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# PROTECTING CONSUMERS FROM THEMSELVES: CONSUMER LAW AND THE VULNERABLE CONSUMER

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## ABSTRACT

*Attitudes toward consumer protection are shaped primarily by complex assumptions about human nature and its interaction with modern marketing. The dominant perspective governing American consumer law is individualism, a descriptive and frequently normative assumption that places watchdog responsibilities on the individual consumer. This perspective is described and analyzed through an examination of public policy arguments about (1) advertising that targets children, (2) restrictions on consumption of sugared beverages, and (3) creation of the Consumer Financial Protection Board. Individualism is then contrasted with the portrayal of consumers as vulnerable. Specifically, insights from behavioral economics and neuropsychology are used to gain a more accurate starting point for creating consumer protection laws and regulations that reflect respect for consumers as they are, rather than as who they are in deductive rational actor models of market exchange.*

## TABLE OF CONTENTS

I. Introduction .....	158
II. Individualism and Consumers .....	160
A. Individual Choice as Primary Causal Agent.....	160
B. Individualism and Public Policy Assisting Consumers.....	164

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III.	The Sound of Consumer Protection in an Individualistic Culture ..	165
A.	Regulation of Advertising to Children.....	166
B.	New York City's Big-Soda Cap.....	169
C.	Individualism and the Consumer Financial Protection Bureau.....	174
IV.	Conceptualizing the Vulnerable Consumer .....	176
A.	What Does It Mean to Be “Vulnerable”? .....	177
B.	Implications of Recognizing Vulnerable Populations .....	179
V.	Bounded Rationality, Willpower, and Consumer Protection .....	181
A.	Bounded Rationality .....	182
1.	Optimism Bias .....	183
2.	Framing Options .....	185
3.	Status Quo Bias.....	186
4.	Vividness Bias .....	187
5.	Confirmation Bias.....	187
6.	Impact Bias .....	188
B.	Bounded Willpower and Imperfect Self-Control.....	189
VI.	Conclusion .....	190

## I. INTRODUCTION

*“I am done with the monster of ‘We,’ the word of serfdom, of plunder, of misery, falsehood and shame.”<sup>1</sup>*

*Ayn Rand*

*“[A] thousand fibres connect you with your fellow-men . . .”<sup>2</sup>*

*Henry Melvill*

*“We don’t accomplish anything in this world alone . . .”<sup>3</sup>*

*Justice Sandra Day O’Connor*

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1. AYN RAND, ANTHEM 112 (1946).

2. Reverend Henry Melvill, Partaking in Other Men’s Sins, Address at St. Margaret’s Church, Lothbury, England (June 12, 1855), in THE GOLDEN LECTURES 450, 454 (1855), available at <https://play.google.com/books/reader2?id=lt8EAAAAQAAJ&p=rintsec=frontcover&output=reader&hl=en&pg=GBS.PA884-IA121>.

3. *Works by Justice Sandra Day O’Connor*, ARIZ. STATE UNIV. SANDRA DAY O’CONNOR COLL. OF LAW, <http://www.law.asu.edu/library/RossBlakleyLawLibrary/SandraDayOConnor/WorksbyJusticeSandraDayOConnor.aspx> (last visited Nov. 11, 2014).

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Consumer law provides rules and incentives that encourage fair market exchanges.<sup>4</sup> The governing ethos of this area of law is the creation of a level playing field. For consumers to fulfill their inclinations, they require honest and complete presentation of the price, durability, and safety information of optional goods or services, as well as an awareness of available options. In a capitalistic framework, the greed that self-consciously fuels multiple efficiency gains is equally capable of motivating suppliers of goods and services to withhold or provide misleading information that distorts the purchasing behavior of consumers. Hence, consumer law needs to serve as a countervailing force moving the terms of the bargain in the direction of respect for consumer welfare.

The needed scope of the countervailing force depends on assumptions about what behavior is reasonable to expect from consumers. In other words, what are the prevalent capabilities of people who form an agreement with businesspeople intent on marketing their good or service so as to maximize their profit? Suppose, for example, that individuals look at themselves and others and see impressive information processors who carefully discover all relevant information about goods and services *and* who make choices based on their reflections about the kind of person they wish to become. From this framework of expectations, consumer law should facilitate these natural tendencies while keeping a regulatory eye on business efforts to occlude access to the information the typical consumer desires to evaluate.

The basic responsibility for the quality of market exchanges would then naturally fall onto the consumers who are benefited or harmed by the logical consequences of the choices they have made. This perspective for viewing consumer behavior is but one element of a dominant way of thinking in the United States: individualism. Part II of this Article describes individualism in some detail as background for the basic argument advanced herein. When an individual views typical consumers through the lens of individualism, it follows that he or she would be pushed in the direction of minimalist governmental efforts to level a playing field that needs little reshaping. Part III analyzes the reasoning used by courts in three distinct markets and draws out the compatibility of individualism with the courts' reasoning. Parts IV and V explain the legal implications of a more realistic appraisal of typical consumers—one in which the full foibles of individuals' minds are the basis

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4. See, e.g., Truth in Lending Act, 15 U.S.C. §§ 1601–1616 (2006); Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x; see generally *Consumer Protection Laws*, LAWYERS.COM, <http://consumer-law.lawyers.com/consumer-fraud/consumer-protection-laws.html> (last visited Nov. 11, 2014).

for consumer law.

## II. INDIVIDUALISM AND CONSUMERS

Consumers make hundreds of decisions each week that result in purchases that more or less meet their desires for dependable, healthful, and fairly priced goods and services.<sup>5</sup> To view consumers as if they are a latter-day Robinson Crusoe is to expect them to have the time, mental acuity, and chemical and engineering acumen that would enable them to represent their interests effectively when they interact with businesses. Individualism is the perspective that holds the individual responsible for the logical consequences of the individual's choices.<sup>6</sup> In the words of Amitai Etzioni, such a way of seeing the world emphasizes "me-ness," and distrusts "we-ness."<sup>7</sup>

### A. Individual Choice as Primary Causal Agent

Individualism permeates American culture.<sup>8</sup> On its surface, the word individualism may look simple, a distinct value requiring little explanation. However, individualism is in fact a complex idea reliant on several questionable assumptions about an individual's ability to be in control of his or her own lives.<sup>9</sup>

The most important assumptions necessary for understanding individualism is that human beings are "atomistic" entities.<sup>10</sup> Atomism assumes that human beings exist independent of, and unaffected by, external

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5. See *Consumer Expenditures—2013*, U.S. DEP'T OF LABOR: BUREAU OF LABOR STATISTICS (Sept. 9, 2014), <http://www.bls.gov/news.release/cesan.nr0.htm>.

6. See generally Steven M. Lukes, *Individualism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/286303/individualism> (last visited Nov. 11, 2014).

7. See AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 128 (1993) ("An era dedicated to a return to we-ness would value and promote design that is pro-community.").

8. See generally ROBERT N. BELLAH ET AL., *INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE* 3–10 (1987).

9. See Markella B. Rutherford, *A Bibliographic Essay on Individualism*, 4 HEDGEHOG REV. 116, 116 (2002), available at <http://www.iasc-culture.org/THR/archive/s/Individualism/4.1LRutherford.pdf>.

10. Andrea Giampetro-Meyer et. al., *Advancing the Rights of Poor and Working-Class Women in an Individualistic Culture*, 2 LOY. POVERTY L.J. 41, 41 n.2 (1996) (explaining that atomism posits that human beings are "independent, disembodied entities").

influences (e.g., parents, genes, luck, and ethnicity).<sup>11</sup> This atomistic assumption about human nature is fundamental to understanding American individualism. If the direction of people's lives is firmly in their hands, then individuals are primarily responsible for the achievements and failures in their lives. While it is often difficult to distinguish when this assumption of atomism is normative or descriptive, in both cases responsibility for poverty, wealth accumulation, antisocial conduct, and entrepreneurial insight belongs to the individual experiencing these conditions.<sup>12</sup>

To maintain the perspective of personal choice as the basis for explaining alternative directions taken by the lives of individuals, those comfortable with individualism and its implications actively discourage reasoning that places weight on causal forces outside the control of individuals.<sup>13</sup>

The value preference of self-reliance over interdependence flows logically from the assumption that human beings have the ability to control

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11. HARRY C. TRIANDIS, *INDIVIDUALISM & COLLECTIVISM* 2 (1995) (explaining that individualism assumes human beings are "individuals who view themselves as independent of collectives"). Because atomism assumes that humans are unaffected by societal influences, this idea concludes that only they are in charge of creating their own destinies and realities. *See id.*; *see also* Michael Dominic Meuti, *Legalistic Individualism: An Alternative Analysis of Kagan's Adversarial Legalism*, 27 HASTINGS INT'L & COMP. L. REV. 319, 332 (2004) ("[American individualism] tend[s] to 'attribute events to internal individual causes.' Each individual is, therefore, the master of his own destiny, and is responsible for his position in life." (footnote omitted)).

12. *See, e.g.*, Gregory Jordan, *The Causes of Poverty—Cultural v. Structural*, 1 PERSPS. IN PUB. AFF. 18, 19 (2004), available at <http://asu.edu/mpa/Jordan.pdf> ("[S]cholars argue that poverty is largely the result of social and behavioral deficiencies in individuals that ostensibly make them less economically viable within conventional society.").

