University of St. Thomas Journal of Law and Public Policy

Volume 8
Issue 2 *Spring 2014*

Article 1

Rulemaking under Dodd-Frank: Putting the "Person" Back into the Consumer Lending Process

Elizabeth R. Schiltz
University of St. Thomas School of Law, erschiltz@stthomas.edu

Follow this and additional works at: http://ir.stthomas.edu/ustjlpp

Part of the Banking and Finance Law Commons

Bluebook Citation
Elizabeth R. Schiltz, *Rulemaking under Dodd-Frank: Putting the "Person" Back into the Consumer Lending Process*, 8 U. St. Thomas J.L. & Pub. Pol'y 117 (2014).

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact Editor-in-Chief Patrick O'Neill.

RULEMAKING UNDER DODD-FRANK: PUTTING THE "PERSON" BACK INTO THE CONSUMER LENDING PROCESS

ELIZABETH R. SCHILTZ

INTRODUCTION

The global financial crisis, triggered by the collapse of the U.S. mortgage market in 2008, posed a challenging paradox:

> "There is no question that [it was] a global financial crisis. . . . The collapse of the real estate bubble [in the U.S.] exposed the degree of interconnectedness among financial institutions across the globe created by the worldwide market for the derivate investment products created on the backs of the underlying real estate loans—the mortgage-backed securities in all their complex manifestations, and the credit default swaps that were essentially insurance policies on the risks of default of these securities. . . .
>
> [At the same time, though, a]t its root, the . . . crisis is in a very important sense fundamentally a uniquely *local* phenomenon. It is the result of individual consumer transactions that are about as inherently local as a commercial transaction can ever get—loans to specific individual consumers tied to specific unique, *unmovable* pieces of residential real estate. Every single loan packaged into the bundles of investment opportunities that became "toxic assets" held by large institutional investors originated with a contractual relationship between an individual borrower and a single lender. In addition to the global macroeconomic consequences of the collapse of this market, every one of these loans that goes into default has personal consequences for the individual borrower whose home is the collateral for that loan.[1]

1. Elizabeth R. Schiltz, The Paradox of the Global and the Local in the Financial Crisis of 2008: Applying the Lessons of Caritas in Veritate to the Regulation of Consumer Credit in the

This paradox raises practical questions about the "architecture" of the appropriate legal and regulatory responses to the crises:

> Does the scope of the problem demand the efficiencies of broad-brush, national (or even global) standards governing such activity, or does the origin of the problem in individual consumer transactions require more differentiated, individualized local responses? Or is some combination of the two approaches the most effective way to prevent future global economic meltdowns?[2]

In addition to this practical *geographical* challenge of locating the proper legal jurisdiction to effectively address the problem; this paradox exposes a *relational* challenge. In structuring a regulatory response to the crisis, what is the proper weight to be given to the interests of the various parties to the relationships created in the consumer lending process: the consumer, the lender, and the entities that acquire interests in the credit transaction between the consumer and lender (the institutions that securitize the loans, assign credit ratings to the securities, and buy the resulting pieces of the securitized loans)? This question lies at the heart of identifying the proper regulatory response to the global financial crisis.

The global financial crisis has evoked strong responses from world religious leaders, including forceful statements from Popes Benedict XVI and Francis.[3] All of these messages share an insistence on the centrality of the human person as the appropriate focus of market mechanisms, and skepticism about the exclusive focus on efficiency——the lodestar of market economies—as the ultimate goal of economic regulation. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[4] ("Dodd-Frank"), in many respects, addresses these same concerns. One of Dodd-Frank's major innovations was the creation of the Consumer Financial Protection Bureau ("CFPB"), a federal agency with the specific mandate of

---

United States and the European Union, 26 J. OF LAW & RELIGION 173, 173–74 (2010) (citations omitted).

2. *Id.* at 174–75.

3. This Article will focus on the writings of Pope Benedict XVI and Pope Francis. Many world religious leaders have affirmed these writings. See, e.g., Doing The Truth In Love: An Evangelical Call for Response to Caritas In Veritate, FIRST THINGS, Aug. 18, 2009, http://www.firstthings.com/onthesquare/2009/08/doing-the-truth-in-love58-an-evangelical-call-for-response-to-caritas-in-veritate (last visited Jan. 20, 2014) (statement of 68 Evangelical Protestant community leaders from the U.S., Canada, England, the Netherlands, Sri Lanka, and New Zealand).

4. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of predominately 12 & 15 U.S.C.).

protecting the consumer, thus placing, at least for one agency, the "person" at the center of regulatory deliberations. Further, Dodd-Frank's consumer credit provisions establish significant new regulatory requirements at every stage of the credit process, putting a giant brake on the consumer credit "'machine"' through which the building blocks of individual consumer loans are transformed into securitized credit instruments and effectively rejecting "'efficiency"' as the primary measure of consumer credit regulation. However, in practice, there have proven to be substantial limits to Dodd-Frank's rejection of efficiency, and to the CFPB's ability to keep "'the person"' at the center of consumer credit regulation. The most common challenges to Dodd-Frank's regulatory measures are that they render the American banking system uncompetitive with respect to other, less-regulated jurisdictions, and that they are inefficient—the very defenses that Popes Benedict and Francis allege contributed to the financial collapse that Dodd-Frank was enacted to address.

In Part I of this Article, I will first summarize the arguments of Popes Benedict and Francis for a reorientation of economic analysis to recover a focus on the "'person"' in an economic transaction. I will then put these arguments into context, showing their relationship to other, non-religious critiques of the regulatory system in the wake of the global financial collapse. In Part II, I will first describe how the creation of the CFPB and the regulatory authority bestowed on it by Dodd-Frank could be seen as providing a possible structural mechanism for facilitating such a renewed focus on the person. Then, I will consider the limits to this refocus that are built into this structural mechanism. I will conclude with a preliminary assessment of how successful the CFPB is likely to be as an unlikely instrument of the Church's proposals for global financial reform.

I. COMMON THEMES IN RELIGIOUS AND SECULAR REACTIONS TO THE GLOBAL FINANCIAL CRISIS

A. Popes Benedict and Francis on Financial Reform

1. The Relational Human Person as the Proper Focus of Market Activity

In his 2009 encyclical *Caritas in veritate,*[5] ("*Caritas*") Pope Benedict XVI responded to the exploding financial crisis by arguing that the two principles in the encyclical's title——charity and truth——must be

5. Pope Benedict XVI, Encyclical Letter Caritas in veritate (2009) [hereinafter Caritas].

inextricably linked together in every aspect of our common lives together—our common vocation to an authentically human "economic, social, and political development."[6] This includes the market. Benedict noted that a properly functioning market can operate as "the economic institution that permits encounter between persons, inasmuch as they are economic subjects who make use of contracts to regulate their relations as they exchange goods and services of equivalent value between them, in order to satisfy their needs and desires."[7] However,

> if the market is governed solely by the principle of the equivalence in value of exchanged goods, it cannot produce the social cohesion that it requires in order to function well. *Without internal forms of solidarity and mutual trust, the market cannot completely fulfill its proper economic function.* And today it is this trust which has ceased to exist, and the loss of trust is a grave loss.[8]

Infusing the market with the principle of gratuitousness and the logic of gift is, Pope Benedict claimed, "[t]he great challenge before us, accentuated by the problems of development in this global era and made even more urgent by the economic and financial crisis."[9] He challenged us to

