# NOBODY'S FOOLS: THE RATIONAL AUDIENCE AS FIRST AMENDMENT IDEAL

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> The premise of the First Amendment is that the American people are neither sheep nor fools . . . . Given the premises of democracy, there is no such thing as too much speech.[1]

*Assumptions about audiences shape the outcomes of First Amendment cases. Yet the Supreme Court rarely specifies what its assumptions about audiences are, much less attempts to justify them. Drawing on literary theory, this Article identifies and defends two critical assumptions that emerge from First Amendment cases involving so-called core speech. The first is that audiences are capable of rationally assessing the truth, quality, and credibility of core speech. The second is that more speech is generally preferable to less. These assumptions, which I refer to collectively as the rational audience model, lie at the heart of the marketplace of ideas metaphor, which has long been a target of criticism among First Amendment scholars. Now, however, cognitive psychology and behavioral economics provide empirical evidence that the assumptions of the rational audience model are demonstrably false in some commonplace settings. This Article nonetheless contends that behavioral economics has not yet made the case for jettisoning the rational audience model in the realm of core speech. As the Supreme Court has recognized, a legal test that looks at the actual effects of speech would be cumbersome and expensive to apply, and would therefore chill speech, but there are even more compelling reasons to adhere to a test focused on the reasonable interpretation of core speech. The rational audience model constrains paternalistic speech regulation, thereby safeguarding individual au-*

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1. McConnell v. FEC, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part).

*tonomy and the foundations of democratic self-governance. Moreover, the rational audience model prevents public discourse from being reduced to the level of the least educated or least sophisticated audience member. The model calls on citizens to raise their cognitive capacities to meet the demands of public discourse, and it serves as a check on the government's increasingly powerful ability to drown out other speakers in that discourse. This Article concludes that the rational audience model represents a flawed but worthy ideal.*

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## I. INTRODUCTION

A skilled speaker tailors her message to her audience. Except in rare instances, however, she does so based on experiential rather than empirical data.[2] As it turns out, the Supreme Court of the United States

2. Although audience research is uncommon in First Amendment cases, it is an important source of evidence in some legal contexts, such as trademark confusion litigation. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23 cmt. c (1995) ("Consumer surveys can be helpful in establishing whether confusion is likely. . . . [A] survey that reasonably reflects the state of mind of prospective purchasers as they encounter the designations in the marketplace is admissible evidence of the likelihood of confusion."). It is also common in a number of social contexts, such as advertising and jury consulting. *See* Spike Cramphorn, *What Advertising Testing Might Have Been, If We Had Only Known*, 44 J. ADVERTISING RES. 170, 175 (2004) ("Partly because of this perceived importance of awareness, focus groups became, and continue to be, a common means of consensus checking reactions to creative ideas."); Rachel Hartje, Comment, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41

also tends to rely on assumptions rather than evidence in determining how audiences decode so-called core speech—a contested category that receives maximum First Amendment protection.[3] The Court rarely articulates its assumptions about the presumed audience of core speech, but its assumptions shape the outcomes of First Amendment cases. After all, a naïve and credulous audience might interpret speech one way and a savvy and sophisticated audience another. Education, cultural background, and countless other characteristics may also influence the way any given audience member interprets speech.[4] Yet in the vast majority of First Amendment cases, the Court presumes to judge how audiences interpret speech without so much as a nod to these difficulties.[5] Instead, the Court defaults to a set of normative assumptions which, taken together, reflects an idealized vision of the audience of core speech. The first of these assumptions is that audiences are capable of rationally assessing the truth, quality, and credibility of core speech.[6] The second is that more speech is generally preferable to less.[7]

CAL. W. L. REV. 479, 493–94 (2005) ("Jury consultants predominantly rely upon the use of opinion polls to construct a profile of the type of person that will be most receptive to a client's case. . . . [D]emographic data is compiled and jury consultants look for specific correlations between desirable traits . . . .").

3. The Court has never given a precise definition of core speech, but it is clear that it includes political speech at a minimum, and may encompass historical, literary, scientific, and even artistic speech as well. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))); Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940) (asserting that free speech entails "the liberty to discuss publicly and truthfully all matters of public concern," enabling citizens to "cope with the exigencies of [their] period"). Perhaps the most useful definition is that core speech is anything that is not intermediate or low-value speech. *See* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33, 37 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (noting that the "default category," for First Amendment purposes, is "high-value speech"). "Speakers need not establish that their speech is political, or artistic, or scientific, or otherwise high value; they need only establish that it is not in one of the low-value categories." *Id.* For further explanation, see Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1581–89 (2007).

4. In fact, these characteristics vary so much from person to person that it makes little sense to speak of any particular speech or text as if it had a single interpretation. For discussion of how assumptions about hypothetical or "implied" readers influence the interpretation of literary texts, see *infra* Part II. For discussion of how judges' assumptions about readers shape the interpretation of whether a statement is defamatory in a tort context, see Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 36–49 (1996).

5. The Court has at times acknowledged that vulnerable audience members may be without judicial recourse against speech protected by the First Amendment. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (stating that "so long as the means are peaceful," speech cannot be brought down to the level of the most vulnerable audience member). *But cf.* FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978) (allowing channeling of indecent broadcast programming). For more discussion, see *infra* Part II.

6. *See, e.g.*, *Org. for a Better Austin*, 402 U.S. at 418 ("It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication.").

7. Although these assumptions can be decoupled, this Article will refer to them jointly as the rational audience assumption.

First Amendment scholarship has criticized the doctrinal influence of the rational audience ideal for some time,[8] but a new challenge is mounting from a different quarter. Empirical work in the fields of cognitive psychology and behavioral economics suggests that both the rational audience and the more-is-better assumptions may be demonstrably false in some commonplace settings. Behavioral economics began as a critique of the rationality assumption of classical economics, namely, that people rationally determine and maximize self-interest.[9] This critique of rationality has penetrated deep into scholarly discourse[10] and is making inroads into popular discourse as well. In fact, *New York Times* columnist David Brooks described the U.S. financial crisis that began in 2008 as "a coming-out party for behavioral economists."[11] Behavioral economics explains the financial crisis better than classical economics because it recognizes that "markets are not perfectly efficient, people are not always good guardians of their own self-interest and there might be limited circumstances when government could usefully slant the decision-making architecture"[12] to encourage better policy decisions.

The behavioral economic critique of rational decision making arguably applies as readily to speech markets as to economic ones.[13] In the face of this critique, the Supreme Court's continued adherence to the rational audience model in the realm of core speech deserves serious examination and analysis. This Article is directed to that goal.

The Court's own explanation has been limited. Only two Justices have directly addressed the constitutional preference for standards based on a rational audience rather than a real one. In *FEC v. Wisconsin Right to Life, Inc.*,[14] Chief Justice Roberts, joined by Justice Alito, explained

8. This scholarship often criticizes the influence of the marketplace of ideas metaphor in First Amendment scholarship. *See, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5; *see also* discussion *infra* Part III.A. The marketplace metaphor neatly encapsulates the assumptions of the rational audience ideal, and it remains the dominant metaphor of First Amendment jurisprudence. I have chosen to refer to the rational audience ideal, *in addition to* the more common marketplace metaphor, because this terminology brings out the often hidden or overlooked assumptions of the marketplace metaphor.

9. *See* discussion *infra* Part III.B. I have chosen to use the term behavioral economics here. The body of scholarship that attempts to apply the insights of cognitive psychology is often referred to as "behavioral analysis" or "behavioral economics." The scholarly literature of "behavioral law and economics" is particularly rich. *See, e.g.*, Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 1 (Cass R. Sunstein ed., 2000). The common thread in all of this scholarship is an attempt to understand and model how humans make decisions.

10. See discussion of this critique in Part III.B, *infra*.

11. David Brooks, *The Behavioral Revolution*, N.Y. TIMES, Oct. 27, 2008, at A31.

12. *Id.*

13. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 651 (2006).

14. In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457–58 (2007), Wisconsin Right to Life (WRTL) asserted that it wished to run ads from its general treasury funds criticizing the stance of Wisconsin Senators on the filibustering of judicial nominees. These ads did not urge Wisconsin voters to elect or defeat the Senators; nonetheless, the ads met the definition of "electioneering communications" under section 203 of the BCRA (Bipartisan Campaign Reform Act of 2002), therefore making it a federal crime to air them within thirty days of a federal primary or sixty days of a general election.

that the First Amendment requires the line between protected and unprotected political speech to be drawn based on the reasonable interpretation of such speech rather than "*the actual effect speech will have . . . on a particular segment of the target audience*."[15] Justice Roberts' primary argument for ignoring the actual effect of speech on real audiences is a practical one. An actual-effect test would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard . . . will unquestionably chill a substantial amount of political speech."[16] In other words, the cumbersome and expensive process of gathering evidence about audience effects will chill political speech to an unacceptable degree. But this rationale rests on the unexplained assumption that the hypothetical risk of chilling speech outweighs the benefits of examining the real effects of speech. Standing alone, expediency is an insufficient explanation for why First Amendment jurisprudence should continue to indulge the rational audience assumption and the more-is-better assumption. Moreover, it does not explain why the Court allows for the possibility that vulnerable audience members may need protection from their own poor judgment in the realm of commercial[17]

*Id.* at 460. WRTL sought declaratory and injunctive relief in district court, alleging that the application of the "electioneering communications" provisions to their ads violated the First Amendment. *Id.* Five Supreme Court Justices—Scalia, Kennedy, Thomas, Alito, and Chief Justice Roberts—ultimately held that the application of the "electioneering communications" provisions to WRTL's ads violated the First Amendment, though they could not agree on a single rationale for this holding. *Id.* at 457, 481 (principal opinion supported by two votes); *id.* at 482–83 (Alito, J., concurring); *id.* at 504 (Scalia, J., concurring in part and concurring in the judgment). Three of the five Justices who upheld the as-applied challenges would have simply overturned the Court's prior holding in *McConnell v. FEC*, 540 U.S. 93 (2003), with regard to the facial constitutionality of the electioneering communications provisions. Justice Scalia, joined by Justices Kennedy and Thomas, contended that the Court should reject *McConnell* because it "sets us the unsavory task of separating issue-speech from election-speech with no clear criterion." *Wis. Right to Life*, 551 U.S. at 484 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia, while not exactly praising *Buckley*'s "magic words" test for separating issue ads from express advocacy, observed that "[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." *Id.* at 495. Chief Justice Roberts and Justice Alito, however, would have decided the case on a narrower ground. Chief Justice Roberts wrote that the BCRA's provisions could be constitutionally applied to ads that constitute "express advocacy" and ads that are the "functional equivalent" of express advocacy. *Id.* at 482 (principal opinion supported by two votes). However, Chief Justice Roberts wrote, "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469. Applying this test, he determined that the WRTL's ads were not the functional equivalent of express advocacy because they dealt with a genuine issue—the filibuster of judicial nominees—and they "d[id] not mention an election, candidacy, political party, or challenger; and they d[id] not take a position on a candidate's character, qualifications, or fitness for office." *Id.* at 470.

15. *Wis. Right to Life*, 551 U.S. at 469–70 (principal opinion supported by two votes) (emphasis added). Chief Justice Roberts and Justice Alito would have adopted a test requiring a court to protect the campaign speech at issue only if "no reasonable interpretation" of it would place it within the unprotected category of "express advocacy" under BCRA section 203. *Id.* at 470. Justices Scalia, Kennedy, and Thomas believed that even this test failed to draw a bright enough line to protect core political speech. *See id.* at 492, 499 n.7 (Scalia, J., concurring in part and concurring in the judgment).

16. *Id.* at 469 (principal opinion supported by two votes).

17. *See* discussion *infra* Part II.B.

and other non-core speech,[18] but not in the realm of core speech. This Article therefore explores more fully the justifications for continuing to presume that audiences of core speech are rational in the face of growing evidence to the contrary.

First, though, the stage must be set. Part II draws on literary theory to illuminate the process by which the Court constructs an implied audience in First Amendment cases. In the realm of core speech, this implied audience is composed of rational and skeptical citizens who are capable, when left to their own devices, of sorting through masses of information to discover truth.[19] Thus, governmental intervention in the speech marketplace is almost always unjustified. In the realm of commercial and other non-core speech, however, the Court sometimes (though not consistently) applies a credulous consumer model of the implied audience.[20] This alternate model, which posits that many audience members are naïve and easily misled, provides justification for paternalistic governmental intervention in the realm of commercial speech. Part II thus demonstrates that assumptions about audiences shape outcomes of First Amendment cases but leaves unanswered which set of assumptions courts ought to adopt.

Part III addresses scholarship that calls for more paternalistic interventions in the speech marketplace, giving prominence to the still largely implicit critique posed by cognitive psychology and behavioral economics.[21] This new vein of criticism suggests that the marketplace of ideas is flawed because humans are flawed: they are not rational information processors, and more information often leads to worse decisions instead of better ones. Yet the implications of this evidence for First Amendment doctrine are unclear. Government actors are not immune from the constraints on rationality affecting their fellow citizens. And even if individuals are only rational in fits and starts, the evidence is not at all clear that this irrationality infects aggregate decision making.

More importantly, Part IV contends that clinging to an admittedly flawed ideal of audience rationality is better than the alternative. As the

18. For example, the Court's electoral speech jurisprudence is, to put it generously, inconsistent in this assumption about the ability of the voting public to make rational decisions when presented with masses of highly biased information. An excellent article by Daniel Ortiz traces competing models of political decision making that underlie campaign speech decisions. *See generally* Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1 (1995). Under one model, the Court treats the citizen as a "civic smarty" who "make[s] highly informed political choices." *Id.* at 4. Under the other, the Court treats the citizen as a "civic slob" who is "passive and uninformed." *Id.*; *see also* Daniel R. Ortiz, *The Paradox of Mass Democracy*, *in* RETHINKING THE VOTE: THE POLITICS AND PROSPECTS OF AMERICAN ELECTION REFORM 210, 211 (Ann N. Crigler et al. eds., 2004).

19. *See* discussion *infra* Part II.B.

20. *See* discussion *infra* Part II.C.

21. Although there is a large and growing body of literature on behavioral economics and cognitive psychology, only two scholars seem to have applied this literature in the First Amendment context. *See* Bambauer, *supra* note 13, at 651; Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 6–7 (2003).

Court has noted, concerns of judicial economy support the rationality assumption.[22] But rationality is also important as an aspirational norm. First Amendment doctrine encourages us to develop our capacities to engage in the level of public discourse democratic theory demands.[23] Failure to apply a rational audience standard would reduce public discourse to the level of the least sophisticated audience, while punishing speakers who are unable to predict what that level is. Perhaps more significantly, both the rationality assumption and the more-is-better assumption serve as a check on government's increasingly powerful attempts to use its agenda-setting power to manipulate public discourse. Finally, a State that indulges an irrationality assumption, or even a bounded rationality assumption, fails to respect the autonomy of its citizens, an autonomy upon which a self-governing democracy depends.

## II. THE RATIONAL AUDIENCE IN FIRST AMENDMENT JURISPRUDENCE

### *A. Literary Theory and the Implied Audience Construct*

Every First Amendment decision involves a text to be decoded. In decoding the disputed texts in First Amendment cases, the Court justifies its interpretations not by reference to the Justices' subjective decodings but by implicit reference to the decodings of a hypothetical reasonable or rational audience.[24] As this Article demonstrates, this process of interpretation is typically hidden beneath the surface of First Amendment opinions. The goal, therefore, is to unearth the process by which courts construct audiences of disputed texts and to show that this process not only helps legitimize outcomes but also advances the fundamental purposes of the First Amendment.

Although legal theory has been obsessed with courts' processes of interpretation as a general matter, it has done little to illuminate the process by which courts impute interpretation of a disputed text to a body of reasonable observers.[25] An entire vein of literary criticism, however, has devoted itself to uncovering the role readers play in creating the meaning of a text.[26] This vein of criticism, often called reader-

22. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (Roberts, C.J. & Alito, J., dictum).

23. As opposed to consumers, for example. Although this argument will be explained more fully in Part IV, *infra*, suffice to say that if citizens are incapable of rational decision making through participation in public discourse, they are equally incapable of self-governance, the hallmark of democracy.

24. *See supra* notes 6, 14–16 and accompanying text.

25. I have attempted previously to illuminate how common law doctrines in defamation cases allow judges to construct the implied audience of allegedly defamatory speech. *See* Lidsky, *supra* note 4, at 16–17.

