Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment

Michael R. Siebecker
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MICHAEL R. SIEBECKER*

ABSTRACT

Does the First Amendment shield politically tinged corporate speech from the compelled disclosure and reporting requirements embedded in the U.S. securities laws? The question arises in the securities regulation context because of an impending jurisprudential train wreck between the Supreme Court's commercial speech doctrine and its approach to corporate political speech. As corporations begin mixing commercial messages with political commentary, First Amendment jurisprudence simply provides insufficient guidance on the role government should play in regulating that speech. Although First Amendment jurisprudence generally counsels against governmental restrictions on corporate political speech without regard to the truth or falsity of the message, a different branch of that same jurisprudence suggests governmental regulation of commercial speech remains essential to ensure consumers receive accurate information and to maintain market efficiency. Unfortunately, the Supreme Court has never articulated sufficiently clear definitions of "commercial" or "political" speech, or the boundaries between them, to address claims of politically tinged corporate speech. Because the securities laws essentially operate

* Assistant Professor, University of Florida College of Law; B.A, Yale University; J.D., LL.M, M.Phil., Columbia University. My deepest gratitude goes to Cynthia Williams for her generous insights and inspiration on this project and many others. In addition, for thoughtful comments and criticisms on an earlier draft, I would like to thank Robert Amdur, Jim Chen, Jonathan Cohen, Stuart Cohn, David Dana, Joel Goldstein, Tom Hurst, Lyrissa Lidsky, Donald Polden, Jeffrey Rachlinski, Frederick Schauer, Chris Slobogin, Lee-ford Tritt, Peter Wiedenbeck, Barbara Woodhouse and all the participants in the inaugural Jurisgenesis Conference at Washington University. For research support, I am indebted to the University of Florida College of Law and to the careful work of my assistants, Jeffrey Bekiares, Bill Dolence, and Jonathan Schwartz.
through content-based regulation of compelled speech, which often touches inherently political matters, the securities laws seem especially vulnerable to constitutional attack.

Considering the limitations of current speech jurisprudence, this Article examines whether the “institutional approach” to the First Amendment advocated by Frederick Schauer provides a theoretical basis for maintaining a robust securities regulation regime. Following that approach, a determination of speech rights in any particular institutional setting should depend on an assessment of the societal importance of the institution as well as the relationship between speech rights and the institution’s basic role. The Article concludes that an institutional approach to First Amendment jurisprudence not only provides sufficiently strong reasons for insulating the securities regulation regime from the First Amendment’s reach, but also lends strong support for embracing a new institutional approach to First Amendment jurisprudence itself.
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INTRODUCTION

Does the First Amendment protect from regulation any corporate speech that touches some political chord or matter of public concern? If so, does the First Amendment shield politically tinged corporate speech from the compelled disclosure and reporting requirements embedded in the U.S. securities laws and regulations? For those especially concerned with the integrity of the U.S. capital markets, obtaining an answer to that second question remains a paramount concern. Crafting a general theory addressing the political speech rights of corporations, however, need not necessarily precede a determination of the proper reach of the U.S. securities laws. Instead, an examination of the institutional justifications for maintaining a robust securities regulation regime, based on Frederick Schauer’s newly developed “institutional approach” to the First Amendment,¹ might provide sufficiently strong reasons for insulating the American system of compelled corporate reporting and disclosure from constitutional attack.

Motivating the need for a new institutional analysis is an impending jurisprudential train wreck in the realm of securities regulation. Speeding from one direction is the “commercial speech” doctrine, a much-criticized set of standards articulated by the Supreme Court that permits substantial regulation of false or misleading commercial speech. Charging from the opposite course is the Supreme Court’s somewhat disjointed First Amendment jurisprudence regarding corporate political speech that does not take the truth or falsity of the communication into account. The track itself—the conduit for the collision—is the system of compelled disclosure and reporting contained in the U.S. securities laws and regulations. Fueling the engines on both sides are a confluence of external pressures: a recent surge in socially responsible investing (SRI), defined as the integration of social, environmental, and political criteria into the investment decision-making process;² a

¹. Frederick Schauer, Towards an Institutional First Amendment, 89 MINN. L. REV. 1256 (2005).
concomitant growing need for corporations to establish a public record on those issues relevant to the SRI community; and an increasingly vigilant shareholder advocacy movement monitoring and testing the truth of corporate communications.

Perhaps surprisingly, few scholars even recognize that the Supreme Court's jurisprudence in the areas of commercial speech and corporate political speech are hurtling towards each other along the same track. Certainly many question the commercial speech doctrine's basic design and reach. Others separately criticize the intellectual integrity of the Supreme Court's justifications for subjecting corporations to significant regulation in the electoral context while granting them significant political speech rights in other areas. Still, there seems to be no general recognition that the clean distinction between political and commercial speech cannot endure. As a result, little attention has been paid to what impact the impending collision of those two areas of First Amendment jurisprudence might have on other areas of the law.

Some recent cases make clear, however, that the Supreme Court's forced divide between commercial speech and corporate political speech is intellectually unstable. Companies have begun to assert that when factual disclosures are intertwined with even minimal political commentary, the entire amalgam becomes fully protected political speech under the First Amendment. For example, in *Nike, Inc. v. Kasky*, a case fully argued before the Supreme Court prior to being remanded for additional fact-finding, Nike argued that it could not be held liable under a California consumer fraud statute for any potentially false or misleading statements made to the press about its overseas labor policies, because those statements were part of an ongoing public debate about international labor practices. In essence, Nike's claim effectively called for collapsing the commercial speech doctrine into the Supreme Court's political speech jurisprudence, forcing a union of standards not easily wed.

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3. See infra notes 65-67 and accompanying text.
4. See infra note 116 and accompanying text.
If corporations like Nike continue to blur the distinction between the commercial and the political, maintaining the current jurisprudential divide would require the Supreme Court to address some extremely difficult—yet very basic—questions that it has not yet answered with any clarity: What is commercial speech? What is political speech? When does commercial speech become political speech? Drawing those definitional lines presents a monumental jurisprudential task with far-reaching consequences perhaps too difficult to predict. In light of the attempt to collapse the distinction between political and commercial speech already brought before the Supreme Court in Nike, and with other cases sure to follow, such substantial theoretical excavation and remodeling of First Amendment jurisprudence seems unavoidable.

But why do the U.S. securities laws provide the conduit for the collision between political and commercial speech? Were corporations to find broad political protection under the First Amendment for factual disclosures, the detailed system of mandatory reporting and disclosure provided by the U.S. securities laws could be undone. Private causes of action for securities fraud currently recognized by the Supreme Court would lose their theoretical underpinnings, and the system of forced public transparency for public corporations and sales of securities would become muddied by political maneuvering. Investors could be left foundering without reliable information upon which to base investment decisions, and gross market inefficiencies could potentially result if market prices rested on infirm or false factual assumptions. Perhaps in no other institutional setting would a revamping of the distinction between commercial and political speech rights for corporations have a greater impact.

Some might suggest that questioning the First Amendment’s impact on the stability of the system of mandatory reporting and disclosure under the U.S. securities laws simply raises a false concern. After all, even though the Securities and Exchange Commission (SEC) regulates with a very heavy hand the precise content of corporate disclosures, the Supreme Court has never seriously suggested that the securities laws or the agency that enforces them are vulnerable to attack under the First Amendment. Although decades ago some predicted a similar collision between the
securities laws and the First Amendment, none occurred. In fact, the Court has hinted on several occasions that the securities regulation regime sits comfortably outside the protective reach of the First Amendment.

The problem, however, stems from the lack of any principled grounds for carving out securities regulation from the scope of the First Amendment. Although normative reasons for denying corporations expansive speech rights certainly exist, so do countervailing justifications for providing extensive speech rights to corporations that would undermine, perhaps significantly, the current securities laws. In essence, the securities regulation regime remains quite theoretically disconnected from the First Amendment. At best, the continuing viability of the system of compelled reporting and disclosure embedded in the securities laws remains subject to a guessing game about which speech norms might provide enough glue to hold the structure together, or to rend the system apart, if serious challenges began to arise.

Although the securities laws might currently drift undisturbed by waves of speech claims, a significant jurisprudential shift in the First Amendment could easily lead to direct speech-based challenges to some of the most basic securities laws. The recent speech claims of corporations require some restructuring of the definitions of commercial and political speech, as well as redrawing the lines between them. It is therefore important to examine whether any sound theoretical basis exists for insulating the securities regulation regime from the reach of the First Amendment. And if traditional normative justifications for free speech do not provide adequate guidance regarding the First Amendment's scope in the realm of securities regulation, it seems prudent to investigate whether any nonnormative theory might provide a more useful organizing construct.

The "institutional approach" to the First Amendment advocated by Frederick Schauer seems to provide just such a theoretical hook

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8. See infra Part II.C.
for maintaining a robust securities regulation regime. Schauer's analytical framework looks beyond normative speech theory to the social, economic, and political factors that surround and affect speech claims to explain the shape the First Amendment should take. From that external vantage point, determining what level of speech protection the First Amendment affords in a particular institutional setting thus depends on an analysis of the societal importance of the institution, as well as an assessment of how the speech regulation itself relates to the institution's basic role. Although Schauer's approach might yield sound reasons for carving out certain areas of law from the First Amendment's reach, neither he nor anyone else has yet to apply the analysis to the institution of securities regulation.

The project here, then, is to address in a comprehensive fashion whether an institutional approach provides sufficient grounds for insulating from the reach of the First Amendment the system of compelled reporting and disclosure embedded in the U.S. securities laws. Although the analysis rests on Schauer's conception of an institutional approach to the First Amendment, the goal is to test the theory's application in the setting of securities regulation rather than to provide an exhaustive recapitulation and defense of the basic tenets of the institutional approach itself.

To determine the First Amendment's reach under the institutional approach in the context of securities regulation, this Article follows a simple path. Using Nike as a springboard for analysis, Part I describes the impending collision between the commercial speech doctrine and the Supreme Court's approach to corporate political speech, giving particular attention to the confluence of political and social factors that make that jurisprudential collision imminent. Part II sets forth the current status and limitations of the Supreme Court's commercial speech doctrine and its approach to corporate political speech. In addition, Part II details the absence of any jurisprudential anchor for the Supreme Court's apparent exclusion of securities regulation from serious First Amendment review. Moving from a description of the problem to a potential solution, Part III articulates Schauer's general argument for a new

10. Schauer, supra note 1, at 1274; Schauer, supra note 9, at 1787.
11. Schauer, supra note 1, at 1274.
institutional approach to First Amendment jurisprudence. Carefully assessing a variety of social, legal, economic, and political concerns, Part IV applies that institutional approach in the particular setting of securities regulation. Part V revisits the questions presented in *Nike* and attempts to see what answers, if any, the institutional approach to the First Amendment might provide. This Article concludes that an institutional approach to First Amendment jurisprudence not only provides sufficiently strong reasons for insulating to a great extent the institution of securities regulation from the First Amendment's reach, but also lends strong support for embracing a new institutional approach to First Amendment jurisprudence itself.