> . . .demonstrate, in thinking and behavior, not only that traditional principles of social ethics like transparency, honesty and responsibility cannot be ignored or attenuated, but also that in commercial relationships the principle of gratuitousness and the logic of gift as an expression of fraternity can and must find their place within normal economic activity. This is a human demand at the present time, but it is also demanded by economic logic. It is a demand both of charity and of truth.[10]

The concepts of "gratuitousness" and the "logic of gift" are complex ideas whose full explication is well beyond the scope of this article. However, many commentators begin unpacking these ideas with the basic insight that Benedict's critic of the economic system is fundamentally an anthropological critic. Much of modern economic theory rests on assumptions about human behavior that are not justified. Most significantly

---

6. *Id.* ¶ 34.
7. *Id.* ¶ 35.
8. *Id.*
9. *Id.* ¶ 36.
10. *Id.*

for Benedict's critique, in the words of theologian Kenneth Himes,[11] the imago Dei that all humans reflect is a "Trinitarian communion of divine persons." Humans, thus, are inherently social and relational, and human development is necessarily relational: "To ignore the importance of social relationships, the common good, and solidarity for the sake of maximizing profits is to misinterpret the meaning of human development by overlooking the essential relatedness of the person."[12] Theologian Miguel Díaz (who served as U.S. Ambassador to the Holy See from 2009 to 2012[13]) notes that *Caritas*

> contains a rich reflection on "what has become a central category of contemporary philosophical and theological reflection: the category of relation. Rejecting isolation, the encyclical embraces relationship to others and interdependence as essential to what it means to be human, and as the signpost for envisioning just and truth-filled economic initiatives. . . . [T]he encyclical's arguments reflect ongoing Roman Catholic concerns to affirm the relational nature of human and other creaturely existence and to reconcile individual and communal identity."[14]

Economist Stefano Zamagni understands *Caritas*' stress on reciprocity as:

> "a call to overcome the now-outdated dichotomy between the economic and social spheres. Modernity has left us as a legacy the idea that access to the economy requires setting profit as the main goal and being moved by self-interest, which is the same as saying that one cannot be a true entrepreneur if one does not pursue profit maximization. This absurd idea derives from the theoretical error that confuses the market economy, a genus, with one of its particular species, namely capitalism. This error, in turn, has led us to erroneously identify the economy as the place where wealth (or income) is produced and the social sphere as the place where

11. Kevin Himes, *Benedict's View of the Person*, in THE MORAL DYNAMICS OF ECONOMIC LIFE: AN EXTENSION AND CRITIQUE OF CARITAS IN VERITATE 31, 32 (Daniel K. Finn ed., 2012) [hereinafter "MORAL DYNAMICS"].""

12. *Id.*

13. 155 Cong. Rec. S8783 (Aug. 4, 2009); *See also Univ. of Dayton*, MIGUEL DÍAZ, http://www.udayton.edu/directory/artssciences/university_professor_faith_justice/diaz_miguel.php (last visited Feb. 27, 2014).

14. Miguel H. Díaz, Theological Foundations of Human Relation, in MORAL DYNAMICS, *supra* note 11, at 62–63.

wealth is distributed and solidarity is found."[15]

Caritas calls for us to envisage the market as a sphere where the principle of reciprocity has as strong a claim as a proper measure of transactions as the principle of exchange. Allowing the principle of reciprocity to permeate the market, as well as our social relations, corrects the mistaken anthropology that underlies the current economy: it restores the centrality of the human person to market calculations, and acknowledges the relationality of human nature.

1. Rejecting Efficiency as Predominant Value, in Favor of Focus on the Person

One consistent thread in *Caritas* that follows from all of the above is the rejection of the market's lodestar, "efficiency" as the sole, or even predominant, value to govern economic analysis. It is efficiency arguments that have been the predominant drivers in the globalization of credit that led to the financial collapse. In the U.S., the decreased local authority over consumer credit regulation that led to its essential deregulation historically was justified by the need to provide a more efficient market for consumer financial products. Eliminating variations in the regulation of credit at the local level allowed nationally chartered banks to offer uniform products to consumers across the U.S. efficiently. Regulatory barriers were eliminated based largely on the argument that consumers' interests are best served by having access to a multiplicity of such products offered at the lower rates that the operational efficiencies produce.[16]

Benedict does not reject efficiency arguments out of hand. He acknowledges that the efficiencies engendered by the globalization of the world's economies have "been the principal driving force behind the emergence from underdevelopment of whole regions, and in itself it represents a great opportunity."[17] As the theologian Douglas Farrow points out, Benedict insists that "[g]lobalization . . . is something more than the inevitable consequence of technology. In fact, it tells us something about the way humanity is made. Globalization, in other words, is a consequence of divine design."[18] This appreciation for the potential benefits of

15. Stefano Zamagni, *Reciprocity and Fraternity*, in MORAL DYNAMICS, *supra* note 11, at 74.

16. *See* Schiltz, *supra* note 1, at 201–04. *See also* Gill North & Ross P. Buckley, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Unresolved Issues of Regulatory Culture and Mindset*, 35 MELB. U. L. REV. 479 (2011).

17. *Caritas*, *supra* note 5, ¶ 33.

18. Douglas Farrow, *Charity and Unity*, FIRST THINGS, Oct. 2009, at 37–38.

globalization is shared by many who likewise condemn its excesses.[19]

"Nevertheless," Benedict cautions in *Caritas*, "without the guidance of charity in truth, this global force could cause unprecedented damage and create new divisions within the human family."[20] Indeed, Benedict insightfully applies the analysis of the danger of the technological imperative to the efficiency arguments like those made to facilitate the globalization of credit. He writes:

> Often the development of peoples is considered a matter offinancial engineering, the freeing up of markets, the removal of tariffs, investment in production, and institutional reforms—in other words, a purely technical matter. All these factors are of great importance, but we have to ask why technical choices made thus far have yielded rather mixed results. We need to think hard about the cause. Development will never be fully guaranteed through automatic or impersonal forces, whether they derive from the markets or from international politics. *Development is impossible without upright men and women, without financiers and politicians whose consciences are finely attuned to the requirements of the common good.* Both professional competence and moral consistency are necessary. When technology is allowed to take over, the result is confusion between ends and means, such that the sole criterion for action in business is thought to be the maximization of profit, in politics the consolidation of power, and in science the findings of research. Often, underneath the intricacies of economic, financial and political interconnections, there remain misunderstandings, hardships and injustice. The flow of technological know-how increases, but it is those in possession of it who benefit, while the situation on the ground for the peoples who live in its shadow remains unchanged: for them there is little chance of emancipation.[21]

Theologian and economist Albino Barrera develops this analogy, with a historical reference to the industrial revolution. He explains:

> Contemporary globalization actually entails two separate but complementary phenomena: global economic integration and the

19. ROBERT J. SHILLER, THE SUBPRIME SOLUTION 23 (2008).
20. *Caritas*, *supra* note 5, ¶ 33.
21. *Id.* ¶ 71.

emergence of the knowledge economy. In the same way that cheap cotton cloth, cheap iron and steel, cheap steam power and electricity, and cheap oil gave rise to the modern industrial economy of the last three centuries, so today cheap information is radically altering the way we work, consume, live, and interact with one another. This emerging globalized "knowledge economy" will be as historic and transformative for the postindustrial era as the Industrial Revolution was in shaping modernity centuries ago.

Epochal economic shifts are usually accompanied by changes in the public's market ethos. People's perception of what is right or wrong and what is fair or unfair adjusts in the wake of the damaging effects of paradigm shifts. For example, in response to the abuses during the early phases of the Industrial Revolution, nineteenth-century British social legislation imposed a minimum age for employment, maximum hours and days of work, and workplace safety regulations. These norms eventually became standard for most countries in the twentieth century. Today, we are in the midst of a similar adjustment in market morality.

