that has guided free speech jurisprudence for so long. Deference to institutional norms does not commit lawyers or courts to the status quo, nor does it prevent them from pressing for change; it simply presents them with a different set of tools with which to do so.<sup>201</sup> The final Part of this Article suggests how those tools might be usefully applied to certain oft-recognized speech institutions.

### III. APPLYING THE NEW INSTITUTIONAL FIRST AMENDMENT

#### A. *Morse Code: The Supreme Court's Nuanced Endorsement of the New Institutional First Amendment in Schoolhouse Speech Cases*

In June 2007, the Supreme Court handed down *Morse v. Frederick*,<sup>202</sup> the fourth major school speech case it has ever decided.<sup>203</sup> The splintered Court ruled that a high school principal did not violate the First Amendment by confiscating a banner reading “BONG HiTS

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on their own independent analysis, they should defer to it, and if they have good reason to think it inefficient, they should not defer.”).

200. See Sullivan, *supra* note 8, at 1657–66 (considering different possibilities for differentiating between speech institutions).

201. The most important way is by pushing for change in institutional norms, not just formal laws. Katz, *supra* note 79, at 1757 (“[W]e could argue within the private communities to which we belong in favor of more efficient and effective norms—writing op-ed pieces, attending neighborhood meetings, serving on volunteer committees, and the like—the very work that in previous generations helped make lawyers the leaders of their communities.”).

202. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

203. The first three were *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). I do not include cases such as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which involved speech on school grounds but did not rest squarely on a theory of school speech. I note, however, that even those cases tangentially reaching the school speech question have tended to support the institutional view. See *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495–96 (2007) (holding that a high school sports association could prohibit high school coaches from recruiting middle school athletes in part because the association needed to do so to manage the league); *Bd. of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (holding that the First Amendment limits schools’ power to remove books from library shelves); *Flint v. Dennison*, 488 F.3d 816, 820 (9th Cir. 2007) (holding that, despite student election candidates’ free speech right to campaign spending, a state university may impose a dollar limit on spending because “educational interests outweigh the free speech interests of the students”).

4 JESUS” and disciplining a student who refused to take it down himself.<sup>204</sup> Although its holding seems limited, *Morse*’s reasoning confirms the descriptive and predictive validity of the New Institutional First Amendment.

Deference to speech institutions’ internal norms is dependent on the degree to which those institutions advance the marketplace of ideas. This inquiry cannot be answered solely by reference to law. It is in many ways—to invoke another of Holmes’s famous dicta—a question of “experience” rather than “logic.”<sup>205</sup> Experience has proven that schools enhance the marketplace of ideas and that they must occasionally limit student speech to do so. The education that schools impart doubtless improves students’ ability to participate in, and contribute to, the marketplace of ideas. But to educate, schools must often impose rules on students, especially younger ones, who are still on their way to becoming fully functional buyers and sellers of ideas. Indeed, the importance of schools’ internal regulation has been recognized for at least as long as the marketplace of ideas metaphor has been employed. John Stuart Mill, whose marketplace-like conception of free speech was a close cousin of Milton’s and an ancestor of Holmes’s, explicitly excluded children from the market: “It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood.”<sup>206</sup> Writing more recently, Bruce Hafen explicitly connected the marketplace metaphor to schools’ need to control students to prepare them to participate in that market:

In a public school, the marketplace of ideas cannot be controlled by judges as a practical matter, nor can it be controlled by students as a matter of personal maturity; therefore, if faculty and administrators lack the discretion to control it, there is little meaningful marketplace at all—neither in the school nor in the public square of the future.<sup>207</sup>

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204. *Morse*, 127 S. Ct. at 2622.

205. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (“The life of the law has not been logic: it has been experience.”).

206. MILL, *supra* note 24, at 135–36.

207. Hafen, *supra* note 6, at 706. Of course, support for schools’ authority to limit speech is not universal. See Hafen, *supra* note 8, at 689 (“Many have concluded that a high school really is a public forum in which the adult ‘marketplace of ideas’ concept holds full sway.”).

Deference to schools' regulation of student speech is thus well in line with popular and academic understandings of the purpose of schools.

In keeping with this shared understanding—and vindicating the New Institutional First Amendment—the Supreme Court has long treated K-12 schools as special speech institutions.<sup>208</sup> The Court's schoolhouse speech cases—beginning with *Tinker v. Des Moines Independent Community School District*<sup>209</sup> and continuing through *Morse*—demonstrate the Court's attempt to balance students' First Amendment rights (which undoubtedly follow them into school every day) with schools' need to prepare those students to participate in the marketplace of ideas. These cases are tied together by the notion, voiced by Justice Stewart in *Ginsberg v. New York*,<sup>210</sup> that “a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”<sup>211</sup>

In *Tinker*, the Court famously held that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>212</sup> Professor Schauer reads this passage as “reaffirm[ing] the general presumption that First Amendment rights do not vary substantially with institutional setting.”<sup>213</sup> But *Tinker* is entirely consistent with the New Institutional First Amendment. The Court's decision could be read as giving schools power only to limit personal intercommunication that is unrelated to “the work of the schools,”<sup>214</sup> or as holding that even personal intercommunication is protected unless it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”<sup>215</sup> Either reading, however, vindicates the notion that the schools' power over student speech is coextensive with the schools' institutional mission—education and the spread of ideas—

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208. See Hafen, *supra* note 6, at 718 (“In this sense, a school is unlike any other arm of the federal or state governments, because non-educational institutions have fundamentally different purposes and functions.”).

209. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

210. *Ginsberg v. New York*, 390 U.S. 629 (1968).

211. *Id.* at 649–50 (Stewart, J., concurring).

212. *Tinker*, 393 U.S. at 506.

213. Schauer, *supra* note 2, at 1263.

214. *Tinker*, 393 U.S. at 508.

215. *Id.* at 513.

which is what justifies schools' unique First Amendment treatment in the first place.<sup>216</sup>

Moreover, the Court's later school speech cases—all of which have upheld restrictions on student speech—have demonstrated an increasing institutional awareness. In *Bethel School District No. 403 v. Fraser*,<sup>217</sup> a student was suspended after delivering a sexually suggestive speech at a high school assembly.<sup>218</sup> Upholding the suspension and the school's authority to determine "what manner of speech in the classroom or in school assembly is inappropriate,"<sup>219</sup> the Court clarified that even though the First Amendment did apply to students in public schools, their free speech rights "are not automatically coextensive with the rights of adults in other settings."<sup>220</sup> Specifically, *Fraser* held that a school need not tolerate student speech that "would undermine the school's basic educational mission."<sup>221</sup> The decision was thus attuned to the institutional needs of schools, upholding their authority to impose restrictions on student speech that interferes with the school's ability to perform its institutional function—to educate, and thus to advance the marketplace of ideas.

Two years later, *Hazelwood School District v. Kuhlmeier*<sup>222</sup> elaborated and clarified *Tinker* and *Fraser*. In *Hazelwood*, a high school principal removed two controversial articles from the school newspaper on the grounds that the students who wrote them had not mastered certain requirements of the journalism curriculum, and that the articles would threaten both the privacy of other students and the legal, moral, and ethical obligations of the writers.<sup>223</sup> The Court found that "we cannot reject as unreasonable Principal Reynolds's conclusion that neither the pregnancy article nor the divorce article

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216. *See id.* at 507 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

217. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

218. *Id.* at 677–78.

219. *Id.* at 683.

220. *Id.* at 682.

221. *Id.* at 685; *see also* Hafen, *supra* note 8, at 693 ("The Court's analysis suggests that the *Hazelwood* standard involves two stages of inquiry: courts must first ask whether the student expression at issue occurs in a context that implicates the school's educational mission and must then ask whether the educator's decision has a rational—but not necessarily an explicitly educational—basis.").

222. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

223. *Id.* at 276.

was suitable for publication.” and that “no violation of First Amendment rights occurred.”<sup>224</sup> In other words, the Court applied a kind of reasonableness review—highlighting the “standard of review” question<sup>225</sup>—to a school’s (organization’s) interpretation of its own curricular (institutional) norms. The First Amendment protects student speech “only when the decision to censor . . . student expression has no valid *educational purpose*.”<sup>226</sup> Sounding like an NIE theorist arguing for government deference to preexisting economic institutions, Justice White observed that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”<sup>227</sup>

*Tinker* established that the First Amendment applies in schools, but *Fraser* and *Hazelwood* clarified that high school principals could limit student speech when that speech would interfere with the schools’ educational (institutional) goals.<sup>228</sup> Read together, these three cases support the New Institutional First Amendment conclusion, explicitly confirmed by the Court in *Hazelwood*, that “schools as well as courts can advance and protect the values of the first amendment.”<sup>229</sup>

*Morse* continues this general trend, upholding the power of schools to limit student speech while justifying those restrictions (albeit not explicitly) in the name of schools’ special role in the marketplace of ideas. In *Morse*, the Court upheld the power of schools to limit speech that reasonably appears to encourage illegal drug use, but protected students’ free speech right to advocate decriminalization or any other “idea” that might contribute to the marketplace.<sup>230</sup> Justice Alito’s controlling concurrence, joined by

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224. *Id.*

225. *See supra* Part II.B.3

226. *Id.* at 273 (emphasis added).

227. *Id.*

228. The distinction between acceptable and unacceptable speech restrictions may track the line between topics on which the schools themselves can have a legitimate “speech” interest. Thus restrictions on speech about drugs and sex pass muster, but not restrictions on speech about the Vietnam War. I leave aside this point—which I thank Scott Moss for bringing to my attention—only because I believe it raises thorny issues about the difference between content- and viewpoint-based restrictions and the role of institutions as speakers. *See generally* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735 (1995) (arguing that only useful institutional speech should receive First Amendment protection). I hope to address these important complications in future work.