26. Important works in the area include STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); WOLFGANG ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE (Wolfgang Iser & David Henry Wilson trans., Johns Hopkins Univ. Press 1978) (1976) [hereinafter ISER, THE ACT OF READING]; WOLFGANG ISER, THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT (Wolfgang

response criticism or reception theory, has a variety of adherents united by a central insight: namely, "the meaning of the text consists of our experience of what the text *does* to us as we read it."[27] This Article does not purport to fully mine this rich vein of criticism, but instead gleans a few critical insights that have ready application to First Amendment jurisprudence.

Perhaps the central insight is simply a heightened awareness of the role of the audience (or individual audience members) in fixing the meaning of a First Amendment text. Different audience members bring different experiences and backgrounds to the text and will therefore interpret the same text quite differently. Focusing on the role of readers, observers, or listeners of texts provides a new prism through which to view seminal cases on freedom of expression.[28]

Reader-response criticism also offers other insights relevant to the interpretation of First Amendment texts. Reader-response criticism posits a special status for the literary critic. In order to interpret a text "correctly," the critic must develop insights into how other readers will interact with a given text and must predict how these readers will decode

Iser & David Henry Wilson trans., Johns Hopkins Univ. Press 1974) (1972) [hereinafter ISER, THE IMPLIED READER]; HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION (Timothy Bahti trans., Univ. of Minn. Press 1982) (1970). For two good summaries of reader-response criticism as a whole, see TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 47–78 (2d ed. 1996) and LOIS TYSON, CRITICAL THEORY TODAY: A USER-FRIENDLY GUIDE 153–96 (1999). For application of the insights of reader-response theory to the question of what is fair use in copyright law, see generally Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008).

27. TYSON, *supra* note 26, at 162; *see also* EAGLETON, *supra* note 26, at 64–65 ("Literary texts do not exist on bookshelves: they are processes of signification materialized only in the practice of reading. For literature to happen, the reader is quite as vital as the author."); ISER, THE IMPLIED READER, *supra* note 26, at xiii ("The reader discovers the meaning of the text . . . ."); TYSON, *supra* note 26, at 157 ("[A] written text is . . . an event that occurs within the reader, whose response is of primary importance in creating the text.").

28. A similar test is used in First Amendment Establishment Clause cases. In Establishment Clause cases, the Supreme Court makes quite explicit its reliance on the "reasonable observer" as the benchmark by which the Court decides if a person would perceive a statute as a state endorsement of religion. In *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985), Justice O'Connor's concurrence focused on "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement." *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (applying an adult community member to the reasonable objective observer standard); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (applying the reasonable observer test to determine if there was a perception of government promotion of religion but specifying that the relevant observer is a high school student). In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 36 (2004), Justice O'Connor described the reasonable observer in the context of the use of the phrase "under God" in the Pledge of Allegiance:

> For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. . . . The reasonable observer . . . , fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.

For criticism of the test, see Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases:* McCreary County v. ACLU of Kentucky *and* Van Orden v. Perry, 4 FIRST AMENDMENT L. REV. 139, 141–42 (2006).

the text.[29] And yet reader-response critics do not attempt to take surveys about how readers decode texts. Rather, they posit an idealized reader who is educated and conversant with stylistic and literary conventions.[30] The critic then tries to see the text through the eyes of its "implied reader," in the words of Wolfgang Iser,[31] in order to make the "correct" or "best" meaning of the text emerge.[32] In First Amendment decisions, courts play the role of critics, stepping into the shoes of implied reasonable readers in order to fix the meaning of the disputed text.

A final insight of reader-response criticism is simply that although there may be a best interpretation of a text, there is no universal interpretation of a text. Meaning is not fixed by the author's intent or the text itself; rather, meaning is an interactive process, a continuing dialogue between text and reader, a dialogue that changes over time.[33] Nonetheless, in courts if not in the classrooms of literature professors, the disputed text must be definitively decoded so that a final judgment can be rendered. Although different readers will decode texts differently, courts must settle upon a meaning; that meaning, in turn, determines whether the speaker, author, publisher, or broadcaster receives the shelter of the First Amendment.[34]

These insights have ready application to actual cases. Consider, for example, the famous case of *Cohen v. California*.[35] *Cohen* involved an apparently simple text in the form of a jacket bearing the words "Fuck the Draft."[36] Is "Fuck the Draft," when inscribed on a jacket worn in the hallways of a courthouse, a heart-felt protest against the mandatory conscription of young men to serve in Vietnam?[37] Or is the text on and of the jacket a puerile epithet with little, if any, communicative value? In order to decide the case, the Supreme Court was forced to decide which

29. Jane P. Tompkins, *Introduction to Reader-Response Criticism*, *in* READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM ix, xi (Jane P. Tompkins ed., 1980); Jane P. Tompkins, *The Reader in History: The Changing Shape of Literary Response*, *in* READER-RESPONSE CRITICISM, *supra*, at 201, 205–06.

30. Stanley E. Fish, *Literature in the Reader: Affective Stylistics*, *in* READER-RESPONSE CRITICISM, *supra* note 29, at 70, 87; Gerald Prince, *Introduction to the Study of the Narratee*, *in* READER-RESPONSE CRITICISM, *supra* note 29, at 7, 9.

31. Iser defines "implied reader" as "incorporat[ing] both the prestructuring of the potential meaning by the text, and the reader's actualization of this potential through the reading process." ISER, THE IMPLIED READER, *supra* note 26, at xii.

32. *See id.*

33. *Id.* at 174–75.

34. In determining the public's interpretation of a religious symbol as government sponsored, the court

> d[id] not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think Grand Rapids endorses religion. Instead, we ask whether *the* reasonable observer *would* conclude that Grand Rapids endorses religion by allowing Chabad House's display.

Ams. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1544 (6th Cir. 1992).

35. 403 U.S. 15 (1971).

36. *Id.* at 16.

37. *Id.*

interpretation of Cohen's famous jacket was the "correct" interpretation.[38] In 1968, some audience members may have experienced the words on the jacket as "meaningless" epithets whose only purpose was to offend community sensibilities; other audience members may have seen them as a strident political commentary on the most important issue of Cohen's day. Forty years later, an audience may construct an entirely different meaning. Students who read about the famous jacket are likely to be well acquainted with the "F-word" but less well acquainted with the Vietnam War. Thus, for them, the sentiment on Cohen's jacket may be just another way of saying "I don't like the draft."

The Court in *Cohen* never directly acknowledged this interpretive difficulty, but the resolution of it determined the outcome of the case. A lower court had upheld Cohen's thirty-day sentence for disturbing the peace based on the presumed effect his speech would have on his audience.[39] Specifically, the lower court held that the State correctly predicted that the jacket "might cause *others* to rise up to commit a violent act against the person of [Cohen] or attempt to forceably [sic] remove his jacket."[40] The predicted response of these others gave the State the authority to jail Cohen for disturbing the peace.

The Court predicted a very different reception of the jacket. The Court explicitly denoted the viewers of the jacket as reasonable people.[41] The Court—or at least the six-Justice majority[42]—hypothesized that "[n]o individual actually or likely to be present could *reasonably* have regarded the words on appellant's jacket as a direct personal insult."[43] The Court refused to accept the State's argument that the jacket would incite individuals or groups to violence, though it cited little to support this conclusion.[44] The Court gave no justification for the assumption that the audience was composed of reasonable people. Nor did the Court provide a convincing explanation why reasonable people would not respond forcefully to Cohen's jacket, beyond observing that no one "was in fact violently aroused" by the jacket,[45] which arguably was a product of luck rather than the nature of the provocation.

Nonetheless, the Court made clear that its construction of the audience of Cohen's speech trumped the State's. The Court accused the State of attempting to censor speech based on the predicted reaction of

38. *Id.* at 21–22.

39. *Id.* at 16–17.

40. People v. Cohen, 81 Cal. Rptr. 503, 506 (Cal. Dist. Ct. App. 1969) (emphasis added).

41. *Cohen*, 403 U.S. at 20.

42. The three dissenting Justices first determined that Cohen's behavior "was mainly conduct and little speech," and then determined that it was "well within the sphere of *Chaplinsky v. New Hampshire*," the Supreme Court's seminal fighting words case. *Id.* at 27 (Blackmun, J., Burger, C.J., & Black, J., dissenting).

43. *Id.* at 20 (majority opinion) (emphasis added).

44. *Id.* Of course, the State need not wait until violence occurs before regulating speech that constitutes incitement.

45. *Id.*

"a hypothetical coterie of the violent and lawless."[46] The State was not entitled to assume the worst about its citizens.[47] Even if the State feared a breach of the peace, it could not censor speech absent "evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen."[48] This, of course, created a procedural imbalance that favors free speech; the State must provided strong evidence that its predictions of audience reactions are not speculative, but the Court is free to speculate at will. More to the point, the Court's speculation provided the definitive decoding of Cohen's jacket. The Court determined that reasonable viewers would interpret the jacket as asserting an "evident position on the inutility or immorality of the draft,"[49] and that, in turn, meant that the State could not criminalize his speech.[50]

As *Cohen* illustrates, First Amendment jurisprudence accords courts the role of disinterested critics of the disputed texts of First Amendment cases. The Court (and by extension lower courts) claims superior authority vis-à-vis the legislative and executive branches in predicting the effects of speech. It may be that the courts are granted this authority due to some institutional superiority,[51] but there is no indication that courts are superior to the other branches of government in predicting the responses of audiences to speech. Indeed, courts appear to project an idealized construct of readers, listeners, and viewers into First Amendment cases with little regard for the "facts on the ground."[52] Even if empirical research were practical, the construct allows courts to claim to be speaking for a broader audience than just themselves when they interpret disputed speech. Moreover, as this Article ultimately shows, the characteristics imputed to this idealized audience aid judges in advancing the broader ideals of the First Amendment. First, however, it is important to develop a more well-rounded portrait of the implied audience of First Amendment speech.

### *B. Characteristics of the Implied Audience of Core Speech*

Although there is no settled definition of core speech—speech that garners the lion's share of First Amendment protection—it includes at a

46. *Id.* at 23.
47. *Id.*
48. *Id.*
49. *Id.* at 18.
50. Justice Blackmun, joined by Chief Justice Burger and Justice Black in dissent, avoided the problem of audience response by concluding, with very little explanation, that "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech." *Id.* at 27 (Blackmun, J., dissenting).
51. As Professor John Jeffries has written, "The institution of the judiciary is peculiarly well suited—in personnel, training, ideology, and institutional structure—to implement the ideals of the First Amendment." John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 427 (1983).
52. *See Cohen*, 403 U.S. at 20.

minimum political speech[53] and speech dealing with issues of public concern.[54] This speech lies at the core of the First Amendment because political speech in a democracy is essential to democratic self-governance; without this information, citizens cannot play their assigned roles in choosing and instructing their representatives and in participating in the formation of public policy. Yet core speech also includes speech that enables citizens to develop their critical faculties and understand the exigencies of their eras, such as literary, artistic, historical, and scientific speech. Built into the very concept of core speech, then, is the idea that it appeals to its audience in their capacities as *citizens* first and foremost, rather than appealing purely to economic, sexual, or other forms of self-interest. The assumptions courts make about the audiences of core speech, therefore, mirror the assumptions courts make about citizens.

In envisioning the implied audience of core speech, courts might assume that audience members are naïve and credulous, lacking the education or sophistication necessary to critically assess the messages they receive. The modern trend for core speech, however, has been to assume that audiences are savvy and sophisticated, capable of sorting through masses of information to discover truth, however provisional or contested. Indeed, these assumptions underpin two articles of faith in modern First Amendment theory: (1) audiences are capable of rationally evaluating the truth, quality, credibility, and usefulness of core speech

53. Some would include only political speech in the definition of core speech. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971) (defining "the core of the first amendment" as "speech that is explicitly political").

54. *See* discussion *supra* note 3. The Court's distinction between core and non-core speech owes a debt to the work of Alexander Meiklejohn, who defined the core of the First Amendment to include speech of "governing importance." Justice Black's concurrence in the seminal case of *New York Times Co. v. Sullivan*, for example, cited Meiklejohn for the notion that "[a]n unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring). Although initially it appeared that Meiklejohn's theory would protect only political speech, he later broadened his theory to include literary, historical, and scientific speech, based on the notion that these types of speech fostered the development of our capacities as citizens to make informed public decisions. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26–28, 76–84, 144–47 (1948). The lines between core and non-core speech can be blurred at the margin, and it is sometimes easier to define core speech by what it is not. Commercial speech, for example, is not core speech; it does not sufficiently advance public discussion on issues of governing importance. But commercial speech receives significant First Amendment protection because it provides important information to citizens in their roles as consumers. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 & n.6 (1980). Fighting words are not core speech; they do not advance public discussion and are designated as "low-value speech" because of their tendency to bypass cognitive processes and produce immediate violence. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Defining core First Amendment speech creates troublesome issues at the margins, but it is clear, at a minimum, that core speech includes discussions of political, literary, artistic, historical, cultural, and social concerns. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208 ("The Amendment has a 'central meaning'—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.'"); *see also* Boos v. Barry, 485 U.S. 312, 318 (1988).

without the aid of government intervention; and (2) more speech is better than less.

### *1. The Rational Audience Assumption*

Democratic theory demands faith in the rationality of citizens, and several members of the founding generation, steeped in the ideals of the Enlightenment, publicly professed this faith.[55] In his inaugural address of 1801, Thomas Jefferson boldly proclaimed: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[56] Reason, so the argument goes, will drive out "error[s] of opinion" from public discourse, forming the basis for enlightened public policy.[57]

This is not to say that the Founders were starry-eyed idealists. As one historian has written, the Founding Fathers adopted the Constitution of 1787 to curtail "excessive democracy."[58] They realized they were embarking on an experiment, and several expressed doubt about the extent

55. From the Federalist No. 1:

> [I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This does not mean that revolutionary leaders were naïve about self-interest. Indeed, concern about the tendency of state legislatures to pander to the parochial concerns of their citizens spurred the adoption of the Constitution in 1787. As Madison noted in The Federalist No. 51, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* SUSAN JACOBY, FREETHINKERS: A HISTORY OF AMERICAN SECULARISM 13 (2004) (noting the "essential rationalism" of the Founders).

56. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* THE ESSENTIAL JEFFERSON 56 (Jean M. Yarbrough ed., 2006). Jefferson's remarks presumably relate to the controversy over the Sedition Act of 1798 that the Federalist Party had enacted in an attempt to deny Jefferson and his Republican Party victory in the election of 1800. The Act made it a crime to print any false, scandalous, and malicious writings about the federal government, the Congress, or the president. Sedition Act of 1798, 1 Stat. 596, 596–97. The Act expired by its own terms in 1801. *Id.* at 597. Although enforcement of the Act virtually silenced Republican newspapers, Jefferson won the election and the Act was never renewed. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 63–67 (2004). The Court, however, did not declare that the punishment of seditious libel violated the First Amendment until 1964. *N.Y. Times Co.*, 376 U.S. at 276 ("These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

57. *See* Thomas Jefferson, First Inaugural Address, *in* THE ESSENTIAL JEFFERSON, *supra* note 56, at 56.

58. WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 5 (2007) (citing numerous sources); *see also* RICHARD K. MATTHEWS, IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON (1995); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996). Some Americans during this period believed that government should be made more democratic, others that it should be more republican. As Dr. Holton notes, some Americans criticized the state governments prior to 1787 for a "glut" of democracy and others for "a shortage of democracy." *See* HOLTON, *supra*, at 163. Some citizens even "embraced the slogan 'VOX POPULI VOX DEI'—'the voice of the people is the voice of God.'" *Id.* at 164. This was a response, in part, to the limits on the franchise. *See id.* at 163–64.

to which citizens could set aside self-interest to favor rational public policy.[59] Indeed, the constitutional system they designed contains measures designed to prevent state legislatures from embracing irrational populist measures.[60]

Though the Founders espoused a democratic theory rooted in rationalism, it was not until the twentieth century that courts began to fashion a modern, libertarian First Amendment around the notion of the rationality of citizen audiences. The clear and present danger doctrine became the building block of this modern First Amendment, but its beginnings were not auspicious. The test debuted in *Schenck v. United States*, which involved a felony conviction under the Espionage Act of 1917 for distributing pamphlets critical of World War I to men who had been drafted.[61] The Court framed the issue as whether the speaker's words "create[d] a clear and present danger"[62] of "bring[ing] about the substantive evils that Congress had a right to prevent."[63] Yet in application, the Court focused on the "tendency" of the defendant's pamphlet to interfere with the draft without demanding proof of actual interference.[64] The focus on the "tendency" of the speech suggested that it could be suppressed if someone somewhere might respond badly to it. Thus, the maiden voyage of the clear and present danger test served to suppress rather than defend radical speech.[65]

From this inauspicious beginning the clear and present danger test eventually became a bulwark protecting dissident speech. As is well known,[66] Justice Holmes, under prompting by Judge Hand and other libertarian thinkers,[67] recalibrated the clear and present danger test. The new, protective version of the test emerged in Justice Holmes' dissent in *Abrams v. United States*.[68] There, the government prosecuted five Russian immigrants under the Espionage Act for distributing pamphlets critical of U.S. involvement in World War I.[69] Though a majority of the

59. *See id.* at 165.