13. *See* Ernest Wallwork, *Ethical Analysis of Research Partnerships with Communities*, 18 KENNEDY INST. ETHICS J. 57, 57–58 (2008) (explaining the destiny of the individual in sociological terms: "Against the radical individualist assumption that individuals make decisions freely when they are unconstrained by social affiliations, the community-research partnership movement regards the individual as embedded in narrative traditions, institutions, roles, shared goals, and environments (natural and social), without which human beings can neither survive nor flourish morally."). *See also* Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 323–25 (2006) (discussing the debate about human agency and whether agency is independent of, or intertwined with, societal externalities). Carle identifies that "a person's attachments to a community and its socially derived values constitute the person herself; we could not understand the concept of a person separate from these attachments." *Id.* at 326 (citing MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 90 (1982)).

their realities and destinies.<sup>14</sup> Because individualism assumes that human beings function independent of societal forces and have the ability to create their own realities, the individual's dependence on any external entity or resource is consequently viewed as unnecessary—and oftentimes inappropriate.<sup>15</sup> The self that emerges from this value perspective is more of a separate sovereign than a partner or a member of a community of intertwined relationships.<sup>16</sup>

Because this value preference is so powerful, many Americans resist acknowledging that they are, in fact, dependent on government entities in some fashion.<sup>17</sup> There is a lack of recognition of the depth of government assistance that affects every citizen, including the seemingly affluent citizen.<sup>18</sup> One receives public subsidies, for example, and sees them as just

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14. See, e.g., Anita Casalina, *Self Reliance and Interdependence*, BILLIONS RISING (Jan. 28, 2013), <http://billionsrising.org/self-reliance-and-interdependent/> ("[D]ependence on . . . others doesn't unleash the human potential anywhere near as much as self reliance.").

15. See TRIANDIS, *supra* note 11.

16. See BELLAH ET AL., *supra* note 8, at 3 ("[W]hen people are reduced to isolated individuals, . . . public discussion and popular initiative will languish . . .").

17. Cf. DAVID LEAKE & RHONDA BLACK, ESSENTIAL TOOLS: IMPROVING SECONDARY EDUCATION & TRANSITION FOR YOUTH WITH DISABILITIES, 18 (Oct. 2005), available at [http://www.ncset.org/publications/essentialtools/diversity/EssentialTools\\_Diversity.pdf](http://www.ncset.org/publications/essentialtools/diversity/EssentialTools_Diversity.pdf) (discussing how American individualism is a result of a "standard of living that allows self-sufficiency . . . to be the expected norm").

18. See Firmin Debrabander, *Deluded Individualism*, N.Y. TIMES (Aug. 18, 2012), [http://opinionator.blogs.nytimes.com/2012/08/18/deluded-individualism/?\\_php=true&\\_ttype=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2012/08/18/deluded-individualism/?_php=true&_ttype=blogs&_r=0). Debrabander's article makes note that an incredibly high percentage of Americans believe they are not reliant on government assistance and that they are totally self-reliant, despite the fact that mortgage interest deductions help the wealthy, farm subsidies lower food prices across the board, federal mortgage assurances lower interest rates generally, and an exceedingly large Department of Defense employs hundreds of thousands of Americans. *Id.* A study conducted by Pew Research supports Debrabander's conclusion. See *The American-Western European Values Gap*, PEW RESEARCH GLOBAL ATTITUDES PROJECT, <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/> (last updated Feb. 29, 2012). The study relied on a survey comparing the opinions of European citizens to those of American citizens regarding assumptions of individualism. *See id.* One of the questions on this survey asked participants whether they agreed that "success in life is pretty much determined by forces outside our control." *Id.* (internal quotation marks omitted). According to the survey, the percentage of Americans agreeing that success is due to forces outside an individual's control was less than all four European countries' respondents. *Id.* For a similar assertion see MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 32 (1999) ("Compared with the more socially

recognition of prior personal excellence.<sup>19</sup>

This individualistic value of self-reliance can also be witnessed in the American focus on the importance of “hard work.”<sup>20</sup> The wisdom of expecting and practicing self-reliance played a major role in the 2012 U.S. presidential campaign.<sup>21</sup> During this campaign, Barack Obama and Mitt Romney pushed and pulled at the country’s acceptance of assumptions of individualism. President Obama mocked, in a roundabout way, certain individualistic beliefs of “wealthy, successful Americans.”<sup>22</sup> Obama pushed a nonindividualistic notion that people do not become wealthy and successful through their own hard work and determination alone; instead, everyone needs assistance from social networks to permit personal development.<sup>23</sup>

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minded Europeans, Americans are thought to place a higher value on self-reliance and individual initiative and to recoil from the idea of government responsibility for individuals’ well-being.”).

19. See Debrabander, *supra* note 18.

20. See Christopher Angevine, *The Consociative Value of Work: What Homelessness-To-Work Programs Can Teach Us About Reforming and Expanding Prison Labor*, 4 CRIM. L. BRIEF 19, 19 (2009) (“Americans’ devotion to work may have manifold causes—among them a tax structure that does not disincentivize extra work, social concern for material wealth, and a culture of self-sufficiency and raw individualism—but that commitment has deep roots in the very fabric of the nation’s history.”).

21. See Gary Moss, *Guillory Sees 2012 Presidential Campaign as a Conflict Between Individualism & Community*, UNIV. OF N.C. GAZETTE (Aug. 21, 2012), <http://gazette.unc.edu/2012/08/21/guillory-sees-2012-presidential-race-as-a-conflict-between-individualism-and-community/> (“[T]here is really a big issue undergirding the campaign. That is: To what extent is the United States a country in which government is one expression of community, and to what extent is the United States a gathering of independent capitalists?” (quoting Ferrel Guillory, professor of journalism at the University of North Carolina)).

22. Kelefa Sanneh, *Sloganeering*, THE NEW YORKER (August, 13, 2012), <http://www.newyorker.com/magazine/2012/08/13/sloganeering> (internal quotation marks omitted). President Obama told one crowd of Democratic supporters:

If you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you’ve got a business, that—you didn’t build that. Somebody else made that happen.

*Id.*

23. See *id.*

In response to Obama's attempts to debunk the tenets of individualism, Romney embraced individualism and appealed to the country's classic values of self-reliance and autonomy with slogans such as "We Built America," "Built by Us," and "Government Didn't Build My Business, I Did."<sup>24</sup> To leave no doubt about his fealty to individualism, Romney spent time during his campaign lauding the individual successes of visible business owners Papa John (John Schnatter), Steve Jobs, and Henry Ford.<sup>25</sup> He spoke at great length about the genius and hard work these individuals put into creating their successful firms.<sup>26</sup>

### B. Individualism and Public Policy Assisting Consumers

Once Americans understand the assumptions and value preferences behind the idea of American individualism, they can begin to make sense of the popularity in the United States of slogans like "personal responsibility" and "freedom from government assistance."<sup>27</sup> Individualism provides intellectual support for policies that place responsibility on individuals to achieve their own goals.<sup>28</sup> Governmental policies that would assist individuals in achieving their goals are pictured as an obstruction to individual efficacy.<sup>29</sup>

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24. *See id.* (internal quotation marks omitted).

25. *Id.*

26. *See id.*

27. *Cf. TRIANDIS, supra* note 11 (explaining that American individualism assumes human beings are generally independent); *Meuti, supra* note 11.

28. *See TRIANDIS, supra* note 11; *Meuti, supra* note 11.

29. *See GILENS, supra* note 18, at 34. Gilens's study of American attitudes toward forms of government found that

when asked whether "government is responsible for the well-being of all its citizens and has an obligation to take care of them" or "people are responsible for their own well-being and have an obligation to take care of themselves," 74 percent of Americans place the responsibility on individuals rather than government.

*Id. See also* Gregory B. Markus, *American Individualism Reconsidered*, in *CITIZENS AND POLITICS: PERSPECTIVES FROM POLITICAL PSYCHOLOGY* 401, 407 (James H. Kuklinski, ed., 2001). Markus explains how the popular belief of individualism has led to popular liberal thought that lifts up the idea of "limited government" in the United States. *See id.* The author states:

The image of humans as self-determining creatures . . . remains one of the most powerful dimensions of liberal thought. For all of us raised in liberal societies, our deep attachment to freedom takes its meaning and value from the

Individualism provides legitimacy for patterns of inequality. A logical extension of individualism is the deep belief that those who hold a large percentage of the country's wealth have "earned" their wealth, and those who are in poverty have "earned" their lack of financial success.<sup>30</sup> Consumers with greater wealth have more time and access to expert advice, relevant information, and product options. Consequently, individualism fosters a sense of quietude toward the needs of consumers as a group to have social assistance in making better consumption decisions.<sup>31</sup> The consumers at the top of the income and wealth pyramid have demonstrated to an audience of voters suffused with individualism that individuals are quite capable of effectuating their interests as consumers.<sup>32</sup>

The point here is that the legal protection of consumers does not evolve in the abstract. It emerges from a context that leans on a particular understanding of who an American consumer *should* be. The more that legal policy is shaped by individualism, the more consumers will be expected to protect themselves, making use of the rational calculating skills they are assumed to have or to somehow learn.

### III. THE SOUND OF CONSUMER PROTECTION IN AN INDIVIDUALISTIC CULTURE

Assumptions, by their nature, are hidden. They do their work below

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presupposition of our self-determining, self-making nature: that is what freedom is for, the exercise of that capacity.

*Id.* (alteration in original) (quoting Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8 (1989)). These attitudes result in derogation of anyone vulnerable and in need of governmental policy assistance. *See, e.g.*, JILLIAN JIMENEZ, SOCIAL POLICY AND SOCIAL CHANGE: TOWARD THE CREATION OF SOCIAL AND ECONOMIC JUSTICE 52 (2010) ("The consequences of these values for persons who cannot work, are unemployed, or are working at marginal jobs are punishing.").

30. *See* BRUCE S. JANSSON, THE RELUCTANT WELFARE STATE: ENGAGING HISTORY TO ADVANCE SOCIAL WORK PRACTICE IN CONTEMPORARY SOCIETY 46 (7th ed. 2012) (stating that conservatives "begin with the belief that members of some vulnerable populations often *create* their relatively low income by not prizes hard work to the extent of affluent persons").

31. *See id.* at 47 (discussing how some are "unwilling to increase taxes to fund social policies that might reduce inequality among vulnerable populations").

