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What Is Consumer Protection for?

Luke Herrine

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ABSTRACT

When law and economics barreled its way into consumer protection scholarship two score years ago, it brought with it the consumer sovereignty framework: an approach to analysis in which actual markets are compared to an ideal market in which consumers optimize exogenous welfare functions by choosing between optimally competitive sellers. Even after two decades of behavioralist critique and even with increasingly critical perspectives taking root since the Global Financial Crisis, this consumer sovereignty ideal continues to serve as both a descriptive and normative baseline for consumer protection scholarship.

This Article argues that it is time to reconsider the consumer sovereignty framework in toto. *A "moral economy framework" would be better. Instead of treating consumers as welfare maximization machines that sometimes malfunction,we ought to conceptualize them as bundles of socially influenced habits. Instead of treating markets as deviations from an ideal of perfect competition, we ought to conceptualize them as socially constructed and reproduced institutional forms. Instead of treating the goal of consumer markets as having rational consumer choice drive all outcomes, we ought to treat consumer markets as having multiple purposes, in accordance with their role in contributing to (a contestable account of) human flourishing. In sum, consumer markets are collectively created spaces to serve social ends.*

Thinking about consumer protection in this way allows us to see many existing laws in a new light, to draw together disparate strands of scholarship that dissent from economic orthodoxy, and to ask different sorts of questions about what—and whom—consumer protection is for.

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"Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle."

–Oliver Wendell Holmes[1]

"[C]onsideration of [how market competition works] by orthodox theorists has tended, in my view, to be subordinated to a widely-felt methodological necessity that all analytical conclusions should conform to the Procrustean bed of marginalist-equilibrium equations."

–P.W.S. Andrews[2]

I. Introduction

Consumer protection law in the United States is in the middle of its most dramatic rethinking since the 1970s. In consumer finance, for example, the explosive collapse of the subprime mortgage market brought about a wave of critical scholarship,[3] followed more recently by scrutiny of predatory practices in the credit card,[4] student loan,[5] payday loan,[6] and auto loan[7] markets, among others. And the lens has often turned more critical over time, moving from a focus on the limits of rationality to the historically situated processes of domination and exclusion that shape credit provision.[8] In the domain of internet governance,

[1] Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894).
[2] P.W.S. ANDREWS, ON COMPETITION IN ECONOMIC THEORY 65 (1964).
[3] *See generally* ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD (2018) (discussing the crash and its aftermath); RON SUSKIND, CONFIDENCE MEN: WALL STREET, WASHINGTON, AND THE EDUCATION OF A PRESIDENT 3-6 (2011) (discussing the elevated role of Elizabeth Warren and her alarms about the state of consumer financial market regulation after years of being sidelined by those in power); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) (creating the Consumer Financial Protection Bureau and a number of new consumer financial protection regulations in response to the crisis).
[4] *See generally, cf.* Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The Card Act and Beyond*, 97 CORNELL L. REV. 967 (2012). For skeptical research on credit cards before the financial crisis, *see generally, cf.* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899 (2006).
[5] *Cf.* David Halperin, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, REPUBLIC REP. (Apr. 9, 2014, 4:21 PM), https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/ (last updated Mar. 3, 2022); CONSUMER FINANCIAL PROTECTION BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM (Sep. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.
[6] *See generally, cf.* Creola Johnson, *America's First Consumer Financial Watchdog is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 CATH. U. L. REV. 381 (2012); *but see, generally* Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023 (2012). For critical research before the financial crisis, *see generally, cf.* CHRISTOPHER PETERSON, TAMING THE SHARKS: TOWARDS A CURE OF THE HIGH-COST CREDIT MARKET (1st ed. 2004).
[7] *See generally, cf.* Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 GEO. L.J. 1257 (2020).
[8] *See generally, e.g.*, Vijay Raghavan, *Consumer Law's Equity Gap*, 3 UTAH L. REV. (forthcoming 2022); *see*

to take a different example, early faith in the power of notice-and-consent regimes has given way to several overlapping worries about the unchecked power of massive tech corporations to structure our lives.[9] Private surveillance, consumer manipulation, algorithmic discrimination, and ruthless elimination of competing models from which consumers can choose have all been the subject of growing literatures.[10]

This critical scrutiny has only haltingly affected policy, though momentum seems to be building. For example, both the Federal Trade Commission and the (still new) Consumer Financial Protection Bureau are currently headed by appointees with a reputation and a mandate for bucking the status quo, the former in the domain of Big Tech and the latter (of course) in the domain of consumer finance.[11] Action has been more decisive abroad.[12]

It has an even more halting impact on the theory of consumer protection. Since roughly 1980, consumer protection scholarship has been dominated by neoclassical welfare economics, commonly called "law and economics" or "economic analysis". From the neoclassical perspective, the purpose of consumer protection is to make markets work as much as possible like a utopian market in which rational informed choices of consumers (modeled as welfare optimization machines) drive outcomes through the decentralized force of free competition. In such a world, consumers can be said to be "sovereign", and so I refer to the dominant paradigm as the "consumer sovereignty framework".

Like much economic analysis in the 1980s and '90s, the consumer sovereignty framework was initially used for primarily deregulatory purposes. Regulators were commonly said to be overconfident in their own abilities to make markets work better and

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generally Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403 (2020); *see generally* Pamela Foohey et al., *The Folly of Credit as Pandemic Relief*, 68 UCLA. L. REV. DISC.126 (2020); *see generally* Dalié Jiménez & Jonathan Glater, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 132 (2020); *see generally* Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211 (2019).

[9] *See generally, Cf.* Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460 (2020) (reviewing SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019)); *see also, generally* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019) (discussing recent work on the rise of "surveillance capitalism" and "informational capitalism"); *see generally* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015) (discussing how surveillance and data-driven decisions without accountability produce a form of arbitrary power).

[10] *See generally, e.g.*, SAFIYA UMJOA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); *see generally* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014); *see generally* Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311 (2015); *see generally* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

[11] Josh Sisco, *Why FTC Chair Lina Khan's Attempt to Stop Tech Surveillance Faces Long Odds*, THE INFORMATION (Jan. 11, 2022), https://www.theinformation.com/articles/why-ftc-chair-lina-khans-attempt-to-stop-tech-surveillance-faces-long-odds; Associated Press, *Senate Confirms Rohit Chopra to Lead the Consumer Financial Protection Bureau*, NPR (Oct. 1, 2021, 10:45 AM), https://www.npr.org/2021/10/01/1042310553/cfpb-senate-confirms-rohit-chopra-watchdog-consumer-financial-protection-bureau.

[12] *E.g.*, Eur. Parl. Doc. Commission Regulation 2016/679 2016 O.J. (L 119), art. 5(1)(b)-(c); *but see* Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773, 800–01 (2020); Brian Liu & Raquel Leslie, *China's Tech Crackdown: A Year-in-Review*, LAWFARE (Jan. 7, 2022, 9:51 AM), https://www.lawfareblog.com/chinas-tech-crackdown-year-review; Michael Pettis, *What Does Evergrande Meltdown Mean for China?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sep. 20, 2021), https://carnegieendowment.org/chinafinancialmarkets/85391.

underconfident in the power of markets to self-correct through the power of decentralized choice. Markets and consumers were understood to be close enough to their utopian form (or at least to have a tendency toward that form) to be left alone. In more recent decades, the consumer sovereignty framework has become the *lingua franca* in which pro- and anti-regulatory arguments are expressed. Advocates for more robust consumer protection must point to the "market failures" and "transaction costs" that prevent consumer choice from reigning supreme—creating "inefficiencies" and "rents"—in order to make their case. Consumers' "bounded rationality" has probably been the most discussed source of potential "market failure" since the turn of the century. Sometimes distributional consequences are also appealed to. Advocates for more minimal regulation can respond by questioning whether the evidence of market failures is as it initially appears (for example: are apparently irrational actions actually rational when viewed from a different angle?), by adducing to ways that a market does or might address the failure (through "private ordering") if given more time to work itself out, by pointing out the potential costs and perverse consequences that might result even from well-intentioned and -designed regulation, and so on.[13]

Starting just before the financial crisis, the consumer sovereignty framework has endured repeated attacks, but it remains the default theoretical approach because it has not been subject to systematic reconsideration. Behavioral economists have pointed out the many problems with assuming that consumers are "rational" in the relevant sense, but they reinforce the normative and descriptive baseline of consumer rationality by treating evidence about human psychology as a litany of ways that actual consumers fail to maximize their preexisting preferences (and they do not even begin to ask questions about where preferences come from). The few authors who have offered deeper critiques of the consumer sovereignty framework—on the grounds that it blinds us to the way consumer markets reproduce inequality, enable manipulation of our decisions and our deliberations, and/or infringe on values beyond the accumulation of things—have not connected their critiques into a full rethinking of the consumer sovereignty framework.[14]

This theoretical stasis is in contrast with surrounding fields experiencing similar tumult. In addition to sending ripples through consumer finance, the global financial crisis also occasioned reconsideration of how to regulate securities and commodities markets, of the purpose and content financial regulation, and even of the nature of monetary systems—leading to changes and reform proposals on a much grander scale than that found in any field of consumer financial regulation.[15] And scholarship on the law of money, banking, and financial regulation has been increasingly populated with deep challenges to conventional macroeconomic theories and now contains a variety of competing alternatives in the Keynesian, post-Keynesian, and neo-chartalist registers.[16] Meanwhile, discussion of regulation

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[13] *See infra* Part II.B.

[14] Here I have in mind works such as Margaret Jane Radin, Boilerplate (2013); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211 (2019); Lauren Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015). As will become clear, I rely on these works and others in a similarly critical vein in articulating my own critique.

[15] *See generally, e.g.*, Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KENTUCKY L. J. 229 (2020-21); Robert Hockett & Saule Omarova, *White Paper in Support of a National Investment Authority*, CORNELL L. SCH. (June 2017), https://www.banking.senate.gov/download/omarova-testimony-appendix-6-15-17pdf.

[16] *See generally, e.g.*, Robert Hockett & Saule Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017) (providing a framework for thinking about law's role in structuring financial markets); Christine A. Desan,

of Big Tech has taken place mostly in the language of the law of the internet and of antitrust law, both of which have been inthe process of their own contested reorientations.[17] Shifts in antitrust scholarship and policy have been motivated by critiques of industrial organization economics, especially of the Chicago School variety, with a variety of emergent alternatives proposed under the umbrellas of neo-Brandeisianism and moral economy.[18] Scholarship on the internet has become increasingly focused on the irreducibly social and relational processes that structure how we use it.[19]

In this article I propose a systematic reconsideration of the theory of consumer protection. Synthesizing and extending several existing literatures, I argue that the consumer sovereignty framework should be rejected and begin to sketch an alternative, which I refer to as a "moral economy framework". To see the fundamental problems with the the consumer sovereignty framework, one can begin in the familiar territory of behavioral economics. I argue that taking evidence about human decision-making seriously means not just identifying discrete "behavioral market failures" but rejecting the optimization-machine model at the core of neoclassical welfare economics. As multiple decision researchers have pointed out, the optimization machine model is unreasonably demanding of a cognitive system and, since both desires and decisions techniques are (at least to some degree) learned, drawing a line between maximization and maximand is not straightforward in practice or in theory. Further, since welfare economics defines wellbeing in terms of what optimization machines choose, it becomes unclear how to say what is good for consumers when they persistently deviate from that model. Independently from these considerations about rationality, a focus on aggregating individual welfare maximization functions distracts from irreducibly social values, such as equal treatment, privacy, and procedural fairness. Taking these sorts of values seriously requires thinking about how any given market interacts with surrounding institutions (including other markets) rather than focusing on making sure consumers have free choices between competitive sellers. It also requires asking different sorts of questions than how to maximize welfare.

These problems with overemphasizing rational choice point to the need for an account that conceptualizes how social context shapes choice.

Whereas a consumer sovereignty view treats the purpose of consumer markets as setting up a neutral social space in which rational and informed consumers can choose between competitive firms, thereby aiming leave all decisions about value up to the decentralized choices of consumers themselves, a moral economy view treats the purpose of consumer markets as ensuring that goods and services are provided ina way that comports with the values of those whom the political system represents. That is to say: a moral economy view treats consumer markets as contingent ways to solve problems of social

Money as a Legal Institution, *in* MONEY IN THE WESTERN LEGAL TRADITION: MIDDLE AGES TO BRETTON WOODS 18 (David Fox & Wolfgang Ernst. Eds., 2016); *see generally* MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION (2016) (discussing how runs on money are related to financial crises).

[17] INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF RPT. & RECOMMENDATIONS (2020), *available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf; *see generally* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2017).

[18] *See generally* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); *see generally* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

[19] *See generally, e.g.*, Kapczynski, *supra* note 9; *see generally* Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDELUS 18 (2016), http://nrs.harvard.edu/urn-3:HUL.InstRepos:3707857.

provision, to ensure that the right goods and services get to the right people in accordance with principles of what is needed for human flourishing and what counts as a fair way to balance different forms of flourishing. Whose principles of fairness govern depend on political processes for sorting out different interests and values, making the question of which values should govern deeply entangled with the question of whose interests should be represented and how. In a democratic moral economy, market governance institutions should be connected to processes that include the interests of all affected by that market, with processes that aim to correct for the social marginalization (based on race, class, gender, etc.) that other parts of the provisioning process have created.

A moral economy view does not in the least mean abandoning consumer choice. *Both* consumer sovereignty and moral economy views see the promotion of consumer autonomy—via providing information, preventing manipulation andcoercion—as a valid purpose of consumer protection, but they understand the value differently. A moral economy view sees autonomy not just as setting up the conditions to allow consumers to choose freely between options but as active facilitation of the process of self-determination. The latter implies, among other things, structuring the socialization process to ensure that consumers have the tools tounderstand their options and eliminating less valuable or more complex options in order to focus limited attention only on the choices that matter.[20]

But a moral economy view also sees consumer autonomy as one among multiple values pertaining to the interests of end users that must be balanced in designing a consumer protection regime. Also relevant are values such as intra-consumer fairness, fair dealing (or non-exploitation), inclusion, and privacy. How to weigh each of these values will depend on the social context—the nature of the good or service in question and the way it is provided—as interpreted by those charged with governing the market.[21]

In sum, a moral economy lens shifts focus away from attempting to design a market so that consumer choice drives all outcome and toward attempting to design institutions (including markets) that produce valuable and justly distributed choices for end users of goods and services. It shifts the locus of legitimation away from the question of whether each consumer is exercising sovereignty merely by choosingwhat to buy (and/or whether the market is maximizing net welfare) and toward the question of whether the institutions making and enforcing consumer protection laws are connected to legitimate processes of collective will formation.

This way of thinking about consumer markets and consumer protection makesbetter sense of the empirical evidence on consumer markets and of the moral intuitions behind recent reformist efforts than focusing on market failures relative to aperfectly competitive baseline. For example, a moral economy view does not "trim the sails" of behavioral economics, to use Ryan Bubb and Richard Pildes's evocative phrase.[22] It treats humans as social animals that decide according to a set of learned heuristics deployed in contexts of limited information and unavoidable uncertainty about the future. It judges consumer rationality not in terms of an inherent quality in the human cognitive apparatus but in terms of how well any decision-making technique serves a given purpose in a given context. For another, a moral economy view attends to the way that the choices in consumer markets are shaped by upstream

[20] *See infra* Part V.B.5.
[21] *See infra* Part V.B.
[22] *See generally* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims its Sails and Why*, 127 HARV. L. REV. 1593 (2014).

institutional decisions—the supply and demand of automobiles is shaped by decisionsabout which transportation infrastructure to invest in, the supply and demand ofhouses is shaped by decisions about the role race should play in investments in home construction, sales, and ownership, etc.[23]

A moral economy approach also leaves space for values that are not reducible to welfare maximization or the promotion of free and rational consumer choice but that are nevertheless widely recognized as grounded in reason. Because it treats value as irreducibly plural, it can cognize the importance of values like fair dispute resolution, privacy, and preventing inequality regardless of whether consumers manifest a willingness to pay for them.[24]

The moral economy framework is also more consistent with the reconsiderations of money, antitrust, internet governance, and other fields of economic governance than even a consumer sovereignty framework loaded withfrictions, irrationalities, and market failures. Indeed, it is directly continuous with the former theories. Like neo-chartalist and Keynesian accounts of money, it treats collective decisions about the structure of the fiscal-monetary system as shaping the domain of consumer markets and the role of consumer choice in directing resources toward different industrial processes.[25] Like moral economy accounts of antitrust, it treats the shape of market competition as structured by the legal architecture of coordination rights.[26] Like relational accounts of data governance, it conceptualizes decisions on the internet as irreducibly shaped by collective decisions.[27]

The remainder of this article elaborates on the critique of the consumer sovereignty framework and provides a more detailed outline of a moral economy alternative.

In Part II, I introduce the concept of consumer sovereignty and give it some historical context. In doing so, I elaborate on the argument that even scholarship that critiques rational choice assumptions—that is, even behavioral economics—tends to reproduce a framework that centers consumer sovereignty as a normative and descriptive baseline.

In Part III, I bring together several critiques that have been leveled at the consumer sovereignty framework into an overarching critique of its fundamentalcommitments. Using examples from multiple markets, I explain how reliance on a concept of idealized individual rationality to ground normative judgments cannot work in a world in which that rationality is impossible and makes no sense in a world in which individual choices are structured by collective decisions about how todistribute choices and how to shape the process of preference formation.

These critiques create a vacuum that I begin to fill with the moral economy framework. In Part IV, I outline the basic descriptive and moral approach. Descriptively, a moral economy framework draws on institutionalist approaches to economic action: those that treat spaces of economic action as collectively produced and reproduced in a series of contested settlements. Normatively, it evaluates institutions in terms of their social function—their ability to contribute to one or another aspect of human flourishing—rather than in terms of their ability to create a neutral space in which function can be entirely determined through decentralized

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[23] *See infra* III.A; IV.A.
[24] *See infra* IV.C; V.B.
[25] *See generally* Alfred S. Eichner & J.A. Kregel, *An Essay on Post-Keynesian Theory: A NewParadigm in Economics*, 13 J. ECON. LIT. 1293 (1975); *see generally* Marc Lavoie, *A Post Keynesian Approach to Consumer Choice*, 16 J. POST KEYNESIAN ECON. 539 (1994).
[26] *See generally* Paul, *supra* note 17.
[27] *See generally* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 370 (2021).

action.

Part V then elaborates on the implications of a moral economy framework for analysis of consumer protection. In it, I argue that consumer protection is the way a political collectivity that has already determined to channel provision of a given good/service through a market attempts to ensure that that market functions in a way that lives up to that collectivity's shared values. I then posit four intersecting values that consumer protection institutions tend to focus on: suitability, intra-consumer fairness, fair dealing, and decisional autonomy.

