

Reshaping the American Concept of Consumer Interest in the Food Policy Debate

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INTRODUCTION

On November 24, 2010,¹ San Francisco's Board of Supervisors (hereinafter "the Board") enacted an ordinance banning the bundling of toys with children's meals that do not meet specific nutritional requirements.² The Board faced strong public and political opposition to the passage of the ordinance, even from those that typically support anti-obesity and other public health initiatives. San Francisco Mayor Gavin Newsom vetoed the ordinance, for "[d]espite [the ordinance's] good intentions, [he could not] support this unwise and unprecedented governmental intrusion into parental responsibilities and private choices."³ Ultimately, there was sufficient support on the Board to override Newsom's veto, and the ordinance passed. Though the Board won the political fight over enacting the ordinance, the success of the regulation in the domain of public opinion is much less certain.

Since the ordinance was first proposed, it has drawn intensive public criticism. Its opponents perceive the regulation as an unwelcome intrusion of governmental authority into the private realms of personal responsibility and individual choice. Most vividly, the California Restaurant Association opposed the legislation through images, depicting a child with a toy in handcuffs with the headline, "Who Made Politicians the Toy Police?"⁴ This public outcry against the invasion of the "nanny state" is nothing new, yet the divisiveness over this ordinance is quite puzzling in light of its relatively narrow impact on actual consumer choices. Even with the ordinance, consumers can choose the exact same combination of food items as they would have before. The only difference is that now, if a consumer chooses an unhealthy combination meal, he or she will have to buy the toy separately. Therefore, the ordinance is more accurately characterized as creating an incentive to provide healthy children's meals, not as a ban against unhealthy children's meals, as these options are still available.

1. The Board of Supervisors first passed the ordinance on November 2, 2010. See Eric Mar, *Opposing View on Child Obesity: Put Kids' Health First*, USA TODAY, Nov. 8, 2010, http://www.usatoday.com/news/opinion/editorials/2010-11-09-editorial09_ST1_N.htm. (San Francisco Mayor Gavin Newsom vetoed the ordinance on Friday, November 12; see Michael Martinez, *Mayor Vetoes San Francisco Ban on Happy Meals with Toys*, CNN (Nov. 12, 2010, 8:33 PM), <http://www.cnn.com/2010/US/11/12/california.fast.food.ban/index.html>. The Board of Supervisors voted on November 23 to override the veto 8 to 3. Rachel Gordon & Heather Knight, *Supes Override Meal-Toy Veto*, S.F. CHRON., Nov. 24, 2011, http://articles.sfgate.com/2010-11-24/bay-area/24943611_1_veto-meal-toy-drug-companies. The ordinance took effect in December 2011. *Id.*

2. See S.F., CAL., HEALTH CODE art. 8, §§ 471.1-.9 (2010), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances10/o0290-10.pdf>.

3. Martinez, *supra* note 1.

4. Poster, Cal. Rest. Ass'n, *Tough on Crime?*, available at <http://www.calrest.org/go/CRA/?LinkServID=2300091B-C688-4663-BAC00E1F7351F460&showMeta=0> (last visited Nov. 27, 2011).

In this Note, I argue that the debate over the San Francisco ordinance is not about the actual effects of the law, but instead is about the law's expressive value and how this symbolic meaning affirms or challenges the values of different groups in society. Supporters of the ordinance primarily have a solidaristic worldview, meaning that they look to governmental and other societal-level remedies to address problems. Opponents of the ordinance, however, have primarily an individualistic worldview, meaning that they prioritize individual choice and personal responsibility in problem solving. I argue that because of this dichotomy in ideologies, supporters of the San Francisco ordinance cannot rely on the traditional method of persuasion in the public health context—the approach of simply relying on the dissemination of positive scientific evidence to shape public opinion. This traditional approach will further polarize, not persuade, the ordinance's opponents, who prioritize individual autonomy over systematic governmental interventions. Rather, to be successful the ordinance's supporters need to respond to their critics by directly addressing the expressive nature of the ordinance debate. Such an approach requires two steps. First, ordinance supporters should challenge their individualistic opponents' assumption that the children's meal ordinance limits individual choice. Second, rather than fighting their opponents' claim that the ordinance is destroying consumer *economic* interests in having the maximum number of consumer choices, the supporters need to reframe the debate's discourse to show how the ordinance promotes consumer *protection* interests in health and safety. The purpose of this reframing is not to ignore the legitimacy of consumer economic interests but to bring attention to consumer protection interests. Though consumer protection interests are critical, as of yet, they have not been at the forefront of the ordinance debate.

In Part I, I begin to develop this argument by laying out the discursive frameworks used by the opponents and supporters of the children's meal ordinance. Section I.A demonstrates how critics focus on the symbolic meaning of the ordinance, while Section I.B shows how supporters focus on the actual impacts of the ordinance.

In Part II, I utilize cultural cognition theory to demonstrate how cultural worldviews shape public responses to the arguments of both supporters and opponents of the ordinance. Section II.A defines the individualistic and solidaristic cultural worldviews in more detail and shows how these worldviews parallel the different ideologies on both sides of the ordinance debate. Section II.B argues that individuals will evaluate the persuasiveness of information presented by each side based on the information's conformity to their cultural worldviews. Furthermore, the perceived cultural identity of the supporters and opponents of the ordinance themselves plays a key role in the debate, and San Francisco's highly salient liberal identity critically limits the city's proposals from being accepted by those with an individualistic cultural worldview.

In Part III, I sharpen and extend my focus on the individualistic cultural worldview, which presents a key challenge for the supporters of the ordinance. Specifically, Section III.A examines causal misattribution and weight bias, both of which are generated by an individualistic cultural worldview and bar the arguments of the ordinance supporters from gaining traction. Section III.B briefly explores some causes for the prevalence of an individualistic worldview in American society. Having developed an understanding of the individualistic worldview through this prior analysis of its causes and effects, I then, in Section III.C, turn to the strategic response that supporters of the ordinance should adopt. This Section argues that supporters should move beyond the traditional public education approach and directly address the expressive nature of the law. I draw from the history of tobacco regulation to show that reversing even deeply entrenched cultural values is possible.

In Part IV, I lay out two principal ways that supporters of the ordinance should directly engage the expressive nature of the debate. Section IV.A challenges the assumption that the ordinance necessarily reduces informed decisionmaking. Instead, independent, informed decisionmaking is already limited by consumers' lack of understanding of basic nutritional sciences and food marketers' attempts to mislead consumers and usurp parental authority. Moreover, I contend that the ordinance actually increases the number of meaningful consumer choices and that, even if it did limit individual choice, there are three countervailing policy considerations that would still justify passing of the ordinance. Section IV.B argues that supporters of the ordinance should reframe consumer interest to prioritize consumer protection interests in health and safety, and considers some of the possible challenges that the United States faces in making this shift. Reframing the debate may be particularly difficult because the debate implicates other highly sensitive cultural issues in American society, such as the possible contribution of working mothers to the obesity crisis and the correlation of unhealthy diets with specific racial groups. Despite these challenges, numerous historical examples demonstrate that it is possible to shift to different conceptions of consumerism through careful, deliberative advocacy. Focusing on the Progressive Era, I analyze both the general shift from producerism to the rise of American consumerism and the specific shift within the producerist sphere from a laissez-faire individualism to a more bureaucratic state that prioritizes the dignity of laborers as a class. Just as the Progressive Era's changes were a necessary response to the rapidly shifting class relationships triggered by industrialism, changes today are necessary to adapt to shifts in our relationship with food driven by technological "advancements" in food production. Accordingly, additional government action, such as the ordinance, is necessary to enable us to make meaningful, informed choices as consumers.

Section IV.C then addresses a possible criticism to my central proposal—

namely, the criticism that calling for supporters to directly address the expressive values of the ordinance is illiberal and undemocratic. Critics may argue that supporters should still favor the traditional public education strategy, since statistical and scientific explanations are more rational and legitimate than debating the cultural values of different societal groups. However, I argue that the opponents of the ordinance are already engaged in public moralizing, and, more importantly, I apply Max Weber's theory of knowledge formation to show that addressing the expressive moral values of the ordinance does not necessitate either illiberal or biased decisionmaking.

After addressing this primary concern, I conclude by arguing that physicians are the stakeholders who should lead the efforts in reframing the expressive value of the ordinance debate. While San Francisco is limited by its ultra-partisan cultural identity, physicians are uniquely situated in that they have the professional authority, legitimacy, and broad acceptability to lead this policy campaign. To convince the public that the overconsumption of fast food is a public, rather than individual, crisis, advocates need to go beyond public education and focus on the expressive moral values of their claims. Physicians are in the prime position to lead this charge.

I. RHETORICAL FRAMEWORKS OF THE SAN FRANCISCO ORDINANCE DEBATE

To an outsider, the controversy over the San Francisco ordinance may seem disproportionate to the ordinance's relatively limited impact on consumers' actual consumption choices. Specifically, while the ordinance prevents a fast food chain from bundling the sale of an unhealthy children's meal together with a toy as a single menu item, the ordinance does not ban the sale of either the toy or the unhealthy meal alone. Consequently, customers can still choose to purchase both items simultaneously, they just need to order them separately.⁵ Functionally, the ordinance is not so much a *ban*, but rather a change in the *default* children's meal from an unhealthy to a healthy option. In other words, the healthy meal combination is the standard default option, but the unhealthy meal combination is

5. Note that there is the need to worry about whether the ordinance will effectively narrow consumer choice if in fact the future price of buying the two items separately is much higher than the current bundled cost. While it is impossible to predict exactly how fast food restaurants will change their pricing options in response to the ordinance, as it does not become effective until December 2011, it is unlikely that the cost of the unhealthy meal and toy separately will be much greater than the bundle, as fast food restaurants are not principally trying to profit from the sale of the toy, but instead wish to use the toy as an incentive to attract children to purchase the rest of the bundle. See e.g., Tom Stewart, *The Negative Effects of Child-Centered Marketing for Fast Food*, HELIUM, <http://www.helium.com/items/1483355-fast-food-ads-fast-food-marketing-fast-food-and-children-fast-food-health> (last updated Jan. 7, 2010) (stating that toys in children's meals are a key part of the advertising and marketing schemes created by fast food restaurants to attract children to their unhealthy products).

still available if customers take the initiative to purchase the toy separately.⁶ The effects of the ordinance can be further circumvented not only by consumers, but also by the fast food restaurants themselves. Fast food restaurants can effectively nullify any cost barriers to purchasing the toys separately by selling them for only a nominal fee.⁷ Given the relative ease with which restaurants can structure their purchasing options around the law and customers can purchase the unhealthy meal and toy as separate items, the ordinance effectively cannot force change in consumers' resulting meal choices.

In spite of its minimal impact, the ordinance has generated extensive controversy. In this Part, I describe the discursive frameworks surrounding this debate. The first Section of this Part argues that critics of the ordinance are opposed to the expressive value of the ordinance, not its actual impact. Oppositely, the second Section argues that the supporters of the ordinance are primarily focused on the ordinance's actual impact on childhood obesity rather than on the ordinance's symbolic meaning.

A. Opponents of the Ordinance

Opponents of the children's meal ordinance object to the fact that the law supposedly limits individual choice.⁸ However, in this Section, I show that their criticism focuses not on the actual *effects* of the law on actual consumer choices, but on what they perceive the law to be *expressing* about individual choice. For example, Restaurant Association spokesman Daniel Conway framed his objections to the ordinance in explicitly expressive terms, claiming that San Francisco's ordinance was "sending the message that parents are making the wrong choices, and therefore, they should no longer have that choice."⁹ In addition to consumer choices, others recognize that the impact on producers is similarly of a symbolic nature: "The fallout from San Francisco won't be

6. Trevor Hunnicutt, *Happy Meal Ban Passed: San Francisco Says No to Toys*, CHRISTIAN SCI. MONITOR, Nov. 3, 2010, <http://www.csmonitor.com/Business/Latest-News-Wires/2010/1103/Happy-Meal-ban-passed-San-Francisco-says-no-to-toys> ("If the kids want the toys, they can still get the toys.").

