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GOVERNMENT AND THE CONSUMER

Richard J. Barber*

I believe we are on the threshold of a fundamental change in our popular economic thought, that in the future we are going to think less about the producer and more about the consumer.—Governor Franklin D. Roosevelt (May 1932)¹

In Washington, consumer legislation is still a dream.—Senator Philip A. Hart (December 1963)²

THE consumer has long been a subject of political concern, yet his problems as a purchaser are now probably greater in number and more serious than ever before. The failure of public policy to respond adequately to consumer needs must certainly be one of the most perplexing chapters in any examination of our federal government's response to the challenges of an increasingly complex economy. What is particularly intriguing is that the consumer's difficulties in the marketplace have long been recognized, both by the public in general and by political spokesmen. Indeed, it seems that more ink has been spilled, more speeches delivered, and more presidential and congressional documents issued on the subject of consumer problems—all with less effect—than in any other area of public concern, except, perhaps, for issues of war and peace.

Adam Smith, that shrewd Scot who recognized the need for government involvement in a private economy more often than many of his twentieth-century "conservative" followers like to admit, emphasized nearly two centuries ago that "consumption is the sole end and purpose of all production" and that "the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer."³ Smith was quite right to emphasize

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1. THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 639, 645 (1938).

2. Address to the Association of California Consumers Convention, Dec. 7, 1963, p. 1 (mimeo.). Speaking more recently, Senator Hart—who has become a hero among consumers because of his sponsorship of the Truth-in-Packaging Bill (see note 74 *infra*)—assessed the situation again: "The fact is that Congress has [still] not passed one piece of legislation tailored specifically for the economic interests of consumers." Testimony before the Michigan House of Representatives Judiciary Subcommittee on Consumer Protection, Nov. 30, 1965, p. 2 (mimeo.). The Senate passed a Truth-in-Packaging bill June 9; House action is still uncertain as this article goes to press.

3. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 625 (Modern Library ed. 1937). Smith also asserted that "the point is so perfectly self-evident, that it would be absurd to attempt to disprove it." *Ibid.* However, Smith recognized that consumers were not accorded equal consideration vis-à-vis producers. See note 58 *infra*. An analogy can be drawn to the elementary Keynesian point that

the importance of the consumer's role. In fact, consumer expenditures today account for almost two thirds of the \$700 billion in goods and services produced annually in the United States.⁴ Yet if the consumer is as important as the producer, government has been concerned far more with the interests of producers. Although competition is essential to a free enterprise economy (disregarding Schumpeter, and his assumptions about the necessity of monopoly for technological progress⁵ have been seriously challenged⁶), the businessman has eagerly (and understandably, from his standpoint) sought to secure a monopolistic shelter from its unmitigated and often harsh winds. Moreover, government has done at least as much to help sellers gain a monopoly as it has to delimit or destroy their protected positions.

As a result of the attention accorded to producers, the consumer's problems have been considered only erratically, haphazardly, and sporadically. In contrast to producers (and the Government itself), who are armed with information and who are otherwise able to make informed, rational decisions, the individual buyer, who is besieged by advertising, deceived by packages, confronted with an expanding range of highly complex goods, limited in time, and exhausted by a trek along the aisles of a supermarket, is simply not qualified to buy discriminately and wisely. The "art of spending money" remains as backward as the distinguished economist, Wesley C. Mitchell, depicted it in his classic article published more than

"effective demand" is a product of consumption and investment expenditure, with what is not consumed being regarded as "invested." KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1936).

4. In the fourth quarter of 1965 the country's gross national product, seasonally adjusted at an annual rate, totaled \$695 billion. Personal consumption expenditures amounted to \$440 billion (if interest paid by consumers were included, the figure would exceed \$452 billion). *ECONOMIC REPORT OF THE PRESIDENT* 209 (table C-1), 226 (table C-14) (Jan. 1966).

5. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942). In Schumpeter's view, innovation is critical for "the competition that counts" is, "the competition from the new commodity, the new technology, the new source of supply . . ." *Id.* at 84. Schumpeter regarded monopoly as an essential precondition for innovation.

6. Recent empirical studies tend to rebut the notion that large business firms are more innovative than smaller organizations. In fact, most basic inventions made during this century have come from individuals or small firms. See JEWKES, *THE SOURCES OF INVENTION* ch. IV (1958); Schmookler, *Inventors Past and Present*, 39 *REV. ECON. & STAT.* 321 (1957). One analyst concluded that "there are inherent incompatibilities between the large industrial laboratories and high-level invention achievement." Hamberg, *Invention in the Industrial Research Laboratory*, 71 *J. POL. ECONOMY* 95, 115 (1963). For additional material on this subject, see *Hearings on Economic Concentration Before the Senate Subcommittee on Antitrust and Monopoly*, 89th Cong., 1st Sess., pt. 4 (1965).

a half century ago.⁷ Government, in spite of the quantitatively large number of steps taken with the declared objective of aiding the consumer, has not helped significantly to correct this imbalance between producers and consumers.