32. *See* Meuti, *supra* note 11, at 336. Meuti concludes that because of their strong values of individualism, U.S. citizens may fail to understand the need for any collective policies or the need for policies that go against the grain of values of self-sufficiency and independence by focusing on the interdependence of citizens and society. *Id.* at 346-47.

the surface.<sup>33</sup> The details of arguments about specific “consumer protection” initiatives, important as they are, will be enacted, modified, or rejected by interest groups that form their arguments using a normative assumption about who consumers should be. As demonstrated in the following three consumer protection policy struggles, the assumption of individualism only occasionally makes its presence known. Yet, the visible reasoning would make little sense outside an individualistic framework.

#### *A. Regulation of Advertising to Children*

Vigorous opposition to government consumer protection efforts in the United States is the norm.<sup>34</sup> One of the most notorious examples of successful opposition to consumer protection is the debacle known as “Kid Vid.”<sup>35</sup> In 1978, the Federal Trade Commission (FTC) proposed limiting, and even banning, certain advertising directed toward children.<sup>36</sup> The FTC was concerned that “television advertising for any product directed to children who are too young to appreciate the selling purpose of, or otherwise comprehend or evaluate, . . . [was] inherently unfair and deceptive.”<sup>37</sup> The FTC’s Notice of Proposed Rulemaking invited comment on banning all television advertisements targeting young children, banning advertising for sugary snack foods aimed at older children (on the basis of the risk of tooth decay), and requiring that television advertisements of other sugared foods

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33. See generally M. NEIL BROWNE AND STUART M. KEELEY, ASKING THE RIGHT QUESTIONS: A GUIDE TO CRITICAL THINKING 59–60 (11th ed. 2015) (noting that unstated assumptions are important in understanding an argument). This point highlights a paradox: the most significant component of reasoning is often the one most likely to be overlooked. *See id.*

34. See, e.g., Pat Garofalo, *What’s Behind Big-Name Opposition to Consumer Protection Reform? The Same Love of Big Profits that Drives Big Banks*, NEXT NEW DEAL (Aug. 18, 2009), <http://www.nextnewdeal.net/whats-behind-big-name-opposition-consumer-protection-reform-same-love-big-profits-drives-big-banks>; Tamara Keith, *New Consumer Protection Agency Faces Opposition*, NPR (July 21, 2011), <http://www.npr.org/2011/07/21/138550502/new-consumer-protection-agency-faces-opposition>.

35. See generally Susan Bartlett Foote & Robert H. Mnookin, *The “Kid Vid” Crusade*, 61 NAT’L AFF. 90 (1980).

36. *Id.*; TERESA MORAN SCHWARTZ & ALICE SAKER HARDY, *FTC RULEMAKING: THREE BOLD INITIATIVES AND THEIR LEGAL IMPACT* 12 (2004), available at [http://www.ftc.gov/sites/default/files/documents/public\\_events/FTC%2090th%20Anniversary%20Symposium/040922schwartzhrdy.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/040922schwartzhrdy.pdf).

37. See DAVID L. GEE, *THE ROLE OF FOOD MARKETING ON CHILDHOOD OBESITY* 5 (2005) (internal quotation marks omitted), available at <http://www.cwu.edu/~geed/547/food%20marketing%20and%20childhood%20obesity.ppt>.

be balanced with health-nutrition disclosures when the audience consisted of a substantial percentage of older children.<sup>38</sup>

Television networks, advertising agencies, food and toy companies, and even cigarette manufacturers opposed the FTC's proceedings, attempted to stop hearings, and filed lawsuits against the FTC.<sup>39</sup> The FTC Deputy Director for Consumer Protection who was in charge of the rulemaking procedure discussed the breadth of the opposition:

[W]e were opposed by the cereal industry, the sugar industry, the candy industry, the toy industry and the broadcast industry. The farmers were against us because they were raising wheat that was being used in sugared cereals. We even had the cigarette industry against us. Why? Although cigarettes weren't being advertised to children, the cigarette industry was convinced that if we were successful in this proceeding, they would be next. So they raised all this money to oppose this rule-making proceeding. They used tactics that really had never been seen before but now are pretty common.<sup>40</sup>

The food industry framed the issue as a prime example of over-exuberant government interference.<sup>41</sup> The *Washington Post* dubbed the FTC a "National Nanny."<sup>42</sup> It asked, "[W]hat are the children to be protected from? The candy and sugar-coated cereals that lead to tooth decay? Or the inability or refusal of their parents to say no?"<sup>43</sup> The *Washington Post* went on to argue:

The food products will still be there, sitting on the shelves of the local supermarkets after all, no matter what happens to the commercials. So

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38. See generally *id.*; Children's Advertising, 43 Fed. Reg. 17,967–72 (Apr. 27, 1978) (to be codified at 16 C.F.R. pt. 461); FTC STAFF REPORT ON TELEVISED ADVERTISING TO CHILDREN 1–12 (1978) [hereinafter FTC STAFF REPORT]; Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission & The Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 79–80 (2005).

39. See Westen, *supra* note 38, at 87.

40. *Id.*

41. See MICHAEL MOSS, SUGAR FAT SALT: HOW THE FOOD GIANTS HOOKED US 76–81 (2013).

42. Westen, *supra* note 38, at 83 (quoting Editorial, *Farewell to the National Nanny*, WASH. POST, Apr. 6, 1981, at A14) (internal quotation marks omitted); see also MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 69–70 (1983).

43. PERTSCHUK, *supra* note 42, at 70 (quoting Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A14).

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the proposal, in reality, is designed to protect children from the weaknesses of their parents—and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess—if you can afford one. It is not a proper role of government.<sup>44</sup>

That parents should possess the knowledge and mental habits that would propel them to just say “no” in particular instances is taken for granted.

Legislative hearings produced 6,000 pages of testimony and 60,000 pages of written comment.<sup>45</sup> Before the FTC took final action,<sup>46</sup> Congress passed the FTC Improvement Act of 1980, which specifically denied the FTC authority to issue any rule regarding children’s advertising on the basis that the advertising constitutes an unfair act or practice.<sup>47</sup> “These amendments also prevented the Commission for a period of three years from initiating any new rulemaking proceeding restricting commercial advertising based on unfairness, and this prohibition was continued” and effectively “deprived the agency of a Congressional authorization for 14 years.”<sup>48</sup>

Food marketing to children continues to be both a big consumer protection concern and a big business issue.<sup>49</sup> From an individualistic perspective, restricting the freedom of firms to sell their products to children makes little sense. The parent—acting as a surrogate for the child—will, or

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44. *Id.* (quoting *The FTC as National Nanny*, *supra* note 43).

45. Westen, *supra* note 38, at 80 (citing FTC, FINAL STAFF REPORT AND RECOMMENDATION, IN THE MATTER OF CHILDREN’S ADVERTISING (1981)).

46. The FTC terminated the Kid-Vid rulemaking in 1981 without taking any action; it left behind a voluminous record of opposition. *Id.* (citing Children’s Advertising, 46 Fed. Reg. 48,710, 48,712 (Oct. 2, 1981) (codified at 16 C.F.R. pt. 461)). The FTC concluded that the only effective remedy would be a total ban on advertising to children, but this would end children’s TV programming. Children’s Advertising, 46 Fed. Reg. at 48,712.

47. Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, 378 (codified as amended at 15 U.S.C. § 57a(h)) (“The Commission shall not have any authority to promulgate any rule in the children’s advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.” (internal quotation mark omitted)).

48. Roscoe B. Starek, III, Former Comm’r, FTC, The ABCs at the FTC: Marketing and Advertising to Children, Address at the Minn. Inst. of Legal Educ. (July 25, 1997), *available at* <http://www.ftc.gov/public-statements/1997/07/abcs-ftc-marketing-and-advertising-children> (footnote omitted).

49. See, e.g., *Food Marketing to Youth*, RUDD CTR. FOR FOOD POL’Y & OBESITY, [http://www.yaleruddcenter.org/what\\_we\\_do.aspx?id=4](http://www.yaleruddcenter.org/what_we_do.aspx?id=4) (last visited Nov. 11, 2014).

should, calmly, rationally, and with both eyes fixed on the long-run developmental needs of the child, direct purchases in an optimal fashion. This form of reasoning presumes that no advertisement can overcome the skill of the parent in making these decisions adroitly.

### B. New York City's Big-Soda Cap

An exploding can of soda is an apt visual for the controversy that bubbled up concerning a proposed regulation to combat obesity in New York City.<sup>50</sup> A storm of opinion and opposition began in the summer of 2012 when Mayor Michael Bloomberg issued a press release<sup>51</sup> about the dangers and cost of obesity to New Yorkers.<sup>52</sup>

The press release notes that “[o]besity is the second leading cause of preventable premature death, killing 5,800 New Yorkers annually, and is the only major public health issue in America that is getting worse.”<sup>53</sup> It further notes that “[o]ne in three adult New Yorkers has diabetes or pre-diabetes,” and “[s]ugary beverages are [the] key driver of the obesity epidemic.”<sup>54</sup>

Based on a plan proposed by the Mayor, the New York City Department of Health and Mental Hygiene (DOH) proposed that the New York City Health Code be amended to include a 16-ounce size limit on sugary beverages offered and sold in food-service establishments.<sup>55</sup> The

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50. See generally Henry Goldman & Duane D. Stanford, *NYC Mayor Bloomberg Seeks Ban on Super-Size Soft Drinks*, BLOOMBERG (May 31, 2012), <http://www.bloomberg.com/news/2012-05-31/nyc-mayor-bloomberg-seeks-ban-on-super-size-soft-drinks.html>.

51. Press Release, New York City, Mayor Bloomberg, Public Advocate DeBlasio, Manhattan Borough President Stringer, Montefiore Hospital CEO Safyer, Deputy Mayor Gibbs and Health Commissioner Farley Highlight Health Impacts of Obesity (June 5, 2012), [http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor\\_press\\_release&catID=1194&doc\\_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012a%2Fpr200-12.html&cc=unused1978&rc=1194&ndi=1](http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012a%2Fpr200-12.html&cc=unused1978&rc=1194&ndi=1).

52. Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/nyregion/most-new-workers-oppose-bloomberg-soda-ban.html>.

