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Nobody's Fools: The Rational Audience as First Amendment Ideal

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NOBODY’S FOOLS: THE RATIONAL AUDIENCE AS FIRST AMENDMENT IDEAL

*Lyrissa Lidsky**

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

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¹ *McConnell v. FEC*, 540 U.S. 93, 258 (Scalia, J., , dissenting) (emphasis in original).

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 United States Supreme Court 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.

² Although audience research is uncommon in First Amendment cases, it is common in some legal contexts, such as trademark confusion litigation. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23 (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 Know*, 44 J. OF ADVER. RESEARCH 170, (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, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 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 Supreme 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) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’”); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (asserting that free speech entails “the liberty to discuss publicly 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* 33, 37, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* (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.”). For further explanation, see Lyriisa Barnett Lidsky and Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1581-89 (2007).

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 Supreme 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. The second is that more speech is generally preferable to less.⁶

First Amendment scholarship has criticized the doctrinal influence of the rational audience ideal for some time,⁷ 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.⁸ This critique of rationality has

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 section II, *infra*. For discussion of how judges’ assumptions about readers shape the interpretation of whether a statement is defamatory in a tort context, see Lyrrisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996).

⁵ The Court has at times acknowledged that vulnerable audience members may need extra protection from speech protected by the First Amendment. See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) cases stating that speech can’t be brought down to the level of the most vulnerable audience member. *But cf.* *Federal Communications Comm’n v. Pacifica*, 438 U.S. 726 (1978) (allowing channeling of indecent broadcast programming). For more discussion, see *supra* section ____.

⁶ Although these assumptions can be decoupled, this article will refer to them jointly as the rational audience assumption.

⁷ 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 (1984); see 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.

⁸ 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

penetrated deep into scholarly discourse⁹ and is making inroads into popular discourse as well. In late October of 2008, New York Times columnist David Brooks wrote that the U.S. “financial crisis is going to amount to a coming-out party for behavioral economists.”¹⁰ Behavioral economics explains the current 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”¹¹ to encourage better policy decisions.

The behavioral economic critique of rational decision-making arguably applies as readily to speech markets as to economic ones.¹² 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 addressed directly the constitutional preference for standards based on a rational audience rather than a real one. In *FEC v. Wisconsin Right to Life, Inc.*,¹³ Chief Justice Roberts, joined by Justice Alito, explained that the First

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 (Cass R. Sunstein, ed., 2000). The common thread in all of this scholarship is an attempt to understand and model how humans make decisions.

⁹ See discussion of this critique at *infra* section III.B.

¹⁰ David Brooks, *The Behavioral Revolution*, N.Y. TIMES, Oct. 27, 2008, available at <http://www.nytimes.com/2008/10/28/opinion/28brooks.html>.

¹¹ *Id.*

¹² Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006).

¹³ In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. ____ (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 § 203 of the BCRA (Bipartisan Campaign Reform Act of 2002), therefore making it a federal crime to air them within 30 days of a federal primary or 60 days of a general election. 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. 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.

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.*”¹⁴ 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.”¹⁵ 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 commercial¹⁶

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.” Justice Scalia, while not exactly praising *Buckley*’s “magic words” test for separating issue ads from express advocacy, observed that: “If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it.” 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. 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.” 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 “did not mention an election, candidacy, political party, or challenger and they do not take a position on a candidate’s character, qualifications, or fitness for office.”

¹⁴ *Id.* at 16. 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 § 203. 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 16, 21, and 21 n.7.

¹⁵ *Id.*

¹⁶ See discussion *infra* ____.

and other “non-core” speech¹⁷ 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 Supreme 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. 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. 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.¹⁸ 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

¹⁷ For example, the Supreme 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 (Ann N. Crigler, ed., Oxford U. Press 2004).

¹⁸ 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 Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment* (2003) 76 TEMPLE L. REV 1 (2003).

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 Supreme Court has noted, concerns of judicial economy support the rationality assumption. 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.¹⁹ Failure to apply a rational audience standard would reduce public discourse to the level of the least sophisticated audience, while punishing speakers 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 of First Amendment cases, the Supreme 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. However, as this article will demonstrate, 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

¹⁹ 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.

which courts impute interpretation of a disputed text to a body of reasonable observers.²⁰ An entire vein of literary criticism, however, has devoted itself to uncovering the role readers play in creating the meaning of a text.²¹ This vein of criticism, often called reader-response criticism or reception theory, has a variety of adherents united by a central insight, namely that: “What happens to and with the participation of the reader” is “the meaning” of the text.”²² 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 to the text different experiences and backgrounds and will therefore interpret the same text quite differently. As this article will demonstrate below, this focus on the role of readers, observers, or listeners of “texts” provides a new prism through which to view seminal cases on freedom of expression.²³

²⁰ Some scholars have attempted to illuminate how common law doctrines in defamation cases allow judges to construct implied audience of allegedly defamatory speech. Lyrisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996).

²¹ Important works in the area include HANS ROBERT JANSS, *TOWARD AN AESTHETIC OF RECEPTION* (Timothy Bakti trans., 1987); WOLFGANG ISER, *THE IMPLIED READER*, (1974); WOLFGANG ISER, *THE ACT OF READING* (Johns Hopkins U. Press (1978); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980) For two good summaries of reader-response criticism as a whole, see LOIS TYSON, *CRITICAL THEORY TODAY: A USER-FRIENDLY GUIDE* (1999)) and TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 47-78 (1996) (1983)).

²² Tyson, *supra* note 20 at 154 (1999) (quoting Stanley Fish). *See also id.* at 157 (“[A] written text is . . . an event that occurs within the reader, whose response is of primary importance in creating the text.”; WOLFGANG ISER, *THE IMPLIED READER* xii (1974) (“The reader discovers the meaning of the text . . .”); TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 64-65 (1996) (asserting that for reception theory, “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.”)

²³ 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 (1985), Justice O’Connor concurrence focuses on “whether the objective, acquainted with the text, legislative history, and implementation of the statute would perceive it as a state endorsement.” *See also Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (Supreme Court applies the reasonable observer test to determine if there was a perception of government promotion of religion but specifies that the relevant observer is a high school student); *Zelman v. Simmons-*

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 the text.²⁴ And yet reader-response critics don’t 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.²⁵ The critic then tries to see the text through the eyes of its “implied reader,” in the words of Wolfgang Iser,²⁶ in order to make the “correct” or “best” meaning of the text emerge. 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 while 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. 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.²⁷

Harris, 536 U.S. 639 (2002) (applying an adult community member to the reasonable objective observer standard). In *Elk Grove Unified School Dist. 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 Duncan, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky & Van Orden v. Perry*, N.C. FIRST AM. L. REV. 139 (2006).

²⁴ JANE P. TOMPKINS, *READER – RESPONSE CRITICISM* xi, 205 (6th ed. 1980).

²⁵ *Id.* at 9, 87,

²⁶ Iser uses the term “implied reader” to refer to “the reader that the text seems to be addressing.” (CTT 174).

²⁷ In determining the public’s interpretation of a religious symbol as government sponsored, the court “[did] 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

These insights have ready application to actual cases. Consider, for example, the famous case of *Cohen v. California*.²⁸ *Cohen* involved an apparently simple text in the form of a jacket bearing the words “Fuck the Draft.”²⁹ Is “Fuck the Draft,” when inscribed on a jacket worn in the hallways of a courthouse,³⁰ a heart-felt protest against the mandatory conscription of young men to serve in Vietnam? 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 interpretation of Cohen’s famous jacket was the “correct” interpretation. 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 Supreme 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 30-day sentence for disturbing the peace based on the presumed effect his speech would have on his audience.³¹ 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 [Cohen] or attempt to forceably [sic] remove his jacket.”³² The predicted response of these others gave the State the authority to jail Cohen for disturbing the peace.

The Supreme Court predicted a very different reception of the jacket. The Court explicitly denoted the viewers of the jacket as reasonable people.³³ The Court—or at least the six-justice majority³⁴--hypothesized that: “No

observer would conclude that Grand Rapids endorses religion by allowing Chabad House’s display” *Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1544.

²⁸ 403 U.S. 15 (1971).

²⁹ *Id.*

³⁰ *Id.* at 16.

³¹ *Id.* at 16-17 (emphasis added).

³² *Id.* at 17 (emphasis added).

³³ *Id.* at 20.