7. *See id.* (arguing that while it is impossible at this point to predict exactly how fast food restaurants will respond to the ordinance, they are unlikely to charge a large separate fee for the toys, which are mostly used as a promotional item to incentivize children to purchase the children's meals).

8. *See, e.g.,* Liz Robbins, *If the Meal Is Too Fatty and Salty, a City Council Proposal Would Take the Toy Away*, N.Y. TIMES, Apr. 6, 2011, <http://query.nytimes.com/gst/fullpage.html?res=9504E0D61F3CF935A35757C0A9679D8B63> ("This proposal robs parents of choice.").

9. Byron Ginsburg, *Mixed Message from Mar(s)*, FREETOCHOOSEOURMEALS.COM (Oct. 1, 2010), <http://www.freetochooseourmeals.com/tag/san-francisco-toy-ban>; *see also* Frank Miele, *Freedom of Choice: Just Another Thing We've Lost?*, DAILY INTER LAKE, Nov. 21, 2010, http://www.dailyinterlake.com/opinion/columns/frank/article_48c11e9c-f50f-11df-b52b-001cc4c002e0.html (framing the McDonald's ordinance as a loss of liberty and freedom of choice).

financial -- there are just 19 McDonald's in the city. Instead, it's symbolic."¹⁰ In fact, for some opponents, that the law lacks actual impact and is just "legislation that pushes the boundaries of government for purely symbolic reasons," renders the law even more offensive.¹¹

Critics have explicitly noted that the actual impact of the ordinance is relatively narrow in that it does not force consumers to change their fast food consumption preferences. For example, critics have argued that the ordinance is simply a case of "liberals unleash[ing] their coercive urges" that "will probably have no effect on the health of San Franciscans."¹² Other critics have argued that focusing on fast food restaurants is misguided in general, as it is simply an expressive "sideshow" from the actual arenas where the childhood obesity battle should be fought—in schools¹³ and in homes.¹⁴ Specifically, critics of the ordinance have also recognized the ease with which customers can circumvent the law, by arguing the following:

The anti-Happy Meal campaign is a silly, self-congratulatory exercise; removing the toy is not going to send consumers flocking to Whole Foods. They will still go to McDonald's, buy a burger and fries without the box, and perhaps ask the cashier for whatever movie-themed promotional trinket lies behind the counter.¹⁵

Similarly, other critics have noted that customers can also avoid the law by simply going to one of the many fast food restaurants that lies just beyond the

10. Melanie Warner, *San Francisco's New Ordinance: The Beginning of the End for Happy Meal Toys*, BNET (Nov. 3, 2010, 5:37 PM), <http://www.bnet.com/blog/food-industry/san-francisco-8217s-new-ordinance-the-beginning-of-the-end-for-happy-meal-toys/1935>.

11. Benjamin Wachs & Joe Eskenazi, *How the Happy Meal Ban Explains San Francisco*, S.F. WEEKLY, Jan. 19, 2011, <http://www.sfweekly.com/content/printVersion/2330057>; see also Matthew Bastian, *Sad Tale of the Happy Meal*, TIMES (Trenton, N.J.), Dec. 20, 2010, <http://www.nj.com/opinion/times/oped/index.ssf?base/news-1/1292827538253910.xml&coll=5> ("The anti-Happy Meal campaign is a silly, self-congratulatory exercise; removing the toy is not going to send consumers flocking to Whole Foods.").

12. Mona Charen, *The Happy Meal Banners and Their Ilk*, NAT'L REV. ONLINE (Nov. 16, 2010, 12:00 AM), <http://www.nationalreview.com/articles/253332/happy-meal-banners-and-their-ilk-mona-charen>.

13. *Unhappy Meal*, BLADEN J. (Elizabethtown, N.C.), Nov. 22, 2010, http://www.bladenjournal.com/pages/full_story/push?articleUnhappy+meal%20&id=10407558&instance=secondary_opinion_left_column.

14. Michael O'Connor, *Toying With Kids' Health*, OMAHA WORLD-HERALD, Jan. 30, 2011, <http://www.omaha.com/article/20110130/LIVEWELL02/701309882/1161> ("Jim Partington of the Nebraska Restaurant Association likened the toy debate to a 'sideshow.' Kids eat most of their meals at home, he said, so improving nutrition there is key to combating obesity.").

15. Matthew Bastian, *supra* note 11, at A9.

perimeter of San Francisco and is not subject to the ordinance.¹⁶

B. Supporters of the Ordinance

In contrast to the critics of the San Francisco ordinance, most supporters primarily focus not on the expressive value of the ordinance, but rather on its actual impact on obesity. To support this non-partisan public health position, proponents of the ordinance base their claims on the results of scientific studies and other forms of empirical evidence that highlight the severity of the childhood obesity crisis and the ordinance's potential to be an effective solution. For example, in the "Findings" section of the San Francisco ordinance, the text cites numerous studies and surveys detailing the growth of the children obesity epidemic in San Francisco, the impact of eating at fast food restaurants on childhood obesity, and the effect of toy marketing on children's consumption choices.¹⁷ In other words, the language of the ordinance focuses on the effects of toy marketing on the childhood obesity crisis in San Francisco and the potential *impact* of the ordinance in addressing this localized problem. Beyond the text itself, supporters of the ordinance often refer to studies showing (1) that the rates of childhood obesity have tripled over the last three decades¹⁸ and (2) that there exists a causal relationship between childhood obesity and fast food consumption.¹⁹ Supporters of the ordinance primarily frame the law in terms of how it impacts the childhood obesity crisis rather than how it champions liberal values.²⁰

While primarily focusing on the law's potential impact, some supporters do address the law's expressive and symbolic elements. Ross Mirkarimi, one of the San Francisco supervisors who voted for the ordinance, said that "he is proud of the board for 'pushing the envelope' with the legislation, which he said has spurred discussion nationwide on the issue of healthy fast-food options and what role local governments should have."²¹ Likewise, other supporters have stated that the law "will send a strong message to companies and force them [to] change

16. Meredith Jessup, *San Francisco Takes the "Happy" Out of Happy Meals*, BLAZE (Nov. 11, 2010, 6:01 PM), <http://www.theblaze.com/stories/san-francisco-takes-the-happy-out-of-happy-meals> (noting "that anyone could circumvent the law easily: 'Someone doesn't have to travel very far – a mile outside San Francisco – to get the traditional McDonald's Happy Meals experience'").

17. See S.F., CAL., HEALTH CODE art. 8 § 471.1 (2010), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances10/o0290-10.pdf>.

18. See, e.g., *Overweight in Children*, AM. HEART ASS'N (Mar. 29, 2011, 1:24 PM), http://www.heart.org/HEARTORG/GettingHealthy/Overweight-in-Children_UCM_304054_Article.jsp.

19. Sarah Parsons, *Unhappy Meals: San Francisco May Ban Toys with Kids' Fast Food*, CHANGE.ORG (Sept. 28, 2010, 12:53 AM), <http://news.change.org/stories/unhappy-meals-san-francisco-may-ban-toys-with-kids-fast-food>.

20. See, e.g., *id.* (focusing on the effect of unhealthy children's meals on health).

21. Dan McMenamin, *Supes Override Veto of Fast Food Toy Ban, Should Go into Effect Next Year*, SF APPEAL (Nov. 23, 2010, 4:03 PM), <http://sfappeal.com/news/2010/11/supes-override-veto-of-fast-food-toy-ban-should-go-into-effect-next-year.php>.

the way they do business.”²² However, many other supporters are sensitive to the fact that framing the law in expressive terms could actually create more resistance than support. These supporters are wary of highlighting that San Francisco is intentionally pushing the boundaries, as it could trigger a push for the city’s outlier liberal tendencies to be resisted and reigned in.²³ For example, Eric Mar, the San Francisco supervisor who first introduced the ordinance, was careful to explicitly describe the law not as a dramatic shift in policymaking, but as a small, incremental step that is part and parcel of a broader package of food policy proposals—such as menu labeling laws and improvements to school lunches—that local governments had been enacting over the last decade.²⁴

The arguments adopted by both sides uncover the discursive frameworks underlying the ordinance controversy, which in spite of their importance have seldom been at the forefront of the debate.

II. THE ORDINANCE DEBATE THROUGH THE LENS OF CULTURAL COGNITION THEORY

In this Part, I utilize cultural cognition theory to uncover the moral and cultural beliefs underlying the ordinance debate. Fundamentally, the heart of the debate is over which set of cultural worldviews the ordinance prioritizes, not about the actual consequences of the ordinance. Cultural cognition theory also reveals that individuals evaluate the persuasiveness of information based on the information’s conformity to their cultural worldviews, and San Francisco’s liberal identity could prevent its proposals from gaining widespread acceptance. I develop this argument by first laying out the key provisions of cultural cognition theory and then applying these provisions to the ordinance debate.

A. Individualistic Versus Solidaristic Cultural Worldviews

Cultural cognition theory refers to a number of social and psychological mechanisms that collectively operate to ensure that our cultural beliefs are the lens through which we perceive and make sense of objective information.²⁵ Even when presented with the same facts, individuals with different cultural

22. David Orr, *San Francisco Delays Vote on Controversial Toy Ban*, CHANGE.ORG (Oct. 20, 2010), <http://news.change.org/stories/san-francisco-delays-vote-on-controversial-toy-ban>.

23. Eric Mar, *Creating Access to Healthier Meal Options*, YALE RUDD CENTER (Feb. 23, 2011), http://streaming.yale.edu/cmi2/opa/podcasts/health_and_medicine/mar_toy_022211.mp3; see also Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117-18 (2007) (demonstrating with a number of historical examples that the more that a policy reflects relatively extreme, outlier beliefs, the more danger there is that the supporters explicitly touting these beliefs could polarize rather than convince their opponents).

24. Mar, *supra* note 23 (“This is a simple and modest policy that holds fast food accountable.”).

25. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150 (2006).

worldviews will understand and process this information differently. However, this is not a deliberate process; individuals are not consciously shaping their responses to information to conform to their existing cultural worldviews. Rather, individuals believe that they are “objectively” responding to information, but their existing values affect how this process occurs. From the viewpoint of cultural cognition theory, culture is not a bias consciously driving decisionmaking, but instead it is an implicit and unconscious filter through which individuals engage in rational information processing.²⁶ Numerous disciplines use the term “culture” to reference a wide breadth of concepts, but cultural cognition theory uses the term “culture” to refer specifically to the different types of cultural worldviews, developed by Mary Douglas and Aaron Wildavsky, that frame how information is understood.²⁷ Douglas and Wildavsky developed multiple dimensions for classifying of cultural worldviews, but for the purposes of this Note only the solidaristic versus individualistic dimension is relevant.²⁸

People with an individualistic worldview “believe that individuals are expected to secure their own needs without collective assistance” and “individual interests enjoy immunity from regulation aimed at securing collective interests.”²⁹ Therefore, the opponents of the ordinance can be classified broadly as having an individualistic worldview, for most believe that the ordinance is an unnecessary governmental intrusion into the realms of personal responsibility and individual choice.³⁰ Oppositely, those with a solidaristic worldview believe “collective needs trump individual initiative” and “society is expected to secure the conditions of individual flourishing.”³¹ Therefore, supporters of the ordinance can be broadly classified as having a solidaristic worldview, as most believe that governmental intervention is necessary to address the problem of childhood obesity.

The solidaristic versus individualistic distinction extends beyond the specific context of the San Francisco debate. It also reflects the division in opinions between the two sides of the broader debate on fast food regulations.³² Specifically, a survey of media reporting on fast food regulatory issues shows

26. *Id.*

27. *Id.* at 153 (citing MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* (1982)).

28. *Id.*

29. *Id.* at 151.

30. Of course, this Note does not claim that every opponent to the ordinance has an individualistic worldview. Rather, generally classifying opponents as having an individualistic worldview and supporters as having a solidaristic worldview allows for the argument to illuminate some of the key differences in the discursive elements of the debate. For examples of criticism that the ordinance infringes on individual choice, see *supra* Section I.A of this Note.