The market is playing an increasingly central role in shaping and implementing public policy . . . . The market can be a wonderful instrument encouraging creativity and constructive technological change—and it has been a big part of the rise of many nations out of the depths of subsistence agriculture. But the market has also seeped into many facets of our common and private lives (e.g., commercial surrogacy). Left on its own with minimal oversight from the community, the marketplace will impose its own ethos. Since it is focused principally on allocative efficiency, the neoclassical market takes little note of the unintended consequences it spawns, such as materialism, consumerism, impersonalism, and individualism. Unsuspecting market participants will find themselves either internalizing these values by default or reluctantly conforming to them for their own economic survival. Market models and rules bring with them a market mentality, that is, a market-generated morality."[22]

2. Pope Francis' Emphasis on the Person

Pope Francis' statements on this topic have been consistent with those

22. Albino Barrera, *Global Economic Forces*, in MORAL DYNAMICS, *supra* note 11, at 22.

of Pope Benedict described above, albeit clearly intended more for their rhetorical impact than their intellectual suasion. Among Pope Francis' first public pronouncements was an address to new ambassadors of Kyrgyzstan, Antigua and Barbuda, the Grand Duchy of Luxembourg and Botswana on May 16, 2013, in which he first articulated words that eventually found their way into his recent Apostolic Exhortation, *Evangelii Gaudium* (*"Gaudium")*:

> The current financial crisis can make us overlook the fact that it originated in a profound human crisis: the denial of the primacy of the human person! We have created new idols. The worship of the ancient golden calf . . . has returned in a new and ruthless guise in the idolatry of money and the dictatorship of an impersonal economy lacking a truly human purpose. The worldwide crisis affecting finance and the economy lays bare their imbalances and, above all, their lack of real concern for human beings; man is reduced to one of his needs alone: consumption.[23]

Even more strongly than Pope Benedict, Pope Francis argues that the mechanism of the free market cannot, on its own, retrieve the needed focus on the person. He writes:

> Some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market, will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naïve trust in the goodness of those wielding economic power and in the sacralized workings of the prevailing economic system.[24]

He argues that the growing gap between the majority poor and "the prosperity enjoyed by those happy few" results from

> ideologies which defend the absolute autonomy of the marketplace and financial speculation. Consequently, they reject the right of

23. Pope Francis, Apostolic Exhortation *Evangelii Gaudium* ¶ 55 (2013) [hereinafter *Gaudium*].; *See also Francis' Address to New Ambassadors* (May 16, 2013), *available at* http://www.zenit.org/en/articles/francis-address-to-new-ambassadors (last visited Jan. 20, 2014) (address to new ambassadors to the Holy See).

24. *Id.* ¶ 54.

> states, charged with vigilance for the common good, to exercise any form of control. A new tyranny is thus born, invisible and often virtual, which unilaterally and relentlessly imposes its own laws and rules. . . . In this system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenseless before the interests of a deified market, which become the only rule.[25]

He challenges political and financial leaders: "I exhort you to generous solidarity and to the return of economics and finance to an ethical approach which favors human beings,"[26] keeping in mind that "[t]he dignity of each human person and the pursuit of the common good are concerns which ought to shape all economic policies."[27]

B. Putting the Popes' Arguments in Context

The theological language in which Popes Benedict and Francis couch their critiques should not obscure the fact that their analysis of the problems leading to the global financial crisis is consistent with arguments made by many commentators approaching the topic from secular viewpoints. Let us now examine some of these arguments that focus on three different actors in the drama of the financial crisis: the consumers, the regulators, and the bankers.

1. The Consumers: The Anthropological Critique of the Behavioral Economists

One analysis of the global financial crisis that also stresses the need for a renewed focus on the human person is that of the behavioral economists. Legal scholar Dee Pridgen describes how behavioral economics has, in fact, begun to effect what she calls a "sea-change" in consumer protection law over the past few years; the enactment of Dodd-Frank and creation of the CFPB are the most dramatic manifestations of a fundamental change in the underlying theory of consumer protection.[28] She argues that the first wave of federal consumer protection laws enacted in the late 1960s and early 1970s (the Consumer Credit Protection Act[29], and most significantly the

---

25. *Id.* ¶ 56.
26. *Id.* ¶ 58.
27. *Id.* ¶ 203.
28. Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 405 (2013).
29. 15 U.S.C.A. §§ 1601–1693r (West 2014).

section of that act known as the Truth in Lending Act[30]), were primarily disclosure laws.[31] They were based on the theory that clear, uniform disclosure of the terms of each credit transaction would enable consumers to make rational choices about their credit. As Pridgen explains:

> It was presumed that if the law provided consumers with standardized information about the comparative costs of competing credit products, then the competitive marketplace would be able to function to maximize consumer welfare. This is known as rational choice theory, premised on the existence of "homo economicus," a rational consumer choice maker, who by making rational choices based on individual preferences, will lead to the best economic outcome for the market as a whole. Based on this theory, much of consumer credit law took a pure disclosure approach to consumer protection in which consumers were given relevant information about competing credit products, and were expected to choose the one that maximized their welfare. Disclosure of information was viewed as a panacea for imperfections in the market for consumer credit, because in theory, disclosures of information alone could protect consumers and promote competition while imposing the least cost on the market and meeting with the least amount of political resistance.[32]

In contrast, Dodd-Frank and the other significant piece of federal consumer protection legislation of recent years, the Credit CARD Act of 2009,[33] go beyond mandating disclosure to imposing substantive restrictions on credit practices. Pridgen contends that the impetus for this new approach to consumer credit regulation stems from the work of behavioral economics scholars, who

> questioned the premise that consumers would always act rationally in their own self-interest if presented with adequate information. Basically, these scholars concluded that rational choice theory does not accurately describe how consumers actually behave in the marketplace. Behavioral economics scholars focused on certain cognitive barriers that prevent most consumers from choosing

30. 15 U.S.C.A. §§ 1601–1665e (West 2014).
31. Pridgen, *supra* note 28, 416–17.
32. *Id.*
33. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.).

rationally, and also revealed that markets of credit products may have actually exploited these flaws in consumer decision-making for their own benefit.[34]

Pridgen argues that the failure of the disclosure regime to prevent the global financial crisis can be understood in light of the insights of behavioral economics. Why did so many consumers ignore information provided in the federally-mandated disclosures that ought to have warned them that the expiration of low interest rates on balloon mortgages and significant pre-payment penalties would lock them into mortgages they could not afford to sustain? Behavioral economics posits a number of explanations. Information about higher interest rates after the initial low-rate period can be ignored by consumers facing "information overload," who tend to focus instead on the most immediate features, such as closing costs and initial monthly payments,[35] and by consumers whose natural inclination is to be overly optimistic about the future.[36] Two of the explanations offered by behavioral economists focus on particular aspects of consumers' relationships with the credit providers. Pridgen cites scholarship arguing that "borrowers who feel insecure about their creditworthiness may be overly trusting of a broker or lender representative, even if what the broker/lender says is contradicted by written disclosures."[37] Also, the "endowment effect" can cause a home-buyer to feel as though they already own the home they are engaged in buying, and can make them reluctant to unwind a complex transaction already commenced with a host of other people.[38]

In essence, similar to Popes Benedict and Francis, the behavioral economists are also lodging an anthropological critique of modern economic theory, to explain the global financial crisis and shape the proper

---

34. Pridgen, *supra* note 28, at 417 (citing Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Edward L. Rubin, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality Markets, and Human Beings*, 80 CHI.-KENT L. REV. 1091 (2005); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249 (2006); Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135 (2009)).

