

Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism

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As one who has criticized Mr. Nader and his associates for advocating more and more economic regulation while simultaneously documenting its past failures,¹ I applaud much of what is said in the preceding pages. The unqualified statements that "present economic regulation lacks both a comprehensive theory and a consistent goal . . ." and "that our unguided regulatory system undermines competition and entrenches monopoly at the public's expense . . ."² are obvious conclusions to be drawn from the so-called "Nader Reports."³ It is significant, however, that Mr. Nader and Mr. Green have categorically drawn them, for their credibility with some parts of our society may counteract the widespread conviction that faith in economic regulation is the mark of the educated Twentieth Century man.

My misgivings are rather with their proposals for reform, which call for significant deregulation but also identify a number of areas where government intervention is said to be appropriate. The difference between this approved regulation and the kind they condemn seems to me essentially cosmetic and based largely on their idiosyncratic preferences, rather than on economic theory. Their reasons for condemning existing regulation, therefore, leave Mr. Nader and Mr. Green in the grasp of creeping capitalism, for their argument, if any deference is to be paid to logic, calls inexorably for a clear-cut affirmation of the free market.

I

Economic regulation has proven to be a noble but futile endeavor. The catalog of fiascos collected by Mr. Nader and Mr. Green demonstrates that proposition, and it is by no means exhaustive. Their dis-

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Throughout this critique, I refer to Mr. Nader first and Mr. Green second. That was the order in which they appeared until they requested a reversal after both pieces were set into galleys.

1. R. WINTER, *THE CONSUMER ADVOCATE VERSUS THE CONSUMER* (1972).

2. Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 *YALE L.J.* at 871 (1973).

3. See, e.g., R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* (1970); J. TURNER, *THE CHEMICAL FEAST* (1970); E. COX, R. FELLMETH & J. SCHULTZ, *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* (1969).

cussion of the I.C.C., for example, arrays only a fraction of the mischief it has contrived.⁴

Mr. Nader and Mr. Green correctly identify one source of regulatory failure as the misuse of economic theory.⁵ All too often the underlying justification for government regulation has been theoretically defective or distortions of theory have been used to justify regulatory fiat aiding special interests. They might well have added two other common errors made by advocates of regulation, common enough that Mr. Nader and Mr. Green occasionally commit them themselves. The first is assuming that any departure from the economist's model of perfect competition justifies regulation. Of course it does not. The model is but an abstraction designed solely as an analytic or pedagogic tool. Because no claim is made that it accurately describes reality or that only perfect competition maximizes consumer welfare, a departure from the model is not itself proof of a net injury to consumers. For example, no one contends that consumers have perfect knowledge in the real world, even though it is frequently assumed in the model for analytic purposes. This divergence between reality and academic assumptions, however, is not itself sufficient to make a case for regulation. Because the collection and transmittal of knowledge consumes society's resources, it is not costless, and may itself be a commodity best allocated by the market. Similarly, the model of perfect competition does not describe the only circumstances in which consumer welfare is maximized. Industrial concentration may in fact be better for consumers than atomistic competition when there are economies of scale.

Something more than a departure from the abstraction of perfect competition must thus be shown to justify government intervention. The kind of market failure which may call for regulation involves a failure of competition (natural monopoly), free rider effects (national defense), externalities (auto pollution), or the like—cases in which voluntary exchange is thought to be inhibited rather than facilitated by free markets.

The second error is failing to distinguish between regulation of this sort, which expedites free exchange (market supporting), and that which inhibits it for ethical reasons or personal preference (market supplanting). Mr. Nader and Mr. Green sometimes seem to advocate the former, sometimes the latter, without pausing to distinguish between them. Indeed, for all the economic gloss of their article, most

4. See generally R. FELLMETH, *supra* note 3.

5. Green & Nader, *supra* note 2, at 872-75.

of their suggestions for regulation appear to be based on their own value preferences rather than established market failure—preferences which they spend little time explaining, much less justifying.

II

Mr. Nader and Mr. Green identify a second source of regulatory failure in the processes used to regulate. Just as economic regulation suffers from the lack of basis in economic theory, it also has no basis in theories about which legal institutions are best suited to particular regulatory goals.