31. Kahan & Braman, *supra* note 25, at 151.

32. It is beyond the scope of this Note to apply cultural cognition theory to the broader regulatory debate. However, it is important to introduce this application of the theory to a new field, as the well-developed body of research and analysis underlying cultural cognition theory can substantially contribute to and inform the broader debate on fast food regulation.

that local governments, consumer groups, nutrition and public health academics, and medical lobby groups tend to favor an individualistic worldview that assigns “responsibility to government, business and larger social forces” for regulating the fast food industry.³³ On the other hand, food and advertising industries favor an individualistic frame that focuses on individual parental responsibility for monitoring and regulating the consumption of fast food.³⁴

In sum, the views of the supporters and opponents do not just reflect differences on the issues specific to the ordinance debate, but also much more fundamental cultural worldviews over the proper delegation of responsibility between individuals and society in general.

B. Biased Assimilation: How Cultural Worldviews Mediate Information Processing

Clearly, the interests of the San Francisco Board align with a solidaristic worldview, while the interests of the fast food restaurants align with an individualistic worldview. The key issue, however, is how the general public responds to the claims made by each side. Not surprisingly, cultural cognition facilitates this process.

According to cultural cognition theory, people’s responses to the facts and arguments presented by both the supporters and opponents of the ordinance do not depend solely on the substance of presented information. Rather, responses also are predicated both on the source of information and on beliefs about that source.³⁵ In other words, a person is more likely to react positively to a given piece of information if it comes from a source that the person perceives as having a worldview in alignment with his or her own. This process, in which cultural worldviews mediate how people process information, is known as “biased assimilation.”³⁶ Biased assimilation recognizes that individuals are not often in positions to investigate personally a wide range of risks, and, therefore, individuals have to rely on those whom they trust for risk assessment. Douglas and Wildavsky note that people naturally trust those who share their values.³⁷ Since the experts that people tend to trust generally share their cultural commitments, the biased assimilation process often results in a reaffirmation of one’s own cultural worldviews.³⁸

33. Regina G. Lawrence, *Framing Obesity: The Evolution of News Discourse on a Public Health Issue*, 9 HARV. INT’L J. PRESS/POL. 56, 57 (2004).

34. *Id.* at 64.

35. Kahan & Braman, *supra* note 25, at 151, 155-56.

36. *See id.* at 163-64 (citing Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979)).

37. *Id.* at 151.

38. Beyond Kahan’s cultural cognition theory, this phenomenon has been widely studied and is also described as “confirmation bias,” the tendency to seek out information that bolsters pre-

Furthermore, the link between cultural worldviews and credibility “is not severed by disconfirming empirical information.”³⁹ “[R]ather than update their prior beliefs based on new information, [individuals] tend to evaluate the persuasiveness of new information based on its conformity to their experience.”⁴⁰ Individuals tend to dismiss claims as unreliable if they view them as originating from a source that does not share their cultural commitments.⁴¹ In the ordinance debate, San Francisco’s salience as a “public communicator[] unmistakably associated with particular cultural outlooks or styles”⁴² plays a critical role in the public acceptability of the city’s proposals, regardless of the substance of the empirical information underlying its policies. To the extent that San Francisco is viewed as a uniquely liberal entity largely unrepresentative of the rest of the country, rather than as a “neutral” policymaking entity that reflects a range of worldviews, the city’s enactment of the ordinance is less easily acceptable to those with a cultural worldview.

Indeed, other examples of the rhetoric used by the critics of the ordinance demonstrates just how much biased assimilation plays a role in the San Francisco ordinance debate. Specifically, many opponents have ignored the substance of the law itself and have focused on the fact that it originated from San Francisco, which they view as a bastion of unleashed liberalism with residents whose beliefs are misaligned with mainstream American political values.⁴³ “The Happy Meal ordinance is not at all surprising given San Francisco’s famously liberal leanings.”⁴⁴ As one commentator wrote, “The uber-bohemians of San Francisco love this sort of thing; others, maybe not so much.”⁴⁵ More importantly, other

existing views and to ignore data that contradicts those views. The term confirmation bias was first developed by Peter C. Watson. See P.C. Watson, *On the Failure To Eliminate Hypothesis in a Conceptual Task*, 12 Q.J. EXPERIMENTAL PSYCHOL. 129 (1960).

39. See Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635 (1951); Kahan, *supra* note 23, at 121; Irving Lorge, *Prestige, Suggestion, and Attitudes*, 7 J. SOC. PSYCHOL. 386 (1936).

40. Kahan, *supra* note 23, at 121.

41. *Id.* (citing Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 28 (1993), which demonstrates this effect experimentally with a sample of trained statisticians).

42. Dan M. Kahan, *Fixing the Communications Failure*, 463 NATURE 296, 297 (2010).

43. See, e.g., Charen, *supra* note 12, (citing the ban as an example of “[w]hen liberals unleash their coercive urges”); Laurence D. Cohen & Gina Barreca, *Life, Liberty and the Pursuit of Happy Meals*, HARTFORD COURANT (Conn.), Jan. 30, 2011, http://articles.courant.com/2011-01-30/news/hc-op-cohen-barreca-happy-0130-20110130_1_cheeseburger-column-tonka-trucks (describing the creators of the ordinance as “[t]he California nutballs”); Ronald V. Miller, Jr., *McDonald’s Happy Meal Lawsuit*, MD. INJURY L. BLOG (Dec. 16, 2010), http://www.marylandinjurylawyerblog.com/2010/12/mcdonalds_happy_meal_lawsuit.html (referencing “the liberal bastion of San Francisco”).

44. Trevor Hunnicutt, *Happy Meal Toy Ban Under Consideration in San Francisco*, HUFFINGTON POST (Oct. 2, 2010 4:16 PM), http://www.huffingtonpost.com/2010/10/03/happy-meal-toy-san-francisco-possible-ban_n_748456.html.

45. Charlotte Allen, Editorial, *Stick a Fork in It, We’re Done*, L.A. TIMES, Feb. 13, 2011,

opponents have worried that San Francisco's law could infect other parts of the country.⁴⁶ In response to the passage of the ordinance, "restaurant associations in other states started lobbying lawmakers to ensure [that] the wicked nanny government of San Francisco wouldn't spill over into their states."⁴⁷ As evidenced by these quotes, opponents of the ordinance have not only objected to the message of what the ordinance expresses, but also to the legitimacy of its source.

Biased assimilation theory also suggests that the facts presented by more "neutral" sources are more easily accepted. This is evidenced by comparing the experience of San Francisco to that of Santa Clara County, California. Santa Clara County passed an ordinance that banned the bundling of unhealthy children's meals with toys six months before San Francisco passed its ordinance.⁴⁸ Though the Santa Clara ordinance was controversial, it generated

<http://articles.latimes.com/2011/feb/13/opinion/la-oe-allen-congress-green-20110213>.

46. Warner, *supra* note 10. The perception that San Francisco, and California more generally, is a tipping point for regulatory "epidemics," see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 7 (2000) (likening the birth of new trends and phenomena to "epidemics"), is partially based on the fact that California has on multiple occasions served as the nation's regulatory bellwether, see Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491, 1520 (2007) (describing California as a "policy bellwether"), and repeatedly so in food policy, see Baylen J. Linnekin, *The "California Effect" & The Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAPMAN L. REV. 357, 373 (2010). For example, soon after San Francisco passed its menu labeling ordinance, see *San Francisco Moves Forward on Menu Labeling*, NATION'S RESTAURANT NEWS (Mar. 11, 2008), <http://www.nm.com/article/san-francisco-moves-forward-menu-labeling>, California became the first state to enact its own menu labeling requirements, see Press Release, Ctr. for Sci. in the Pub. Interest, *California First State in Nation to Pass Menu Labeling Law* (Sept. 30, 2008), available at <http://www.cspinet.org/new/200809301.html>. Other local and state governments soon followed suit. See, e.g., Press Release, Ctr. for Sci. in the Pub. Interest, *Philadelphia Passes Strongest Nutrition Labeling Requirements for Chain Restaurant Menus* (Nov. 6, 2008), available at <http://cspinet.org/new/200811061.html>. This eventually led to the adoption of the Federal Menu Labeling Law in 2010. See Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573 (to be codified at 21 U.S.C. § 343(q)(5)). David Vogel of Berkeley's Haas School of Business has documented the "critical role of powerful and wealthy 'green' political jurisdictions in promoting a 'regulatory race to the top,'" generally known as the "California Effect," in a number of regulatory arenas. See Linnekin, *supra*, at 373 (citing DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 6 (1995)).

47. Erin Sherbert, *Other States Trying To Dodge Happy Meal Ban Humiliation*, SF WEEKLY: BLOGS (May 10, 2011 12:42 PM), http://blogs.sfweekly.com/thesnitch/2011/05/happy_meal_ban.php; see also Thomas Pardee, *States of the Nation: Where To Watch and Why*, ADVERTISING AGE, Mar. 7, 2011, <http://adage.coverleaf.com/advertisingage/20110307/?pg=2> ("If a bad idea bubbles up in one state, you'll see it in other states."); Wachs & Eskenazi, *supra* note 11 ("But when you put San Francisco's laundry list of bans alongside New York City's fatwa against trans fats, Chicago's slavery disclosure ordinance . . . , or Seattle's mandatory composting laws . . . , it becomes clear that a left-leaning pack of cities is fundamentally changing the role—and pushing the limits—of local government.").

48. Santa Clara enacted the ordinance on April 28, 2010. See SANTA CLARA COUNTY, CAL., tit.

nowhere near the level of nationwide interest that San Francisco's later ordinance stirred up. From a consequentialist perspective, this imbalance is quite puzzling, given that Santa Clara was the first to introduce this type of law. Moreover, Santa Clara's law affects a much larger population—there are 805,235 people in San Francisco⁴⁹ and 1,781,642 people in Santa Clara County.⁵⁰ The contrast between the public reactions to San Francisco's ordinance and Santa Clara County's can be partially explained by the fact that with San Francisco, “[t]he actions of the city's tiny population . . . often have an outsized impact on our national consciousness and the political landscape.”⁵¹ In other words, while Santa Clara also is a part of outlying liberal California, it has less salience in the national public imagination than San Francisco.

Finally, biased assimilation theory predicts that an individual will perceive the depth of relevant subject-matter expertise to be secondary to a source's perceived cultural commitments.⁵² Soon after San Francisco enacted its ordinance, a mother of two from Sacramento, Monet Parham, filed a class action lawsuit against McDonald's, claiming that the restaurant violated consumer protection laws by using deceptive advertising tactics to target children.⁵³ Many critics of the lawsuit viewed Parham's case as proof that San Francisco's children's meal ordinance triggered a wave of consumers blaming fast food restaurants for their own personal responsibility failures.⁵⁴ Much of the criticism of the case also focused on the fact that Parham was a regional program manager for child nutrition matters and therefore not a “typical” California mother.⁵⁵ Despite these attacks, as someone working directly in child nutrition, Parham presumably had more knowledge about the causes and effects of childhood obesity than a “typical” mother. However, Parham's expertise did not lead to her being perceived as a more credible and legitimate litigant against McDonald's; rather, the public perceived Parham as an agent of the radical California regulatory regime, which tarnished her credibility as a “legitimate” plaintiff. The reaction to Parham's lawsuit highlights the primacy of political partisanship over scientific knowledge; individuals simply do not always operate in accordance

A, div. A18, ch. 22 (2010), available at <http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2010/April%2027,%202010/202926863/TMPKeyboard203040014.pdf>.

49. *State & County Quickfacts: San Francisco (City), California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/0667000.html> (last updated Oct. 18, 2011).

50. *State & County QuickFacts: Santa Clara County, California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/06085.html> (last updated Oct. 13, 2011).