II. The Consumer Sovereignty Framework

A. What's in a Name?

Unlike, say, the "consumer welfare standard" in antitrust, the "consumer sovereignty framework" is not a generallyaccepted name for a school of thought or regulatory program.[28] One can find approving references to "consumer sovereignty" in the consumer protection literature, but nobody I know of describes their own analysis or policy proposals as an application of a *framework* that goes by that name.[29]

No: "consumer sovereignty framework" is my own way of referring to a set ofanalytical tendencies and the models they rely on—implicitly or explicitly. Thesetendencies will be familiar to anybody versed in the academic or policy analyticliterature on consumer protection. Think, for instance, of talk about consumer marketsaiming for "efficiency," and/or "trading off" efficiency with "equity" or an invocationof the power of "market forces" in the absence of a "market failure." Most readers will probably associate these ideas with "economic analysis" or "law and economics."

The trouble with going down the familiar road of referring to "economic analysis" or "law and economics" is that it obscures the methodological distinctiveness involved. The very term "economic analysis" conveys a sense of being beyond frameworks. It does not help that (many of) its practitioners present its approaches to modeling as the onlyavailable "scientific" way of doing policy analysis,[30] its brand of moral analysis is portrayed as either the only neutral and precise way of sorting good from badoutcomes or as perfectly compatible with any moral concern one might come up with(never mind if those are inconsistent),[31] and its assumptions as the "standard view" from which any variation ought to begin.[32] If one were relying entirely on these self- categorizations, one might get the impression that, to the extent there is anydistinctive "framework" involved, it is just the minimal scaffolding necessary to support rigorous analysis of the economy.

This conflation of a *particular tradition of* economic analysis with *basic competence*

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[28] *See generally* A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019).

[29] *E.g.* JAMES C. MILLER III, THE ECONOMIST AS REFORMER, REVAMPING THE FTC, 1981–1985, 7–8 (1989); *see generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

[30] *E.g.* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 3 (6th ed. 2012).

[31] *E.g.*, *id.* at 4; ALAN DEVLIN, FUNDAMENTAL PRINCIPLES OF LAW AND ECONOMICS 31-33 (2015); RICHARD A POSNER, ECONOMIC ANALYSIS OF THE LAW 12-17 (9th ed. 2014); ANDREW MAS-COLELL ET AL., MICROECONOMIC THEORY 825-27, 549-50 (1995) (discussing Pareto frontiers and their role in social welfare functions and the First Fundamental Theorem of Welfare Economics: that markets that are "perfect" in the neoclassical sense are always Pareto frontiers); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 4-5 (7th ed. 2001) (providing an intuitive definition of efficiency as "the most effective use of a society's resourcesin satisfying people's wants and needs.").

[32] *E.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT 3 (2012).

in economic analysis has made it easier for those trained in this tradition to present their views as both disinterested and epistemically privileged. In its more radically deregulatory days, the law and economics movement (and its donors) cultivated this impression intentionally, as a way of cloaking a particular set of goals in the dress of professional competence.[33] But even when not wielded so strategically,it has circumscribed the range of thinkable policy options and legitimate topics of debate in the name of "rigor."[34] And, as I will discuss later, it occludes the role of other versions of economic analysis—institutionalism in particular--in shaping earlier histories of consumer protection.

To refer to "consumer sovereignty" is to highlight the politics already present in methodology. The term itself was a favorite of early law-and-economics devoted deregulators. FTC Chair James Miller III contrasted "consumer sovereignty" with what he called the "moralistic posturing" of his more pro-regulatory predecessors."[35] To promote consumer sovereignty, for Miller, is to "reinforce market forces," which, by their nature "let individual consumers selectfrom available products and services they most prefer," given that "firms [in competitive markets] have incentives to produce efficiently, to offer the optimal combinations of price and quality, and to search out new products and services that consumers may find attractive."[36]

Miller does not speak for all economic analysts, of course, but he was speaking for a tradition of analysis—neoclassical welfare economics and information economics--that he inherited and that others who identify with the mainstream of economists have as well. It is a style of analysis that has become the *lingua franca* of consumer protection scholarship in the intervening years, whether adopted by the pro-regulatory or anti-regulatory camp. As we will see, even behavioral economics—often portrayed as a dissenting tradition—embraces the basic methodological and normative assumptions that Miller did. It is what they have in common that I refer to as the "consumer sovereignty framework."

B. What's in the Framework?

What is the consumer sovereignty framework? It is a way of thinking about how markets work and how they ought to work that answers both those questions with reference to an utopian market.

A good place to start is with the neoclassical conception of value. As inheritors of the utilitarian tradition, it evaluates the merit of all institutions— including markets—based on their ability to produce outcomes that maximize "welfare."[37] As it has come to be used by neoclassical thinkers, "welfare" means whatever agents choose for themselves when they have perfect information about their options and an exogenously arrived at well-ordered ranking of those options.[38] An institution is valuable if and only if it contributes to outcomes

[33] *See generally* Steven M. Teles, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 181–219 (2008) (discussing how conservative donors negotiated with elite institutions to fund positions in law and economics without ideological tests); *see generally* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L.REV. 431 (2021) (discussing the role of neoclassical economics in the movement to defang the FTC).
[34] *See generally* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022).
[35] *See generally* MILLER III, *supra* note 28.
[36] *Id.* at 9.
[37] *See generally* Francis M. Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22 (1957).
[38] *See* DANIEL HAUSMAN ET AL., ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY 126-69 (3d ed. 2017); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1213-17

that rationalindividuals prefer over other possible outcomes.

If one thinks about them a certain way, free markets are institutions perfectly designed to dynamically adjust to allow individuals to choose the best possibleoutcomes given others' choices. Presume, for starters, that individuals generally act "rationally"—in the sense of being able to rank every possible outcome in terms of desirability and always choosing the options that lead them to the most preferable available outcome. Now add the assumption that individuals generally have the optimal amount of "information" necessary to determine which option will lead to their preferred outcome. If these conditions hold, then one can treat actual choices (of consumers or others) as "revealing preferences" between available options.[39]

An ideal market can also ensure that the options provided are the best possible. Under conditions of "perfect competition" in which all factories operate at full capacity, all businesses will immediately lose market share (or go bankrupt) if they fail to cater to the interests of the marginal consumer. So long as certain other conditions hold (proper pricing of risks, etc.), the best possible options will be presented to consumers, subject only to resource constraints at a given technological frontier.

Put the two together: if institutions must constantly compete for consumers' business and consumers are informed rational welfare maximizers (and contracts and property rights are costlessly enforced, etc.), then invisible hand of the market will cause free consumer choice to place all resources in the hands of those who most value them in a *general equilibrium*.[40] Consumer sovereignty will maximize consumer (and perhaps total) welfare.[41]

Since the consumer sovereignty ideal allocates resources optimally—according to welfare economists' understanding of optimality—those who adopt this style of thinking tend to use it as a normative guidepost. One way it can do so is serving ideal can serve as a model of a legitimate *process* by which outcomes should be arrived at: these are the "market forces"

(1991). In the name of quick exposition and since my analysis will not turn on the matter, I am fudging on how the social welfare criterion is defined. In practice, economic analysis nearly always applies the Kaldor-Hicks criterion, which seeksto maximize total "wealth"—that is, willingness to pay—on the theory that it is always better to have more, since those with more could always compensate those with less. But the social welfare function can theoretically be defined in any number of ways, focusing on increasing the welfare of the least well-off first, for example, although doing so requires making interpersonal wellbeing comparisons. *See generally* Matthew D. Adler, *Cost-Benefit Analysis and Social Welfare Functions*, *in* THE OXFORD HANDBOOK OF ETHICS AND ECONOMICS (Mark D. White ed., 2019). Yet most of the theoretical literature—and most non-lawyer economists—focus on Pareto optimality, which is fully compatible with declining to make interpersonal comparisons of well-being (since individuals make these comparisons themselves).

[39] Again, this is a breezy critical introduction to technical concepts the assumptions of which are not always explicit in the literature that presents them. For a more careful, technical, and sympathetic introduction, *see* Hal R. Varian, *Revealed Preference*, *in* SAMUELSONIAN ECONOMICS AND THE TWENTY-FIRST CENTURY 99 (Michael Szenberg, Lall Ramrattan & Aron A. Gottesman eds., 2006).

[40] *See* MAS-COLELL ET AL., *supra* note 30, at 549-50, 825-27 (1995) (discussing the First Fundamental Theorem of Welfare Economics: that markets that are "perfect" in the neoclassical sense are always Pareto frontiers and Pareto frontiers and their role in social welfare functions). In the world of law-and-economics, this world is most commonly associated with Coase (though Coase was only articulating what was commonly understood). *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Ronald H. Coase, *The Firm, the Market, and the Law*, *in* THE FIRM, THE MARKET, AND THE LAW 1, 10-14 (1988) (discussing the reception of *The Problem of Social Cost* among lawyers). *See generally* John Geanakoplos, *The Arrow-Debreu Model of General Equilibrium*, *in* THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 116 (J. Eatwell, M. Milgate & P. Newman eds., 1987).

[41] On some practical differences between those concepts, *see generally* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

that should be allowed to work.[42] If there is some reason to doubt that the ideal process can be instantiated (if, say, goods are nonrivalrous or if there are positive returns to scale or if "transaction costs" are especially high) or if an analyst is trying to choose between multiple ways to set up a market (that is, the choice presented to consumers must be hypothetical because it involves counterfactual institutionalizations), then the hypothetical world provides a way to think about which *outcomes* should be aimed for. In that case, one should aim for whichever outcomes rational and informed consumers *would* choose, assuming one can determine what that would be. These are often referred to as "efficient" outcomes, and are generally operationalized as looking for outcomes that maximize net "willingness to pay" or some variation on that formula.[43]

Because it can plausibly be portrayed as the most bare-bones description of a "market", the consumer sovereignty ideal also tends to serve as a descriptive baseline.[44] That means one should start with the presumption that the "forces" driving any given market are those that drive the ideal: that real markets function *as if* they were optimal.[45] One can then make the model more sensitive to reality by "relaxing" one or another assumption involved with that ideal or positing one or another "friction" or "market failure" that would prevent the ideal from being realized.[46] Usually, in the name of parsimony or on the logic that imperfections will tend to be competed away over a long enough period of time, one should aim to posit as few variations on the baseline model as possible.[47]

This template encourages the legal/policy analyst to think of different areas as "fragmentary implementation[s] of aspects of general equilibrium theory."[48] One imagines what role such an institution would have in creating the conditions for consumer sovereignty, posits that role as *the* function of the institution, and then recommends reforms that would "rationalize" the institution so that it performs that function and only that function (with perhaps some leeway for other normativegoals).

C. *What's in It for Policymakers?*

Within this style of thinking, the role of consumer protection has been generally understood to be ensuring that consumers have the *information* necessary to properly distinguish between options and, more hesitantly, ensuring that consumers' choices actually reflect their preferences (that is, they are "rational") rather than resulting from coercion or manipulation. And determining how to do each of these things has generally been understood as a matter of applied "information economics".

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[42] This approach is especially common in arguments for avoiding regulation.

[43] As mentioned, there are at least two meanings of "efficiency": Kaldor-Hicks and Pareto optimality. The latter is more common among theoretical economists, but it is quite difficult to apply to actual situations. *See generally* Calabresi, *supra* note 42. The former is almost always what is referred in the law-and-economics scholarship, and it forms the theoretical basis for modern economic interpretations of cost-benefit analysis, which relies on "willingness to pay." *See* HAUSMAN ET AL., *supra* note 42, at 158–60.

[44] On "methodological individualism," *see generally* Jon Elster, *The Case for Methodological Individualism*, 11 THEORY & SOC'Y 453 (1982).

[45] *See generally* Milton Friedman, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS (Milton Freidman ed., 1953).

[46] *See generally* Bator, *supra* note 41.

[47] For a critical introduction to this approach, *see* PETER SPIEGLER, BEHIND THE MODEL: A CONSTRUCTIVE CRITIQUE OF ECONOMIC MODELING 13–35 (2015).

[48] Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1806 (2020).

Modern information economics began with George Stigler's 1961 article "The Economics of Information," which argues that acquiring information is costly and that we can understand a good deal of sales and advertising practices as a market's endogenous way of minimizing "search costs": i.e. of providing the most relevant information to the potential consumer who will find it most useful.[49] On such an approach, consumers are to be treated as having complete and consistent underlying preferences, in need only of information to determine how those preferences map onto the consumer products on offer. It was an alternative to then-influential institutionalist accounts that understood firms as manipulating consumers' desires.[50]

Other microeconomic theorists built on top of Stigler's account, with two conceptual moves proving most influential in shaping the contemporary framework. First, the idea (first distilled in George Aklerof's 1970 article) that "information asymmetries" might allow suboptimal or predatory sellers to persist even in a competitive market has played a major role in identifying market failures that consumer protection might solve for beyond outright fraud.[51] Second, empirical evidence (most influentially put forward by Daniel Kahneman, Amos Tversky, and Richard Thaler starting in the early 1980s) that consumers are predictably "biased" in a way that causes them to choose suboptimally even in the face of all the necessary information has become increasingly important in theorizing consumer market failures.[52]

Such limitations on consumers' ability to choose had cited by earlier generations of economists as reasons to build economics on something other than neoclassical foundations.[53] Building on Stigler's initial move, the innovation of Aklerof, Thaler, et al. was to describe these limitations in ways that reaffirmed the relevance of those foundations by treating reality as a deviation from the perfectly competitive ideal. Though behavioral economists sometimes claim to reject neoclassical models, they reinforce the dominance of the overall framework. One starts with the presumption that the conditions for consumer sovereignty are present, and then one adduces to as few deviations from that utopia as possible to capture the observed reality. Once one identifies these "market failures," one can explore the costs and benefits of intervening to correct for them.

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[49] *See generally* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961). For a discussion of the role that Stigler's view (and its development by Nelson in particular) plays in subsequent economic literature on advertising, *see generally* Kyle Bagwell, *The Economic Analysis of Advertising*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1701 (M. Armstrong & R. Porter eds., 2007). For an iconoclastic history of the concept of "information" in modern economics, *see generally* Mirowski & Nik-Khah, *supra* note 36.

[50] Stigler was strongly opposed to regulation, to the point he was willing to fudge results. *See* BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY 164 (2019); Niklas Olsen, *From Choice to Welfare: The Concept of the Consumer in the Chicago School of Economics*, 14 MOD. INTELL. HIST. 507, 525 (2017).

[51] *See generally* George A. Aklerof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); *see generally* Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q. J. ECON. 629 (1976).

[52] *See generally* Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (collecting early research in the area); *see generally* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHV. & ORG. 39 (1980) (articulating some implications for consumer markets).

[53] *Cf.* Walton H. Hamilton, *The Institutional Approach to Economics*, 9 PAPERS & PROC. OF THE 31ST ANN. MTG. OF THE AM. ECON. ASSOC. 309, 317 (1919) ("Economic theory must be basedon an acceptable theory of human behavior" that "recognize[s] that economy forbids the satisfaction ofall instincts…[attempts to] discern in the variety of institutional situations impinging upon individuals the chief source of differences in the content of their behavior…and…takes account of the limitations imposed by past activity upon the flexibility with which one can act in future.").

D. An Application

The recent literature on consumer-facing boilerplate—including arbitration clauses—illustrates the resulting analytical frame. Behavioral economists have been instrumental in pointing out the fact that most boilerplate is unread, misunderstood, or both.[54] Nearly all observers now accept that consumers fail to understand the fineprint of many (perhaps most) of the transactions they enter into and that many(perhaps most) sellers structure their transactions with consumers to exploit this lack of understanding.[55] Such exploitation has been identified in multiple individual elements of consumer transactions, including both price terms (penalty fees, early payment fees, variable interest rates, teaser rates, algorithmic pricing)[56] and non-priceterms (liability waivers, detailed terms of service agreements, arbitration clauses, forum selection clauses, class action waivers).[57] Overall transactional complexity (length and inscrutability of boilerplate, interaction between multiple complicated terms) has also been implicated in advantage-taking strategies.[58]

Clearly, talking about boilerplate in this way requires acknowledging that consumers do not act as they would in a world of consumer sovereignty. Behavioral economists have been persistent and convincing in making this point. Yet many of them have continued to do so by keeping the neoclassical notion of a pure market at the center of their analysis. Irrationality is merely added to the list of ways that realitycan differ from the ideal.

Oren Bar-Gill's work on consumer contracts is exemplary. In his influential and carefully reasoned *Seduction by Contract*, Bar-Gill models consumer markets asif consumers were sovereign (and firms were operating at full capacity and all risks were priced in etc.), except that consumers "suffer from biases and misperceptions" that cause them to underestimate the total price and/or overestimate the benefit of a consumer transaction.[59] Consumers might misperceive product aspects (e.g. failing to understand that a teaser rate is only introductory) or the relevance of those aspects to their likely use of a product (e.g. being overoptimistic about paying on time and therefore failing to predict the impact that late fees will have). Knowing as much, "a seller may be able to [make artful use of fine print to] increase demand by raising the *perceived* benefit [or lowering the *perceived* total price] without

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[54] This discussion sets aside doctrinal concerns related to the application of contract law to unread contracts—on which, *see generally* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135 (2019)—and defers discussion of the moral status of individual autonomy to the "moral economy" approach. *See infra* Section V.C.1.

[55] Empirical research on how consumers understand their contracts has been central to moving this debate forward. *See generally* Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1 (2015); *see generally* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014); *see generally* Florencia Marotta-Wurgler & Robert Aylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240 (2013); *see generally* Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677 (2007).

[56] *See generally, e.g.*, Bar-Gill & Bubb, *supra* note 4 (teaser rates and hidden fees); *see generally* Van Loo, *supra* note 10 (algorithmic pricing).

[57] *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (summarizing many objections).

[58] *E.g.*, BAR-GILL, *supra* note 31, at 66–68, 141–45, 208–11; OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURES OF MANDATED DISCLOSURE 14–32 (2014); *see generally* Levitin, *supra* note 7.