53. Press Release, *supra* note 51.

54. *Id.*

55. See *id.* Official public comment followed, and a hearing on the proposed amendment was held on July 24, 2012, before the Board of Health. See Memorandum from Susan Kasangra to the Members of the Bd. Of Health, N.Y. City Dep't of Health and Mental Hygiene, Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to

“Soda Cap” was born.

Supporters called Bloomberg “a fearless leader in the arena of food policy”<sup>56</sup> and advocated, among other things, that the Soda Cap would reduce consumption of soda, which was one “piece of the puzzle” necessary to protect the health and wellness of children and adults.<sup>57</sup> Regarding the individual’s interest in choosing for oneself, one advocate argued that “trivial issues of personal freedom . . . pale before the public health and welfare exigency.”<sup>58</sup> This echoed Mayor Bloomberg’s viewpoint that it is “the role of government to ‘improve the health and longevity of its citizens.’”<sup>59</sup> Indeed, from an economic perspective, the lure of antiobesity regulation is strong in view of the healthcare costs associated with obesity and weight gain.<sup>60</sup>

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Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments 1 (Sept. 6, 2012), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments.pdf> [hereinafter *DOH Hearing Summary*]. The Board of Health received more than 38,000 written comments about the Soda Cap, and while only 16 percent opposed the Soda Cap, opposition was vigorous and well-publicized. *Id.*; see Grynbaum & Connelly, *supra* note 52; see also Jason Kessler, *NYC Soda Ban Unfair to Small, Minority-Owned Businesses*, CNN (Jan. 25, 2013), <http://www.cnn.com/2013/01/23/health/new-york-large-drinks/>. Ironically, the iconic “Big Gulp” from 7-Eleven was exempted from the ban because grocery and convenience stores are regulated by the State of New York, not the City of New York. Kessler, *supra*.

56. Press Release, *supra* note 51 (quoting Food Policy Coordinator Kim Kessler).

57. Public Comments to the NYC Department of Health and Mental Hygiene regarding the Proposed Amendment to Health Code Article 81, at 67 [hereinafter Public Comments]. Portion sizes for beverages have increased steadily over the years. See *The New (Ab)normal*, CDC, <http://www.cdc.gov/makinghealtheasier/images/cdc-new-abnormal-infographic.png> (last visited Nov. 11, 2014).

58. Public Comments, *supra* note 57, at 40; *see also id.* at 326 (“While the idea of limiting the portion sizes of sugary drinks sold in food service establishments does raise some concerns regarding the level of government regulation of personal choice, the city’s growing prevalence of obesity is so alarming that it deserves significant attention in the form of this proposed amendment.” (public comment submitted by The Committee for Hispanic Children and Families, Inc.)).

59. Becket Adams, *It’s the Government’s ‘Role’ to Improve Your Health: Bloomberg Responds to ‘Nanny’ Critics*, THEBLAZE (June 14, 2012), <http://www.theblaze.com/stories/2012/06/14/its-the-governments-role-to-improve-your-health-bloomberg-responds-to-nanny-critics/> (quoting Mayor Bloomberg).

60. *See* Stella Daily, *Of Freedom and Fat: Why Anti-Obesity Laws are Immoral*, 4 OBJECTIVE STANDARD 53, 54 (2009) (citing a 2002 economic analysis that found more than nine percent of total medical expenditures were attributed to conditions related to weight gain and obesity and that half of that amount was paid for by Medicare and Medicaid).

In sharp contrast, opposition centered on the consumer's right and ability to "choose for themselves how to manage bodily care, to make informed diet decisions, to ingest calories and to control how much of a lawful and safe product they choose to consume."<sup>61</sup> For others, the "bottom line [was] that consumers do not need [the government] to tell them what to drink or what size" because "New Yorkers have the right to make their own decisions."<sup>62</sup> It was argued that "the government has to [allow] an individual to take responsibility for their own actions"<sup>63</sup> even if those actions have harmful repercussions.<sup>64</sup>

Even those who conceded that limiting the size of sugary drinks was merely an intrusion designed to address a serious health issue found it to be a "situation where government regulation has gone too far" because it impacted people's right to make their own consumption decisions.<sup>65</sup>

Viewed through the principles of objectivism, government attempts to protect citizens violate the moral imperative that individuals can and should make consumption and life decisions for themselves.<sup>66</sup> Moderate forms of individualism allow the government to support education about obesity and

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61. Public Comments, *supra* note 57, at 638 (brief submitted by the American Beverage Association).

62. *Id.* at 955 (public comment offered by a New York City Councilmember).

63. *Id.* at 30.

64. *See id.* at 33 ("Enough is enough! . . . This is America and I want to make my own choices [regarding] what to eat, smoke and how to live. Leave us alone!"); *see also id.* at 3 ("You have got to realize that we do NOT live in Russia. We live in the USA, and, we have our freedom to do as we please, as long as we are in the confines of the law.").

65. *See id.* at 1 (public comment offered by several New York City Councilmembers).

66. Individualism, in many respects, forms a partnership with objectivist reasoning, which is premised on the moral right to make one's own decisions. *See* Craig Biddle, *What is Objectivism?*, OBJECTIVE STANDARD, <https://www.theobjectivestandard.com/what-is-objectivism/> (last visited Nov. 17, 2014) ("Objectivism advocates the virtues of rational self-interest . . ."); *see, e.g.*, Ari Armstrong, *Government Involvement in Organ Donation Constitutes Death Panels*, OBJECTIVE STANDARD (June 5, 2013), <https://www.theobjectivestandard.com/2013/06/government-involvement-in-organ-donation-constitutes-death-panels/> (arguing that the government's only role in regulating organ transplants should be to protect individual rights and enforce contracts, even those contracts that involve the sale of organs). Individualism seems to emanate more from a human nature assumption about what it is reasonable to assume adults can do intermixed with the expectation that they should be held accountable in terms of responsibility for any failings to make decisions consistent with that capability.

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healthy lifestyle choices but do not allow government to make those choices for its citizens.<sup>67</sup> Even a health crisis does not justify regulation for this type of reasoning:

[A] person's life is his to live as he sees fit, and the fact that his judgment is his basic means of living, a person has a moral right to sell or consume whatever foods he chooses, as long as he does not violate anyone else's rights (e.g., by committing fraud or theft) in the process.<sup>68</sup>

Opponents of the regulation cautioned against government intrusion cloaked in the guise of consumer protection.<sup>69</sup> The Soda Cap, to them, was “a step closer to coming into someone's home and telling them what to do.”<sup>70</sup> It raised the specter of “constant encroachment of government intrusion in day to day lives,”<sup>71</sup> and was “not only absurd, but it takes away one of our most basic rights as Americans, freedom.”<sup>72</sup> They warned that the logic behind the Soda Cap had no rational stopping point: “The same logic that supports the proposed rule could also result in a law insisting that all families consume a set menu dictated by a *Bureau of Government-Prescribed Eating*, to ensure that everyone obtains the governmentally preferred caloric balance and distribution of nutrients.”<sup>73</sup>

In this chilling scenario, the government would prescribe calorie and nutrient requirements like the Soda Cap “through sweeping and wooden rules, designed for mass enforcement, without any mechanism for the individualized considerations that are the hallmark of true health

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67. In this perspective, a corollary to a free society is that government's role as public servant does not permit it to rule in ways that it deems good for its people. *See* Public Comments, *supra* note 57, at 477 (public comment submitted by the Washington Legal Foundation).

68. Daily, *supra* note 60, at 56; *see also id.* at 57 (arguing that where the government has created for itself a *legal* right to interfere, such laws should be repealed).

69. *See, e.g.*, Public Comments, *supra* note 57, at 1 (public comment offered by several New York City Councilmembers).

70. *Id.* at 574.

71. *Id.* at 30.

72. *Id.* at 6.

73. *Id.* at 639–40 (emphasis added) (comments submitted by the American Beverage Association). Readers of the increasingly popular genre of dystopian fantasy may recognize a world in which government delivers prepackaged daily food designed to provide different classes of society with different nutrients for growth, performance, etc. *See generally* ALLY CONDIE, MATCHED (2010).

assessments.”<sup>74</sup> A “Bureau of Government-Prescribed Eating”<sup>75</sup> may sound like the stuff of dystopian fiction, but this libertarian reasoning makes a complementary partner for individualistic thinking. In both streams of thought, individuals are expected to provide their own consumer protection.<sup>76</sup>

The Soda Cap was passed by the New York City Board of Health but was deemed invalid by a judge the day before it was to take effect.<sup>77</sup> The appellate court affirmed this decision, holding that the Soda Cap was invalid because the Board of Health exceeded the bounds of its authority.<sup>78</sup> Legal wrangling over the Soda Cap and other consumer protection proposals in New York continue to highlight the fundamental conflict between community responsibility for consumer welfare<sup>79</sup> and individualism.

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74. Public Comments, *supra* note 57, at 640 (comments submitted by the American Beverage Association).

75. *Id.* at 639–40.

76. See *What is the Libertarian Party?*, LIBERTARIAN PARTY, <http://www.lp.org/introduction/what-is-the-libertarian-party> (last visited Nov. 11, 2014) (stating Libertarianism “respects [the] unique and competent individual”).

77. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health and Mental Hygiene, No. 653584/12, 2013 WL 1343607, at \*3, \*20 (N.Y. Sup. Ct. Mar. 3, 2013), *aff’d*, No. 05505, 2013 WL 3880139, at \*16 (N.Y. App. Div. July 30, 2013). The petitioners argued that consumers must have the ability to make their own life choices, without regard to whether those choices have a collective effect. Petitioner’s Notice of Verified Petition at 16, *N.Y. Statewide Coal. Of Hispanic Chambers of Commerce*, 2013 WL 3880139. The petitioners further argued that businesses have the right to make their own choices about how to market and package their products. *See id.* at 5.

78. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 3880139, at \*16. During oral argument, the appellate court was reportedly skeptical of the Board of Health’s claims; one judge “asked if the city might [next] limit scoops of ice cream.” Michael M. Grynbaum, *City Argues to Overturn Ruling That Prevented Limits on Sugary Drinks*, N.Y. TIMES (June 11, 2013), <http://www.nytimes.com/2013/06/12/nyregion/bloomberg-presses-for-reversal-of-court-ban-on-sugary-drink-limits.html>.

79. Bloomberg continues to support the Soda Cap and has stated that “while other people will wring their hands over the problem of sugary drinks, in New York City, we’re doing something about it” and that because “[w]e have a responsibility as human beings to do something, to save each other, to save the lives of ourselves, our families, our friends, and all of the rest of the people that live on God’s planet. . . . [t]hroughout its history, the New York City Board of Health has taken bold action to confront major public health problems.” *Mayor Bloomberg Discusses City’s Efforts to Combat Obesity and Sugary Beverage Regulation*, NYC.GOV (March 11, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/090-13/mayor-bloomberg-city-s-efforts-combat-obesity-sugar-beverage-regulation#/0> (internal quotation marks omitted); *see also Mayor Bloomberg*

### C. Individualism and the Consumer Financial Protection Bureau

Laws intended to protect consumers in financial markets are more complex than ounce limitations on sugary drinks, and opposition to such laws share roots in individualism. In response to the 2008 financial market collapse, Congress sought to create a Consumer Financial Protection Bureau<sup>80</sup> (CFPB) “so that the spectacular failure of consumer protection at the root of the [financial regulatory crisis would] never [be] repeated.”<sup>81</sup> The rationale was that the government doesn’t “allow toy companies to sell toys that could hurt our kids. . . . [or] electronics companies to sell defective appliances” and shouldn’t permit financial service companies to sell “dangerous financial products.”<sup>82</sup> Proponents said the CFPB would be a “cop on the beat” and a “watchdog and protector” in “response to exploding complexity, scope, and scale of new financial instruments and markets.”<sup>83</sup>

Hearing these arguments begs the question: why are the same arguments not used in a huge array of consumer markets? Apparently, the answer is in the scope of the apparent tragedy resulting from market exchanges in particular purchasing decisions. However, to return to the

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*Announces New Legislation to Further Reduce Smoking Rate*, NYC.GOV (March 18, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/102-13/mayor-bloomberg-new-legislation-further-reduce-smoking-rate> (discussing Mayor Bloomberg’s proposed law to the New York City Council to forbid stores from prominently displaying cigarette and tobacco products).

80. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1011, 124 Stat. 1376, 1964 (2010), (codified at 12 U.S.C. § 5491 (2010)) [hereinafter Dodd-Frank Act].

81. *The Administration’s Proposal to Modernize the Financial Regulatory System: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 2 (2009) (statement of Christopher J. Dodd, Chairman S. Comm. on Banking, Hous. and Urban Affairs) [hereinafter *Proposal to Modernize*]; see generally *Community and Consumer Advocates’ Perspectives on the Obama Administration’s Financial Regulatory Reform Proposals: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. 1–2 (2009); *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. 1 (2009); *Banking Industry Perspectives on the Obama Administration’s Financial Regulatory Reform Proposals: Hearing Before H. Fin. Servs. Comm.*, 111th Cong. 1–2 (2009).

82. *Proposal to Modernize*, *supra* note 81, at 2 (statement of Sen. Christopher J. Dodd). A dangerous financial product was described as one that the lender knows cannot be repaid. *See id.*

83. *Creating a Consumer Financial Protection Agency: A Cornerstone of America’s New Economic Foundation: Hearing Before S. Comm. on Banking Hous. and Urban Affairs*, 111th Cong. 49, 66 (2009) (statements by Richard Blumenthal, Connecticut Attorney General) [hereinafter *Creating a Consumer Financial Protection Agency*].

earlier example of advertising to children, it is difficult to understand on its face why a product that harms a child's health would be less likely to quell individualistic arguments than when the product is a mortgage.

Opponents predictably decried the monstrous new financial nanny that would infringe on the rights of liberty, choice, privacy, and innovation,<sup>84</sup> calling it an "unprecedented departure by the U.S. government from some of the fundamental ideas . . . that have underpinned U.S. society since its inception."<sup>85</sup> The individualism argument was inherent in claims that law limited consumer choice by taking away the individual's right to decide what financial products were best for them.<sup>86</sup> Choice<sup>87</sup> was framed as the central issue: one critic described a family that was prevented from choosing a home

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84. See David Francis, *Critics Say Consumer Bureau is an Overreaching Monster*, FISCAL TIMES (May 30, 2013), <http://www.thefiscaltimes.com/Articles/2013/05/30/Critic-s-Say-Consumer-Bureau-is-an-Overreaching-Monster>. Opponents did not suggest that all consumer financial protection measures were an affront to individualism but argued that the regulatory system in place already appropriately protected the consumer. Hearing, *Creating a Consumer Financial Protection Agency*, *supra* note 83, at 72 (statement by Edward L. Yingling, President and Chief Executive Officer of the Am. Bankers Ass'n).

85. Hearing, *Creating a Consumer Financial Protection Agency*, *supra* note 83, at 133–34 (statement by Peter Wallison). As is often the case, liberty arguments were intermingled with individualism opposition. Opponents quoted legal icons to argue that the desire to protect consumers made the creation of the new agency especially suspect:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rules. The greater dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

*Id.* at 134 (quoting *Olmstead v. United States*, 277 U.S. 479 (1928)) (internal quotation marks omitted) (statement by Peter Wallison).

86. Proponents of the agency accused detractors of misrepresenting its purpose, arguing that the CFPB would not limit customer choice: "[The CFPB] will not make choices for consumers or deny them access to products and services. . . . [but would] assure that consumers fully understand the financial realities and consequences of financial obligations, credit cards or loans they are considering before they make commitments." Hearing, *Creating a Consumer Financial Protection Agency*, *supra* note 83, at 66 (statement by Richard Blumenthal, Connecticut Attorney General).

87. When an argument focuses on the meme of choice, it typically flows from libertarian ideas. See *What is the Libertarian Party?*, *supra* note 76. On the other hand, proponents of individualism tend to prefer memes centering on responsibility. See *supra* Part II. But both forms of argument are mutually reinforcing in terms of a generalized opposition to the expansion of consumer protection.

mortgage that met the family's individual assessment of needs because the Act would deem the family high-risk and unsophisticated.<sup>88</sup> The CFPB would create "a mechanism that [would] ultimately deny some people access to some products because of their deficiencies in experience, sophistication, and perhaps even intelligence."<sup>89</sup> The dispute illustrates the conflict between individualism and government regulation that is intended to protect the public from itself or from open-market competition.

#### IV. CONCEPTUALIZING THE VULNERABLE CONSUMER

When this Article refers to consumers, it is referring to hundreds of millions of people who interact with sellers in markets. Consequently, one must be cautious about statements implying universalized descriptions of their attributes. However, proponents and opponents of enhanced consumer protection must use introspection, observation, and compilations of data to determine a starting point for their reasoning about a specific consumer protection suggestion. Legal systems would flounder at the prospect of creating and enforcing a designer consumer protection package for each level of consumer mental, psychological, and economic capabilities.

Individualism approaches this challenge by portraying consumers as rational calculators with extensive information, experience, and mental awareness.<sup>90</sup> No doubt there are customers somewhere who approximate that portrayal. However, there is a substantial argument for characterizing consumers quite differently. What would it mean to see them as highly vulnerable to manipulation by sellers and deficient in terms of the time and monetary resources that would enable them to move in the direction of the consumer as conceptualized by adherents of individualism?

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88. See Hearing, *Creating a Consumer Financial Protection Agency*, *supra* note 83, at 133 ("So, what about the husband and wife who intend to keep their home until their children are grown and are willing, for this reason, to accept a prepayment penalty in order to get a lower rate on their fixed-rate mortgage? The administration is suggesting that this option might not be available to them if the mortgage provider (and ultimately the CFP[B]) does not consider them 'sophisticated' consumers.") (statement by Peter Wallison).

89. *Id.* (statement by Peter Wallison). In a nutshell, the argument was simple: "As long as the disclosure is fair and honest, why should anyone be prohibited from buying a product or service?" *Id.* at 134 (statement by Peter Wallison).

90. See *supra* Part II.

### *A. What Does It Mean to Be “Vulnerable”?*

Both the sociology and social work professions define “vulnerability” in terms of a lack of ability to protect oneself from two forms of potential threats to a person’s health and development.<sup>91</sup> The logic of examining vulnerability from the vantage points of these two professions stems from the recognition that their clients are generally perceived as requiring assistance from a caring community.<sup>92</sup>

What kinds of threats create a threat to health and development? First, some threats are natural to anyone’s life. At certain stages of life, a person is threatened by an inability to take care of his or her needs for hygiene and food intake.<sup>93</sup> In short, the person is vulnerable.<sup>94</sup> A second set of threats is social in that the threats arise from relationships involving interactions with others.<sup>95</sup> This second threat is the result of power imbalances and the willingness of some with disproportionate amounts of power to use their potency to harm the interests of the relatively weak.<sup>96</sup>

Vulnerability exists in tension with individualism, which assumes that individuals possess the power to combat whatever hardships may befall them.<sup>97</sup> In marked contrast to this belief pattern, the sociological–social work perspective concerning vulnerable populations claims that certain

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91. See JANET SEDEN, ET. AL., PROFESSIONAL DEVELOPMENT IN SOCIAL WORK 104 (2011) (defining a vulnerable individual as one “who is in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation” (quoting DEP’T OF HEALTH, NO SECRETS: GUIDANCE ON DEVELOPING AND IMPLEMENTING MULTI-AGENCY POLICIES AND PROCEDURES TO PROTECT VULNERABLE ADULTS FROM ABUSE 8–9 (2009))).

92. See *id.* at 104–05.

93. See *id.* at 105.

94. See *id.* at 104–05.

95. See *id.* at 105 (“Vulnerable adults could also include those perceived to be difficult, as well as others with a long history of violence . . . .” (internal quotation marks omitted)).