I. THE IMPENDING JURISPRUDENTIAL COLLISION BETWEEN COMMERCIAL SPEECH AND CORPORATE POLITICAL SPEECH

The incompatibility between the Supreme Court's First Amendment jurisprudence regarding commercial speech and corporate political speech is becoming increasingly apparent. The basic problem lies in a renewed effort by corporations to mix commercial and political speech in their public statements. But

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12. While the securities laws have not yet faced any direct challenge under the First Amendment, companies have begun asserting that politically tinged corporate speech deserves immunity from regulation or liability in a variety of other contexts. See, e.g., *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 929-32, 942 (9th Cir. 2006) (satellite television company successfully claimed that its demand letters sent to thousands of recipients, who allegedly accessed the satellite signal without authorization, could not give rise to a RICO claim against the company because the letters constituted protected speech under the First Amendment); *CPC Int'l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 461-63 (4th Cir. 2000) (corporation and its president successfully claimed that its postings on a Web site describing the company's lost battle in a protracted trademark and copyright dispute could not be subject to an injunction, because the Web postings were not commercial speech and therefore deserved full First Amendment protection); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 585-86 (2d Cir. 2000) (rejecting a corporation's claim that Internet domain names constituted political speech immune from antitrust regulation, but nonetheless noting that “domain names may be employed for a variety of communicative purposes with both functional and expressive elements, ranging from the truly mundane ... commercial speech and even core political speech squarely implicating First Amendment concerns.... [W]e do not preclude the possibility that certain domain names and new gTLDs, could indeed amount to protected speech”); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1110-11 (C.D. Cal. 2004) (in deceptive trade practice case, defendant Lavasoft successfully claimed that its statements about plaintiff's software on Lavasoft's Web site and in code embedded in Lavasoft's Ad-Aware detection
why is this a problem? To the extent corporations invest commercial messages with political content, the Supreme Court's existing First Amendment jurisprudence does not provide sufficient guidance on the role government should play in regulating that speech. If the corporate speech is political, First Amendment jurisprudence strongly counsels against governmental restrictions without regard to the truth or falsity of the message.13 If the corporate speech is commercial, however, a different branch of that same jurisprudence suggests governmental regulation remains essential to ensure consumers receive accurate information and to maintain market efficiency.14 Of course, the jurisprudential paralysis results only if corporations actually combine commercial and political speech. But as explained below, a surge in socially responsible investing coupled with a strong shareholder advocacy movement has caused just that commingling of commercial and political corporate speech.


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

Although efforts to encourage socially responsible corporate behavior span centuries, the modern SRI movement in the United States arose in the aftermath of the social upheaval in the 1960s. Since that rebirth, the SRI community has grown at a remarkable pace. With increasing frequency, consumers and investors make decisions about whether to purchase a company's stock or products based in part on an assessment of the company's performance in a variety of social, ethical, environmental, and political areas. Whether based on positive compliance with desired practices, such as paying a living wage to company workers, or avoidance of undesired policies, such as animal testing of products, consumers and investors are screening company policies and practices with increasing regularity.

As the broader investing community embraces corporate social responsibility, the SRI movement enhances its influence in the corporate world. With mainstream money managers increasingly incorporating various social criteria into their investing, "[o]ver the past decade, SRI has become a major force in the U.S. financial marketplace." By 2005, total assets under professional management in portfolios screened for one or more social issues had risen to $2.29 trillion, an increase of 258% from 1995. That increase reflects 9% greater growth than assets under professional manage-

15. SIF REPORT, supra note 2, at 3-4.
17. See Is There Money in Morals?, MONEY MGMT., Feb. 1, 2006 ("The criteria used to select companies for investment has evolved as well. Ethical funds now utilise both negative and positive screening processes (using certain criteria to either exclude or include companies) and are looking more closely at the issues to decide where it is appropriate to invest.").
ment not screened based on social criteria within the same period. Moreover, between 2003 and 2005 assets invested in SRI mutual funds increased by 18.5%, with a 40% increase in funds dedicated to community investing projects.

In addition, a vigorous shareholder advocacy movement has had a growing impact on corporate policies and practices. Between 2003 and 2005, shareholder proposals on a variety of social and environmental issues increased by more than 16%, and the number of those proposals that actually reached a vote at the annual shareholder meeting increased by more than 22%. With respect to large institutional investors that filed resolutions on social or environmental issues, assets under their control increased by 57% over that same period, from $448 billion to $703 billion. In qualitative terms, shareholders have played “a major role in improving corporate behavior through resolutions, letter writing, and negotiations with management on issues ranging from environmental risk and workplace standards to diversity, human rights violations, and a myriad of corporate governance concerns.” As an essential part of the SRI community, shareholder advocacy has caused corporations to confront how their businesses affect a variety of social, ethical, political, and environmental matters.

By increasing the overall demand for corporations that embrace socially responsible business practices, or through a willingness to pay a “stock premium” for socially sound business practices, the SRI community creates a monetary incentive for corporations to embrace publicly the ethic of corporate social responsibility. That incentive for public acceptance of socially responsible business practices provides the next causal link in the jurisprudential collision.

19. Id.
20. Id.
21. Id. Many shareholder proposals, however, are withdrawn from consideration because the proposing shareholders reach agreements with management regarding implementation of the underlying objectives. Therefore, the withdrawal of a proposal itself does not indicate a failed attempt by shareholders to effect corporate change. See SIF REPORT, supra note 2, at 21-22.
23. SIF REPORT, supra note 2, at 21.
B. Corporate Responses to Socially Responsible Investing

The rise in SRI has sparked a concomitant increase in corporate responses to public concerns about corporate social responsibility. Recent studies indicate that more than half of the companies in the S&P 100 Index, which measures the performance of one hundred major companies in the United States across diverse industry groups, include information about social and environmental business practices on their Web sites. Moreover, 40% of those same companies issue special “corporate social responsibility (CSR) reports” upon which investors and consumers in the SRI community rely. Because companies suffer negative market consequences when reports come to light regarding harmful social, labor, or environmental practices, some corporations have begun working together with SRI funds and shareholder advocacy groups to build into their business plans specific policies responsive to the SRI community.

Regardless of whether corporations actually embrace a cooperative posture in striving to achieve the goals of the SRI community, corporations increasingly heed the market’s demand for disclosures

26. Id.
27. For example, Domini Investments, a bellwether SRI fund, dropped Wal-Mart from its socially responsible index fund, the Domini 400, based on reports about poor labor and human rights conditions involving its overseas suppliers. See Ellen Braunstein, From Sweatshops to Shopping Malls, RETAIL TRAFFIC, Sept. 1, 2001, available at http://retailtrafficmag.com/mag/retail_hot_topic_sweatshops/index.html (describing Domini’s decision based on “a report from the National Labor Committee that Wal-Mart goods were made by nearly enslaved workers under armed guard in Honduras and China. Wal-Mart’s ‘Kathie Lee’ goods were made by 13-year-olds in Honduras, forced to work 13 hours a day, the report states”).
regarding business practices and operations relevant to socially responsible investing. As a recent PricewaterhouseCoopers study indicated, many large U.S. companies consider their stance on labor, environmental, and social practices to be "the next competitive battlefield." Engaging on the battlefield requires corporations to speak on a variety of social, political, ethical, and environmental matters. And to the extent the First Amendment fully protects those inherently political disclosures, their accuracy becomes impossible to test. That inability to challenge the truth of politically tinged corporate speech seriously threatens the basic viability of socially responsible investing.

C. Nike, Inc. v. Kasky

The case of Nike, Inc. v. Kasky reveals the imminence of the collision between commercial and political speech, even though the Supreme Court ultimately remanded the case without reaching the underlying merits. The case involved a suit brought by a private citizen, Marc Kasky, under a California consumer fraud statute that prohibited "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Kasky claimed that Nike repeatedly made false or misleading statements to the press about its overseas labor practices, in violation of the statute. Nike's public defense of its labor practices was prompted by concerns about the negative impact that recent newspaper and television stories regarding its labor practices were having on Nike stockholders and consumers. Stating in 1998 that "the American consumer doesn't want to buy products made under abusive conditions," Nike's CEO, Phil Knight, partially blamed the

32. CAL. BUS. & PROF. CODE § 17200 (West 2000).
34. Bill Richards, Nike To Increase Minimum Age in Asia for New Hirings, Improve Air
company's lackluster financial performance over the prior two years on public concerns about Nike's labor practices. Nonetheless, in the context of its Supreme Court challenge to the consumer fraud statute, Nike claimed that because its statements to the press touched on matters of public concern, those comments deserved full protection under the First Amendment.

So how does Nike bring to light the jurisprudential problems the Court will inevitably have to face? When laws place civil or criminal penalties on certain instances of commercial speech, companies have a strong incentive to escape the ambit of those regulations by claiming political protection under the First Amendment. In Nike, a consumer protection statute fueled the contest. But corporate speech restrictions appear in other areas of the law as well. Most notably, the securities laws regulate corporate speech in myriad ways using a variety of different standards for liability. Moreover, the degree of regulation in the consumer protection setting pales in comparison to the rigid speech regulation under the securities laws. So if companies like Nike can use the First Amendment to evade civil or criminal penalties for fraudulent or misleading speech, compliance with the securities laws will seem unnecessary, at least when corporate speech touches some matter of public concern.

Given the amount of resources and effort companies expend complying with the securities laws in offering securities, making quarterly or annual reports, soliciting shareholder proxies, and in a host of other corporate contexts, a strong incentive may exist to link corporate disclosures with enough political sentiment to render

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35. See Letter from Philip H. Knight, Chairman of the Bd. & Chief Executive Officer, Nike, Inc., to the Shareholders (1998), available at http://www.nike.com/nikebiz/nikebiz.jhtml?page=17 (select “Fiscal year 1998 annual report” hyperlink under “Annual Reports”; then select “Letter to Shareholders” hyperlink) (attributing disappointing financial results to “Asia ... brown shoes ... labor practices ... resignations ... layoffs ... [and] boring ads” (ellipses in original)).

36. See Brief for Petitioners at 43, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575) (arguing that statements about company practices that touch some issue of public concern must be protected unless made with “actual malice”).

37. See infra notes 180-87 and accompanying text.

38. See infra notes 180-87.

the amalgam fully protected under the First Amendment. Current First Amendment jurisprudence, however, provides no clear guidelines regarding the boundaries between commercial and corporate political speech. That the Supreme Court was willing to take the case lends continuing credibility to the claim that, under existing First Amendment jurisprudence, politically tinged commercial speech deserves robust protection. To the extent corporations like Nike are able to collapse the distinction between commercial and political speech, then, the continuing viability of the securities regulation regime gets cast into doubt.

II. THE LIMITATIONS OF FIRST AMENDMENT THEORY

Fully understanding why current First Amendment jurisprudence remains incapable of ensuring the integrity of the U.S. capital markets requires an examination of the disparate principles and standards governing corporate political speech and commercial speech. The current jurisprudential rift seems to originate less from fidelity to any fundamental philosophical commitments at the outset than from an organic, perhaps imperfect, evolution of legal standards over time. That courts refine legal principles and standards upon consideration of new cases should cause neither surprise nor alarm. To the contrary, that process represents the great hallmark of the common law method itself.

What remains especially notable—and increasingly problematic—in the case of corporate speech is that the controlling legal standards did not evolve along a single path. Instead, a split occurred in corporate speech jurisprudence. Although a detailed examination of the historical causes of that doctrinal divide lies well outside the scope of this Article, a brief description of the evolution of the current standards governing commercial speech and corporate political speech helps establish that, in the realm of corporate speech, a


jurisprudential fork indeed developed. And with its tines currently pointed in opposite directions, that fork has become an increasingly frustrating legal tool for resolving new speech claims.

A. Commercial Speech Doctrine

The commercial speech doctrine first emerged during World War II in *Valentine v. Chrestensen*, a case that rather presciently anticipated the current jurisprudential problem. In *Chrestensen*, an owner of a decommissioned U.S. naval submarine who wanted to use leaflets to solicit paying customers challenged a New York City sanitary code prohibition on the distribution of commercial handbills. Perhaps too cleverly, the plaintiff attempted to evade the ordinance by distributing double-sided leaflets containing a commercial advertisement for the submarine on the front and a political protest of another local ordinance on the back. While the context related to sanitation rather than securities regulation, the case provides a strikingly early example of an effort to insulate commercial speech from regulation by creating an amalgam of commercial and political commentary.

Despite the rather sophisticated strategy employed by the plaintiff—a strategy since reinvigorated by modern corporations like Nike—the Court resolved any potential tension between commercial and political speech rights simply by ignoring the latter. In an extremely brief opinion, the Court announced that while limitations certainly exist on the ability to regulate speech in certain public fora, "the Constitution imposes no such restraint on government as respects purely commercial advertising." The Court cursorily rejected plaintiff's contention that he was engaged in disseminating public commentary "inextricably attached" to commercial advertising by stating, "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity

42. 316 U.S. 52 (1942).
43. *Id.* at 53-54.
44. *Id.* at 53.
45. *Id.* at 54.
46. *Id.* at 55.
from the law's command.”\textsuperscript{47} The Court thus embraced a pragmatic justification for the outcome without engaging the difficult jurisprudential issues raised regarding the precise nature of commercial and political speech. Although the Court's scant analysis has faced significant criticism,\textsuperscript{48} the case nonetheless provides the historical foundation for affording commercial speech limited constitutional protection and an early glimpse at the jurisprudential challenges posed when commercial and political speech are mixed together.