51. Warner, *supra* note 10.

52. See Kahan, *supra* note 23.

53. Complaint, *Parham v. McDonald's Corp.*, No. CGC-10-506178 (Cal. App. Dep't Super. Ct., Jan. 5, 2011), available at http://cspinet.org/new/pdf/mcdonald_scomplaint.pdf.

54. See, e.g., Walter Olson, *McDonald's Suit over Happy Meal Toys by California Mom Monet Parham New Low in Responsible Parenting*, N.Y. DAILY NEWS, Dec. 15, 2010, http://articles.nydailynews.com/2010-12-15/news/27084481_1_french-fries-happy-meals-kids.

55. *Id.*

with the principle that those who know the most about a subject matter should be the ones who inform policy on it.

In sum, this Part reveals the primacy of cultural values to the ordinance debate. The perception of the facts and arguments presented by supporters of the ordinance is ultimately determined by the interaction of the cultural worldviews of the public and the supporters' own perceived cultural identities.

III. CAUSES, EFFECTS AND RESPONSES TO AN INDIVIDUALISTIC WORLDVIEW⁵⁶

This Part enumerates the challenges that an individualistic worldview presents to proponents of the San Francisco ordinance. An individualistic ideology prioritizes individual control and personal responsibility, greatly emphasizing the role that individual action can have in determining weight outcomes. Section III.A first explores two consequences of such beliefs, namely, causal misattribution and weight bias, and Section III.B then examines some potential causes for the prevalence of an individualistic worldview in American society. Lastly, Part C introduces the strategy that supporters of the ordinance should adopt to respond most effectively to those with an individualistic worldview.

A. Consequences of an Individualistic Worldview: Causal Misattribution and Weight Bias

There is widespread scientific consensus that personal responsibility is *not* the predominant determinant of body weight.⁵⁷ Determining causality for weight outcomes is very complex; weight is driven by a multitude of interacting factors, including biology, genetics, personal responsibility and environment.⁵⁸ Moreover, the precise nature of these interactions still is largely unknown.⁵⁹ That said, scientists have concluded that genetic factors play a primary causal role,

56. See Lucy Wang, *Weight Discrimination: One Size Fits All Remedy?*, 117 YALE L.J. 1900, 1904-06 (2008), for a more comprehensive and in-depth analysis of the obesity studies cited in this Section.

57. See, e.g., GINA KOLATA, *RETHINKING THIN: THE NEW SCIENCE OF WEIGHT LOSS—AND THE MYTHS AND REALITIES OF DIETING* 69-70 (2007) (quoting obesity researcher Mickey Stunkard as saying that people assume that the overweight “really could lose weight if [they] settled down and stopped being such . . . fat slob[s]”); Catharine Wang & Elliot J. Coups, *Causal Beliefs about Obesity and Associated Health Behaviors: Results from a Population-based Survey*, 7 INT’L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 19 (2010) (finding that “72% of respondents endorsed the belief that lifestyle behaviors have ‘a lot’ to do with causing obesity, whereas 19% indicated that inheritance has ‘a lot’ to do with causing obesity”).

58. Boyd A. Swinburn et al., *The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments*, 378 LANCET 804 (2011); Walker S. Carlos Poston II & John P. Foreyt, *Obesity Is an Environmental Issue*, 146 ATHEROSCLEROSIS 201 (1999); Steven L. Gortmaker et al., *Increasing Pediatric Obesity in the United States*, 141 AM J. DISEASES CHILD. 535 (1987).

59. See Wang, *supra* note 56, at 1096-1208, for a more thorough discussion of the causalities of obesity.

explaining approximately seventy percent of individual variation in BMI.⁶⁰ Accordingly, although important, individual choice is not the predominant determinant of weight.

In spite of the substantial scientific consensus on the factors leading to obesity, personal responsibility is disproportionately cited in public discourse as the primary cause of obesity.⁶¹ This can be explained by cultural cognition theory discussed above. When multiple causal factors exist for a given phenomenon, people are likely to prioritize the cause most consistent with their cultural worldviews, irrespective of scientific research.⁶² Consequently, the belief that personal responsibility primarily causes obesity is particularly prevalent because it is consistent with an individualistic cultural worldview, which prioritizes individual choice and control.

Discrimination due to weight bias is another consequence of the belief that being overweight largely is a failure of personal responsibility. Though an individualistic worldview embraces the positive idea that an individual has the power to shape one's own life, the darker corollary is that personal failures are one's own fault. The more that individuals believe that body weight is entirely within one's personal control, the more likely they are to negatively evaluate others against on the basis of weight.⁶³ As a result of this weight bias, overweight⁶⁴ people openly are stereotyped as "mean, stupid, ugly, unhappy, less competent, sloppy, lazy, socially isolated, and lacking in self-discipline, motivation, and personal control."⁶⁵

Indeed, these stereotypes of overweight people are primarily judgments about personal flaws and *moral* failings. Weight bias, unlike other forms of discrimination, such as gender or race, cloaks its discriminatory nature by framing weight gain as being within an individual's control. Framing weight as simply a behavioral choice hides the true discriminatory nature of weight bias

60. Hermine H.M. Maes et al., *Genetic and Environmental Factors in Relative Body Weight and Human Adiposity*, 27 BEHAV. GENETICS 325, 325 (1997) (analyzing various methodologies and finding that an integrated model estimates a genetic contribution of sixty-seven percent).

61. Rebecca M. Puhl & Kelly D. Brownell, *Psychosocial Origins of Obesity Stigma: Toward Changing a Powerful and Pervasive Bias*, 4 OBESITY REVS. 213, 215-16 (2003).

62. See, e.g., Kahan, *supra* note 23, at 131-42 (finding that this phenomenon occurs in multiple fields and citing examples such as sodomy; drugs, guns, and smoking; and nuclear energy and global warming).

63. Christian S. Crandall & April Horstman Reser, *Attributions and Weight-Based Prejudice*, in WEIGHT BIAS: NATURE, CONSEQUENCES, & REMEDIES 83, 83 (Kelly D. Brownell et al. eds., 2005).

64. The Centers for Disease Control and Prevention (CDC) identifies as overweight an adult whose body-mass index (BMI)—defined as weight in kilograms divided by the height in meters squared—is between 25 and 29.9. See *Overweight and Obesity: Defining Overweight and Obesity*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/defining.html> (last updated June 21, 2010). The CDC identifies as obese an adult whose BMI is thirty or above. See *id.*

65. Rebecca M. Puhl & Kelly D. Brownell, *Confronting and Coping with Weight Stigma: An Investigation of Overweight and Obese Adults*, 14 OBESITY 1802, 1802 (2006).

and makes it more difficult to eliminate.

Another challenge in generating support for the ordinance is that even those with expert knowledge and personal experience about obesity's actual primary causes are still susceptible to causal misattribution and weight bias. According to a recent study, healthcare professionals share the same prejudices against overweight people as the general public.⁶⁶ Therefore, even though healthcare professionals presumably have more access to, and a better ability to understand, information about the causalities of obesity, these professionals' worldviews still primarily drive their behavior and beliefs. Likewise, overweight individuals, who presumably have more personal experience and understanding of the difficulties of controlling weight through individual behavior, are also susceptible to weight bias.⁶⁷ Individuals' beliefs that weight is largely controllable may "help[] protect against negative effects of stigma by making self-blame and negative attributions less likely."⁶⁸ The idea that personal choice is the key determinant of weight outcomes, which is consistent with an individualistic worldview, can trump both scientific knowledge and personal experience.

This myth of weight controllability also explains the apparent contradictions in several obesity and obesity-related rate trends. Over the last three decades, the obesity rate has risen consistently; "[t]he prevalence of obesity and overweight among US children and adults has more than doubled since the 1970s, and the rate continues to rise."⁶⁹ During this time, however, there has been no research showing a concomitant decrease in personal responsibility values.⁷⁰

66. *Id.* at 1806, 1808 (ranking "[i]nappropriate comments from doctors" as the fourth most common type of stigmatizing situation and finding that physicians are the second most common source of discrimination next to family members: among overweight survey respondents, sixty-nine percent reported discrimination from a physician, and fifty-two percent reported experiencing such discrimination multiple times).

67. Phebe Cramer & Tiffany Steinwert, *Thin Is Good, Fat Is Bad: How Early Does It Begin?*, 19 J. APPLIED DEVELOPMENTAL PSYCHOL. 429, 447 (1998) (finding that overweight children can be just as likely to stigmatize overweight children as non-overweight children). This phenomenon has also been shown to exist with gun ownership. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 452 (1999) ("Survey data show no significant correlation between prior victimization or fear of victimization and positions on gun control. Nor can variation in opinions about gun control be fully explained by variations in violent crime rates across space or time or by variations in the perception of such crime rates. Whatever they say in public, those involved in the gun control debate are not really motivated by beliefs about guns and crime.").

68. Puhl & Brownell, *supra* note 65, at 1813.

69. Youfa Wang & May A. Beydoun, *The Obesity Epidemic in the United States—Gender, Age, Socioeconomic, Racial/Ethnic, and Geographic Characteristics: A Systematic Meta-Regression Analysis*, 29 EPIDEMIOLOGIC REVS. 6, 22 (2007).

70. To the best knowledge of the author, there are no published studies showing that, over the same period of time that U.S. obesity rates have increased, Americans value personal responsibility any less. Rather, there do exist studies demonstrating that the United States places greater emphasis on personal responsibility as compared with other countries, such as France. See, e.g., Abigail C. Saguy et al., *Social Problem Construction and National Context: News Reporting on "Overweight" and "Obesity" in the United States and France*, 57 SOC. PROBLEMS 586, 593 (2010).

Simultaneously, there has been a rise in expenditures at fast food restaurants,⁷¹ and multiple studies have shown a causal association among frequency of fast food consumption and excess energy intake, weight gain, and obesity.⁷² In spite of these trends, public opinion has shifted in the opposite direction, with the prevalence of weight bias increasing, not decreasing.⁷³ The psychological mechanisms of cultural cognition explain this apparent contradiction. Consistent with an individualistic worldview, people blame rising obesity rates as a failure of personal responsibility. When overweight individualistic people turn to analyzing themselves, however, their own personal experiences with weight management may challenge this “myth of controllability.” The fact that they are themselves overweight, and yet presumably without major deficiencies in personal responsibility, directly challenges their individualistic belief that weight gain is a personal responsibility problem. This discomfort, which individuals experience when they are presented with evidence contradicting their beliefs, is known as “cognitive dissonance.”⁷⁴ To prevent cognitive dissonance, individuals may infer an alternative interpretation of the facts that does not conflict with their individualistic cultural worldview. In this case, individuals may implicitly shift their perceptions of what constitutes obesity downwards to conclude that they themselves are not overweight, since they are not personally irresponsible. Although admittedly speculative, this explanation provides a plausible account of the rising prevalence of obesity and weight bias concomitant with a decrease in individuals’ propensity to self-identify as overweight. It also highlights how strongly cultural worldviews can dominate in the face of directly contradicting information.

B. Possible Causes of an Individualistic Worldview

Historically, Americans consistently have held a more individualistic

71. Eric Schlosser, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 3 (2004) (“In 1970, Americans spent about \$6 billion on fast food; in 2001, they spent more than \$110 billion.”).

72. See, e.g., J. K. Binkley et al., *The Relation Between Dietary Change and Rising US Obesity*, 24 *INT’L J. OBESITY* 1032, 1037 (2000) (finding a significant, positive relationship between BMI and one’s consumption of food at fast food outlets for both men and women); Biing-Hwan Lin et al., *Nutrient Contribution of Food Away from Home*, in *AMERICAN’S EATING HABITS: CHANGES AND CONSEQUENCES* 213, 236 (Frazão ed., 1999), available at <http://www.ers.usda.gov/publications/aib750/aib750l.pdf> (finding little nutritional improvement in foods consumed away from home between 1977-78 and 1994-95); Megan A. McCrory et al., *Overeating in America: Association Between Restaurant Food Consumption and Body Fatness in Healthy Adult Men and Women Ages 19 to 80*, 7 *OBESITY RES.* 564, 570 (1999) (finding “a positive association between restaurant food consumption frequency and body fatness”).

73. Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 *OBESITY* 941, 941 (2009) (finding that “[t]he prevalence of weight discrimination in the United States has increased by 66% over the past decade”).

74. Cognitive dissonance theory was first developed in LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

cultural worldview than citizens of other countries. This Note does not detail the circumstances of this history, as legal comparativists and historians have extensively developed this analysis in other writings.⁷⁵ Rather, this Section focuses on more recent developments—how the concept of obesity expressed through media and advertising reflects and then further entrenches an individualistic worldview. These causal factors are important to detail, with respect to both identifying avenues for future study and understanding how supporters of the ordinance can most effectively frame their arguments.

How the media frames obesity likely has contributed to both the rising prevalence of weight bias and the perpetuation of the belief that personal responsibility is the primary cause of obesity. One study of the U.S. media's depiction of the obesity crisis concluded that there was a fivefold increase in media attention to obesity from 1992 to 2003.⁷⁶ This news coverage commonly framed obesity as a problem caused by a lack of personal responsibility as opposed to societal level factors.⁷⁷ Similarly, the media predominately focused on individually versus socially (or environmentally) based solutions for solving the crisis.⁷⁸

An individualistic worldview is perpetuated not just by “objective” informational sources, such as news agencies, but also by numerous stakeholders with direct financial interests in strengthening the dominance of an individualistic worldview. Restaurants and food manufacturers commonly deflect their own responsibility for contributing to the obesity crisis by emphasizing the need for individuals to take ownership over their health by engaging in more physical activity.⁷⁹ The fast growing diet industry, whose annual revenues increased from \$33.3 billion in 1995⁸⁰ to over \$55 billion in 2006,⁸¹ also has fueled the personal responsibility discourse. Emphasizing that weight gain is a matter of personal choice and responsibility is essential to the diet industry, which is premised on the idea that individuals can take full control of their weight by buying the “right” products and procedures. Therefore, both “objective” news media and advertisers have contributed to a rise in public exposure to obesity issues and the personal responsibility narrative. Moreover, because of its increased public salience, it appears that more members of society share an individualistic

75. See, e.g., Saguy et al., *supra* note 70, at 591-92.

76. Lawrence, *supra* note 33, at 64 (examining a sample consisting of numerous network evening news programs and national newspapers, including the *New York Times*).

77. See *id.*; Tatiana Andreyeva et al., *Changes in Perceived Weight Discrimination Among Americans 1995-1996 Through 2004-2006*, 16 *OBESITY* 1129, 1133 (2008).

78. Andreyeva et al., *supra* note 77, at 1133.

79. Jeffrey P. Koplan & Kelly D. Brownell, *Response of the Food and Beverage Industry to the Obesity Threat*, 304 *JAMA* 1487, 1487 (2010).

80. Andreyeva et al., *supra* note 77, at 1133 (citing MARKETDATA ENTERPRISES, *THE U.S. WEIGHT LOSS AND DIET CONTROL MARKET* (4th ed. 1996)).

81. *Id.* (citing MARKETDATA ENTERPRISES, *THE U.S. WEIGHT LOSS AND DIET CONTROL MARKET* (9th ed. 2007)).

worldview than is actually the case.⁸² The “availability heuristic”—the phenomenon of individuals being more likely to conform to cultural worldviews that they perceive to be dominant despite their original convictions—has further entrenched the prevalence of an individualistic worldview.⁸³

In sum, there are numerous, powerful stakeholders whose actions and interests directly align with the individualistic worldview held by opponents of the ordinance. To effectively advocate for the continued existence of the ordinance, its supporters cannot focus solely on disseminating neutral scientific information.

C. Supporters’ Responses to an Individualistic Worldview: The Need for Change

In the San Francisco ordinance debate, supporters did not sufficiently address the expressive nature of the debate. Rather, the supporters primarily employed “the obvious strategy for dispelling disagreement, and for promoting enlightened democratic decisionmaking, [which was] to produce and disseminate sound information as widely as possible.”⁸⁴ In doing so, the supporters hoped that the “truth” would eventually drown out their competitors. Such an emphasis on public education has been the long-standing approach of public health organizations.⁸⁵ However, this strategy is misguided because it ignores that the core of the obesity debate is over competing cultural worldviews, rather than the dissemination of key facts. If “the truth carries implications that threaten people’s cultural values, then holding their heads underwater is likely to harden their resistance and increase their willingness to support alternative arguments, no matter how lacking in evidence.”⁸⁶ Therefore, supporters of the ordinance need to change course and directly address the expressive elements of the ordinance debate.

82. Dan M. Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147, 149-50 (2011) (“Individuals more readily impute expert knowledge and trustworthiness to information sources whom they perceive as sharing their worldviews and deny the same to those whose worldviews they perceive as different from theirs. As a result, information sources that share their worldviews will be overrepresented in individuals’ mental inventories of experts. If individuals observe that a view they are predisposed to believe is in fact espoused by a disproportionate share of the information sources whom individuals recognize to be ‘experts’ by virtue of such a cultural affinity – as could happen if these putative experts are also subject to forces of cultural cognition – individuals of opposing outlooks will end up with different impressions of what ‘most’ credible experts believe.” (footnote omitted)).

83. *Id.* at 149.

84. Kahan & Braman, *supra* note 25, at 151.

85. See generally Peter Barton Hutt, Assistant Gen. Counsel, Food, Drugs, and Prod. Safety Dep’t of Health, Educ., and Welfare, Remarks at the Annual Conference of the Association on Food and Drug Officials of the United States (June 21, 1972), in *Public Information and Public Participation in the Food and Drug Administration*, 36 Q. BULL. ASS’N FOOD & DRUG OFFICIALS 212 (1972) (advocating for greater public education and disclosure in relation to the Food and Drug Administration).

86. Kahan, *supra* note 42, at 297 (2010).

While an individualistic worldview is deeply entrenched in American culture, even deeply entrenched worldviews can change. Specifically, the history of tobacco regulation illustrates how advocates may use awareness and direct engagement of expressive values to change public opinion and enact policy.⁸⁷ In 1964, the Surgeon General issued a report strongly warning of the dangers of smoking and condemning the practice.⁸⁸ In response, public health officials decided to use public education as their key strategy to combat smoking, specifically focusing their efforts on disseminating the information from the Surgeon General's report.⁸⁹ However, the discovery and dissemination of information on the harms of smoking did not spark much change; rather, cigarette usage rates actually continued to rise through the end of the 1970s.⁹⁰ Similarly, consumer lawsuits against tobacco companies and efforts to regulate smoking beyond warning requirements and television advertising bans all stalled.⁹¹ Accordingly, scientific discovery of smoking's harms and the subsequent dissemination of this information was a critical, but insufficient, step in decreasing smoking rates and passing antismoking regulations.

Actual changes in consumer behavior did not occur until the symbolic, cultural, and moral connotations of smoking also changed.⁹² Eventually, public health advocates shifted their strategy away from educating the public about the harmful effects of smoking to directly challenging the stereotypes of the typical smoker's identity.⁹³ Rather than focusing on the harmful effects of the *act* of smoking, advocates reframed the *identities* of smokers from being cool and desirable (e.g., the masculinity Marlboro Man) to morally and socially deviant.⁹⁴ Only after the expressive and normative value of smoking changed did the activity become socially unpopular, and real progress started to develop with respect to both regulatory reform and changes in consumer behavior. Usage rates dropped dramatically, and the U.S. government pushed through a wave of antismoking regulations.⁹⁵ A later Surgeon General acknowledged in retrospect that "the diffusion of new knowledge [embodied in the 1964 Surgeon General's Report] was impeded by the entrenched norm of smoking."⁹⁶ The smoking

87. The following treatment of tobacco regulation is based on the analysis of smoking in Kahan, *supra* note 23, at 136-39.

88. *Id.* at 130.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 137-38 (citing Constance A. Nathanson, *Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns*, 24 J. HEALTH POL. POL'Y & L. 421, 436 (1999)).

95. *Id.* at 137.

96. *Id.* (alteration in original) (quoting CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 40 (2000)) (internal quotation marks omitted).

example illustrates that, while people *are* responsive to scientific information, awareness of cultural perspectives also is necessary to change. Regulators could not make real progress in regulatory reform until they challenged the expressive value of smoking through reframing.

Therefore, while the prevalence of an individualistic worldview presents numerous challenges to supporters of the ordinance, the tobacco example provides an encouraging illustration of how expressive strategies can transform even dominant cultural worldviews.

IV. EXPRESS STRATEGIES TO BE EMPLOYED BY SUPPORTERS OF THE ORDINANCE

This Part details two expressive strategies that supporters of the ordinance should adopt. First, Section IV.A suggests that supporters of the ordinance can directly breakdown their opponents' primary expressive claim, namely, that the ordinance harms individual choice, by showing that the ordinance does not in fact harm informed decisionmaking. Second, Section IV.B contends that, while opponents of the ordinance assume that consumer *economic* interests are the most important concern, proponents of the ordinance should argue that consumer *protection* interests are more critical.

A. Challenging the Inherent Assumptions of an Individualistic Worldview

Critics of the ordinance primarily are concerned with the fact that the regulation encroaches on individual free choice. This argument assumes, however, that prior to the ordinance's enactment, consumers were able to make informed choices that reflected their preferences and desires. However, this assumption was not true, for "[i]ndividuals' desires and preferences are not always reflected in the choices they [sic] make. A lack of information, maturity, or voluntariness can thwart the realization of desires."⁹⁷ Specifically, substantial evidence shows that consumers do not make informed decisions about fast food consumption because they are not properly educated about the basic dietary knowledge that is needed to critically assess encountered health and nutritional claims. Further exacerbating this problem is that restaurants and food manufacturers often use marketing strategies that are misleading and deceptive.

1. The General Public Lacks Health Literacy

Most Americans lack even a very basic understanding of nutritional science. In 2003, the Surgeon General declared that individuals urgently need fundamental education on basic "health literacy," defined as "the ability of an

97. Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 456 (2000).

individual to understand, access, and use health-related information and services.”⁹⁸ For example, a 2011 survey found that only nine percent of Americans could accurately estimate the number of calories they should consume in a day.⁹⁹ Likewise, in an all-female study, ninety-one percent of subjects were unaware of the number of calories needed to gain or lose a pound of fat.¹⁰⁰ Even nutrition experts have trouble accurately estimating restaurant food calories. According to a recent study, experienced nutrition professionals underestimate the caloric content of restaurant food by two hundred to nearly seven hundred calories.¹⁰¹ Outside of estimating the *absolute* number of calories in food, consumers struggle simply to determine the *relative* healthfulness of different food items, as the “[d]ifferences in calories among various options are not always intuitively obvious.”¹⁰² For example, a McDonald’s cheeseburger and a large fries contain fewer calories than a Starbucks blueberry muffin and a twenty-four-ounce mocha Frappuccino.¹⁰³ It is important to note that because all of this research studied American adults, young children—the more relevant population group for the San Francisco ordinance debate—are likely to have even less nutritional knowledge.

2. *Marketers Confuse Decisionmaking and Constrain Parental Authority*

In addition to consumers’ own lack of nutritional knowledge, food producers’ advertising tactics create a marketing environment that further constrains individuals’ abilities to make truly independent and informed choices. First, many of the health claims found on food packing are inaccurate, misleading, or even intentionally deceptive. Many food producers add health claims to their products, as these claims increase consumers’ willingness to

98. Vice Admiral Richard H. Carmona, Acting Assistant Sec’y for the U.S. Surgeon Gen., Remarks at the American Enterprise Institute Obesity Conference (June 10, 2003), *available at* <http://www.surgeongeneral.gov/news/speeches/obesity061003.htm>.

99. INT’L FOOD INFO. COUNCIL FOUND., 2011 FOOD & HEALTH SURVEY: CONSUMER ATTITUDES TOWARD FOOD SAFETY, NUTRITION & HEALTH (2011), *available at* <http://www.foodinsight.org/Content/3840/2011%20IFIC%20FDTN%20Food%20and%20Health%20Survey.pdf>.