96. See *id.*

97. See JANSSON, *supra* note 30, at 46–47. Jansson argues that conservatives begin with assumptions contrary to that of the empathetic assumptions of social work: “[Conservatives] begin with the belief that members of some vulnerable populations often *create* their relatively low income by not prizing hard work to the extent of affluent persons.” *Id.* at 46. American conservatives then contend, predictably, that “[t]his tendency toward laziness is promoted, moreover, by those social policies that create ‘perverse incentives.’” *Id.*

individuals are overwhelmed by their oppressed lives and the circumstances and events they are powerless to control.<sup>98</sup>

According to the sociological perspective, vulnerability stems from the position of the individual within society.<sup>99</sup> Sociologists assert that individuals become vulnerable when they do not hold a superior position in society.<sup>100</sup> This lower position of power within society places the population or individual at risk of exploitation or harm because limited power in American society means having a lack of access to resources and a consequent lack of ability to have one's voice heard; the absence of voice then makes the vulnerable individual an easy target for those with the capability and the will to use others for their egoistic purposes.<sup>101</sup> Most importantly, sociology does not view this state of vulnerability as a condition that people bring upon themselves, but instead is a result of "social construction."<sup>102</sup>

Similar to sociology, social work often assumes that people are "made

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98. See generally ALEX GITTERMAN, HANDBOOK OF SOCIAL WORK PRACTICE AND RESILIENT POPULATIONS 1–16 (3d ed. 2014). Gitterman outlines several examples of vulnerability that exist due to circumstances outside the control of the vulnerable individual, such as poverty, lack of resources, discrimination, and family upbringing. *Id.* For example, Gitterman asserts that "[w]hen community and family supports are weak or unavailable and when internal resources are impaired, these populations are very vulnerable to physical, cognitive, emotional and social deterioration." *Id.* at 1. As a more specific example, Gitterman discusses the vulnerability of the American black family and how that vulnerability stems from "[t]he dramatic economic changes intensified by our country's long history of racism and discrimination." *Id.* at 7.

99. See Janet Scammell & Gill Calvin Thomas, *The Social Construction of Vulnerability*, in UNDERSTANDING VULNERABILITY: A NURSING AND HEALTHCARE APPROACH 111–12 (Vanessa Heaslip & Juile Ryden eds., 2013) [hereinafter UNDERSTANDING VULNERABILITY].

100. See *id.* at 123.

101. See *id.*; see also JANSSON, *supra* note 30, at 40 (discussing that women, older people, and LGBT populations have often been kept powerless by excluding them from "the economic and social mainstream").

102. See Scammell & Thomas, *supra* note 99. Scammell and Thomas use the idea of "social constructionism" to explain how an individual becomes vulnerable. *Id.* The authors state that a vulnerable "identity is not one-sided but multi-factorial, [and] that it is not fixed but changing and is profoundly influenced by context." *Id.* at 111. As such, there are several factors external to the individual that could contribute to someone's being vulnerable. See *id.*; see also SEDEN ET AL., *supra* note 91, at xiv (identifying that people are "made vulnerable . . . by poverty, bereavement, addiction, isolation, mental distress, disability, neglect, abuse or other circumstances") (quoting DEP'T FOR CHILDREN, SCH. & FAMILIES, REVISED EVERY CHILD MATTERS OUTCOMES FRAMEWORK 1 (2008) [hereinafter DEP'T FOR CHILDREN, SCH. & FAMILIES]).

vulnerable”<sup>103</sup> by external circumstances that are thrust upon the individual.<sup>104</sup> Social workers believe that characteristics such as race, citizenship, age, gender, sexuality, and income make some individuals more vulnerable than others to unjust representations in society, discrimination, and oppression.<sup>105</sup> Besides the circumstances discussed above, social workers also define vulnerability as the need to be dependent on an outside source for survival or well-being.<sup>106</sup> Children and older adults are the most common examples of this type of vulnerability.<sup>107</sup> As such, social workers often use the term “vulnerable” to identify those populations that are in need of protection.<sup>108</sup> Would an ordinary consumer have these defining attributes of vulnerability?

### B. Implications of Recognizing Vulnerable Populations

Social work developed as a reaction to the need for professionals who could assist those who are vulnerable.<sup>109</sup> The National Association of Social Workers (NASW) Code of Ethics states that “[t]he primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty.”<sup>110</sup> More specifically, social work seeks to address the needs of vulnerable populations by promoting organizations, communities, and social

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103. See SEDEN ET AL., *supra* note 91, at xiv (quoting DEPT FOR CHILDREN, SCHOOLS & FAMILIES, *supra* note 102, at 1).

104. *Id.* (quoting DEPT FOR CHILDREN, SCH. & FAMILIES, *supra* note 102); *see also* *Code of Ethics of the National Association of Social Workers*, NAT'L ASS'N OF SOC. WORKERS, <http://www.socialworkers.org/pubs/code/code.asp> (last visited Nov. 10, 2014) (“Fundamental to social work is attention to the environmental forces that create, contribute to, and address problems in living.”).

105. See Rowena Fong, *Overview of Working with Vulnerable Populations and Persons at Risk*, in SOCIAL WORKERS' DESK REFERENCE 925, 925 (Albert R. Roberts ed., 2d ed. 2009).

106. See JANSSON, *supra* note 30, at 40.

107. *Id.* (“We can identify *dependent* vulnerable populations . . . , such as children, who occupy an unusual status. Generally lacking political clout, children depend on the goodwill of adults for requisite services, housing, and resources.”).

108. See Vanessa Heaslip, *Understanding Vulnerability*, in UNDERSTANDING VULNERABILITY, *supra* note 99, at 14 (discussing “[v]ulnerability as a mechanism to identify social groups in need of protection”).

109. See generally *Social Work History*, NAT'L ASS'N OF SOC. WORKERS, <http://www.naswdc.org/pressroom/features/general/history.asp> (last visited Nov. 10, 2014).

110. *Id.*

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institutions that provide assistance, advocacy, and necessary resources for these populations.<sup>111</sup>

The social-work perspective places importance on interventions and solutions to aid or protect those who are vulnerable.<sup>112</sup> The primary institution that is capable of implementing these interventions and solutions for the vulnerable is the government.<sup>113</sup> Rooted in American liberal assumptions about the role of government, social work favors the argument that some degree of government is needed to protect and meet the needs of vulnerable citizens.<sup>114</sup>

To extend the concept of vulnerability to consumers, with its attendant argument on behalf of community responsibility for facilitating consumer welfare, requires the same kind of analysis that encouraged sociology and social work to label only certain groups vulnerable. Are there power differentials that shape the flow and quality of information available to consumers? Is it reasonable to expect consumers to cope with and process the marketing efforts of large suppliers in complex markets? Do consumers have the educational background to appreciate the health impacts of a wide

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111. *Id.* (“These [social work] activities may be in the form of direct practice, community organizing, supervision, consultation administration, advocacy, social and political action, policy development and implementation, education, and research and evaluation.”).

112. See Fong, *supra* note 105. Fong states that social workers need to be aware of populations and individuals who are vulnerable and “find culturally appropriate interventions and solutions.” *Id.*

113. See JANSSON, *supra* note 30, at 5. Jansson’s text on American society’s distaste for social welfare discusses an imaginary society absent government assistance. *Id.* Jansson then points out the consequences of such a society for those who are vulnerable:

[T]he members of vulnerable populations would be placed in particular jeopardy by the absence of government programs, regulations, and civil rights . . . . Such forms of prejudice as racism, homophobia, gender-based discrimination, ageism, classism, hostility to immigrants, xenophobia, and dislike of persons with mental and physical issues are deeply rooted in American society.

*Id.*

114. See FREDERIC G. REAMER, SOCIAL WORK VALUES AND ETHICS 133 (3d ed. 2006). Reamer states that social work values and ethical principles imply “that it is appropriate for government agencies to be able to require local communities to accommodate their fair share of individuals . . . . [which] is . . . consistent with the guideline that individuals’ right to basic well-being . . . takes precedence over other individuals’ right to freedom and self-determination.” *Id.* at 134.

range of chemicals? Are consumers likely to reflect the kind of logical and empirical skills required to make the decisions they would like to make from the perspective of the person they would like to become?

The next Part begins an exploration of these defining characteristics of vulnerability. It describes consumers as they are, not as they might be inside the vigorous imagination of someone with interests contrary to theirs.

#### V. BOUNDED RATIONALITY, WILLPOWER, AND CONSUMER PROTECTION

If one considers adults as vulnerable in the marketplace, a good place to start in appreciating that vulnerability is to focus on the attributes of individuals that often lead them to make poor choices, seizing upon irrelevant considerations to support their decisions even as they ignore important ones. A growing body of study focuses on how human behavior systemically deviates from a traditional rational-actor model.<sup>115</sup> People often act quite divergently from what would be predicted by a rational-actor model.<sup>116</sup> In other words, their behavior is bounded or restricted by these deviations.

Often, human preferences are not well-defined, and choices are made that seem inconsistent with stated preferences. In some contexts, people systematically make decisions against their own interests or in tension with what a traditional rationality model would predict.<sup>117</sup> Although the

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115. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

116. See *id.* (stating that the use of a limited number of heuristics in decision making “lead[s] to severe and systematic errors”).