Three principal mechanisms are employed to carry out economic regulation. The first is the direct statutory command. At times it is quite specific, *e.g.*, the Fair Labor Standards Act;⁶ at others, it is more general, *e.g.*, the Sherman Act.⁷ In either case, judicial enforcement is required, although considerable power to initiate proceedings may be lodged in the Executive Branch. The second mechanism is the delegation of authority to some part of the Executive Branch to execute a statutory mandate of more or less specificity, *e.g.*, housing and HUD.⁸ The final device is the independent regulatory agency to which a considerable amount of discretion is delegated.⁹ The distribution of responsibility among these mechanisms often seems random and each has encountered formidable problems in carrying out its assigned tasks.

No matter which method is employed, failure will result when the theoretical justification for regulation is inadequate. At best, the outcome will be random and arbitrary; at worst, many will suffer significant economic harm. But even where a theoretical basis for regulation exists, intervention can be justified only if regulatory processes are likely to make matters better rather than worse. Any such conclusion must overcome formidable hurdles. Where, for example, the regulatory mission calls on the agency to reproduce the results of a well functioning market, the endeavor may be hopeless. There is rarely any way to determine outside of an actual market what those results are. Market results—whether the optimal number of firms in an industry, the optimal size of a firm, or the market clearing price—are reached in the context of changing variables, with trial and error and the imitation of successful competitors as the principal tactics of par-

6. 29 U.S.C. §§ 201 *et seq.* (1970).

7. 19 U.S.C. § 102 (1970).

8. *See* Housing and Urban Development Act, 42 U.S.C. §§ 1401 *et seq.* (1970).

9. *See, e.g.*, Interstate Commerce Act, 49 U.S.C. § 14 (1970).

ticipating firms. Economic success or failure, not hypothetical speculations, signal the result. Business decisions thus must often be made quickly, pragmatically, and by fiat. Law, however, imposes constraining mechanisms: Procedural safeguards, the need to collect and present evidence, the demands of an adversary process—all create an infinitely more cumbersome process.

Economic results, moreover, depend on intangibles which can be measured only by market performance. The size of a firm, for example, depends on many intangibles—morale, leadership, administrative ability, organization—which can be measured by the market alone. A firm with an exceptionally talented management will be more efficient than its competitors and will grow. Consumers will lose if it is broken up and its superior efficiency destroyed because of governmental speculation that a smaller firm is optimal. Agency adjudication simply cannot measure the intangibles which lead to economic success and distinguish the efficient from the harmful. One might as well choose the National League batting champion without considering the scorecards.

Regulation by executive or independent agency encounters additional difficulties. Due process constraints and a desire to protect the lower bureaucracy from partisan decisions necessarily decrease worker discipline in the civil service. Survival for the bureaucrat often depends on matters other than the expeditious performance of his duties. This is one of the lessons of the Nader Report on the F.T.C.¹⁰ Yet, at higher levels, partisan influence is substantial.¹¹ And partisanship, all would agree, is inconsistent with intelligent economic regulation.

Moreover, government by its very nature reacts to political pressure, rather than impartial standards, and one should anticipate that executive or independent agencies will respond most favorably to those with the greatest ability and incentive to organize and press their claims. Typically, a small number of individuals or firms (low cost of organization) with significant and enduring interests (high potential benefits) are better able to organize than larger groups with more transitory matters at stake. Thus, those the agency is supposed to regulate may be most successful in influencing its behavior and many have concluded, along with Mr. Nader and Mr. Green, that numerous agencies serve, not as protective mechanisms shielding consumers from industry power, but rather as vehicles protecting industry itself from competition. Again, the Nader Reports document this conclusion.¹²

10. See, e.g., COX *et al.*, *supra* note 3, at 148.

11. E.g., FELLMETH, *supra* note 3, at 1-4.

12. See note 3 *supra*.

A final drawback of regulation is that government embodies many of the very imperfections attributed to the market by those who call for regulation. In a very literal sense, therefore, regulation can be a cure worse than the disease. Much has been made of the consumer's inability to affect his market destinies and his lack of product information. Yet surely these criticisms are even more cogent where government is involved. A product which does not satisfy consumers is far more likely to disappear than a government ruling. When the I.C.C. prohibits new truckers from entering the market, consumers rarely know of the ruling—much less why it was made—and, of course, can do nothing to change it. If the Edsel had had I.C.C. protection, there probably would have been far fewer red faces at the Ford Motor Company.

III

Mr. Nader and Mr. Green are thus to be applauded for concluding that substantial deregulation is essential. Their other proposals for reform, however, entail regulation which is in principle indistinguishable from that which they condemn.