³⁴ The three dissenting justices first determined that Cohen behavior “was mainly conduct and little speech,” and then determined that it was “well within the sphere of *Chaplinsky v.*

individual actually or likely to be present could *reasonably* have regarded the words on appellant's jacket as a direct personal insult."³⁵ The Court refused to accept the State's argument that the jacket would incite individuals or groups to violence,³⁶ though it cited little to support this conclusion. The Court cited no reason 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 more forcefully to Cohen's jacket, beyond observing that no one "was in fact violently aroused" by the jacket, 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 "a hypothetical coterie of the violent and the lawless."³⁷ The State was not entitled to assume the worst about its citizens. 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." This, of course, creates a procedural imbalance that favors free speech: the State must provide 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 provides the definitive decoding of Cohen's jacket. The Court determines that reasonable viewers would interpret the jacket as asserting an "evident position on the inutility or immorality of the draft,"³⁸ and that, in turn, means that the State may not criminalize his speech.³⁹

As *Cohen* illustrates, First Amendment jurisprudence accords courts the role of disinterested "critics" of the disputed "texts" of First Amendment cases. The Supreme Court (and by extension lower courts) claims superior authority vis-à-vis the legislative and executive branches in predicting the effects of

New Hampshire," the Supreme Court's seminal fighting words case. *Id.* at 27 (Blackmun, Burger, and Black, J.J., dissenting)..

³⁵ *Id.* (emphasis added).

³⁶ *Id.* at 20. Of course, the State need not wait until violence occurs before regulating speech that constitutes incitement.

³⁷ *Id.* at 23.

³⁸ *Id.* at 18.

³⁹ Justice Blackmun, joined by Justices Burger and 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." Very conclusory. *Id.* at 27 (Blackmun, J., dissenting).

speech. It may be that the courts are granted this authority due to some institutional superiority,⁴⁰ 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.” 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 will ultimately show, 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 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—that speech that garners the lion’s share of First Amendment protection—it includes at a minimum political speech⁴¹ and speech dealing with issues of public concern.⁴²

⁴⁰ As Professor John Jeffries has written, the “institution of the judiciary is peculiarly well suited—in personnel, in training, ideology, and institutional structure—to implement the ideals of the First Amendment.” John Jeffries, *Rethinking Prior Restraints*, 92 YALE L.J. 409, 427 (1983).

⁴¹ 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 (1971) (defining “the core of the first amendment” as “speech that is explicitly political”)

⁴² See discussion *infra* n.2. The Supreme Court’s distinctions between core and non-core speech owe a debt to the work of Alexander Meiklejohn, who defined the core of the First Amendment to include speech of “governing importance.” The Court, for example, cited Meiklejohn in the seminal case of *New York Times v. Sullivan* for the notion that: “An unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964). 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* 24-28, 79-80 (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; however, commercial speech receives significant First Amendment protection because it provides important information to citizens in their roles as consumers. Fighting words are not core speech; they do not advance public discussion and are designated as “low-value speech” because of their tendency to

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, are a mirror of 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 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.⁴³ In his inaugural address of

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 generally* 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, e.g.* *Boos v. Barry*, 485 U.S. 312, 318 (1988).

⁴³ 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

1801, Thomas Jefferson boldly proclaimed: “If there be any amongst us who would wish to dissolve this Union or 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.”⁴⁴ Reason, so the argument goes, will drive out “errors of opinion” from public discourse, forming the basis for enlightened public policy.

This is not to say that the Founders were starry-eyed idealists. As one historian has written,⁴⁵ the Founding Fathers adopted the Constitution of 1787 to curtail “excessive democracy.”⁴⁶ They realized they were embarked on an experiment, and several expressed doubt about the extent to which citizens could set aside self-interest to favor rational public policy. Indeed, the

force.” 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.” See also SUSAN JACOBY, *FREETHINKERS, A HISTORY OF AMERICAN SECULARISM* 13 (2004) (noting the “essential rationalism” of the founders).

⁴⁴ Jefferson’s remarks presumably relate to the controversy over the Sedition Act of 1798, which 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. The Act expired by its own terms in 1801. Although enforcement of the Act virtually silenced Republican newspapers, Jefferson won the election and the Act was never renewed. The U.S. Supreme Court, however, did not declare that the punishment of seditious libel violated the First Amendment until 1964. *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964) (“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.”).

⁴⁵ WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 5 (Hill and Wang, ed. 2007) (citing numerous sources); RICHARD K. MATTHEWS, *IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON* (University Press of Kansas) (1995). See also MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (Harvard University Press) (1996).

⁴⁶ HOLTON, *UNRULY AMERICANS*, *supra* note ___, at 5. 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.” *Id.* 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. *Id.* at 163-64.

constitutional system they designed contains measures designed to prevent state legislatures from embracing irrational populist measures.⁴⁷

Despite the roots of rationalism in democratic theory, 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*,⁴⁸ 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. The Court framed the issues as whether the speaker's words "create[d] a clear and present danger"⁴⁹ of "bring[ing] about substantive evils that Congress has a right to prevent."⁵⁰ 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. The maiden voyage of the clear and present danger test served to suppress rather than defend radical speech.

Then, as is well known,⁵¹ Justice Holmes, under prompting by Judge Learned Hand and other libertarian thinkers,⁵² recalibrated the clear and present danger test to protect speech. The new, protective version of the clear and present danger test emerged in Holmes dissent in *Abrams v. United States*. There, the government prosecuted five Russian immigrants under the Espionage Act for distributing pamphlets critical of U.S. involvement in World War I. Though a majority of the Court upheld the conviction of the defendants in *Abrams*, Holmes argued that the First Amendment forbade suppression of their speech unless it presented an imminent threat of "immediate" harm:

⁴⁷ For example, the Constitution omitted the rights of citizens to instruct and recall Congressmen. HOLTON, *supra* note ___, at 199. The Constitution also made each Congressman answerable to a much larger group of constituents than was the case in the state assemblies. *Id.* at 200. The end result was that "[t]he [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 277.

⁴⁸ 249 U.S. 47, 52 (1919).

⁴⁹ *Id.* at 52.

⁵⁰ *Id.* at 52.

⁵¹ See David M. Rabban, *The Emergence of the Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1317 (1983) (discussing the series of Holmes and Brandeis dissents that were the basis for the modern incitement test).

⁵² See G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992).

“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].

Holmes’ justly famous dissent in *Abrams*, which was joined by Justice Brandeis, reflected a belief that “humans are inherently rational beings.”⁵³ Given enough time to reflect, an audience will reject “evil counsels” such as those advocated by the speakers Holmes describes as “poor and puny anonymities” in *Abrams*. 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. 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.⁵⁴

Justice Brandeis takes Holmes’ themes even further in his lyrical concurring opinion in *Whitney v. California*,⁵⁵ 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.”⁵⁶ 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.⁵⁷ 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 in the past conduct furnished reason to believe advocacy was

⁵³ G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 579 n.11 (1995).

⁵⁴ Holmes’ own faith was less than whole-hearted. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (noting that there are times when “[e]loquence may set fire to reason.”)

⁵⁵ 274 U.S. 357 (1927) (Brandeis, J., concurring). 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 *id.* (“If in the long run the beliefs express 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 Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971) (arguing that such speech may be suppressed because it undermines democracy)).

⁵⁶ 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).

⁵⁷ 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.” *Whitney*, 274 U.S. at 363.

then contemplated.”⁵⁸ Brandeis made clear that such violence should rarely be expected, due to the “expected” rationality of audiences. Our system of government, Brandeis wrote, depends on “confidence in the power of free and fearless reasoning applied through the process of popular government.”⁵⁹ 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.⁶⁰

Brandeis echoes many of the themes articulated by Holmes in *Abrams*. Government intervention, or “enforced silence,” hinders rather than advances rational public discourse.⁶¹ Open discourse allows the implied audience of citizens to decide for themselves where truth and falsity lie. Only when the opportunity for rational discourse is cut off by emergency circumstances may the government step in. Ordinarily, however, citizens will reject “falsehoods and fallacies” because public discussion provides the “processes of education” necessary to refute them.⁶² Brandeis later explains that a tenet of democracy is

⁵⁸ *Whitney*, 274 U.S. at 376

⁵⁹ *Id.* at 377

⁶⁰ *Id.*

⁶¹ *Whitney*, 274 U.S. at 376. See also “Believing in 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*, in *ETERNALLY VIGILANT*, *supra* note ___, at 61, 78 (asserting that 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.”) (emphasis in original).

⁶² As I have explained previously, Brandeis’ theory of the First Amendment depends for its operation on the rule of law 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 . . .”) See Lyriisa Barnett Lidsky, *Brandenburg and the United States’ War on Incitement Abroad: Defending a Double Standard* 1009, 1025 (2002) (citing 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) (noting that “[c]ivil liberties . . . imply the existence of an organized society maintaining public order without which liberty itself would be lost in excesses of unrestrained abuses.”)

that “deliberative forces should prevail over the arbitrary.”⁶³ 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.” At its core, Brandeis’ opinion envisions a body of informed citizens engaging in a rational exercise in self-governance.