60. For example, the Constitution omitted the rights of citizens to instruct and recall Congressmen. HOLTON, *supra* note 58, at 199. The Constitution also made each Congressman answerable to a much larger group of constituents than was the case in the state assemblies. *See id.* at 200–05. The end result was that the constitutional convention "managed to construct a new national government that was considerably less democratic than even the most conservative of the state constitutions." *Id.* at 211. The Bill of Rights, in turn, counteracted the antidemocratic elements of the Constitution of 1787. *Id.* at 256–58.

61. 249 U.S. 47, 52 (1919).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 52–53.

66. *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1317 (1983) (discussing the series of Justices Holmes' and Brandeis' dissents that were the basis for the modern incitement test).

67. *See* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 407–12 (1992).

68. 250 U.S. 616, 628, 630 (1919) (Holmes, J., dissenting).

69. *Id.* at 616–17 (majority opinion).

Court upheld the conviction of the defendants in *Abrams*, Justice Holmes argued that the First Amendment forbade suppression of their speech unless it presented an imminent threat of "immediate" harm: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment]."[70]

Justice Holmes' justly famous dissent in *Abrams*, which was joined by Justice Brandeis, reflected a belief that "humans are inherently rational beings."[71] Given enough time to reflect, an audience will reject "evil counsels" such as those advocated by the speakers Justice Holmes described as "poor and puny anonymities" in *Abrams*.[72] The First Amendment protected the speech of these defendants because the government had failed to offer proof that their speech had hindered the war effort or that they intended it to do so.[73] Justice Holmes' opinion rests on faith in rational deliberation as an antidote to violence. Citizens will not leap to action merely because radical speakers, like the socialists in *Abrams*, urge them to do so.[74]

Justice Brandeis takes Justice Holmes' themes even further in his lyrical concurring opinion in *Whitney v. California*,[75] described by Professor Vincent Blasi as "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment."[76] Justice Brandeis applied the clear and present danger test to evaluate the constitutionality of the conviction of an avowed communist under California's Criminal Syndicalism Act.[77] Justice Brandeis wrote that the conviction violated the First Amendment because the State failed to show "either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."[78] Justice Brandeis made clear that such violence

70. *Id.* at 630–31 (Holmes, J., dissenting).

71. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 579 n.11 (1995).

72. *Abrams*, 250 U.S. at 629–30 (Holmes, J., dissenting).

73. *Id.* at 628–29.

74. Justice Holmes' own faith was less than whole-hearted. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.").

75. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring). Justice Holmes believed that whether reason would ultimately prevail or not, the principle of free expression prohibited government from attempting to dictate the beliefs of citizens. *See Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) ("If in the long run the beliefs expressed in a proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."). For a critique of this idea, see Bork, *supra* note 53, at 21 (arguing that such speech may be suppressed because it undermines democracy).

76. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 668 (1988).

77. *Whitney*, 274 U.S. at 378 (Brandeis, J., concurring). The basis of the prosecution was that the party platform of the Communist Labor Party, of which Alicia Whitney was a founding member, advocated "revolutionary class struggle." *Id.* at 363 (majority opinion).

78. *Id.* at 376 (Brandeis, J., concurring).

should rarely occur, due to the "expected" rationality of audiences.[79] Our system of government, Justice Brandeis wrote, depends on "confidence in the power of free and fearless reasoning applied through the processes of popular government."[80] When such reasoning prevails,

> no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[81]

Brandeis echoes many of the themes articulated by Justice Holmes in *Abrams*. Government intervention, or "enforced silence," hinders rather than advances rational public discourse.[82] Open discourse allows the implied audience of citizens to decide for themselves where truth and falsity lie.[83] Only when the opportunity for rational discourse is cut off by emergency circumstances may the government intervene.[84] Ordinarily, however, citizens will reject "falsehoods and fallacies" because public discussion provides the "processes of education" necessary to refute them.[85] Justice Brandeis later explains that a tenet of democracy is that "deliberative forces should prevail over the arbitrary."[86] This tenet, however, can only prevail if citizens, in their role as audience, actively engage the "political duty" to participate in public discourse and refute what they believe to be "noxious doctrine."[87] At its core, Justice Brandeis' opinion envisions a body of informed citizens engaging in a rational exercise in self-governance.

79. *See id.*

80. *Id.* at 377.

81. *Id.*

82. *Id.* at 377; *see also id.* at 375–76 ("Believing in the power of reason as applied through public discussion, [the Framers] eschewed silence coerced by law—the argument of force in its worst form."); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT, *supra* note 3, at 61, 78 ("[Justice Brandeis concluded] that we simply *have* to believe in the power of reason in order to preserve a system of government in which the coercive power of the state does not swamp the individual. If we abandon the faith that reason matters, we are left with a society governed exclusively by force.").

83. *See* Blasi, *supra* note 82, at 92.

84. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

85. As I have explained previously, Justice Brandeis' theory of the First Amendment depends for its operation on the rule of law in a vibrant civil society—what Bernard Lewis has described as "part of society, between the family and the state, in which the mainsprings of association, initiative, and action are voluntary, determined by opinion or interest, or other personal choice." Lyrissa Barnett Lidsky, Brandenburg *and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1024 n.102 (2002) (quoting BERNARD LEWIS, WHAT WENT WRONG?: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 110 (2002)); *see also* Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("Civil liberties . . . imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.").

86. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

87. *Id.*

Justices Holmes and Brandeis provided the building blocks,[88] but any number of First Amendment doctrines rely on a model of the audience as rational, skeptical, and capable of sorting through masses of information to find truth. The fighting words doctrine assumes that only in rare instances will an individual listener have a "non-cognitive" reaction to speech and impulsively do violence to the speaker.[89] The incitement doctrine, in turn, is the "crowd response" counterpart of the fighting words doctrine.[90] Rational individuals will not respond violently to "mere advocacy" of unlawful action;[91] they respond only when "advocacy of the use of force or of law violation . . . is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[92] The incitement doctrine, in both theory and application, assumes that citizens will rarely respond with violence to the impassioned rhetoric of a radical speaker.[93]

Even doctrines designed to ensure that government does not narrow the range of views open to its citizens presume that the citizenry is basically rational. The stringent First Amendment limitations on prosecutions for seditious libel[94] promote public discourse that is "uninhibited, robust, and wide open" based on the theory that citizens can sort through conflicting claims to discern the truth about "public men" and public measures.[95] Indeed, libel law clings to this theory even while acknowledging that public discourse will "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" as well as "half-truths," "misinformation," "exaggeration," "vilification," and false statements of facts.[96] The First Amendment's prohibition on content-based discrimination rests, in part, on the assumption that the State must not narrow the range of information open to its citizens; they, and only they, are charged with rationally winnowing the unmediated flow of information they receive.[97]

88. Bork, *supra* note 53, at 23 (observing that free speech law today "grows out of" the dissenting (or concurring) opinions of Justices Holmes and Brandeis).

89. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (defining fighting words as those "likely to provoke the average person to retaliation, and thereby cause a breach of the peace"); *see also* RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT: CASES AND THEORY 93 (2008) ("The fighting-words decisions . . . involve[] a determination of whether words are abusive or so akin to an assault that they are likely to cause a violent response.").

90. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969); *see also* Texas v. Johnson, 491 U.S. 397, 408 (1989) (stating that First Amendment jurisprudence does not presume "an audience that takes serious offense at particular expression is necessarily likely to disturb the peace").

91. *See Brandenburg*, 395 U.S. at 448–49.

92. *Id.* at 447.

93. *Brandenburg*, for example, involved a Ku Klux Klan member urging other members, some armed, to "[b]ury the niggers." *Id.* at 445–46, 446 n.1. The Court found the circumstances of the speech, however, evidenced the audience would not respond with violence. *Id.* at 448–49.

94. Garrison v. Louisiana, 379 U.S. 64, 78 (1964) (requiring knowledge of falsity and reckless disregard on the speaker's part).

95. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268, 270 (1964).

96. *Id.* at 270–71, 273.

97. *See* Texas v. Johnson, 491 U.S. 397, 417–19 (1989).

Audience rationalism receives its main instantiation in the dominant metaphor in First Amendment jurisprudence—the marketplace of ideas.[98] Justice Holmes injected the metaphor into First Amendment jurisprudence when he endorsed the "free trade in ideas" in *Abrams v. United States*.[99] Justice Holmes endorsed the metaphor as a sound foundation of public policy, asserting that "*the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out."[100] Yet it is not clear that the skeptical Justice Holmes fully endorsed the sentiment underlying his own ringing rhetoric, for he immediately declared that the marketplace of ideas "is an experiment, as all life is an experiment."[101]

The constitutional experiment with free trade in ideas depends fundamentally on the rationalism of the "consumers" in the marketplace. Only rational consumers can sort through undifferentiated masses of information to discern what is valuable, to pluck the wheat from the chaff. Indeed, the marketplace metaphor even contains a model of the reasoning process of these consumers. Competition implies action and reaction, and consumers must actively compare and contrast competing ideas, allowing "full and free discussion" to "expose[] the false."[102] When the market is permitted to function freely, the aggregate decisions of rational consumers of information will ultimately drive the purveyors of worthless goods from the market. This process is essential for the formation of sound public policy.

### *2. More-Is-Better, or Against Paternalism*

There is no necessary relation between the assumption that audiences are rational and the assumption that they are better off with

98. The Court has repeatedly relied on the marketplace metaphor. For a recent example, see *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) (unanimous) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product." (citation omitted)). As Professor Stanley Ingber has noted, "Content-based restrictions leave the public with an incomplete, and perhaps inaccurate, perception of the social and political universe. Thus, these restrictions can undermine the search for truth and distort the process by which citizens make critical decisions." Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy*, 56 GEO. WASH. L. REV. 187, 191 (1987) (book review).

99. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

100. *Id.* (emphasis added).

101. *Id.* Compare Justice Holmes' assertion with Justice Brandeis' contention that the Framers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

102. Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting). "When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions." *Id.*

more information rather than less. Even rational actors might make better decisions when they are not overwhelmed by unlimited options. Nonetheless, First Amendment decisions have consistently tied the two assumptions together, and nowhere is this more evident than in the marketplace metaphor itself.

The marketplace metaphor justifies the assumption that more is better on several bases, only one of which is that more information might aid decision making. The marketplace of ideas ostensibly leads to the emergence of Truth.[103] The best decisions, of course, are based on truth, and the search for truth is fostered by "the dissemination of news from as many different sources, and with as many different facets and colors as is possible."[104] The more competitors who jockey for dominance in the marketplace of ideas, the better the ideas that will ultimately triumph, though of course this assumes that those judging the quality of ideas are rational information consumers.

That said, the primary justification for the assumption that more-is-better is not that it leads to better democratic decision making.[105] Consider Judge Hand's oft-quoted[106] assertion that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[107] It is not that right conclusions will always emerge from discourse that includes a "multitude of tongues." Rather, a diverse discourse is preferable to a discourse whose parameters are dictated by the State.[108]

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

104. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.); *see also* Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Th[e First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . .").

105. "A legitimate government must assure the right of each individual to participate in and influence governmental decision-making, not because decisions so reached are best, but because only decisions so derived deserve obedience. This perspective of free expression is closely aligned with democratic theory." Ingber, *supra* note 98, at 220.

106. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 191–92 (1973) (Brennan, J., dissenting); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

107. *Associated Press*, 52 F. Supp. at 372; THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 176 (1994) (describing the case as articulating the principle of "no censorship" and that "individuals are fully capable of choosing what they would hear, read, or believe").

108. *See* Richard A. Posner, *The Speech Market and the Legacy of* Schenck, *in* ETERNALLY VIGILANT, *supra* note 3, at 121, 142 (observing that government regulators are no more able than ordinary consumers to "sort out truth from falsity" in the marketplace of ideas, and that the speech market is "particularly vulnerable to heavy-handed regulation"). If a diverse discourse were the only goal, the Supreme Court would routinely uphold government regulation to enhance the diversity of discourse. *Compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking a government regulation that required diverse viewpoints in newspapers), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) (upholding a law requiring radio stations to allow individuals a right to respond to attacks). Moreover, the Supreme Court would also routinely uphold government-mandated disclosure requirements in all speech contexts, since such requirements increase the stock of information available in the marketplace. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357

This preference dictates a laissez-faire approach to regulation of the marketplace of ideas. Without the constraint of the First Amendment, the temptation of governments to suppress the speech of critics would simply be too great, as the experience of speech suppression in authoritarian regimes attests. Moreover, the history of speech regulation is replete with examples of the suppression of truth and enshrinement of error.[109] Professor Frederick Schauer explains:

> Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.[110]

The distrust of government that permeates free speech theory applies even when the government attempts to restrict core speech "with the purest of motives."[111]

Anti-paternalism permeates First Amendment doctrines governing core speech.[112] Paternalistic speech regulations attempt to restrict the free flow of information because citizens might misunderstand or misuse the information.[113] Such regulations are fundamentally at odds with our national commitment to democratic self-governance. Moreover, government denigrates the autonomy of citizens[114] when it limits the stock of

(1995) (striking government-mandated disclosure for author of anonymous political pamphlets), *with* Meese v. Keene, 481 U.S. 465, 485 (1987) (upholding mandatory disclosure for foreign "political propaganda" films).

109. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 81–86 (1982) (giving numerous examples, including the persecution of Galileo).

110. *Id.* at 86.

111. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 791 (1988).

112. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.31 (1978) ("The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what the people may hear."); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 582–83 (2004) (noting the dominance of the antipaternalism principle in First Amendment jurisprudence); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 557–58 (1991) ("[T]raditional First Amendment jurisprudence . . . assumes that people are ordinarily the best judges of their own interests."); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212 (1983) ("The Court has long embraced an 'antipaternalistic' understanding of the first amendment.").

113. Professor Dale Carpenter defines paternalism in the First Amendment context as regulation of speech "*justified by the government's belief that speaking or receiving the information in the speech is not in citizens' own best interests*." Carpenter, *supra* note 112, at 582–83. Philosopher Joel Feinberg has written: "[Paternalism] suggests the view that the state stands to its citizens as a parent . . . stands to his children . . . ." 3 JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 4 (1986).

114. "When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones . . . ." MEIKLEJOHN, *supra* note 54, at 27. In the context of commercial speech, see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."). In *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel*, 408 U.S. 753, 762–63

information from which they may draw to decide their collective fates.[115] Respect for autonomy thus demands that the State adopt a vision of the core-speech audience that sees them as capable of sorting through the information that bombards them in the marketplace to discern what is useful and what is true. This vision wavers, however, when it comes to other speech contexts, as the following Section reveals.

### *C. The Implied Audience of Non-Core Speech: A Case Study*

Paternalism was once a perfectly legitimate basis on which to regulate commercial speech.[116] Indeed, practically anything was a perfectly legitimate basis on which to regulate commercial speech[117] prior to its elevation to constitutionally protected status in *Virginia State Board of Pharmacy* in 1976.[118] Before that, a legitimate argument for regulating commercial speech was that advertising manipulates credulous consumers into buying more of a product than they need.[119] Another legitimate argument was that advertising confuses consumers about their best interests by making them subject to the siren song of the lowest price, regardless of quality.[120]

(1972), the Court acknowledged a First Amendment right to "receive information and ideas." And in *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), in examining the constitutionality of a restriction on prisoners' mail, the Court stated, "Both parties to the correspondence have an interest . . . and censorship of the communication between them necessarily impinges on the interest of each."

115. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message."). Speaker autonomy underpins many First Amendment doctrines. For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974), the Court upheld the right of a newspaper to exercise editorial discretion in determining the newspaper's contents. Even in the broadcast context, the government may interfere with speaker autonomy only because, in a medium that requires government allocation to be viable, "the right[s] of the viewers and listeners" are "paramount." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

116. The Court's electoral speech cases also provide a good example of how it veers back and forth between assumptions about the intelligence and sophistication of the audience of campaign-related speech and information. For more, see the excellent discussion by Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights Into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225 (2003).

117. In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Court held that the First Amendment does not protect "purely commercial advertising." For additional discussion, see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993).

118. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (holding that the First Amendment protects commercial speech).

119. Since 1976, states have attempted, mostly unsuccessfully, to use a "demand reduction" argument to justify bans on advertising in a variety of contexts. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 355, 376 (1977) (ban on lawyer advertising); Carey v. Population Servs. Int'l, 431 U.S. 678, 689, 700 (1977) (ban on contraceptive advertising); Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 92–94 (1977) (ban on "For Sale" signs). Even after 1976, the Court upheld a ban on casino advertising despite the "reduction of demand for casino gambling." Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986). For further discussion, see *infra* text accompanying notes 121–28.

120. The State made, and the Court rejected, this argument made in *Bates v. State Bar of Arizona*, 433 U.S. 350, 373–74, 384 (1977). The Court refused to find that price advertising by attorneys was inherently misleading. *Id.* at 372. Instead, the Court believed the absence of attorney advertisements

The revolution in commercial speech jurisprudence came when the Supreme Court substituted a savvier implied audience for the credulous consumers it had previously envisioned. Suddenly, in *Virginia State Board of Pharmacy*, the Court demanded that states treat the receivers of commercial speech as rational actors, capable of parsing the biased claims of advertisers to make "private economic decisions" that are "intelligent and well informed."[121] The Court rejected the State's argument that banning price advertising of pharmaceuticals would protect consumers from irrationally choosing cheaper pharmaceuticals at the expense of higher-quality pharmacy services.[122] The Court roundly condemned the State's attempt to "protect" its citizens by keeping them in "ignorance,"[123] noting that the ban was based on "the reactions it is assumed people will have to the free flow of drug price information."[124] In a 1977 case, the Court even embraced the notion that "more speech" is typically an appropriate remedy for any harms that may flow from commercial speech.[125] Even so, the Court applied not strict but intermediate scrutiny to restrictions on commercial speech.[126] Under the so-called *Central Hudson* test, restrictions of truthful and non-misleading commercial speech would only be upheld if the State established a substantial government interest, directly advanced by the restrictions, which were "not more extensive than is necessary to serve that interest."[127] Henceforth, the Court would not allow states to protect their citizens from themselves, except in a few isolated cases.[128]

As it turns out, the implied audience construct is an excellent vehicle for parsing commercial speech jurisprudence, since the shift from a credulous consumer model to a savvy shopper model largely explains the Court's increasing protection of commercial speech.[129] The aim here,

would leave many consumers poorly equipped to seek legal services. *Id.* at 370. The Court described advertising as a boon to "informed and reliable decisionmaking." *Id.* at 364.

121. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

122. *Id.* at 769–70.

123. *Id.*

124. *Id.* at 769.

125. Linmark Assocs., Inc. v. Twp. of Willingsboro, 431 U.S. 85, 97 (1977) (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

126. *Id.* at 95–97.

127. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). The test for intermediate scrutiny is often called the *Central Hudson* test, after the case which established it. *See id.* Commercial speech is considered less valuable than core political speech, and greater regulation is permitted because commercial speech is more "durable" and hardy and more verifiable than core speech. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 & n.24.

128. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 429 (1993) (prohibitions on lottery advertising); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 342 (1986) (restrictions on casino advertising).

129. Indeed, as Professor Mitchell Berman has noted, "constitutional protection for commercial speech remains mostly predicated on . . . listener interests." Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser*," 55 VAND. L. REV. 693, 724 (2002); *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000) ("Commercial speech doctrine . . . is sharply audience oriented.").

however, is merely to illustrate the phenomenon by comparing two cases, one that adopts a credulous consumer model (and has since been overruled *sub silentio*) and another that adopts the savvy shopper model.[130] This illustration demonstrates that the choice of implied audience is not inevitable but is instead deeply value-laden, a point which also has application in core speech cases.

With that limited objective in mind, compare *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[131] with *44 Liquormart, Inc. v. Rhode Island*.[132] Both cases involve "vice" advertising; specifically, advertising of casino gambling and alcoholic beverages, respectively.[133] *Posadas* demonstrates that even after the Court put commercial speech under the mantle of the First Amendment, application of a credulous consumer model allowed a paternalistic rationale for regulation to succeed. *Posadas* involved a ban on truthful and non-misleading advertisement of legal casino gambling to Puerto Rico citizens.[134]

The basis for the ban was that advertising would "increase the demand for the product advertised."[135] In other words, the government of Puerto Rico believed it knew better than its own citizens where their best interests lay; it felt compelled to protect its citizens from mindlessly succumbing to advertisements and increasing consumption of an activity that would be "bad" for them. Puerto Rico contended that casino gambling by its residents threatened their "health, safety and welfare" by contributing to "the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime."[136] Interestingly, however, the government's fears about the negative secondary effects of gambling did not apply when it came to tourists; indeed, the government wanted *tourists* to mindlessly succumb to casino advertisements, and its restrictions applied only to advertising aimed at residents.[137]

In upholding the Puerto Rico advertising restrictions, the Court found that Puerto Rico had a "substantial" interest in decreasing gambling by residents, thereby protecting their "health, safety, and welfare."[138] One might reasonably have asked why Puerto Rico legalized gambling if it cared so much about the health, safety, and welfare of its

Thus, commercial speech doctrine may be a particularly appropriate realm for application of a construct that focuses on assumptions about audiences latent in the text of judicial opinions.

130. It is more troublesome when the government forces ignorance on its citizens by withholding information than when it forces knowledge on them through disclosure requirements. Mandatory disclosure does not compromise autonomy in the same way as withholding information.

131. 478 U.S. at 328.

132. 517 U.S. 484 (1996).

133. *44 Liquormart, Inc.*, 517 U.S. at 514; *Posadas de P.R. Assocs.*, 478 U.S. at 332.

134. *Posadas de P.R. Assocs.*, 478 U.S. at 332–33.

135. *Id.* at 342.

136. *Id.* at 341 (citation omitted).

137. *Id.* at 332.

138. *Id.* at 341.

citizens, but the Court glossed over this obvious point.[139] The Court, having found a substantial governmental interest, also found that Puerto Rico's chosen statute directly advanced it. Puerto Rico was "reasonable"[140] in assuming that shielding citizens from targeted advertising would decrease their demand for casino gambling, inevitably benefitting them.[141] Finally, and perhaps most controversially, the Court held that Puerto Rico satisfied the last hurdle of intermediate scrutiny: its restrictions were "no more extensive than necessary" to decrease citizen demand.[142] In reaching this conclusion, the Court expressed little faith in the marketplace of ideas as a solution to the State's problem. The Court left it "up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."[143] In other words, the State gets to decide whether its citizens should be trusted to apply their rational faculties to the issue and decide their own best interests, even when presented with truthful "information"[144] from conflicting viewpoints.

*Posadas* turns standard First Amendment assumptions on their heads. The restrictions in *Posadas* banned truthful speech to an audience of Puerto Rican residents based on the assumption that they would be seduced into "overconsuming" casino gambling.[145] The restrictions assumed, and the Court accepted, that Puerto Ricans as a whole, and not merely a small subset of them, would misapprehend their own interests.[146] The Court allowed the State to manipulate its consumers by limiting their stock of information about gambling, and did so, ironically, in the name of protecting them from manipulation by casino advertisers. *Posa-*

139. Indeed, the Court later accepted the argument that since Puerto Rico could have banned casino gambling (but chose not to do so), it could take the "lesser" step of banning advertisements promoting casino gambling. *Id.* at 345–46.

140. *Id.* at 342.

141. *Id.* at 341–42.

142. *Id.* at 343.

143. *Id.* at 344. In addition, the Court concluded that because Puerto Rico could prohibit gambling altogether, it could certainly take the lesser step of prohibiting advertisements for gambling. *Id.* at 346 ("[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.").

144. Some scholars have pointed out that much advertising is not truly "informational" and does not contribute to rational decision making. *See, e.g.*, Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1100–03 (1990). But arguably a rational consumer can disaggregate the informational and non-informational components of an advertisement and make his own determination of value. In the realm of core speech, the First Amendment fully protects some works whose value is not purely or even predominantly informational, but protection of core speech is justified by an interest in fostering individual self-fulfillment that is not present in the realm of commercial speech. *Cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (noting that forms of art like music and songs are protected by the First Amendment).

145. *See Posadas de P.R. Assocs.*, 478 U.S. at 344.

146. *See id.*

*das* rejects not just the rational consumer assumption,[147] but also the assumption "that some accurate information is better than no information at all."[148] *Posadas*, in fact, assumes that citizens would be better off if they did not know that casino gambling existed.[149] The implied audience in *Posadas* is a group of unsophisticated and credulous consumers in need of paternalistic intervention.

It is hard to reconcile this model of the implied audience with the one more commonly applied in core speech cases, and in fact the Court has never tried. Yet the modern trend, even in commercial speech cases, is to give more credit to the targets of commercial speech. Indicative of this trend is *44 Liquormart, Inc. v. Rhode Island*,[150] which held unconstitutional a ban on advertising retail prices of alcoholic beverages,[151] though the Justices had trouble agreeing on a single rationale for the holding. A majority of Justices believed that the ban on price advertising failed the *Central Hudson* test,[152] although at least four Justices suggested that intermediate scrutiny was insufficiently protective of the speech interests involved in the case.[153] The State's reason for the ban on price advertising was to inhibit alcohol consumption among its citizens.[154] Al-

147. There was a five member majority. Justice Brennan was joined in his dissent by Justices Marshall and Blackmun. *Id.* at 348 (Brennan, J., dissenting). Justice Stevens dissented separately in an opinion joined by Justices Marshall and Blackmun. *Id.* at 359 (Stevens, J., dissenting).

148. *Id.* at 358 (Brennan, J., dissenting) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980)). The dissenters likewise contended that "[t]he First Amendment presupposes that 'people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them.'" *Id.* (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)).

149. *See id.* (Brennan, J., dissenting) ("I would hold that Puerto Rico may not suppress the dissemination of truthful information about entirely lawful activity merely to keep its residents ignorant."); *see also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 858 (1999) ("In . . . *Posadas* . . . , the reason for keeping the information from potential consumers was not based on a concern about such information coming from any seller, but simply on a desire to keep such information from the audience as a general matter.").

150. 517 U.S. 484 (1996). In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995), the Court held, 9-0, that a ban on truthful advertising of alcohol content on beer labels violated the First Amendment. The Court rejected the notion that a different constitutional standard should apply to "vice" advertising than to other forms of commercial speech. *Id.* at 489–90.

151. *44 Liquormart, Inc.*, 517 U.S. at 489.

152. *Id.* at 508 (principal opinion supported by four votes); *see also id.* at 517–18 (Scalia, J., concurring in part and in the judgment) (expressing disapproval of the *Central Hudson* test as "hav[ing] nothing more than policy intuition to support it," but agreeing that it "would prohibit the challenged regulation"); *id.* at 523 (Thomas, J., concurring in part and in the judgment) ("I do not join the principal opinion's application of the *Central Hudson* balancing test because I do not believe that such a test should be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."); *id.* at 528–29 (O'Connor, J., with whom Rehnquist, C.J., Souter and Breyer, JJ., join, concurring in the judgment) (concluding that the ban failed *Central Hudson*).

153. *See id.* at 501 (principal opinion supported by three votes) (arguing that bans on commercial speech "for reasons unrelated to the preservation of a fair bargaining process" deserved more "rigorous" First Amendment review); *id.* at 523 (Thomas, J., concurring in part and in the judgment) (arguing that a stricter standard than intermediate scrutiny should apply).

154. *See id.* at 492–94 (majority opinion).

though this counted as a "substantial" state interest,[155] the Court barred the State from accomplishing it by depriving its citizens of truthful information. The State contended that a ban on advertising would help keep alcohol prices high, thus limiting consumption.[156] The principal opinion found, however, that a ban on price advertising would not "directly advance[]" the State's goal because there was no evidence indicating that an advertising ban would have "significantly reduce[d]" consumption.[157] More to the point, the State had other weapons in its regulatory arsenal, such as taxation of alcoholic beverages, that would not target speech.[158] Thus, a complete ban on price advertising was "more extensive than necessary" to achieve the State's goal.[159]

A dominant theme of the opinions in *44 Liquormart* is the First Amendment's abhorrence of paternalistic regulation, even when applied to commercial speech. The principal opinion chided Rhode Island for attempting to regulate based "solely on the offensive assumption that the public will respond 'irrationally' to the truth."[160] In other words, the State was constitutionally required to assume that the audience, when confronted with alcohol price advertising, would not begin mindlessly guzzling up the cheapest alcohol possible.[161] Even in the realm of commercial speech, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[162] Echoing the sentiments expressed in the principal opinion, Justice Thomas, concurring in the judgment, went even further, asserting that *any* regulation of commercial speech intended to keep consumers ignorant was *per se* unconstitutional.[163]

With *44 Liquormart*, the Court imposed a construction of the implied audience in the realm of commercial speech that was consistent with the construction it uses in the realm of core speech. Commercial speech jurisprudence, however, provides suggestive evidence about how

155. *Id.* at 528–29 (O'Connor, J., concurring in the judgment) (stating that all parties agree the State's interest was substantial and that the ban directly advanced it, but holding that the ban nonetheless was unconstitutional because it was more extensive than necessary).

156. *Id.* at 494 (majority opinion).

157. *See id.* at 504–05 (principal opinion supported by four votes) (emphasis omitted).

158. *Id.* at 507.

159. *Id.*

160. *Id.* at 503 (principal opinion supported by three votes). One can also read in the opinion a respect for the processes of democratic self governance. An increase in taxes on alcoholic beverages will make citizens aware of the State's temperance policy in a way that a ban on price advertising of alcoholic beverages will not.

161. *Id.* at 507–08 (principal opinion supported by four votes).

162. *Id.* at 503 (principal opinion supported by three votes). Though Justice Thomas did not sign on to this portion of the principal opinion, he agreed with its sentiments. *See id.* at 518 (Thomas, J., concurring) (contending that restrictions on speech are "*per se* illegitimate" when based on an asserted interest "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace"). Thus, at least four Justices explicitly disavowed paternalism as a basis for regulating commercial speech.

163. *Id.* (Thomas, J., concurring).

core speech jurisprudence might look different without the reigning assumptions of rationalism and anti-paternalism.

## III. PREDICTABLE IRRATIONALITY AND OTHER CRITIQUES

First Amendment jurisprudence assumes, for most purposes, that the implied audience of core speech is comprised of rational information processors. But what if this assumption is demonstrably false? Or what if even rational actors make better decisions with less, rather than more, information? Traditional First Amendment scholarship has leveled two criticisms at the rationality assumption underlying the marketplace of ideas paradigm, one based in market dysfunction and the other in human dysfunction.[164] The first is that even if citizens are mostly rational, the minimum conditions for a functioning marketplace of ideas are not met.[165] In other words, because the marketplace of ideas does not truly provide information from a diversity of sources, citizens cannot use the marketplace to make rational decisions. The second criticism is that the rationality assumption is simply wrong, because evidence indicates that citizens are not rational.[166] This second vein of criticism has been bolstered by a growing body of scholarship incorporating the insights of cognitive psychology. Cognitive psychology has already challenged the rational actor assumption of classical economics,[167] and it is poised to challenge the rationality assumption of First Amendment law.[168] In this Section, however, I hope to show that criticisms of the rationality assumption do not fundamentally undermine the reasons for applying it.

164. Stanley Ingber summarizes these criticisms succinctly as follows:

> [R]eal world conditions . . . interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals.

Ingber, *supra* note 8, at 5.

165. *Id.*

166. *Id.* at 15.