Many decades later, the Supreme Court significantly changed course and articulated much broader constitutional protection for commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*\textsuperscript{49} The case involved a Virginia statute prohibiting the publication or advertisement of prescription drug prices. Abandoning the bald statement in *Chrestensen* that the Constitution places no limits on the regulation of commercial speech,\textsuperscript{50} the Supreme Court extended First Amendment protection even to speech that does “no more than propose a commercial transaction.”\textsuperscript{51} Justifying constitutional protection from the listener's perspective, the Court stated that the public has an interest in the “free flow of commercial information” that may be “keener by far” than any interest in “the day's most urgent political debate.”\textsuperscript{52} Although striking down the regulation, the Court indicated that commercial speech still faced greater regulation than noncommercial speech. Switching from the listener's perspective to an assessment of the speaker's interests, the Court suggested that deceptive or false commercial speech could still face legitimate regulation because the truthfulness of commercial speech was more easily verifiable by the speaker than political speech, and the overarching

\textsuperscript{47} Id.

\textsuperscript{48} See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. Rev. 627, 628 (1990) (describing the Court's failure to discuss the First Amendment's underlying purposes and values to support its decision that commercial speech deserved no constitutional protection).

\textsuperscript{49} 425 U.S. 748 (1976).

\textsuperscript{50} Id. at 776; see also Bigelow v. Virginia, 421 U.S. 809, 820 n.6 (1975) (discussing Justice Douglas's reflections on the analysis in *Chrestensen* as "casual," "offhand," and unable to survive later scrutiny).


\textsuperscript{52} Id. at 763.
need for businesses to advertise would counteract any potential chilling effect that speech regulations might ordinarily entail.\textsuperscript{53} The Court’s assessment of the speaker’s and listener’s interests arguably justifies subjecting commercial speech to greater regulation. What the Court failed to provide, however, was any meaningful method for distinguishing commercial from noncommercial or political speech.

Soon after \textit{Virginia State Board}, the Supreme Court articulated the modern test for commercial speech protection in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission}.\textsuperscript{54} In striking down a regulation banning all advertising by a utility company, the Court adopted a four-part test to determine when the First Amendment protects commercial speech. As a threshold matter, in order to receive any constitutional protection the commercial speech must relate to lawful activity and not be misleading.\textsuperscript{55} Second, a substantial governmental interest must support the speech regulation.\textsuperscript{56} Third, the regulation must directly advance that substantial governmental interest.\textsuperscript{57} Finally, the regulation must not be “more extensive than is necessary to serve that interest.”\textsuperscript{58} As the Court stated, the Constitution affords “a lesser protection to commercial speech than to other constitutionally guaranteed expression.”\textsuperscript{59} Moving away from the tone, if not the substance, of the broad comment in \textit{Virginia State Board} that the public’s interest in commercial information might be “keener by far”\textsuperscript{60} than any interest in current political debates, the Court stated that only the “informational function of advertising” required constitutional protection.\textsuperscript{61} Moreover, while citing \textit{Virginia State Board}, the Court adopted a seemingly broader definition of commercial speech as “expression related solely to the economic interests of

\begin{footnotesize}
\begin{enumerate}
\item[53.] \textit{Id.} at 772 n.24.
\item[54.] \textit{447} U.S. 557 (1980).
\item[55.] \textit{Id.} at 566.
\item[56.] \textit{Id.}
\item[57.] \textit{Id.}
\item[58.] \textit{Id.}
\item[59.] \textit{Id.} at 563.
\item[61.] \textit{Cent. Hudson}, 447 U.S. at 563-64.
\end{enumerate}
\end{footnotesize}
the speaker and its audience."\textsuperscript{62} Despite the apparently increasing reach of what commercial speech entailed, the definition of commercial speech itself remained vague. Nonetheless, the analytical framework provided by the Court presented a level of intermediate scrutiny for commercial speech\textsuperscript{63} occupying a jurisprudential rung below the strict scrutiny afforded political speech and other types of noncommercial expression.\textsuperscript{64}

Application of the \textit{Central Hudson} test, however, has produced rather inconsistent levels of protection for commercial speech and a lack of confidence in the \textit{Central Hudson} framework itself.\textsuperscript{65} Of course, an intermediate scrutiny test is not necessarily unworkable.\textsuperscript{66} But the \textit{Central Hudson} test has at times permitted significant commercial speech regulation, while at other times allowed broad commercial speech rights, even when significant governmental interests were at stake.\textsuperscript{67}

For instance, with the \textit{Central Hudson} pendulum swinging toward greater protection for commercial speech, the Court struck down a prohibition on advertising liquor prices in \textit{44 Liquormart, Inc. v. Rhode Island}.\textsuperscript{68} Although the Justices' opinions varied, a majority called into question the continuing validity of the distinc-

\footnotesize{\textsuperscript{62} Id. at 561.  
\textsuperscript{64} See, e.g., Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that a regulation prohibiting solicitors to be within 100 feet of entrances to polling places is subject to strict scrutiny); Boos v. Barry, 485 U.S. 312, 321 (1988) (holding that a regulation of political speech displayed near foreign embassies must be subjected to strict scrutiny).  
\textsuperscript{67} See Kozinski & Banner, \textit{ supra} note 48, at 630.  
\textsuperscript{68} 517 U.S. 484 (1996).}
tion between commercial and noncommercial speech embraced by *Central Hudson.* In a later case, *Lorrilard Tobacco Co. v. Reilly,* the Court struck down certain restrictions on tobacco sales within a close proximity to schools and playgrounds. Although acknowledging the strong governmental interest in curtailing underage tobacco use, the Court found the fit between the precise regulations at issue and the state interest insufficiently tight.

Revealing how murky *Central Hudson* becomes in the context of politically tinged commercial speech, the Court held unconstitutional a federal statute prohibiting unsolicited mailing of contraceptive advertisements in *Bolger v. Youngs Drug Products Corp.* The Court found that the pamphlets at issue, which described how the drug manufacturer's condoms prevented unwanted pregnancies and venereal disease, contained "discussions of important public issues" and could not be "characterized merely as proposals to engage in commercial transactions." Moreover, the Court noted that even though the drug company had an "economic motivation for mailing the pamphlets," which referred to a "specific product" and were "conceded to be advertisements," none of those factors established the speech was commercial rather than political.

Without any principled definition of commercial or political speech to guide the analysis, however, the Court simply announced that the

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69. See id. at 502 (Stevens, J., joined by Kennedy, J., and Ginsburg, J.) ("The special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the 'commonsense distinctions' that exist between commercial and noncommercial speech. Regulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference." (citation omitted)); see also id. at 522 (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is 'of lower value' than 'noncommercial' speech."); id. at 517 (Scalia, J., concurring in part and in the judgment) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.").


71. Id. at 564-66.


73. Id. at 67-68.

74. Id. at 66.

75. Id. at 67.

76. Id. at 66.

77. Id.
"combination of all these characteristics" \(^{78}\) rendered the pamphlets commercial speech. While the commercial speech label made the pamphlets more amenable to regulation, the Court nonetheless struck down the statute, concluding it was not narrowly tailored to the otherwise substantial governmental interest in promoting parental counseling on birth control issues.\(^ {79}\)

With the *Central Hudson* pendulum swinging toward greater regulation of commercial speech, the Court upheld a ban on advertisements for casino gambling in *Posadas de Puerto Rico Associates v. Tourism Co.*\(^ {80}\) Applying the four-part commercial speech test, the Court found that the state had a significant interest in curtailing gambling among residents of Puerto Rico and that the regulation was sufficiently tailored to the state interest.\(^ {81}\) In stark contrast to *Lorrilard*, the Court found a sufficiently tight fit between the state interest and the regulation, even though the statute applied only to casino gambling.\(^ {82}\)

Similarly favoring commercial speech regulation, the Court upheld a statute barring private companies from selling products on a state college campus in *Board of Trustees of the State University of New York v. Fox*,\(^ {83}\) a case considering whether students could hold "Tupperware parties" in their dormitories. Harkening back to the strategy in *Chrestensen*,\(^ {84}\) the plaintiffs argued that, as part of the Tupperware party, lessons in home economics were inextricably intertwined with the commercial sales pitch.\(^ {85}\) The Tupperware party, however, seemed to lack any of the political commentary at stake in *Chrestensen*.\(^ {86}\) Perhaps as a result, the Court summarily rejected the notion that the Tupperware party contained an amalgam of commercial and noncommercial speech deserving full First Amendment protection.\(^ {87}\) Moreover, explicitly rejecting the

78. *Id.* at 67 (emphasis in the original).
79. *Id.* at 72-75.
81. *Id.* at 341-42.
82. *Id.*
84. See *supra* notes 42-48 and accompanying text.
85. *Fox*, 492 U.S. at 474-75.
86. See *supra* notes 42-44 and accompanying text.
87. As Justice Scalia stated in the majority opinion:

   No law of man or of nature makes it impossible to sell housewares without
notion that *Central Hudson* required the same strict scrutiny afforded regulations of political speech, the Court held that the restrictions on commercial speech need not be the least restrictive available. Acknowledging the potential vagueness of the guidance provided, the Court stated that "we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.'" With that leeway, the Court upheld the commercial speech restriction.

The description of how the commercial speech doctrine has evolved provides an important context for understanding the contrast between the treatment of commercial speech and corporate political speech. Certainly for many scholars, the variance in outcomes under the *Central Hudson* test seems ad hoc, lacking a consistent speech principle or unifying definition of commercial speech to support the decisions as a group. The very existence of the commercial speech doctrine, however, requires separating commercial messages from political expression in the eyes of the First Amendment. When the line between the commercial and political thus becomes blurred, any frustration with a lack of clarity in the commercial speech doctrine becomes compounded by a new set of potentially relevant standards governing corporate political speech.

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88. See *id.* at 478 ("[W]e think it would be incompatible with the asserted 'subordinate position [of commercial speech] in the scale of First Amendment values' to apply a more rigid standard in the present context." (second alteration in original)).
89. *Id.* at 480.
90. *Id.* at 480-81 (quoting *Ohralik* v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).
91. See, *e.g.*, Kozinski & Volokh, *supra* note 65 and accompanying text; Post, *supra* note 65 and accompanying text.
B. Corporate Political Speech

An examination of the evolving standards governing corporate political speech reveals that, while political speech generally receives the most ardent protection under the First Amendment, the protection afforded corporate political speech varies depending on the context. At its core, the First Amendment serves to protect free political deliberation and commentary. As a result, any regulations affecting political speech receive strict scrutiny, rarely surviving judicial review. In the realm of corporate political speech, however, the level of protection seems to vary depending on whether the speech occurs in the context of an impending election. Although outside the electoral environment the First Amendment deems irrelevant the speaker's identity as a corporation or a person, within the context of an upcoming election, the political speech of corporations may be subject to greater regulation than other political speakers.

At least outside the special context of an impending election, corporations arguably enjoy broad political speech rights. In First National Bank of Boston v. Bellotti, the Supreme Court invalidated a Massachusetts criminal statute that prohibited a corporation from

92. See, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." (second alteration in original) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (holding that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); see also Charles W. Collier, Cultural Critique and Legal Change, 43 FLA. L. REV. 463, 472-73 (1991) (describing how the Supreme Court embraced "highly speech-protective principles" in the context of political speech); Greg Lisby, Press Rights and Laws, in AMERICAN JOURNALISM: HISTORY, PRINCIPLES, PRACTICES 135-36 (W. David Sloan & Lisa Mullikin Parcell eds., 2002) ("Thus, an understanding of the history of press rights and laws in America is a recognition of the delicate balance the Constitution attempts to preserve between public rights and private rights, between openness and secrecy, between the tyranny of the majority and the tyranny of the minority, between the free flow of information and the restrictions on that flow for private profit."); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255-57 (asserting that the First Amendment primarily serves to protect political deliberation and "governmental responsibility").