100. Press Release: American Women Speak Out About Weight Loss and Their Thoughts on Healthy Eating: Splenda® Sweetener Products and SHAPE Magazine Team Up on Recent Survey That Sheds Light on Weight Loss Perceptions (Jan. 10, 2011), *available at* <http://www.prnewswire.com/news-releases/american-women-speak-out-about-weight-loss-and-their-thoughts-on-healthy-eating-113202939.html>.

101. DEP’T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE 6 (2008), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf>.

102. *Id.*

103. Harold Goldstein & Eric Schlosser, Editorial, *Putting Health on the Menu: Requiring Fast-Food and Restaurant Chains To Post Calorie Information Wouldn’t Hurt Them and Could Help Us*, L.A. TIMES, Aug. 5, 2008, <http://articles.latimes.com/2008/aug/05/opinion/oe-schlosser5>.

purchase the food items.¹⁰⁴ However, studies have shown that consumers find these claims misleading and confusing, and consequently they lead consumers to generate inaccurate inferences from these claims.¹⁰⁵

Furthermore, many researchers have concluded that fast food advertisements and promotions marketed to children are inherently deceptive because (1) young children do not have the full mental development to understand the intent of advertising and (2) many marketing strategies aim to foster emotionally based and *unconscious* reactions. In other words, as stated by the President of the American Pediatric Association, advertising that targets children is inherently deceptive because children neither understand advertising nor have the cognitive abilities to defend against such ads.¹⁰⁶ Moreover, even more directly misleading, “the most common persuasive strategy employed in advertising is to associate the product with fun and happiness, rather than to provide any factual product-related information.”¹⁰⁷ In fact, McDonald’s corporate spokesman Walt Riker has explicitly stated that, “Ronald does not promote food, but fun and activity—the McDonald’s experience.”¹⁰⁸ The use of the toys in marketing children’s meals—the issue in the San Francisco ordinance debate—is a clear example of this type of marketing strategy.

Critics of the ordinance may respond that, even if such marketing tactics effectively influence children, this fact is largely irrelevant to the debate, as it is the parents who should counteract such influence by exercising control and authority over their children. However, food marketers—coining industry terms such as “pester power,” “the nag factor,” and “kidinfluence”—intentionally and openly encourage children to influence their parents’ purchases.¹⁰⁹ Food

104. Jennifer L. Harris et al., *Nutrition-Related Claims on Children’s Cereals: What Do They Mean to Parents and Do They Influence Willingness To Buy?*, 2 PUB. HEALTH NUTRITION 1 (2011).

105. See, e.g., WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT. SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 23, 25 (2010), available at http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf; Jennifer Pomeranz, *Front-of-Package Food and Beverage Labeling: New Directions for Research and Regulation*, 40 AM J. PREVENTIVE MED., 382, 385 (2011); see also C. Elliot, *Assessing ‘Fun Foods’: Nutritional Content and Analysis of Supermarket Foods Targeted at Children*, 9 OBESITY REVS. 368, 376 (2008) (discussing how more “policy attention needs to be directed towards the fact that the very existence of a nutrition claim(s) might be misleading”).

106. Michele Simon, *Why the Happy Meal Is a Crime—and Not Just a Culinary One*, GRIST (Jan. 24, 2011), <http://www.grist.org/article/2011-01-24-why-the-happy-meal-is-a-crime-and-not-just-a-culinary-one>.

107. *Clowning with Kids’ Health: The Case for Ronald McDonald’s Retirement*, CORP. ACCOUNTABILITY INT’L 8, <http://www.retireronald.org/files/Retire%20Ronald%20Expose.pdf> (last visited Oct. 27, 2011) (quoting Brian Wilcox et al., AM. PSYCHOLOGICAL ASS’N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 23 (2004), available at <http://www.apa.org/pi/families/resources/advertising-children.pdf>) (internal quotation marks omitted).

108. *Id.* (quoting Caroline E. Mayer, *McDonald’s Makes Ronald a Health Ambassador*, WASH. POST, Jan. 25, 2005, at E1) (internal quotation marks omitted).

109. Jennifer Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade*

marketers devote substantial funds to researching how to optimize these strategies. For example, one marketing study was explicitly designed to determine a messaging strategy that most effectively induced children to nag their parents to buy advertised products.¹¹⁰ Other marketers have created seven categories of nagging tactics and even “categorize[d] parents according to identified stress factors and conditions (such as income, marital status, and guilt) that make a parent more vulnerable to the nagging of their children.”¹¹¹ The prevalence of such intentional manipulation strategies is not to be underestimated; one advertising executive essentially admitted that, “we’re *relying* on the kid to pester the mom to buy the product.”¹¹²

Food marketers’ strategies create strong counter to the San Francisco ordinance critics’ claim that the issue is simply one of exercising parental authority, as the marketing strategies used to sell children’s meals are targeted to directly undermine this parental control. Courts have explicitly recognized that this type of marketing interferes with parents’ independent choices. For example, in a case before the California Supreme Court, plaintiffs charged two advertising agencies, General Foods Corporation and Safeway Stores, “with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast cereals.”¹¹³ In its decision, the court recognized that even though parents bought the cereals, they “d[id] not exercise a totally independent judgment” in doing as a result of their children’s influence.¹¹⁴

3. *Quality Versus Quantity of Choice*

Not only are critics of the ordinance overly optimistic about the ability of consumers to make independent, informed choices, they also mistakenly prioritize the quantity of choices available to consumers without considering whether consumers can successfully choose between meaningfully differentiated items. For example, the Yale Rudd Center for Food Policy and Obesity conducted a recent study of children’s menu options from a sample of fast food chains, including those with top sales in 2008 and 2009.¹¹⁵ The study found that

Commission Has the Constitutional and Statutory Authority To Regulate, 38 J.L. MED. & ETHICS 98, 99 (2010) (footnotes omitted) (internal quotation marks omitted).

110. *Clowning with Kids’ Health: The Case for Ronald McDonald’s Retirement*, *supra* note 107, at 17-18.

111. *Id.* at 17-18 (citing SUSAN LINN, CONSUMING KIDS: PROTECTING OUR CHILDREN FROM THE ONSLAUGHT OF MARKETING & ADVERTISING 34 (2004) and JAMES U. MCNEAL, KIDS AS CONSUMERS: A HANDBOOK OF MARKETING TO CHILDREN (1992)).

112. *Id.* at 17 (emphasis added) (quoting *How Marketers Target Kids*, MEDIA AWARENESS NETWORK, http://www.mediaawareness.ca/english/parents/marketing/marketers_target_kids.cfm (accessed Feb. 19, 2010)) (internal quotation marks omitted).

113. *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 663 (Cal. 1983) (superseded by statute on other grounds).

114. *Id.* at 674.

115. JENNIFER L. HARRIS ET AL., FAST FOOD F.A.C.T.S.: EVALUATING FAST FOOD NUTRITION

of 3039 possible children's meal combinations, only twelve met nutrition criteria for preschoolers and only fifteen met nutrition criteria for older children.¹¹⁶ Therefore, almost all of the available choices failed to meet basic nutritional guidelines, and consumers do not have the freedom to make choices among meaningfully different alternatives to the extent that consumers value healthfulness as a key criterion in making consumption choices.

Furthermore, if anything, the enactment of the ordinance is actually expected to increase the number of meaningful choices available to consumers, as fast food restaurants are likely to respond by increasing the number of available healthy meal options. Fast food restaurants indeed have increased their healthy options with the implementation of menu-labeling laws.¹¹⁷ For example, since introduction of the menu-labeling laws, "Starbucks . . . has changed its 'default' milk from whole milk to reduced-fat milk, . . . Dunkin' Donuts has a new lower-calorie line[,] . . . and McDonald's has reduced the size of a helping of French fries."¹¹⁸ Therefore, if the effect of the ordinance is to limit countless harmful options while incentivizing an increase in the currently marginal number of healthful options, the ordinance could actually play a positive role in increasing the quality of available choices.

4. Policy Priorities that Justify Limiting Individual Choices

Even if the ordinance were to constrain individual choice, strong countervailing policy considerations would still justify the law's enactment. First, governmental intervention may be more necessary in cases where it is very difficult for consumers to make personal risk determinations. Making accurate risk assessments about food decisions is difficult, since the present benefit of satisfying hunger and cravings is much more immediate than the future potential harms, which include obesity and diabetes. In other words, the lack of temporal proximity between the consumption of fast food and its ultimate cumulative health effects makes it more difficult for individuals to exercise control and responsibility in making healthy choices and risk assessments.

Second, studies showing that health and nutrition education may be insufficient to motivate people to make healthy eating choices justify the need for more direct government intervention. The intervention of governmental action, in the face of systematic individual failures to act, has occurred frequently in other public health and safety contexts, such as with mandated seatbelt laws.

AND MARKETING TO YOUTH 17 (2010), available at http://www.fastfoodmarketing.org/media/FastFoodFACTS_Report.pdf.

116. *Id.* at 48.

117. Kim Severson, *Calories Do Count*, N.Y. TIMES, Oct. 28, 2008, <http://www.nytimes.com/2008/10/29/dining/29calories.html?pagewanted=all>.

118. *Food Regulation in America: Menu Items*, ECONOMIST, Aug. 28, 2008, <http://www.economist.com/node/12010393>.

Specifically, for the ordinance debate, despite that “Americans are now aware of the importance of good diet or nutrition due to public and private nutrition information programs, it is becoming increasingly clear that nutrition knowledge does not directly predict dietary behavior as those with more knowledge do not necessarily change behavior.”¹¹⁹ Child-directed obesity regulations that are dependent on personal self-sacrifice are likely to fail.¹²⁰

Third, a growing amount of evidence shows that fast foods actually exhibit addictive properties.¹²¹ There is strong support for the proposition that sugar, in particular, can be addictive.¹²² Other studies have not only shown that there are interactions between the neural pathways for appetite and cravings, but also that food deprivation affects reward systems in the same way as drugs and other addictive substances.¹²³ If these research studies conclusively prove that fast food is indeed addictive, this greatly weakens the argument that personal control and responsibility are the only forces needed to regulate fast food consumption.

B. Reshaping Consumer Interests from Economic to Protectionist

In addition to challenging the belief that the ordinance is harmful to individual free choice, advocates of the ordinance also should reframe the priority they put on consumer *protection* interests, the framework that provides the most compelling support for the ordinance. James Whitman provides a classification of two different types of consumer interests that conceptually align with the two sides of the ordinance debate—consumer *protection* interests and consumer *economic* interests.¹²⁴ Consumer *economic* interests are defined as consumers’ interests “in purchasing goods and services at the lowest possible price, in having access to the widest variety of goods and services, in having easy access to credit, in being able to shop at maximally convenient hours and locations, and the like.”¹²⁵ Consumer *protection* interests, on the other hand, are

119. Rodolfo Nayga Jr., *Impact of Sociodemographic Factors on Perceived Importance of Nutrition in Food Shopping*, 31 J. CONSUMER AFF. 1, 1-2 (1997).

120. *Cf.* Peter Barton Hutt, *Regulatory Implementation of Dietary Recommendations*, 36 FOOD DRUG COSM. L.J. 66, 69 (1981) (“If health promotion and disease prevention programs depend solely, or even primarily, on personal self-sacrifice and abjuration, they are doomed to failure.”).

121. Roni Caryn Rabin, *Can You Be Addicted to Foods?*, N.Y. TIMES: WELL BLOG (Jan. 5, 2011, 11:57 AM), <http://well.blogs.nytimes.com/2011/01/05/can-you-be-addicted-to-foods>.

122. *See* Nicole M. Avena et al., *Evidence for Sugar Addiction: Behavioral and Neurochemical Effects of Intermittent, Excessive Sugar Intake*, 32 NEUROSCIENCE & BIOBEHAVIORAL REVS. 20, 32 (2008); Hollis Templeton, *Food, Fitness, and Addiction*, FITBIE, <http://fitbie.msn.com/lose-weight/food-fitness-and-addiction> (last visited Oct. 29, 2011).