229. Hafen, *supra* note 8, at 685.

230. *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring).

Justice Kennedy, clarifies the limited holding of the case, while effectively justifying it by reference to the marketplace of ideas:

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.”<sup>231</sup>

Chief Justice Roberts’s putative majority opinion strikes a similar tone, citing passages from *Tinker*, *Fraser*, *Hazelwood*, and other cases to stress the “special characteristics of the school environment.”<sup>232</sup>

Indeed, all four of the opinions in *Morse* that reached the First Amendment question<sup>233</sup> highlighted the institutional role of schools, albeit drawing different conclusions about what that role allowed or required.<sup>234</sup> Justice Alito announced that “public schools are invaluable and beneficent institutions,”<sup>235</sup> and that speech restrictions within them must be (and can be) “based on some special characteristic of the school setting.”<sup>236</sup> He found that the school’s responsibility to keep students safe from drugs was just such a characteristic.<sup>237</sup> Although the majority opinion gave more rhetorical support to the school’s position, it too was based on a concern for student safety and refused to endorse a rule that would allow schools to restrict student speech based solely on its offensiveness: “After all, much political and religious speech might be perceived as offensive to

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231. *Id.*

232. *Id.* at 2621 (majority opinion) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

233. Justice Breyer, concurring in part and dissenting in part, did not fully reach the First Amendment question, and would have resolved the case on qualified immunity grounds. *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring).

234. Interestingly for the marketplace metaphor, there seemed to be some debate within the Court—and even within Justice Roberts’s own opinion—as to whether Frederick’s sign was intended to convey any idea at all. *Compare id.* at 2624 (majority opinion) (“Frederick himself claimed ‘that the words were just nonsense meant to attract television cameras.’”), *and id.* at 2625 (“[N]ot even Frederick argues that the banner conveys any sort of political or religious message.”), *with id.* (“At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs.”).

235. *Id.* at 2637 (Alito, J., concurring).

236. *Id.* at 2638.

237. *Id.*

some.”<sup>238</sup> Justice Thomas, concurring in the judgment, expressed his belief that *Tinker* and its progeny should be overruled, and that the First Amendment simply does not apply to student speech in schools.<sup>239</sup> Arguing for an even stronger level of institutional deference than advocated in this Article, Justice Thomas wrote that “[l]ocal school boards, not the courts, should determine what pedagogical interests are ‘legitimate’ and what rules ‘reasonably relat[e]’ to those interests.”<sup>240</sup> At the other end of the spectrum, Justice Stevens, joined by Justices Souter and Ginsburg, objected that “[t]o the extent the Court defers to the principal’s ostensibly reasonable judgment, it abdicates its constitutional responsibility.”<sup>241</sup> Although Justice Stevens allowed that student speech is proscribable if it “violates a permissible rule [ ]or expressly advocates conduct that is illegal and harmful to students,”<sup>242</sup> he expressly declined to defer to the principal’s interpretation of those rules.<sup>243</sup> “The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy.”<sup>244</sup> But Justice Stevens’s dissent only highlighted what the majority, drawing on *Tinker*, *Fraser*, and *Hazelwood*, had decided: That schools *are* entitled to deference in choosing and applying rules designed to protect their institutional missions. The opinions of the Court—Chief Justice Roberts’s majority and Justice Alito’s controlling concurrence—thus support the New Institutional First Amendment described here.

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238. *Id.* at 2629 (majority opinion).

239. *Id.* at 2634 (Thomas, J., concurring).

240. *Id.* at 2636 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); *see also id.* at 2631 (“In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.”). Thomas is not alone in this view. *See* Stanley Fish, *Think Again—Clarence Thomas Is Right*, N.Y. TIMES, July 8, 2007, <http://fish.blogs.nytimes.com/2007/07/08/clarence-thomas-is-right> (claiming that the First Amendment should not apply to students or teachers because education occurs in a different context than democracy).

241. *Morse*, 127 S. Ct. at 2647 (Stevens, J., dissenting).

242. *Id.* at 2644.

243. *Id.* at 2647. Interestingly, the school district’s written rule governing student speech was, in Justice Stevens’s assessment, “otherwise quite tolerant of non-disruptive student speech.” *Id.* at 2646. The rule reads in part: “Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.” *Id.* (quoting the school’s written rule).

244. *Id.* at 2647.