93. See, e.g., Burson v. Freeman, 504 U.S. 191, 211 (1992) (Kennedy, J., concurring) ("[I]t is the rare case in which we have held that a law survives strict scrutiny.").

making contributions to influence voter opinion on ballot issues relating to matters outside the ambit of the business or assets of the corporation. Noting a primary purpose of the First Amendment was to protect discussion of governmental affairs, the Court stated that “[i]t is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”

Focusing squarely on political debate’s impact on the audience, the Court concluded that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”

Citing that precise language from Bellotti, in Consolidated Edison Co. v. Public Service Commission the Court overturned a New York administrative order prohibiting public utility companies from including inserts discussing controversial issues of public policy in customer billing statements.

Just a few years later, in Pacific Gas & Electric Co. v. Public Utilities Commission, the Court again refused to embrace a permissive standard for regulating corporate political speech and held unconstitutional a state commission’s order requiring public utilities to include third-party newsletters along with the monthly bills sent to customers. With the value of political speech to the audience rather than to the speaker at the forefront of the analysis, the Court reasoned that “[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” At least in the context of nonelectoral political speech, then, corporations seem entitled to the same speech rights as other political speakers.

Despite the parity in First Amendment protection afforded political speakers outside the electoral context, corporate political speech faces much greater susceptibility to regulation once an

95. Id. at 777 (footnote omitted).
96. Id.
98. 475 U.S. 1 (1986).
99. Id. at 8 (quoting Bellotti, 435 U.S. at 783).
election for office is at stake. Although a great number of cases spanning many decades address limitations on corporate political activity in the electoral context, surveying just a few provides a sufficient point for contrast. Much of the distinction in recent years flows from the Supreme Court's consideration in Buckley v. Valeo of campaign restrictions contained in the Federal Election Campaign Act of 1971 (FECA). The restrictions, which limited campaign contributions to $1000 by any person or corporation, were upheld by the Court after it interpreted the limitation to apply to instances of "express advocacy" that mentioned a clearly identified candidate in an upcoming election.

The basic holding of Buckley was upheld in Federal Election Commission v. Massachusetts Citizens for Life, Inc., a case involving a subsequent amendment to FECA that prohibited corporations from using general treasury funds to make contributions towards express advocacy in the context of an election. With respect to nonprofit institutions, the Court held the regulation unconstitutional. Nonetheless, the Court embraced the principles underlying FECA's limitation on the electoral speech rights of corporations, citing a host of ills it had recently recognized result from excessive corporate spending and the corrosive control of corporations over the electoral process.

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104. 479 U.S. 238 (1986).
105. Id. at 263-64.
106. The Court remarked:

We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," to "eliminate the effect of aggregated wealth on federal elections," to curb the political influence of "those who exercise control over large aggregations of capital," and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization."

This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas is important. It acknowledges the wisdom of Justice Holmes' observation that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market ...."
Curtailing the special status of nonprofits, the Court limited the application of *Massachusetts Citizens* in *Austin v. Michigan State Chamber of Commerce*. In that case, the Court rejected a challenge to a Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures supporting or opposing candidates in elections for state office. Although the Chamber of Commerce was a nonprofit entity, the Court distinguished the purely political purposes of the nonprofit entity in *Massachusetts Citizens* with the Chamber of Commerce, which engaged in political and nonpolitical activities. As a result, the Court upheld the regulation, supported by similar strong references to the deleterious effects of excessive corporate influence over the electoral process. As in earlier cases, of great importance to the Court was the ability to amass wealth that arguably garners corporations an unfair advantage in public debates.

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. *Id.* at 257 (ellipsis in original) (citations and footnote omitted).

108. *Id.* at 661-65.
109. The Court stated that corporations are "by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." The desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth "does not undermine its justification for regulating corporations." *Id.* at 665 (citations omitted). In analyzing the application of the First Amendment to the Fourteenth Amendment claims preserved, the Court stated, "[T]he State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Id.* at 666.
110. The Court wrote that *state law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

*Id.* at 658-59 (quoting *Mass. Citizens for Life*, *479 U.S.* at 257).
In a pair of very recent cases, the Supreme Court continued to uphold the regulation of corporate political activity within the electoral context. In *Federal Election Commission v. Beaumont*\(^{111}\) the Court rejected a challenge to regulations under FECA that barred direct corporate campaign contributions to a nonprofit advocacy corporation in the context of federal elections. Emphasizing the long line of cases supporting regulation of corporate electoral speech, the Court rather boldly stated that "[a]ny attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,' which we have canvassed a number of times before."\(^{112}\) Most recently, in *McConnell v. FEC*,\(^{113}\) the Court upheld a federal regulation effectively barring a corporation from using treasury funds to produce advertisements that merely mention a candidate's name within sixty days of an election.\(^{114}\) In an extremely lengthy opinion, the Court accepted the compelling state interest in regulating the corporate political speech at issue, stating that "[w]e have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"\(^{115}\)

Thus, although the First Amendment provides significant protection for corporate political speech well before election day, that protection all but evaporates as election day draws near. In certain circumstances, the Court embraces normative justifications for a robust deliberative process that includes corporate speakers. In other situations the Court relies on different speech principles to protect that same deliberative process from excessive corporate influence. The point of making the contrast between the speech rights corporations enjoy inside and outside the electoral context is

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111. 539 U.S. 146 (2003).
112. *Id.* at 152 (quoting *United States v. UAW-CIO*, 352 U.S. 567, 585 (1957)).
not to identify some glaring defect in the Court's logic in selecting among competing speech norms to protect or restrict corporate speech.\footnote{For other viewpoints suggesting such a defect exists, see Samuel A. Terilli, \textit{Nike v. Kasky} and the Running-But-Going-Nowhere Commercial Speech Debate, 10 COMM. L. & POLY 383 (2005); David S. Welkowitz & Tyler T. Ochoa, \textit{The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity To Terminate Non-Defamatory Political Speech}, 45 SANTA CLARA L. REV. 651 (2005).} Instead, the contrast reveals that the political speech rights of corporations necessarily vary depending on which of the conflicting underlying speech principles the Court chooses to use as a guide.

The Supreme Court's failure to articulate any clear definition of political speech itself, however, remains even more problematic. Although one may demarcate intelligibly the outer boundary of an election cycle, that ability provides little help in determining whether the Court's political speech jurisprudence should even be the relevant framework for assessing the constitutionality of any instance of corporate speech. Absent clear definitions of what constitutes commercial and political speech, predicting which particular jurisprudential approach should govern the speech rights corporations enjoy becomes all but impossible. The unpredictability created by that definitional gap lies at the very heart of the potential threat to the securities regulation regime and the continued integrity of the U.S. capital markets.

\subsection*{C. Securities Regulation Adrift}

The securities regulation regime currently inhabits an island of immunity from the First Amendment. That respite from constitutional scrutiny might seem especially odd considering securities regulation primarily involves restrictions on speech.\footnote{See Roberta S. Karmel, \textit{The First Amendment and Government Regulation of Economic Markets}, 55 BROOK. L. REV. 1, 1 (1989) ("Securities regulation is essentially the regulation of speech."); Schauer, supra note 9, at 1778 ("It might be hyperbole to describe the Securities and Exchange Commission as the Content Regulation Commission, but such a description would not be wholly inaccurate.").} After all, not only do the securities laws and the rules promulgated by the SEC both compel and prohibit corporate speech,\footnote{See, e.g., 15 U.S.C. § 77e (2000) (prohibiting "gun jumping"); 15 U.S.C. § 78j (2000); 15 U.S.C. § 78n (2000); 17 C.F.R. § 240.10b-5 (2006) (prohibiting fraudulent omissions or} but they regulate the
Whether in the context of the sale of securities, annual and quarterly reporting, proxy solicitation, representations by investment advisers, or prohibitions on fraud and insider trading, the securities laws attempt to maintain confidence in the capital markets through a complex web of corporate speech restrictions and disclosure requirements. Although the U.S. securities laws do not currently face any serious constitutional challenges, the Court has not yet offered any principled justification for excluding those heavy-handed speech regulations from the First Amendment's protective reach. As a result, no clear theoretical anchor supports the continued viability of the U.S. securities regulation regime. Constitutionally adrift, the network of securities laws remains especially vulnerable as new corporate speech claims arise.

So how does the Supreme Court apply its existing commercial speech and corporate political speech principles in the realm of securities regulation? Quite simply, the Supreme Court has never squarely addressed that task. At most, the Court has made occasional—and frustratingly oblique—references to the special nature of the securities markets that permits substantial governmental regulation.

For instance, in Lowe v. SEC, the Court considered whether the SEC could enjoin the publication of an investment newsletter under the Investment Advisers Act of 1940. Because the publisher was not registered as an investment adviser under the statute and did

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119. See, e.g., 17 C.F.R. § 229.10 (2006); 17 C.F.R. §§ 243.100-.103 (2006); see also Thomas Lee Hazen, The Law of Securities Regulation § 3.3 (5th ed. 2005) (providing an overview of various regulations that control the content, form, and manner of corporate disclosures).


121. See Schauer, supra note 9, at 1777-82.


not otherwise qualify for an exemption, the SEC enjoined dissemination of the newsletter.\textsuperscript{124} Although originally granting certiorari to consider whether the SEC's prior restraint on speech violated the First Amendment, the Court parsed the statute's language to afford an exemption to the publisher.\textsuperscript{125} Using basic tools of statutory construction to decide the case, the Court ultimately chose not to consider any First Amendment issue.\textsuperscript{126}

Moving from avoidance to obfuscation, the Court has nonetheless provided momentary glimpses of the role speech rights play in the securities realm, albeit in cases that did not even involve any securities regulation issue. For example, in \textit{Paris Adult Theatre I v. Slaton},\textsuperscript{127} a famous pornography case involving the display of obscene movies in places of public accommodation, the Supreme Court gave a brief nod to government regulation of securities. In a part of the opinion disparaging unfettered personal liberty as the guiding light of free speech jurisprudence, the Court stated "that neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."\textsuperscript{128} Although the original constitutional challenges to the state securities laws in the early part of the twentieth century did not even involve speech claims,\textsuperscript{129} the Court nonetheless seemed to invest its prior decisions upholding the validity of state securities regulations with an extra layer of protection from the First Amendment.

\textsuperscript{124} Lowe, 472 U.S. at 184.
\textsuperscript{125} Id. at 210-11.
\textsuperscript{126} Id.
\textsuperscript{127} 413 U.S. 49 (1973).
\textsuperscript{128} Id. at 64 (citation omitted). "Blue sky" laws are state statutes that regulate securities. See STUART R. COHN, SECURITIES COUNSELING FOR NEW AND DEVELOPING COMPANIES § 1:2 (2005).
\textsuperscript{129} See, e.g., Merrick v. N.W. Halsey & Co., 242 U.S. 568, 569-70 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 560-61 (1917); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917) (each challenging a state securities law under the Fourteenth Amendment and the Commerce Clause); see also COHN, supra note 128, § 1:2 (discussing the early constitutional challenges to state "blue sky" laws).
A few years later, in *Ohralik v. Ohio State Bar Ass’n*\(^\text{130}\), the Supreme Court affirmed the indefinite suspension of a lawyer who personally solicited accident victims in violation of state disciplinary rules. Discussing the First Amendment's application to the lawyer's commercial solicitation, the Court stated in dicta that

> [n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, [and] corporate proxy statements .... Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of the activity.\(^\text{131}\)

Although the Court obviously intended to provide only anecdotal examples of where the First Amendment cannot reach, whether proxy statements and securities sales stand as sufficient surrogates for the myriad other contexts in which the securities laws regulate corporate speech remains wholly unclear.

Finally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a case involving a defamation action against a credit reporting agency that issued false credit reports, the Court cited *Ohralik* for the general proposition that certain types of speech fall outside the First Amendment's protective umbrella.\(^\text{132}\) Hinting that its prior pronouncement regarding the broad ability of government to regulate securities sales and proxy statements was based on the commercial nature of the speech involved, the Court stated that "similar regulation of political speech is subject to the most rigorous scrutiny."\(^\text{133}\) Of course, the difficulty in distinguishing between commercial and political speech provides the crux of the problem in the securities regulation realm as corporations begin to entangle corporate disclosures with political commentary. If the securities laws remain insulated from First Amendment challenges based on an assumption that the regulated speech involves no political

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131. *Id.* at 456 (citations omitted).
133. *Id.; see also* SEC v. Wall St. Publ’g Inst., Inc., 851 F.2d 365, 372 (D.C. Cir. 1988) (explicitly adopting the proposition in *Dun & Bradstreet* exempting securities regulation from constitutional scrutiny).
component, constitutional review of such regulations seems more likely as that assumption becomes empirically suspect.