Holmes and Brandeis provided the building blocks,⁶⁴ but any number of First Amendment doctrines relies 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.⁶⁵ The incitement doctrine, in turn, is the “crowd response” counterpart of the fighting words doctrine.⁶⁶ Rational individuals will not respond violently to “mere advocacy” of unlawful action,⁶⁷ 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.” Incitement doctrine, in both theory and application, assumes that citizens will rarely respond with violence to the impassioned rhetoric of a radical speaker.⁶⁸

Even doctrines designed to insure that government does not narrow the range of views open to its citizens presume that the citizenry is basically rational. The stringent First Amendment’s limitations on prosecutions for seditious libel⁶⁹ promote public discourse that is “uninhibited, robust, and wide open” based on the theory that citizens can sort through conflicting claims to

⁶³ *Id.*

⁶⁴ Robert H. Bork, *supra* note __, at 1 (observing that free speech law today “grows out of” the dissenting (or concurring) opinion of Holmes and Brandeis).

⁶⁵ *Chaplinsky* at 574 (defining fighting words as those “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”); “The fighting-words decisions [] involve[] a determination of whether words are abusive or so akin to an assault that they are likely to involve a violent response.” RONALD KROTOSZYNSKI, JR., STEVEN GEY, CHRISTINA WELLS, AND LYRISSA BARNETT LIDSKY, *THE FIRST AMENDMENT: CASES AND THEORY* 93 (2008).

⁶⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See also* *Texas v. Johnson*, 491 U.S. 397, 408 (1989) (holding that “[o]ur precedents do not countenance [] a presumption” that “an audience that takes serious offense at particular expression is necessarily likely to disturb the peace”).

⁶⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶⁸ *Brandenburg*, for example, involved a Ku Klux Klan member urging other members, some armed, to “[b]ury the niggers.” *Id.* at 446 n.1 and 445-46.

⁶⁹ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

discern the truth about “public men” and public measures.⁷⁰ 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.⁷¹ 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.

Audience rationalism receives its main instantiation in the dominant metaphor in First Amendment jurisprudence—the marketplace of ideas.⁷² Justice Holmes injected the metaphor into First Amendment jurisprudence when he endorsed the “free trade in ideas” in *Abrams v. U.S.*⁷³ 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.” Yet it is not clear that the skeptical Holmes fully endorsed the sentiment underlying his own ringing rhetoric, for he immediately declared that the marketplace of ideas was a product of “the theory of our Constitution. It is an experiment, as all life is an experiment.”⁷⁴

The constitutional experiment with free trade in ideas depends fundamentally on the rationalism of the “consumers” in the marketplace. Only rational information consumers can sort through undifferentiated masses of

⁷⁰ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁷¹ *Id.* at 270-73.

⁷² The Supreme Court has repeatedly relied on the marketplace metaphor. For a recent example, see *Lopez Torres v. New York Board of Election*, No. 06-766, (Jan. 16, 2008) (Scalia, J., writing for the majority) (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.”). As Professor Stan Ingber has noted, “[c]ontent-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).

⁷³ *Abrams v. U.S.*, 250 U.S. 616, 630-631 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (emphasis added).

⁷⁴ *Id.* at 628. Compare Brandeis’ contention that the Framers “believed that freedom to think as you will and to speak as you thing are means indispensable to the discovery and spread of political truth.” *Whitney*, 274 U.S. at 375.

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.”⁷⁵ 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 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.⁷⁶ 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.”⁷⁷ 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.⁷⁸ Consider

⁷⁵ “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.” *Dennis v. United States*, 341 U.S. 494 (1951) (Douglas, J., dissenting).

⁷⁶ *Abrams v. U.S.*, 250 U.S. 616, 630-631 (1919) (Holmes, J., dissenting).

⁷⁷ *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943). See also “The 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” *Associated Press v. U.S.*, 326 U.S. 1, 21 (1945).

⁷⁸ “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

Judge Hand's oft-quoted⁷⁹ assertion that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."⁸⁰ It is not that right conclusions will always emerge from discourse that includes a "multitude of tongues." Rather, it is that a diverse discourse is preferable to a discourse whose parameters are dictated by the State.⁸¹

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 their 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.⁸² Professor Frederick Schauer explains:

Freedom of speech is based in large part on a distrust 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 powers in a more general sense. . . .⁸³

closely aligned with democratic theory." Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy*, 56 GEO. WASH. L. REV. 187, 220 (1987).

⁷⁹ See, e.g., *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 503 (1973); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁰ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). THOMAS G. KRATTENMAKER AND 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").

⁸¹ See Richard Posner, *The Speech Market and the Legacy of Schenck*, in *ETERNALLY VIGILANT*, *supra* note __, 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 *Tornillo* to *Red Lion*. 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 __ with *Meese v. Keene*.

⁸² FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 81-86 (1982) (giving numerous examples, including the persecution of Galileo).

⁸³ *Id.*

The distrust of government that permeates free speech theory applies even when the government attempts to restrict core speech “even for the purest of motives.”⁸⁴

Anti-paternalism permeates First Amendment doctrines governing core speech.⁸⁵ Paternalistic speech regulations attempt to restrict the free flow of information because citizens might misunderstand or misuse the information.⁸⁶ Such regulations are fundamentally at odds with our national commitment to democratic self-governance. Moreover, government denigrates the autonomy of citizens⁸⁷ when it limits the stock of information from which they may draw

⁸⁴ *Riley v. National Federation of the Blind*, 487 U.S. 781, 790-91 (1988).

⁸⁵ See, e.g., *First National Bank v. Bellotti*, 435 U.S. 765, 791 N.31 (1981) (“The First Amendment rejects the highly paternalistic approach of statutes . . . which restrict what people may hear.”). See also 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*, 105 HARV. L. REV. 554, 557-58 (1991) (observing that “traditional 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 ‘anti-paternalistic’ understanding of the first amendment.”).

⁸⁶ 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 interest.” See Carpenter, *supra* note __, at 582-83. Philosopher Joel Feinberg has written: “Paternalism . . . suggests the view that the state stands to its citizens as if they were children.” JOEL FEINBERG, HARM TO SELF 62 (1986).

⁸⁷ “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 __, at 26. In the context of commercial speech, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (Reasoning that “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 (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, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to “receive information and ideas,” and that freedom of speech “necessarily protects the right to receive.” And in *Procunier v. Martinez*, 416 U.S. 396, 408-409 (1974), where censorship of prison inmates’ mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of non-inmates to whom the correspondence was addressed.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976).

to decide their collective fates.⁸⁸ Respect for autonomy thus demands that the State adopt a vision of the audience of core speech 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.⁸⁹ Indeed, practically anything was a perfectly legitimate basis on which to regulate commercial speech⁹⁰ prior to its elevation to constitutionally protected status in *Virginia Board of Pharmacy* in 1976.⁹¹ Prior to that point, a legitimate argument for regulating commercial speech was that advertising manipulates credulous consumers into buying more of a product than they need.⁹² Another legitimate argument would be that

⁸⁸ Respect for speaker autonomy underpins many First Amendment decisions. *See, e.g.,* *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (describing, as “the fundamental rule of protection under the First Amendment” the principle “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 Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974), the Supreme Court upheld the right of a newspaper to exercise editorial discretion to exclude from its pages “that which ‘reason’ tells them should not be published.” 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 rights of viewers and listeners” are “paramount.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁸⁹ The Court’s electoral speech cases also provide a good example of how the Court 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, *infra* note 22.

⁹⁰ In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Supreme Court held that the First Amendment does not protect “purely commercial advertising.” *See* Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 *TEX. L. REV.* 747 (1993).

⁹¹ *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748, 770 (1976) (holding that commercial speech is protected by the First Amendment).

⁹² 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 (1977) (ban on lawyer advertising); *Carey v. Population Services Int’l*, 431 U.S. 678, 700 (1977) (ban on contraceptive advertising); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92-94 (1977) (ban on “For Sale” signs); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (ban on prescription drug

advertising confuses consumers about their best interests by making them subject to the siren song of the lowest price, regardless of quality.⁹³

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 Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁹⁴ 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.”⁹⁵ There, 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. The Court roundly condemned the State’s attempt to “protect” its citizens by keeping them in “ignorance,”⁹⁶ noting that the ban was based on “the reactions it is assumed people will have to the free flow of drug price information.”⁹⁷ In a 1977 case, the Court even embraced the notion, applied by Justice Brandeis to political speech, that “more speech” is typically an appropriate remedy for any harms that may flow from commercial speech.⁹⁸ Even so, the Court applied not strict but intermediate scrutiny to restrictions on commercial speech:⁹⁹ under the so-

prices); *Bigelow v. Virginia* (1975) (ban on abortion advertising). Even after 1976, the Supreme Court upheld a ban on casino advertising justified based on a “reduction of demand for casino gambling.” *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986), discussed below *infra* at text accompanying notes ___ through ___.