35. *Id.* at 418 (citing Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725 (2005); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending*: Price, 65 MD. L. REV. 707, 768 (2006)).

36. *Id.* at 419 (citing Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073 (2009)).

37. *Id.* at 418 (citing Jessica M. Choplin et al., *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 LAW & PSYCHOL. REV. 61 (2011); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617 (2009)).

38. *Id.* at 418–19 (citing Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 734 (1999)).

regulatory response to the crisis. Instead of regulations based on the fictional "rational economic actor," the behavioral economists are arguing that we should examine the real human being, including the reality of the relational nature of human interactions, and shape regulations based on this insight. Thus, even Pridgen's title for this section of her article, *From "Homo Economicus" to Real Consumers*, echoes Popes Benedict and Francis' appeal for a refocus of economic theory to the "human person."[39]

Of course, the field of behavioral economics, as well as the scope and wisdom of proposed specific applications of its conclusions, are subject to critique,[40] and a defense of the field is beyond the scope of this article. For our purposes, though, it is clear that a major theoretical justification for the regulatory approach of the CFPB relies on a renewed focus on the "person" who is the subject of every consumer transaction.

2. The Regulators: Asleep at the Switch?

Some commentators on global financial crises place the primary blame not on deficient regulatory schemes, but rather on financial regulators who were "asleep at the switch."[41] Richard Posner, for example, argues that the Federal Reserve Board and other banking regulators in the United States did have the regulatory authority to prevent financial institutions from making the sorts of loans that eventually led to credit collapse even before the enactment of Dodd-Frank, but that they failed to exercise it.[42] Some of the explanations for this failure focus on the venality of the people who were rotating through the revolving doors between the highest echelons of the regulatory agencies and the highest echelons of the regulated financial institutions,[43] and of the lobbyists and politicians who respond to the massive amounts of money spent by the financial services industry to influence regulatory actions.[44]

It is notable that the Popes' writings do *not* focus on topics such as greed and venality. Instead, they focus on a more benign—if no less dangerous—explanation: a misguided faith in the mechanisms of the

---

39. *Id.* at 416.

40. Pridgen, *supra* note 28, at 430–31 (and sources cited therein). *See also* Joshua D. Wright & Eric Helland, *The Dramatic Rise of Consumer Protection Law*, in THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 316, 363 (2013) (criticizing behaviorist theory and its application to the financial crisis).

41. Richard Posner, *Financial Regulatory Reform: The Politics of Denial*, 6 THE ECONOMISTS' VOICE, no. 11, 2009, at 2.

42. *Id.*

43. *Id.*; Jagdish Bhagwati, *Feeble Critiques: Capitalism's Petty Detractors*, 172 WORLD AFFAIRS 36, 42 (2009).; *See also* the Oscar-award winning documentary, THE INSIDE JOB (Sony Picture Classics 2010).

44. Bhagwati, *supra* note 43,at 42–43.

market. This more benign explanation is explored by many commentators, including legal scholars Gill North and Ross Buckley.[45] North and Buckley note that the Congress granted the Federal Reserve Board statutory authority to address and regulate abuses in the mortgage lending market as early as 1994, with the enactment of the Home Ownership and Equity Protection Act of 1994 ("H"OEPA").46 But the Federal Reserve exercised this authority lightly, emphasizing additional consumer education campaigns and making negligible regulatory changes, until 2008.[46] North and Buckley contend that the Fed's reluctance to react more forcefully to mounting evidence of abusive home lending practices

was consistent with the well-established global patterns of increasing deregulation and a strong reliance on markets—a fundamental belief in the ability of markets to deal with themselves, a view that regulatory interference in markets should be kept to a minimum, an emphasis on efficiency or economic factors, and a belief that consumers should act rationally and look after their own interests.[47] The actions of the Fed were also consistent with the long-standing policy in the U.S. to encourage people to own their own homes.[48] Based on these worldviews, the governors of the Fed saw the growth in the subprime market as a natural and positive development that was allowing millions of people to own their own homes.[49] They were therefore reluctant to interfere; even though they acknowledged that abuses were occurring, they determined that the greater economic good or the net societal benefit was served by allowing the lending to continue.[50] As late as May 2007, Chairman Bernanke indicated that

> we believe that the effect of the troubles in the subprime sector on the broader housing market will likely be limited, and we do not expect significant spillovers from the subprime market to the rest of the economy or to the financial system . . .
>
> Credit market innovations have expanded opportunities for many households. Markets can overshoot, but ultimately, market forces also work to rein in excesses. For some, the self-correcting pullback may seem too late and too severe. But I believe that, in the long

45. North & Buckley, *supra* note 16.
46. *Id.* at 508.
46. *Id.* at 509.
47. *Id.* at 520.
48. *Id.*
49. *Id.*
50. North & Buckley, *supra* note 16, at 520.

run, markets are better than regulators at allocating credit.[51]

North and Buckley argue that this irrational faith in the mechanisms of the market suggests that "regulators need to radically change the framework used to assess the net societal effects of the financial policy they administer."[52] In essence, they would fault Bernanke for failing to properly value the human and social cost of the lateness and severity of the market's "self-correcting pullback."

Those asserting this category of analysis of the current crisis are not typically advocating a complete rejection of the free market. Indeed, this analysis is often lodged as an argument *against* the robust interventionism of Dodd-Frank.[53] If the problem is not in the lack of robust regulation, but rather the will of the regulators overseeing the regulation, we do not need stronger laws, but rather better regulators. How do we improve the regulators? By widening their focus to recognize that the mechanisms of the free market are not always going to be sufficient to address all of the collateral effects of economic decisions on society. In Zamagni's words, to reject the error of identifying "the economy as the place where wealth (or income) is produced and the social sphere as the place where wealth is distributed and solidarity is found."[54] Or, as Barrera suggested, to address the failure of the "neoclassical market . . . [to] take . . . note of the unintended consequences it spawns, such as materialism, consumerism, impersonalism, and individualism."[55] Or, in Pope Francis' words, to reject the "absolute autonomy of the market," and to keep in mind that "[t]he dignity of each human person and the pursuit of the common good are concerns which ought to shape all economic policies."[56]

Again, nailing down the details of exactly *how* the regulators and financial professionals should incorporate considerations about the personal and social effects of economic decisions in their work and in the administration of our consumer protection laws is a vast topic beyond the scope of this article. But for our purposes, it is significant to note the similarities between the papal and secular analyses of the global financial crisis, and the call for a change in regulatory culture or mindset to address it.

---

51. *Id.* at 521.
52. *Id.* at 519.
53. Wright & Helland, *supra* note 40, at 363; Posner, *supra* note 41, at 4.
54. Zamagni, *supra* note 15, at 74.
55. Barrera, *supra* note 22, at 22.
56. Gaudium, *supra* note 23, ¶ 203.

3. *The Bankers: Hobbled Virtues*

Many commentators have focused on the role of the banks making subprime loans to consumers who were doomed to default, while the banks isolated themselves from the risks of default by securitizing the loans and selling them in increasingly complex variations of collateralized debt obligations and derivative securities. This has transformed the banking industry "from a relationship business to a transactional business and from a customer to a counterparty business model."[57] The banker's focus is no longer on the soundness of the front-end transaction of the person who is acquiring a home, but rather the profit to be made in selling that loan to another institution. The possible "'cost"' of the default is not a concern of the bank, since the bank will not bear that cost; the consumer bears that cost alone. Again, as with the regulators, some commentators focus on the venality of the bankers, the "Wolves of Wall Street,"[58] whose financial incentives were based largely on the numbers of loans generated, securitized, and sold to investors.[59] Others, however, offer a more nuanced analysis of the culpability of the bankers.