167. Judge Posner describes the rationality assumption in traditional economics as follows: "The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.' . . . Behavior is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (6th ed. 2003) (internal citation omitted); *see also* RICHARD H. THALER, QUASI RATIONAL ECONOMICS xiii (1991) ("[A]ll economic models of consumer choice are based on rational behavior . . . ."). Drawing insights from cognitive psychology, behavioral economics questions the rationality assumption and seeks to demonstrate how humans depart from what rationality would dictate in predictable ways. *See* Sunstein, *supra* note 9, at 1.

168. *See generally* Bambauer, *supra* note 13, at 651; Horwitz, *supra* note 21, at 4–5.

### *A. The Traditional Critique: Market Dysfunction*

According to critics, the marketplace of ideas cannot function because a few powerful voices drown out all others.[169] The resulting lack of diversity in public discourse deprives citizen of the information they need to make rational decisions and denies them their right to participate in policy formation.

Some First Amendment scholars have questioned the marketplace metaphor because of the dramatic gap between the ideal versus the real speech marketplace. Owen Fiss is a leading exponent of the market dysfunction critique.[170] Like other market dysfunction critics, Fiss builds his critique on the assertion that the marketplace of ideas has changed since the First Amendment was ratified.[171] In 1791, public debate was rich with the voices of citizens from across the political and economic (though not racial or gender) spectrum, but "[t]oday public debate is dominated by the television networks and a number of large newspapers and magazines."[172] According to Fiss, the concentration of the mass media distorts the marketplace of ideas because corporate owners of the mass media place maximizing profit above serving the public interest.[173] One distortion is the exclusion of certain types of views—namely, in the words of Charles Fried, those that are "unpopular, unfamiliar, and ill-funded."[174] Another distortion is the exclusion of certain types of speakers—the poor, the poorly educated, women, and minorities.[175] As a result, the market does not serve the needs and interests of citizens, and the electorate as a whole is deprived of the information required for meaningful self-governance.

The market dysfunction critique compels Fiss and others like him to an obvious prescriptive solution, namely benign government intervention to ensure a diverse and fully participatory marketplace of ideas.[176] Fiss

169. Ingber argues that

> monopolitistic practices, economies of scale, and an unequal distribution of resources have made it difficult for new ventures to enter the business of mass communications. Because these factors limit entry to the economically advantaged, voices, which might have been heard in the time of the town meeting and pamphleteer, today may be effectively quelled.

Ingber, *supra* note 98, at 188–89.

170. *See, e.g.*, Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

171. For criticism of the historical argument, see L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 182–84 (1987).

172. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787 (1987).

173. *See id.*; *see also* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1211–12 (1996) (observing that "[a] broadcaster's paramount objective is the creation and maintenance of an audience possessed of certain demographic characteristics" and contending that "commercial speech doctrine provides a more analytically sound basis for justifying government regulation of broadcasters").

174. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 250 (1992).

175. *See generally* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 163–96 (1987).

176. *See, e.g.*, Ingber, *supra* note 8, at 5 ("Scholarly critics of the marketplace model argue that the *model itself* suggests a vital need for government regulation of the market.").

contends that government should "act as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy."[177] It is important to note that the argument for state intervention does not *necessarily* assume that the electorate is irrational. Rather, it assumes that the government must guarantee that citizens receive the necessary inputs of rational decision making, which are not now available in the marketplace of ideas.[178] At its heart, the market dysfunction argument views the implied audience as a helpless captive of powerful media forces, unable or unwilling to free itself to seek information from other outlets. It also calls for powerful though ostensibly benign state intervention in the field of free expression. Regardless of the descriptive merits of the market dysfunction critique, its normative agenda to improve the market has had little traction outside the context of broadcasting,[179] and even there its influence appears to be waning.[180]

177. *See* Fiss, *supra* note 172, at 788.

178. It is worth noting that government paternalism directed to increasing the stock of information available to citizens is less troubling than government paternalism restricting the stock of information. Even so, both involve the government choosing for its citizens which information is worthy of their attention, and the government already does this through its agenda-setting role. *See* discussion *infra* Part IV.B.3.

179. In the era before government regulation of broadcasting, "[c]ompeting stations broadcast[ed] at the same frequency in the same geographic location," leading to signal interference, and ultimately to chaos. MARC A. FRANKLIN ET AL., MASS MEDIA LAW 76 (7th ed. 2005). As a result, broadcasters sought, and got, federal regulation of the airwaves. JEREMY HARRIS LIPSCHULTZ, FREE EXPRESSION IN THE AGE OF THE INTERNET: SOCIAL AND LEGAL BOUNDARIES 60 (2000) ("Regulation was demanded by existing broadcasters, who wanted to protect their stake in a new industry and did not want new players to interfere with and squelch less powerful signals."). Congress passed the Radio Act of 1927 and then a few years later the Communications Act of 1934. *Id.* at 61. Both Acts assigned the federal government an active role in allocating the airwaves to serve public ends. Specifically, the Communications Act of 1934 commanded the Federal Communications Commission (FCC) to issue and deny licenses to broadcasters as dictated by "public interest, convenience, or necessity." *Id.* Pursuant to this authority, the FCC has over the years employed various measures to ensure that a diversity of views is broadcast to the public. One of these measures is the now-defunct fairness doctrine, which required broadcasters to present both sides of controversial issues. *Id.* at 67. As part of the doctrine, the FCC required any broadcast licensee whose programming contained a "personal attack" on the character or integrity of a person or group to provide them "a reasonable opportunity to respond over the licensee's facilities." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 373–74 (1969). The Court upheld the constitutionality of the FCC's "personal attack" rule in *Red Lion Broadcasting Co. v. FCC*, and in the process signed off on the notion that the marketplace of ideas might sometimes need a boost from government. *Id.* at 390. In *Red Lion*, the Court justified government intervention to promote a diversity of views on the unique characteristics of the broadcast medium, particularly the "scarcity of radio frequencies." *Id.* Broadcasters accede to certain conditions when they accept a license to use the airwaves and "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community." *Id.* at 389. According to the Court, the rights of broadcasters as speakers are trumped by the rights of "viewers and listeners" to receive information; to hold otherwise would allow broadcasters to use their government-granted license to "monopoliz[e]" the marketplace of ideas. *Id.* at 390. The Court goes to great pains explaining that its holding is a response to a structural distortion in the marketplace of ideas caused by spectrum scarcity. This, and only this, can justify direct government intervention, even when motivated by a desire to enhance diversity in public discourse. *See id.*

180. The FCC has argued that the scarcity doctrine no longer justifies the unique application of the First Amendment to broadcast regulations designed to enhance diversity. Syracuse Peace Council,

### *B. Cognitive Psychology and the Human Dysfunction Critique*

A more foundational criticism of the marketplace ideal is that its faith in human reason is misplaced. Even if the marketplace functions perfectly, truth cannot emerge if human beings are too lazy to seek it or if they willfully cling to irrational beliefs.[181] A sampling of recent surveys suggests the extent to which the citizenry is uninformed and, even worse, misinformed about current events. A July 2008 survey revealed that fifty-nine percent of Americans reported knowing little or nothing about either of the presidential contenders' policy positions,[182] though an earlier survey indicated that eighty-four percent of Americans knew that Oprah Winfrey was campaigning for Barack Obama.[183] A March 2008 survey indicated that only twenty-eight percent of Americans were aware of the approximate number of casualties in the war in Iraq.[184] Though Americans' dearth of awareness of political events might be explained away by the concept of "rational ignorance,"[185] the extent of irrational ignorance is alarming. In place of facts, many Americans substitute fictions about politics and everything else: twelve percent of Americans surveyed in 2008 believed that Barack Obama was Muslim, despite extensive media coverage refuting this misperception.[186] Worse, according to a survey re-

2 F.C.C.R. 5043, 5058 (1987) ("[T]he dramatic transformation in the telecommunications marketplace provides a basis for the [Supreme] Court to reconsider its application of diminished First Amendment protection to the electronic media."); *see also* Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (rejecting the scarcity rationale). The Supreme Court has declined to extend the broadcast paradigm to other media. *See* Reno v. ACLU, 521 U.S. 844, 868–70 (1997) (declining to apply the *Red Lion* paradigm to the Internet because it is not characterized by scarcity and has not been historically subject to regulation"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) (declining to extend *Red Lion* to cable television); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional a statute granting political candidates the right to reply to attack on their records in newspapers). For a good survey of the Court's jurisprudence in this area, read Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

181. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965–66 (1978); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1644–47 (1967); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 135 (1989).

182. Pew Research Ctr. for the People & the Press, *Candidates' Policy Positions Still Not Widely Known*, PEWRESEARCHCENTERPUBLICATIONS, July 16, 2008, http://pewresearch.org/pubs/899/candidates-policy-positions-still-not-widely-known.

183. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, POLITICAL KNOWLEDGE UPDATE: AWARENESS OF IRAQ WAR FATALITIES PLUMMETS 2 (2008), http://people-press.org/reports/pdf/401.pdf.

184. *Id.* Many Americans are ignorant of basic political information. A 2004 study, for example, revealed that only thirty-one percent of Americans knew that William Rehnquist was Chief Justice of the Supreme Court (though eighty-six percent knew that Dick Cheney was Vice President). Stephen Earl Bennett, *Political Ignorance Revisited*, PUBLIC OPINION PROS, Dec. 2005, http://www.publicationopinionpros.norc.org/features/2005/dec/bennett.asp.

185. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 928 (2006) (citing "[a] vast body of empirical studies demonstrat[ing] citizens' lack of political knowledge," but observing that public choice theory explains why "the public's ignorance is rational").

186. Michael Dimock, *Belief that Obama Is Muslim Is Durable, Bipartisan—But Most Likely to Sway Democratic Votes*, PEWRESEARCHCENTERPUBLICATIONS, July 15, 2008, http://pewresearch.org/pubs/898/belief-that-obama-is-muslim-is-bipartisan-but-most-likely-to-sway-democrats.

ported in the *New York Times*, "Americans are as likely to believe in flying saucers as in evolution."[187] And eighteen percent of Americans believe the sun orbits the earth.[188]

Cognitive psychology provides a new window on these lamentable statistics and, in the process, raises questions about the ideal of rationality and whether most citizens would be better off even if the marketplace ideal became a reality. "Cognitive psychology is concerned with internal processes, mental limitations, and the way in which the processes are shaped by the limitations."[189] One of the basic insights of cognitive psychology is that human decision making is not perfectly rational.[190] This insight, which is also the basis for behavioral economics,[191] is incorporated in a concept known as "bounded rationality."[192] According to Herbert Simon, "boundedly rational agents experience limits in formulating and solving complex problems and in processing (receiving, storing, retrieving, transmitting) information."[193] Individuals become boundedly rational when complex decision-making environments tax their cognitive faculties. In the face of complexity, individuals typically employ heuristics—i.e., "mental shortcuts"[194]—to aid their decision making, but these heuristics can cause decision making to depart from what strict rationality would dictate. Though my aim here is not to delve deeply into the rich literature of cognitive psychology and behavioral economics, a couple of examples of how heuristics might impede fully rational decision making

187. Nicholas D. Kristof, *'With a Few More Brains . . . ,'* N.Y. TIMES, Mar. 30, 2008, at WK14.

188. Sam Wang & Sandra Aamodt, *Your Brain Lies to You*, N.Y. TIMES, June 27, 2008, at A19.

189. Daniel Kahneman et al., *Preface* to JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES xi, xii (Daniel Kahneman et al. eds., 1982). In addition to cognitive biases, emotion can also cloud humans' abilities to make rational decisions. For further discussion, see Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 3–4 (2007) (discussing the ways in which emotions distort decision making).

190. For these purposes, a decision is rational if it (1) "is based on the decision maker's current assets," monetary as well as psychological; (2) "is based on the possible consequences of the choice"; (3) calculates the likelihood of uncertain consequences "according to the basic rules of probability theory"; and (4) is chosen with regard for the "constraints" of probable outcomes and the "values or satisfactions associated" with those outcomes. REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 18 (2001). Based on this definition, research in psychology shows that not only do people often make "patently irrational" decisions, they are "irrational in *systematic* ways—ways related to their automatic or 'bounded' thinking habits." *Id.* at 22.

191. *See* Jeffrey L. Harrison, *Happiness, Efficiency, and the Promise of Decisional Equity: From Outcome to Process*, 36 PEPP. L. REV. 935, 937 (2009) ("[C]onventional economics is based on behavioral assumptions that have over the last twenty-five years come under increasing scrutiny. Principal among these assumptions is that people are rational and motivated by self-interest alone.").

192. *See* Herbert A. Simon, *Introductory Comment*, *in* ECONOMICS, BOUNDED RATIONALITY AND THE COGNITIVE REVOLUTION 3, 3–7 (Herbert A. Simon et al. eds., 1992).

193. Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 553 (1981) (citing HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL 198–99 (1957)).

194. *See* BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS 57 (2004); *see also* HASTIE & DAWES, *supra* note 190, at 95 ("People rely on cognitive strategies that 'work' most of the time; are cognitively economical; and are robust in the sense that they are durable in the face of incomplete information, changing situations, and momentary distraction. But most of these strategies also produce signature errors and biases . . . .").

may help the reader understand the emerging challenge to the marketplace of ideas.

One example is the framing effect: research reveals that how a question is framed fundamentally affects peoples' answers. In a well-known experiment, Nobel Prize winners Daniel Kahneman and Amos Tversky asked research subjects to fill out questionnaires about how to handle a disease outbreak.[195] Subjects were asked to imagine that 600 people would contract a life-threatening illness for which there are two possible treatments. They were then told: "If Program A is adopted, 200 people will be saved. . . . If Program B is adopted, there is a 1/3 probability that 600 people will be saved, and 2/3 probability that no people will be saved."[196] In this scenario, seventy-two percent of respondents chose Program A, preferring saving 200 lives for certain to the risk of saving no one.[197] Kahneman and Tversky then reframed the question and told respondents: "If Program C is adopted 400 people will die. . . . If program D is adopted there is [a] 1/3 probability that nobody will die, and [a] 2/3 probability that 600 people will die."[198] This question presented respondents with exactly the same choice as before, but this time seventy-eight percent chose treatment D.[199] When asked who they would save, respondents made one choice; when asked who they would let die, respondents made another. The disparity in results is explained by risk aversion and the different ways humans perceive losses and gains.[200] The first scenario focuses on the saving of 200 people as a sure gain; the second focuses on the death of 400 as a sure loss. The results are the same, but respondents' perception of risk changes when the options are described differently.

Framing highlights the extent to which human decision making departs from the ideal of rationality. In Kahneman and Tversky's study,

195. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981) [hereinafter Tversky & Kahneman, *Framing*]. This example is used by HASTIE & DAWES, *supra* note 190, at 303; SCHWARTZ, *supra* note 194, at 64–65; and Bambauer, *supra* note 13, at 682. *See also* Barbara McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259, 1259 (1982) (demonstrating that people respond differently to treatments when presented in terms of survival rates versus mortality rates, even where the outcomes of the treatments are exactly the same). For more on the framing effect, see David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 334, 334–35 (Thomas Gilovich et al. eds., 2002), or Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 343 (1984).

196. Tversky & Kahneman, *Framing*, *supra* note 195, at 453.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* ("Inconsistent responses to [the] problems . . . arise from the conjunction of a framing effect with contradictory attitudes toward risks involving gains and losses."). Tversky and Kahneman refused to label the "preference reversals" seen in the differing responses to the two scenarios as "necessarily irrational." *Id.* at 458. Instead, "[l]ike other intellectual limitations, discussed . . . under the heading of 'bounded rationality,' the practice of acting on the most readily available frame can sometimes be justified by reference to the mental effort required to explore alternative frames and avoid potential inconsistencies." *Id.*

individuals appeared to have a difficult time transcending the "frame" to get at the true choice presented by the hypothetical scenario. Their choices reflected intuition rather than reason, making it hard to avoid the conclusion that the choices were irrational. Even worse, this form of irrationality resists being "cured" by more education or greater knowledge.[201] Susceptibility to the framing effect makes both sophisticated and unsophisticated audiences susceptible to "manipulation."[202] Though skillful use of framing is a staple of courtroom advocacy, and, arguably, of all persuasive speaking, unscrupulous use of framing is the hallmark of the propagandist and demagogue. At a minimum, research on framing undermines the assumptions of First Amendment jurisprudence that citizens are rational processors of information.