Once we make the assumption that the free market is to serve as the principal coordinator of economic activity, a theory of regulation must be two-pronged: First, it must establish those cases of market failure sufficiently serious to justify intervention, along with the goals such regulation should strive to achieve; second, it should describe the legal processes appropriate to the various kinds of regulation.

Since an important reason for choosing the market is to serve individual consuming tastes, a theory of regulation ought, where possible, transcend the preferences of particular individuals.¹³ A preference for the welfare of certain groups or for conduct which appeals to one's personal tastes is simply not a general theory of economic regulation: Individual value preferences can justify all forms of governmental intervention once the legitimate requirements of the political process have been satisfied.

Viewed in these terms, Mr. Nader and Mr. Green's theory of regulation is utterly inadequate. Apart from occasional ad hoc statements indicating their own preferences, their exposition is, on the one hand,

13. Departures from the market can, of course, be justified on the grounds that a generalized moral or ethical norm calls for other results, *e.g.*, toy safety. Such departures should be clearly labeled as such and accompanied by a thorough discussion of the origin of the governing norm and its scope, as well as of the costs of abandoning the market in the particular instance. Mr. Nader and Mr. Green make no such claims, much less engage in such a discussion, on behalf of the regulation they suggest.

too broad to give guidance as to what circumstances call for regulation or which mechanisms lessen its inherent risks and, on the other, too narrow to justify many of the demands for government action made by Mr. Nader and his associates.

A. *Safety Regulation*

Consider, for example, safety regulation. Mr. Nader has been criticized for imposing on consumers his preferences as to the proper trade-off between risks and the costs of avoiding them.¹⁴ The justification for safety regulation Mr. Nader and Mr. Green now offer seeks to avoid such criticism by arguing that "it is better to prevent consumer harm than to compensate it later."¹⁵ To the extent that compensation through tort litigation is inadequate—whether because of legal sloth or an inability to calculate damages—the real cost of a risk will not be properly allocated. Nevertheless, if regulation is to be justified, it must be shown, first, that compensation is in fact inadequate in the case of the particular product, and second, that the benefits lost by regulation are less than the difference between the compensation received by injured parties and that which adequately covers the loss.

If we apply this formula to one of Mr. Nader and Mr. Green's examples, drug regulation, the difficulty of making such a showing is evident. Let us assume that the damages paid in tort by drug manufacturers are less than the cost of the injuries caused. Mr. Nader and Mr. Green would require drug regulation in such circumstances. Yet recent findings have demonstrated that rigorous drug regulation significantly impedes the rate of introduction of new drugs and thus prevents beneficial as well as harmful drugs from entering the market.¹⁶ And those who suffer from the absence of beneficial drugs get *no compensation at all*. That the cost-effectiveness argument supports the call for regulation thus seems on the available facts anything but self-evident.

The second justification offered for safety regulation—that "the harm inflicted may simply be unacceptable to its victims"¹⁷—is, save where externalities are present, simply no theory at all. Mr. Nader and Mr. Green would make autos crashworthy, but how does one explain *compulsory* seat belts in terms of consumer judgments as to unacceptable

14. See note 1 *supra*.

15. Green & Nader, *supra* note 2, at 885.

16. S. PELTZMAN, *THE BENEFITS AND COSTS OF NEW DRUG REGULATION* (1972).

17. Green & Nader, *supra* note 2, at 885.

risks? After all, consumers who find the risk "unacceptable" can have seat belts installed and hardly need a loud, continuous buzzer to torment them into buckling up. Clearly, the judgment of acceptability stems from the preferences of Mr. Nader and Mr. Green, rather than from those of auto buyers.

In light of the campaigns mounted in the name of consumerism, the rhetoric of cost effectiveness and unacceptability is thus just so much boilerplate justifying the imposition of the campaigners' preferences. Neither rationale supports, for example, the campaign over the sturdiness of automobile bumpers. Similarly, while the Nader Report on the F.D.A. criticizes white bread because it is less nutritious than other breads, it concedes that less nutritious breads may be more profitable.¹⁸ The only explanation for that phenomenon, of course, is consumer choice.