One of the most interesting is that of Dutch economists and philosophers Johan Graafland and Bert W. van de Ven.[60] They argue that bankers are prevented from exercising virtues that they themselves consider essential to their mission of banking by the constraints of the free market system. Graafland and van de Ven analyzed the mission statements of eight of the world's largest banks, including ones hit heavily by the financial crisis, such as Goldman Sachs and J.P. Morgan Chase & Co. They concluded that the essential mission of the profession of bankers (in contrast to the general mission of all corporations of maximizing shareholder value) is "to serve the interests of customers by providing them with relevant financial products at competitive prices."[61] From a review of the codes of conducts of these banks, Graafland and van de Ven then extracted the following three core virtues considered essential to accomplishing these missions: honesty, due care, and accuracy.[62] Honesty and integrity are identified by Goldman Sachs as being "at the heart of our business," and by Deutsche Bank and ING as being essential in gaining the

---

57. Paul L. Lee, *Heightened Compliance Risk Inherent to Modern Banking*, AM. BANKER, Dec. 16, 2013.

58. THE WOLF OF WALL STREET (Paramount Pictures and Red Granite Productions 2013).

59. Johan Graafland & Bert W. van de Ven, *The Credit Crisis and the Moral Responsibility of Professionals in Finance* 12 (European Banking Center, Discussion Paper No. 2011-012, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809752.

60. *See id.*

61. *Id.* at 5.

62. *Id.* at 7–8.

trust of their stakeholders.[63] The virtue of "'due care"' is described by RABO Bank as

> "providing those financial services considered best and most appropriate by our clients, ensuring the continuity of those services, with a view to the long-term interests of the client and by demonstrating our commitment to our clients and their environment, in ways that help them achieve both their personal, social, and economic ambitions."[64]

Graafland and van de Ven point out that this virtue (in contrast to the virtue of honesty),

> argues that sellers and buyers often do not meet as equals and that sellers that are in a more advantaged position have a duty to take special care of the buyer's interest in the design of the product and the instructions of how to use it. This is particularly relevant in the case of financial products that typically cover a long period of time (mortgages) and therefore involve complex inter-temporal considerations most ordinary people are not well capable of assessing. This means that a supplier is morally negligent when others are harmed by a product in a way that the supplier could possibly have foreseen or prevented.[65]

The third virtue identified by the banks in their codes of conduct is accuracy and high quality of expertise provided. This entails an accurate understanding of the products sold.Deutsche Bank claims: "As a German global brand, a desire for accuracy, thoroughness and quality runs through our organization. We understand issues in depth. This is why we keep things simple and clear."[66] J.P. Morgan asserts, "To build a fortress balance sheet, we must thoroughly understand all our assets and liabilities."[67]

Graafland and van de Ven then examine the actual behavior of banks during and after the global financial crisis, and conclude, of course, that bankers often did not exhibit the virtues outlined in their moral codes.[68] Lack of honesty was sometimes evident in sales of risky investments to

63. *Id.* at 7.
64. *Id.*
65. Graafland & van de Ven, *supra* note 60, at 7–8.
66. *Id.* at 8.
67. *Id.*
68. *Id.* at 9.

unsuspecting buyers.[69] Lack of due care for the interests of customers was evident in the aggressive sales of mortgage products with low teaser rates, and in steering borrowers to products that yielded the highest incentives for the bankers rather than most advantage to the customers.[70] The most grievous failure according to Graafland and van de Ven, however, was the failure to live up to the virtue of accuracy and professional expertise, permitting the housing bubble to grow and burst with such disastrous consequences:

> In the case of the securitization business, there was not only a lack of knowledge of the risks involved, but also a lack of motivation to want to know that the securitization business was creating a bubble of gigantic proportions. As long as the bubble was still growing, many people benefited from inflating it further. No one appreciates the whistleblower who spoils the party. The truth was simply too inconvenient to dissuade those who continued to make huge profits from continuing these lending practices. The ignorance of bankers, therefore, can hardly count as an excuse. On the contrary, they should have tried to learn more about the way their products were designed, and what the inherent risks of these products were.[71]

Nevertheless, Graafland and van de Ven stress that it would be a mistake to conclude that the credit crisis "stems from a lack of moral strength on the part of banks and other financial market parties and the individual professionals working in these sectors."[72] Instead, they argue that the structures of the largely unregulated market in which these bankers were operating hampered their ability to exercise these virtues. They point to Gillian Tett's study of bankers at J.P. Morgan, who were initially wary of securitizing mortgages, because of their inability to accurately assess the risks of these instruments.[73] Eventually, however, this reluctance to share in the profits being made by these instruments forced them to merge with Chase, which was actively involved in this market. After the merger, only the beginning of the collapse of this market prevented J.P. Morgan Chase & Co. from entering the market more aggressively. Graafland and van de Ven write:

---

69. *Id.*
70. *Id.* at 9–10.
71. Graafland & van de Ven, *supra* note 60, at 11.
72. *Id.* at 13.
73. *Id.* at 13–14 (referencing GILLIAN TETT, FOOL'S GOLD: HOW UNRESTRAINED GREED CORRUPTED A DREAM, SHATTERED GLOBAL MARKETS AND UNLEASHED A CATASTROPHE (2009)).

> Looking back we must conclude that banks like J.P. Morgan, with its old-fashioned belief in the virtues of superior risk management, were on the verge of becoming extinct. Old-school risk management makes sense only if you believe that sooner or later there is bound to be an end to the good times, or in other words that the economy goes through a business cycle. Instead, financial experts had come to believe that the risk-measurement models they were using were so sophisticated that they would remove more uncertainty than ever before. At the heart of this belief was the false assumption that the markets would always be liquid enough to allow any financial instrument to be bought or sold readily.[74]

Graafland and van de Ven place this "crude and naïve trust in the . . . workings of the prevailing economic system"[75] into the context of the prevailing legal scheme shaped by this same trust, in which "[l]ack of regulation . . . offered banks the opportunity to provide mortgages to clients with insufficient collateral or financial strength and to pass the credit risk on to other market parties."[76] Another element of the prevailing market ideology that they fault is the assumption that "economic liberty is essential in order to leave room for the unforeseeable and unpredictable."[77] This valorization of innovation contributed to the lack of concern about the complex financial products being created and sold without adequate concern for, let alone understanding of, the risks that these products turned out to pose to the world economic system. Economist Jagdish Bhagwati ties these two dangers—the lack of regulation and the seductiveness of innovation—together, observing that:

> . . . few on Wall Street caught up in the euphoria over these financial innovations allowed for the reality of huge potential downsides that should have required prudence and safeguards. All economists and policymakers know about what Joseph Schumpeter called the "creative destruction" of capitalism, but the invention of these new financial instruments had a wholly different downside possibility, one capable of bringing about what I have called . . . "destructive creation." This potential requires that innovation in the financial sector be dealt with differently than other innovation. I

74. *Id.* at 14.
75. Gaudium, *supra* note 23, ¶ 54.
76. Graafland & van de Ven, *supra* note 60 at 15.
77. *Id.* (referencing F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960)).