Despite the extraordinary brevity of the comments about speech rights and securities regulation in Paris Adult Theatre, Ohralik, and Dun & Bradstreet, the need to protect the public from harm provides some unifying thread. Recognizing that common theme might seem at odds with the basic critique that the securities regulation regime remains constitutionally adrift and intellectually disconnected from the First Amendment. While linking the ability to regulate speech to public harm provides a clear philosophical platform upon which to begin building a coherent system of speech rights, the unadorned commentary by the Court provides little insight regarding the ultimate shape those rights might take in the securities regulation context. What level of public harm must exist for the government to regulate corporate speech? Does minimal threat of harm justify extraordinary regulation? Does fraud provide the relevant metric? If so, should common law fraud principles supplant the vast system of statutes, rules, and regulations that constitute the modern securities regulation regime? Must courts balance public harms against the political speech rights of corporations? At what point do political viewpoints become fraudulent? To those questions, the Court offers no answers. Instead, the Court simply leaves the brief and blunt impression that some unidentified, potential public harms involving the sale of securities and corporate proxies effectively insulate those areas of securities regulation from challenge under the First Amendment.

Thus, the Supreme Court has occasionally proclaimed, absent much explanation, that the securities markets remain subject to government regulation without interference from the First Amendment. The lack of any principled grounds for such a constitutional exemption, however, makes the continuing validity of that proclamation itself somewhat suspect. Perhaps if the Supreme Court’s existing jurisprudence regarding commercial speech and corporate political speech were clear, a challenge to the basic constitutionality of the securities laws would seem wholly unfounded. But when, as now, the commercial speech doctrine and the Court’s approach to corporate political speech are bound to collide, a constitutional battle over some of the most basic components of the securities regulation regime seems quite possible.
III. A NEW INSTITUTIONAL APPROACH

The project of this Article is simply to provide an intellectual "test drive" for the institutional approach, not to provide a wholesale recapitulation and defense of Frederick Schauer's theory. Nonetheless, in order to understand whether an institutional analysis of the First Amendment helps determine the proper scope of speech rights within the securities regulation regime, a brief explanation of the background and tenets of the theory seems essential.

A. The Nature of the Problem

A fundamental descriptive failure in current speech theory motivates the development of an institutional approach to the First Amendment. According to Schauer, no single speech principle seems capable of describing accurately the set of speech rights enjoyed under the U.S. Constitution. Certain areas of speech regulation, such as copyright, antitrust, and securities regulation, rarely face constitutional challenges despite the rather severe speech limitations those regulations sometimes entail. In other speech contexts, constitutional attacks regularly occur even when the speech limitations are slight. Although normative speech theories based on self-government, democratic deliberation, a search for truth, tolerance, personal autonomy, self-expression, or a variety of other principles may each provide a strong foundation upon which to build a coherent system of expressive rights, none adequately accounts for the particular shape the First Amendment has actually taken. Therefore, those speech norms do not provide sufficient guidance for those trying to determine where new speech claims might actually fit within an existing jurisprudential framework that does not clearly embrace any particular speech principle.

135. Schauer, supra note 9, at 1766-67.
136. Id. at 1785-86.
137. Schauer, supra note 1, at 1273.
In addition, as a result of failing to consider the role institutions might play in defining speech rights, the loose mix of doctrines, standards, and tests embedded in current First Amendment jurisprudence has produced inconsistent and incoherent outcomes. As Schauer asserts, “there may be a point at which First Amendment doctrine’s institutional agnosticism has a highly distorting effect.” For instance, a serious problem arises when the Supreme Court’s failure to demarcate the boundaries of an institutional press creates fewer rights of access and rights to withhold confidentially obtained information than what might be found in countries with a much less-developed respect for freedom of the press. The problem can also be too much speech protection, as in instances where individuals who give instructions to commit mass harms are afforded the same speech rights as individuals speaking before live audiences. As a general matter, when courts fail to distinguish among speech that occurs over the Internet, on cable television, in print media, and by telephone, “serious questions arise as to whether courts have overlooked important historical, structural, economic, and cultural differences among the various channels and institutions of communication.” Without attention to context, then, the variety of speech principles, doctrines, and tests that comprise First Amendment jurisprudence produce outcomes seemingly at odds with the basic goals of free speech itself.

B. The Tenets of Schauer’s Solution

In contrast to the failings of existing speech theory, an institutional approach might not only explain more clearly why the First Amendment reaches some areas and not others, but it could offer a valuable analytical tool for shaping the First Amendment’s contours as new claims and contexts arise. And, according to Schauer, while assessing institutional functions and their social importance may present a difficult empirical challenge, casting a blind eye to

138. Id. at 1270, 1278.
139. Id. at 1270.
140. Id. at 1270-71.
141. Id. at 1271.
142. Id.
143. Schauer, supra note 9, at 1784-87.
the role institutions play will only further distort First Amendment doctrine.144

So what are the tenets of Schauer's institutional approach to the First Amendment? The theory rests on a surprisingly simple suggestion that courts should take institutions into account when analyzing the proper scope of speech rights.145 According to Schauer, certain important institutions in society function in ways that embrace or threaten fundamental values underlying the First Amendment.146 To the extent an institution plays an important role in American society, the scope of speech rights within that institution should depend, at least in part, on an assessment of the link between the speech and the institution itself.147 Conceived in that way, an institutional approach takes heed of the institution's importance to the First Amendment and diminishes the need to defend instances of speech directly based on some underlying speech principles.148 Rather than forcing a debate over which speech principles should control the ultimate outcome of the inquiry,149 the institutional approach attempts simply to change the framework for the inquiry itself.150

Adopting that new analytical framework, then, might lead to acceptance of greater speech rights in some institutional settings and acquiescence to more stringent speech restrictions in others. For instance, Schauer suggests that based on an institutional approach, "we might imagine a First Amendment that less grudgingly accepted colleges and universities as appropriate areas for highly (externally) unregulated inquiry."151 That justification would be based on the institutional importance that universities play in the acquisition of knowledge and the development of social life, as well as on the role that academic freedom plays within the university.152 In contrast, in the institutional setting of elections, greater speech restrictions (in some circumstances) might be more readily

144. Schauer, supra note 1, at 1273.
145. Id. at 1274.
146. Id. at 1273-74.
147. Id.
148. Id.
149. Id. at 1273 & n.87.
150. Id. at 1274.
151. Id.
152. Id. at 1274-75.
defensible based on the role elections play in securing fairness and equality in American society and the necessity of restricting some instances of speech to secure those goals. Thus, the institutional approach remains less concerned with the level of speech protection than with the kind of institutions that deserve consideration under the First Amendment.

Even if Schauer is right that First Amendment jurisprudence must take institutions seriously, is there really such a current antipathy towards an institutional approach? Put differently, do courts really avoid taking institutions into account when determining the First Amendment's reach? According to Schauer, the answer to both questions is yes. While some exceptions exist, courts have historically interpreted the First Amendment based on distinctions among different types of speech rather than different kinds of institutional settings. Schauer links the current institutional agnosticism to the mistaken perception that free speech is purely an individual right. Although First Amendment cases and commentaries are replete with justifications for speech based on social rather than personal values, the sensibility that speech is an individual human right makes somewhat unseemly a discussion of institutions as a primary locus of speech analysis.

It is important to note, however, that an institutional approach does not intend to supplant current First Amendment jurisprudence. Quite to the contrary, the institutional approach provides an added layer of analysis rather than an entirely new analytical framework. At least initially, that additional analytical layer might seem redundant or intellectually cumbersome. But an institutional perspective perhaps adds value by encouraging courts to take a step back from the hodgepodge of overlapping, somewhat conflicting, and frequently vague speech theories, definitions, and tests, and to look at the institutional context in which the speech occurs. In simple terms, it asks courts to consider the importance of certain institu-

153. Id. at 1276.
154. Id. at 1277.
155. Id. at 1263 & n.43 (discussing the context-centered analysis the Supreme Court has embraced for broadcasting and military speech).
156. Id. at 1263.
157. Id. at 1268.
158. Id. at 1268-69.
159. Id. at 1273 n.87.
tions in American life and to assess the effects of enhancing or restricting speech rights through the lens of those institutions. So, in the context of securities regulation, before answering the question of whether corporations should enjoy full First Amendment protection for politically tinged commercial speech, the institutional approach suggests looking at the importance of the securities regulation regime itself and the effects that granting corporations broad speech rights would have on the integrity of the capital markets. That added perspective seems neither redundant nor cumbersome. Instead, it may very well be essential to guide the evolution of First Amendment jurisprudence along a path that pays adequate fidelity to the realities of the society we actually inhabit.

Conceived in that way, an institutional approach to the First Amendment does not attempt to build speech rights in a theoretical vacuum divorced from the necessities and struggles of social, economic, and political life. As a result, the existence of scattered pockets of speech immune from the First Amendment’s reach does not present the theoretical anomalies that even the most gifted jurisprudential gymnast has difficulty explaining. But in addition to providing greater descriptive clarity regarding the particular shape our speech rights actually take in American society, the institutional approach helps provide a useful framework for answering difficult speech rights questions where traditional normative speech theories conflict or simply fail to offer sufficient guidance. Following the institutional approach, an analysis of the proper reach of the First Amendment must not begin in the ether of normative speech theory, but rather must initially set foot on the ground where the institutions and individuals who inhabit them interact.

Quite obviously, this brief articulation of the institutional approach does not intend to provide a detailed defense of the theory Schauer developed more elegantly in his own work. But to the extent Schauer might be right in his belief that “it seems increasingly implausible to imagine that such institutionally defined locations should play only a minimal role in the design of First Amendment doctrine,” the project here remains one of applied

160. See Schauer, supra note 9, at 1769-74.
161. Schauer, supra note 1, at 1277.
science. Applied to the institution of securities regulation, whether an institutional approach sheds any light on how to respond to the impending jurisprudential collision between the commercial speech doctrine and the current standards governing corporate political speech remains to be seen. If the theory resonates in that particular application, the exercise perhaps not only helps answer the question about the First Amendment’s proper reach in the context of securities regulation but might also provide some insights into the usefulness of the institutional approach itself.

IV. SECURITIES REGULATION AND THE INSTITUTIONAL APPROACH

The institutional approach to the First Amendment involves a two-step analysis to examine what speech rights corporations should enjoy within the securities regulation regime. The first step involves assessing the institutional importance of the securities regulation regime. That assessment necessarily includes evaluating the relationship between securities regulation and the values underlying the First Amendment. The second step involves investigating the relationship between restrictions on corporate speech and the institution of securities regulation. In particular, the analysis will focus on the effects that granting full First Amendment protection to politically tinged corporate speech would have on the system of mandatory disclosure and reporting under existing securities laws. Based on that two-step investigation, very strong institutional arguments seem to exist for permitting extensive regulation of corporate political speech in order to preserve the integrity of the U.S. capital markets.

A. The Institutional Importance of Securities Regulation

The securities regulation regime ranks among the most important institutions in the United States.162 At the very heart of that

162. Of course, determining whether a set of practices or policies should be labeled an "institution" may present a difficult threshold challenge. With respect to the securities regulation regime, however, the labeling issue does not seem terribly problematic. The detailed set of statutes, rules and regulations constituting the securities laws, along with the long history of the Securities & Exchange Commission, make both the core and contours of the securities regulation regime seem rather easily definable. That ease of definition arguably
institutional importance lies the special role that securities play in American life.\textsuperscript{163} In addition to representing the basic instruments of economic ownership of corporations, securities provide the right to control corporations as well. Those economic and control rights attached to securities seem especially significant, considering that corporations own the vast majority of the assets and means of production that drive the American economy.\textsuperscript{164} Moreover, on a large scale, governments and businesses alike use securities to raise capital for building new facilities, expanding production, developing communities, or undertaking massive public projects.\textsuperscript{165} On a smaller scale, millions of individuals invest in securities to provide resources for education, retirement, health care, or a variety of pursuits and concerns.\textsuperscript{166} On many levels, then, securities play an integral role in achieving some of the most important goals of our personal and collective lives.