This assumption is further undermined by research demonstrating that humans systematically err in filtering available information to choose which is relevant and which is not. One example of a systematic reasoning error is the availability heuristic, a logical fallacy that has direct relevance to public discourse and public policy decisions.[203] The availability heuristic means that individuals are likely to believe something if it is repeated often enough, thus making it the "evidence" that is most "available" to their consciousness when making decisions.[204] The availability heuristic also makes people more likely to call to mind events that are vivid or emotionally charged, and thus more likely to accept these events as relevant to their decision making.[205] The availability heuristic explains, for example, why people perceive flying as more risky than driving. The availability heuristic may even lead to an availability cascade, in which not just individuals but groups are more likely to believe a statement or a vivid anecdote that is frequently repeated in public

201. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 n.26 (2001) (listing sources supporting the assertion that experts are subject to framing and other cognitive biases). Tversky and Kahneman note that "[t]he reliance on heuristics and the prevalence of biases are not restricted to laymen. Experienced researchers are also prone to the same biases—when they think intuitively." Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 189, at 3, 18.

202. Bambauer, *supra* note 13, at 683.

203. Another fallacy in this regard that may have relevance for public policy decisions is the optimism bias that leads humans to consistently view their own odds of avoiding an unpleasant outcome as better than they actually are. Armor & Taylor, *supra* note 195, at 336. Another fallacy of relevance to public discourse is the herd mentality, in which individuals may go along with what they believe to be the majority consensus. This fallacy helps explain stock market bubbles and crashes. *See* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 148–55 (2000) (discussing overconfidence in market behaviors); *see also* David Hirshleifer & Siew Hong Teoh, *Thought and Behavior Contagion in Capital Markets*, *in* HANDBOOK OF FINANCIAL MARKETS: DYNAMICS AND EVOLUTION 1, 1–46 (Thorsten Hens & Klaus Reiner Schenk-Hoppé eds., 2009). Crime may even increase crime in response to high prosecution rates. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) ("[T]he perception that one's peers will or will not disapprove exerts a much stronger influence than does the threat of a formal sanction on whether a person decides to engage in a range of common offenses . . . .").

204. Tversky & Kahneman, *supra* note 201, at 11–14.

205. *Id.*

discourse.[206] The availability heuristic explains why politicians commonly use vivid anecdotes rather than dry statistics in discussing public policy issues. It also allows politicians to manipulate public discourse, and ultimately public policy formation. Taken together, the evidence regarding cognitive biases threatens one of the foundational assumptions of the marketplace of ideas; namely, that humans are rational actors, capable of sifting through available information, sorting the wheat from the chaff, and ultimately reaching truth.

More alarming is evidence that more information does not always lead to better decision making, even for experts.[207] In fact, as Cass Sunstein and Richard Thaler have written, the argument "that more is necessarily better . . . is quite implausible in many contexts."[208] Research reveals that increased information may lead to decision paralysis. A 2000 study involving jams—yes, the kind made from fruit—showed that shoppers presented with the ability to sample twenty-four varieties ended up buying jam only three percent of the time.[209] In contrast, shoppers presented with only six varieties of jam ended up buying jam thirty percent of the time.[210] A more recent study found that employees were less likely to participate in a 401(k) plan as the options of funds in which to invest increased.[211]

Not only does additional information lead to decision paralysis, it may also change the underlying decision, even if the additional information is irrelevant.[212] One study, for example, found that the outcome of a mock jury trial changed when the "jurors" were presented with three possible verdicts as opposed to two, even though the additional options were irrelevant.[213] In another study, when participants were asked to choose between a "low-end" camera and a "mid-level" camera, about fif-

206. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 728 (1999).

207. Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 456–57 (2003) ("Studies show that by trying to evaluate more information, individuals who are accountable often overinterpret information, focus too much on less relevant information while ignoring key (or 'diagnostic') information, and pay too much attention to conflicting information in anticipation of criticism from the party they are accountable to.").

208. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1196 (2003); *see also* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 62, 80 (1988); SCHWARTZ, *supra* note 194, at 3. This also means that people are easily manipulated by propaganda.

209. Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995, 996–97 (2000).

210. *Id.* at 997.

211. Sheena Iyengar et al., *How Much Choice Is Too Much?: Contributions to 401(k) Retirement Plans* 9 (Pension Research Council, Working Paper No. 2003-10). Even experienced professionals fall prey to decision paralysis when faced with numerous options. *See* Bambauer, *supra* note 13, at 683.

212. *See* SCHWARTZ, *supra* note 194, at 1–8. Increased information—in the form of exposure to both sides of an issue—may even lead to increased polarization of attitudes. For additional discussion, see Lee Sigelman & Carol K. Sigelman, *Judgments of the Carter-Reagan Debate: The Eyes of the Beholders*, 48 PUB. OPINION Q. 624, 624 (1984).

213. Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 290–91 (1996).

ty percent chose each one.[214] But when participants were asked to choose between three cameras—low-end, mid-level, and high-end—seventy-two percent chose the mid-level camera.[215] In these contexts, more information obviously affected decisions but did not make them more rational. That said, it is certainly not always the case that more information leads to worse decisions. "[I]ncreased quantities of irrelevant information" impede decision making, but "increased amounts of relevant information" improve it.[216] The trick, of course, is sorting the relevant from the irrelevant, a task which the marketplace metaphor leaves to the people themselves, at least in the realm of core speech.

### *C. Is More Intervention in the Marketplace of Ideas Justified?*

As the discussion above suggests, an emerging body of evidence suggests that defects in human reasoning are complex and pervasive, and that humans often lack the ability meaningfully to process information "from a multitude of tongues," particularly when trying to formulate policies for the future. Indeed, Professor Derek Bambauer, one of the few scholars to apply cognitive psychology to First Amendment law, has argued that such evidence demonstrates the descriptive failure of the marketplace metaphor; he goes further (much further) by concluding that this descriptive failure justifies jettisoning the marketplace metaphor as "a framework for decisions about regulating communications," clearing the way for government to play a stronger role in channeling information into and out of the public sphere.[217]

Although Bambauer's work is useful and engaging, he overplays his hand to the extent he rejects, seemingly altogether, the marketplace metaphor's foundational assumption of human rationality.[218] People are sometimes irrational in quite predictable ways, but they are not always, or even predominantly, irrational. People use cognitive heuristics because they *generally* work, and pointing to instances where they do not work does not undermine this fundamental principle. On average, heuristics help people make "good enough" decisions, and they reduce deci-

214. *Id.* at 288 (citing Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 290 (1992)).

215. *Id.*

216. Charles A. O'Reilly, III, *Individuals and Information Overload in Organizations: Is More Necessarily Better?*, 23 ACAD. MGMT. J. 684, 685 (1980); *see also id.* at 692 (confirming these findings).

> When information is limited, a menu of countless options increases the costs of decisions without increasing the likelihood of accuracy. But when choosers are highly informed, the availability of numerous options decreases the likelihood of error and does not greatly increase decision costs, simply because informed choosers can more easily navigate the menu of options.

Sunstein & Thaler, *supra* note 208, at 1197–98.

217. Bambauer, *supra* note 13, at 696. As I shall contend in the next section, ideals have uses even if they are never fully realized. *See infra* Part IV.B.7.

218. Like Bambauer, Paul Horwitz suggests that behavioral analysis may "sweep aside some of the prevailing metaphors of First Amendment theory." Horwitz, *supra* note 21, at 8–9.

sion-making costs in the face of complexity and uncertainty.[219] This helps explain, in part, why "democracy seems to be working pretty well" despite citizens' "widespread ignorance" of many basic political facts.[220] As political scientists Richard Lau and David Redlawsk have noted, even if American voters cannot always articulate reasoned positions on policy issues, they may still be able to "vote[] 'correctly'" and "'in accordance with what their fully informed preferences would be.'"[221] In the political realm, voters use traits such as a candidate's party affiliation or ideology as proxies for the candidate's policy positions;[222] as a result, voting decisions may end up being more rational than the relatively low levels of political knowledge amongst the citizenry would predict. While such cognitive strategies are not always effective, there is no evidence that irrationality so pervades voter decision making that we must give up on democracy.

Moreover, it is by no means clear that one can generalize from evidence that individuals are subject to cognitive biases in some settings to the conclusion that decision making in society at large is fundamentally flawed in a way that demands government action. There are clearly instances in which aggregate decisions are more rational than individual decisions[223] and in which the group "knows" more than the individual.[224] James Surowiecki wrote about this phenomenon in his book, *The Wisdom of Crowds.* Drawing on a number of studies of group decision making, Surowiecki showed that "[i]f you ask a large enough group of diverse, independent people to make a prediction or estimate a probability, and then average those estimates, the errors each of them makes in coming up with an answer will cancel themselves out."[225] The result is that groups of individuals acting independently of one another are very good predictors of certain phenomena, such as whether a horse is likely to win a race,[226] or whether a company is likely to prosper.[227] Indeed, this is why financial markets as a whole tend to outperform all but a handful of individual investors.[228] Though it is easy to point to examples of irrationality in markets—particularly in the spring of 2010—the point is that irratio-

219. *See id.* at 13.

220. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 951 (2001).

221. *Id.*

222. *See id.* at 952–53.

223. *Id.* at 952 ("Aggregate opinion can be much more stable and apparently 'rational' than individual opinions, as long as error in individual opinions is assumed to be random." (citation omitted)). The problem, of course, is that cognitive biases lead to non-random errors, and groups are sometimes subject to "group think." *See generally* JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS 3–22 (2004).

224. *See generally* SUROWIECKI, *supra* note 223, at 3–22.

225. *Id.* at 10.

226. *Id.* at 14.

227. *Id.* at 234–35.

228. *Id.*

nality is a deviation from the norm. On average, though certainly not always, collective decision making by diverse groups reaches rational results.

Even if the assumptions underlying marketplace theory are false, it does not necessarily follow that citizens would be better served by increased filtering of information flowing into the marketplace of ideas. Experts are often subject to the same cognitive biases as the rest of us, and self-interest is just as likely to taint their decisions.[229] There is no guarantee that experts would be better at filtering information to provide the amount that is optimal for rational decision making. Moreover, as demonstrated below, filtering is unlikely to be performed by completely disinterested parties, and less than perfect decision making may be a reasonable price to pay to preserve First Amendment, and indeed democratic, values.

## IV. JUSTIFICATIONS FOR CLINGING TO A FLAWED IDEAL

Over the years, the assumptions underlying much of First Amendment jurisprudence, including the rationality assumption and the more-is-better assumption, have come under intense criticism. Now, a body of scholarship lying outside the legal realm forms the basis of a new challenge to these assumptions. This creates a problem, not just for First Amendment theory, but for law more generally: the rationality and more-is-better assumptions are embedded in the marketplace metaphor because they are embedded in democratic theory and legal doctrine. What is needed are new, or simply comprehensively restated, justifications for clinging to what is clearly a flawed ideal.

### *A. Procedural Concerns*

Consider again the justification for adhering to the rationality ideal proffered by Chief Justice Roberts and Justice Alito in *FEC v. Wisconsin Right to Life, Inc*.[230] The Justices insisted that First Amendment protection hinges on a "reasonable interpretation" of the contested speech rather than its[231] "*actual effect* . . . on a particular segment of the target au-

229. *See supra* notes 203–04 and accompanying text.

230. 551 U.S. 449 (2007). For a full discussion of the case's holding and the disagreements amongst the Justices in the majority, see *supra* note 14. Of course the refusal to apply an actual-effect test may result in the suppression of speech in some instances. In *Gitlow v. New York*, the Court affirmed a conviction for advocacy of criminal anarchy where the defendant published a Manifesto for the Left Wing of the Socialist Party under the incitement principle. The Court found "no evidence of any effect resulting from the publication and circulation of the Manifesto." Gitlow v. New York, 268 U.S. 652, 656 (1925). Yet, it reasoned "the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen." *Id.* at 669. The Court also wrote: "A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration." *Id.*

231. *Wis. Right to Life, Inc.*, 551 U.S. at 469 (principal opinion supported by two votes). Chief Justice Roberts and Justice Alito would have adopted a test requiring a court to protect the campaign

dience."[232] A reasonable interpretation, of course, hinges on imagining how a reasonable audience would decode the speech. Though the Justices did not fully explain the justification for using an impliedly rational audience as the benchmark for judging speech, they did contend that an actual-effect test would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result" and would "unquestionably chill a substantial amount of political speech."[233]

Let's look at the justifications more fully. Certainly experts and probably polling data would be needed in order to determine the actual effect of contested speech, and both experts and polls prolong litigation and drive up its costs. It is worth exploring further, however, whether an actual-effect test would be feasible. In trademark law, courts are routinely asked to rely on survey evidence to determine infringement claims.[234] The test for infringement is whether a defendant's use of the plaintiff's trademark is "likely to cause confusion, or to cause mistake, or to deceive."[235] The goal of this "likelihood of confusion" test is to determine whether "an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question."[236] Courts concede that the likelihood of confusion test is difficult to apply because it depends on "varying human reactions."[237] They nevertheless gamely plug away at assessing the likelihood of confusion based on a number of factors:

speech at issue only if "no reasonable interpretation" of it would place it within the unprotected category of "express advocacy" under BCRA § 203. *Id.* at 469–70. Justices Scalia, Kennedy, and Thomas believed that even this test failed to draw a bright enough line to protect core political speech. *Id.* at 492 (Scalia, J., concurring in part and concurring in the judgment).

232. *Id.* at 469 (principal opinion supported by two votes) (emphasis added) (citing Buckley v. Valeo, 424 U.S. 1, 43 (1976) (per curiam)).

233. *Id.*

234. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23 cmt. c (1995) ("Consumer surveys can be helpful in establishing whether confusion is likely."); *see also, e.g.*, Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964, 974 (10th Cir. 2002) ("[E]vidence [of actual confusion] may be introduced through surveys, although their evidentiary value depends on the methodology and questions asked."); CAE, Inc. v. Clean Air Eng'g, Inc., 267 F.3d 660, 685 (7th Cir. 2001) ("[E]vidence of actual confusion, if available, is entitled to substantial weight in the likelihood of confusion analysis . . . ."); Rust Env't & Infrastructure, Inc. v. Teunissen, 131 F.3d 1210, 1218 (7th Cir. 1997) ("Actual confusion can be shown by either direct evidence or by survey evidence."); Michael J. Allen, *The Role of Actual Confusion Evidence in Trademark Infringement Litigation*, 83 TRADEMARK REP. 267, 267–68 (1993) ("[M]ost courts agree that actual confusion is one of the most important factors, if not the most important factor, considered in determining the likelihood of confusion . . . .").

235. 15 U.S.C. § 1114(1)(a) (2006).

236. McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1130 (2d Cir. 1979). Although the Second Circuit references the ordinarily prudent purchaser, the very same opinion states that it is relevant that purchasers may be "unknowledgeable" and "unsophisticated" and that the "purchasing public must be credited with only a modicum of intelligence." *Id.* at 1138 (quoting Carnation Co. v. Cal. Growers Wineries, 97 F.2d 80, 81 (C.C.P.A. 1938)). Similarly, courts have also noted that the test depends on whether a person "with a not very definite or clear recollection as to the real trade-mark, is likely to become confused or misled." Northam Warren Corp. v. Universal Cosmetic Co., 18 F.2d 774, 775 (7th Cir. 1927). Even so, the court need not apply the likelihood of confusion test "merely to protect the most gullible fringe of the consuming public." Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd., 34 F.3d 410, 414 (7th Cir. 1994).