[59] BAR-GILL, *supra* note 31, at 10.

incurring the added cost of raising the *actual* benefit [or lowering the *actual* total price]."[60]

Normatively, Bar-Gill treats "behavioral market failure" as problematic because of its deviation from consumer sovereignty: the "artificially inflated demand" (relative to what demand would be under conditions of perfect rationality, perfect competition, and perfect information) allows sellers to "increase profits at the expense of consumers," allows unscrupulous or low quality sellers to obtain an artificially high amount of market share, and causes consumers to consume products that are badly matched to their preferences (again, relative to ideal conditions).[61] All of this can be straightforwardly read off of the fact that consumers misperceive costs and benefits, because that misperception prevents consumer choice from playing its optimizing role. Bar-Gill also acknowledges the relevance of distributive implications, noting that poorer and less sophisticated consumers may be more likely to misperceive costs and benefits—and that poorer consumers can thus end up cross-subsidizing wealthier consumers.[62] But it is not entirely clear what he thinks the relevance of distributive considerations are: is disproportionate impact on low-income consumers just another count against inefficient boilerplate or is unfairness somethingto be given independent normative consideration?[63]

In any case, to ameliorate the effects of exploitative boilerplate, Bar-Gill recommends improving disclosures as a first resort. He favors disclosure because, if well designed, it "directly targets the mistakes and misperceptions at the core of the behavioral market failure."[64] That is to say, it makes consumers act more like their ideal forms, which makes consumer choice more effective at disciplining firms and optimizing preference functions without introducing any further "distortions." But, even if disclosures are not that effective, they are also to be prioritized because they are "the least intrusive form of regulation, and thus, the form of regulation most likelyto be adopted."[65] Elsewhere, Bar-Gill has favored more "intrusive" measures such as banning and/or mandating certain clauses as a second resort should the first resort of disclosures be proven not to work.[66]

Bar-Gill does not specify the normative relevance of the "intrusiveness" of a regulation. One would think that, for a welfarist, a more intrusive regulation would bepreferable to a less intrusive regulation only if it led to welfare improvements—in other words, intrusiveness does not have independent relevance. One way to read the focus on intrusiveness is as articulating a role for non-welfare considerations—for respecting consumer autonomy as a good in itself,

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[60] *Id.* at 11.
[61] *Id.* at 23–25.
[62] *Id.* at 25–26.
[63] In private correspondence, Bar-Gill has stated that one way he thinks about distributive issues is by adopting a cardinalist lens and prioritizing the interest of low-income consumers based on the principle of diminishing marginal utility of income. But he stops short at using a cardinalist approach under all circumstances. It is not clear to me how he proposes choosing between ordinalist and cardinalist approaches. To revert to cardinalist analysis only if one decides that distributive considerations are relevant on other grounds would seem ad hoc or question-begging. It is also not clear that diminishing marginal utility of income provides a satisfying way to model distributive concerns—doing so makes distributive considerations entirely dependent on the relative strength of individual preferences for money (rich people who *really* love money would be prioritized over poor people who have been conditioned to be willing to go without, which seems backwards). These worries might be possible to address, but not even the initial argument in favor of diminishing marginal utility of wealth is made, so it is not clear how to assess the relative importance of distributive considerations in Bar-Gill's work.
[64] BAR-GILL, *supra* note 31, at 32.
[65] *Id.*
[66] *See generally* Oren Bar-Gill, *Price Caps in Multiprice Markets*, 44 J. LEGAL STUD. 453 (2015).

perhaps—but that would be inconsistent with a purely welfarist view. Another way to read it is as treating any regulation as "intrusive" insofar as it fails to treat consumers as people who pretty close to being rational optimizers, but just need a bit of help. In other words, regulations are "intrusive" to the extent they give up on the hope of consumersovereignty.

At every stage of Bar-Gill's analysis, consumer sovereignty reasserts itself as the baseline from which analysis begins and the end toward which consumer market regulation aims. Bar-Gill is not unique in this respect. He is just especially clear and consistent about his commitment to consumer sovereignty. Many scholars who have alower threshold than Bar-Gill for "choice-restricting" regulation nevertheless tend to describe the problem to be solved in terms of market failures and to center net welfaremaximization in normative analyses (with some consideration for distributional issues).[67] They are just more skeptical about the possibility of correcting for the market failures by making consumers act more like their ideal form.

III. Against the Consumer Sovereignty Framework

Among consumer protection scholars, it has become increasingly acceptedthat deviations from that ideal are the rule rather than the exception. What remains is to see these deviations between ideal and actual not as evidence of "market failures" but as reasons to doubt the relevance of the consumer sovereignty ideal to the analysisof actually existing consumer markets. It is the burden of this section to make that case.

The argument is divided into two parts. The first discusses the problems with the consumer sovereignty framework's understanding of rational choice and its normative relevance. The second discusses the problems with focusing on creating neutral spaces in which choice guides outcomes given the irreducibly relationalcharacter of institutions.

A. Rethinking Choice & Rationality

The first problem with the consumer sovereignty framework is that it defines welfare in terms of a particular model of what rational decisionmaking looks like: call it the "optimization-machine model." As behavioral economists have pointed out, the simple optimization-machine model often badly describes how consumers actually decide. Relative to *homo economicus*, actual consumers are overoptimistic, too attached to what they have, too steeply discounting of risks that are small or far enough in the future, etc. Readers will surely be able to produce their own examples. This lack of fitbetween actual and ideal consumers presents deeper practical and conceptual problems than can be accommodated by even a behaviorally informed consumer sovereignty framework.[68]

At the practical level, if consumers persistently fail to act like optimization machines, then treating them as malfunctioning optimization machines in need of slight repairs can be perverse. Nudges away from one "irrational" heuristic thatsellers can take advantage of can simply lead to a different "irrational" heuristic that sellers can also take advantage of. And one or another heuristic is usually all one can hope for, since an optimizing decision procedure accounting for all potential optionsis so demanding of time and cognition that it is usually

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[67] *See generally* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TX. L. REV. 1255 (2002); *see generally* Bubb & Pildes, *supra* note 21; *see generally* Michael S. Barr et al., *Behaviorally Informed Regulation*, *in* BEHAVIORAL FDNS. OF PUB. POL'Y 440 (Eldar Shafir ed., 2012); *see generally* Van Loo, *supra* note 10.

[68] *See* EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS 19–138 (2018).

irrational to attempt—not to mention beyond the capacity of most consumers. That means we need a way to matchheuristics to choice contexts, which requires grappling with ways that consumers' cognition is fundamentally unlike that of an optimization machine.

At the conceptual level, a welfare economist's ability to rank outcomes depends entirely on whether consumers operate enough like welfare optimization machines that an analyst can infer welfare-optimizing outcomes from their choices. Ifconsumers make choices in a way that persistently deviates from how they would make choices were they optimization machines, it becomes impossible to read welfare off of consumers' choices. One needs some other ground on which to base welfare judgments.

Taken together, the problems created by the lack of fit between the optimization machine model and consumers' actual decision-making processes forcesapart the notions of choice, rationality, and welfare. It invites reconsideration of how consumers decide and how to evaluate which decisions are good.

1. When Nudges Aren't Enough

Over the past decade, several authors have pointed out the ways in which a behavioral economics that focuses on attempting to mold consumers into optimizers fails to grapple with the reality of how consumers decide. Lauren Willis has shown that regulatory attempts to "nudge" inertial consumers into making better decisionsby changing the default option can be (at least partially) nullified by sellers whonudge consumers to reject the default.[69] For instance, banks who were forced to stop making checking account overdraft fees the default option found multiple ways to getconsumers who were the most vulnerable to overdrawing their account even when they had cheaper borrowing options elsewhere to *opt into* overdraft fees.

Extending Willis's argument, Ryan Bubb and Richard Pildes have made a convincing case that behavioral economics often "trims its sails" by focusing on "choice preserving" regulatory approaches even in the face of evidence that firms cancontinue to manipulate choices, resulting in consumers choosing strictly dominated options.[70] Employers offering 401(k) retirement accounts, for instance, can nudge consumers toward less diversified and higher-fee accounts even when the law prohibits those accounts from being the default.

Omri Ben-Shahar and Carl Schneider have provided extensive evidence that attempting to improve consumer decisionmaking by mandating and tweaking the design of disclosures has largely not accomplished the goals set for it. Even when decisions are highly salient—as in the case of whether to undergo a medical procedure—and even when consumers have the nature of the decision explained to them, they often avoid making a decision or choose inferior options.[71] Indeed, Ben- Shahar and Schneider argue that mandating disclosures can make decisions *worse* by,for example, overwhelming consumers with information, leading them to focus on thewrong things.[72] All of which is in addition to the fact that many consumers do not have the education or skills—a basic understanding of probability, for example—to understand or to evaluate the decisions with which they are confronted.

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[69] *See generally* Lauren Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155 (2013); *see generally* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).
[70] *See generally* Bubb & Pildes, *supra* note 21; *see generally* Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476 (2015).
[71] BEN-SHAHAR & SCHNEIDER, *supra* note 63, at 56–78.
[72] *Id.* at 175–82.

These and similar cases illustrate some ways in which consumer decision- making fundamentally differs from that of a welfare optimization machine, such that using the latter as a model for the former leads regulation astray.

Unlike optimization machines—for which more information is always good—consumers have a limit to the amount of information they can account for and tend to rely on others to process most of the relevant information for them. Consumers can become confused, overwhelmed, and decision-fatigued, leading to choice procedures that ignore even salient information or use it in an erratic way.[73] Unlike optimization machines, consumers are socially suggestible.[74] Opportunistic firms can take advantage of this suggestibility to nudge consumers toward unfavorable options without providing much in the way of information. And unlike optimization machines, consumers often have ill-defined preferences that can be influenced by others. Mere exposure to one among many options can produce a preference for that option (whether in the form of habit, brand loyalty, or love for the familiar), whichcan then create a barrier to trying other options.[75]

For these and related reasons, providing more information, better information, or simpler information does not necessarily guide consumers toward better choices. Nor does creating default options or making opting out easier.[76]

This evidence about consumer choice might be seen as grounds to doubt that there is *ever* a situation in which consumers function as optimization machines.[77] Persistent "irrationality" relative to the neoclassical definition of rationality couldthen be seen as evidence not as the need for an even more complicated round of epicycles but rather of the lack of fit between the neoclassical model of rationalityand the way consumers actually make choices. On this view, even when consumers choose well, they do so using a different process than that suggested by the optimization model.

Lauren Willis's work on financial literacy education provides an evocative example of the advantage of this type of reframing.[78] Willis points out that it wouldbe impossible to make every consumer enough of a financial expert to be able to rationally assess the relative value of each product in any given consumer financial market, let comparing across all of them.

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[73] *See generally* Sendhil Mullainathan & Eldar Shafir, SCARCITY (2013); *see generally* Barry Schwartz et al., *Maximizing Versus Satisficing: Happiness is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCH. 1178 (2002); *see generally* Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCH. REV. 650 (1996); *see generally* Herbert A. Simon, *Rational Choice and theStructure of the Environment*, 63 PSYCH. REV. 129 (1956).

[74] *Infra.* notes 95-103 and accompanying text.

[75] *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE 580–92 (1990).

[76] On some of the normative implications of satisficing, *see generally* Michael Byron, *Satisficing and Optimality*, 109 ETHICS 67 (1998).

[77] *See generally* Gerd Gigerenzer, *As-if Behavioral Economics*, *in* SIMPLY RATIONAL: DECISION MAKING IN THE REAL WORLD (2015); *see generally* COGNITIVE UNCONSCIOUS AND HUMAN RATIONALITY (Laura Macchi Maria Bagassi, & Riccardo Viale eds., 2016); Richard Samuels et al., *Reasonand Rationality*, *in* HANDBOOK OF EPISTEMOLOGY 131 (Ikka Niiniluoto, Matti Sintonen, & Jan Wolenski eds., 2004); STEPHEN P. STICH, THE FRAGMENTATION OF REASON: PREFACE TO A PRAGMATIC THEORY OF COGNITIVE EVALUATION 129–58 (1990). As Gigerenzer points out, Herbert Simon—the original theorist of "bounded rationality"—thought about reasoning processes as bounded in the way suggested here, even though he is often cited for the embarrassed optimization-machine approach. Gerd Gigerenzer, *Towards a Rational Theory of Heuristics*, *in* MINDS, MODELS & MILIEUX: COMMEMORATING THE CENTENNIAL OF THE BIRTH OF HERBERT SIMON 34 (Roger Frantz & Leslie Marsh eds., 2016).

[78] *See generally* Lauren Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197 (2008).

These choices require a sophisticatedunderstanding of how financial assets work, how to assess their value, how to assemble a portfolio, how to assess overlapping regulatory schemes, and the like. The task of assessing the relative value of different financial instruments is difficult even for sophisticated investors (as every financial collapse re-proves) and for the expert regulators of those instruments.[79] We underestimate their complexity in part because they are already so simplified by our regulatory structure.

It is important that what makes this task difficult is not just that an enormous amount of accurate information is required to perform it. Rather, the ability to assess the relevance of that information to an evolving set of products in an evolving set of financial circumstances involves a rarified set of *skills*, which themselves require timeand effort to acquire, time and effort to maintain, and time and effort to use well. Andthese skills become ever more rarified as financial instruments become more complex, as financial markets become more intermingled, and as financial modeling becomes more mathematically sophisticated. Even the most able financial decision-makers do not come close to operating as optimization machines—they have suboptimal information, confront radical uncertainty, use rules of thumb, and make errors. But they employ a diverse and evolving set of techniques to help them attempt to approximate optimization within the domains in which they operate.

Given differences in ability, it would be patently absurd to expect even a substantial portion of (let alone *all*) consumer-investors to approximate optimization machines. And, given the amount of training and time required, it would be an absurdly inefficient use of resources to try to train them to do so.[80] The set of skills financial experts acquire are a set of skills that are adaptive for a highly limited set of circumstances. Ordinary consumers have to employ a more rudimentary set of techniques. Instead of costly but customizable methods like doing detailed research toevaluate and compare multiple different asset classes, calculations to price for interestrate risk, and the like, ordinary consumers must make do with simpler heuristics such as "do not try to beat the market—use an index fund," "compare APRs," "try to pay off your full credit card bill rather than the minimum amount due."

As with the skills financial experts learn, these techniques are socially acquired (from others) in addition to being shaped by direct experience (i.e. being exposed to certain sorts of decisions). And, as Willis points out, financial literacy education attempts to intervene in this process of social learning, imparting a set of skills, habits, and rules of thumb that financial literacy educators think will be adaptive to circumstances that most of their students are likely to face.[81] These decision procedures are easier to learn and use, but are less customizable to different environments. If, say, an APR does not actually account for the full cost of credit oran index fund does not actually diversify well, then these rules of thumb will fail the consumers that use them.

The focus on social acquisition has consequences. As Willis argues, opportunistic financial institutions can undermine the efficacy of financial literacy education by designing products with costs that are undetectable by a given rule of thumb. If financial regulation does not prevent such arbitrage, any given set of financial literacy tools quickly becomes out of date.[82] (Financial institutions can also create counter-education campaigns to inculcate different rules

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[79] *Id.* at 219–226, 261–64.

[80] Gigerenzer makes the point about the inefficiency of optimization based on perfect information. Gigerenzer, *supra* note 82, at 234.

[81] Willis, *supra* note 83, at 202–04.

[82] *Id.* at 283–85.

of thumb.)

In sum, whether for experts or for ordinary consumers, financial decision techniques are not pre-programmed settings of in-built reasoning machines, but are habits that are (consciously or unconsciously) learned, taught, adapted, and shared. Like writing, table manners, or mating rituals, they are ways of being and doing into which we are socialized according to the circumstances to which we are exposed that we can adapt (depending on how clever we are) to fit new circumstances. Like any habit, these heuristics straddle the line between guides for forming preferences and guides for making decisions (given a set of preferences). Heuristics such as "choose the option with the lowest sticker price" or "trust the recommendation of your local storekeeper" are forms of decision that do not fit neatly into a preference-rationality dichotomy. They include elements of both.

If all of this is so, then it is perverse to attempt to make markets look morelike the neoclassical ideal by making consumer choice work more like that of *homo economicus*. No matter how much information and how much de-biasing one pileson, one simply will not make consumers act like their neoclassical doppelgangers.The role of choice in promoting welfare depends on the *interaction* between how consumers have learned to choose and the way the regulatory environment structures choice. Whether a consumer's choice results in the contract that leaves them as well off as possible depends on the *fit* between her procedure and the nature of the choice with which she is presented.[83] A regulatory environment that standardizes products and cracks down on attempts to arbitrage between legal categories (e.g. creating money market accounts to avoid regulations on depository institutions) makes simple rules of thumb more adaptive and makes the task of financial literacy educationeasier. It may also prevent some consumers from accessing the options that would work best for them.

2. Rationality is not Normativity

The previous section provides a reason to pry apart choice and welfare. But there is a further question about whether that is even possible without taking asledgehammer to the foundation of the consumer sovereignty framework. As Daniel Markovits and Zachary Liscow point out in forthcoming work, if choice and welfare come apart, we are no longer talking about "welfare" in the neoclassical sense.[84] Neoclassical welfare economics uses choice and welfare to define each other. Consumer choice is valuable because and to the extent that it is welfare maximizing, which it always is in a world of consumer sovereignty.[85] Welfare is inherently valuable, but, in the name of individualism, pluralism, and anti-paternalism, it is defined as whatever perfectly informed and rational consumers choose. Once one allows for the possibility that consumer choices are not welfare maximizing—let alone that they *persistently* fail to be welfare maximizing—one has no clear way to determine what is welfare maximizing.

In an attempt to avoid grappling with these theoretical difficulties, somebehavioral economists focus on situations in which there are strictly dominated (or dominating)

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[83] *See generally* STICH, *supra* note 82.

[84] *See generally* Zachary Liscow & Daniel Markovits, *A Revolution in Denial: The Radical Normative Implications of Behavioral Law and Economics* (working paper on file with author).

[85] This is not to say that those who apply welfare economics do not themselves value choice forreasons other than those baked into the model they employ. As we will see, however, attempting to incorporate those values into a welfare economic analysis means overruling welfare economics in a given set of circumstances, which requires abandoning welfare economics as the deep underlying framework of normative evaluation.

options—options that nobody could choose (or avoid) if they werethinking clearly.[86] Usually these involve clear errors in reasoning or money-money trade-offs in which there are no commensuration difficulties or other grounds on which to disagree with value judgments. In such situations, one can frame normative judgments about what is better or worse for somebody as a judgment that that person would share if they thought about it properly, which, if you squint enough, seems likebasically the same thing as saying that their judgment is guiding analysis.