⁹³ The State made, and the Supreme Court rejected, this argument made in *Bates v. State Bar of Ariz.* 433 U.S. 350, 384 (1977). The Court refused to find that price advertising by attorneys was “[i]nherently misleading.” *Id.* at 372. Instead, the Court believed the absence of attorney advertisements 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.*

⁹⁴ cite

⁹⁵ *Id.* at 765.

⁹⁶ *Id.* at 768.

⁹⁷ *Id.*

⁹⁸ *Linmark Associates, Inc. v. Willingsboro*, 431 U.S. 85, 97 (1977).

⁹⁹ See *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)

Commercial speech was deemed less valuable than commercial speech, and greater regulation is permitted because commercial speech is more “hardy” and more verifiable than core speech. *Id.* at 771 and n. 24.

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 “no more extensive than necessary to serve that interest.”¹⁰⁰ Henceforth, the Court would not allow states to protect their citizens from themselves, except in a few isolated cases.¹⁰¹

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 Supreme Court’s increasing protection of commercial speech.¹⁰² The aim here, however, is merely to illustrate the phenomenon by comparing two cases, one of which adopts a credulous consumer model (and has since been overruled *sub silentio*) and the other the savvy shopper model.¹⁰³ This illustration demonstrates that the choice of implied audience is not inevitable but is instead deeply value-laden, a point which has application in core speech cases as well.

With that limited objective in mind, it is useful to compare *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*¹⁰⁴ with *44 Liquormart v. Rhode Island*.¹⁰⁵ Both cases involve “vice advertising,” specifically advertising of casino gambling and alcoholic beverages

¹⁰⁰ The test for intermediate scrutiny is often called the *Central Hudson* test, after the case which established it. See *Id.* at 566.

¹⁰¹ See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986).
; *United States v. Edge Broadcasting*, 509 U.S. 418 (1993).

¹⁰² 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, __ (2000) (“Commercial speech doctrine . . . is sharply audience oriented.”) 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.)

¹⁰³ 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.

¹⁰⁴ 478 U.S. 328, 341 (1986).

¹⁰⁵ 514 U.S. 476 (1995). An apt comparison would also be *44 Liquormart, Inc. v Rhode Island*, 517 U.S. 484 (1996), although comparison is complicated because a majority of Justices could agree on striking down a restriction on retail price advertising of alcoholic beverages, they couldn’t agree on why the restriction should be struck down.

respectively. *Posadas* demonstrates that even after the Supreme 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.¹⁰⁶ The basis for the ban was that advertising would “increase the demand for the product advertised.”¹⁰⁷ 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.”¹⁰⁸ Interestingly, however, the government’s fear of negative secondary effect 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.

In upholding the Puerto Rico advertising restrictions, the Court found that Puerto Rico’s had a “substantial” interest in decreasing gambling by residents, thereby protecting their “health, safety, and welfare.”¹⁰⁹ One might reasonably have asked why Puerto Rico legalized gambling, if it cared so much about the health, safety, and welfare of its citizens, but the Court glossed over this obvious point.¹¹⁰ The Court, having found a substantial governmental interest, also found that Puerto Rico’s chosen statute directly advanced it; Puerto Rico was “reasonable”¹¹¹ in assuming that shielding citizens from advertising targeted at them would decrease their demand for casino gambling, inevitably benefitting them. Finally, and perhaps most controversially, the Supreme Court held that Puerto Rico satisfied the last hurdle of intermediate

¹⁰⁶ *Id.* at 330.

¹⁰⁷ *Id.* at 342.

¹⁰⁸ *Id.* at 341.

¹⁰⁹ *Id.*

¹¹⁰ 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.

¹¹¹ *Id.* at 342.

scrutiny: its restrictions were “no more extensive than necessary” to decrease citizen demand. 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 [] a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.”¹¹² 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”¹¹³ 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. 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. The Court allowed the State to manipulate its consumers by limiting their stock of information about consumer gambling, and did so, ironically, in the name of protecting them from manipulation by casino advertisers. *Posadas* rejects not just the rational consumer assumption,¹¹⁴ but also the assumption “that some accurate information is better than no information at all.”¹¹⁵ *Posadas*, in fact, assumes that citizens would be better off if they did not know that casino gambling

¹¹² *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.”).

¹¹³ Some scholars have pointed out that much advertising is not truly “informational” and does not contribute to rational decision-making. Ronald Collins and David Skover. 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 arguably protection of core speech is justified by an interest in fostering individual self-fulfillment that is not present in the realm of commercial speech.

¹¹⁴ Brennan was joined in his dissent by Marshall and Blackmun. Stevens dissented separately, in an opinion joined by Marshall and Blackmun. *See generally Posadas*, 478 U.S. 328 (1986).

¹¹⁵ *Id.* at 358 (Brennan, J., dissenting). The dissenters likewise contended that the 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.*

existed.¹¹⁶ 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 Supreme 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*,¹¹⁷ which held unconstitutional on a 9-0 vote a ban on advertising retail prices of alcoholic beverages,¹¹⁸ 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,¹¹⁹ although at least five justices suggested that intermediate scrutiny was insufficiently protective of the speech interests involved in the case.¹²⁰ The State's reason for the ban on price advertising was to inhibit alcohol consumption among its citizens. Although this counted as a "substantial" state interest,¹²¹ the Court barred the state from accomplishing it by depriving its

¹¹⁶ See 478 U.S. 328, 358 (1986) (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.")

¹¹⁷ 517 U.S. 484 (1996). In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Supreme 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.

¹¹⁸ *Id.* at 489.

¹¹⁹ See *id.* at ____; *Id.* at 518 (Scalia, J., concurring in part and in the judgment) (expressing disapproval of *Central Hudson*, but agreeing that it "would prohibit the challenged regulation"); *Id.* at 523 (stating that "I do not join the principal opinion application of *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 (O'Connor, J., with whom Rehnquist, C.J., Souter and Breyer, JJ., join, concurring in the judgment) (concluding that the ban failed *Central Hudson*)

¹²⁰ See *id.* at 501 (principal opinion supported by 4 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).

¹²¹ *Id.* at 529 (O'Connor, J., with whom Rehnquist, C.J., and Souter and Breyer, JJ., joined) (assuming arguendo that the State's interest was substantial and that the ban directly advanced

citizens of truthful information. The State contended that a ban on advertising would help keep alcohol prices high, thus limiting consumption. The principal opinion found, however, that a ban on price advertising would not “directly advance” the goal of reducing consumption, since there was no evidence indicating that an advertising ban would have a “significant” effect on consumption. More to the point, the State had other weapons in its regulatory arsenal, such as taxation of alcoholic beverages, that would not target speech.¹²² Thus, a complete ban on price advertising was “more extensive than necessary” to achieve the State’s goal.

A dominant theme in 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 truth.”¹²³ 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.¹²⁴ 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.”¹²⁵ Echoing the sentiments expressed in the principal opinion, Justice Thomas, concurring in the judgment, went even further. Justice Thomas believed that *any* regulation of commercial speech intended to keep consumers ignorant was *per se* unconstitutional.¹²⁶

With *44 Liquormart*, the Court returns to a construction of the implied audience of commercial speech more consistent with that it implied in the

it, but holding that the ban nonetheless was unconstitutional because it was more extensive than necessary).

¹²² *Id.* at 507.

¹²³ 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.

¹²⁴ *Id.*

¹²⁵ *Id.* at 503. 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 in “keep[ing] legal uses or a produce or sevice ignorant in order to manipulate their choices in the marketplace”). Thus, at least five justices explicitly disavowed paternalism as a basis for regulating commercial speech.

¹²⁶ *Id.* at 518.

realm of core speech. Commercial speech jurisprudence, however, provides suggestive evidence about how core speech jurisprudence might look different without the reigning assumptions of rationalism and anti-paternalism.

III. PREDICTABLE IRRATIONALITY AND OTHER CRITIQUES

The First Amendment 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.¹²⁷ First, even if citizens are mostly rational, the minimum conditions for a functioning marketplace of ideas are not met. In other words, since the marketplace of ideas does not truly provide information from a diversity of sources, citizens can not use information in the marketplace of ideas to make rational decisions. Second, the rationality assumption is simply wrong, because evidence indicates that citizens are not rational. 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,¹²⁸ and it is poised to challenge the rationality assumption of First Amendment

¹²⁷ Stanley Ingber summarizes these criticism 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 manipulations, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals.” Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984).

¹²⁸ Richard 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* 3-4 (5th ed. 1998); see also RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* xiii (1991) (observing that “all 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 CASS R. SUNSTEIN, *INTRODUCTION TO BEHAVIORAL LAW AND ECONOMICS* 1, 1 (Cass R. Sunstein, ed., 2000).

law.¹²⁹ In this section, however, I hope to show that criticisms of the rationality assumption do not fundamentally undermine the reasons for applying it.

A. *The Market Dysfunction Critique*

According to some marketplace skeptics, the marketplace of ideas cannot function because a few powerful voices drown out all others.¹³⁰ 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.