Mr. Nader and Mr. Green make much of the fact that existing economic regulation has been turned to the advantage of special interest groups. There is nothing inherent in safety regulation, however, that makes it immune from such manipulation. Product safety regulation is, in fact, well suited for use as a weapon against one's competitors. Indeed, it is merely one form of restriction on entry. Had Mr. Nader been the force in the 50's that he is today, it is likely that he would have made strange bedfellows with the American auto industry in its battle against the small (and less safe) foreign car.¹⁹

Because Mr. Nader and Mr. Green fail to justify safety regulation on grounds of true market failure, their discussion does not elaborate a theory of regulation, but is rather a statement of their personal aversion for certain risks (or for others taking those risks). A theory supporting some forms of safety regulation may, however, exist. Where safety information is not accessible to competitors or testing organizations, the case for regulation in the form of inspection—sanitary conditions in food processing, for example—is stronger. Similarly, where products do not have close substitutes—cigarettes perhaps—and there seems to be a high risk of physical damage or addiction, a case of market failure can arguably be made. One might contend that the lack of close substitutes constitutes a failure of competition limiting market incentives to expose a product's dangers and that the generation of information from other sources, *e.g.*, independent testing agencies, will be slower than governmental processes. Mr. Nader and Mr.

18. J. TURNER, *THE CHEMICAL FEAST* 111-12 (Grossman, 1970).

19. *Cf.* L. DODGE, *SMALL ON SAFETY: THE DESIGNED-IN DANGERS OF THE VOLKSWAGEN* (1972).

Green forego any such discussion, I must assume, because market failure simply does not justify the kind of regulation they would enact.

B. *Externalities*

Citing auto pollution as an example, Mr. Nader and Mr. Green also call for the regulation of externalities where persons not a party to an economic transaction are injured by it.²⁰ No one would deny, of course, that externalities are an example of market failure, but Mr. Nader and Mr. Green overstate the extent to which they serve as a guide for regulation. The externality formula does tell us which parties will benefit from regulation but precious little about whether, when, or how we ought to go about it.

In fact, almost any economic regulation may be justified by externality theory. Those who say they suffer psychic harm from the mere thought of others watching obscene movies can make a case for regulating the sale of pornography, just as Mr. Nader and Mr. Green presumably can make a case for seat belts on the grounds that they cannot bear the thought of people risking life and limb. Calling something an externality, therefore, merely throws us back on our personal value systems.

Just as the significance of an externality depends on the eye (or nose or mind) of the beholder, so too their elimination may have very different distributional effects on individuals and groups. Consider auto pollution: Regulating pollution by requiring anti-pollution devices on all cars will benefit those who live in certain urban areas and those particularly susceptible to air pollution more than it benefits those who live in rural areas or those with hardy respiratory systems. Such regulation will injure car owners generally, who must pay more for their car, burn more gas, and, because of the increased demand, pay more for the gas they burn. The price of oil may also be affected by the increase in gas demand, a result which must certainly aggravate the fuel crisis.²¹ Much of the cost of reducing auto pollution will thus be

20. Green & Nader, *supra* note 2, at 886.

21. The Clean Air Act, 42 U.S.C. § 1857 (1970), requires emission control measures for the 1973 model year which increase gasoline consumption at least seven percent. Substantially stricter requirements for 1976 promise even less efficient performance. Newsweek, Jan. 22, 1973, at 54.

Demand for petroleum products, including demand by motorists, is expected to grow by fifty-eight percent between 1972 and 1985. *Id.* Capacity and resources to supply that demand are in doubt. *Id.* at 52, 53.

Current Environmental Protection Agency plans to meet ambient air quality standards in the Los Angeles smog basin by 1975 include conversion of commercial fleet vehicles to natural gas operation, N.Y. Times, Jan. 14, 1973, at 41, col. 2, but this action would shift demand to other fossil fuels in equally short supply. Newsweek, Jan. 22, 1973, at 53.

borne by those who neither significantly cause pollution nor greatly benefit from its regulation, *e.g.*, the rural poor who need a car. Imposing such costs on them seems rather like the original externality the regulation was designed to remedy. Mr. Nader and Mr. Green's call for such regulation necessarily implies a personal judgment that the gain to some groups outweighs the harm to others. Nor do they suggest why government regulators will be able to make such judgments more fairly and efficiently than previous regulators dealing with similar economic or technical complexities.²²

I am not arguing that we should not regulate activities entailing significant externalities. They are a type of market failure and thus carry no presumption with them. Nevertheless, regulation entails difficult cost-benefit judgments as well as normative or distributional decisions favoring some groups over others—issues which are often obscured and never resolved by saying that regulation is needed “to protect the public.”