Not to open eyes. To say that consumers make bad decisions when they fail todiversify their retirement portfolios or when they use high-price loans to fund everyday or luxury expenditures (rather than fill gaps during emergencies) or when they fall for teaser rates is to make a statement about what is good for those consumers. To say that everybody would agree on a given option or mode of valuation "if they thought about it" (that, say, retirement investments should be diversified or the risks of toasters exploding should be less than 5% over 10 years) is not to say that, as an empirical matter, everybody *does* agree when they think about it, but rather that, as a normative matter, everybody *should* agree or else they have not thought about it in the right way.[87] People who choose a strictly dominated option choose badly regardless of whether or how much they think about it or whether they can be convinced that they were wrong.They are worse off because they have less money or face a higher risk of harm than they could have had they chosen differently. They chose badly because their decision strategy led to bad results. The results lead us to look for the part of the decision strategy that went wrong.

None of which answers the question of how to determine what is good for people and how those determinations relate to individual choice and rationality. It is only to point out that equating the former with the latter will not work unless one ignores how people actually go about deciding (in which case, one risks begging the question).[88]

3. Where do Preferences Come From?

It is not just evidence that consumers choose according to learned heuristics that presents problems for the consumer sovereignty model. It is also evidence that consumers' very grounds for decision—their preferences—are contingent on social context and subject to social influence. I mentioned this as part of the discussion of behavioral economics, but it is important

[86] *See, e.g.,* GEORGE A. AKLEROF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION xii-xvi (2015); *see generally* Ben McQuillen & Robert Sugden, *Reconciling Normative and Behavioural Economics: The Problems to be Solved*, 38 SOC. CHOICE & WELFARE 553 (2012).

[87] *See* Liscow & Markovits, *supra* note 89, at 9–22 (classifying the various approaches to avoiding this problem).

[88] Alan Schwartz argues for an alternative approach: given that biases are pervasive and multiple and can cut in multiple directions, policymakers should treat consumers as presumptively rational absent compelling evidence that the biases tip in a particular direction in a particular market (and regulation can do something about it). Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373, 1382 (2015). This approach would seem to give up on the claim that the optimization machine model is a good positive model, leaving the value of the optimization machine model to rest entirely on the claim that its adoption is morally proper for those committed to individual freedom. Disconnecting the latter claim from the former is risky, though, since the latter claim was supposed to be grounded on an account of how individual choice leads to welfare maximization that depends on the descriptive accuracy (or at least non-systematic deviation) of something like Walrasian equilibrium. Phrased as an internal objection: the major risk of Schwartz's approach is that if reality systematically deviates from the ideal in a way that is not easily measurable in any particular case (or is very costly to detect), then waiting for compelling evidence could result in massive welfare reduction.

enough to confront on its own.[89]

As John Hanson and Doug Kysar pointed out over twenty years ago (and others have reaffirmed since), to "take behavioralism seriously" requires grappling with the context sensitivity—or endogeneity—of consumers' preferences.[90] Well-known "biases" like the endowment effect (in which individuals prefer a commodity more if they are in possession of it than if they are not), reciprocity (including brand loyalty), and physical addiction shape not just how consumers process information about their options but how they rank those options.[91]

If consumers' preferences are shaped by the context of decision, then those preferences cannot provide a clear or justifiable guide to sorting between outcomes. At a simple conceptual level, if consumers have different preferences in different circumstances, it is not clear how one can go about determining which preferences to defer to. If I start out not liking beer but then I acquire the taste after social pressureto keep trying, should my liking or my disliking be deferred to? What if I become addicted to beer? This type of conceptual problem opens space for moral laundering, because consumers with malleable preferences are vulnerable to being manipulated into buying products they might not have and/or at prices they might not have been willing to pay.[92] In such circumstances, deferring to consumers' choices in the name of consumer sovereignty would be perverse.[93] It would treat firms' efforts to control consumers' choices as consumers' efforts to control firms' choices. It would defer to the outcomes of successful propaganda campaigns in the name of ensuring consumer power.[94]

This is no idle worry, nor is it limited to scattered attempts to take advantage of "bias." Everything from the content of disclosures to the design of stores to the script of sales pitches to the investment in ongoing public relations strategies is an attempt to manipulate the context of decision to shape consumers' preferences.[95] Shmuel Becher and Sarah Dadush have recently pointed out that firms increasingly rely on strategies of emotional manipulation, presenting products as sources of social connection in a society in which loneliness is increasingly prevalent.[96] As the cigarette industry and the oil industry have shown especially dramatically,

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[89] *See generally supra* note 79 and accompanying text.

[90] *See generally* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); *see generally* Calo, *supra* note 10.

[91] Hanson, *supra* note 95, at 672–87.

[92] If it seems unfair to present alcohol as an example of how consumer demand works, it is worth noting that cultivating addiction to as indispensable a substance as salt is the business model of many major food brands. *See generally* MICHAEL MOSS, SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US (2014).

[93] It is actually not clear in neoclassical theory whether advertising that alters preferences is morally problematic. If preference functions are to be treated as incomparable, there is no clear criteria for determining whether pre-influence or post-influence preferences should be favored: the maximization of either makes the consumer that has them as well off as possible. Of course, that line of analysis would seem to treat consumer sovereignty as irrelevant: if firms can brainwash consumers successfully, an ordinalist welfarist has no grounds to object internal to her theory. One way to avoid this difficulty is to treat influence advertising as a barrier to entry that increases consumers' switching costs, making it easier for firms to raise prices and throttle supply. Thus, the problem is one of supramarginal prices relative to the perfectly competitive baseline and one does not need to muddle about in preferences. *See, e.g.*, Ramsi Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2278–90 (2018). If we reject the relevance of that baseline, then this analysishas its own set of problems.

[94] This type of argument played a major role in the analyses of economists who doubted consumer sovereignty theories and developed accounts of business management of demand via advertisement. *See generally, e.g.* JOHN K. GALBRAITH, THE AFFLUENT SOCIETY (4th ed. 1984); *See generally* Scitovsky, *supra* note 36.

[95] On the pervasiveness of influence campaigns, *see generally, e.g.,* AERON DAVIS, PROMOTIONAL CULTURES: THE RISE AND SPREAD OF ADVERTISING, PUBLIC RELATIONS, MARKETING AND BRANDING (2013). On market manipulation on the internet, *see generally* Calo, *supra* note 10.

[96] *See generally* Shmuel Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*,

businesses can shape entire informational and libidinal environments: through funding research and aggressive press campaigns, they can control which information is produced and distributed about their product, which sources of information (even which scientific methods) are seen as trustworthy, which ways of talking about an issue are politically correct, which emotions people associate a with a company.[97] As the online advertising industry has made increasingly clear, businesses with an enormous amount of information about consumers' lives can create customized environments that direct consumers toward whole worldviews.[98] And these are hardly the only examples of firms investing in campaigns to create brand loyalty, to influence consumers' understanding of risk, to shape consumers' sense of what one must buy tobe socially accepted.

To be clear: the claim is not that sellers are all-powerful mind control agents. In attempting to influence consumers, sellers respond to cultural shifts outside their control—shifting advertising messages from conformist to rebellious, from ironic to sincere, as surrounding cultural norms shift.[99] And advertising must always compete with other calls on consumers' attention, with counter-advertising, and the like. But, first, making sense of these cultural shifts presents profound problems for a frame of analysis that treats culture as exogenous, and, second, sellers do impact the way cultural forms shift—embedding jingles in our heads, funding entertainment thatfurthers their bottom line, creating cycles of fashion to order our sense of social time.[100] In doing so, they intervene in the process of preference

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2021 U. ILL. L. REV. 1547 (2021). I am skeptical that this phenomenon is as new as Becher & Dadush seem to think it is.

[97] *See generally* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2010). Hanson and David Yosifson refer to these tendrils of influence as "deep capture." *See generally* Jon D. Hanson & David G. Yosifson, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); *see generally* ADRIAN KUENZLER, RESTORING CONSUMER SOVEREIGNTY: HOW MARKETS MANIPULATE US AND WHAT THE LAW CAN DO ABOUT IT (2017) (Kuenzler's revised concept of "consumer sovereignty" is quite different from either the neoclassical or the Austrian version thereof—addressing it is beyond the scope of this article).

[98] *See* COHEN, *supra* note 9, at 68–72; *but see generally* Donald MacKenzie, *Cookies, Pixels, and Fingerprints*, 43 LONDON REV. BOOKS (2021), https://www.lrb.co.uk/the-paper/v43/n07/donald- mackenzie/cookies-pixels-and-fingerprints (raising doubts about the effectiveness of tracking-based advertising).

[99] The way this dynamic worked in the 1960s is well explored in Thomas Frank's book, *The Conquest of Cool. See generally* THOMAS FRANK, THE CONQUEST OF COOL: BUSINESS CULTURE, COUNTERCULTURE, AND THE RISE OF HIP CONSUMERISM (1997).

[100] The amount of competition any given message has depends in its content and on how well funded the opposition is. Messages to purchase as much as possible, to continue to watch commercially funded programming, to have faith in big companies with brand identities, and the like are in the interests of many sellers to promote, and amplify each other. A message to buy a particular brand of a particular product might have to shout to get above the crowd and risk diminishing returns. GALIBRATH, *supra* note 99, at 816–37. Economic research on advertising has largely focused on the latter type of influence: can a firm increase its market power (and raise prices, lower quality, etc.) via advertising or does advertising force firms to compete with each other? Or does it have no effect on specific demand? The literature has not produced univocal answers to these questions, *see* Bagwell, *supra* note 53, at 1828, although "[o]ne of the more durable empirical relationships uncovered in statistical investigations of firm and industry profitability…is the tendency for profitability to be relatively high in high-advertising consumer goods industries." SCHERER & ROSS, *supra* note 80, at 598. As P.W.S. Andrews once pointed out, competition via advertising creates a path-dependent ratcheting-up effect: "even though its long-term effects might be negative by being met by countervailing expenditures by competitors, [it] would not readily be either abandoned or reduced so long as any of those competitors continued to advertise; by the same token, the weapon would be taken up with increased vigor by some individual firm if for any reason its use happened to be (temporarily) abandoned by its competitors." ANDREWS, *supra* note 2, at 125. In any case, given endogeneity

formation.

B. *The Irreducibly Social Nature of Markets*

Ignoring the social shaping of preferences is not the only way that the consumer sovereignty framework fails to grapple with the irreducibly social aspects of consumer market governance. These aspects are both descriptive and normative.

Descriptively, focusing on what individual choice does or does not reveal about welfare obscures aspects of consumer markets that are beyond the control of individual consumer choices, even in competitive markets. Consumer markets are not neutral spaces of social commensuration. They are, instead, made up of a series of collectively constructed institutions that shape which options are available, how easy it is for different consumers to access different options, and (as we have just explored) how consumers seek out and choose between available options. If we want to account for how social spaces do and should shape our choices, we cannot use a framework that assumes they do not.

Normatively, conceptualizing value entirely in terms of an aggregation of individual welfare functions (or, in a Paretian formulation, the outcome that each individual manifests a preference for) fails to grapple with inherently intersubjective values pertaining to consumer protection institutions. Social values that commonly resonate in the domain of constitutional law—those pertaining to inclusion, to anti- subordination, to privacy, to dignity, to free exchange of ideas—do not suddenly become irrelevant when a social space is constructed as a consumer market. These values are about how we *relate* to each other—they do not refer to any single individual's welfare but rather about the social space shared by multiple individuals.It is to do violence to them to attempt to account for their value through the aggregation of individual consumer's willingness to pay for them.[101] To ask whether a consumer market is constructed in a way that—for example—properly includes people from different racial, ethnic, or religious backgrounds *even when some consumers or sellers would prefer not to be inclusive* is to ask a different sort of question about that market than whether it allows for preference maximization.[102]

More generally, if we view the goal of consumer markets as constructing spaces where every consumer can choose whatever they want, we fail to see how the way we construct consumer markets implicates these other values. Even worse, we risk treating the contingencies that allowed some people's values to win out over others' as indicative of a neutral social optimization procedure that settle the value question without our having to think about it. There is a risk of laundering the power of some to pursue their interests more effectively than others as the emergent result ofdecentralized choice.[103]

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difficulties and theoretical mismatch, the literature generally does not address the deeper effects of advertising on subject formation.

[101] *See generally* Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints into Economic Analysis of Law*, 96 CAL. L. REV. 323 (2008). I do not find the positive approach introduced in this article (i.e. rights-responsive CBA) amenable, but it contains an excellent summary much of the relevant literature and a good analysis of why deontological considerations cannot simply be subsumed into welfarist approaches.

[102] Amartya Sen long ago made the basic conceptual point about interdependent preference functions in the welfare economics literature. *See generally* Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

[103] On the inevitability of favoring the wealthy—and reproducing inequality—by favoring wealth maximization, *see generally* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018); *see generally* Mark Glick & Gabriel Lozada, *The Erroneous Foundations of Law and Economics* (INET Working Paper, Feb. 2021), https://www.ineteconomics.org/research/research-papers/the-erroneous-foundations-of-law- and-economics.

1. Collective Construction and the Rule of Law

One place that the irreducibly social nature of consumer markets has come to the fore in the legal literature is the debates over using boilerplate to customize legal regimes.

In the pure world of consumer sovereignty, the ability to use contracts to fully customize which rules and dispute resolution mechanisms govern each and every transaction would result in the optimal governance regime. Governance should be treated as part of the package deal that any firm sells any consumer: the cost of legal rules and the savings that firms obtain by contracting around them are passed onto consumers as part of the total price of a transaction.[104] Rational consumers will choose the transactions that reflect the optimal balance of price, product quality, and risk of unredressed harm. So the contracts that prevail will be only those that best balance the interests of consumers and firms with respect to which legal regime should govern.[105]

Doubts about consumers' ability to understand their rights, to sort out the way different legal regimes affect their rights, to arrive at an understanding about the way the boilerplate in contracts that they don't read affects the legal regime, and to chooserationally between different types of boilerplate provide ample reason to reject the most Pollyannaish argument for full customizability.[106] But these are not the sorts of doubts that concern us in this section.

The sorts of doubts we are concerned with are those that focus on howcustomizing governance can be problematic even assuming consumers are rationaland informed. Peggy Radin has argued powerfully that widespread use of boilerplate to create custom domains of governance and dispute resolution creates an end run around public legal systems. This contributes to "democratic degradation" by undermining the ability of a polity to arrive at collective decisions about which rights should be guaranteed, how disputes should be resolved, or how to set priorities.[107] If firms can create custom domains of alternative dispute resolution with a constantly shifting set of substantive and procedural rules and without any check on their authority beyond what consumers attend to and market structure selects for, they can ignore basic rule of law principles such as advance notice of rules and impartiality of judges.[108] If firms can opt out of rules "that are part of a legislative regime arrived at only with much difficulty, debate, and compromise," they "undermine the significance of political debate" and compromise.[109] Firms might even enter into compromises "just for show," knowing that they can always rewrite the rules to their liking, subject only to the contingent ability of informed consumers to disciplinethem.

Even without such shenanigans, rights that have been collectively agreed toare vacated of meaning if consumers become unable to vindicate them. Additionally, if firms can freely alter the balance of rights that have been collectively agreed to or change the way disputes are resolved, they erode the ability of public institutions to shape even basic private law rules, creating fiefdoms of privately created and enforced law. Replacing bargained-for

[104] *See generally* Arthur A. Leff, *Contract as Thing*, 19 AM. L. REV. 131 (1970); *see generally* Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006).
[105] *See generally* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 1 J. DISPUTE RESOL. 89 (2001) (discussing why costs will be passed on under perfect competition); *See generally* Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995) (differentiating ex ante from ex post dispute resolution agreements).
[106] *See generally supra* note 60 and accompanying texts.
[107] RADIN, *supra* note 62, at 3–53 (2013).
[108] *Id.* at 38-39.
[109] *Id.* at 40.

rules with rules created by just one side of the bargaining table is itself problematic, but it is made even more so to the extent that firms can use these fiefdoms to cement their power and decrease others' ability to bargain against them in the future.[110]

Many authors have also posited that the more that legal and procedural protections become a product add-on, the more that access to justice depends on ability to pay.[111] This dynamic makes both substantive and procedural rights luxuries rather than collectively (even if imperfectly) guaranteed goods. Myriam Gilles points out that consumers with the fewest resources are likely to be the most benefited by an ability to aggregate claims and to obtain a lawyer on a contingency basis.[112] They are also likely to be the most targeted by abusive practices, making access to a public court system more valuable to them even as they are less able to pay a premium for it.Moreover, as their claims get siphoned out of the public legal system—whether to be resolved via arbitration or, more likely, to be ignored—they become less visible to judges and other bureaucrats.[113] What claims do make it to court might appear less plausible—because rarer—which is likely to make judges less sympathetic and to reduce the ability of legislators and members of the public to evaluate the ability ofthe judicial system to redress these grievances. One channel for bringing the problems of poorer consumers to the attention of public decision-makers is cut off.

The notion that one should have access to a fair dispute resolution system whether or not one is able or willing to pay for it is, of course, directly contrary to a system of valuation based on manifest willingness to pay. A bit more subtly, a publicdispute resolution system that engages in practices of public reason that lead to a consistent set of rules that can be publicly debated so as to be amenable to democraticchange is a sort of commons or public good that requires collective action to be created and maintained. Individual bargains to opt out of such a system serve to erodeit, undermining its value—again, pitting willingness to pay directly against another value.[114] From a different angle, to be able to make sense of the claim that judges become less understanding about or solicitous of the situations of poor consumers if disputes involving the latter are channeled to private courts requires viewing judges' "preferences" for outcomes as shaped by the institutions in which they are embedded.To be able to appreciate the possibility that the power to create domains of private governance might contribute to the accumulation of power to reshape other aspects ofthe social order in one's favor requires accounting for dynamic effects of a systemand path dependence.[115]

These types of concerns require invoking values that cannot be reduced to individual welfare and require attending to other aspects of the structuring of consumer markets than whether they allow consumers to choose between competitive sellers.

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110 *See generally* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011) (on the problematic fiefdoms); *See generally* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA (2014) (on the problems with self-dealing in collective governance that they create).

111 *E.g.* Kathryn Sabbeth, *Market-Based Law Development*, LPE BLOG (Jul. 21, 2021), https://lpeproject.org/blog/market-based-law-development/; Myriam E. Gilles, *Class Warfare: The disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016); *see generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

112 *See generally* Gilles, *supra* note 116.

113 *Id.*; *see generally* Sabbeth, *supra* note 116.

114 The point here is not that one cannot use a neoclassical framework to make sense of the notion of a "public good" or a "commons," but that to be able to evaluate its value and its dynamics requires something different than imagining if it were commodified. On the inherent intersubjectivity of managing a commons and other non-commodified goods, *see generally* ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005).

115 *See* MARK GRANOVETTER, SOCIETY AND ECONOMY: FRAMEWORK AND PRINCIPLES 91–105 (2017).