Owen Fiss is a leading exponent of the market dysfunction critique.¹³¹ 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.¹³² “Today,” asserts Fiss, “public debate is dominated by the television networks and a number of large newspapers and magazines.”¹³³ The concentration of the mass media distorts the marketplace of ideas. Corporate ownership leads the mass media to place maximizing profit above serving the public interest.¹³⁴ The mass media exclude certain types of views--namely, in the words of Charles Fried, those that are “unpopular, unfamiliar, and ill-

¹²⁹ See generally Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment* (2003).

¹³⁰ “[M]onopolistic 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.” Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy*, 56 GEO. WASH. L. REV. 187, 188 (1987).

¹³¹ Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991). See also Jerome Barron; Cass Susstein.

¹³² For criticism of the historical argument, see Lucas A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 182-84 (1987).

¹³³ Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787 (1987).

¹³⁴ See Ronald J. Krotoszyski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1211-1212 (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[n] analytically sound basis for justifying regulation of broadcasters”).

funded.”¹³⁵ The media also exclude certain types of speakers--the poor, the poorly educated, women, and minorities. 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. According to Fiss and other critics of the marketplace model, the obvious answer to these problems is benign government intervention to ensure a diverse and fully participatory marketplace of ideas.¹³⁶ Fiss writes: “The state is to 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.”¹³⁷ 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, inputs that are not now available in the marketplace of ideas. One gets the sense, though, that state intervention argument does have at least an element of paternalism.¹³⁸ At its heart, the argument views the implied audience as helpless captives of powerful media forces, unable or unwilling to free themselves to seek information from other outlets. Perhaps, then, it is unsurprising that argument for benign state intervention to improve the market has had little traction outside the context of broadcasting,¹³⁹ and even there its influence appears to be waning.¹⁴⁰

¹³⁵ 59 U.CHI. L. REV. 225, 250

¹³⁶ “Scholarly critics of the marketplace model argue that the model itself suggests a vital need for government regulation of the market.” Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984).

¹³⁷ See Fiss, *Why the State?*, *supra* note __ at 788.

¹³⁸ 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* Section IV.C.3.

¹³⁹ In the era before government regulation of broadcasting, “competing stations broadcast at the same frequency in the same geographic location,” leading to signal interference, and ultimately to ‘chaos’.” MARC A. FRANKLIN, DAVID A. ANDERSON, & LYRISSA BARNETT LIDSKY, *MASS MEDIA LAW* 76 (7th ed. 2005). As a result, broadcasters sought, and got, federal regulation of the airwaves. JEREMY 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. 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

B. *Cognitive Psychology and the Human Dysfunction Critique*

A more penetrating criticism of the marketplace ideal is that its faith in human reason is misplaced. Even if the marketplace functions perfectly,

Commission (FCC) to issue and deny licenses to broadcasters as dictated by “public interest, convenience, or necessity.” 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. 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 “an offer of a reasonable opportunity to respond over the licensee’s facilities.” The Supreme 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. In *Red Lion*, the Supreme 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.* at 390. 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.* 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.* 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.

¹⁴⁰ 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. In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 FCC Red. 5043, 5048 (1987) (Mem. Opn. and order) (“The 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 *Telecommunications Research & Action Center v. FCC* 801 F.2d 501 (D.C. Cir. 1986) (rejecting the scarcity rationale). The Supreme Court has declined to extend the broadcast paradigm to other media. See *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (newspapers) (holding unconstitutional a statute granting political candidates the right to reply to attack on their records in newspapers); *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) (Internet) (declining to apply *Red Lion* paradigm because Internet is not characterized by scarcity and has not historically subject to regulation; holding that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”); *Turner Broadcasting System, Inc. v. FCC*, (cable). 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 *GEORGETOWN L. J.* 245 (2003).

truth¹⁴¹ cannot emerge if human beings are too lazy to seek it or if they willfully cling to irrational beliefs. 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,¹⁴² though an earlier survey indicated that eighty-four percent of Americans knew that Oprah Winfrey was campaigning for Barack Obama.¹⁴³ 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.¹⁴⁴ Though Americans' dearth of awareness of political events might be explained away by the concept of "rational ignorance,"¹⁴⁵ 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 believed that Barack Obama is Muslim, despite extensive media coverage refuting this misperception.¹⁴⁶ Worse, according to a survey reported in the *New York Times*, "Americans are as likely to believe in flying

¹⁴¹ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1341 (1961); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

¹⁴² Pew Research Center for the People and the Press, *Candidates' Policy Positions Still Not Widely Known*, July 16, 2008 (reporting results of survey), available at <http://pewresearch.org/pubs/899/candidates-policy-positions-still-not-widely-known>.

¹⁴³ Pew Research Center for the People and the Press, *Candidates' Policy Positions Still Not Widely Known*, July 16, 2008 (reporting results of Pew News IQ survey conducted from Feb. 28 – March 2, 2008), available at <http://pewresearch.org/pubs/899/candidates-policy-positions-still-not-widely-known>

¹⁴⁴ Scott Keeter, *Awareness of Iraq War Fatalities Plummets*, Pew Research Center for the People and the Press, March 12, 2008. 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 U.S. Supreme Court (though 86 percent knew that Dick Cheney was Vice-President). Survey by University of Michigan, *American National Election Study*, 2004.

¹⁴⁵ See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 928 (2006) (citing empirical studies "demonstrate[ing] citizens' lack of political knowledge," but observing that public choice theory explains why "the public's ignorance is rational").

¹⁴⁶ Michael Dimock, *Belief that Obama is Muslim is Durable, Bipartisan—but Most Likely to Sway Democratic Votes*, Pew Research Center for the People and the Press, 2008, available at <http://pewresearch.org/pubs/898/belief-that-obama-is-muslim-is-bipartisan-but-most-likely-to-sway-democrats>

saucers as in evolution.”¹⁴⁷ And almost 20 percent of Americans believe the sun orbits the earth.¹⁴⁸

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”¹⁴⁹ One of basic insights of cognitive psychology is that human decision-making is not perfectly rational.¹⁵⁰ This insight, which is the basis for behavioral economics as well,¹⁵¹ is incorporated in a concept known as “bounded rationality.”¹⁵² According to Herbert Simon, “boundedly rational agents experience limits in formulating and solving complex problems and in processing (receiving, storing, retrieving, transmitting) information.”¹⁵³

¹⁴⁷ Nicholas D. Kristof, *With a Few More Brains . . .*, N.Y. TIMES, March 30, 2008,

¹⁴⁸ Sam Wang & Sandra Aamodt, *Your Brain Lies to You*, INT. HERALD TRIB., June 29, 2008, available at <http://www.ihrt.com/articles/2008/06/29/opinion/edwang.php>

¹⁴⁹ JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES xii (Daniel Kahneman, Paul Slovic, & Amos Tversky, eds. 1982). In addition to cognitive biases, emotion can also cloud humans’ abilities to make rational decisions. For discussion, see Jeremy Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 2 (2007) (discussing the ways in which emotions distort decision-making).

¹⁵⁰ For these purposes, a decision is rational if it (1) “is based on the decisionmaker’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.

¹⁵¹ See Jeffrey Harrison, *Happiness, Efficiency, and the Promise of Decisional Equity: From Outcome to Process*, ___ L. Rev. ___ (2008). (“[C]onventional economics is based on behavioral assumptions that have, over the last twenty-five years, come under increasing scrutiny. Principal among these assumptions are that people are rational and motivated by self-interest alone.”)

¹⁵² See Herbert Simon, *Rational Choice and the Structure of the Environment*, in *ECONOMICS, BOUNDED RATIONALITY AND THE COGNITIVE REVOLUTION* (Massimon Egidi and Robin Marris, eds., 1992).

¹⁵³ Oliver Williamson, *The Economics of Organization: The Transaction Cost Approach* 87 AM. J. OF SOCIOLOGY 548, 553 (quoting HERBERT SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL*, 198 (John Wiley 1957))

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”¹⁵⁴-- 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 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 to it. 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.¹⁵⁵ 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 a 2/3 probability that no people will be saved.”¹⁵⁶ In this scenario, seventy-two percent of respondents chose Program A, preferring saving 200 lives for certain to the risk of saving no one. 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 in 3 probability that nobody will die and a 2 in 3 probability that 600 will die.”¹⁵⁷ This question presented respondents with exactly the same choice as before, but this time 78 percent

¹⁵⁴ BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 57 (2004); see also Hastie and Dawes, *supra* note __, 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 . . .”).

¹⁵⁵ Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981) [henceforth, Tversky & Kahneman, *Framing*]. This example is used by Bambauer, *supra* note __, at 682; Schwartz, *supra* note __, at 64-65; and Hastie & Dawes, *supra* note __, at 303. See also Barbara McNeil, Stephen Pauker, Harold Sox, and Amos Tversky, *On the Elicitation of Preferences for Alternative Therapies*, 306 *NEW ENGLAND J. MED.* 216 (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 and Shelley E. Taylor, see also Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AMER. PSYCHOLOGIST* 342, 343 (1984).

