

21 Health Matrix 189, *

n27 I have previously argued that one practical, constitutionally permissible, and normatively estimable way of constraining the adverse influence of corporate advertising is to focus on the extent to which commercial speech is misleading, and develop a more psychologically informed conception of how human beings can be misled through manipulation of unseen cognitive and motivational biases and vulnerabilities. See *Resisting Deep Capture*, supra note 22, at 542-83. But enforcement of any consumer protection standards by external government administration suffers from regulatory inefficiencies that are well documented. See *The Public Choice Problem in Corporate Law*, supra note 8.

n28 See, e.g., Gregory S. Carpenter et al., *Meaningful Brands from Meaningless Differentiation: The Dependence on Irrelevant Attributes*, 31 J. OF MARKETING RES. 339 (1994). Carpenter and his colleagues designed an experimental setting in which they asked subjects to rank their preferences for products said to have various attributes. The experiment deliberately included objectively meaningless bluster in its description of some product attributes. *Id.* at 342. For example, in one version of the experiment, the researchers presented subjects with hypothetical down jackets, most of which were said to contain "regular down filling," but one of which was said to contain "alpine class down fill." The latter attribute was wholly meaningless (the researchers just made up the term and the attribute "alpine class down fill."). *Id.* When asked to evaluate the products the subjects consistently ranked the "alpine class down fill" jackets as being superior to those described as having regular down fill, thus "demonstrating that buyers positively value the differentiated brand if the true value of the irrelevant attribute is not revealed to them." *Id.* at 343.

The experimenters explained this outcome by reference to the fact that their subjects were engaged in a decision-making process characterized by limited cognitive resources and limited time. (This is true of all subjects, all consumers, and all humans—our brains and our time on Earth are finite, and thus our ability to take in and process information about the world around us is limited. See generally *The Situational Character*, supra note 16 (reviewing social science of human decision-making and its relevance for legal analysis)). Carpenter et al.'s subjects relied on a host of cognitive heuristics, short-cuts, and rules-of-thumb, to aid them in their decision-making. These decision-making processes can be relatively easily manipulated, as Carpenter et al.'s study helps to demonstrate. For example, one heuristic that humans regularly employ, according to social scientists, is a general theory of communication which holds that "the purpose of communication is to inform, to communicate something not already known." Carpenter et al., supra note 28, at 341 (citation omitted). Thus, consumers are cognitively biased towards believing that information communicated to them will be meaningful. *Id.* Additionally, because our limited cognitive powers preclude us from assessing every element of circumstances in which we find ourselves, we tend to focus our evaluative efforts on those elements in a given environment which are most highly salient. This cognitive tendency can be highly useful, as for example when walking through the woods we might ignore the pallid dynamics of the bugs or worms in our path and focus instead on the rather vivid Mountain Lion in front of us. Carpenter et al. argue that these dynamics were at work in their down jacket study: "The irrelevant attribute makes the differentiated brand distinctive in consumers' minds—not only different but more salient, perhaps perceptually dominant, and therefore preferred." *Id.* at 341 (citation omitted).

Our cognitive frailties thus leave us vulnerable to manipulation by discursive methods that the law calls "mere" puffery. Unfortunately, the social science also suggests that the manipulative power of advertising irrelevant product attributes is not easily cured by simply pointing out the source of the manipulation. After their basic design, Carpenter et al. took their inquiry a step further. They revealed to their subjects that the term "alpine class down fill" was meaningless, and that the down in jackets containing it was no different than regular down fill. Even after being informed that the "alpine class down fill" bluster was meaningless, subjects persisted in evaluating the "alpine class down fill" jackets more favorably than the regular jackets. *Id.* at 341-43. "Subjects preferred the differentiated brand regardless of the information revealed to them, suggesting that the primary impact of the irrelevant attribute was to increase the competitive salience of its brand." *Id.* at 344.

Carpenter and his co-authors rightly conclude that findings such as these cast doubt on the conventional models of consumer behavior that inform many areas of law and social policy:

Our results are somewhat disquieting for the model of rational choice. Central to this view is the notion that preferences are fixed, exogenous, and revealed by choice. In this context, more information improves decision making—better informed consumers make better judgments. Irrelevant information in such a framework is immaterial and should not affect decisions. We show that irrelevant information does indeed have an impact. A brand attribute may not have objective value. Rather, preferences for it may be constructed in response to the context in which valuation is made. This suggests that, contrary to the model of rational choice, preferences are endogenous, that is, constructed rather than revealed, and more information can bias decisions systematically.

Id. at 348 (citation omitted). Findings such as these cast doubt in particular, I argue, on the shareholder primacy theory of corporate law, which presumes that the profit-motive serves not just shareholder interests but also consumer interests, by forcing firms to discern consumer interests and serve them. If it is true, as the social science suggests, that corporations can often pursue profits for shareholders by manipulating or misleading consumers, rather than discerning and serving consumer desires, then we may have reason to doubt the social utility of shareholder primacy in firm governance. See also *Resisting Deep Capture*, supra note 22, at 525-38 (reviewing contradictions between the law's assumptions and social science's conclusions about the power of puffery).

n29 See *Resisting Deep Capture*, supra note 22, at 521.

For internal use only