2. Irreducibly Social Aspects of Data Governance

A similar set of concerns has come to the fore in recent literature on data governance. Take the matter of data privacy, for example. Whereas it was once tenable to hold out hope that a notice-and-consent regime would allow individual internet users to determine how to trade off the risks of constant surveillance and manipulation against the benefits of not having to pay any money, that position has become increasingly difficult to defend.[116] One reason for this is appreciation of the positive feedback dynamic of "network power," whereby each new user of an online platform "increases the desirability of that standard in the eyes of the potential user," such that even a strong preference for a different standard can be totally overwhelmedas the standard loses its viability.[117] As more and more aspects of life become mediated through social media, cell phones, and other platforms that collect dataabout users, striving for anything like privacy becomes something closer to choosing social isolation and perhaps choosing to forego a number of opportunities (e.g. jobs that require use of a cell phone, landlords who only accept payment electronically).

Another ground for doubting the power of customization is that much of the relevant data pertains to individuals' *relations to others*, which means that the amountof data available from any individual depends in large part on the actions of others— others over whom she may have little to no influence and who may have much less ofan interest in protecting the data in question.[118] One thus does not even have to consent to any surveillance or even to be directly surveilled in order to be caught upin the growing dragnets that spread unevenly across our society. Yet another is that (similarly to the difficulties of financial literacy that Willis has identified), managing how one's data is collected and used "is a vast, complex, and never-ending projectthat does not scale; it becomes virtually impossible to do comprehensively. The best people can do is manage their privacy haphazardly."[119]

It is, in other words, impossible to design a system in which everybody can choose their own level of privacy. Which data is collected and how it is used is unavoidably a question of collective institutional design.[120] What is more, as several authors have pointed out, privacy has different implications for those in marginalized social positions. In a society with a criminal legal system that often punishes darkskin and poverty, a block with security cameras is a block made safer for some types of people and more dangerous for others. Yet people marginalized by race and/orclass will often be those least able to opt out of a surveillance system—whether because non-tracking options can require more investment of time and resources, or because understanding the way tracking works requires certain types of training and socialization that tends to be class-biased, because of lack of political or buying power to shape the design of systems, because institutions that interact with poor and racially

[116] *See generally* Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. 1 (2021).
[117] *See generally* DAVID S. GREWAL, NETWORK POWER (2009).
[118] *See generally* Viljoen, *supra* note 26. For a neoclassical parsing of the inherent relationality in terms of externalities, *See generally* Daron Acemoglu et al., *Too Much Data: Prices and Inefficiencies in Data Markets* (NBER Working Paper 26296, Sep. 2019), https://www.nber.org/papers/w26296 (discussing "data externalities" that cannot be managed by any individual transaction).
[119] Solove, *supra* note 121, at 5. *See generally* PASQUALE, *supra* note 9 (noting that how our data is used is often inscrutable given the "black box" nature of much of the data infrastructure).
[120] This is not to say that customization of any sort is impossible, but that (1) full customization is not possible and (2) the amount of customization that is possible depends on collective decisions abouthow the data system is designed.

marginalized people tend to build in more intrusive surveillance, or some combination. For these and related reasons, scholars like Salome Viljoen have argued that one cannot conceptualize the value of privacy or institutions to protect it by leaving the matter to individual choice. Its relational nature and the social values it implicates require collective deliberation.[121]

3. In Sum

These are only a few examples. One could point to many other irreducibly social aspects of consumer markets—the way they channel race and class differences (on which more below),[122] the "recursive collective action problems" that are endemic to financial markets,[123] the network effects involved in the use of product standards, languages, currencies, and the like,[124] the unavoidable trade-offs involved with customizing vs. standardizing informational environments.[125] One could point tomany other values irreducible to choice preservation or individual welfare: the value of market (including price and macroprudential) stability, the value of living in a society not polluted by propaganda and "fake news," the value of designing spaces of exchange to accommodate multiple physical and mental abilities.

It may not be impossible to make sense of these phenomena and values within a neoclassical framework. Some combination of transaction costs, externalities, and public goods might be used to piece together models of social spaces in which perfectcompetition between rational consumers does not work. Some tweaking of the social welfare function can make it less monistic and perhaps deontological concerns can be incorporated. Doing so may provide some reason to stick with something like a consumer sovereignty framework, but it does not provide an argument for preserving the consumer sovereignty ideal. The more deviations from the ideal one piles on top ofthe other to explain phenomena that are inconsistent with the basic social forces imagined by the ideal, the further one moves from the consumer sovereignty framework. I myself am inclined toward treating these as reasons to move away from neoclassical analysis altogether—there is something strange about using concepts thathave the consumer sovereignty ideal baked into them as a baseline to do analysis that is supposed to move beyond that baseline. But even those who do not join me there will have some reason to join me in considering an alternative way of thinking about consumer markets and their governance. It is to that task we now turn.

IV. Toward Moral Economy

With "moral economy framework" I am again using an unfamiliar term to bring together certain familiar tendencies of analysis while connecting them to less-discussed theoretical moves.

The term "moral economy" was introduced into modern discourse by the historian E.P. Thompson.[126] He used it to name the conceptions of proper market governance that guided

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[121] *See generally* Viljoen, *supra* note 26.
[122] *Infra* notes 156-157 and accompanying text.
[123] *See generally* Robert C. Hockett, *Recursive Collective Action Problems: The Structure of Procyclicality in Financial and Monetary Markets, Macroeconomics, and Formally Similar Contexts*, 3 J. FIN. PERSP. 1 (2015).
[124] *See generally* GREWAL, *supra* note 122; *see generally* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011).
[125] On the flattening effect of sameness, *see generally* HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (1964). On the dividing effect of difference, *see generally* CASS R.SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009).
[126] *See generally* E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76 (1971).

what were, in retrospect, perhaps the earliest consumer activists in the history of capitalism. In the *locus classicus*, “The Moral Economy of the English Crowd,” Thompson examines the grain riots that took place in England inthe eighteenth century in response to price spikes that took place just before shortages as grain markets came to be controlled by wholesaling middlemen. Thompson argued that the riots were not “spasmodic[] respon[ses] to elementary economic stimuli” (such as the threat of starvation) but rather based on “grievances [that] operatedwithin a popular consensus as to what were legitimate and what were illegitimate practices in marketing, milling, banking, etc…”[127] This consensus was grounded in “an eroded body of Statute law [sic], as well as common law and custom” concerning the role of different actors in grain markets.[128] Those laws included including price controls (e.g. the Assizes of Bread and of Ale), limits on where, when, and to whom grain could be sold (e.g. prohibitions on engrossing, forestalling, and regrating; rules about the hours of market operation), and regulations promoting fair dealing (e.g. proto-tort law enforced by courts leet, quality control measures enforced by inspectors). The rioters engaged in a “selective reconstruction” of these traditional rules, “taking from it all those features which most favoured the poor and which offered a prospect of cheap corn [i.e. wheat]” and actually attempting to enforce them through collective action—not refusing to pay grain sellers at all, but refusing to pay them more than the “just price.”[129] The folk understanding that developed “can be said to constitute the moral economy of the poor.”[130]

Thompson used the term “moral economy” to contrast with “political economy,” the classical form of which was developed to oppose the moral logics offered by grain rioters.[131] Adam Smith’s influential passages on the topic argue that grain prices should be allowed to find their own level and that the pre-modernregulation invoked by the grain rioters only got in the way of the ability of high pricesto call forth more grain to alleviate shortages.[132] For Smith, attempting to impose“fair price” on the market is a self-defeating exercise that interferes with the self- regulating functions of the market that ultimately benefit everybody.

If the consumer sovereignty framework inherits and updates Smith’s notion ofself-correcting markets, the moral economy framework inherits and updates grain rioters’ notion of collectively controlled markets. As Sanjukta Paul recently put it, a “moral economy vision…takes the social coordination of markets as given, and embraces making and implementing normative choices about market construction asa key regulatory task.”[133] To be clear, one need not agree with the grain rioters’ particular positions on price control during times of shortage to adopt a moral economy framework. What is required is seeing markets as objects of social coordination all the way down, and thus responsive to the interests and priorities of those doing the coordinating. What exactly is involved in the social coordination of markets is an ongoing inquiry, an inquiry that informs ongoing debates about—and struggles over—which norms ought to guide their governance.

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[127] *Id.* at 78-79.
[128] *Id.* at 83.
[129] *Id.* at 98.
[130] *Id.* at 79.
[131] *See* E.P. Thompson, *Moral Economy Reviewed*, *in* CUSTOMS IN COMMON 259, 277–85 (Penguin Books 1993) (discussing the antagonism between political and moral economy).
[132] *See generally* Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book IV, Ch. 5 (London, W. Strahan & T. Cadell 1776).
[133] Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 179 (2021).

Indeed, extending Thompson's notion, one can think about moral economy in the Anglo-American world[134] as an ongoing series of "selective reconstructions" that connects grain rioters to many of today's consumer protection institutions.[135] Modified versions of the seventeenth century English legal forms and social norms that grain rioters drew on traveled across the Atlantic with the settler colonial project, lasting, as Bill Novak has illustrated, well into the nineteenth century.[136] Populist, Progressive, and Liberal/New Deal officials borrowed legal concepts and forms of moral reasoning from this common law tradition in seeking to impose the interests of the evolving coalition of farmers and industrial workers that formed the base of these movements onto institutions that had been transformed by the coalition of investors, entrepreneurs, and corporate lawyers in the Industrial Revolution.[137] The economists that supported these reforms drew from more critical currents of classical political economy and combined them with more sociological and fairness-based considerations.

It was these officials and the researchers and lawyers who supported themwho built much of the modern infrastructure of consumer protection: public utility regulation, the Food and Drug Administration, the Federal Trade Commission.[138] And it was their habits of thought that early neoliberal thinkers reacted against in building out notions of consumer sovereignty. Some of those habits—institutionalist and Keynesian economics, social democratically inflected Realist legal theory—remained influential well into the twentieth century.[139] To take just one example: the Senator and institutionalist economist Paul Douglas proposed the bill that became the Truth in Lending Act as a way of supplementing New Deal structurallimits on lending and ensuring that borrowing markets were navigable even by cognitively limited consumers.[140]

Although these habits of thought have been minimized and marginalized during the neoliberal era, they have not disappeared. Many of the laws written in earlier eras remain on the books and their logics continue to guide thinking in a way that has not been completely incorporated into a consumer sovereignty framework.[141] One can find (what I would

[134] Others have extended the concept of moral economy beyond the Anglo world, but for our purposes,the narrower focus makes most sense. *See* LAURENCE FONTAINE, THE MORAL ECONOMY: POVERTY, CREDIT, AND TRUST IN EARLY MODERN EUROPE 247–48 (2014) (Continental Europe); JAMES C. SCOTT, THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA 42–44 (Yale University Press 1976) (Southeast Asia); *see also* I.M. WEBER, HOW CHINA ESCAPED SHOCK THERAPY 17–41 (2021) (discussing ancient market regulation in China, although not under a "moral economy" rubric); *see generally* STEPHEN GUDEMAN, THE ANTHROPOLOGY OF ECONOMY (2001) (discussing South American contexts in a substantivist framework).
[135] As Rosamund Faith has illustrated, the seventeenth century legal and moral framework that grain rioters selectively reconstructed from was itself a selective reconstruction of previous ways of regulating the circulation of goods and services, which were the subject of ongoing periodic contestation well before the Norman invasion. *See generally* ROSAMUND FAITH, THE MORAL ECONOMY OF THE COUNTRYSIDE: ANGLO-SAXON TO ANGLO-NORMAN ENGLAND (2020).
[136] *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); *see also* CHRISTOPHER TOMLINS, FREEDOM BOUND LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865 (2010).
[137] *See* Herrine, *supra* note 32, at 453–62.
[138] *See generally* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823 (2019).
[139] *See generally supra* note 38 and accompanying text.
[140] Ann Fleming, *The Long History of "Truth in Lending,"* 30 J. POL'Y HIST. 236, 238 (2018).
[141] *E.g.*, 42 U.S.C. § 1281 *et seq.*; 42 U.S.C.S. § 2000(a) *et seq.*; N.Y. PUB. SERV. LAW § 32(c) (Consol. 2022); *see generally* Paul Goodman, *The Emergence of the Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880*, 80 J. AM. HIST. 470 (1993); 10 U.S.C.S. § 987 (setting a usury cap for lending to members of the armed forces); Heather Morton, *Price Gouging State Statutes*, NAT'L

characterize as) moral economy logics in several parts of the scholarly literature on consumer protection, even if these have not been drawn together as part of a common frame of inquiry.[142] Meanwhile, non-neoclassical traditions of economic analysis and non-welfarist traditions of moral reasoning have continued to be developed outside the mainstream of economics and policy analysis.

In drawing these threads together into my own "selective reconstruction" of a moral economy approach to consumer protection, I do not seek to situate them in a fully worked out theory of what the economy is, how markets work, and how policy should intervene. Rather, I seek to outline a style of analysis in sufficient detail to differentiate it from the consumer sovereignty framework, to provide an alternative description of consumer protection, and to facilitate more detailed inquiries.

Descriptively, I draw from what I call "institutionalist" theories in heterodox economics, sociology, anthropology, and history that conceptualize the process of social provisioning as part of a social collectivity's ongoing and contested efforts toreproduce itself through time.[143] Normatively, I draw on what I call "substantivist" theories that treat moral reasoning as critical reflection on practices of valuation. In particular, the approaches to moral reasoning I favor reject reductions of moral reasoning to any single value—like welfare—and instead focus on the different andoften incommensurable ways that we find value in our lives.[144]

From this perspective, consumer protection should be seen as one of the set oftools through which a political community determines the values and interests any given consumer market ought to further and to experiment with ways to ensure that it lives up to those values as best as possible. Consumer protection institutions are thus contingent on collective decisions to provide a good/service using a market. Via consumer protection regulation, a political community can correct for forms of market provision that are not living up to the values of that community regarding the terms on consumers should be able to access the good/service in question.

Which values should guide this analysis is an unavoidably political matter: resolved through interpersonal reason-giving and struggles for power, not the working out of a single framework. In the democratic vein that has run through the moral economy tradition, that means connecting the values that guide consumer protection institutions to broadly representative institutions. Exactly what democracy requires is, of course, contested—perhaps essentially so. But, regardless of the particular position, a focus on political legitimacy in a community of equals is quite different from a technocratic focus on creating a neutral space in which consumer choice can govern.

A. Institutionalism

CONF. OF STATE LEG. (Mar. 3, 2022), https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx (collecting state-level statutes).

[142] *E.g.,* RADIN, *supra* note 62, at 155–77 (discussing moral considerations relevant to boilerplate's enforceability); PASQUALE, *supra* note 9, at 189–218 (on the relevance of democratic legitimacy and fair process to technology law); COHEN, *supra* note 9, at 246–50 (on algorithms' erosion of legal and democratic exercises of power); *see generally* Viljoen, *supra* note 26 (on the inherently relational nature of surveillance).

[143] *See generally, e.g.,* FREDERIC S. LEE, MICROECONOMICS: A HETERODOX APPROACH (Tae-Hee Jo ed., 2017). An institutionalist approach is related to a *realist* approach to law, at least as some have conceptualized it. *See generally* Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMPAR. ECON. 188 (2017); *see generally* BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW (2017).

[144] *See generally, e.g.,* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993).

1. In General

"Institutionalism" means different things in different disciplines. Here I use it broadly to denote multiple non-neoclassical traditions that treat social provisioning asembedded in an overlapping series of historical processes that actors inherit and grapple with as they attempt to (mobilize others to) direct these processes in directions that benefit them.[145]

One relevant aspect of institutionalist accounts is situating particular markets and transactions in the context of ongoing macro-level systems, processes, and struggles: within supply chains, monetary systems, political entities, cultures, status hierarchies.

For instance, Post-Keynesian and Neo-chartalist political economists haveemphasized how, in a money-mediated economy, monetary design shapes which activities are prioritized, who gets to decide which risks to take, who gets bailed outin moments of crisis, and many other things besides.[146] Just as a simple example, outsourcing money issuance to profit-focused banks prioritizes money issuance to activities that can produce profits, the sooner the better.[147] Contrariwise, channeling spending into basic research and liberal arts education supports activities that do not immediately generate profit encourages more open experimentation and deeper critical reflection on current practices, which may or may not have a longer-term monetary payoff.[148] Especially salient to consumer markets are the aspects of monetary design that determine how much spending should be channeled through consumer purchasing power (vs. government purchases or public or private investment in expanded capacity) including how to distribute purchasing power to different types of consumers.[149] Looking at things from this angle, to design institutions (like markets) to respond to the whims of paying customers is to prioritize the wants and needs of those whom the monetary system has provided liquidity. This is only the beginning of the inquiry, of course.[150]

Perhaps more familiar are the efforts of sociologists, anthropologists, political scientists, and other social researchers to trace how the reproduction of class, race,and gender hierarchies affects various domains of social life.[151] These lines of research seek to explain, for example, the way that racialized differences in housing market outcomes are reproduced over time even as their precise form changes. They do so not by seeking out "imperfections" in markets but by tracking how earlier formsof hierarchization (such as *de jure* segregation) could create the conditions for later forms of hierarchization (such as *de facto*

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[145] The phrase "instituted process" is from Polanyi. *See generally* Karl Polanyi, *The Economy as Instituted Process*, *in* TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMIES IN HISTORY AND THEORY (Karl Polanyi, Conrad M. Arnesberg, & Harry W. Pearson eds., 1957).

[146] *See generally* Alex Williams, *The Post-Keynesian Worldview in Five Principles*, SUBSTACK (Mar. 9, 2021), https://vebaccount.substack.com/p/the-post-keynesian-worldview-in-five. For a more technical introduction, *ee generally* MARC LAVOIE, POST-KEYNESIAN ECONOMICS: NEW FOUNDATIONS (2015).

[147] Chris Desan argues that channeling monetary issuance in this way is a—perhaps *the*—distinctive feature of capitalism. *See generally* CHRISTINE DESAN, MAKING MONEY (2014); Christine Desan, *The Power of Paradigms in the Histories of Economic Development*, JUST MONEY (Mar. 12, 2020), https://justmoney.org/c-desan-the-power-of-paradigms-in-histories-of-economic-development/.

[148] *See generally* MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE (2013).

[149] *See generally* HYMAN P. MINSKY, STABILIZING AN UNSTABLE ECONOMY (2008); *see generally* Matthew C. Klein & MICHAEL PETTIS, TRADE WARS ARE CLASS WARS (2020).