¹⁵⁶ Tversky & Kahneman, *Framing*, *supra* note __, at 453.

¹⁵⁷ *Id.*

chose treatment D.¹⁵⁸ 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.¹⁵⁹ 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 Tversky and Kahneman's study, 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.¹⁶⁰ Susceptibility to the framing effect makes both sophisticated and unsophisticated audiences susceptible to "manipulation."¹⁶¹ Though skillful use of framing is a staple of courtroom advocacy, and, arguably, of all persuasive speaking, unscrupulous use of framing may bolster the propagandist and demagogue. At a minimum, research on framing and other cognitive biases undermines the notion, so pervasive in First Amendment jurisprudence, that citizens are rational processors of information.

And humans are not simply subject to errors in processing information; they commonly err in filtering available information to choose which is relevant and which is not. One example of this is the availability heuristic, a

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ("Inconsistent responses [to the scenarios] arise from the conjunction of a framing effect with contradictory attitudes toward risk 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, "like 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.*

¹⁶⁰ See Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrick, *Inside the Judicial Mind*, at 13 n. 25 (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* 1, 18 in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, Paul Slovic, and Amos Tversky, eds. 1982).

¹⁶¹ Bambauer, *supra* note __, at 683.

logical fallacy that has direct relevance to public discourse and public policy decisions.¹⁶² 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. The availability heuristic makes people more likely to remember events that are vivid or emotionally charged, and thus more likely to accept these events as relevant to their decision-making. 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 an event that is frequently repeated in public discourse.¹⁶³ The availability heuristic explains why politicians commonly use vivid anecdotes 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.¹⁶⁴ In fact, as Cass Sunstein and

¹⁶² Another fallacy in this regard that may have relevance for public policy decisions is the optimism bias, which leads humans to consistently view their own odds of avoiding an unpleasant outcome as better than they actually are. David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 334, 336 (Thomas Gilovich, ed, Cambridge Univ. Press, 2002). 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 generally David Hirshleifer & Siew Hong Teoh, *Thought and Behavior Contagion in Capital Markets*, in *HANDBOOK OF FINANCIAL MARKETS: DYNAMICS AND EVOLUTION* ((Thorstein Hens & Kaues Reiner Schenk-Hoppé, eds. 2008) ; see also ROBERT J. SHILLER, , *IRRATIONAL EXUBERANCE*,152 (Princeton Univ. Press 2000) (discussing overconfidence in market behaviors). Crime may even increase in response to high prosecution rates. Daniel M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) (suggesting with empirical support that "the 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").

¹⁶³ See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 728 (1999).

¹⁶⁴ 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

Richard Thaler have written, the argument that “more is necessarily better” “is quite implausible in many contexts.”¹⁶⁵ 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 24 varieties ended up buying any only 3 percent of the time. In contrast, shoppers presented with only 3 varieties of jam ended up buying jam 30 percent of the time.¹⁶⁶ 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.¹⁶⁷

Not only does additional information lead to decision paralysis, it may also change the underlying decision, even if the additional information is irrelevant.¹⁶⁸ 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.¹⁶⁹ In another study, when participants were asked to choose between a “low-end” camera and a “mid-level” camera, about 50 percent chose each one. 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.¹⁷⁰ In these

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.”

¹⁶⁵ Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, Public Law and Legal Theory Working Paper 43, at 37 (2003). BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004); See Gerald Dworkin, *Is More Choice Better than Less*, in GERALD DWORKIN, *AUTONOMY* (1988). This also means that people are easily manipulated by propaganda.

¹⁶⁶ SHEENA SETHI, *CHOICE AND ITS DISCONTENTS: A NEW LOOK AT THE ROLE OF CHOICE IN INTRINSIC MOTIVATION* (1998)

¹⁶⁷ Sheena Iyengar, Wei Jiang & Gur Huberman, *How Much Choice is Too Much? Contributions*

to 401(k) Retirement Plans, 7 (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 ___, at 683.

¹⁶⁸ See Schwartz, *supra* note ___. Increased information—in the form of “exposure to both sides of an issues”—may even lead to “increased polarization of attitudes.” See Lee Sigelman & Carol K. Sigelman, *Judgment of the Carter-Reagan Debate: The Eyes of the Beholders*, 48 *PUBLIC OPINION QUARTERLY* 624, 624 (2001).

¹⁶⁹ Mark Kelman, Yuval Rottenstreich, & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 *J. LEGAL STUD.* 287, 291 (1996)

¹⁷⁰ See *id.* at 288 (citing Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 *J. MARKETING RES.* 281, 290 (1992)).

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 decisionmaking, but “increased amounts of relevant information” improve it.¹⁷¹ 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 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 justifies jettisoning the marketplace metaphor as “a framework for decisions about regulating communications”¹⁷² and clearing the way for government to play a stronger role in channeling information into and out of the public sphere.

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.¹⁷³ 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 does not undermine this fundamental principle. On average, heuristics help people

¹⁷¹ Charles A. O’Reilly, III, *Individuals and Information Overload in Organizations: Is More Necessarily Better?*, 23 ACADEMY OF MANAGEMENT J. 684, 685 (1980); *see also id.* at 692 (confirming these findings). *See also* “When information is limited, countless options increase the costs of decisions without increasing the likelihood of accuracy. But when choosers are highly informed, numerous options decrease the likelihood of error and do not greatly increase decision costs, simply because informed choosers can more easily navigate the menu of options.” Sunstein, *supra* note ___, at 38.

¹⁷² Bambauer, *supra* note ___, at 696. As I shall contend in the next section, ideals have uses even if they are never fully realized. *See infra* at ___.

¹⁷³ Like Bambauer, Paul Horwitz suggests that behavioral analysis may “sweep aside some of the prevailing metaphors of First Amendment theory.” Paul Horwitz, *Free Speech as Risk Analysis*, 76 TEMPLE L. REV. 1 (2003).

make “good enough” decisions, and they reduce decision-making costs in the face of complexity and uncertainty. This helps explain, in part, why “democracy seems to be working pretty well” despite citizens’ “widespread ignorance” of many basic political facts.¹⁷⁴ 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 “pick the candidate who will make the right decision,”¹⁷⁵ at least most of the time. In the political realm, voters use traits such as a candidate’s party affiliation or ideology as proxies for the candidate’s policy positions;¹⁷⁶ 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,¹⁷⁷ and the group “knows” more than the individual.¹⁷⁸ 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 of each of them makes in coming up with an answer will cancel themselves out.”¹⁷⁹ 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

¹⁷⁴ Lau & Redlawsk, *supra* note __, at 951.

¹⁷⁵ Surowiecki, *supra* note __, at 266.

¹⁷⁶ Lau & Redlawsk, *supra* note __, at __.

¹⁷⁷ “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.” Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 951-52 (2001). The problem, of course, is that cognitive biases lead to nonrandom errors, and groups are sometimes subject to “group think,” especially when they do not meet the conditions specified by Surowiecki. *See generally* JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

¹⁷⁸ *See generally* Surowiecki, *supra* note __.

¹⁷⁹ *Id.* at 10.

a race,¹⁸⁰ or whether a company is likely to prosper.¹⁸¹ Indeed, this is why financial markets as a whole tend to outperform all but a handful of individual investors.¹⁸² Though it is easy to point to examples of irrationality in markets, particularly in Spring 2009, the point is that irrationality 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.¹⁸³ 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 a comprehensively restated, justifications for clinging to what is clearly a flawed ideal.

A. *Procedural Concerns*

Consider again the justification for adhering to that ideal proffered by Chief Justice Roberts and Justice Alito in *FEC v. Wisconsin Right to Life*,

¹⁸⁰ *Id.* at 14

¹⁸¹ *Id.* at 234-35.

¹⁸² *Id.*

¹⁸³ See discussion *supra*.

*Inc.*¹⁸⁴ The Justices insisted that First Amendment protection hinges on a “reasonable interpretation” of the contested speech rather than its¹⁸⁵ “actual effect . . . on a particular segment of the target audience.”¹⁸⁶ 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 offer 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.”¹⁸⁷

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 both prolong litigation and drive up its costs. However, it is worth exploring further whether an actual effects test would be feasible. In trademark law, courts are routinely asked to rely on survey evidence to determine infringement claims.¹⁸⁸ The test for

¹⁸⁴ 551 U.S. ____ (2007). For a full discussion of the case’s holding and the disagreements amongst the Justices in the majority, see *infra* note ___. 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 Supreme Court affirmed the conviction of advocacy of criminal anarchy where the defendant published a Manifesto for the Left Wing of the Socialist Party, under the principal of incitement. The Court reasoned that despite there being “no evidence of any effect resulting from the publication and circulation of the Manifesto . . . the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen.” 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.” *Gitlow v. New York* 268 U.S. 652 (1925).