> have therefore argued that we need an independent set of experts, who are familiar with Wall Street but are not part of it (or of the Wall Street-Treasury Complex), to evaluate the downside of new instruments, and to make that informed analysis available to regulators, who, after all, cannot regulate what they do not understand.[78]

In the end, Graafland and van de Ven conclude that an effective response to the global financial crisis will require *both* an industry-wide rededication of bankers to their identified virtues, and "complementary institutional changes away from the Anglo-Saxon free market paradigm to a more nuanced market view that acknowledges the need for regulation where the risks of market imperfections harming overall welfare are simply too high and too persistent."[79]

Again, assessing the validity of and figuring out how to implement Graafland and van de Ven's propositions is beyond the scope of this article. For our purposes, though, it is significant to recognize how many of their themes are echoed in Pope Benedict's and Francis' critiques. The banker's identified virtue of the "'duty of care"' recognizes the relational character of the economic transactions that constitute the banker's business. The recognition of the importance of the trust engendered by a longer-term perspective of the banker's relationship with her customer evokes Pope Benedict's call "that traditional principles of social ethics like transparency, honesty and responsibility cannot be ignored or attenuated, but also that in commercial relationships the principle of gratuitousness and the logic of gift as an expression of fraternity can and must find their place within normal economic activity."[80] Their concern for the failure of bankers to live up to their identified virtue of "'accuracy"' with respect to overly complex and innovative financial products echoes Pope Benedict's warning that:

> "Development is impossible without upright men and women, without financiers and politicians whose consciences are finely attuned to the requirements of the common good. Both professional competence and moral consistency are necessary. When technology is allowed to take over, the result is confusion between ends and means, such that the sole criterion for action in business is thought to be the maximization of profit . . . ."[81]

---

78. Bhagwati, *supra* note 43,at 44.
79. Graafland & van de Ven, *supra* note 60, at 16.
80. *Caritas*, *supra* note 5, ¶ 36.
81. *Id.* ¶ 71.

II. Do Dodd-Frank Reforms Offer a Realistic Possibility of a Renewed Focus on the Person in the Machinery of Consumer Credit?

A. *The Consumer Protection Provisions of Dodd-Frank*

1. *Creation of the CFPB*

Dodd-Frank's major innovation with respect to consumer protection was clearly the creation of the CFPB, a federal agency with the specific mandate of looking out for the interests of the "'person"' at the end of every consumer finance transaction. Prior to this, consumer protection regulations were drafted and enforced by a panoply of agencies whose primary focus and constituencies were the financial institutions at the other end of every consumer finance transaction—the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration. Under Dodd-Frank, the consumer protection functions of all of those agencies have been consolidated into the CFPB, which has been given the power previously scattered among those agencies (and the Federal Trade Commission) to draft regulations implementing and to enforce the significant federal consumer financial protection laws gathered under the umbrella of the Consumer Credit Protection Act.[82] The CFPB is charged with implementing and enforcing "federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[83]

The CFPB was also organized in ways that potentially give it much more power than the Federal Trade Commission ("FTC"), which had been the major federal consumer protection agency.[84] In contrast to the FTC, the CFPB is an "independent bureau" within the Federal Reserve System, and is funded by revenues from the Federal Reserve.[85] In this regard, its funding puts it on an equal footing with the other federal banking agencies such as the Federal Reserve and the Office of the Comptroller of the Currency.[86] In contrast, the FTC is funded by annual congressional appropriations,

82. 12 U.S.C. § 5581 (2012).
83. 12 U.S.C. § 5511(a) (2011).
84. Pridgen, *supra* note 28, at 407–408.
85. *Id.* at 411.
86. *Id.*

subjecting it to more direct Congressional control.[87] The CFPB is run by a single director, appointed by the President (with the advice and consent of the Senate) for a five-year term, in contrast to the FTC, which is run by five commissioners, no more than three of which can be from any one political party.[88]

The very existence of a structurally powerful governmental agency whose charge aligns so closely with Pope Francis' call for consideration of the dignity of each human person and pursuit of the common good in shaping economic policies[89] is a powerful force for keeping a focus on the person in the sausage-making of the political process. Even more significant than these organizational features, though, are some of the specific new regulatory powers that Dodd-Frank bestowed on the CFPB.

2. *Substantive Prohibitions in Dodd-Frank's Title XIV: Prohibitions on Steering, and Ability to Pay Requirements.*

Title XIV of Dodd-Frank has a telling subtitle: "The Mortgage Reform and AntiPredatory Lending Act of 2010."[90] It prohibits a number of particular practices judged to be too predatory to be justified in residential mortgage loans, such as excessive prepayment penalties,[91] financing of single premium credit insurance,[92] and pre-dispute mandatory arbitration provisions.[93] Two additional provisions in Title XIV which have received much attention can be viewed as, in essence *forcing* various participants in the consumer credit process to consider the individual human being at the other side of the loan agreement, and to practice the banking virtue identified by Graafland and van de Ven as the "duty of care."[94]

The first is a set of restrictions on activities of mortgage brokers, the companies that find lenders for consumers and help them negotiate terms. It used to be quite common for brokers to get kick-backs from lenders, giving brokers financial incentives to steer consumers to loans that might not be best suited for them. Dodd-Frank now prohibits this practice.[95] The regulatory language promulgated by the CFPB reads:

---

87. *Id.*

88. *Id.* at 412.

89. *Gaudium*, *supra* note 23, ¶ 203.

90. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

91. 15 U.S.C. § 1639c(c) (2012).

92. 15 U.S.C. § 1639c(d) (2012).

93. 15 U.S.C. § 1639b(e)(1) (2011).

94. *See* Graafland & van de Ven, *supra* note 60, at 9–10 (explaining only Graafland and van De Ven's definition of the "duty of care." The statement proceeding the citation to Graafland and van de Ven's is the 'argument.)

95. 15 U.S.C. § 1639b(c)(1) (2011).

> In connection with a consumer credit transaction secured by a dwelling, a loan originator shall not direct or "''steer"'' a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer's interest.[96]

The second is the requirement that lenders thoroughly document that consumers to whom they extend residential mortgages do, in fact, have the ability to repay those loans. No lender

> "may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments."[97]

The statute sets out a "'safe-harbor'," giving banks a presumption of ability to repay if the mortgage meets the definition of a "qualified mortgage," that contains particular pro-consumer features.[98]

Clearly, both of these requirements impose on mortgage lenders a hitherto absent legal requirement of a "'duty to care"' responsibility. At some point in the lending process for a home mortgage, two significant players—the mortgage broker and the mortgage lender—are legally *forced* to consider *the particular human being* to whom a mortgage loan is being made.

3. The Authority to Regulate "Unfair, Deceptive, and Abusive Practices"

Since the enactment of the Federal Trade Commission Act of 1914, the primary standard governing most consumer protection (in both federal and state laws) has been whether consumer practices were "unfair or deceptive."[99] Dodd-Frank gave the CFPB the authority to regulate practices

96. 12 C.F.R. § 1026.36(e)(1) (2012).
97. 15 U.S.C. §1639c(a)(1) (2011).
98. 15 U.S.C. §1639c(b) (2011).
99. 15 U.S.C. § 45 (2006).

that are unfair, deceptive, or "abusive," without specifying the breadth or content of that new power. Dodd-Frank defines an act or practice as "'abusive"' if it:

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
>
> (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or services; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[100]

To date, the CFPB has exercised its authority to regulate unfair and deceptive practices through enforcement actions and informal advisory issuances[101] rather than through formal rule-making,[102] and has not offered any specific guidance on the "'abusive"' feature of these practices. The enforcement actions do, however, offer some flavor for the sorts of behavior the CFPB may be intending to police through this power. The most high-profile enforcement actions brought by the CFPB under this authority to date have been actions against Capital One Financial[103] and Discover Bank[104] for deceptive marketing practices to pressure credit card customers into buying add-on products, like payment protection and credit monitoring, and against Cash America, a pay day lender for filing inaccurate affidavits and filings in debt collection actions.[105]

---

100. 12 U.S.C. § 5531(d) (2011).