Adequate regulation, however, remains essential to secure the multifarious benefits that securities provide to individuals, corporations, and governments. The modern securities regulation regime itself emerged in the wake of the stock market crash in 1929, which instantly extinguished massive amounts of wealth and, in turn, led to the Great Depression.\textsuperscript{167} Based on concerns that unregulated markets could not produce adequate levels of corporate disclosures or provide sufficient protection to investors from stock price manipulation and fraud,\textsuperscript{168} Congress established the backbone of the

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\item\textsuperscript{163} Hazen, supra note 119, § 1.1[1].
\item\textsuperscript{164} Id.
\item\textsuperscript{165} Id.
\item\textsuperscript{166} Id.
\item\textsuperscript{167} Thomas Lee Hazen, Principles of Securities Regulation 14-15 (2005); Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 35-36 (5th ed. 2004); Sec. and Exch. Comm'n, 50 Years of the U.S. Securities and Exchange Commission, in Marc I. Steinberg, Securities Regulation 8-9 (4th ed. 2004); Williams, supra note 29, at 1223.
\item\textsuperscript{168} Roberta Romano, The Advantage of Competitive Federalism for Securities Regulation 12 (2002); see also Hazen, supra note 167, at 15 ("[T]he congressional hearings which culminated in the first federal securities legislation are replete with examples of outrageous conduct by securities promoters that most certainly had a disastrous impact on our nation's economy."). See generally Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate
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securities regulation framework by passing the Securities Act of 1933169 (Securities Act) and the Securities Exchange Act of 1934170 (Exchange Act). Other significant securities laws followed,171 each designed to repose confidence in the U.S. capital markets and in the corporate disclosures upon which investors make their decisions.172

In addition, as the central policy-making and enforcement agency in the securities regulation realm, the SEC promulgates rules and regulations under the various securities laws and monitors instances of fraud and corporate impropriety.173 Although some criticize the effectiveness of the SEC,174 it has nonetheless "played an important role in maintaining the efficiency and integrity of the American securities markets."175 Whether prosecuting insider trading, ensuring the fairness of an initial public offering, regulating a corporate proxy solicitation, or investigating instances of stock price manipulation over the Internet, the SEC is "widely regarded as the nation's finest independent regulatory


170. Id. §§ 78a-nn.
172. See, e.g., ROBERTA ROMANO, FOUNDATIONS OF CORPORATE LAW 293 (Oxford Univ. Press 1993).
173. HAZEN, supra note 119, § 1.2[3][c].
175. HAZEN, supra note 167, at 17.
With a single-minded zeal for making the U.S. securities markets an attractive place for capital investment, the SEC arguably plays a more active role in shaping and enforcing law than any other governmental agency.

The institutional importance of the securities regulation regime is also directly related to speech. In order to preserve corporate transparency and fair trading, securities regulation has historically depended on speech restrictions. The prevention of securities fraud, market manipulation, proxy solicitation abuses, insider trading, and a host of other ills addressed by the securities laws are at least in part based on the same basic premise that market integrity requires truthful disclosures.

Although the next section provides a detailed exposition of the various ways in which securities regulation depends on speech restrictions, the point here is to convey from an institutional perspective the important connection between First Amendment values and the securities regulation regime. But unlike other institutions, such as universities, which are designed to foster the exchange of ideas unfettered by regulation, the institution of securities regulation is premised upon controlled dissemination of truthful information. As a result, the connection between First Amendment values and securities regulation seems strongly negative.

Thus, not only does the securities regulation regime represent one of the most important institutions in the United States, but its institutional role remains primarily tied to ensuring the integrity of the capital markets. Accordingly, to the extent speech restrictions remain integral to preserving market integrity, an institutional approach to the First Amendment would favor greater speech regulation in that particular setting.

177. See Burt Neuborne, The First Amendment and Government Regulation of Capital Markets, 55 BROOK. L. REV. 5, 51-52 (1989); see also Wolfson, supra note 120, at 277-80 (describing SEC restrictions on speech).
179. Schauer, supra note 1, at 1274.
B. The Nexus Between Speech Restrictions and Securities Regulation

Speech restrictions play a paramount role in the system of mandatory disclosure and periodic reporting embedded in the U.S. securities laws. Requiring much more than accurate reporting of raw financial data, the network of securities laws also compels companies to disclose at various times a host of qualitative information regarding the company's code of ethics, basic business operations, competitive risks, legal proceedings, internal controls over financial data, executive compensation policies and management's discussion and analysis (MD&A) of the company's financial conditions and operations. Depending on the particular context in which those disclosures are made, such as in a prospectus for an initial public offering of stock or in a company's annual report to shareholders, the securities laws provide a panoply of liability standards for noncompliance.

Examining how an extension of full First Amendment protection to politically tinged corporate speech might adversely affect the securities regulation regime perhaps provides the best way to understand the essential institutional connection between speech restrictions and regulation of the capital markets. That approach reveals that in a variety of contexts, from the sale of securities to periodic corporate reporting, and from antifraud prohibitions to proxy solicitation requirements, granting expansive First Amendment protection to corporate political speech would unravel some of the most basic and most important provisions in the U.S. securities laws.

181. Id. § 229.406.
182. Id. § 229.101.
183. Id. § 229.305.
184. Id. § 229.103.
185. Id. § 229.308.
186. Id. §§ 229.403-.405.
187. Id. § 229.303.
188. Some of the ideas expressed in this section were inspired by arguments I developed in an amicus brief submitted to the U.S. Supreme Court in Nike v. Kasky. See Brief for Domini Social Investments et al. as Amici Curiae Supporting Respondent, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (per curiam) (No. 02-575), 2003 WL 1844598.
1. Gun Jumping and Market Conditioning Encouraged

To the extent the First Amendment protects any corporate speech that touches a political concern, corporations issuing securities could engage in a variety of currently prohibited advertising and public relations activities in order to condition the market prior to a securities offering. Section 5 of the Securities Act prohibits any "offer to sell" a security unless a registration statement has been filed with the SEC.\(^\text{189}\) Courts and the SEC broadly interpret what constitutes an offer to sell, and statements about the issuer or the security during this "pre-filing" period will violate section 5 if the comments could be reasonably calculated to generate a buying interest.\(^\text{190}\) In particular, while the SEC encourages issuers to maintain regular advertising and disclosure practices during the prefiling period,\(^\text{191}\) significantly increased advertising or media activity will be deemed impermissible "gun jumping" in violation of section 5, even if the publicity does not mention the securities offering.\(^\text{192}\)

Some SEC rules provide insulation from gun jumping liability, subject to certain conditions. With respect to statements about the impending securities sale itself, SEC Rule 135 provides a "safe harbor" from a potential section 5 violation as long as the issuer comments are limited to eight specified categories of information.\(^\text{193}\) If the issuer statements go beyond the information contained in those specified categories, however, the safe harbor will not insulate the issuer from liability.\(^\text{194}\) In its Securities Offering Reform of 2005 (SOR of 2005),\(^\text{195}\) the SEC promulgated new Rules 163, 163A, 168

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\(^{194}\) See, e.g., Chris-Craft Indus., Inc. v. Bangor Punta Corp., 426 F.2d 569 (2d Cir. 1970).

and 169. Although the new rules relax substantially the gun jumping prohibitions for existing public companies, the rules retain the market conditioning limitations for first time issuers of securities. At least with respect to new issuers, then, in order to prevent "gun jumping" activities that unfairly condition the market in advance of an offering, section 5 and Rule 135 provide strict limits on what a company may communicate to the public.

Using political speech protections as a shield, however, new issuers could engage in the very kinds of advertising and publicity activities currently prohibited under section 5. Consider an aggressive marketing campaign in advance of an initial public stock offering for Acme Corporation. The campaign rests on a single ad that depicts smiling, ruddy workers in Acme factories around the globe, interspersed with images of poverty and deprivation for those outside the walls of the Acme plants. At the end of the ad appears a single phrase "Acme Promotes Freedom—Join Us" accompanied by the Acme trademark emblem. Even if the ad raises general public interest in Acme and the breadth of its impressive overseas operations, the ad arguably represents political speech and urges others to adopt Acme's principled commitment to bringing the benefits of economic development to otherwise impoverished peoples. No matter what the content, the campaign would likely violate the gun jumping prohibitions in section 5 if the level of advertising significantly exceeds Acme's past practices. If politically tinged corporate speech received full First Amendment protection, however, Acme could vastly increase its advertising activity using the ad and still remain insulated from section 5.

Taking another example, Acme might like to announce its initial securities offering using a series of full page print ads titled "How Acme Promotes Freedom Around the Globe." In addition to reciting all the information permitted under Rule 135, the ads would detail Acme's political commitment to expanding freedom in new countries and admonish other companies to join Acme in increasing economic development in Third World countries by ensuring safe

labor standards for previously oppressed workers. Without doubt, such an ad would not enjoy the safe harbor provided by Rule 135 and would run afoul of section 5. Yet, despite the precise content limitations set forth in rule 135, Acme could ignore those proscriptions as long as the ads announcing the stock offering were inextricably linked to political speech.

By using the First Amendment as a shield and cloaking efforts to drum up investor interest under the guise of political speech, Acme could avoid with impunity the strict limitations on gun jumping and market conditioning established through section 5 and Rule 135.

2. Investor Solicitation Rules Thwarted

Giving corporate speech broad First Amendment protection would enable issuers to use currently impermissible “free writing” and nonconforming prospectuses as part of their sales efforts. Even after filing a registration statement with the SEC, section 5 of the Securities Act still prohibits issuers from soliciting using a prospectus that does not conform to the stringent and detailed content requirements for a “statutory prospectus” set forth in section 10. Similar to the broad interpretation given an “offer to sell,” courts and the SEC construe “prospectus” to cover any written offer to sell a security as well as offers made by radio or television broadcasts.

The securities laws and regulations provide exceptions to the requirement that written solicitation materials meet the statutory prospectus standards. Section 2(a) permits the issuer to make simple identifying statements and Rule 134 permits publication of “tombstone” ads that list only highly specified pieces of information about the issuer, the underwriter, and the offering. Moreover, in the SOR of 2005, the SEC significantly expanded the conditions

201. See 15 U.S.C. § 77b(10) (2000) (indicating that the identifying statement should indicate where a statutory prospectus may be obtained and only “identify the security, state the price thereof, state by whom orders will be executed, and contain such other information” as required by the SEC).
under which issuers may use free writing after the filing of a registration statement. Even the reformed regulations contain significant limitations, however, such as the requirement that "non-reporting" and "unseasoned" issuers (which include companies undertaking an initial public stock offering) deliver a statutory prospectus along with any free writing materials. Unless a statutory exception applies, section 5 prohibits using any prospectus that fails to conform to the statutory prospectus requirements and no other "free writing," such as glossy promotional materials, may even accompany a statutory prospectus.

In much the same manner that issuers could condition the market using political speech, issuers could use a broad grant of First Amendment protection to sidestep the prohibition on nonconforming prospectuses and free writing. Again using Acme Corporation as an example, Acme might like to enhance the attractiveness of its initial public offering solicitation with a glossy portfolio that includes "Acme Position Papers" on hot political topics specially tailored to the interests of recipients. Registered Republicans might receive a statement about Acme's commitment to the Republican agenda, while Democrats might receive a similar promise to support Democratic initiatives. Female recipients might also receive an additional position paper describing Acme's staunch advocacy of women's rights, while men might find another position paper demanding more public spending on prostate cancer research. Regardless of the impact on Acme's ability to increase interest in its securities, those extra communications (if not accompanied by a statutory prospectus) obviously violate the restrictions provided in section 5. But even if those "position papers" seem disingenuous and distract investors from the required information set forth in the statutory prospectus, those solicitation materials would be immune

204. See Securities Offering Reform, Securities Act Release No. 8591, 2005 WL 1692642, available at http://www.sec.gov/rules/final/finalarchive/finalarchive2005.shtml; see also HAZEN, supra note 119, § 2.2, n. 13.10 (Supp. 2006) ("A non-reporting issuer would be an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act," and "[a]n unseasoned issuer would be an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities.").
from regulation if mixed political and commercial speech were to receive blanket protection under the First Amendment.