¹⁸⁵ *Id.* at ___. 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 § 203. 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 16, 21, and 21 n.7.

¹⁸⁶ *Id.* at ___. (emphasis added) (citing *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam)).

¹⁸⁷ *Id.*

¹⁸⁸ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23, cmt. c (“Consumer surveys can be helpful in establishing whether confusion is likely.”). See also, e.g., *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218, 45 U.S.P.Q.2d 1187 (7th Cir. 1997) (“Actual confusion can be shown by either direct evidence or by survey evidence.”); *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 974 (10th Cir. Okla. 2002) (holding that “evidence [of actual confusion] may be introduced through surveys, although their evidentiary value depends on the methodology and the questions asked”). *CAE, Inc. v. Clean Air Engineering, Inc.*, 267 F.3d 660, 685, 60 U.S.P.Q.2d 1449 (7th Cir. 2001) (“evidence of actual confusion, if

infringement is whether a defendant's use of the plaintiff's trademark is "likely to cause confusion or mistake or to deceive purchasers as the source of origin of such goods."¹⁸⁹ 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 the source of the goods in questions"¹⁹⁰ Courts concede that the "likelihood of confusion" test is difficult to apply because it depends on "varying human reactions."¹⁹¹ They nevertheless gamely plug away at assessing the likelihood of confusion based on a number of factors:

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 . . .

¹⁹²

available, is entitled to substantial weight in the likelihood of confusion analysis") Michael J. Allen, *The Role of Actual Confusion Evidence in Trademark Infringement Litigation*, 83 T.M.R. 267, 267-68 (May/June 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")

¹⁸⁹ 15 U.S.C.A. § 1114(1)(a).

¹⁹⁰ *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126 (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" need only "be credited with . . . a modicum of intelligence." *Id.* at ___. 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 "to protect the most gullible fringe of the consuming public." *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*, 34 F.3d 410, 414 (7th Cir. 1994).

¹⁹¹ *Pickle-Rite Co v. Chicago Pickle Co.* 171 F.Supp. 671 (N.D. Ill. 1959) (citing *Colburn v. Puritan Mills*, 108 F.2d 377, 378 (7th Cir. 1939)).

¹⁹² These factors are called the Polaroid formula. *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126 (2d Cir. 1979) (referencing *Polaroid Corp. v. Polaroid Electronics Corp.*, 287 F.D. 492, 495 (2d Cir.), *cert. denied*, 368 U.S. 820 (1961); *see also* PAUL GOLDSTEIN AND R. ANTHONY REESE, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY* (6th ed. 2008) (noting, however, that "[e]ach circuit has adopted its own factors," though the tests tend to overlap).

All this, and courts “may have to take still other variables into account.”¹⁹³

In applying these factors, courts do rely on their own assumptions about how the presumed audience of purchasers would respond to the competing trademarks, but in addition they frequently rely on the testimony of “professionals in marketing or applied statistics to conduct surveys of consumers.”¹⁹⁴ Yet this “empirical” evidence does little to clarify the task of interpreting whether consumers would be likely to be confused. In the words of Judge Richard Posner, “[t]he battle of experts that ensues is frequently unyielding.”¹⁹⁵ 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.¹⁹⁶ Moreover, the use of survey evidence raises the question of how many members of the consuming public must be likely to be confused. Is 7.6% an “appreciable” number of confused purchasers, as one court was asked to decide?¹⁹⁷ Considering these difficulties, both judges and scholars have concluded that surveys regarding “actual confusion” amongst “real” purchasers provides little benefit and adds significant costs to infringement cases. 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.¹⁹⁸ This is especially true because trademark law does not really worry about the chilling effect of expensive and protracted litigation on trademark infringement. In First Amendment law, however, the chilling effect of expensive and protracted litigation is likely to be substantial.¹⁹⁹

¹⁹³ *Id.*

¹⁹⁴ *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*, 34 F.3d 410, 414 (7th Cir. 1994).

¹⁹⁵ *Id.* at 415.

¹⁹⁶ *See id.*; *see also id.* at 416 (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”).

¹⁹⁷ *McCarthy on Trademarks*. If not, *see* same concept in *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 626 (8th Cir. 1987).

¹⁹⁸ 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*

¹⁹⁹ *See* Lyrissa Barnett Lidsky, *Silencing John Doe*, 49 DUKE L.J. 855, 890-92 (2000) (discussing the chilling effect of protracted litigation on free speech); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO

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. Two of these justifications—the need to respect citizen autonomy and remain true to democratic theory—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. Two less common justifications are that the rational audience assumption helps prevent the “dumbing down” of public discourse and checks government abuse of its agenda-setting power to dominate public discourse. 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 mass media industry.

1. Democracy and Autonomy

The assumption that citizens are rational is deeply embedded in democratic theory.²⁰⁰ In a liberal democracy such as ours, the government derives both its powers and its legitimacy from the “consent of the governed,”²⁰¹ and the governed make their will known through a variety of means, such as voting in elections and participating in public discourse.²⁰²

ST. L.J. 1753, 1789 (1998) (“[I]t is now clear that chill on speakers comes . . . from concern about the costs of litigation.”).

²⁰⁰ 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.” Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*,

81 WASH. U. L. Q. 417, 435 (2003).

²⁰¹ Declaration of Independence, July 4, 1776. Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) (discussing the process of “collective self-determination”)

²⁰² 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 makes little sense if one assumes that citizens are pervasively and ineluctably irrational.

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 their 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. 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. First Amendment doctrine also protects the process of critical interaction²⁰³ 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.²⁰⁴

Whether that ideal should be rejected is best left to political theorists. Suffice to say that this is the path our country has chosen, and unless we want to fundamentally alter that system, it makes sense for us to aim for internal

²⁰³ As Robert Post has pointed out, First Amendment doctrine clears a space for “a process of critical interaction.” *Id.* at 637. 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.” LIBERALISM: CRITICAL CONCEPTS IN POLITICAL SCIENCE 261 (G.W. Smith ed., 2002).

²⁰⁴ 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 KROTOSZYSNKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* (NYU Press 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 “not republican 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.”

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 more closely their actual cognitive capabilities. 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 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 nor could there be.²⁰⁵

More critically, authoritative selection of the information to be included in public discourse violates the autonomy of citizens. The need to respect citizens as “autonomous agent[s]” capable of self-determination²⁰⁶ 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 Supreme Court explained this relationship in *Cohen v. California*:²⁰⁷

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.*²⁰⁸

This statement of principle emphasizes the linkage between democratic theory and autonomy. Democracy accords citizens the right to choose their collective

²⁰⁵ See Ronald J. Krotoszynski, Jr., *Race, Equality and the Constitution* (forthcoming 2009) (“One might well wonder if democratic self-government could go on in the absence of spin.”)

²⁰⁶ See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-50 (1989).

²⁰⁷ 403 U.S. 15, 23-24 (1971).

²⁰⁸ *Id.* (emphasis added).

fates: that choice is meaningless if it is coerced or manipulated.²⁰⁹ In fact, democratic decisions are simply illegitimate if they violate this fundamental principle.²¹⁰ Of course, autonomy is not merely an instrumental justification but a deontological one as well. Self-expression lies close to the core of personality, and government intrusions may invade individual freedom in this realm more than in others.²¹¹

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. This principle is at work in 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.²¹² Consider *Greenbelt Cooperative Publishing Ass’n v. Bresler*.²¹³ In *Bresler*, a real estate developer sued for defamation after a newspaper characterized his zoning negotiations with the city council as “blackmail.”²¹⁴ The Supreme 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

²⁰⁹ See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH, 47-50 (1989) (“[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) ([T]he dignity argument merges with the normative argument for democracy.”

²¹⁰ See Baker, *supra* note ___, at 47-50.

²¹¹ Kent Greenawalt; *but cf.* Mark Yudof, *supra* note ___.

²¹² For extensive discussion of the constitutional privilege for opinion, see generally Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

²¹³ 398 U.S. 6 (1970).

²¹⁴ *Id.* at 7.

[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."²¹⁵ 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.²¹⁶ However, 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 Supreme Court correctly described *Bresler* as playing a central role in providing breathing space for freedom of expression²¹⁷

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 Torts. 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 *Vaughn v. Menlove*²¹⁸ explains, the reasonable person standard guards against a collapse of standards, by refusing to allow negligence liability to become "co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual."²¹⁹ 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 negligence injury "tractable"²²⁰

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Milkovich, id.* at 19 (finding that existing doctrine, including *Bresler*, gives breathing space to free expression "without the creation of an artificial dichotomy between 'opinion' and 'fact'.")

²¹⁸ 132 Eng. Rep. 490 (1837).