In 1987, Bruce Hafen noted that “the Supreme Court has begun quietly—almost as a series of asides—to consider the place of an educational institution, qua institution, within first amendment theory.”<sup>245</sup> *Morse* furthers that project, demonstrating the Court’s attention to schools as unique speech institutions with their own marketplace-enhancing internal norms. The New Institutional First Amendment both describes and justifies this treatment of schoolhouse speech while relieving some of the apparent tension between students’ right to speak and educators’ need to occasionally restrict that speech in order to teach them.<sup>246</sup> Best of all, the New Institutional First Amendment does this by reference to one of the First Amendment’s first principles—the advancement of the marketplace of ideas.<sup>247</sup>

### *B. Universities as Speech Institutions*

The institutional needs and norms that justify the Court’s deference to K-12 schools’ internal regulation of student speech do not apply with equal force to universities, even though universities are undoubtedly “speech institutions.” Although schools and universities both advance the marketplace of ideas, they do so in different ways and demand (and deserve) different levels of institutional deference. And just as the New Institutional First Amendment would predict, courts hold universities to a different standard in light of their unique institutional norms. Thus high

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245. Hafen, *supra* note 6, at 712 (citation omitted).

246. *See id.* at 665 (“The degree of authority required to teach children and to preserve an educational environment is fundamentally at odds with the anti-authoritarianism of the first amendment tradition, because education by definition involves the imposition of restraints.”).

247. *See* Hafen, *supra* note 8, at 698 (“The root question, which the typical first amendment model fails to address, is how to organize and operate schools in order to maximize their overall contribution to the values and purposes of the first amendment.”).

schools may impose restrictions on student<sup>248</sup> and teacher<sup>249</sup> speech that would not pass constitutional muster on a college campus.<sup>250</sup>

Professor Schauer writes that “an institutional account of the First Amendment would not surprisingly recognize a special place for the country’s colleges and universities, whose historical and current mission is to play a central role in challenging conventional wisdom.”<sup>251</sup> Explicitly tying universities to the marketplace of ideas metaphor, Justice Brennan wrote in *Keyishian v. Board of Regents*:<sup>252</sup> “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>253</sup> But who exactly is it that “challenges conventional wisdom,” to paraphrase Schauer? The university’s administration, which makes its rules? The student body? The faculty? Claiming a special role for “universities” as institutions is one thing—most First Amendment scholars, not to mention judges and the general public, would probably agree with that much. But the exact contours of that special treatment can be difficult and contentious when one disaggregates the institution. What happens if a university passes an internal rule saying that students cannot criticize the administration? Who gets special First Amendment treatment in that situation—the university administration, as the representative of the “speech institution”? Or

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248. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (allowing the removal of student-written articles from a high school newspaper, when the articles may have violated other students’ privacy and may have been inappropriate subject matter for younger students); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (upholding a student’s suspension for delivering a lewd and suggestive speech at a school assembly).

249. Schauer, *supra* note 119, at 912 (“Existing lower court doctrine indicates that substantially more restrictions are permissible for primary and secondary school teachers than for those who are teaching at the college and university level.”).

250. Eule & Varat, *supra* note 169, at 1593 n.241 (“In a college setting, of course, the protection afforded pupil speech more closely approximates full-citizen speech rights than that conferred on students in the secondary schools.”).

251. Schauer, *supra* note 119, at 925; see also *id.* at 907 (“Most American constitutionalists—who are also academics, to be sure—would agree that there is a constitutional right to academic freedom and would agree that the right exists in, around, or at least near, the First Amendment.”). See generally Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005) (arguing that the Supreme Court’s affirmative action cases can be read as institutionally aware First Amendment decisions).

252. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

253. *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945)).

would that be a situation in which “the tie goes to the speaker, not the censor”?<sup>254</sup> As the analysis throughout this Article has demonstrated, deferring to institutions based on their contribution to the marketplace of ideas means considering not just the speech they produce, but the speech they suppress.<sup>255</sup>

This much, at least, seems clear: Unlike K-12 schools, universities’ First Amendment function—their contribution to the efficiency of the marketplace of ideas—does not require or justify extensive internal speech regulations. To effectively educate young students, K-12 schools must commonly restrict speech. This tension, and society’s acceptance of it, is justified by the fact that young students are not fully equipped to be active participants in the marketplace of ideas. The very purpose of schools is to prepare them for that role. Universities, by contrast, have a student body made up of young adults who are trusted—and in American culture, expected—to challenge ideas and question authority. They are better equipped than they were as K-12 students to participate in the marketplace of ideas. As a result, restrictions on their speech are less likely to be marketplace enhancing.

This does not mean, however, that universities have no power to limit speech through the imposition of institutional norms. Although they cannot resort as easily as K-12 schools to the discipline-and-order justification, universities are just as—if not more—entitled to claim that their decisions to restrict or enable speech are made in the interest of advancing the pursuit of knowledge and truth. And when those claims are genuine, they should be—and generally have been—respected. This is true even when the universities’ institutional interests conflict with those of individual students or professors, as they inevitably do.<sup>256</sup> But even when those individuals claim that their speech acts are academic, and thus contribute to the marketplace of ideas, universities’ decisions to *limit* their speech can be academic

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254. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2669 (2007) (“Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”).