101. *See, e.g.*, Consumer Protection Financial Protection Bureau, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts*, CFPB BULLETIN, Jul. 10, 2013, http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf; Consumer Financial Protection Bureau, *Marketing of Credit Card Add-on Products*, CFPB BULLETIN, Jul. 18, 2012, http://files.consumerfinance.gov/f/201207_cfpb_marketing_of_credit_card_addon_products.pdf.

102. Victoria Finkle, *The Myth of the All Powerful CFPB*, 178 AM. BANKER F322, June 6, 2013 (citing criticism of CFPB for pursuing enforcement actions before rule-making).

103. Capital One Bank, (USA), N.A. No. 2012-CFPB-0001 (C.F.P.B. Jul. 17, 2012) (Stipulation and Consent Order).

104. Discover Bank Greenwood, Nos. FDIC-11-548B, FDIC-11-551k, & 2012-CFPB-0005 (F.D.I.C./C.F.P.B. Sept. 24, 2012) (Joint Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty).

105. Cash America International, Inc., No. 2013-CFPB-0008 (C.F.P.B. Nov. 20, 2013) (Consent Order).

Commentators have suggested that it might be used to extend some of the innovations of Title XIV to lending activity other than mortgage lending. For example, legal scholar Mark Totten has suggested that it might be used to address steering practices in student loans, where private student lenders "fail[] to tell a student about the availability of more-advantageous federal students loans for which the student might otherwise qualify."[106]

A fascinating glimpse into the possible signaling effect of UDAAP enforcement was provided in a recent account of a conference of the American Bankers Association's risk management forum.[107] The lawyers offering bankers advice on how to protect their business from UDAAP enforcement actions urged banks to try to recognize "what is fair, not just what is legal".[108] One attorney advised that "part of successfully designing UDAAP-compliant products comes down to the product's basic value. Products that generate extraordinarily high margins are going to be a killer. . .You don't want to be saying 'we make a lot of money on these products' without being able to articulate why that's appropriate."[109] Another factor that these advisors urged banks to consider was suitability:

> whether the product is well matched to a customer's needs. To demonstrate a new product's value, . . . banks should carefully document why a prospective product's utility makes it worth the cost. That obligation is even greater for products that are sold to "vulnerable" populations like the elderly or non-English speaking customers.
>
> "There ought to be documentation somewhere in your new product program that focuses on the cost/benefit analysis [for consumers]. We're seeing that at some point, the bank is supposed to make the choice for the customer. We're trying to protect customers from themselves."[110]

Moreover, according to these advisors, this responsibility for taking

---

106. MARK TOTTEN, CREDIT REFORM AND THE STATES: THE VITAL ROLE OF ATTORNEYS GENERAL AFTER DODD-FRANK (PRACTITIONER VERSION) 11 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242200.

107. *See* Jeff Horwitz, *How to CFPB-Proof New Financial Products*, AM. BANKER, Apr. 29, 2013, *available at* 2013 WLNR 10301733.

108. *Id.*

109. *Id.*

110. *Id.*

seriously the 'duty of care' did not end at the point of sale.[111]

> Simply because a product appears to offer a reasonable value for a target audience doesn't mean that it's necessarily in the clear, however. After a product hits the market, banks should look carefully at whether the product is well understood and being used as intended. If, for example, customers frequently incur fees that were intended to be a deterrent, banks should reevaluate their product's design. Complaints can also serve as a good tip-off that the product is off the mark.[112]

Thus, even the *threat* of UDAAP enforcement is having the effect of at least causing attorneys for financial institutions to advise banks to think about the particular *consumer* to whom a loan is being made, and to take into account particular vulnerabilities of some populations.

B. *The Structural Mechanisms Placing Obstacles in the Way of a Keeping a Focus on the Consumer*

The enactment of Dodd-Frank was just the beginning of a multi-year process of the implementation of Dodd-Frank through a whole host of regulatory agencies. Dodd-Frank is a particularly "'inchoate"' piece of legislation.[113] Dodd-Frank contained approximately 400 directions to more than 20 different regulatory agencies to issue regulations to flesh out the details of its implementation.[114] All federal regulations are subject to a specific rule-making process.[115] First, the relevant agency drafts proposed regulations. Next these proposed regulations are published for public comment.[116] Then these public comments must be processed by the regulators; in connection with the processing, the regulators are required to demonstrate that they have considered every substantive point raised in the

111. *Id.*
112. *Id.*
113. North & Buckley, *supra* note 16,at 479,
114. PAUL ROSE & CHRISTOPHER J. WALKER, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION v (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231314. One source identifies 533 required rules. *See* U.S. CHAMBER OF COMMERCE, DODD-FRANK ACT OF 2010: SUMMARY OF RULEMAKING, STUDIES, AND CONGRESSIONAL REPORTS, *available at* http://chamberpost.typepad.com/files/dodd-frank-summary-sheet.pdf.
115. *See generally* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 289–426 (2010) (describing regulatory rule-making process).
116. *Id.*

public comments, and, in some cases, to undertake a cost-benefit analysis of the proposed rule.[117] After a regulation is finally promulgated, it is subject to legal challenge for any irregularity in any step of the promulgation process, as well as for conflict with other laws, or exceeding the Congressional mandate of the statute itself.[118] Virtually every stage of the process of the implementation mandated by Dodd-Frank has been held up or challenged by the army of industry representatives who oppose regulation.

Journalist Gary Rivlin, in an article called *How Wall Street Defanged Dodd-Frank* , vividly captured the reality of the extent to which passage of Dodd-Frank represents only the tip of the iceberg in terms of effectuating any changes to the financial system.[119] At 5:30 am on a Friday after the joint House-Senate conference committee approved Dodd-Frank's final language, Rivlin quotes the chief lobbyist for the Financial Services Roundtable: "'Halftime,' shrugged Scott Talbott."[120] Rivlin goes on to report that the financial services industry significantly increased the amount of money spent on lobbying after the enactment of Dodd-Frank, sending a virtual army of lobbyists into the battle of the regulations that give content to the law.[121] Rivlin writes:

> The story of how Wall Street lobbyists worked the halls of Congress, blocking the appointment of Elizabeth Warren, Obama's first choice to head the CFPB, or pushing bills aimed at defanging Dodd-Frank, is fairly well-known by now. But it was the stealthy work of battalions of regulatory lawyers, who descended on the private offices of regulators deep inside the bureaucracy, that has proven more crucial to the industry's effort to pick off pieces of Dodd-Frank. There, a kind of ground war has been going on for almost three years, with the regulators waging hand-to-hand combat to defend every clause and comma in Dodd-Frank, and the lawyers fighting to insert any loophole they can to protect their clients' extraordinary profits. This is how the miracle that was the making of Dodd-Frank—hailed as the most comprehensive financial reform since the 1930s—became a slow-moving horror movie called "The Unmaking of Dodd-Frank": a perfect case study of the ways an industry with nearly unlimited resources can avoid a set of tough-

117. *Id.*

118. *Id.*

119. Gary Rivlin, *How Wall Street Defanged Dodd-Frank*, THE NATION, April 30, 2013, *available at* http://www.thenation.com/article/174113/how-wall-street-defanged-dodd-frank.