Adopting a less aggressive strategy, Acme might simply include in its Rule 134 tombstone ad certain political statements that increase market attention. Imagine a tombstone ad for an upcoming common stock offering that states, in jumbo lettering, “ACME SUPPORTS THE WAR ON TERROR—WE WILL NEVER FORGET 9/11,” followed by a lengthy analysis of Acme’s political position. Although Rule 134 prohibits the use of pictures other than the issuer’s logo or trademark, Acme might use a giant multicolored graphic of the American flag as the backdrop for its endorsement of military action. As long as the speech represents a political comment, broad First Amendment protection for corporate political speech would insulate Acme from liability under section 5.

In the end, expanding the First Amendment to protect politically tinged corporate speech would undermine fundamental provisions of the Securities Act that are necessary to prevent manipulation of investor attitudes and the information upon which reasoned investment decisions are based. Increasing corporate participation in general political debates would thus come at a very high cost to the integrity of U.S. capital markets.


Interpreting the First Amendment to insulate from constitutional review any politically tinged corporate speech would limit dramatically the availability of causes of action under sections 11 and 12 of the Securities Act. Section 11 provides that if a registration statement for the sale of any securities, at the time it was declared effective, “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading,” any


purchaser of the security may bring a civil cause of action.\textsuperscript{208} Potentially liable parties include the issuer, its directors, the officers who sign the registration statement, the underwriters, and any experts named in the registration statement.\textsuperscript{209} The issuer suffers strict liability for any material misstatements, regardless of the degree of care exercised.\textsuperscript{210} In contrast, the remaining defendants can insulate themselves from liability upon proving they acted with "due diligence" in investigating the disclosures contained in the registration statement.\textsuperscript{211}

Complementing the provisions in section 11, the Securities Act offers a second layer of antifraud protection under section 12. Pursuant to section 12, any purchaser enjoys a right of rescission when an offer to sell a security based on a prospectus or oral communication includes "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading."\textsuperscript{212} Revealing the variety of legal standards embedded in the securities laws, section 12 does not impose on issuers the same strict liability under section 11. Instead, all potential defendants, including the issuer, may escape liability under section 12 by proving they did not know, and with "the exercise of reasonable care" could not have known, about the material misstatement or omission.\textsuperscript{213}

Affording politically tinged corporate speech full protection under the First Amendment would undercut substantially the antifraud protections under both sections 11 and 12. With respect to issuer liability under section 11, a material misstatement or omission sufficiently connected to a matter of public concern would receive blanket protection from constitutional review rather than expose the issuer to strict liability for market deception. Moreover, extending broad protection to corporate political speech could render all but irrelevant the "due diligence" and "reasonable care" defenses provided under sections 11 and 12. Quite simply, it would not be

\textsuperscript{208} Id. § 77k(a).
\textsuperscript{209} Id.
\textsuperscript{211} Id. at 382.
\textsuperscript{212} 15 U.S.C. § 77l(a)(2).
\textsuperscript{213} Id.
necessary to exercise reasonable care or due diligence in avoiding material misstatements or omissions if corporate disclosures could be intertwined with political commentary. To avoid the potentially high costs of investigation, verification, and oversight necessary to secure the due diligence and reasonable care defenses, issuers and the other potentially liable parties who control the registration process might opt for the much less expensive option of combining the most precarious corporate disclosures with political commentary. If corporate political speech rights trump the antifraud provisions under sections 11 and 12 of the Securities Act, companies will face a strong incentive to engage in an artful alchemy of mixing any potentially fraudulent disclosures with just enough political content to evade liability.

The facility with which companies could engage in that artful alchemy should cause great alarm. After all, the mandatory disclosure and reporting requirements contained in the securities laws involve both qualitative and quantitative disclosures.\(^{214}\) Clearly, the qualitative disclosures remain most susceptible to manipulation, with descriptive evaluations of company trends and risks easily couched in language evoking some political concern. But even when the securities laws compel disclosure of seemingly unadorned facts about business practices or operations, those factual disclosures may also be strategically embedded in an amalgam of political and commercial speech. Nike's claim that its seemingly factual disclosures about the company's overseas labor practices deserved full First Amendment protection because the statements were part of an ongoing public debate provides just one example of the artful alchemy at work.\(^{216}\) Although Nike attempted to evade the reach of a state consumer fraud statute, there is no reason to expect that same strategy of commingling commercial and political speech would not be employed by a company when compelled to disclose facts about labor practices or environmental litigation under the securities laws.\(^{216}\) As companies, or more specifically the experts who prepare their registration statements,

\(^{214}\) See infra notes 227-34 and accompanying text (discussing the particular disclosures required by Regulation S-K as applied to the Securities Act and the Exchange Act).


routinely intertwine political and commercial speech in an effort to insulate corporate disclosures from liability, the antifraud protections under the Securities Act will become wholly impotent.

4. Exchange Act Fraud Rules Circumvented

In much the same way that insulating mixed commercial and political speech from regulation would debilitate the Securities Act fraud provisions, extending broad First Amendment protection to corporate speech would severely curtail antifraud causes of action arising under sections 10(b) and 14 of the Exchange Act and related SEC Rules.217 Section 10(b) of the Exchange Act and SEC Rule 10b-5 prohibit the use of a materially misleading statement, omission, or any manipulative or deceptive device in connection with the purchase or sale of securities.218 Those prohibitions cover a variety of contexts, including press releases, disclosures in annual or quarterly reports, and Internet communications.219 The Supreme Court has long recognized a private cause of action under 10b-5, but imposing liability on an issuer, its directors, or its executive officers requires proof that the misstatement or omission was made with “scienter”—that is, with intent or recklessness.220 Thus, in contrast to the level of proof needed to establish the “due diligence” and “reasonable care” defenses available under the Securities Act, a much higher level of proof is required for a plaintiff to maintain a successful 10b-5 claim.

Turning to another antifraud provision of the Exchange Act, section 14(a) and Rule 14a-9 prohibit the use of materially misleading statements or omissions in connection with the solicitation of shareholder votes or “proxies.”221 With the Supreme Court recognizing an implied right of action for shareholders to sue an issuer, its directors, or officers under Rule 14a-9,222 affected shareholders may

seek both injunctive relief and money damages caused by the fraud. Again demonstrating the variety of liability standards woven throughout the securities laws, maintaining a Rule 14a-9 claim does not require proof of scienter. In contrast to Rule 10b-5, maintaining a cause of action for proxy fraud simply requires proof of negligence.\(^{223}\) Perhaps betokening the special importance of fairness in the shareholder voting process,\(^{224}\) Rule 14-a9 provides a rather low threshold for liability.

Huddling politically tinged corporate speech under the First Amendment's umbrella of protection, however, would significantly undercut the viability of fraud claims under sections 10 and 14 of the Exchange Act. With respect to a 10b-5 claim, to the extent overcoming strict scrutiny would require more than proof of scienter (for example, requiring reliance and actual damages) even reckless or intentionally misleading statements could escape liability. That possibility could lead to disastrous results for investors. For example, Acme Corporation might state the following in the "Description of Business—International Markets" section of its annual report:\(^{225}\) "In an effort to promote individual freedom and international cooperation, Acme remains dedicated to expanding operations in China." For many market analysts, such a move would mark a significant corporate policy with potentially far-reaching effects (either positive or negative) on the company's operations and profitability. But to the extent mixed commercial and political speech deserves full First Amendment protection, Acme's politically tinged disclosure would become immune from liability even if made recklessly or with knowledge of its falsity. Of course, such brazenly false statements lie at the very core of the kind of fraud Rule 10b-5 aims to prevent. Granting corporations expansive political speech rights could thus render utterly ineffective one of the most important antifraud provisions in the securities laws.

Affording broad protection to politically tinged corporate speech becomes even more problematic in the context of a 14a-9 claim. Were Acme's disclosure about its intention to expand operations in China contained in a proxy solicitation, liability would attach simply

\(^{223}\) Shidler v. All Am. Life & Fin. Corp., 775 F.2d 917, 926-27 (8th Cir. 1985).
by demonstrating the statement was negligently made. While it may seem odd that the securities law would provide a variety of standards for assessing the same potentially fraudulent statement, the disparity in those standards arguably reflects the relative importance of the harm suffered from fraud in different settings. In light of the importance of shareholder voting rights and proxy solicitation to the integrity of the capital markets, the Exchange Act and SEC Rules provide investors with an increased level of protection through a lower threshold for culpability. Collapsing the distinction between commercial and political speech, however, would eviscerate the context-specific distinctions in antifraud protection prescribed by the securities laws. Regardless of any heightened protection from deceptive speech that Rule 14a-9 intends to afford investors, corporations could easily avoid liability by commingling otherwise risky commercial disclosures with political content.

5. Periodic Reporting Rendered Unreliable

Granting full First Amendment protection to corporate speech touching some political chord would render unreliable numerous required disclosures under the securities laws. For instance, Item 101 of Regulation S-K, the omnibus disclosure regulation under the Securities Act and the Exchange Act, requires companies to provide detailed narrative disclosures regarding the company in various periodic reports and offering documents. In addition to compelling a multiyear historical description of the general development of the business, Item 101 requires a forward-looking narrative of “the business done and intended to be done” by the company, an assessment of “positive and negative factors pertaining to the competitive position” of the business, an evaluation of “risks attendant to the foreign operations” of the corporation, a discussion of the potential affects of governmental

227. See 17 C.F.R. § 229.10-.1123 (2006); see also LOSS & SELIGMAN, supra note 167, at 155-87 (providing an overview of Regulation S-K).
229. Id. § 229.101(a).
230. Id. § 229.101 (c)(1).
231. Id. § 229.101 (c)(1)(x).
232. Id. § 229.101 (d)(3).
termination or renegotiation of important contracts, and a detailed disclosure of material effects resulting from compliance with federal, state, and local environmental laws.

If corporate speech touching some political chord were to receive full First Amendment protection, the potential, if not essential, political nature of each of those required disclosures would render corporate responses especially suspect. With respect to the required disclosure of material effects of compliance with environmental laws, a company could encumber its response with a political comment that would render the disclosure utterly misleading and useless to investors. For example, even though Acme might spend billions of dollars each year engaged in compliance with a variety of environmental laws, the company might state in its annual report: “Acme expends only minimal resources in complying with all valid environmental laws and regulations in the United States.” How could Acme escape liability for such an ostensibly false disclosure given the resources it dedicates to compliance? The statement might reflect a political judgment that current environmental laws are unconstitutional or that Acme should be exempt from the reach of the statutory requirements. Thus, regardless of the arguably intentional deception, the statement would remain insulated from liability if inextricably linked to political commentary. That same type of investor manipulation could occur in a host of other disclosure categories that entail some political component.

Once investors recognize that the political nature of certain required disclosures provides an opportunity for gross corporate manipulation and deception, investors might simply fail to take seriously company responses on those matters. That lack of trust in the accuracy of corporate disclosures would have a devastating effect on the SRI community, which screens companies based on their social, political, and environmental commitments. Moreover, the resulting impracticality in distinguishing between corporations with stellar versus abysmal social, environmental, or political records would eliminate the market’s ability to reward companies that embrace corporate social responsibility. While previous
sections addressed the negative impact that broad corporate speech rights would have on the viability of investor fraud actions, the problem here strikes more closely at the very heart of the system of compelled disclosure and reporting itself. If the First Amendment shields companies from liability whenever the nature of the required disclosure touches some political matter, compelling corporations to speak on those issues would be pointless. Such a fundamental flaw in the ability of the securities laws to ensure the public receives accurate information would significantly undermine confidence in the capital markets, especially when an increasing number of investors demand full and fair disclosure regarding certain inherently political matters. Affording corporations broad political speech rights thus would render unreliable a variety of important disclosure requirements in the existing securities laws and frustrate the ability of investors to make sufficiently informed choices.