255. Cf. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 825 (1983) (“[I]nstitutional autonomy was perceived as an integral element of the theory of academic freedom and played an important role in making German institutions among the intellectually freest in the world.”).

256. Schauer, *supra* note 119, at 919 (“[T]here is no avoiding the conflict between a view of academic freedom that views individual academics as its primary and direct beneficiaries, and a contrasting view that locates the right in academic institutions, even if doing so limits the individual rights of the employees of those institutions.”).

judgments as well.<sup>257</sup> To the degree that a university's decision can be justified as marketplace enhancing, courts are likely to defer to it. In *Regents of the University of Michigan v. Ewing*,<sup>258</sup> for example, the Court upheld the University of Michigan's dismissal of a student for academic reasons, citing the "academic freedom" of "state and local educational institution."<sup>259</sup> Justice Stevens explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."<sup>260</sup> The Court refused to override "the faculty's professional judgment" unless it was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."<sup>261</sup>

Universities are thus entitled to institutional deference when it comes to speech regulations that improve, not limit, the free flow of information and ideas. For example, controversial speakers are often allowed to speak only at certain times and places—on the quad, for example, or in an auditorium, but not in the classroom of their choosing. In addition to being reasonable time, place, and manner restrictions,<sup>262</sup> such regulations can be justified on the simple ground that the would-be speaker's contribution to the marketplace of ideas would not outweigh the overall *cost* to the marketplace caused by disrupting classes or the library.<sup>263</sup> Put another way, a rule that

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257. *See id.* at 920.

258. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

259. *Id.* at 226; *see also* *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88–90 (1978) (deferring to university's academic judgment in due process cases).

260. *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

261. *Id.* at 225.

262. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

263. The university might also argue, of course, that its decision to cancel the speech is *itself* an act of speech, because the controversial lecture would inevitably carry the university's imprimatur. The Supreme Court, after all, has recognized that there is no constitutionally significant difference between the right to speak and the right to remain silent. *See, e.g.,* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

prohibits controversial speakers from delivering speeches in the library or in classrooms actually *enhances* the marketplace of ideas, because it protects students' ability to learn.

When universities impose internal restrictions on speech that are not marketplace enhancing, however, their institutional commitment to free speech may actually limit their power under the First Amendment. In *State v. Schmid*, the Princeton case discussed in Part II.B.4,<sup>264</sup> the court seemed to base its decision on the fact that "Princeton . . . clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities."<sup>265</sup> The *Schmid* court thus determined that the university's attempt to impose speech restrictions could not be justified as an academic decision intended to perfect the marketplace of ideas.

A more difficult question would have arisen if the issue were framed as a purely academic dispute. Consider the hypothetical situation of a young literature professor who believes, contrary to accepted wisdom, that Lord Byron was not part of the British Romantic movement and refuses to teach his work in a romance literature class, much to the consternation of the department chairman. Backed by the university's administration, the chairman argues that the romance literature class is the only one in which Byron can be taught, and that literature students must learn Byron to succeed as scholars. The young professor refuses to budge and is eventually disciplined by the university. Invoking the First Amendment, the professor claims that the punishment violates the right to free speech. The university responds that its own decision is purely academic, based on its desire to prepare students for participation in the marketplace of ideas.<sup>266</sup> The case is assigned to a

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orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.".) *But see* *Rumsfeld v. Forum for Academic and Inst. Rights*, 126 S. Ct. 1297, 1311–13 (2006) (rejecting universities' First Amendment freedom of association claims).

264. *See supra* notes 196–98 and accompanying text.

265. *State v. Schmid*, 423 A.2d 615, 631 (N.J. 1980).

266. In keeping with the New Institutional First Amendment, the university's *academic* motivation would be of primary importance, and would differentiate this hypothetical from a case in which a university tried to avoid bad press by preventing a controversial professor from "speaking" on its behalf. *See* Ryan J. Foley, *Letter Warned Barrett to Stop Seeking Publicity*, CAMPUS WATCH, Aug. 3, 2006, <http://www.campus-watch.org/article/id/2671> (reporting the university provost's declaration that "[w]e cannot allow political pressure from critics of unpopular ideas to inhibit the free exchange of ideas" but that the provost had also told a

judge who has read a fascinating and convincing law review article about the New Institutional First Amendment, which the judge intends to apply faithfully. Should the judge defer to the university's decision to sanction the professor, or does the professor's individual academic freedom win out? Both sides, after all, have invoked norms that would seem to improve the marketplace of ideas.<sup>267</sup>

According to New Institutional First Amendment theory, the university should probably prevail. To fulfill their role in advancing and improving the marketplace of ideas, universities must have power to control how students are taught. Their institutional norms are entitled to—and generally receive—deference from courts, at least when those norms serve the role that justifies universities' special treatment in the first place. Decisions about curriculum are precisely the kind of institutional regulations that universities are entrusted to make in the name of the marketplace of ideas. Faced with the choice between one honest academic decision (the university's) and another (the professor's), courts should—and likely will—defer to the organization's interpretation of the institutional rule.