237. Colburn v. Puritan Mills, Inc., 108 F.2d 377, 378 (7th Cir. 1939).

> the strength of [the prior owner's] mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.[238]

All this, and courts "may have to take still other variables into account."[239]

In applying these factors, courts rely on their own assumptions about how the presumed audience of purchasers would respond to the competing trademarks, but they frequently bolster these assumptions with the testimony of "professionals in marketing or applied statistics to conduct surveys of consumers."[240] Nonetheless, this empirical evidence does little to simplify the task of deciding whether consumers would be likely to be confused. In the words of Judge Posner, "The battle of experts that ensues is frequently unedifying."[241] Not only does the "battle"—the fact that the experts are in complete disagreement as to their "findings"—undermine judicial confidence, but judges typically are hard pressed to assess the proffered data due to lack of expertise in statistics or survey methodology.[242] Moreover, the use of survey evidence raises the question of how many members of the consuming public must be likely to be confused to justify a finding of infringement. Is 7.6 percent an "appreciable" number of confused purchasers, as one court was asked to decide?[243] Considering these difficulties, both judges and scholars have concluded that surveys regarding "actual confusion" amongst "real" purchasers provide little benefit and add significant costs to infringement cases.[244] If the state of affairs with regard to such evidence is unsatisfactory in trademark law, there is certainly no reason for First Amendment law to borrow it.[245] This is especially true because trademark law does not really worry about the chilling effect of expensive and protracted liti-

238. Polaroid Corp. v. Polaroid Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961). These factors are called the *Polaroid* formula. *See also* PAUL GOLDSTEIN & R. ANTHONY REESE, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 364 (6th ed. 2008) (noting, however, that "[e]ach circuit has adopted its own factors," though the tests tend to overlap).

239. *Polaroid Corp.*, 287 F.2d at 495.

240. *Indianapolis Colts, Inc.*, 34 F.3d at 414.

241. *Id.* at 415.

242. *See id.* at 415–16 (noting a more fundamental problem common to consumer survey research; namely, "that people are more careful when they are laying out their money than when they are answering questions").

243. *See* Gen. Mills, Inc. v. Kellogg Co., 824 F.2d 622, 626 (8th Cir. 1987).

244. *See* Harvey S. Perlman, *The Restatement of the Law of Unfair Competition: A Work in Progress*, 80 TRADEMARK REP. 461, 472–73 (1990).

245. It is worth mentioning here that First Amendment jurisprudence dealing with religious freedoms employs a reasonable observer test, which again rejects the use of empirical data about the real audience. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 682–83 (2005).

gation on trademark infringement.[246] In First Amendment law, however, the chilling effect of expensive and protracted litigation on protected speech is likely to be substantial.[247]

### *B. First Amendment Values*

Although courts have procedural justifications for relying on the reasonable interpretation of core speech rather than its actual interpretation, there are also compelling philosophical and pragmatic justifications for doing so. The rational audience model constrains paternalistic speech regulation, thereby protecting autonomy interests and the foundations of democratic self-governance.[248] Moreover, the rational audience model helps prevent the dumbing down of public discourse by refusing to regulate based on the needs of the least educated or least sophisticated audience members. Finally, the rational audience model checks government abuse of its agenda-setting power to drown out other speakers and dominate public discourse.[249] In effect, this final argument is an overlooked facet of the distrust of government strain in First Amendment scholarship, and one that has added emphasis given the current state of the mass media.

#### *1. Democracy and Autonomy*

The assumption that citizens are rational is deeply embedded in democratic theory.[250] In a liberal democracy such as ours, the government derives both its power and its legitimacy from the "consent of the governed,"[251] and the governed make their will known through a variety of means, such as voting in elections and participating in public dis-

246. *See* Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 417 (2008).

247. *See* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1789 (1998) ("[I]t is now clear that chill on speakers comes . . . from concern about the costs of litigation."); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 890–92 (2000) (discussing the chilling effect of protracted litigation on free speech).

248. Both autonomy and democratic self-governance are pillars of First Amendment theory, though they are offered to justify the protection of expression generally, rather than the embrace of rationalism and the preference for unrestricted entrance into the marketplace of ideas. *See supra* notes 16, 105 and accompanying text.

249. *See supra* Part IV.B.2–3.

250. Doubtless this is part of the reason that contract law presumes that parties to a contract are capable of making rational decisions about their own ends, that tort law assumes people generally are capable of behaving reasonably, and that the rationality assumption pervades law generally. "Many regulatory schemes, including the federal securities laws, assume that people, at least for the most part, are rational. Consequently, people simply need more information to better evaluate their options and make better decisions. If this is the case, more information is always better than less." Paredes, *supra* note 207, at 435.

251. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) (discussing the process of "collective self-determination").

course.[252] Citizen participation in collective decision making enhances both the legitimacy and the quality of the governing decisions ultimately made. The ideal of democratic self-governance, however, makes no sense unless one assumes that citizens will generally make rational choices to govern the fate of the nation. If a majority of citizens make policy choices based on lies, half-truths, or propaganda, sovereignty lies not with the people but with the purveyors of disinformation. If this is the case, democracy is both impossible and undesirable.

It is generally agreed that a core purpose of the First Amendment is to foster the ideal of democratic self-governance. In fact, First Amendment doctrine has been consciously fashioned to reinforce this ideal.[253] The First Amendment, as interpreted by courts, recognizes the important role of the media in gathering information and presenting it to citizens for their consideration.[254] First Amendment doctrine also protects the process of critical interaction[255] by which citizens come to understand and forge consensus on public issues, and it safeguards the means by which they convey their understanding to their elected representatives.

This argument seems circular because it is. Liberal democracy and freedom of expression are mutually reinforcing. The liberal democratic ideal reflected in the U.S. Constitution imagines a rational citizenry, and the First Amendment is part of the machinery to create that citizenry. If citizens are incapable of exercising their rational faculties to participate in public discourse, then they are equally incapable of rational self-governance. To reject the possibility of a rational citizenry, therefore, is to reject the democratic ideal.[256]

252. Even where the Constitution imposes restraints on majoritarian decision making, deference to majority will is the rule, not the exception. Yet deference to majority will make little sense if one assumes that citizens are pervasively and ineluctably irrational.

253. *See supra* note 54 and accompanying text.

254. *See, e.g.*, First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 783 (1978) ("[T]he Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

255. As Robert Post has pointed out, First Amendment doctrine clears a space for "a process of critical interaction." ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 143 (1995). Participation in discourse arguably fosters citizens' abilities to make rational decisions, not through the intervention of an "enlightened elite." "Rather, the people educate themselves" through the "exchange of opinions, refereed by the public." Bernard Manin, *On Legitimacy and Political Deliberation*, *in* 4 LIBERALISM: CRITICAL CONCEPTS IN POLITICAL THEORY 247, 261 (G.W. Smith ed., 2002).

256. The anti-paternalism of First Amendment doctrine heightens the need for development of critical faculties, making education a critical component of participation in public discourse. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 14–15, 170 (2006) (discussing the importance of education to democratic self-governance). This was a principle forwarded by Thomas Jefferson in a letter to John Tyler in 1810, in which he contended that "no republic can maintain itself in strength" without a program of "general education, to enable every man to judge for himself what will secure or endanger his freedom." Letter from Thomas Jefferson to John Tyler (May 26, 1810), *in* 12 THE WRITINGS OF THOMAS JEFFERSON 393 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

Whether that ideal should be rejected is best left to political theorists. Suffice to say that unless we want to fundamentally alter our system of governance, it makes sense for us to aim for internal consistency. Yet the necessity for embracing rationalism does not necessarily entail embracing the notion that more information is better than less. Perhaps citizens would make better information with a limited stock of information selected to match their actual cognitive capabilities more closely. This process of authoritative selection, after all, is how information is presented in the classroom. Even discussion is managed to make sure that, ideally, all sides of an issue are presented. Why, then, has the Supreme Court rejected this model for public discourse? One answer is that we do not trust state actors to be in charge of the authoritative selection. The choice of inputs into the marketplace of ideas would likely be self-serving, designed to secure public approval for those in power. There simply is no disinterested moderator of public discourse.

More critically, authoritative selection of the information to be included in public discourse violates citizen autonomy. The need to respect citizens as "autonomous agents" capable of self-determination[257] undoubtedly comprises both an underpinning of the more-is-better assumption as well as the rational audience assumption. To deny citizens this autonomy is to deny them a fundamental aspect of citizenship. The Court explained this relationship in *Cohen v. California*:

> [The constitutional right of free expression] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that *no other approach would comport with the premise of individual dignity and choice upon which our political system rests*.[258]

This statement of principle emphasizes the linkage between democratic theory and autonomy. Democracy accords citizens the right to choose their collective fates: that choice is meaningless if it is coerced or manipulated.[259] In fact, democratic decisions are simply illegitimate if they violate this fundamental principle.[260] Of course, autonomy is not merely an instrumental justification but a deontological one as well.[261]

257. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–50 (1989).

258. Cohen v. California, 403 U.S. 15, 24 (1971) (emphasis added).

259. *See* BAKER, *supra* note 257, at 47–50 ("[T]he practices of democratic decision making or welfare maximization [and utilitarianism] can often be understood as properly implementing equal respect for persons as autonomous agents."); Mark G. Yudof, *In Search of a Free Speech Principle*, 82 MICH. L. REV. 680, 695 (1984) (book review) ("[T]he dignity argument merges with the normative argument from democracy.").

260. *See* BAKER, *supra* note 257, at 47–50.

261. *See* Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consume*r, 43 GA. L. REV. 651, 660 (2009) (observing that a Kantian theory of autonomy values choices because it "is personal to the individual," whereas a Millian theory "takes the conse-

Self-expression lies close to the core of personality, and government intrusions may invade individual freedom in this realm more than in others.[262]

### 2. *Preventing the Dumbing Down of Public Discourse*

Democracy and autonomy are important considerations in adopting a model of the audience of First Amendment speech, but it is also important to ask what effect the chosen model will have on public discourse. The rational audience model elevates the level of public discourse in at least two ways.

First, failure to assume that the audience of core speech is composed of reasonable people would reduce public discourse to the level of the least sophisticated audience. Speakers would be responsible for transgressing the boundaries of public discourse unless they correctly predicted the interpretation that might be placed on their speech by unsophisticated audience members. The Court's reasoning in *Spence v. Washington* supports this proposition.[263] In *Spence*, the defendant was convicted in state court of violating an "improper use" statute prohibiting placing "figure, mark, picture, [or] design" on the United States flag.[264] The defendant taped a peace sign on the flag and displayed it outside of his apartment to signify his opposition to the Cambodian invasion and the shooting of students at Kent State University.[265] In deciding that the flag defacement statute was unconstitutional as applied to Spence, the Court reasoned that the defendant's "message was direct, likely to be understood, and within the contours of the First Amendment."[266] The Court thus implicitly recognized that Spence's intent need not be understood by every audience member to receive First Amendment protection.

This principle is also illustrated by the line of Supreme Court cases insulating speakers from tort liability for "non-factual" statements, such as rhetorical hyperbole, parody, and the like—all of which could easily be misinterpreted by unreasonable readers.[267] Consider *Greenbelt Cooperative Publishing Ass'n v. Bresler*.[268] In *Bresler*, a real estate developer sued for defamation after a newspaper characterized his zoning negotia-

quentialist view that society should prefer autonomy because it leads to the overall well-being of society").

262. Greenawalt, *supra* note 181, at 150–52. *But cf.* Yudof, *supra* note 259, at 695 (arguing that people gain just as much dignity from economic factors as from expression of ideas).

263. 418 U.S. 405 (1974).

264. *Id.* at 406–07.

265. *Id.* at 408.

266. *Id.* at 415.

267. For extensive discussion of the constitutional privilege for opinion, see generally Lidsky, *supra* note 247.

268. 398 U.S. 6 (1970).

tions with the city council as "blackmail."[269] The Court held that the First Amendment barred the developer's action, observing: "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article [published by the newspaper] would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized."[270] Though the Court's interpretation clearly contemplated how the word blackmail would be read by a reasonable reader, the Court found that "even the most careless reader" would have interpreted the word as "no more than rhetorical hyperbole" in the context in which it appeared.[271] Nevertheless, the Court clearly endorsed the principle that speakers should not be held liable for "misreadings" of their speech by idiosyncratic or unsophisticated audience members. Thus, the Court correctly described *Bresler* as playing a central role in providing breathing space for freedom of expression.[272] This breathing space allows speakers latitude because they do not have to concern themselves with unsophisticated audience members who will not understand the nuances of their speech.

A second way that the rational audience model prevents the dumbing down of public discourse is by acting as an exhortation to audience members who do not reasonably decode the texts that comprise public discourse. From this perspective, the reasonable audience model in First Amendment law performs a function analogous to the reasonable person in tort law. It sets a minimum standard of reasonableness to which all citizens are expected to conform regardless (for the most part) of their actual capacity to do so. As the classic case of *Vaughan v. Menlove*[273] explains, the reasonable person standard guards against a collapse of standards by refusing to allow negligence liability to become "coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual."[274] Just as the negligence standard encourages citizens to come up to the standard of the reasonable person if they do not already meet it, the effect of the rational audience model is to call citizens to develop their capacities to participate in rational discourse, and to exercise, as it were, their better natures. Negligence law also points to another function of legal standards based on the assumptions that people generally behave rationally. Although the reasonable person standard seems unfair or unjust because it holds individuals to cognitive standards which they cannot meet, it makes the

269. *Id.* at 7.
270. *Id.* at 14.
271. *Id.*
272. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) (finding that existing doctrine, including *Bresler*, gives breathing space to free expression "without the creation of an artificial dichotomy between 'opinion' and fact").
273. (1837) 132 Eng. Rep. 490 (C.C.P.).
274. *Id.* at 493 (Tindal, C.J.).

negligence inquiry "tractable"[275] for lawyers and juries. As Jeffrey Rachlinski points out, behavioral economics has not yet provided a workable alternative or even adequately justified the need for one: "[A]s the research now stands, the influence of meta-cognitive biases on real behavior and real negligence determinations is uncertain. In the real world, other aspects of cognitive processes might allow people to muddle through well enough."[276] These same arguments apply to the rational audience standard in First Amendment doctrine.

To further highlight the "educational" function of the rational audience standard, it is instructive to compare and contrast the model of discourse it represents with the (ideal) model of discourse prevailing in the law school classroom. In some ways, the ideal classroom discourse is a poor analogy for the ideal political discourse. After all, classroom discourse is presided over by a dictator, albeit usually a benevolent one, who has the power to squelch dissent and digression. Classroom discourse is similar to the ideal political discourse, however, in at least one respect. The professor/dictator sets the level of discourse not at the level of the least capable student, and not at the level of the most capable student, but somewhere in between. The reasons for this approach are practical and pedagogical. If the professor aims the class at the lowest level, a sizeable majority of the class will be both bored and insulted. It is by far better to aim for a level of discourse that communicates the most information to the greatest number of students. Besides, this approach sends the message to the least capable students that they must do additional work outside of class, perhaps much more additional work, to come up to the level of understanding possessed by most of their classmates. The idea is to encourage them in these efforts, though of course a small number may abandon them entirely.

Although the classroom setting illustrates the advantages of seeking to guide discourse away from the level of the least savvy or sophisticated audience, it also illustrates the danger of having the level of discourse governed by a dictator. All of us are familiar with a professor who abused the platform provided by his classroom in an attempt to indoctrinate students with his own political views. There are also classroom dictators who orient discourse to gratify their own egos rather than to satisfy the educational needs of students. And even the most benevolent dictator may mislead students because his or her own understanding is flawed or unsound. Of course public discourse is infinitely more complicated than classroom discourse, so it is dangerous to draw conclusions based on the analogy. Nonetheless, the danger that a powerful speaker will domi-

275. Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1057, 1063–67 (2003) ("Because recent research suggests that people commonly overestimate cognitive abilities, the application of the reasonable person test might undermine the deterrence function and produce results wholly inconsistent with ordinary notions of justice and fairness.").

276. *Id.* at 1090–91.

nate discourse—either directly or indirectly—is worthy of further consideration.

### *3. Anti-Paternalism as an Antidote to Agenda Setting*

A third reason to apply the rational audience and more-is-better assumptions stems from distrust of governmental intervention in the marketplace of ideas. Courts have been charged with policing the boundaries of public discourse, and the rational audience assumption prevents them from doing so in an unduly paternalistic manner. If courts were free to indulge the assumption that the public is generally stupid and uninformed, it would lead them to permit governmental intervention in the marketplace in the name of serving the public good. The problem, of course, is that the government must decide what forms of censorship serve the public good, but its judgment of the public good is not only marred by self-interest but also by the same cognitive flaws that affect the rest of us. Moreover, given the already powerful agenda-setting role of the government as speaker in the marketplace of ideas, indulging in an irrational audience assumption would almost certainly eliminate an important check on government manipulation of public discourse.