6. "Super Safe Harbors" Created

Providing First Amendment protection to politically tinged corporate speech would undermine the usefulness of management's discussion and analysis of business operations by creating a "super safe harbor" for forward-looking statements. Pursuant to Item 303 of Regulation S-K, a company must provide management's discussion and analysis of current operations and plans for the future in its periodic reports and prospectuses used to sell securities. That detailed narrative from company management provides "in one section of a filing, material historical and prospective textual disclosure enabling investors and other users to assess the financial condition and results of operations of the registrant, with particular emphasis on the registrant's prospects for the future." Not only...
should the MD&A reflect positive business developments that management anticipates, but the discussion must also entail a disclosure of negative trends and uncertainties likely to have a material adverse effect on the company.240

Even though the MD&A rules mandate discussion of trends and uncertainties, companies might still face liability under sections 11 and 12 of the Securities Act or Rule 10b-5 for fraud based on material misstatements or omissions contained in the MD&A narrative.241 To encourage full disclosure, the securities laws offer certain “safe harbor” provisions that effectively insulate a company from liability based on “forward-looking” statements or projections, under certain circumstances.242 For instance, Rule 175 of the Securities Act and Rule 3b-6 of the Exchange Act shield a corporation from liability for forward-looking statements unless those statements were not made in “good faith” and “with a reasonable basis.”243 Complementing those rules, section 21E of the Exchange Act eliminates liability for forward-looking statements accompanied by “meaningful cautionary statements” that identify important factors potentially affecting management’s predictions or forecasts.244 Even in the absence of meaningful cautionary language, however, section 21E provides that liability will result only if the forward-looking statements were made with “actual knowledge” of their falsity or misleading nature.245

Despite the fine gradations in protection under the existing safe harbor provisions, affording mixed commercial and political speech full First Amendment protection would create an unintended “Super Safe Harbor” for forward-looking statements. While at first blush the disparity in the “meaningful cautionary statements” mechanism, “good faith” or “rational basis” requirements, and an “actual knowledge” threshold for fraud liability might seem a bit disjointed, those safe harbor standards arguably reflect a delicate balance

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240. Id.
243. Id. §§ 230.175, 240.3b-6.
between investors' need for descriptive information beyond raw financial data (such as management's views on positive trends and future risks) and management's desire for reasonable protection from liability for providing that analysis. Creating a Super Safe Harbor for any politically tinged forward-looking statements would unsettle the existing balance. As a result, a bad faith business projection unadorned by "meaningful cautionary statements" could escape liability even if made with "actual knowledge" of its falsity, to the extent overcoming strict scrutiny would require demonstration of reliance or actual damages.\textsuperscript{246} If the First Amendment creates a "super safe harbor" that enables companies to deceive investors by generating false market expectations, MD&A disclosures may likely promote market inefficiency rather than corporate transparency.

7. Plain English Requirement Ignored

The plain English requirements promulgated by the SEC were adopted to make disclosures more easily understandable to an ordinary investor.\textsuperscript{247} According to the SEC, in drafting disclosures companies should use short sentences, active voice, everyday language, bullet lists, and tabular presentations, while avoiding legal jargon, technical business terms, and multiple negatives.\textsuperscript{248} Although a failure to abide by the plain English mandate does not give investors a private cause of action, the SEC still enforces the

\textsuperscript{246} In Nike, the company argued that the Court should adopt an "actual malice" standard to assess the validity of politically tinged corporate speech. See \textit{supra} note 36 and accompanying text. Embracing an actual malice standard would eviscerate and perhaps render unconstitutional some of most important provisions in the securities laws. For example, since recklessness marks the threshold conduct for liability under actual malice, strict liability for issuers under section 11 would be extinguished. See \textit{supra} notes 212-15 and accompanying text. Likewise, the "due diligence" and "reasonable care" defenses for non-issuers would become meaningless, because a malice standard would require a much greater degree of malfeasance for liability to attach. See \textit{supra} notes 213-14 and accompanying text. Along the same lines, suffering liability for negligence under section 14 of the Exchange Act and Rule 14a-9 would be constitutionally impermissible. See \textit{supra} notes 221-26 and accompanying text.


\textsuperscript{248} Id.
If insulated by the First Amendment, however, companies could ignore the plain English requirements to the extent forced revision of language or style somehow affects the content of a political comment. Most certainly, First Amendment concerns over the expression of a political viewpoint would trump the plain English mandates, even if those stylistic requirements significantly enhance accurate and adequate corporate disclosures. To some perhaps, the limited demise of the plain English requirements may not seem terribly troublesome. Still, the incompatibility of the plain English requirements with an overly expansive interpretation of the First Amendment demonstrates that enhancing corporate participation in political debates might come at the expense of effective regulation of U.S. capital markets.

8. Shareholder Proposals Threatened

Extending full First Amendment protection to corporate speech could have particularly serious implications for the viability of shareholder proposals. Pursuant to Rule 14a-8 of the Exchange Act, shareholders can require a company to include shareholder resolutions in the company’s annual proxy statement, subject to certain conditions. Through these resolutions, companies are forced to bring social, environmental, economic, and corporate governance issues to the attention of other shareholders. In that regard, the shareholder proposal mechanism represents an important tool regularly used by shareholders to encourage stronger corporate governance and corporate social responsibility.

The number of proposals introduced by shareholders has increased markedly in the past decade. Recent examples of shareholder proposals include resolutions at Exxon Mobil to prohibit discrimination based on sexual orientation; PepsiCo, Inc. to develop a comprehensive recycling program; Newell-Rubbermaid, Inc. to
reduce emissions and global warming; and Morgan Stanley to limit executive compensation.\footnote{253} Some proposals strike a particularly political chord, such as the New York City Pension Fund's recent proposal that Aon Corporation sever all business ties with Iran.\footnote{254} Regardless of the subject matter, the trend in using shareholder proposals to effect corporate change remains on a steady rise.

Since all these shareholder resolutions touch issues of public concern, were politically tinged corporate speech afforded full First Amendment protection, a company could assert that the basic requirement under Rule 14a-8 to include shareholder resolutions in the annual proxy solicitation violates the company's political speech rights. That concern becomes especially relevant in light of the decision in \textit{Pacific Gas & Electric Co.} striking down compelled disclosure of political speech.\footnote{255} Particularly given the variety of corporate governance scandals in recent years,\footnote{256} undermining corporate accountability through shareholder advocacy and oversight may seem institutionally inappropriate.

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Does the forgoing institutional analysis provide any help in resolving the claims presented in \textit{Nike}? The answer is an unequivocal no. But why? An institutional approach to the First Amendment requires a detailed assessment of the specific institutional context within which the contested speech limitations arise.\footnote{257} Determining whether politically tinged corporate speech should remain immune from the reach of a state consumer fraud statute, thus, must entail an assessment of the particular institution of consumer protection,
and of the nexus between speech regulation and the basic functioning of that institution.\footnote{258}{Schauer, supra note 1, at 1274; see supra note 147 and accompanying text.}

An institutional approach to the First Amendment may indeed prove quite useful in answering the questions raised in Nike, especially considering the intellectual limits of the Supreme Court’s existing speech jurisprudence regarding commercial speech and corporate political speech.\footnote{259}{See supra Part II.} But an analysis of the institutional importance of securities regulation simply provides no relevant insights into the wholly separate institutional setting of consumer fraud regulation. The very crux of the case for an institutional approach rests on a recognition that specific institutional contexts matter when assessing speech rights. Failing to recognize the importance of institutional boundaries would undermine the basic claim that institutions should be taken seriously in First Amendment jurisprudence.\footnote{260}{Schauer, supra note 1, at 1273.}

So does the institutional analysis of securities regulation provide any help in determining whether corporations should enjoy full First Amendment protection for politically tinged corporate speech? To that question, the institutional analysis provides a much clearer answer. Considering the extraordinary importance of the securities regulation regime to American society and the inextricability of the link between speech regulations and the basic functioning of that institution, a strong institutional argument supports carving out from the First Amendment’s reach the system of mandatory disclosure and reporting embedded in the U.S. securities laws.

For some, the added value of such an institutional analysis may seem negligible in light of the Supreme Court’s apparent exemption of the securities regulation regime from serious First Amendment scrutiny.\footnote{261}{See supra Part II.C.} The point of the institutional analysis, however, is not to quarrel with that decision to insulate the securities laws from constitutional review. Instead, the institutional approach intends to provide a principled anchor for what otherwise seems an ad hoc, if not arbitrary, pronouncement disconnected from existing speech jurisprudence.

\footnote{258}{Schauer, supra note 1, at 1274; see supra note 147 and accompanying text.}
\footnote{259}{See supra Part II.}
\footnote{260}{Schauer, supra note 1, at 1273.}
\footnote{261}{See supra Part II.C.}
Of course, an institutional approach to the First Amendment does not provide any bright-line tests or standards for determining the proper scope of speech rights. Perhaps existing speech jurisprudence already suffers from enough tests, bright-line or otherwise, without adding more to the mix. Still, the lack of a discreet and detailed framework for assessing the importance of institutions and the nexus between speech and the basic functioning of those institutions may make us less sanguine about the institutional approach's usefulness. After all, what level of institutional importance requires insulation from the First Amendment? At what point do the connections between institutional function and speech become too ambiguous for drawing any meaningful conclusions about the propriety of speech regulation? To those important questions, the institutional approach remains frustratingly vague.

Despite those limitations, the value of the institutional approach lies in its ability both to address more coherently difficult speech cases and to resolve more efficiently a core of cases in a particular institutional setting. The collision between the Supreme Court's commercial speech doctrine and its approach to political speech remains inevitable as corporations continue to press their political speech rights. When that collision happens, the Court will have to retool at least some of the current definitions, standards, and tests that can no longer provide sufficient guidance. That restructuring may even produce greater uncertainty if the Court continues to evade defining the boundaries between commercial and political speech.

The institutional approach, however, can provide some clarity amidst the confusion. Even in hard cases when existing speech principles might not provide much guidance, to the extent the context involves institutions vital to American life and the basic functions of those institutions depend on speech regulation (or free speech), the institutional approach provides strong arguments for regulation (or freedom from regulation). Once that institutional analysis pulls with sufficient strength in one direction, a core set of cases within that institutional setting can be rather easily resolved.

262. Schauer, supra note 1, at 1273.
263. For general criticism of Schauer's institutional approach, see Carpenter, supra note 134.
Applied to the realm of securities regulation, then, the institutional approach provides a sufficiently strong intellectual anchor to keep the system of mandatory reporting and disclosure embedded in the U.S. securities laws outside the First Amendment's reach. Embracing the institutional approach would effectively rescue the securities regulation regime from drifting aimlessly in constitutional uncertainty and help ensure that the integrity of the U.S. capital markets would not fall victim to the impending jurisprudential collision between commercial and corporate political speech.

CONCLUSION

An institutional approach seems to provide significant principled grounds for permitting greater speech regulation, at least when applied in the realm of securities regulation. The analysis proves especially helpful in that particular context, because the Supreme Court has not provided any clear reasons to explain why the securities laws should sit outside the protective reach of the First Amendment. Quite to the contrary, existing speech jurisprudence casts some doubt about the continuing viability of a robust securities regulation regime. For those concerned about maintaining the integrity of the capital markets, incorporating a respect for institutions into existing First Amendment theory would provide great solace. Absent that analytical adjustment, securities laws would remain rather vulnerable to attack should corporations press for greater political speech rights.

The usefulness of the institutional approach in explaining why the First Amendment should permit greater speech regulation in the securities regulation context also seems to provide at least anecdotal support for the theory as a valuable analytical tool. Of course, that the institutional approach provides some strong insights in one particular context does not necessarily imply the theory would work equally well in every institutional setting. As with many areas of life and law, the proof is in the pudding. But, as Schauer suggests in advocating this new method of constitutional inquiry, "it may be worthwhile to look at what such an approach might yield."264 This Article takes Schauer up on his invitation in

264. Schauer, supra note 1, at 1273.
the realm of securities regulation. And as scholars with expertise in other institutional settings examine the institutional approach's usefulness in different contexts, support for the theory itself may wax or wane. Whether the theory gains enough positive momentum to become a permanent part of First Amendment jurisprudence, thus remains a question for further study. An analysis of the institutional approach in the realm of securities regulation at least serves to get the intellectual ball rolling.