²¹⁹ *Id.*

²²⁰ See Jeffrey Rachlinski, *Misunderstanding Ability, Misallocating Responsibility* 1055, 1057 (2003). ("Because recent research suggests that people commonly overestimate cognitive

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.”²²¹ 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. However, classroom discourse is similar to the ideal political discourse 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 better by far 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 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 to 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

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.”).

²²¹ *Id.* at 1090-91

draw conclusions based on the analogy. Nonetheless, the danger that a powerful speaker will dominate discourse—either directly or indirectly—is worthy of further consideration.

3. Anti-paternalism as 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 with this, 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. 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 science.”²²² The Catholic Church first ordered Galileo not to defend the idea that the earth revolves around the sun. When he did so, the Church put him on trial for heresy. 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.

The American experience also contains dispiriting examples that confirm that the road to hell is paved with good intentions. Many of the most

²²² 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* (1989)

embarrassing examples of speech suppression in American history—from the Sedition Act of 1798 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.²²³ Threats to national security are particularly likely to produce public policy based on cognitively flawed reasoning. The Red Scare cases are but one example. The Russian Revolution sparked the first “Red Scare” in the United States. This period of “anti-radical hysteria,”²²⁴ 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 displays of flags as a sign of opposition to organized government), 16 states criminal syndicalism laws (law prohibiting the advocacy of overthrow of the government), and 12 states passed anarchy and sedition laws.”²²⁵ The result was over 1,400 arrests and 300 convictions. The United States Supreme Court acquiesced in the suppression of dissent,²²⁶ 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 indefinite time in the future.”²²⁷

Why do First Amendment principles often succumb to irrational fears in time of war or 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, since the underlying social conditions were so dramatically different in the two countries. But the “availability” heuristic²²⁸ 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

²²³ See Horwitz, *supra* note __, at __.

²²⁴ MURRAY B. LEVIN, *POLITICAL HYSTERIA IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION* 29 (1971).

²²⁵ See KROTOZYNSKI ET. AL, *FIRST AMENDMENT LAW*, *supra* note __, at 43-44; PATRICIA CAYO SEXTON, *THE WAR ON LABOR AND THE LEFT* 135 (1991)

²²⁶ See *Whitney v. California*, 274 U.S. 357 (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”).

²²⁷ The defendant in *Whitney* helped organize the Communist Labor Party of California, whose Constitution advocated overthrow of the government. *Id.* at 362.

²²⁸ See *infra* section III.B.

availability cascade, convincing a significant segment of the population of 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 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.²²⁹ Although ostensibly instituted to ensure that voters were qualified to exercise the franchise intelligently, the purpose of literacy tests was to disenfranchise black voters.²³⁰ Indeed, literacy tests were "the most popular method of constricting the electorate,"²³¹ and states continued to use them for this purpose until they were eliminated by the Voting Rights Act of 1965.²³²

Literacy tests achieved their nefarious ends not only because blacks were systematically denied educational opportunities, and thus had higher

²²⁹ BERNARD GROFMAN, LISA HANDLEY, AND RICHARD G. NIEMI, *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). As late as 1960, "voter registration rates among whites in the South were more than twice those of blacks." *Id.* at 1.

²³⁰ W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical and Related Considerations*, 48 *How. L.J.* 1, 74 n. 581 (2004) (noting discrimination in application of literacy test to black voters). States also used literacy tests to disenfranchise other groups of voters thought to be capable of voting intelligently, such as recent immigrants. For extended discussion, see Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 *CASE WESTERN RES. L. REV.* 225, 239-40 (2003).

²³¹ 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 222, at 236.

²³² See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314. The nationwide ban originally was in place for five years. See *id.* In 1975, Congress made the ban permanent. See section 102 of the Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended in section 201 of the VRA, 42 U.S.C. § 1973aa (2000)).

illiteracy rates than white Americans,²³³ 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.²³⁴ 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.”²³⁵ From the Court’s perspective, the weak and vicious were simply not entitled to vote, and they left the determination of who was weak and vicious to racist state officials. Even as late as 1959, the Supreme Court could be sanguine in its assertion that the use of facially non-discriminatory literacy tests was constitutional, accepting the premise that “[t]he ability to read and write . . . has some relation to standards designed to promote the intelligent use of the ballot.”²³⁶ Again the Court conceded that state officials might apply such tests in a racially discriminatory fashion, 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. However, 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,”²³⁷ and

²³³ This disproportion was a natural result of the systematic deprivation of educational opportunities to black Americans. Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 616 (2004)

²³⁴ *Williams v. Mississippi*, 170 U.S. 213 (1898).

²³⁵ *Williams*, 170 U.S. at 222.

²³⁶ *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.

²³⁷ Lori Robertson, *In Control*, AM. J. REV., Feb./March 2005, available at ajr.org/Article.ask?id=3812.

“information is a source of power.”²³⁸ 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.²³⁹ Government leaders can also affect discourse by refusing to provide information: by refusing to hold press conferences, to discuss a policy choice beyond certain agreed upon talking points, and to allow access to documents and news sites within its control.²⁴⁰

The government also has at its disposal more ethically questionable ways of manipulating public discourse. It is worthwhile to consider some 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,”²⁴¹ in violation of federal law forbidding dissemination of “covert propaganda” in the United States. The Education Department also issued prepackaged video stories to television stations, which were “‘purposely designed to be indistinguishable from news segments broadcast to the public.’”²⁴² With regard to coverage of the war in Iraq, the Bush administrations tactics were even more troubling. Certainly the Bush administration exaggerated the threat that Saddam Hussein had acquired weapons of mass destruction,²⁴³ and 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

²³⁸ MALCOLM MITHCELL, PROPAGANDA, POLLS, AND PUBLIC OPINION: ARE THE PEOPLE MANIPULATED? 46 (1977).

²³⁹ Lori Robertson, *In Control*, AM. J. REV., Feb./March 2005, available at ajr.org/Article.ask?id=3812 (discussion fact that New York Times reporters were banned from then Vice President Dick Cheney’s campaign plane as punishment for unfavorable coverage).

²⁴⁰ Policy re coffins at Dover AFB. See FRANKLIN ET. AL, *supra* note __, at __.

²⁴¹ See Robert Pear, *Buying of News by Bush’s Aides is Ruled Illegal*, NEW YORK TIMES, Oct. 1, 2005.

²⁴² *Id.*

²⁴³ CHALMERS JOHNSON, THE SORROWS OF EMPIRE 229-30 (200); PAUL RUTHERFORD, WEAPONS OF MASS PERSUASION: MARKETING THE WAR AGAINST IRAQ at 196.

strategic leaks to the press,²⁴⁴ while 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.²⁴⁵ 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. 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,²⁴⁶ though certainly there was impressive reporting during the war on warrantless wiretaps, torture and extraordinary rendition.²⁴⁷ 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, the decline of newspapers undoubtedly cuts resources devoted to investigative journalism.²⁴⁸

I 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

²⁴⁴ See Murray Waas, *Cheney “Authorized” Libby to Leak Classified Information*, NAT’L J., Feb. 9, 2006.

²⁴⁵ David Barstow, *Pentagon Suspends Briefings for Analysts*, N Y TIMES, April 26, 2008.

²⁴⁶ *Five Years On: Media’s Role in Iraq*, CHRISTIAN SCI. MONITOR, March, 19, 2008 (“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, _____ (criticizing media for accepting President Bush’s propaganda without enough investigation); Sherry Ricchiardi, *Whatever Happened to Iraq?*, Am. J. Rev. (June/July 2008), available at www.ajr.org/Article.ask?id=4515 (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 in its coverage of the war in Iraq. See Michael O’Hanlon, *Misplaced Blame: The Media’s Performance in Iraq*, WASH. TIMES, April 11, 2006, available at www.brookings.edu/opinions/2006/0411iraq_ohanlon.aspx.

²⁴⁷ Cite Pulitzer Prize winners for last few years.

²⁴⁸ See, e.g., *Tribune Will Cut Hundreds of Jobs as Businesses Weaken*, N.Y. TIMES, Feb. 14, 2008, at C9. [Additional Cites.]

dip”: not only could the government attempt to drown out other speakers (which the First Amendment does not prohibit), but it could remove its critics as well 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.

However, it by no means follows that the ideal of rationality 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 democracy. 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.”²⁴⁹ But as John Updike has written, “believ[ing]” in “the American political experiment”²⁵⁰ 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.”²⁵¹ 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.

²⁴⁹ *McConnell v. FEC*, 540 U.S. 93, 258 (Scalia, J., dissenting).

²⁵⁰ John Updike, *Testing the Limits of What I Know and What I Feel*, available at: http://thisibelieve.org/disp_ShowEssay.php?uid=14. (also asserting that “To guarantee the individual maximum freedom within a social frame of minimal laws ensures—if not happiness—its hopeful pursuit.”)

²⁵¹ *Id.*