123. Takashi Yamamoto, *Brain Mechanisms of Sweetness and Palatability of Sugars*, NUTRITION REVS. S5, S5 (2003).

124. *See* James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 366-67 (2007).

125. *Id.* at 366.

supported by “consumer *protection and safety* legislation, that is, legislation on such matters as products liability, the purity of food and drugs, nondeceptive advertising, and the like.”¹²⁶ Opponents of the ordinance frame their claims in favor of supporting the *economic* interests of consumers. In response, supporters of the ordinance should reframe the debate to focus on the *protection* interests of consumers.

Prioritizing consumer protection interests over consumer economic interests allows for a shift from a more solidaristic to a more individualistic conception of the ordinance debate. Consumer economic interests align with an individualistic worldview, as consumption is generally considered an individual’s personal choice.¹²⁷ Oppositely, consumer protection interests align with a solidaristic worldview, as health and safety concerns are generally framed as public health issues.¹²⁸ Therefore, this reframing would allow supporters of the ordinance to address the public consequences of personal consumption.

Shifting to an emphasis on consumer protection interests also would necessitate a shift in the level of risk born by society. The combination of a regulatory approach and focus on consumer protection interests is termed the “precautionary principle strategy,” which is a means by which food is regulated in the European Union.¹²⁹ Under the precautionary principle, “when there is scientific uncertainty as to the nature of [the] damage or the likelihood of the risk” posed by some activity, “then decisions should be made so as to prevent such activit[y] . . . unless and until scientific evidence shows that the damage will not occur.”¹³⁰ In other words, in the face of scientific uncertainty, regulators are to err on the side of caution, even when there is no demonstrable risk. By contrast, the dominant American approach is to prioritize consumer economic interests, and consequently, “the American sovereign consumer model asks the individual to accept significantly more risk in life than his European counterpart.”¹³¹ The U.S. model, however, fails to account for the fact that the bearing of more risk may not lead to the socially optimal outcome for consumers. The optimal level of risk ultimately is a cultural, rather than empirical, question.

126. *Id.* at 367.

127. *Id.* (“The spirit of law protecting the consumer economic interest . . . idealizes the consumer as sovereign.”)

128. See Lawrence, *supra* note 33, at 58.

129. World Health Org. (WHO) Secretariat for the Fourth Ministerial Conference on Env’t & Health, Budapest, June 2004, *Dealing with Uncertainty—How Can the Precautionary Principle Help Protect the Future of Our Children* (WHO, Working Paper No. EUR/04/5046267/11, 2004), in WORLD HEALTH ORG., *THE PRECAUTIONARY PRINCIPLE: PROTECTING PUBLIC HEALTH, THE ENVIRONMENT AND THE FUTURE OF OUR CHILDREN* 15, 15 (Marco Martuzzi & Joel A. Tickner eds., 2004), available at http://www.euro.who.int/_data/assets/pdf_file/0003/91173/E83079.pdf.

130. *Cloning, 2002: Hearings Before the Subcomm. on Labor, Health and Human Servs., and Educ., and Related Agencies of the S. Comm. on Appropriations*, 107th Cong. 19 (2002) (statement of Brent Blackwelder, President, Friends of the Earth).

131. Whitman, *supra* note 124, at 390.

If consumers feel strongly that they do not want to run a given risk, even where the evidence shows otherwise, the government should not impose that risk on the population.¹³² A narrow conception of consumer interests that only focuses on consumer economic interests, however, completely prevents a discussion of this critical social issue.

1. Potential Challenges to Establishing the Consumer Protection Interest Framework

In addition to the relative dominance of the individualistic worldview in the United States, there are also other aspects of American culture that may impede deliberate attempts to reposition the meaning of consumer interest. Specifically, it may be difficult for supporters of the ordinance to explicitly discuss the expressive elements of the childhood obesity debate because this dialogue necessarily engages a number of other political and sensitive societal issues.¹³³ For example, deep examination of the causes of childhood obesity prompts us to awkwardly point the finger at parents, particularly working mothers.¹³⁴ For some feminists, it is a particularly uncomfortable notion that all of the gains that women have made in the workforce in terms of gender equality and personal empowerment may also have contributed directly to the rising rates of childhood obesity.¹³⁵ Some feminists may perceive of working mothers as “selfishly” pursuing their own careers, leaving their children to eat junk food at McDonald’s instead of being “properly” cared for at home. Although the question of proper parenting is massively important in American society, it also is not often openly discussed, as parenting is viewed as a particularly private sphere that should not be intruded upon by others’ morals and values.

Another uncomfortable aspect of U.S. culture tied to the obesity debate is that the core of American cuisine is often characterized by items such as hamburgers, fries, and other particularly obesogenic foods that are often most blamed for contributing to the obesity crisis.¹³⁶ Indeed, some commentators

132. See Caroline E. Foster, *Public Opinion and the Interpretation of the World Trade Organisation’s Agreement on Sanitary and Phytosanitary Measures*, 11 J. INT’L ECON. L. 427, 427 (2008).

133. This Note simply introduces these issues and a fuller analysis should be conducted elsewhere.

134. John Cawley & Feng Liu, *Maternal Employment and Childhood Obesity: A Search for Mechanisms in Time Use Data*, (Nat’l Bureau of Econ. Research, Working Paper No. 13600, 2007), available at <http://www.nber.org/papers/w13600.pdf>.

135. Bob Cutler, *Keeping Kids Happy at No Cost to Mom: C3’s Position on County of Santa Clara Toy Ban*, JENNINGS SOC. MEDIA 2 (May 7, 2010), http://jenningsocialmedia.com/downloads/C3.SANTACLARA_Final.pdf (citing “dual-income families resulting in less supervised time” for kids as contributing to the childhood obesity crisis).

136. See SIDNEY MINTZ, *TASTING FOOD, TASTING FREEDOM: EXCURSIONS INTO EATING, POWER, AND THE PAST* 116-18 (1997)

explicitly have demonized anti-obesity efforts as anti-American.¹³⁷ Other individuals have sympathized with narratives knowingly glorifying the excessive and unhealthful nature of fast food as symbolic of the rebellious, masculine aspect of American identity.¹³⁸ Similarly, some obesogenic foods are associated with specific racial identities, and, once again, political correctness creates great discomfort with the singling out of a particular ethnic group's eating habits.¹³⁹ Therefore, the expressive nature of the obesity debate can implicate questions of race, gender, and national identity that make individuals unwilling to engage in these conversations.

2. Factors Indicating Likelihood of Establishing the Consumer Protection Interest

Though the previous discussion focuses on potential limitations to reframing efforts, there are also other factors indicating that a shift in the United States towards a more consumer protectionist approach is possible. Historical examples show that shifts to different types of consumerism have been achieved through careful and calculated advocacy. For example, the rise of American consumerism in the early twentieth century was an intentional effort to create justice and social peace in response to rising class tensions between labor and capital.¹⁴⁰ This deliberate political program shifted people's conceptualizations of their primary identities away from highly differentiated producer identities to a single consumer identity with a shared common interest in buying "cheap" and "good" products.¹⁴¹

Another example contemporaneous with the rise of American consumerism reveals that the United States already has managed to shift from a predominantly individualistic to a solidaristic cultural worldview. This shift has occurred, however, in the context of producer, not consumer, concerns. During the

137. See, e.g., Craig Lambert, *The Way We Eat Now: Ancient Bodies Collide with Modern Technology To Produce a Flabby, Disease-Ridden Populace*, HARV. MAG., May-June 2004, <http://harvardmagazine.com/2004/05/the-way-we-eat-now.html>.

138. Michael Benjamin, *On Happy Meals and Individual Choices*, EPOCH TIMES (May 5, 2011), <http://www.theepochtimes.com/n2/opinion/on-happy-meals-and-individual-choices-55887.html> (arguing that San Francisco's ban is an example of the diminishing of the "[r]ugged individualism [that] once typified that which was great about the American character. Today, Americans have ceded their individual responsibility to government, politicians, and trial lawyers").

139. See, e.g., SONYA A. GRIER, AFRICAN AMERICAN & HISPANIC YOUTH VULNERABILITY TO TARGET MARKETING: IMPLICATIONS FOR UNDERSTANDING THE EFFECTS OF DIGITAL MARKETING (2009), available at <http://digitalads.org/documents/Grier%20NPLAN%20BMSG%20memo.pdf>; Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 356-58 (2003) (discussing the fact that certain minorities disproportionately consume certain harmful products and have higher rates of obesity than whites).

140. Whitman, *supra* note 124, at 361.

141. *Id.*

Progressive Era, the rise of industrialism and the inequity between factory owners and workers challenged the concept of “free” labor. Workers were “free” to contract their labor to employers, but how much actual freedom and choice did workers have in this exchange?¹⁴² Specifically, progressives repudiated the “negative” liberties associated with a laissez-faire labor market, arguing that “free choice in employment contracts did not make a worker more free if he could choose only among terrible offers.”¹⁴³ Instead, progressives argued for “positive” liberty, in which the government would arrange economic life to spread meaningful opportunities more broadly among its citizens.¹⁴⁴ Therefore, there was a shift away from traditional laissez-faire individualism and the myth of self-reliance to a general acceptance of a solidaristic worldview that embraced expert management.¹⁴⁵ As Woodrow Wilson stated in *The New Freedom*, “[T]o let the individual alone is to leave him helpless as against the obstacles with which he has to contend.”¹⁴⁶ Therefore, at least with respect to producer concerns in the United States, there was a shift in the conceptualization of free choice as more than a negative freedom from interference: free choice also came to be viewed as a positive freedom to choose among attractive alternatives.¹⁴⁷

However, progressives did not view this shift as rejecting individual choice and democracy, but as simply adapting these values to modern conditions.¹⁴⁸ In many ways, this shift also signaled a return to the core of Adam Smith’s philosophies; even with his great respect for and optimism in free markets, Smith always insisted that the free market be utilized in service of *dignity* and other human values.¹⁴⁹ Progressives did not see any inconsistencies with valuing both free markets and dignity, for in the same speech in which Roosevelt “called for a renewal of individualism and self-reliance, [he] announced that initiative and energy alone could not sustain a complex economy.”¹⁵⁰ In this new complex economy, a more developed bureaucratic state was necessary to create real choice and dignity for laborers: a state that could allow autonomy and vulnerability to mutually coexist. This historical example closely parallels the current debate about consumer protections and shows that heightened state intervention is not mutually exclusive with consumer choice.

Lastly, aside from the desirability of adopting cultural worldviews, there are pragmatic factors that are also already pushing the United States to embrace

142. JEDIDIAH PURDY, *A TOLERABLE ANARCHY* 177 (2009).

143. *Id.* at 183.

144. *Id.* at 202.

145. *Id.* at 182.

146. *Id.* at 183 (alteration in original) (quoting WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 284 (1913)) (internal quotation marks omitted).

147. *Id.* at 202.

148. *Id.* at 183.

149. *Id.* at 189 (discussing values animating Adam Smith’s ideology).