[150] *See* Luke Herrine & Raúl Carrillo, *The Law and Political Economy of Consumer Finance* (forthcoming, on file with author)

[151] *See generally* ERIK OLIN WRIGHT, UNDERSTANDING CLASS (2015); *see generally* Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1997); Angela P. Harris et al., *Where is the Political Economy?*, LPE BLOG (Jun. 21, 2021), https://lpeproject.org/blog/where-is-the-political-economy/.

segregation and higher-cost loans) by disempowering subordinated groups (for instance, by preventing them fromaccumulating wealth even as the cost of houses go up).[152]

The growing literature on "algorithmic bias" highlights the benefit of attending to recursive dynamics through time especially sharply. Much of its recent emphasis has been on the way that making decisions more efficient, well-informed, and rational can amplify pre-existing racialized (and other) hierarchies.[153] To put it way too simply: algorithms trained on data that reflects a society in which Black and brown people are excluded from opportunities and exposed to higher risks of misfortune, violence, and death will be algorithms that predict that Black and brown people will be less likely to succeed and (what is not quite the same) more likely to fail.[154] Models that price those risks—pass those costs onto users/borrowers—will tend to perpetuate and deepen inequalities regardless of the intentions involved in creating them. The discrimination at issue is entirely economically rational— consumers choose the best options for them among available options offered by competitive sellers and sellers price to (more or less) efficiently minimize risk and expand access to credit—and it may or may not have anything to do with a "taste" fordiscrimination among current market participants.[155] So one needs an account of how inequality channels through time and what institutions do to reproduce or deconstruct it.[156]

These and other recursive structurings of social spaces shape not just the institutions but also the individuals that make up those spaces. People acting within markets, just like people acting anywhere, carry out patterns of behavior they have inherited from others (in the form of "social scripts," of "rituals," of "norms") whether or not we think of it.[157] We exist in

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[152] *See generally* Issa Kohler-Hausmann, *Eddie Murphyand the Danger of Counterfactual Causal Thinking about Detecting Racial Discrimination*, 113 NW. L. REV. 1136 (2018) (on what it means to say that race "causes" an outcome).

[153] *See generally* NOBLE, *supra* note 10; *see generally* PASQUALE, *supra* note 9; *see generally* Batya Friedman & Helen Nissenbaum, *Bias in Computer Systems*, 14 ACM TRANSACTIONS COMPU. SYS. 330 (1996).

[154] *See generally* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019). It is even worse than that, since sophisticated statistical methods can increase the differences between borrowers through entirelyneutral procedures. *See generally* Andreas Fuster et al., *Predictably Unequal? The Effects of Machine Learning on Credit Markets* (forthcoming 2021) (Journal of Finance) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072038.

[155] *See generally* Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006); *see generally* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

[156] Lily Hu, *Law, Liberation, and Causal Inference*, LPE BLOG (Feb. 22, 2021), https://lpeproject.org/blog/law-liberation-and-causal-inference/. Neoclassical economists have notignored the possibility of rational behavior producing morally problematic racial differentiations. In fact, there is a substantial literature on "statistical discrimination" that posits multiple different possible mechanisms that could produce these differentiations. *See generally* Hanming Fang & Andrea Moro, *Theories of Statistical Discrimination and Affirmative Action: A Survey* (NBER Working Paper 15680, 2010), https://www.nber.org/system/files/working_papers/w15860/w15860.pdf. Much could be said about the value and plausibility of these models (both as a whole and individually), but for present purposes the most relevant fact is that the moral evaluation of which forms of racial differentiation are acceptable and which are not is undertheorized. As these models almost all deal with labor market outcomes, they attempt to explain how enduring racial differences could exist in incomes, access to education, and the like, if all actors are economic rational. The usual moral baseline—implicit or explicit—is that the job market ought to sort people according to their marginal productivity (which is taken to be the social value of their labor under conditions of perfect competition) and racial differentiation is problematic insofar as racial categories do not track actual differences in potential marginal productivity. One might question whether a moral commitment to anti-racism should treat racial sorting as acceptable insofar as it tracks productivity differences. As András Tilcsik has shown, this moral baseline can be and has been used to justify discriminatory decisions in the real world. *See generally* András Tilcsik, *Statistical Discrimination and the Racialization of Stereotypes*, 86 AM. SOC. REV. 93 (2021). Whatever the result of that analysis, it is not clear how it pertains to analysis of *consumer* markets.

[157] *See generally* PIERRE BOURDIEU, PRACTICAL REASON: ON THE THEORY OF ACTION (Randall Johnson trans.,

an overlapping set of *cultures*. And, as Mary Douglas and Baron Isherwood put it, "[c]onsumption is the very arena in whichculture is fought over and licked into shape."[158] At least in contemporary U.S. society, what we buy determines how we present ourselves, whom we spend time with, and which forms of socialization we are capable of. We follow each other to ourpurchases. We go the neighborhoods, wear the clothing, try the foods, join the social networks that we learn from others.[159]

Another important aspect of institutionalist accounts is the treatment of markets as subject to coordination all the way down. Institutionalist approaches reject the ideal of a "free market" in which all the collective construction happens at the level of clearly defining property rights and strictly enforcing contracts, with all other coordination emerging via the competition between buyers and sellers to enact pairwise trades.[160] Instead, institutionalists highlight how coordination occurs in an ongoing matter at multiple levels, leading to different markets taking different shapes with different dynamics. To understand the operation of these markets requires analyzing the details of their institutionalization and exploring the implications of other possible institutionalizations rather than comparing them to a single form that can never exist.[161] A market in which participants must submit new products to regulators for approval before selling them works differently than a market in which new products are presumed legitimate; a market stabilized by formal monopoly (e.g. public utility) works differently than one stabilized through price leadership by a dominant firm or through an agreement among financiers or through a formal cartelor through a shared commitment to a given set of norms in which all have been socialized.[162]

To say as much is not to deny the power of competition nor of profit to motivate market actors and to break alliances between them. It is, rather, to deny that competition can be more or less "perfect" and to affirm that its role in guiding social action requires more careful attention.[163] Competition—in markets or otherwise—is always managed and channeled through institutions and negotiations. "Pure" competition among atomistic actors would be too destabilizing to create a lasting social field (if one could even imagine what it would look

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1998); *see generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); *see generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (rev'd ed., 1959); *see generally* GEORG SIMMEL, ON INDIVIDUALITY AND SOCIAL FORMS (Donald N. Levine ed. 1971).

[158] MARY DOUGLAS & BARON ISHERWOOD, THE WORLD OF GOODS 44 (2021). *See generally* VIVIANA ZELIZER, ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY (2010); *see generally* S. Chaursheela, *Gender and the Stability of Consumption: A Feminist Contribution to Post-Keynesian Economics*, 34 CAMBRIDGE J. ECON. 1145 (2010); *see generally* Lyn Spillman, *Enriching Exchange: Cultural Dimensions ofMarkets*, 58 AM. J. ECON. & SOC. 1047 (1999).

[159] For an excellent discussion of the collective decisions involved in how "hedonism" manifests itself, *see generally* Kate Soper, *A New Hedonism* (2017), https://thenextsystem.org/sites/default/files/2017-11/Consumerism_Full.pdf.

[160] This is well emphasized in different ways by Christine Desan's book. DESAN, *supra* note 152 at 37-69, 422-34 (2014); Diego Aguilar Canabal, *The American Mortgage is an Investment in Racial Inequality*, NOEMA (Oct. 15, 2020), https://www.noemamag.com/the-american-mortgage-is-an-investment-in-racial-inequality/.

[161] For examples of how industries evolve through different settlements, *see generally* Leon N. Lindberg et al., *Economic Governance and the Analysis of Structural Change inthe American Economy*, *in* GOVERNANCE OF THE AMERICAN ECONOMY (John L. Campbell, J. Rogers Hollingsworth, & Leon N. Lindberg eds., 1991).

[162] This way of thinking about market competition and its relation to law is discussed in *Labor in Competition Law*. *See generally* Nathan Tankus & Luke Herrine, *Theorizing Market Governance after Coordination Rights*, *in* LABOR IN COMPETITION LAW (Sanjukta Paul et al. eds., forthcoming 2022).

[163] For a sophisticated discussion of the problem with models of "imperfect competition" and "monopolistic competition" *see genearlly* ANDREWS, *supra* note 2.

like).[164] So competition is not the opposite of coordination. Nor is competition the opposite of market power. Even in quite concentrated industries one can find heated contests to capture market share and/or attract equity investors.[165] And there is no intrinsic relationship between inter-firm competition for profit and consumer freedom or power or welfare. Firms can fiercely compete for the ability to make consumers sick, to destroy their environment, to defraud them, etc., so long as doing so generates money profit. In other words, though competition for profit plays a major role in capitalist systems, its role is not that of flattening social context to allow consumer choice to rebuild it.[166]

2. As Applied

How does all of this relate to consumer protection? For one thing, instead of looking only for a discrete set of public institutions that "corrects" the private ordering of markets by setting standards and enforcing them, we are left to look for how some combination of state and non-state institutions interacts to further (or undermine) the interests of (a subset of) end users when a good/service is provided to them through a market. The latter frame includes the former but alters its significance. When a given set of institutions "corrects" for problems in a market, what it is correcting for is not the deviation between real and ideal but rather the perceived shortcomings in other aspects of how that market has been institutionalized. It is by interacting with the other institutions that constitute a market that a corrective institution produces its result (or fails to). It is always the way a *combination* of institutions affects consumer interests that is being analyzed, and the line between consumer protection and other areas of law can be more or less clearly drawn depending on the context and the question.

To take a relatively straightforward example: regulating the practices of payday, title, and other high-price small-dollar lenders would be almost totally unnecessary were incomes stable enough and the social safety net robust enough.[167] In fact, as Abbye Atkinson has shown in recent work, this example can be extended more broadly to credit markets and their relation more direct forms of social provision like free college, public and lower-cost housing, and cash transfers, as well as to policies that structure the amount and distribution of income.[168] As Atkinson points out, credit generally works best when it is taken on by borrowers who expect toearn enough in the future to justify bringing spending forward in time (call this "consumption smoothing") or when it is taken on by borrowers who use it to acquire assets and opportunities that allow them to increase future income (call this "leveraging").[169] "Because credit often amplifies the underlying circumstances into which it is introduced, in times of economic opportunity and expected growth, credit can be a powerful instrument for capturing value and exploiting existing opportunity that might otherwise be lost due to illiquidity."[170]

On the other hand, Atkinson argues, when credit is used to patch gaps in othersources

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[164] For an argument to this effect, *see* LEE, *supra* note 148, at Ch. 6.

[165] For a model of competition that accounts for this aspect, *see* ANWAR SHAIKH, CAPITALISM: COMPETITION, CONFLICT, CRISES 259–352 (2016).

[166] *See generally* ALTERNATIVE THEORIES OF COMPETITION (Jamee K. Moudud et al. eds., 2013).

[167] *See* MEHRSA BARADARAN, HOW THE OTHER HALF BANKS 115–16 (2015) (summarizing the literature finding that users of small dollar loans tend to be of low to moderate income—depending in part on the credit product—and use it to cover everyday expenses). As Baradaran and others have pointed out,"fringe finance" is also a result of the restructuring of bank regulation over the latter half of the twentieth century, increasing the number of "unbanked" people while legalizing high-cost loans. *Id.*

[168] *See generally* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019).

[169] *Id.* at 1104.

[170] *Id.* at 1148.

of income where social insurance might otherwise do so, it allocates risk to those least able to bear it and transfers expected income streams upward.[171] Crucially,she identifies that social policy shapes who can reasonably expect a steady and increasing stream of (wage or investment) income—union representation, pension benefits, subsidized home construction in areas surrounded by collective investments that increase property values, et al. all contribute to how different individuals can and do use credit.[172] Scholars like Monica Prasad have illustrated how countries with stronger social safety nets also tend to have lower consumer debt loads.[173] All of which implies that the regulation of consumer credit—the importance of bankruptcy, the likelihood of predation, etc.—responds to the regulation of other aspects of the social provisioning process and not just the emergent results of consumer choices.

One could multiply examples: the role of bi-weekly wage payments in facilitating the rise of installment loans,[174] the role of increased work hours andwomen entering the labor force in driving demand for processed foods,[175] the role of government-subsidized researcher culture shaping the early notion of the internet as a space of free sharing in turn shaping the current business model of surveillance-and- advertising-based social media.[176] And on and on. Once one adopts the frame of analysis these simpler narratives become only a training ground for finding how institutions shaping the conditions for other institutions happens everywhere.

Additionally, the market governance frame makes it difficult to conceive of a domain of "private ordering" that has its own self-correcting dynamics into which the state "intervenes." Rather, legal institutions shape the space in which non-state actors coordinate their actions even as those non-state actors jockey to reshape those legal institutions.[177]

Consider one common debate about whether consumer markets can be trusted to correct themselves: that which revolves around the role of an *informed minority* of consumers. Those who take the position that markets generally can and should correctthemselves argue that, even if most consumers are underinformed and irrational, a discerning subset can force businesses to treat all consumers well.[178] Those who have been skeptical of this possibility have pointed out that it is highly conditional. It requires any such minority to have similar enough preferences (and similar enough income levels)[179] to others that their choices redound to the benefit of the majority. It requires the minority to be large and/or loud enough that firms must be worried about losing their business and difficult enough to identify in any given transaction that firms cannot discriminate in favor of the minority (perhaps even through cross-

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[171] *Id.* at 1154–57.
[172] *Id.* at 1131.
[173] MONICA PRASAD, THE LAND OF TOO MUCH 196–226 (2012).
[174] *See* LOUIS HYMAN, DEBTOR NATION 89 (2011).
[175] MOSS, *supra* note 97, at 62–65, 204–05.
[176] *See generally* FRED TURNER, FROM COUNTERCULTURE TO CYBERCULTURE (2006); *see generally* Kapczynski, *supra* note 9.
[177] Of course, this has been a basic element of Legal Realist argumentation for a century. *See generally* Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); *see generally* Karl Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665 (1925); *see generally* Deakin et al., *supra* note 148; *see generally* TAMANAHA, *supra* note 148.
[178] *See generally* Schwartz & Wilde, *supra* note 55; *see generally* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006); *see generally* Baird, *supra* note 109.
[179] *See generally* Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012).

subsidy) rather than improving the product for all consumers.[180]

For present purposes, the point is not whether or not such conditions prevail inany given market, but rather that whether they do depends on how a market isinstitutionalized and embedded within other institutions. As Yonathan Arbel and Roy Shapira have pointed out in recent work, the ability of *nudniks* (i.e. complaining consumers) to hold firms to account depends in part on firms' ability to detect and neutralize likely *nudniks*, which depends in part on which forms of detection, discrimination, and neutralization the law allows.[181] To go a level deeper: whether itis possible for even a minority of consumers to become well informed about abusiness practice often depends on whether and in what form sellers face legalpressure to disclose that information and whether there are third parties—journalists, consumer advocacy groups, government agencies, and the like—that have access to information about business practices, the resources to obtain and publish that information, and protection from retaliation by businesses. In these and other ways, the way a market is governed shapes whether there even *is* an informed minority, let alone whether that informed minority can have any effect on business practices, whether that effect has an effect on other consumers' transactions, or whether that effect is beneficial to other consumers. The tradeoff is not between the state intervening and letting the market work: the state has different ways to intervene to shape the way the market works—and for whom.

B. Substantivism

1. In General

The second aspect of moral economy's interpretive approach is grounding normative claims in something other than rational choice under the ideal conditions ofperfect competition. Those who have done so—in critiquing boilerplate's role in eroding the rule of law or surveillance's role in eroding privacy, for example—have tended to rely on substantive claims about which sorts of things are important to humans, both as individuals and as communities.

These approaches are best made sense of through moral theories that I refer to as "substantivist." As with institutionalism, substantivism is meant to be an inclusive term. It refers to any form of moral analysis that takes a position on what it means to live a good life and evaluates institutions in terms of whether they facilitate suchlives. Amartya Sen's[182] and Martha Nussbaum's[183] (different versions of a) capabilities approach is one recent prominent example, as is Roberto Unger's democratic experimentalism,[184] Joseph Raz's perfectionist liberalism,[185] Elizabeth Anderson's pragmatic expressivism,[186] and Cornelius Castoriadis's autonomism,[187] to name just a few.[188] As Martha Nussbaum puts it: "The core

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[180] *See* RADIN, *supra* note 62, at 103–04; *see generally* Bakos et al., *supra* note 60.

[181] *See generally* Yonathan Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop it*, 73 VAND. L. REV. 929 (2020).

[182] AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); AMARTYA SEN, CAPABILITIES AS COMMODITIES (1985).

[183] MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

[184] ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998).

[185] JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

[186] ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993).

[187] Cornelius Castoriadis, *From Marx to Aristotle, from Aristotle to Us*, 45 SOC. RSCH. 667 (Andrew Arato trans., 1978).

[188] Several of these accounts are "neo-Aristotlean" in that they build on Aristotle's ethical frame of asking what makes for a good life among inherently social creatures and modify it to attempt toaccount for the social

idea is that of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a 'flock' or 'herd' animal."[189] From this perspective, "[t]he aim of political planning is," in Peggy Radin's words, "to provide to people the conditions in which a good human life can be chosen and lived."[190]

Staking a position on what does and what does not contribute to humanflourishing does not mean articulating a single picture of what a good person or agood society is. Multiple ways of living are valuable, different valuable ways ofliving may be incompatible with each other, and disagreements about how to determine value may be irresolvable.[191] However, as Sen, Nussbaum, and others haveconvincingly argued, what it means to live a "properly human life" has some universality. All humans need food, water, air, shelter, care for wounds, etc. to survive. A society that fails to provide access to those things to everybody is ipso facto doing worse than one that does. Wellbeing beyond survival seems to depend on some amount of social recognition, care, ability to see our impact on the world, control over our own circumstances, etc.[192]

But humans of course differ over what makes life valuable, so an inclusive society must be one that makes room for difference. As Joseph Raz has argued, (at least) in modern complex societies in which multiple forms of living can coexist, allowing individuals to choose between different valuable lifestyles is key to freedom.But freedom in this sense is not without tradeoffs. As Bernard Williams points out, "asociety given over to 'experiments in living,' in Mill's phrase, is…one sort of society rather than another, and there are various forms of living that it rules out; indeed,those ruled out could include those most worth living."[193] And even in highly complex and flexible societies, the structure of institutions and the limits of Earth's resources still limits who has access to which forms of life. As John Dewey emphasized, experiments in living are unavoidably collective endeavors, and a society of equals must be a society committed to democratic reflection and adjustment of its institutions to adapt to changing circumstances and changing understandings of what is valuable.[194] A democratic society aims to build institutions that allow all participants an equal say in this process of collective interpretation and construction.[195] (What counts as an "equal say" is not at all a straightforward matter—but the point for now is just that the inquiry itself is important.)