117. See Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1469 (2006) (“Since 1955, the role of cognitive biases in decision-making processes has intrigued behavioral psychologists.”); see generally James H. Barnes, Jr., *Cognitive Biases and Their Impact on Strategic Planning*, 5 STRATEGIC MGMT. J. 129 (1984); T.K. Das & Bing-Sheng Tang, *Cognitive Biases & Strategic Decision Processes: An Integrative Approach*, 36 J. MGMT. STUD. 757 (1999); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955). In 1955, “Herbert Simon published *A Behavioral Model of Rational Choice*, which proposed ‘replac[ing] the global rationality of economic man with a’ model inclusive of ‘the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist.’” McCann, *supra* (alteration in original) (quoting Simon *supra*, at 99). Ever since, “economists, legal scholars, and psychologists have evaluated the desirability of utilizing cognitive bias analysis in adjusting expectations for human behavior” and human decisionmaking. *Id.*

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limitations of human decisionmaking are well-documented in other social sciences, such as psychology, only recently has an entire branch of legal study, titled “behavioral law and economics,” explored the implications of actual human behavior patterns and the law.<sup>118</sup>

These psychological insights suggest that actual human beings display both bounded rationality and bounded willpower.<sup>119</sup> Due to both cognitive mental limitations and limited willpower, human decisionmakers tend to employ simplified rules of thumb or heuristics resulting in cognitive biases that negatively affect decisionmaking.<sup>120</sup> These limitations represent significant ways in which most people depart from the standards of a rational-actor model.<sup>121</sup> This Part explores the implications of these human behavior patterns on Americans’ understanding of consumer law and the assumptions of individualism.

While this Part is not intended to be an exhaustive review of the ways in which humans are boundedly rational and exhibit bounded willpower, it provides examples of the countless ways humans and consumers depart from the traditional economic model of human behavior. These biases suggest that the vulnerability of consumers is pronounced.<sup>122</sup> Recognizing the fallibility of human judgment and the vulnerability of consumers it creates suggests constraining individual choice.<sup>123</sup>

#### A. Bounded Rationality

“Bounded rationality . . . refers to the obvious fact that human

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118. See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law & Economics: Its Origins, Fatal Flaws, & Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012).

119. Jolls et al., *supra* note 118, at 1476.

120. *Id.* at 1477–79.

121. See *id.* 121. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law & Economics: Its Origins, Fatal Flaws, & Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012).

122. Nevertheless, the extent of the effects of behavioral decision theory are not without critique. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 551–52 (2004) (suggesting that while individuals may display cognitive errors in laboratory or controlled experiments, they may act more rationally in real-world settings).

123. Jolls et al., *supra* note 118, at 1541 (“Many of the forms of bounded rationality . . . call into question the idea of consumer sovereignty.”).

cognitive abilities are not infinite.”<sup>124</sup> Even smart people are not as bright as they might believe. “We have limited computational skills and seriously flawed memories.”<sup>125</sup> This limited ability to compute and remember information is evidenced in a number of different biases of human behavior.<sup>126</sup>

### 1. Optimism Bias

Optimism bias is an individual’s tendency to assume that general risks posed by products or situations do not apply to themselves.<sup>127</sup> This bias affects smart people too—even though people may understand the risks, they believe that those risks do not apply with equal force to themselves.<sup>128</sup> “[P]eople typically think that their chances of a range of bad outcomes, from having an auto accident to contracting a particular disease to getting fired from a job, are significantly lower than the average person’s chances of suffering” from these problems.<sup>129</sup> Statistically, it cannot be true that everyone has a lower chance of suffering a bad outcome than the average person.<sup>130</sup> For example, the average American estimates they have about a one-in-five chance of personally being the victim of a nonterrorist violent crime, yet believes that the average American has about a two-in-five chance of being victimized.<sup>131</sup>

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124. *Id.* at 1477 (citing Simon, *supra* note 117).

125. *Id.* Jolls et al. divides “departures from the standard model . . . into two categories: judgment and decisionmaking. Actual judgments show systematic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory.” *Id.*

126. *See id.*

127. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1511 (1999).

128. *See id.*

129. Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 204 (2006).

130. *See id.*

131. Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 981 n.82 (2003) (citing Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism*, PSYCHOL. SCI. at 26 (unpublished manuscript)). For another example of how optimism bias affects individual choice, see Farah Majid, *The Irrationality of Credit Card Debt: Examining the Subconscious Biases of Credit Card Users*, 34 L. & PSYCHOL. REV. 165, 169 (2010). Majid describes the theory of how optimism bias affects credit card users in that “borrowers do not consider that unexpected, and often costly, emergencies may occur from time-to-time.” *Id.* This affects borrower behavior by precluding the realization of how often borrowers use their credit

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In the consumer protection context, optimism bias plays a significant role in tobacco smokers' perceptions of risk.<sup>132</sup> Studies "suggest[] that smokers perceive smoking as significantly less risky for themselves than for other smokers, that smokers view their own risks as *not* significantly higher than those for non-smokers, and that smokers tend to underestimate the actual risks to themselves."<sup>133</sup> Although the undervaluation of risks in connection to tobacco is a salient example of how consumer biases affect individualism, optimism bias is not limited to tobacco smokers' perception of risk, because any product that has inherent risks that consumers may underestimate poses a potential problem for consumers.<sup>134</sup> And when

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cards and often purchase items "that do not promote their welfare . . . while failing to purchase items that promote their welfare." *Id.*

132. Hanson & Kysar, *supra* note 127, at 1511–13.

133. *Id.* at 1512. Hanson and Kysar summarize recent studies outlining the effect of optimism bias in estimating tobacco risks. The authors point to a study of "North Carolinians who completed a health risk appraisal and answered questions about perceived risks of heart attack, stroke, and cancer. *Id.* (citing Victor J. Strecher et al., *Do Cigarette Smokers Have Unrealistic Perceptions of Their Heart Attack, Cancer, and Stroke Risks?*, 18 J. BEHAV. MED. 45, 49 (1995)). The study found that smokers "were 36% more likely than nonsmokers to underestimate their risk of heart attack, 137% more likely to underestimate their risk of cancer, and 55% more likely to underestimate their risk of stroke." *Id.* (citing Strecher et al. *supra*, at 52–53). A similar study found that "smokers rated their own chances of contracting [tobacco-related] diseases as similar to those of the entire population of smokers and non-smokers combined." *Id.* at 1513 (citing Jonathan D. Reppucci et al., *Unrealistic Optimism Among Adolescent Smokers and Nonsmokers*, 11 J. PRIMARY PREVENTION 227, 235 (1991)). Another study "found that most smokers do not believe they face an increased risk of heart attack or cancer as compared with that of other people in their age bracket." *Id.* (citing John Z. Ayanian & Paul D. Cleary, *Perceived Risks of Heart Disease and Cancer Among Cigarette Smokers*, 281 JAMA 1019, 1020–21 (1999)).

134. See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1400 (2004) (discussing how optimism bias affects credit card borrower behavior); Michael A. McCann, *Dietary Supplement Labeling: Cognitive Biases, Market Manipulation & Consumer Choice*, 31 AM. J.L. & MED. 215, 223–24 (2005) (discussing the effects of optimism bias on dietary pill consumers). Bar-Gill argues that "[u]nderestimation of future borrowing may also result from an optimism bias that might lead consumers to underestimate the likelihood of contingencies bearing economic hardship. . . . [and] consumers might underestimate the likelihood of adverse events that might generate a need to borrow." Bar-Gill, *supra* (footnote omitted). If "individuals . . . underestimate the probability that either they or a loved one will become ill and require costly treatment," this bias may affect their ability to save and pay for treatment. *See id.* Alternatively, if people "underestimate the likelihood that they will lose their job," this "and other manifestations of the optimism bias will lead consumers to underestimate the likelihood that they will be forced to resort to credit card borrowing." *Id.* To help

consumers systematically underestimate risk, manufacturers may more readily conceal risk information.<sup>135</sup> When optimism bias exists in consumer settings, the law might respond by adopting heightened standards of manufacturer liability for consumer products as a means of protecting consumers.<sup>136</sup>

## 2. *Framing Options*

Individuals can also be irrationally distracted by the external framing of a decision.<sup>137</sup> Because “[p]eople are averse to extremes. . . . [a]s between given alternatives, people seek a compromise.”<sup>138</sup> “In this, as in other respects, the framing of choice matters . . . .”<sup>139</sup> Neoclassical economic theory, the primary exemplar of the assumption of consumer rationality, assumes that preferences are subject to a stable rank ordering that does not vacillate.<sup>140</sup> Yet, this is often not empirically verifiable.<sup>141</sup>

Manufacturers routinely employ strategic framing options in the consumer context to exploit consumer biases.<sup>142</sup> For example, automobile manufacturers routinely make a particular model seem less expensive by adding a more expensive option to the product line in an effort to encourage the buyer to choose the cheaper product.<sup>143</sup> Alternatively, when a consumer

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vulnerable consumers who make these biased decisions, Bar-Gill advocates for more stringent *ex ante* protections for credit card consumers such as warnings, disclosures, and more protective default rules. *See id.* at 1417.

135. Advertisers are in a position to tailor their messages accordingly to exploit biases of consumers through “market manipulation.” Hanson & Kysar, *supra* note 127, at 1425–26.

136. Jolls & Sunstein, *supra* note 129, at 207.

137. Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1181–82 (1997).

138. *Id.* at 1181.

139. *Id.* at 1181–82.

140. *See* HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* 35 (1987).

141. *See* Sunstein, *supra* note 137, at 1182. (“Extremeness aversion suggests that a simple axiom of conventional economic theory—involving the irrelevance of added, unchosen alternatives—is wrong.”).

142. *See id.* In addition to the consumer context, Sunstein also argues that framing “has large consequences for legal advocacy and judgment, as well as for predictions about the effects of law.” *Id.* Advocates, lawyers, and lawmakers ask: “How can a preferred option best be framed as the ‘compromise’ choice?” *Id.* The answer is that “the compromise solution depends on what alternatives are made available.” *Id.*

143. *See* Hanson & Kysar, *supra* note 127, at 1440 (explaining how irrelevant third options affect consumer choice in car sales).

can choose between purchasing a small or large box of popcorn, he or she might choose the small.<sup>144</sup> That same consumer, however, would more likely choose the large box when also presented with the option of an extra-large box.<sup>145</sup> If actors were entirely rational, then framing an irrelevant third choice (in this case, an extra-large box) would not affect the choice between a small and large box.<sup>146</sup>

### 3. Status Quo Bias

“Status quo bias exists when decision makers choose to remain with the status quo more often than traditional [rational actor] theory would suggest.”<sup>147</sup> “[I]f the . . . preferences of an individual . . . suggest that the individual make a change in consumption habits, the individual may still choose to do nothing” to retain the status quo.<sup>148</sup> Various cognitive errors together appear to irrationally wed people to the status quo. One such example is known as the “endowment effect,” where individuals seem to require more compensation to part with an endowment than they are willing to pay to gain it.<sup>149</sup>

In the consumer context, concern about the status quo bias and the endowment effect has inspired debate regarding the “proper default rules for consumer choices involving retirement plans, insurance coverage, and privacy policies.”<sup>150</sup> The status-quo bias is relevant both for the creators of insurance and retirement policies, as well as the consumers using these retirement plans or insurance policies. The “cognitive shortcomings that make regulators reluctant to alter the status quo will tend to make policies

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144. Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 294 (2001).