In Julian Eule and Jonathan Varat's words, "[T]he university is a community in which robust traditions of open discourse and tolerance for competing ideas predate efforts to summon constitutional canons."<sup>268</sup> Such paeans to the speech-enhancing role of universities tend to cast universities as special speakers, and they undoubtedly do play that role. But the flip side of institutional autonomy is deference to the role of universities as *regulators* of speech. Universities are rightly treated as particularly important managers of, and actors in, the marketplace of ideas. But when universities act contrary to these "robust traditions" by limiting speech in ways not likely to improve the marketplace of ideas, courts are unlikely to defer, nor should they.

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controversial professor that he must be careful not to suggest "that you speak for the university").

267. Eule & Varat, *supra* note 169, at 1557 (criticizing the Supreme Court's holding in *Marsh v. Alabama*, 326 U.S. 501 (1946), for failing to explore "the possibility that First Amendment rights lay on both sides of the private dispute"); Sullivan, *supra* note 8, at 1654 ("[W]hen government attempts to restrict the power of private intermediaries to restrict speech, there usually are free speech interests on both sides.").

268. Eule & Varat, *supra* note 169, at 1574–75 (citation omitted).

C. *Commercial Speech: The Marketplace Metaphor in the Real-World Market*

Given this Article's focus on marketplaces and institutional economics, there can be no better place to conclude than with a consideration of commercial speech, the arena where the marketplace of ideas most clearly overlaps with the real-world market. In his dissenting opinion in *Central Hudson Gas & Electric Corp. v. New York Public Services Commission*,<sup>269</sup> the case that established the contemporary test for restrictions on commercial speech, Justice Rehnquist suggested that there was no principled distinction between the marketplace of goods and the marketplace of ideas.<sup>270</sup> This Section concludes that the New Institutional First Amendment may support Justice Rehnquist's view and may also cast light on both the relationship between the real-world marketplace and the marketplace of ideas on the one hand, and on the past, present, and future of commercial speech doctrine on the other.

Prior to 1976's *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>271</sup> commercial speech received no constitutional protection and could be regulated more or less at the government's discretion. For current purposes, the most interesting critic of this approach was none other than Ronald Coase. In two articles written in the 1970s, Coase highlighted the unequal intellectual positions occupied by the market for ideas and the market for goods.<sup>272</sup> Turning to the intersection of the two, Coase argued that "[a]dvertising, the dissemination of messages about the goods and services which people consume, is clearly part of the market for ideas. Intellectuals have not, in general, welcomed this other occupant of their domain."<sup>273</sup> He concluded one of his articles with a discussion of then-current cases,<sup>274</sup> including a district court case from Virginia

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269. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

270. *Id.* at 592–94 (Rehnquist, J., dissenting).

271. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

272. See Coase, *supra* note 5, at 1–2; Coase, *The Market for Goods*, *supra* note 64, at 384; see also *supra* notes 64–67 and accompanying text; cf. Director, *supra* note 22, at 3 (“The free market as a desirable method of organizing the intellectual life of the community was urged long before it was advocated as a desirable method of organizing its economic life.”).

273. Coase, *supra* note 5, at 8–9.

274. *Id.* at 29–31.

called *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*,<sup>275</sup> and a prediction:

It would seem probable that these decisions do not define the outer bounds of the applicability of the First Amendment to advertising but merely mark a stage in a gradual expansion of the kinds of commercial speech which will be brought within the protection of the First Amendment by the courts.<sup>276</sup>

In this, as in so many other things, Coase was right. The very district court case he cited made its way to the Supreme Court, where Justice Blackmun took the opportunity to rule, for the first time clearly, that commercial speech was entitled to First Amendment protection: “What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.”<sup>277</sup>

Harkening back to Justice Holmes’s marketplace metaphor, Justice Blackmun wrote that “society also may have a strong interest in the free flow of commercial information.”<sup>278</sup> He then held that “speech which does ‘no more than propose a commercial transaction’” is not “so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government’” that it should be completely without protection.<sup>279</sup>

But what Justice Blackmun did not create, and what commercial speech doctrine still lacks, is a comprehensive definition of what counts as “commercial speech.” Rather than drawing clear boundaries, the Supreme Court has relied on “various descriptions, indicia, and disclaimers without settling upon a precise and

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275. *Va. Citizens Consumer Council, Inc. v. State Bd. of Pharmacy* 373 F. Supp. 683 (E.D. Va. 1974), *aff’d*, 425 U.S. 748 (1976).