A key goal of the First Amendment is to prevent the government from silencing its critics, but the government often claims beneficent motives when policing public discourse. For example, the government may justify suppression of speech on the grounds that it is necessary to protect citizens from being misled.[277] As history reveals, however, beneficent motives do not protect the government from exercising censorship rooted in flawed reasoning. Perhaps the most infamous example is the Roman Inquisition's persecution of Galileo Galilei, the "father of modern science."[278] The Catholic Church first ordered Galileo not to defend the idea that the earth revolves around the sun.[279] When he did so, the Church put him on trial for heresy.[280] His judges found him guilty, banned his book, forced him to recant his views, and placed him on house arrest for a number of years—all despite the fact that they were wrong and he was right.[281]

The American experience also contains dispiriting examples that confirm that the road to hell is paved with good intentions. Many of the most embarrassing examples of speech suppression in American histo-

277. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it . . . .").

278. *See* MANFRED WEIDHORN, THE PERSON OF THE MILLENNIUM: THE UNIQUE IMPACT OF GALILEO ON WORLD HISTORY 155 (2005). *See generally* MAURICE A. FINOCCHIARO, THE GALILEO AFFAIR: A DOCUMENTARY HISTORY (Maurice A. Finocchiaro ed. & trans., 1989).

279. FINOCCHIARO, *supra* note 278, at 36–37.

280. *Id.* at 35–39.

281. *Id.* at 38–39.

ry—from the Sedition Act of 1798[282] until the present—have come in response to perceived threats to national security. Public policy based on fear, and particularly the government's fear of its own citizens, is particularly likely to rely on cognitively flawed reasoning.[283] The Red Scare cases are but one example. The Russian Revolution sparked the first "Red Scare" in the United States. This period of "antiradical hysteria,"[284] beginning in 1917, led to the enactment of federal and state laws to suppress the speech of Communists, socialists, and anarchists. "[A]t least 27 states passed 'red flag' laws (laws barring the display of flags as a sign of opposition to organized government), 16 states passed criminal syndicalism laws (laws prohibiting the advocacy of overthrow of the government), and 12 states passed anarchy and sedition laws."[285] The result of all this "Red Scare" legislation was over 1400 arrests and 300 convictions.[286] The Supreme Court acquiesced in the suppression of dissent,[287] deferring to state determinations of the dangers presented by radical speech and affirming convictions based on nothing more than abstract advocacy of the overthrow of the government "at some date necessarily far in the future."[288]

Why do First Amendment principles often succumb to irrational fears in time of war or when there are other perceived threats to security? During such periods, citizens and their governments may place undue weight on vivid events that provoke a fear response. In hindsight, it is hard to see how Americans thought an event akin to the Russian Revolution could take place in America because the underlying social conditions were so dramatically different in the two countries. But the "availability" heuristic[289] undoubtedly made the "evidence" more relevant to policy makers trying to protect "the American way of life." Moreover, the widespread discussion of the threat may have led to an availability cascade, convincing a significant segment of the population that the threat was widespread and imminent. The very same pattern has been repeated over and over throughout history, which bespeaks the need for doctrines to help shield against even the most benevolently motivated

282. Sedition Act of 1798, 1 Stat. 596, 596–97; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." (footnote omitted)).

283. *See* Horwitz, *supra* note 21, at 36–37.

284. MURRAY B. LEVIN, POLITICAL HYSTERIA IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION 29 (1971).

285. KROTOSZYNSKI ET AL., *supra* note 89, at 43–44; *see also* PATRICIA CAYO SEXTON, THE WAR ON LABOR AND THE LEFT: UNDERSTANDING AMERICA'S UNIQUE CONSERVATISM 135 (1991).

286. KROTOSZYNSKI ET AL., *supra* note 89, at 44.

287. *See* Whitney v. California, 274 U.S. 357, 363, 372 (1927) (affirming criminal syndicalism conviction for organizing and being a member of the Communist Labor Party of America, which advocated the "overthrow of capitalist rule").

288. *Id.* at 379 (Brandeis, J., concurring). The defendant in *Whitney* helped organize the Communist Labor Party of California, whose constitution advocated overthrow of the government. *Id.* at 363 (majority opinion).

289. *See supra* Part III.B.

government censorship. And even the strongest doctrines may be insufficient to resist the overwhelming emotional pull of censorship in times of national crisis (or perceived crisis).

The cases above involved government assumptions about citizens' irrational propensity for violence. But the government has also abused its power by assuming that a portion of its citizens are ignorant or uneducated. As an illustration of the abuses that can occur when the government assumes the worst of its citizens, consider the sad, sorry history of voter literacy tests. States began to adopt literacy tests as a prerequisite to voter registration at the end of the nineteenth century.[290] Although ostensibly instituted to ensure that voters were qualified to exercise the franchise intelligently, the purpose of literacy tests was to disenfranchise black voters.[291] Indeed, literacy tests were "[p]erhaps the most popular method of constricting the electorate,"[292] and states continued to use them for this purpose until they were eliminated by the Voting Rights Act of 1965.[293]

Literacy tests achieved their nefarious ends not only because blacks were systematically denied educational opportunities, and thus had higher illiteracy rates than white Americans,[294] but also because white officials administered the tests in a highly discriminatory fashion. The Supreme Court tacitly encouraged this behavior. In 1898, the Court upheld a Mississippi law requiring citizens to prove, among other things, that they could interpret a section of the Constitution.[295] The Court acknowledged that the Mississippi legislature intended the law as a tool to disenfranchise black voters but found that it was of no consequence since the law affected equally "weak and vicious white men as well as weak and vicious black men."[296] From the Court's perspective, the weak and vicious were simply not entitled to vote, and they left the determination of who was

290. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 8 (1992) (noting that in the 1890s states used constitutional conventions to adopt means to disenfranchise black voters). "Even as late as 1960, voter registration rates among whites in the South were more than twice those of blacks . . . ." *Id.* at 1.

291. W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical and Related Considerations*, 48 HOW. L.J. 1, 74 n.581 (2004) (noting the "desire to prevent blacks from voting" in imposing literacy tests). States also used literacy tests to disenfranchise other groups of voters thought to be incapable of voting intelligently, such as recent immigrants. For an extended discussion, see Levine, *supra* note 116, at 239–40.

292. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 142 (2000). The states also used residency requirements and poll taxes to constrict the franchise. *See* Levine, *supra* note 116, at 237.

293. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 314–19. The nationwide ban originally was in place for five years. *See id.* at 315. In 1975, Congress made the ban permanent. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973aa (2006)).

294. Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 616 (2004). This disproportion was a natural result of the systematic deprivation of educational opportunities to black Americans. *Id.* at 619.

295. Williams v. Mississippi, 170 U.S. 213, 221, 225 (1898).

296. *Id.* at 222.

weak and vicious to racist state officials. Even as late as 1959, the Court could be sanguine in its assertion that the use of facially nondiscriminatory literacy tests was constitutional, accepting the premise that "[t]he ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot."[297] Again the Court conceded that state officials might apply such tests in a racially discriminatory fashion,[298] but the Court failed to understand that literacy tests—which assume at the outset that many citizens are too dumb to vote—positively invite state officials to act on their own prejudices about their fellow citizens. This is not to say that a "rational voter" assumption would have prevented the widespread disenfranchisement of black voters. But, it would have deprived racist state officials of the cloak of legitimacy provided by the Court's acceptance of a paternalistic justification for administration of voter literacy tests.

There is good reason to be especially suspicious of the government when it seeks to suppress information or choices it believes to be "bad" for its citizens because the government already manipulates citizen preferences through its role in setting the agenda of political discourse in the United States. The federal government is a "'major source of information,'"[299] and "information is a source of power."[300] The government, particularly the executive branch, has a variety of tools and methods to get its message out. Government officials can gather and release data supporting a particular policy agenda. High government officials can hold press conferences, confident in the knowledge that members of the mass media will actually show up prepared to convey some version of the government's message. They can also grant exclusive interviews to get their message out, with the implicit threat that the privilege of access will be revoked if the coverage is not to their liking.[301] Government leaders can also shape discourse by refusing to provide information: by refusing to hold press conferences, to discuss a policy choice beyond certain agreed upon talking points, or to allow access to documents and news sites within its control.[302]

The government also has at its disposal more ethically questionable ways of manipulating public discourse. It is worthwhile to consider some

297. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959). However, the Court has also recognized that such tests can be applied in a manner that violates a citizen's right to equal protection of the laws. *Id.* at 53–54.

298. *Id.* at 53.

299. Lori Robertson, *In Control*, AM. JOURNALISM REV., Feb.–Mar. 2005, at 26, 28 (citation omitted).

300. MALCOLM MITCHELL, PROPAGANDA, POLLS, AND PUBLIC OPINION: ARE THE PEOPLE MANIPULATED? 46 (2d ed. 1977).

301. Robertson, *supra* note 299, at 30 (discussing the fact that *New York Times* reporters were banned from then Vice President Dick Cheney's campaign plane as punishment for unfavorable coverage).

302. *See* Ann Scott Tyson, *Hundreds of Photos of Caskets Released—Pentagon Action Is in Response to Lawsuit*, WASH. POST, Apr. 29, 2005, at A10 (discussing the Bush administration's policy banning photographs and videotapes of coffins at Dover Air Force Base).

of the highly publicized tactics of the George W. Bush administration for getting its message out and undermining the credibility of its critics without directly censoring them. With regard to its education policy, the administration paid a journalist to tout its education policy and hired a public relations firm to study "media perceptions of the Republican Party,"[303] in violation of federal law forbidding dissemination of "covert propaganda" in the United States.[304] The Department of Education also issued prepackaged video stories to television stations, which were "purposely designed to be indistinguishable from news segments broadcast to the public."[305] With regard to coverage of the Iraq War, the Bush administration's tactics were even more troubling. Certainly the Bush administration exaggerated the threat that Saddam Hussein had acquired weapons of mass destruction,[306] and it pushed the idea of a link between Hussein's regime and Osama bin Laden even after this link was thoroughly discredited. The administration also sought to undermine its critics through strategic leaks to the press,[307] while at the same time threatening prosecution of journalists who published leaked information that was embarrassing to the administration. In addition, the Pentagon gave briefings of its "talking points" to retired military officers, who then made television and radio appearances as disinterested military analysts.[308] The point is not to catalog every abuse of the Bush administration, but merely to show that the government's power to set the agenda of political discourse is strong.

The main check on the governmental abuses of agenda-setting power is the "Fourth Estate"—that is, an independent press with the will and resources to investigate government-provided information.[309] The media's performance in this area is decidedly mixed. Many have criticized the media for being lapdogs rather than watchdogs during the run-up to the Iraq War,[310] though certainly there was impressive reporting during

303. Robert Pear, *Buying of News by Bush's Aides Is Ruled Illegal*, N.Y. TIMES, Oct. 1, 2005, at A1.

304. *Id.*

305. *Id.*

306. CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC 229–30 (2004); PAUL RUTHERFORD, WEAPONS OF MASS PERSUASION: MARKETING THE WAR AGAINST IRAQ 196 (2004).

307. *See* Murray Waas, *Cheney "Authorized" Libby to Leak Classified Information*, NAT'L J., Feb. 9, 2006, http://www.nationaljournal.com/about/njweekly/stories/2006/0209nj1.htm.

308. David Barstow, *Pentagon Suspends Briefings for Analysts*, N.Y. TIMES, Apr. 26, 2008, at A15.

309. *See* Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 634 (1975).

310. *Five Years On: Media's Role in Iraq*, CHRISTIAN SCI. MONITOR, Mar. 19, 2008, at 8 ("The press already stands accused of not doing enough before the war to probe the Bush administration's arguments for the invasion, whether it was Saddam Hussein's alleged weapons or the prospects of implanting democracy in Iraq."); *see also* SCOTT MCCLELLAN, WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON'S CULTURE OF DECEPTION 125 (2008) (criticizing media for accepting President Bush's propaganda without enough investigation); Sherry Ricchiardi, *Whatever Happened to Iraq?: How the Media Lost Interest in a Long-Running War with No End in Sight*, AM. JOURNALISM REV. June–July 2008, at 20 (criticizing the lack of coverage after the initial phase of the Iraq War). On the other hand, the Bush administration criticized the media for being unduly negative

the war on warrantless wiretaps, torture, and extraordinary rendition.[311] And conflicting forces are at work on the ability of the media to serve as checks on government manipulation. On one hand, the Internet means that more eyes than ever are scrutinizing government actions. On the other hand, the decline of newspapers undoubtedly cuts resources devoted to investigative journalism.[312]

If the media serves its checking function only sporadically, and the government already has powerful tools to set the agenda of public discourse, certainly the First Amendment doctrine's refusal to allow the government to directly regulate political discourse on paternalistic grounds is justified. In essence, direct regulation on this basis would allow the government to "double dip": not only could the government attempt to drown out other speakers (which the First Amendment does not prohibit), but it could also censor its critics on the grounds that the public would be "misled" by them. From this perspective, the rational audience assumption serves as an additional check on the government's ability to dominate public discourse.

## V. CONCLUSION

The rational audience is an ideal and, like all ideals, is inevitably flawed. There is no such thing as an audience; an audience is merely a collection of individuals with their own different needs, interests, and aptitudes. And there certainly is no such thing as a rational audience, though one can always hope that citizens are more often rational than not. Behavioral economics helps illuminate areas in which human beings tend to make cognitive mistakes, in which rationality predictably fails. Behavioral economics may and probably should influence the way that economic markets are regulated because it has great predictive power in that realm. Indeed, behavioral economics might very well have predicted and helped avoid or at least mitigate the current economic crisis.

It by no means follows, however, that the rationality ideal should be discarded from First Amendment doctrine. A presumption of audience irrationality would justify increased government regulation of the speech marketplace, which presents far more dangers of mischief than increased regulation of economic markets. Speech and expression are closely linked to individual autonomy, and government constriction of core speech—particularly political speech—threatens the entire basis of de-

in its coverage of the war in Iraq. *See* Michael O'Hanlon, *Misplaced Blame*, WASH. TIMES, Apr. 11, 2006, at A14.

311. *See, e.g.*, Steve Fainaru, *Cutting Costs, Bending Rules, and a Trail of Broken Lives: Ambush in Iraq Last November Left Four Americans Missing and a String of Questions About the Firm They Worked For*, WASH. POST, July 29, 2007, at A01; Anthony Shadid, *In Revival of Najaf, Lessons for a New Iraq: Shiite Clergy Build a Spiritual Capital*, WASH. POST, Dec. 10, 2003, at A01.

312. *See, e.g.*, *Tribune Will Cut Hundreds of Jobs as Businesses Weaken*, N.Y. TIMES, Feb. 14, 2008, at C9.

mocracy. If we the people are incapable of rationally choosing our collective fates, then democracy is doomed to failure. On a more practical level, the failure to apply a rational audience assumption would inevitably lead to a dumbing down of public discourse, making speakers responsible if they failed to predict the interpretation placed on their speech by less sophisticated audience members. A standard based on rationalism calls citizens to develop their capacities to engage in rational discourse, to raise their cognitive capacities to the demands of that discourse. We as citizens must risk information overload in order to ensure that we get the information we need. The rational audience ideal reflects a justifiable distrust of overtly paternalistic intervention by government in the realm of speech and expression. In light of the government's already powerful potential to drown out other speakers in the marketplace of ideas, it is useful to preserve the rational audience assumption as an additional check on government's abuse of that power.

Defending rationalism at this point in the American experience seems slightly quixotic. Recent events certainly cast doubt on the assertion of First Amendment doctrine that "the American people are neither sheep nor fools."[313] But as John Updike has written, believing in "the American political experiment"[314] is

> at bottom, a matter of trusting the citizens to know their own minds and best interests. . . . And though the implementation will inevitably be approximate and debatable, and though totalitarianism or technocratic government can obtain some swift successes, in the end, only a democracy can enlist a people's energies on a sustained and renewable basis.[315]

It is this leap of faith in our collective capacities that has led First Amendment doctrine to construct the ideal of the rational audience. It is our duty as citizens to live up to it.

313. McConnell v. FEC, 540 U.S. 93, 258 (2003) (Scalia, J., concurring in part and dissenting in part).

314. John Updike, *All Things Considered: Testing the Limits of What I Know and What I Feel* (NPR radio broadcast Apr. 18, 2005), *available at* http://thisibelieve.org/essay/14/ ("To guarantee the individual maximum freedom within a social frame of minimal laws ensures—if not happiness—its hopeful pursuit.").

315. *Id.*