2. As Applied

complexity of modernity. Others lean toward "neo-pragmatic" in that they build on John Dewey's account value as experimental reflection on our evolving habits (which itself builds on Hegel). And, of course, these are just a few examples of large literature that I do not even gesture at canvassing.

189 NUSSBAUM, *supra* note 188 at 72.

190 MARGARET JANE RADIN, CONTESTED COMMODITIES 64 (1996).

191 Indeed, as Raz argues, the coexistence of multiple incommensurably valuable ways of living and the ability to choose between them can be seen as a positive good of modern liberal societies. *See* RAZ, *supra* note 190 at 348.

192 Post-Keynesian economists have emphasized the descriptive doppelganger of this point: that preference orderings follow lexical priorities, with more basic desires needing to be sated before others(regardless of relative price). *See* Marc Lavoie, *A Post Keynesian Approach to Consumer Choice*, 16 J.POST KEYNESIAN ECON. 539 (1994).

193 BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 172 (1985).

194 JOHN DEWEY, FREEDOM AND CULTURE (1939).

195 *See* NUSSBAUM, *supra* note 188, at 34–101; SEN, DEVELOPMENT AS FREEDOM, *supra* note 187, at 54–86; RADIN, *supra* note 195 at 54–78.

The first step in a substantivist direction for analyzing consumer protection is to embrace the substantive judgments that provide the basis for behavioral economists' claims about consumer irrationality.[196] In order to say that consumers make bad decisions when they fail to diversify their retirement portfolios or when they use high-price loans to fund everyday or luxury expenditures (rather than fill gaps during emergencies) or when they fall for teaser rates, one is making a non- deferential claim about what is good for consumers. I discussed above how this poses a dilemma for an analyst who wants to maintain a theory of value based entirely on rational maximization of subjective preference functions.[197] Here what matters is that if we give up on that quest the dilemma disappears. We interpret the purpose of a product and measure the performance of a product against that purpose. In other words, we determine whether the product is *suitable* for the consumer or not.[198] Our suitability judgment will surely be informed by what consumers seem to want (or say they want) and how they actually use the product, but that is not the same thing as deferring to consumers so long as certain formal conditions are met (or sufficiently approximated).

The next step toward a more thoroughgoing substantive approach would be to treat the standards to which a market should be held as themselves evaluable in terms of a deeper set of standards concerning how to determine what makes a givengood/service valuable and for whom. These standards would, at least in principle, be connected to a vision of what facilitates human flourishing and how to accommodate conflicting interests and conflicting values, as gestured at above.

So, for instance, diversification in retirement portfolios can be understood in terms of the social value of retirement: making it possible for people who are older than a certain age (and, depending on one's view of desert, perhaps have worked a certain number of years) to be able to earn a comfortable income without working. Any view about the value of retirement stability is itself connected to a view about the fair distribution of labor among members of a community, including the role that physical ability and the ravages of the aging process should play in determining who should be responsible for what. To the extent that we have attempted to make retirement stability possible through the use of individual retirement accounts (a decision that itself will be predicated on explicit or implicit judgments about what the preconditions for stable retirement should be), diversification in those accounts is desirable (as are low fees, among other aspects) because it facilitates effective individual investments in retirement.[199] Accordingly, consumer protection should prevent sellers of retirement accounts from nudging consumers to choose non- diversified accounts. But that does not mean that diversification or even designing savings vehicles that maximize returns are the best way to achieve the goal of fairly providing retirement stability (that the judgments implicit in that form of institutional design are the right ones). Defined benefit pensions, guaranteed basic income for people over a certain age, or something else may work better, depending on one's view about what makes for a fair distribution of labor and the preconditions for retirement.[200]

V. The Moral Economy of Consumer Protection

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[196] *See supra* Part III.A.2.
[197] *Id.*
[198] The concept of suitability in the consumer law context was first introduced by Engel & McCoy in *Three Markets*, *supra* note 72.
[199] *See* Ayres & Curtis, *supra* note 75.
[200] On how different retirement systems have been built depending on the values of ruling political coalitions, see GØSTA ESPING-ANDERSON, THE THREE WORLDS OF WELFARE CAPITALISM 79–104 (1990).

With these reorientations in mind, we can now re-ask the question: what is consumer protection for?

A. Distinguishing Consumer Protection

A first step in answering this question is to distinguish consumer protection from other types of institutions. Car users' interest in safety is furthered through well-maintained roads, fairly enforced traffic laws, and conveniently located rest stops in addition to standards for car design, but surely it is not the case that road maintenance, traffic enforcement, and highway design are forms of consumer protection.[201] The details of social security or ERISA or collective bargaining law are not consumer protection, however much they affect the market for retirement accounts. It is one thing to say that consumer protection institutions serve common goals with other institutions, it is another to conflate them.

I propose that three distinctive aspects of consumer protection institutions. The first has been taken for granted so far: they aim to protect the interests of end users of goods and services (rather than, say, workers who make the goods and provide the services). To analyze the consumer protective qualities of a market governance regime—to adopt a consumer protection *lens* of analysis—is to attend to the interests of, well, consumers. How to ultimately design consumer protection institutions will,of course, require balancing consumers'/end users' interests with others (e.g. fairwork conditions, macroeconomic stability, free speech), but to ask about consumer protection is to ask about end users' interests, wherever they fall in the balance.

Second, consumer protection institutions are generally concerned with the contingencies of providing goods *commercially*, via one or another type of market. They attempt to correct for aspects of the construction of social provisioning via markets, and especially by profit-motivated firms, that give producers/distributors power to benefit themselves at consumers' expense.

Third, although multiple aspects of the design of consumer markets can further (or detract from) consumers' interests, we generally reserve the label "consumer protection" for institutions that set and enforce standards of conduct, performance, or treatment rather than those that, say, transfer money to consumers. In a word, consumer protection is *regulatory*.

These lines are not bright. Consumer protection institutions can regulate non-commercial context when, for instance, commercial kitchen safety standards apply to a foodbank. And non-regulatory intervention like consumer education sometimes fallswithin the ambit of consumer protection authorities. Yet drawing the lines can be useful in analyzing the way consumer protection institutions work together with—or substitute for—others without collapsing them. We can see that, say, regulating the sales practices of for-profit colleges and driving for-profit colleges out of the market by providing free higher education are both ways to further consumers' interests in quality educations, even if only the former is a form of consumer protection.

B. A Pluralist Consumer Protection

If we focus on how consumer protection interacts with surrounding institutions in the manner just suggested, we can see it as furthering a series of specific goals while managing specific institutional conditions in a given market. When consumer protection is called upon

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[201] Except perhaps if roads were provided by companies and law set basic quality standards for macadam and the like. On the relation of car safety standards to these other ways of promoting safety, *see* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 27–46 (1990).

to make retirement markets work better, it aims to balance retirement stability with investor autonomy. When it intervenes in credit card markets, it aims to ensure that access to liquidity is provided under fair conditions. When it intervenes in car markets, it aims to increase safety without sacrificing too much in affordability or customizability. And so on.

There is some value in focusing on the specific—on treating the value of consumer markets as dependent on how we value the uses of the good or service they provide. Doing so is consistent with an emphasis on consumer markets being constructed to serve a set of specific interests that we can critically examine indetermining how to construct them differently. But even if we reject the view that consumer markets are all basically doing the same thing, and even if we are alert to the context specificity of consumer protection's purposes, we can still make some generalizations about how consumer protection attempts to make markets better serve substantive goals.[202] I focus on four: suitability, intra-consumer fairness, fair dealing, and autonomy.

1. Suitability

From both a consumer sovereignty and a moral economy perspective, consumer markets are instrumentally valuable to the extent they effectively provide the right resources (goods or services) to the right people for the right uses. But how does one determine how to match resources to uses?

Neoclassical welfare economics focuses on the maximization of a social welfare function that takes as its arguments the idiosyncratic and inscrutable preferences of individuals *qua* consumers. Social priority derives entirely from the strength of a given preference, which is, in practice, usually conflated with the ability to pay for preferences.

A moral economy approach conceptualizes value substantively: the value of a given resource depends on how it fits into our lives. What is it for? What activities and social relations does it facilitate? What risks does it create? How much attention to those risks is it reasonable to expect somebody to attend to? Thinking about the purpose of consumer markets in this way implicates what is perhaps the core task of consumer protection law: ensuring that a good/service being distributed via a consumer market performs its function well. Following Lauren Willis (who follows Engel and McCoy), let's call this "suitability."[203]

One set of questions regarding suitability pertains to preventing a product/service from functioning badly (or not at all). Which are acceptable types of risks for a given product or service to come with? Regulations focusing on product safety—preventing explosions, poisonings, electric shocks, and the like—are of this sort. As are regulations that aim to prevent loans from becoming unpayable.[204]

Even these negative forms of quality control require interpreting the purpose of a given product/service in order to specify which risks and privacy invasions are acceptable. A tinkerer's kit can come with a higher risk of shock than a remote control. Shopping at a mall should come with a lower expectation of privacy than shopping at home.[205] Gambling for fun

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[202] The following typology is a modification of the "meta-goals" that Lauren Willis posits in *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1316 (2015). Although useful, Willis's triad is not sufficiently developed to engage with in detail here and still has one foot in the consumer sovereignty framework.

[203] *Id.* at 1341, 1351.

[204] On the relation between these aspects of quality control, *see* Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY J. (2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/.

[205] On the context-sensitivity of privacy norms, *see* HELEN NISSENBAUM, PRIVACY IN CONTEXT:TECHNOLOGY,

can come with the risk of losing it all that investing in one's retirement should not.[206]

Some forms of quality control go beyond setting a floor on safety. They focus on what we might call "fitness for purpose": ensuring that consumers do not just receive minimally serviceable but the best possible versions of a good or service. For a housing court or a housing inspector to say that a home is "fit for human habitation", they need to have a sense of what is required for human habitation, for example.[207] Some purposes will be obvious, some will be contestable; some will be discrete, some will be open-textured. But one cannot assess quality without specifying which qualities matter.

Saying as much does not imply that the government must make all quality determinations—not in the slightest. Where the relevant qualities of a good/service are readily observable to lay inspection and where which qualities are relevant is widely understood, much of the task of determining whether an object is fit for a particular purpose can be performed by consumers themselves. Is this chair comfortable to sit in? Does this food taste good? Regulatory agencies or non- governmental organizations can aid consumers in these tasks by inspecting and grading products, aggregating consumer reviews, and the like. Mandatory disclosures and other information regulation (to be discussed shortly) can also facilitate consumerdecision-making.

But consumer choice, even if aided in these ways, can only do so muchquality control. Consumers' limitations are especially salient when determining quality requires a particular type of specialization or when consumers are easily manipulated or overwhelmed. And there is hardly a reason to leave quality control to consumer choice when there is no room for disagreement about what counts as high quality or what the tradeoffs with quality should be (e.g. whether a given food or drugis poisonous). Policing quality more directly can be done in a number of ways, from the FDA's pre-approval requirements[208] to business licensing regimes that require periodic inspections[209] to mandating a standardized product (as in the Postwar mortgage market and in the federal student loan market).[210] Even changing firm governance can have quality control elements: public ownership, public utility regulation, professionalization (via licensing requirements and otherwise), worker participation, and other ways of taking the edge off the profit motive can all encourage a firm to develop its own higher

POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010).

[206] On the difficulty of drawing lines between investment and gambling and its role in the developmentof modern contract doctrine, *see* ROY KREITNER, CALCULATING PROMISES (2007).

[207] *Cf.* N.Y. REAL PROPERTY LAW § 235-B (Consol. 2014) (requiring every lease to "warrant that the premises…are fit for human habitation…"); 24 C.F.R. § 982.401–982.407 (setting out "Housing Quality Standards" for units rented out to tenants who use Section 8 vouchers).

[208] 12 U.S.C. § 355 (prohibiting the marketing of new drugs before FDA approval). Saule Omarova has recommended adopting a similar process for complex financial products. *See* Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 WASH. U. L. REV. 64 (2012).

[209] *Cf.* N.Y.C. HEALTH CODE art. 5 (requiring permits for a number of industries); N.Y. AGRI. & MKTS. LAW § 50-h (McKinney 2022) (requiring all dairy farmers to be inspected); N.Y. PUB. HEALTH LAW § 461 (McKinney 2022) (requiring a permit for body piercing specialists and tattooists); N.Y. PUB. HEALTH LAW § 1401 (McKinney 2022) (requiring registration of camps for children)..

[210] *See* Ryan Bubb & Alex Kaufman, *Consumer Biases and Mutual Ownership*, 105 J. PUB. ECON. 39 (2013) (finding that credit unions had less predatory terms than for-profit banks); ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 464–69 (1977) (on the professionalization of management in large enterprises); Nicholas Bagley, *Medicine asa Public Calling*, 114 MICH. L. REV. 57 (2015) (on the intertwining roles of professionalization and public calling regulation in medicine, also discussing public utility regulation).

standards for quality control.[211] For that matter, governmental efforts can supplant or work in tandem with the market governance efforts of sellers themselves—via professional associations and the like.

On the other hand, where there is room for reasonable disagreement about what counts as quality or the appropriate quality-cost tradeoff, consumer choice has a role to play in defining the standards by which a product should be judged. This roleis conceptually distinct from consumer choice's role in sorting out fit from unfit products according to a set standard. In circumstances of disagreement as to product quality, deference to autonomous consumer choice is a matter of respecting a plurality of value judgments. Consumers are setting standards of quality within a range of reasonable standards. As we will discuss in a moment, allowing consumer choice to play this role is not merely a matter of deferring to it: ensuring that consumers understand the stakes of the choice in front of them is important for ensuring that the choice is autonomously made—reflects the value judgments of the consumers in question – rather than the manifestation of confusion or manipulation.[212]

2. Intra-consumer Fairness

Examining the fit between a good or service and a consumer's needs cannot only be done for consumers as a class. Consumers are differently situated, which means that any determination of which interests ought to be served is a determination about how to deal with these differences—about whose interests should be prioritized. These are judgments about what Willis calls "intraconsumer fairness."[213]

To promote fairness between consumers is to ensure that consumers are treated differently only for defensible reasons.[214] Is it consistent with equal treatment for the price of the same good to be higher for consumers who are less attentive? For consumers who purchase the product during a shortage? For consumers whose search history reveals a propensity to pay higher prices? For consumers who have fewer options because of a history of racialized market segmentation? Sometimes thesesorts of questions can be answered categorically with a focus only on the *type of transaction* at issue. One might think it is never fair to take advantage of inattentiveness to slip in an additional charge on a utility bill, for example.[215] Sometimes these sorts of questions will require asking which *population* is most likely to be harmed by the practice at issue. Whether charging more in a shortage seems problematic might depend in part on whether doing so deprives poorer people of necessary goods or prevents people who are already well off from hoarding such goods.

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[211] *See* Ryan Bubb & Alex Kauffman, *Consumer Biases and Mutual Ownership*, 105 J. PUB. ECON. 39 (2013) (finding that credit unions had less predatory terms than for-profit banks); ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 464–69 (1977) (on the professionalization of management in large enterprises); Nicholas Bagley, *Medicine asa Public Calling*, 114 MICH. L. REV. 57 (2015) (on the intertwining roles of professionalization and public calling regulation in medicine, also discussing public utility regulation).

[212] On the preconditions for autonomous choice in this sense, *see* RAZ, *supra* note 190, at 369-399.

[213] Willis, *supra* note 207 at 1316.

[214] How exactly to cash this out is, of course, a contested question, most commonly debated in theequal protection context. *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015) (cataloguing grounds for striking down a law on rational basis review).

[215] *See* Richards v. Direct Energy Svcs., 915 F.3d 88 (2d Cir. 2019) (for disagreeing perspectives on this question).

Fairness judgments are unavoidable, even by welfare economists.[216] It either is or it is not fair to have people who overdraw their banks accounts cross-subsidize those who never do or to set a usury rate that will restrict access to credit to some high-risk borrowers while reducing its cost (and making it easier to pay off) for others.[217] To adopt the welfare optimizing Kaldor-Hicks criterion is to say that differences in treatment are justifiable—are *fair* in the sense at issue—to the extent that the better treated person could theoretically (but not actually) pay off the worse treated person, regardless of what conditions led to the difference in treatment.[218]

But being more explicit about fairness judgments can make their stakes clearer. That is in part because focusing on fairness makes more explicit the way in which consumer markets are connected to deeper fairness values. Promoting fair treatment in consumer markets is connected to a principled commitment to creating a society that treats all of its members as equals: worthy of equal dignity, equal participation, equal voice.[219] And a commitment to equal treatment is often inconsistent with a focus on welfare maximization.

If we think it is unfair that people lower in class and status hierarchies(including based on various identity categories) are offered inferior products or inferior service or are otherwise not well served by a consumer market, then promoting fairness between consumers is in part a matter of attempting to intervene in the reproduction of problematic inequalities that go beyond the particular market or product in question. As many have pointed out, this strategy is likely to be far from the most effective way to eliminate the problematic inequalities, and it exists in tension with the structuring of a social space as a market, in which allocation is mediated through ability to pay and abilities to pay are unequal.[220] Nevertheless, preventing inequalities from compounding in consumer markets—to the extent it can be done (rather than producing perverse effects)—may well be necessary part of a multi-pronged strategy to eliminate the underlying inequality. And there is value in preventing inequalities from becoming sources of disadvantage even if it does not eliminate the inequalities (think, for instance, of the integration of lunch counters—those notorious spaces of consumption!).[221]

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[216] For a sense of how distribution and "fairness" play a role in welfarist theories and in neoclassical economics in particular, see Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173 (2000); Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003).

[217] On the former, see Willis, *Performance-Based*, *supra* note 207, at 1380–85. On the latter *compare* Anne Fleming, *A Single Federal Usury Cap is Too Blunt an Instrument*, LPE BLOG (Oct. 1, 2019), https://lpeproject.org/blog/a-single-federal-usury-cap-is-too-blunt-an- instrument/ *with* Emma Caterine, *The Market Does Not Bind Us*, LPE BLOG (Oct. 2, 2019), https://lpeproject.org/blog/the-market-does-not-bind-us/.

[218] As Bob Hockett points out, all systems that can be evaluated in terms of a *maximand* can also be evaluated in terms of an *equalisand*. Robert Hockett, *The Deep Grammar of Distribution: A Meta- Theory of Justice*, 26 CARDOZO L. REV. 3 1179 (2005).

[219] *See* Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999); JEREMYWALDRON, ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY (2017).