150. *Id.* at 183.

consumer protection interests. Indeed, the EU approach to food safety legislation is not solely driven by predominantly cultural worldviews, but also is in part a purely pragmatic response to some recent food safety scandals. Therefore, as the number of food safety incidences increase in the United States, citizens will demand more food safety protections. Indeed, in the last several years, there have been widespread food safety issues with high public saliency, including salmonella contaminations of both tomatoes¹⁵¹ and peanuts that have caused multiple deaths.¹⁵² Even with, or perhaps as a result of, great technological advances in farming and other aspects of food production, there were still forty-eight million cases of food-borne illness in the United States in 2010.¹⁵³ Therefore, the recent passage of the FDA Food Safety Modernization Act, which is more focused on consumer protection interests than previous legislation, is partially a direct, pragmatic response to these recent food safety scandals and concerns.¹⁵⁴

*a. Addressing the Illiberal Criticism of Reframing the Ordinance
Debate*

However, beyond the issue of whether the prominence of the consumer protection interest *may* be expanded, it is critical to address whether it *should* be expanded. In this Subsection, I respond to a potential criticism of my central proposal, which is that calling for supporters to directly address the expressive values of the ordinance is prohibitively illiberal. Using an expressive framework may be an effective strategy, but should it nonetheless not be adopted because is it troublingly undemocratic to so openly value the cultural worldviews of a specific sub-group? Even if the weight of scientific knowledge indicates that the ordinance creates substantial community health and social benefits, does the value of “unbiased” decisionmaking outweigh the potential health outcome

151. *Tomatoes Pulled Off Shelves, Menus Amid Salmonella Scare*, FOXNEWS.COM (June 19, 2008), <http://www.foxnews.com/story/0,2933,364448,00.html>.

152. Editorial, *Dangerous Food*, N.Y. TIMES, Feb. 17, 2009, <http://www.nytimes.com/2009/02/17/opinion/17tue1.html>.

153. *48 Million U.S. Cases of Food-Borne Illness in 2010 Push Industry Toward RFID-Enabled Food Safety Systems*, SUPPLY & DEMAND CHAIN EXECUTIVE (Apr. 18, 2011), [http://www.sdcexec.com/web/online/FulfillmentLogistics-Trends/48-Million-US-Cases-of-Food-borne-Illness-in-2010-Push-Industry-toward-RFID-enabled-Food-Safety-Systems/15\\$13471](http://www.sdcexec.com/web/online/FulfillmentLogistics-Trends/48-Million-US-Cases-of-Food-borne-Illness-in-2010-Push-Industry-toward-RFID-enabled-Food-Safety-Systems/15$13471).

154. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.); see Patrik Jonsson, *Food Safety Bill 101: What Are the Facts and Myths?*, CHRISTIAN SCI. MONITOR, Nov. 23, 2010, <http://www.csmonitor.com/USA/Politics/2010/1123/Food-safety-bill-101-What-are-the-facts-and-myths> (finding that the food safety bill gives “the Food and Drug Administration more power to recall tainted products, strengthen inspections of vegetable and meat processors, and demand that producers follow tougher standards for keeping food safe”); *Obama Signs Food Safety Bill*, CNN (Jan. 4, 2011), http://articles.cnn.com/2011-01-04/politics/obama.food.safety_1_food-safety-fda-power-commissioner-margaret-hamburg?_s=PM:POLITICS (describing the implications of the Act’s passage).

benefits? These questions highlight the tensions that frequently exist between rational risk regulation and democratic decisionmaking.¹⁵⁵ Addressing this issue is critical, as otherwise critics may forcefully argue that cultural cognition theory leaves individuals either trapped between a state of illiberal and biased policymaking or in an equally unfavorable nihilistic state of total inaction that a strict form of cultural relativism can imply.

Democratic decisionmaking is associated with a general norm against couching arguments explicitly in moral terms.¹⁵⁶ “Liberalism is famously opposed to public moralizing, or at least to certain robust forms of it,”¹⁵⁷ for statistical and scientific explanation is perceived as more “rational,” and therefore more “legitimate,” than naked appeals to values.¹⁵⁸ Consequently, groups oftentimes do not resort to explicitly using expressive moral frames except in “extreme” circumstances, such as when a law is passed that directly challenges their beliefs, and they are placed in a defensive mode, as is the case with the opponents of the San Francisco ordinance.¹⁵⁹

However, Max Weber’s theory of objectivity and subjectivity,¹⁶⁰ which rejects the notion that subjectivity inherently is antagonistic to accessing reality and truth, shows that the role of subjectivity in knowledge creation does not necessarily imply the existence of a problematic bias.¹⁶¹ Although developed in a different historical and intellectual context, Weber’s 1942 theory of knowledge lends a normative justification for the subjective political decisionmaking that necessarily results under cultural cognition theory. Weber believed that subjectivity is what uniquely enables a meaningful and accurate account of the world.¹⁶²

155. See Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1073 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005)) (discussing the relationship between democratic decisionmaking and rational risk regulation).

156. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 203 (1995) (describing the “range and variety of self-censorship common in liberal democratic societies”).

157. Kahan, *supra* note 67, at 478.

158. *Id.* at 446.

159. *Id.* at 493.

160. MAX WEBER, “OBJECTIVITY” IN *SOCIAL SCIENCE AND SOCIAL POLICY* (1904), *reprinted in* THE *METHODOLOGY OF SOCIAL SCIENCES* 49, 49-112 (Edward A. Shils & Henry A. Finch eds. & trans., Transaction Publishers 2011) (1949).

161. See *id.* at 57-58, 81-84.

162. While this Note focuses on the role of subjectivity in Weber’s theory, it is critical to note that Weber *does not* reject the existence of objectivity. Weber recognizes both objectivity and subjectivity and argues that both are necessary for creating scientific study: empirical knowledge is objective and retains its validity across individual variations in values, while value judgments are subjective and are *not* universally consistent. See *id.* at 58, 80. However, Weber does separate the two concepts, “*insist[ing] on the rigorous distinction between empirical knowledge and value-judgments,*” for objectivity and subjectivity each play a vital but distinct role in the process of knowledge formation. See *id.* at 49.

Weber's theory describes reality as an infinite chaos that has no innate significance, and accordingly there is no inherent principle for selecting the subjects that science should pursue.¹⁶³ Rather, the determination of what to study is determined by the researcher, and this is an inherently subjective process, as what the researcher believes is important to study is determined by the specific values that the researcher holds.¹⁶⁴ Therefore, subjectivity is necessary to construct order and meaning in the world, and, consequently, *all* sciences are subjective in the sense that they are dependent on values as determinants of their objects of study.¹⁶⁵ Accordingly, subjectivity should not be conflated with bias, which connotes that a perspective is inaccurate and not as "true" as an unbiased view. A subjective perspective means that the perspective is positioned from a specific viewpoint that may not be universal across all individuals, but this does not mean that this perspective is consequently untrue or otherwise deficient.¹⁶⁶ Weber's theory of knowledge implies that all knowledge is necessarily subjective, meaning that there is no single "true" understanding of the world that is most accurate.¹⁶⁷ Subjectivity therefore should be conceptualized more as an enabling, vital step in knowledge production.¹⁶⁸

This conceptualization of subjectivity as a perspective, rather than a bias, is crucial to the San Francisco ordinance debate, because this approach refutes critics' argument that the ordinance lacks legitimacy because it champions liberal values. Opponents claim that, since the ordinance comes from San Francisco, with its perceived radical liberal identity, it is problematically biased because it is based on a particular *cultural* perspective rather than on *objective* social goals.¹⁶⁹ In other words, the opponents object to the fact that ordinance represents subjective liberal values, rather than objectively sound public health policies. However, Weber's theory shows that subjective liberal values and objective health policies are not necessarily mutually exclusive, as there exists no single, true objective framework through which to understand the debate, only multiple frameworks with differing perspectives. Also, in opposing the "cultural partisanship" evident in San Francisco's policies, critics of the ordinance fail to fully acknowledge how their differing cultural worldviews are driving their own beliefs.¹⁷⁰

163. *See id.* at 62-62, 72, 82.

164. *See id.*

165. *See id.*

166. *See id.* at 84.

167. *See id.* at 84, 111.

168. *See id.* at 110-11.

169. *See, e.g.,* Trevor Hunnicutt, *San Francisco Supes vs. Ronald McDonald*, BOS. GLOBE, Oct. 2, 2010, http://www.boston.com/news/nation/articles/2010/10/02/san_francisco_supes_vs_ronald_mcdonald.

170. This phenomenon in which one can identify the subjective cultural basis of others' perceptions without the ability to similarly recognize the cultural influences on one's own beliefs is described by cultural cognition theory as "naïve realism." *See* Kahan, *supra* note 23, at 130-31.

In sum, Weber's theory provides an account of knowledge formation that acknowledges the key role of subjectivity, but frames subjectivity positively as a situated perspective rather than as a bias. This theory allows for both a more nuanced understanding of the objections of the opponents of the ordinance and support for the strategic response that I propose the supporters of the ordinance should adopt.

CONCLUSION AND NEXT STEPS—RECRUITING PHYSICIANS AS POLICY ENTREPRENEURS

This Note began as an exploration of why the passage of a relatively narrow city ordinance generated such an intense national debate. Analysis of the arguments on both sides reveals that the key division between supporters and opponents of the ordinance is not about the actual effects of the ordinance, but what the ordinance fundamentally symbolizes about the proper relationship between individual responsibility and governmental intervention. Therefore, for their arguments to gain broad acceptance, supporters of the ordinance must explicitly address the expressive meaning of the ordinance. They must first directly counter the assumption that the ordinance actually interferes with individual choice and informed decisionmaking and then reframe the debate to prioritize consumer protection interests over consumer economic interests.

Though this process is critical, it may be especially challenging, as liberal-leaning groups generally are less likely than their conservative counterparts to use explicit moral arguments.¹⁷¹ Indeed, as detailed earlier, opponents of the ordinance already are framing their arguments in expressive terms, loading their claims with highly salient expressive and value-based charges, framing the ordinance as suffocating individual choice and discouraging personal responsibility. It is imperative that proponents of the ordinance directly respond to these expressive claims.

However, there remains the question of which stakeholders can best serve as the "policy entrepreneurs," who will take the principal initiative and responsibility for reframing the expressive value of the ordinance debate. "Individuals reflexively reject information inconsistent with their predispositions when they perceive that it is being advocated by experts whose values they reject and opposed by ones whose values they share."¹⁷² As previously discussed, San Francisco's ultra-partisan cultural identity prevents those from opposing cultural

171. Kahan, *supra* note 67, at 489 ("[D]efections from the norm against public moralizing are not uniform across moral commitments and cultural styles. Citizens who support egalitarianism and civic solidarity are more likely to see appeal in liberal public reason, whether out of principle or pragmatic calculation; citizens who support hierarchy and individualism tend to put little value on liberal public reason and are in fact likely to be horrified by the suggestion that moralizing be banished from political discourse.").

172. Kahan et al., *supra* note 82, at 169.

views from accepting the city as a legitimate source of policy. Rather, people are more receptive to experts whom they perceive to have values that are on both sides of the debate.

While it is beyond the scope of this Note to fully analyze the landscape of possible stakeholders in the ordinance debate, I propose that physicians are uniquely situated to enact change in that they have the professional authority, veracity, and legitimacy to serve as the entrepreneurs of a policy campaign. Physicians have an accepted public role in “‘advocacy for and participation in improving the aspects of communities that affect the health of individuals,’ and they have a ‘primary ethical and professional responsibility for the health of the community members they serve.’”¹⁷³ Indeed, this conceptualizes the role of the physician as that of the scientist-citizen, someone who embodies both “the scientific duty to see the factual truth as well as the practical duty to stand up for his or her own ideals.”¹⁷⁴ In other words, the scientific and moral agent are dual roles that are both necessary. Therefore, physicians can play a key role in leading the consumer protection interest reframing.¹⁷⁵

173. Roberta R. Friedman & Marlene B. Schwartz, *Public Policy To Prevent Childhood Obesity, and the Role of Pediatric Endocrinologists*, 21 J. PEDIATRIC ENDOCRINOLOGY & METABOLISM, 717, 723 (2008) (quoting Russell L. Gruen et al., *Physician-Citizens—Public Roles and Professional Obligations*, 291 JAMA 94, 94 (2004)).

174. WEBER, *supra* note 160, at 58.

175. However, there is a fine line that should be observed. Though some insist that physicians need to become much more political as a collective group, it is critical to not let their status as partisans go too far, as currently their effectiveness in speaking to diverse cultural groups derives from partially the fact that they are perceived of as politically neutral entities. See Kahan, *supra* note 23, at 145-47 (discussing the importance for “cultural vouchers,” who are “individuals bearing authority and credibility within their cultural groups,” in enacting controversial legislation).