120. *Id.*

121. *Id.*

minded reforms it doesn't like.[122]

Rivlin paints a picture of the hopelessly outnumbered lobbyists for the consumers' interests (the article starts with a graphic depicting this: 20 little guys with briefcases representing the lobbyists for the industry sent to Capitol Hill to destroy Dodd-Frank in 2012, pitched against one lone guy (without a briefcase) representing the lobbyists for the consumer).[123]

So, clearly, there is the possibility that pure brute force—in terms of manpower and resources—could muffle the best intentions of anyone hoping to use the new structures and powers of Dodd-Frank to keep the interests of the consumer in the forefront of the response to the financial crisis. But that brute force has some limits, because no lobbyist-influenced regulatory response that completely defies the will of Congress as expressed in the statute is ultimately defensible in court. The CFPB *has* promulgated regulations implementing Dodd-Frank's restrictions on steering and ability-to-pay requirements. Like it or not, the industry *is* going to be subject to some measure of a "'duty to care"' responsibility, some structural road bumps in the consumer lending process that *force* banks to think about *the particular human being* to whom a mortgage loan is being made, in the course of making that loan.

But it is clear that this is an ongoing battle—posing both an ongoing opportunity for regulators to head the calls of the Popes, and an ongoing opportunity for the industry to prevent them from doing so. One of the most troublesome battlegrounds in the rule-making process is proving to be the requirement that regulators conduct a cost-benefit analysis of proposed regulations, and to justify the particular regulatory choices made by such an analysis. This cost-benefit analysis requirement is a rather curious thing, politically. It was initially introduced in an Executive Order issued by President Reagan in 1981, requiring the Office of Management and Budget to conduct a review of proposed new regulations focusing on a cost-benefit analysis.[124] President Clinton maintained this requirement,[125] as did President Obama.[126] Clearly, the abstract principle of imposing a requirement that regulatory agencies rigorously consider all of the possible costs of a proposed regulation before proposing the regulation has bipartisan support. Dodd-Frank specifically mandates that the CFPB, in its rulemaking:

---

122. *Id.*
123. *Id.*
124. Exec. Order No. 12,291, 3 C.F.R. § 1981 (1983).
125. Exec. Order No. 12,866, 3 C.F.R. § 638 (1993-94).
126. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

> Consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons . . . and the impact on consumers in rural areas."[127]

Whether such a cost benefit analysis requirement will impede the ability of the CFPB to keep its focus on the consumer in the way that the Popes advocate will depend on what sorts of factors are considered legitimate factors in the conduct of such an analysis.

In a U.S. Chamber of Commerce Report defending a robust application of a cost-benefit analysis, the authors invoke Benjamin Franklin in defending cost-benefit analysis as, at its core, reflecting

> . . . a venerable, conventional methodology and wisdom on rational decision-making. As expressed, for example, in a 1772 letter that Benjamin Franklin wrote to his friend Joseph Priestly, listing the pros and cons of a solution on a piece of paper and carefully weighting them against one another provides a practical method for solving difficult problems. Franklin's "'prudential algebra"' resonates today as common sense. Advanced econometric analysis and the accumulated experience of diverse agencies applying cost-benefit analysis for many years have improved this intuitive method into a powerful tool for rational rulemaking.[128]

But the danger lies in the possibility that what is defined as a legitimate factor in those lists of benefits and detriments comes to *exclude* anything that is not capable of being quantified—that excludes, by definition, consideration of the cost to the individual consumer at the end of a consumer loan. And there are indications in some of the arguments being made with respect to the role of cost-benefit analyses in Dodd-Frank rulemaking that this could be happening.

Consider, for example, the U.S. Chamber of Commerce report that I just cited. In arguing for a more robust application of the cost-benefit

127. 12 U.S.C. § 5512(b)(2)(A) (2012). *But see* JEFFREY N. GORDON, THE EMPTY CALL FOR BENEFIT-COST ANALYSIS IN FINANCIAL REGULATION 12–16 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2378562 (arguing that similar language elsewhere in Dodd-Frank does not require a quantification of "'costs"' and "'benefits"' typically signified by a cost-benefit analysis).

128. Rose & Walker, *supra* note 116,at 11.

justification of financial regulation, the authors dismiss any critiques of cost-benefit analysis by, first of all, suggesting that the cost-benefit analysis requirement is *only* designed to "provide a methodology to capture all the costs that can be captured, enabling regulators to determine the best course of action. Where costs cannot be quantified, the agency may include qualitative evaluation that explains the virtues of a particular regulatory actions."[129] However, the Report then goes on to discuss in detail the trio of decisions from the D.C. Circuit Court of Appeals in which regulations proposed by the Securities and Exchange Commission were held to have failed to satisfy particular requirements for a valid cost-benefit analysis, all of which tended to focus on inadequacies in the *quantifiable* items on Ben Franklin's list.[130] The non-quantifiable side of Ben Franklin's column (where many of the costs to the consumer might be found) seems to be in danger of getting short shrift.

The real danger here, lurking in the background of the issue of cost-benefit analysis, is not, as Rivlin suggests, that the "'industry"' will successfully use the courts to continue to thwart any regulation that might impose the slightest cost on the industry, in the guise of this "'cost-benefit analysis."' Rather, the real danger is much more subtle; it is' the same danger that the Popes articulated, with which I began this article. The danger is that the "'cost-benefit analysis"' will not be opened up to permit factors that fall into the column of the human costs of the financial crisis, the non-quantifiable costs, to balance some of the quantifiable financial costs to the industry.

The authors of the Chamber of Commerce report explicitly reject the validity of any moral or ethical critiques of cost-benefit analysis[131] with these words:

> whatever the value of [ethical or moral] arguments against the use of cost-benefit analysis in the context of environmental, safety, or other regulations, they rarely apply in the context of financial regulation because financial regulation is less likely to implicate thorny questions of placing a value on human life or comparing

---

129. *Id.* at 18 (citing Exec. Order 13,563, 3 C.F.R. § 215 (2011-12)).

130. *Id.* at 29–33 (citing Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); Bus. Roundtable & U.S. Chamber of Commerce v. SEC, 647 F.3d 1144 (D.C. Cir. 2011)). ; *But see* Am. Petroleum Inst. v. EPA, 684 F.3d 1342 (D.C. Cir. 2012) (suggesting some curbs on the court's review of agency cost-benefit analyses).

131. *Id.* at 18 (citing Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L. J. 1981, 2049 (1998); Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005 (2000); Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931 (2000)).

> tangible economic costs with less tangible environmental costs, such as the value of wildlife preserves or endangered species. Instead, while there will still be debates about how to quantify different costs and benefits, generally the costs and benefits at issue in financial regulation are economic and thus quantifiable without having to engage in valuing noneconomic costs or benefits.[132]

Besides demonstrating absurdly circular logic, the claim that the costs and benefits at issue in financial regulation are always economic and thus quantifiable, seems to me to have been rather soundly refuted by the undeniable human toll of the global financial crisis. This is precisely why Pope Francis exhorted political and financial leaders "to generous solidarity and a return of economics and finance to an ethical approach which favors human beings,"[133] keeping in mind that "[t]he dignity of each human person and the pursuit of the common good are concerns which ought to shape all economic policies."[134]

---

132. *Id.* at 18–19.
133. *Gaudium*, *supra* note 23, ¶ 58.
134. *Id.* ¶ 203.