[220] This type of point is frequently framed in welfarist terms as an equity-efficiency tradeoff. *See* Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 Yale L.J. 2478 (2014). But we need not—and should not!—adoptthat framing. Generally, it requires conflating "efficiency" with "having a social space serve its purposes well as possible",, a conflation I have given reason to doubt in general and which I think is frequently tendentious or circular in specific cases.

[221] 42 U.S.C. § 2000a; Christopher W. Schmidt, *Why the 1960 Lunch Counter Sit-ins Worked: A Case Study of*

3. Fair Dealing

What is more, a concern for intra-consumer fairness can often be hard to disentangle from a concern for fairness between consumers and firms. But it is worth drawing at least a conceptual line to separately examine what we might call the value of *fair dealing*.

To promote fair dealing is to be concerned with preventing sellers from abusing their power over consumers. Consumers that rely on businesses to obtain access to goods and services are left at the mercy of those businesses. They must trust that the good they order will be the one delivered, that the payment they make will be credited, that the information they provide will be securely kept, that that the fineprint is not totally lopsided, that the seller will not weasel out of its legal obligationsor renege on its promises when consumers do not have the resources to force them to.If these and other sources of vulnerability become sources of profit, then the business profiting does so at consumers' expense rather than by contributing to her flourishing.[222] (Notice that if a firm can increase revenues and market share through advantage-taking, then competition may tend to *speed* rather than *slow* the spread advantage-taking practices, leading to a situation in which collective action or the action of a third party is required to countervail competitive pressures.)

Accordingly, consumer law has several techniques to prevent vulnerabilities from becoming sources of profit and sources of harm. Bans on unconscionable clauses and unfair acts and practices attempt to root out a broad variety of advantage- taking tactics by setting out a principle against them and relying on courts andregulators to interpret which of an evolving set of business practices violate that principle.[223] Price ceilings, price gouging laws, and bans on specific contract clauses and practices aim more narrowly.[224] Laws setting minimum standards—for privacy, for quality—create a floor on how much a business can take advantage of a customer's vulnerability. Public utility laws prevent advantage-taking for goods that are especially important (even essential), which makes the conditions of their sale especially morally urgent and makes advantage-taking especially likely.[225]

Anti-discrimination laws also aim to prevent certain specific vulnerabilities (i.e. being the member of a "protected class") from being sources of advantagetaking.[226] When a subset of consumers have a predictable set of vulnerabilities causedby structural exclusion, then policing fair dealing is connected to promoting intra-consumer fairness. Unfair dealing can be seen as both wrong in itself and as wrong to the extent that it contributes to baleful social processes that reward those businesses most willing to exploit consumers and that increase the vulnerability of thealready vulnerable.[227]

Law and Social Movement Mobilization, 5 INDIANA J. L. & SOC. EQUAL. 281 (2017).

[222] For the role of this kind of fairness in traditional fair price schemes, see William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REG. 721, 730–42(2018); Herrine, *supra* note 32, at 448–49.

[223] *Cf.* 15 U.S.C. § 45; U.C.C. § 2-302.

[224] 10 U.S.C. § 987 (setting a usury cap for lending to members of the armed forces); Heather Morton,*Price Gouging State Statutes*, Nat'l Conf. State Legis. (May 21, 2021), https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx (collecting state-level statutes).

[225] *See* K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival ofthe Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018).

[226] Cf. 15 U.S.C. §§ 1691–1691f() (prohibiting lending discrimination based on "race, color, religion,national origin, sex or marital status, or age (providing the applicant has the capacity to contract)")

[227] On the moral logic of the concept of "oppression" see Iris Marion Young, *Five Faces of Oppression*, *in* JUSTICE AND THE POLITICS OF DIFFERENCE 39 (1990); Nancy Fraser, *Rethinking Recognition*, NEW LEFT REV. (May/June 2000), *available at*https://newleftreview.org/issues/ii3/articles/nancy-fraser-rethinking-recognition.

4. Consumer Decisional Autonomy

What about consumer decisional autonomy? In a consumer sovereigntyframework, autonomy is the default state of consumer markets: optimization machines automatically make the best choices based on all the available information—they are built to be autonomous—and competitive marketsautomatically produce exactly those choice sets that are consistent with everybody's autonomous choices. From this perspective, all of the regulatory interventions wehave been contemplating in the name of safety, suitability, equity, or fair dealing threaten autonomy (perhaps for good reasons, but nevertheless). Regulation in the name of social values *ipso facto* threatens paternalism.

As discussed above, this way of thinking about things fails to account for howhumans actually choose and how choice sets are actually produced.[228] More choice is not inherently good for choosers without infinite computational capacity. It is better to treat consumer decisional autonomy as a positive capability—the ability to evaluate and to choose between valuable options based on an accurate understanding of what the likely outcomes of choosing each option will be—that must be actively cultivated rather than assumed to exist.[229]

To help make sense of this notion of autonomy, we can split it into two elements. Call the first element autonomy's "domain". This is the set of choices that any given consumer or class of consumers can realistically make. When a decision about the tradeoff between privacy invasion and a user fee in social media or betweenmortgages with high default risks or restricting access to credit is left in the hands of consumers, their domain of autonomy is increased. That is so even if no consumers actually choose those options or if those options are welfare reducing.

However, a regulatory system that formally allows consumers to make a givenchoice does not thereby expand the domain of autonomy of every consumer. It only expands the domain of autonomy for consumers for whom the choice in question is possible to make, given their resources, their geographic location, their immigration status, etc. Failing to ban a cancer-causing pesticide only leaves the choice of pesticide-exposed vs. non-pesticide-exposed produce to consumers if some farms actually stop using the pesticide. And then it only provides that option in way that produces starker tradeoffs for those with less money and/or less access to those markets.

Determining which tradeoffs should be available to consumers cannot beentirely separated from considerations about safety, suitability, equity, and fair dealing. Part of the inquiry in making decisions about proper safety regulationsinvolves asking which safety risks are appropriate to let individuals bear given the useof the product—e.g. the risk of crashing in skis or the risk of burning oneself on the stove—and which safety risks are unnecessary—e.g. the risk of being decapitated bya stylish dashboard or the risk of developing cancer from pesticides.[230] And part of the inquiry in determining how to achieve intra-consumer fairness involves grappling with situations in which restricting the choices of some consumers expands thechoices of others—as when restricting credit card fees increases lending options for lower-

[228] *Supra* Part III.A.

[229] Although not presented in exactly this way, this is the core of Elizabeth Warren's argument in her influential article that introduced the idea of a CFPB. *See* Warren, *Unsafe*, *supra* note 209.

[230] This reasoning draws on that of Joseph Raz. *See* Raz, *supra* note 190, at 422 (arguing that choices between bad outcomes or between irrelevant outcomes are not valuable—rather, choice is valuable tothe extent it makinges an individual "more likely to realize their aim").

income consumers while reducing the availability of credit card rewards for higher-income consumers.[231]

The second element of autonomy is the capacity to make a genuine choice among the available alternatives. What makes a choice "genuine" is, of course, a matter of extensive philosophical debate.[232] We cannot possibly get into those weeds here, but we can stay at a level of generality that can give a sense of the scope of the inquiry. Everybody who thinks choice is valuable thinks that it is only valuable to the extent it meets certain conditions of genuineness—some choices are not *really* choices—even if there is disagreement about how to justify those conditions and how demanding they must be.

Force and fraud are the most obvious threats to genuine choice. Fraud presents a problem because it orients a consumer's intentions toward a good or service that is not actually being sold to her. The thing she chooses is not the thing she is sold. One cannot rely on choice as either an indicator of welfare or an indicator of will. Force—or coercion—presents a problem because it produces the wrong sort of intention: the consumer intends to avoid the source of coercion (threat of pain, social ostracism, etc.) rather than to enjoy the good/service.[233]

Much of consumer protection can be understood as creating the conditions for autonomous choice by reducing possibilities of force and fraud. Prohibitions on deceptive practices are, of course, ways of making common law prohibitions on fraudeasier to enforce in a modern context.[234] Prohibitions on high-pressure sales tactics and on sharp dealing are directly focused on reducing coercion (here fair dealing and autonomy overlap).[235] Efforts to promote commercial honesty and to make consumers better informed about the consequences of their decisions—via mandatory disclosures, advertising regulations, etc.—can also be seen as efforts to orient consumers' intentions toward the actual likely consequences of their decisions.[236] Efforts to police unfair sales tactics, to prevent firms from manipulating consumers' emotions, and to create minimum quality standards can also be seen as efforts to reduce coercion.

As we expand the lens beyond narrow policing of force or fraud, we run into asimilar line-drawing problem that confronts fair dealing. Which forms of influence onconsumers promote their autonomy and which do not? The more one is inclined to think that genuine choice depends on the ability of the chooser to deliberate, to be trained in particular types of reasoning, and/or to have a say the institutions that shapeher deliberations—that is, the more one is inclined to a "positive" account of freedom—the more role one will see in constructing social institutions in a way that promotes particular ways of choosing, with freedom being a discursive relationship between participation in the process of collective construction of

[231] On the cross-subsidy in credit cards, see Sumit Agrawal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards* (NBER Working Paper 19484, Jun. 2014).

[232] *See generally* Scott Anderson, *Coercion*, STAN. ENCYC. PHIL. (2011), https://plato.stanford.edu/entries/coercion/; Gerald Dworkin, *Paternalism*, STAN. ENCYC. OF PHIL. (2017).

[233] *See generally* MICHAEL TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 78–126 (1993).

[234] Restatement (Second) of Torts, § 402B (declaring material misrepresentations unlawful in the sale ofchattels); 15 U.S.C. §45 (banning "deceptive acts or practices"); Cal. Bus & Prof. § 17500 et seq. (banning false advertising).

[235] 16 C.F.R. § 429 et seq. (regulating door-to-door sales practices).

[236] 15 U.S.C. § 1601 et seq. (TILA, setting out disclosure requirements for credit offerings); 12 CFR § 1026.1 et seq. (regulations implementing TILA).

socialization and being able to independently navigate a socialization process.[237]

C. *Consumer Protection in a Democratic Society*

More generally, different people will have different judgments about how to interpret and to prioritize each of these values, at both wholesale and retail. Part of thequestion in analyzing a consumer protection regime will thus be how to determine which—whose—judgments govern. These are questions of political morality: which market governance regime is *legitimate* and why?

From a consumer sovereignty perspective, legitimacy is largely derivative of the "first order" question of how to organize a market in which consumers aresovereign. The market itself—so long as it is perfectly competitive—provides the space of moral commensuration, so the legitimate political process is that which produces something close enough to a competitive market. As a second best, apolitical process is legitimate if it uses experts to determine which outcomes would obtain market in a competitive market in an effort to replicate those outcomes as closely as possible. The use of cost-benefit analysis—a simulation of outcomes that would obtain were everything commodified and everybody made purchase decisions accordingly—is thus itself legitimating. It makes public decision-making "rational" by yoking it to individual rationality.[238]

From a moral economy perspective, it makes more sense to judge the legitimacy of market governance institutions—including consumer protection institutions—in terms of how representative they are of the interests and the values of those they affect.[239] In particular, consumer protection institutions should represent the interests of consumers, with special attention to the interests of consumers whoare worst off. They should be connected to processes of democratic deliberation and will formation about the proper purpose and scope of consumer markets, whichincludes contributing to the process of organizing otherwise disorganized consumers, "enabling them against powerful individuals and more cohesive and powerful social groups."[240] Consumers' interests will, of course, have to be balanced with others' interests to arrive at a form of governance that is representative of all affected, but our focus here is on the consumer protective elements of these institutions.

The way an institution is structured—which powers it has, which types of transactions it has authority over, which areas of expertise it draws from, which constituencies it interacts with, etc.—shapes which sorts of questions it asks and how it goes about answering them. Part of the question of how to design the governance of consumer markets, then, involves asking how to divide up these different inquiries ina way that is satisfactorily connected to the process of democratic will formation.

This point can be made more clearly if its own domain is circumscribed. Letus focus just on federal consumer protection administrative agencies. While a moral economy framework does not rule out any use of any form of cost-benefit analysis, it does not locate the

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[237] *See* Ian Carter, *Positive and Negative Liberty*, STAN. ENCYC. PHIL. (2016).

[238] This simplifies the analysis, which must, at least to pass legal muster, identify congressionalauthority for weighing costs and benefits first. *See* Cass R. Sunstein, *Cost-Benefit Analysis andArbitrariness Review*, 41 HARV. ENVTL. L. REV. 1 (2017).

[239] *See generally* Nadia Urbinati & Mark E. Warren, *The Concept ofRepresentation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387 (2008) (summarizing recent literature on the relevance of "representation" to the legitimation of political institutions in democratic regimes).

[240] Steven Klein, *Democracy Requires Organized Collective Power*, 29 J. POL. PHIL. (forthcoming 2021), *available at* https://onlinelibrary.wiley.com/doi/full/10.1111/jopp.12249.

legitimacy of administrative agencies in their employment thereof.[241] Rather, it has a closer affinity with more overtly political, indeed *democratic*, theories of administrative legitimacy: those that emphasize thatadministrative agencies gain their authority by being connected to institutionalized processes of deliberation that are accountable to democratic publics.[242]

On this type of view, part of the legitimacy of an administrative agency is derivative of the legitimacy of the Congress that creates it. To the extent that Congress properly represents the relevant constituencies (contrary to fact, let usassume it does for ease of exposition), its articulation of the purpose and domain of action of an administrative agency is grounded in a process of democratic willformation.[243] Congress can create a narrow domain of action by writing specific prohibitions with detailed requirements or limited authorizations—such as the Fair Credit Reporting Act, or the Children's Online Privacy Protection Act.[244] In such situations, an agency's scope legitimacy is more squarely legal and more properly circumscribed by courts. But Congress can also leave room for maneuver, as when it broadly prohibits "unfair or deceptive [or abusive] acts and practices" or when a statute has an ambiguous meaning.[245] In the latter case, an agency's scope of legitimacy is matter of ongoing interpretation and contestation—less properly a matter of professionalized legal interpretation than a matter of how the agency itself relates to different constituencies. As Blake Emerson puts it, the "administrative system must synthesize the partial distillations of public opinion that come before itin the form of statutes, presidential directives, and input from the affected public. It must do so in a way that is calculated to counter and redress the unequal distribution of argumentative resources that otherwise dominate social and political processes."[246]

In consumer protection context, that means attempting to correct for the advantages sellers have in framing the value questions—the propaganda operations they run (public relations, advertising, etc.), the influence over advertising-funded media, etc.—and providing space for the sort critical reflection on the values implicated in market governance that unthinking participation in a consumer market does notnecessarily allow for.

Of course, administrative decision-making requires the use of experts and studies to advise on the likely impacts of different potential courses of action and to weigh tradeoffs. But that is not the same thing as quantifying each cost and benefit in terms of willingness to pay

[241] For critiques of cost-benefit analysis that resonate with this type of view, see FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); HAUSMAN, MCPHERSON, & KATZ, *supra* note 42, at 165-70; DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY (2010); Symposium on Cost-Benefit Analysis, LPE Blog (Oct. 2021), https://lpeproject.org/symposia/cost- benefit-analysis/. If Congress (or, more controversially, the President) mandates a quantified CBA as part of the regulatory process, the use of CBA is part of the conditions of legitimacy for an agency. Butin such a circumstance, the CBA is not itself the grounds for an agency's legitimacy (because of the purported "neutrality" it offers): rather, the CBA is legitimated by its democratic authorization.

[242] *See* Katharine Jackson, *What Makes and Administrative Agency "Democratic"?*, LPE BLOG (Nov. 11, 2020); BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY (2019). *See also* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823 (2019).

[243] Here I am drawing from Robert Post's schema in Robert Post, *Theorizing Disagreement*, 98 CAL. L.REV. 1319 (2010).

[244] 15 U.S.C. §§ 1681–1681x; 15 U.S.C. §§ 6501–6506. To clarify: the breadth of an agency's authority depends not just on the scope of its substantive authorization, but also the capacities it has been given and the amount of money it has been authorized to spend.

[245] 15 U.S.C. § 45; 12 U.S.C. § 5531.

[246] EMERSON, *supra* note 247, at 151.

and maximizing the net benefits.[247] Suppose that an agency is tasked with minimizing the impact that a given loan product has on low- income people. It will need experts to determine the current impacts of that product and the likely impacts of different potential regulatory interventions. It will need experts to help it sort through which interventions are consistent with its legal authority and perhaps even which interventions would present public relations problems. But these experts work in service of a set of values that have been determined through a political process (specified by Congress and/or by political agents at the agency, in response to social movements). The agency will be aiming forsome combination of intra-consumer fairness, fair dealing, and enhancing the autonomy of low-income consumers. It will surely be willing to accept a massive reduction in measured net willingness to pay if the costs are highly concentrated among higher-income households but the benefits concentrated among low-income households.

VI. Conclusion

Consumer protection scholars do not tend to be theorists (unless they are also neoclassical economists) and (non-neoclassical) theorists do not tend to focus on consumer protection. One of the central purposes of this article is to change that by clearing discursive territory in which to debate the political economy of consumer protection with a broader conceptual palette than has been customary. Clearing that ground has meant covering an unusually large amount of territory, drawing from an unusually broad range of theoretical traditions, and moving in and out of examples from across a wide ranging field of law. But let me end by summing up the basic political and conceptual thrust of my own position.

There is an intuitive appeal to the basic idea that an area of law devoted to the interests of consumers ought to concern itself with making consumers sovereign over the market. Consumer sovereignty sounds an awful like it means consumer power. And it does, but only in a particular type of institutional setup in which a consumer's ability to choose between different commodities enables her to determine the direction of production to serve her interests as well as possible given others' interests and current technology.

I have argued that, outside of the impossible conditions in which consumer choice implies total control over a market—let alone a whole economy—the role of consumer choice is much more circumscribed and much more sensitive to the structure of market governance. And consumer choice can only be a guide to moral inquiry if one ignores how humans arrive at our views and make our decisions. Consumer choice surely plays some role in directing production, but that role is far from the simple one suggested by consumer sovereignty.

In the real world, ensuring that a market does not undermine the interests of consumers requires an exercise of sovereignty in a more political sense. Consumers, viewed as whole humans influenced by social conditions, capable of moral reasoning,and prone collective forms of mobilization in addition to choice on the market, must be able to discover and express their interests through the process of contestation over the control of shared resources. If this is a form of consumer sovereignty, it is a form of public and not private sovereignty. It is an aspect of the apparatus to ensure democratic control over the social provisioning process.

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[247] *See generally* KYSAR, *supra* note 246.