276. Coase, *supra* note 5, at 31–32.

277. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 773 (1976) (footnote omitted). In an addendum to his article, Professor Coase acknowledged that *Virginia State Board* had confirmed his view, and offered another prediction, one which has not yet proven itself: “Now that it has been decided that commercial speech is covered by the First Amendment, consideration of the limits of its application, the inevitable ‘balancing,’ can proceed in a sensible manner, a process in which the studies by economists of the effects of advertising may be expected to play a useful role.” Coase, *supra* note 5, at 33–34.

278. *Va. State Bd. of Pharmacy*, 425 U.S. at 764.

279. *Id.* at 762 (citations omitted).

comprehensive definition.”<sup>280</sup> In part, the Court’s hesitance to establish a single firm definition reflects the fact that advertising and other forms of commercial speech have become increasingly difficult to recognize in practice. Indeed, viewers of many modern advertisements may have a difficult time discerning what product or service is being offered, or how it relates to the ad they have seen. Thus, unlike the school and university examples discussed in Sections A and B—both of which admit of reasonably straightforward definition—discussions of commercial speech are plagued by the difficulty of identifying commercial activity in the first place.

The New Institutional First Amendment does not offer a simple solution, but it does have a clear diagnosis: the primary problem with commercial speech doctrine is the lack of an institutional identity. Commercial speech is difficult to define precisely because, to a far greater degree than universities, “commercial speakers” do not comprise a readily identifiable institution. Is “business” an institution? What of noncommercial speakers—such as universities or the government—who occasionally engage in commercial acts? Answering those questions only leads to a second-order but equally important question: is “business” the kind of speech institution that is entitled to First Amendment protection—that is, does it advance the free flow of ideas in the marketplace of ideas? These are difficult questions for which the New Institutional First Amendment—like contemporary commercial speech doctrine—does not provide easy answers.

Nevertheless, elements of the New Institutional First Amendment could easily be incorporated into current commercial speech doctrine, and may help lead to a better definition of the category itself. Despite lacking a firm definition of “commercial speech,” in *Central Hudson Gas & Electric v. Public Service Commission*, the Court established a four-prong test that grants commercial speech (whatever it is) a sort of intermediate level of protection.<sup>281</sup> Some parts of *Central Hudson*’s test already reflect the Holmesian marketplace model, and could easily accommodate a greater institutional focus. The first prong, for example, which asks

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280. Piety, *supra* note 187, at 381; Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 56 (1999).

281. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

whether the speech involved is false or misleading,<sup>282</sup> fits well with the New Institutional First Amendment approach. Speech that is false or misleading can hardly be said to contribute to the marketplace of ideas, and institutional or organizational speakers that deliver such speech do not contribute to the marketplace. The Court has “concluded that all ideas, but only *accurate* statements of fact, further self-government,”<sup>283</sup> and *Central Hudson* itself said that the government had the power to “ban forms of communication more likely to deceive the public than to inform it.”<sup>284</sup> The second and third prongs assess “whether the asserted governmental interest is substantial”<sup>285</sup> and “whether the regulation directly advances the governmental interest asserted.”<sup>286</sup> These inquiries would remain the same under an institutional approach. Similarly, the fourth prong of the *Central Hudson* test—that measuring overbreadth<sup>287</sup>—could relatively easily be transformed into an inquiry about the boundaries of the institution whose speech acts are at issue. Under this reading, an overbroad restriction on speech would be one that impermissibly cut across institutional boundaries, limiting the speech of “good” institutions as well as “bad.”

Whether these modifications of the *Central Hudson* test would appreciably advance the search for a coherent commercial speech doctrine is a question demanding more analysis than can be afforded here.<sup>288</sup> Some complications are immediately evident. For one thing,

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282. *Id.* at 566. See also *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 496 (1982) (holding that the government may entirely ban commercial speech that proposes illegal transactions); *Friedman v. Rogers*, 440 U.S. 1, 13–15 (1979) (upholding a statute prohibiting the practice of optometry under misleading names); see also Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665, 674–75 (2000) (discussing *Friedman* in the context of whether the Washington Redskins’ trademark constitutes commercial speech).

283. Ingber, *supra* note 7, at 14 (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 340–41 (1974); *Ocala-Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring); *Time, Inc. v. Hill*, 385 U.S. 374, 405 n.2 (1967) (Harlan, J., concurring in part and dissenting in part)).

284. *Cent. Hudson*, 447 U.S. at 563.

285. *Id.* at 566.