145. *Id.*

146. See RICHARD H. THALER, QUASI RATIONAL ECONOMICS 42 (1991).

147. Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL’Y 25, 26 (2006).

148. *Id.* Scharff and Parisi suggest that this behavior favoring the status quo is demonstrated by “a large body of literature examining the difference between the willingness to pay (WTP) for the acquisition of a property right and the willingness to accept compensation (WTA) for the loss of an equivalent property right.” *Id.* at 26–27.

149. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAVIOR & ORG. 39, 43–44 (1980); see also Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003).

150. James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL’Y 779, 787–88 (2012).

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‘sticky’ around initial policies.”<sup>151</sup> Therefore, “[t]he direction in which the status quo bias will steer policy . . . depend[s] on the initial policy endowment.”<sup>152</sup> Likewise, consumers might be more unwilling to shift from a default policy out of a desire to simply preserve the status quo.

#### 4. *Vividness Bias*

The vividness bias causes individuals to place more weight on concrete, emotionally interesting information than on more helpful, abstract data.<sup>153</sup> Individuals are more influenced by anecdotal, emotionally compelling testimony than probably more accurate, aggregate data and statistics.<sup>154</sup> “[T]he vividness heuristic focuses attention away from abstract evidence, which is difficult and time consuming to evaluate, to concrete evidence, which most people have more experience evaluating . . .”<sup>155</sup> Consumers should be concerned about advertisers, politicians, or others manipulating their potential to demonstrate this bias because it “creates an incentive for people to specialize in manipulating the bias to their own ends” to exploit the vulnerable.<sup>156</sup>

#### 5. *Confirmation Bias*

Confirmation bias suggests that individuals are prone “to ignore or discount information that challenges existing beliefs.”<sup>157</sup> “Confirmation bias

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151. *Id.* at 788. Cooper and Kovacic elaborate that “[f]rom this stickiness emerges a path dependency in policy choice, where policies adopted in the past have a lingering impact on future policy adoption.” *Id.*

152. *Id.*

153. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 55–56 (1980).

154. See Eugene Borgida & Richard E. Nisbett, *The Differential Impact of Abstract vs. Concrete Information on Decisions*, 7 J. APPLIED SOC. PSYCHOL. 258, 261–62 (1977). Borgida and Nisbett demonstrate this bias with their experiment on student course selection. *Id.* at 261. They gave the students three different sources of information: (1) a statistical summary of the evaluations of the entire population of students taking the course, (2) the live comments of a few students, and (3) no evaluations. *Id.* Statistically, the impressions of the complete population are more likely to be accurate than the impressions of a small sample of a few students. However, the students were more influenced by the anecdotal testimony of the three live students than by the aggregate data that is likely more accurate. *Id.* at 266.

155. Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54, 74 (2006).

156. *See id.*

157. McCann, *supra* note 117, at 1511.

is especially prevalent among those who are overconfident, and it frequently leads to ‘irrational’ decision-making.”<sup>158</sup> In the business context, this bias manifests with individuals avoiding consideration of worst-case scenarios or refraining from consulting with “Devil’s advocates” advisors.<sup>159</sup> However, the same bias could be applied in more general settings, such as individuals or consumers failing to consider worst-case scenarios of risky procedures or failing to consider counterarguments to a course of action.

#### *6. Impact Bias*

Researchers have discovered that individuals have difficulty predicting the intensity and duration of their emotional reactions.<sup>160</sup> One major bias, known as the impact bias, refers to the phenomenon that occurs when people overestimate how badly they will feel after a negative outcome and how long that feeling will last.<sup>161</sup> “For example, some consumers may make unnecessary purchases to avoid the anticipated negative feelings they will have if they forego the purchase.”<sup>162</sup> The existence of the impact bias means that “[c]onsumers . . . are especially prone to miswanting.”<sup>163</sup> Consumers “might believe that a new BMW will make life perfect[,] [b]ut it will almost certainly be less exciting than we anticipated; nor will it excite us for as long as predicted.”<sup>164</sup> Impact bias “characterizes how [consumers] experience the dimming excitement over not just a BMW but also over any object or event that [they] presume will make [them] happy.”<sup>165</sup>

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158. *Id.* at 1470–71.

159. *See id.* at 1471 (internal quotation marks omitted) (citing Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1394 n.146 (2002)).

160. *See* Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQ. L. REV. 817, 818 (2004) (discussing predicted feelings in contrast to experienced feelings); Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345, 346–47 (2003) (discussing the forecasting of the duration and intensity of future feelings and emotions).

161. *See* Wilson & Gilbert, *supra* note 160, at 349–51.

162. Majid, *supra* note 131, at 172 (citing Jon Gertner, *The Futile Pursuit of Happiness*, N.Y. TIMES (Sept. 7, 2003), <http://www.nytimes.com/2003/09/07/magazine/07HAPPINESS.html?pagewanted=all>).

163. *Id.*

164. Gertner, *supra* note 162.

165. *Id.*

### B. Bounded Willpower and Imperfect Self-Control

“In addition to bounded rationality, people often display bounded willpower.”<sup>166</sup> Bounded willpower “refers to the fact that human beings often take actions that they know to be in conflict with their own long-term interests.”<sup>167</sup> Often poor self-control leads to this bounded willpower.<sup>168</sup>

“[T]he ‘imperfect self-control’ bias states that many [consumers] will overestimate their own willpower to avoid buying things they want but do not actually need.”<sup>169</sup> For example, New Year’s resolutions to regularly attend the gym are quickly forgotten in the months following the beginning of the year.<sup>170</sup> Promises to quit sweets are easily forgotten, even though the promisors had the best intention to honor them.<sup>171</sup> Individuals set alarm clocks with intentions of waking up early, only to turn them off and ignore their buzz in the morning.<sup>172</sup> In the consumer context, this bias translates to consumers’ “overestimat[ing] their own willpower to avoid buying things they want but do not actually need.”<sup>173</sup> Imperfect self-control informs consumption and savings decisions and can contribute to insufficient saving for retirement.<sup>174</sup>

Many people are able to appreciate the fact that they have limited self-control or bounded willpower and take steps to reduce the effects of this bias.<sup>175</sup> For example, people concerned about weight gain purposefully avoid keeping tempting desserts in the house.<sup>176</sup> Or, “[i]n some cases they may vote for or support governmental policies, such as social security, to eliminate any

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166. Jolls et al., *supra* note 118, at 1479.

167. *Id.*

168. *See id.*

169. Majid, *supra* note 131, at 169 (citing Bar-Gill, *supra* note 134, at 1375).

170. Bar-Gill, *supra* note 134, at 1373 (citing Stefano DellaVigna & Ulrike Malmendier, *Overestimating Self-Control: Evidence from the Health Club Industry* (2003)).

171. *See id.* (citing RICHARD H. THALER, THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 98 (1992)).

172. *Id.* (citing THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 58 (1984)).

173. Majid, *supra* note 131, at 169 (citing Bar-Gill, *supra* note 134, at 1375).

174. *See generally* Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions*, 70 SOC. SEC. BULL. 1 (2010), available at <http://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p1.html>.

175. Jolls et al., *supra* note 118, at 1479.

176. *Id.*

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temptation to succumb to the desire for immediate rewards.”<sup>177</sup> In this manner, the demand for law, regulation, and consumer protection may reflect people’s understanding of their own bounded willpower.<sup>178</sup>

## VI. CONCLUSION

This brief look at the mental shortcuts that human beings unconsciously take when making decisions signals a pronounced vulnerability to marketing efforts designed to get individuals to say “yes” to an offer to purchase consumer goods. The insight that is especially worth noting about this cognitive heuristic research is that these cognitive heuristics *cannot be controlled* by the individual. This insight directly contradicts the ontological assumption of individualism. Americans are not the careful rational calculators we might prefer to be.

Consumer law should be a response to consumers as they are, not to consumers as they are portrayed in a seminar room where orderly, predictable behavior satisfies their yearning for a world they can understand and control. But an even larger impediment to consumer protection is the eagerness of those on the other side of the product and price negotiation table.

Sellers prefer to speak of consumers as being clever, knowledgeable, puissant, and rational. They wonder aloud why they would need a muscular regulatory regime when rational consumers can accomplish the necessary regulation through their judicious consumption decisions. Were that characterization correct, the range of acceptable marketing behavior would be enlarged.

As a metaphor for equal opportunity, Americans often justify public policies by appealing to the creation of a level playing field. Construction of such a field requires paying attention to the economic power, technical sophistication, and mental proclivities of typical consumers. Appeals to

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177. *Id.* (citing Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275 (1991)).

178. *Id.* For an up-to-date, extensive discussion on cognitive heuristic research, see DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011). Kahneman describes two systems of thought: “System 1 thinking,” which is automatic and uncontrolled, and “System 2 thinking,” which is slow and deliberate and more characteristic of the rational and calculating picture of human beings painted by individualism. *Id.* at 20–21. Kahneman outlines the different ways that System 1 thinking manifests in individuals’ decisionmaking, oftentimes leading to decisions that are not rational or in the best interest of the individual. *See id.*

models of superconsumers who can match the economic power, technical understandings, and mental sophistication of talented and well-financed marketing divisions of major firms have little role to play in public policy debates. Vulnerable consumers are not helpless; they just need a helping hand.