C. *Enabling Regulation*

Mr. Nader and Mr. Green also approve of something called enabling regulation as a theoretically valid form of market control.²³ Their description is, however, so broad and so vague as to drain the phrase of meaning.

Of course, the antitrust laws can be employed as a market supporting rather than a market supplanting device. But Mr. Nader and Mr. Green have a view of antitrust which does not seem theoretically valid. For example, they speak of concentration as though it necessarily and invariably entails a net loss to consumers. There is no *a priori* reason to draw that conclusion. In the case of the hypothetical absolute monopolist, economic theory does, of course, tell us that there will be an efficiency loss in that resources will be misallocated because price will be above marginal cost and output will be restricted. But until one knows what efficiency gains—reduction of marginal cost—are produced

22. The Los Angeles situation illustrates the incredible complexity of measuring costs and benefits. In addition to conversion of some vehicles from petroleum to natural gas operation, note 21 *supra*, the Environmental Protection Agency is considering gasoline rationing and restrictions on vehicle use designed to reduce auto travel by as much as eighty percent. N.Y. Times, Jan. 16, 1973, at 10, col. 6. Since the Los Angeles area has virtually no effective public transportation, the proposed strictures would have a severe impact on the economy of the area generally and certain groups within it in particular. California officials doubt that auto traffic can be reduced by even twenty percent. *Id.* at 21, col. 1. And the rationing that would be involved will entail allocational difficulties so severe many doubt it could ever be implemented.

23. Green & Nader, *supra* note 2, at 886.

through economies of scale, the factual conclusion that consumers suffer from concentration cannot be made.²⁴

Concentration is not restricted to basic industries but is found in many markets. The fact is that many small businesses are concentrated in terms of their market and are in principle indistinguishable from more visible industries such as the auto industry. Within convenient distance from the Yale Law School, for example, there has, in my memory, been only one drug store. Relative to the price of its average product, its local market power is probably significant, as is the cumulative national impact of countless similar examples. A consistent, principled assault on concentration would thus involve a frontal attack on vast areas of the economy and not just on certain highly visible, and politically vulnerable, industries.

Antitrust is, moreover, a regulation aimed at a short-run problem. So long as government does not restrict entry, any concentration not based on efficiency will ultimately be destroyed by market forces. Market forces may be considerably slower than the judicial processes, however, and antitrust may be necessary to prevent the short-run establishment of market power through overt collusion or merger. The antitrust enforcer should aim, therefore, not at concentration brought about by internal growth, but rather at overt collusion or mergers involving significant market power. To go as far as Mr. Nader and Mr. Green seem to suggest would in effect require the courts to determine the optimal size or number of firms in an industry, the same impossible task of impersonating a well-functioning market they shun in the context of rate regulation.

If enabling regulation is merely market supporting such as is contract and proper antitrust law, it may have some theoretical basis. But Mr. Nader and Mr. Green in effect call any laws they like enabling regulation. Anti-discrimination laws, occupational health and safety requirements, and unemployment compensation may be good laws and may arguably be grounded in economic efficiency.²⁵ To lump them

24. See Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AMER. ECON. REV. 18 (1968).

25. Some may argue that anti-discrimination laws serve economic efficiency in that they compel market participants to govern their behavior according to monetary returns alone and to disregard certain psychic benefits. Nevertheless, economic efficiency can readily be thought to include psychic benefit and it is the case that we do not regulate that form of reward generally, *i.e.*, why not a law against taking the color of a product into account? For that reason, I prefer to justify such laws on non-market rationales, which are legion.

Unemployment compensation may be thought of as a corollary to governmental control of money, which necessarily affects employment opportunities. Health and safety requirements are more difficult to justify in such terms. I can understand why an employer might

together as Mr. Nader and Mr. Green do, however, is simply to abandon the search for theory. Advocates of the farm program and the Lockheed loan, after all, rely heavily on the need to protect individuals in the productive process. Indeed, there are few instances of economic regulation that cannot be justified on such grounds so long as they are consistent with one's preferences.

Similarly, most of Mr. Nader and Mr. Green's proposals for increasing the flow of information seem based on personal preference, rather than market failure. For example, absent some showing of market failure, there is no reason to treat information differently than any other commodity. Competition rewards those who provide the information desired by consumers. One can expect entrepreneurs to establish independent testing organizations where the value of information to consumers is greater than the cost of collection and transmittal. One scholar who has studied securities regulation has confirmed the proposition that general expectations of increased benefits to the consumer from regulation of information are mistaken.²⁶

To be sure, I have heard it argued that in some cases a free rider effect deters entrepreneurs from going into the information business or that where there is a high risk or danger of addiction, *e.g.*, cigarettes, market forces are slower than government where the product has no close substitutes. Even assuming that such contentions are true, one must still bring the argument to the retail level and scrutinize particular markets, rather than call for general regulation.