286. *Id.*

287. *Id.*

288. The Court has signaled that it may be considering a move to an entirely new framework of analysis. As discussed in Part II.B.4, the Court in 2003 granted certiorari in a widely watched case, *Nike v. Kasky*, 539 U.S. 654, 655 (2003), which offered an opportunity to revisit and clarify both the definition of commercial speech and its governing standard. See Goldstein, *supra* note 184, at 70–72. But to the disappointment of First Amendment scholars, *id.* at 63–64, the Court—

First Amendment questions arise on somewhat different footing in the commercial context than in academic contexts. The major question in school and university cases is generally whether the academic institution (or organization) can internally regulate individual speech, whereas in the commercial speech cases the question is usually whether the government (or even another institution) can regulate the speech of the commercial institution or organization.

Suffice to say, the Supreme Court's commercial speech doctrine has evolved in fits and starts. But despite ups and downs, the trend has been to accord increasing protection to "commercial" speech, both by applying the governing *Central Hudson* test more strictly and by classifying less and less speech as commercial in the first place. It is possible to fit both of these two trends—a contracting category of commercial speech and an expanding protection for the speech within it—into the New Institutional First Amendment framework. To reconceptualize in terms of that framework, one might say that the Court has come to accept Professor Coase's view that commercial speech "is clearly part of the market for ideas,"<sup>289</sup> and perhaps that the institutions and organizations who deliver it are entitled to special First Amendment treatment.

#### CONCLUSION

For all the power it has exercised over free speech theory since *Abrams*, the marketplace of ideas metaphor has done little to keep pace with changes in economic theory. Although criticisms of the marketplace of ideas metaphor have mirrored—and in many instances explicitly adopted—criticisms of the neoclassical view of a perfectly efficient economic market, defenders of the metaphor have not yet responded—as their economist counterparts have—by adopting a view of the "marketplace" that takes into account the existence of transaction costs and the institutions that mediate them. The New Institutional First Amendment described here attempts to do just that. In essence, it argues that if the marketplace of ideas is the animating purpose of the First Amendment, it can be served by institutions as well as by individuals.

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over two written dissents—later dismissed certiorari as improvidently granted. *Kasky*, 539 U.S. at 655 (2003) (majority opinion); *id.* at 665 (Kennedy, J., dissenting); *id.* (Breyer, J., dissenting).

289. Coase, *supra* note 5, at 8.

But there is another bit of internecine conflict the New Institutional First Amendment could help resolve: the discord among the First Amendment's doctrinal categories. These familiar categories—commercial speech, government speech, schoolhouse speech, and so on—increasingly overlap with one another and lack any intrinsic meaning.<sup>290</sup> The institutions that originally gave rise to these categories no longer limit themselves to the roles with which they are traditionally associated and which the doctrines arose to address. Schools and government units, for example, increasingly enter into naming rights deals with commercial sponsors.<sup>291</sup> How should such speech acts be defined, and what level of First Amendment protection should they receive? Are they commercial speech, government speech, the school's speech, or something else entirely? And what *principle* justifies the result?

The New Institutional First Amendment helps to resolve these and other difficulties, by dusting off and partially rehabilitating the marketplace metaphor that has animated First Amendment jurisprudence since at least 1919, albeit with increasing shakiness. Differentiating between speech institutions may not always be an easy task, but it is no more difficult—and is quite a bit more useful—than the line-drawing courts must attempt under the contemporary “categorization” approach.

The New Institutional First Amendment is not simply explanatory; it is also predictive and normative. As such, its vitality will be tested by the increasing number of “speech institutions” demanding the Court's attention. In addition to the thorny problem of commercial speech, which may well be the next big thing in First Amendment law,<sup>292</sup> many of the Court's looming First Amendment issues—copyright,<sup>293</sup> scientific speech, and speech in the electoral sphere,<sup>294</sup> for example—would benefit from the institutional approach. Online speech presents perhaps the most interesting challenge, as the internet replaces the traditional press (long regarded as a prototypical

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290. See generally Blocher, *supra* note 179 (arguing that the First Amendment categories of government speech, commercial speech, and schoolhouse speech have collapsed upon each other).

291. *Id.* at 6–16.

292. See *supra* notes 183–91 and accompanying text.

293. See Schauer, *supra* note 124, at 1799.

294. Schauer, *supra* note 121, at 92 n.42 (citing C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 24–28 (1998)).

“speech institution”) as the dominant forum for public debate.<sup>295</sup> The New Institutional First Amendment, unlike many free speech theories, is able to capture and explain the unique, exchange-enhancing nature of the Internet and suggest why that special role might entitle it to special institutional treatment.

As it becomes “increasingly possible and likely . . . that Americans can go about their daily lives without entering the public fora cordoned off for strong First Amendment protection,”<sup>296</sup> private institutions’ regulation of speech has become increasingly important. The New Institutional First Amendment recognizes, as economists have for decades, that individuals create and live under an institutional regime.

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295. SCOTT GANT, *WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* 24–32, 135–51 (2007).

296. Note, *Unsolicited Communications*, *supra* note 21, at 1322; *see also id.* at 1328 (“The privatization of traditionally public space is a straightforward threat to the marketplace of ideas.”).