Where questions of definition are concerned, it can also be argued that a competitive market may lead to a proliferation of confusing definitions. But while defining weights and measures or the import of contractual language may be a proper role for government, that is not the same as imposing on consumers the cost of collecting and transmitting information which they find has little value.

D. *Yardstick Enterprise*

The final circumstance in which Mr. Nader and Mr. Green call for economic regulation involves what they term yardstick enterprise.²⁷

be held strictly liable for such injuries (see Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972)), but other kinds of regulation raise more difficult questions for the reasons stated earlier in the discussion of safety regulation. (The extent of Mr. Nader and Mr. Green's confusion is reflected in the fact that, having engaged in a substantial discussion of the justifications for "safety regulation," they call occupational health and safety requirements "enabling regulation.")

26. G. STIGLER *et al.*, CAN REGULATORY AGENCIES PROTECT THE CONSUMER 12 (American Enterprise Institute, 1971).

27. Green & Nader, *supra* note 2, at 886-87.

Again, all of their talk of “public need” and setting “an example for private enterprise” comes down to the proposition that the government ought to engage in certain activities which Mr. Nader and Mr. Green personally find worthy. One will recall how heavily “yardstick” arguments were relied on by proponents of the supersonic transport and the space program. I do not know whether Mr. Nader and Mr. Green support those particular endeavors, but, given the right personal preferences, those projects certainly fall within their definition of yardstick enterprise.

Mr. Nader and Mr. Green have admirably established the case for economic deregulation. In so doing, however, they step onto the slippery slope. Just as one piece of regulation has led to another, so too the genie of deregulation, once released, is not easily contained. The very logic of their condemnation of existing regulation undercuts what they offer us in their theory of economic regulation, a theory, which, when scrutinized, unfortunately comes down to the maxim, “Whatever Ralph Nader thinks is best for the country is best for the country.” That is a proposition, I think, that commands the intellectual respect it deserves.

IV

The one major change in regulatory process Mr. Nader and Mr. Green suggest is the establishment of a Consumer Protection Agency to represent consumers before other federal agencies.²⁸ Since it is thought that the other agencies have failed in part because only special interests appear before them, it is hoped that this new agency will improve overall regulatory performance. Unless there is truly magic in a name, however, we must conclude that the reasons this agency will be able to avoid the pitfalls which have downed its predecessors are anything but self-evident. Sloth, inefficiency, and responsiveness to special interests can prey on it as easily as they have preyed on its brethren. Indeed, the very argument that widespread agency failure can be cured by the creation of yet another agency seems to answer itself.

Such an agency, moreover, seems wrong in concept. Legal representation can be effective only when there is a single interest to represent. Where, as with consumers, there is no homogeneous, single interest, representation is impossible. For this reason, the proposed Consumer Protection Agency must always be the principal rather than the agent.

28. *Id.* at 888-89.

Consumer tastes vary widely as to products, appearance, quality, safety, durability, price, and so on. Every purchase involves innumerable trade-offs among such matters; a single agency can represent only the views of certain consumers. To be sure, more might be represented than previously, but there is no reason to expect the agency to add any more than another narrow interest group to the detriment of the most powerless in our society.

It is interesting to speculate on whether the "consumer tastes" such an agency is likely to represent are those of the upper-income consumer. While consumerism appears as an anti-establishment movement, a closer examination suggests it may be largely the ideological handiwork of the liberal, upper-middle class. To be sure, law can compel the production of "better" products, but only by increasing their cost. It can also compel, at a cost, the dissemination of detailed product information which is of greatest value to the highly educated. All these measures must decrease output and in particular decrease the production of cheap, mass produced goods. It is all very well for middle and higher income groups to call for more quality and safety when they can afford it. Laws compelling greater production of "better" goods may, because of economies of scale, make such goods less expensive. But such laws may also eliminate the even cheaper products the poor can now afford. We have had much experience in the past with producer groups seeking governmental protection from competition. Can one now make the argument that consumerism is unique in seeking a monopoly for the consuming tastes of its members, the upper-middle class?