One major reason for the lack of positive governmental action in this area is that the problems of the consumer have never been defined in any systematic fashion and thus have not been comprehensively confronted. Consumers' problems have almost always been viewed on an *ad hoc* basis—as isolated cases to be resolved individually. Seldom have they been placed in a more general framework or seen as symptoms of a fundamental economic disorder that must itself be diagnosed and treated.

This article takes up four major topics. First, the principal characteristics of governmental action with respect to consumer protection are reviewed, with emphasis on developments during the past thirty years. Second, the traditional pleas for consumer protection are examined with a view toward determining the inadequacies in governmental action. Third, the problems of the consumer are studied in the context of oligopolistic industrial markets in which non-price competition accentuates the place of advertising and severely restricts the dissemination of factual information that is essential to enlightened purchase decisions. Fourth, the ingredients of a meaningful consumer protection program are outlined and the probabilities for their political implementation appraised.

I. GOVERNMENT AND THE CONSUMER: A SURVEY OF THE EXPERIENCE

The question of the protection of the consumers is one of protracted historical interest.⁸ For at least seven hundred years the hand of authority—church, guild, or state—has played a role in regulating the affairs of the market, often, but not always, with the aim of assisting the consumer. The Scholastics insisted upon a “just price.” The Tudors took various steps in the sixteenth century to regulate what they regarded as improper conduct in the evolving medieval markets. Legislation which condemned forestalling, engrossing, and regrating was in part designed to protect buyers from monopolists.⁹

7. Mitchell, *The Backward Art of Spending Money*, 2 AM. ECON. REV. 269 (1912). “Important as the art of spending money is, we have developed less skill in its practice than in the practice of making money.” *Ibid.*

8. For a brief, well-written study of the historical aspects of consumer protection, see LEVETT, *THE CONSUMER IN HISTORY* (1929).

9. See Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

In the eighteenth and nineteenth centuries laws were passed to control prices which were thought to be "too high." More recently, state and federal antitrust laws adopted in the United States during the latter decades of the nineteenth century had their origin as much in a broad feeling of pricing abuses as in any other single factor.¹⁰

To acknowledge past governmental efforts to deal with problems of consumer interest is not to indicate that those activities significantly helped the individual buyer. Twelfth century laws banning engrossing and related practices protected the exclusive market rights granted by the Crown. Moreover, the enactment of the Statute of Monopolies in 1623 did not terminate the exclusive powers conferred on chartered trading companies, cities, and boroughs. Other laws that might appear to have aided the consumer were just as much designed to bolster the trade-restraining practices of the guilds. Thus, it can be seen that the consumer's market position remained nearly as limited as ever.¹¹

Concern for the consumer over the centuries has not been confined to prices and the price mechanism. At least as early as the fifteenth century, authoritative proclamations were issued that closely regulated the content and quality of food products. For example, in 1450 the Munich Brewers Guild specified the contents for beer.¹² Similarly, weights and measures have been controlled for hundreds of years, and it is interesting to note that this is the subject of one of the few specific provisions in the United States Constitution that is of immediate concern to citizens in their role as consumers.¹³ Even the conditions of retail trade have long been subject to governmental control, as indicated by an early English decree which forbade merchants "to set up red or black cloths or shields whereby the eyes of the buyers were deceived in the choice of a good cloth."¹⁴ Moreover, governments have always been concerned with fraud and deceit.

10. For a general review of state regulatory efforts, particularly during the past century, see Jones, *Historical Development of the Law of Business Competition* (pts. 1-4), 35 *YALE L.J.* 905 (1926), 36 *id.* 42, 207, 351 (1927). The considerable distaste for business trusts among buyers who felt they were being exploited was a significant factor, and perhaps the major consideration, leading to the passage of state and federal antitrust laws during the late nineteenth century. See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 *U. CHI. L. REV.* 221 (1956). This sentiment—a form of consumer discontent—ran especially strong in the farm community. See Hicks, *THE POPULIST REVOLT* (1931).

11. See Letwin, note 9 *supra*.

12. *N.Y. Times*, Oct. 17, 1965, § 1, p. 13, col. 1 (city ed.).

13. "The Congress shall have the power to . . . fix the standard of weights and measures." U.S. CONST. art. I, § 8.

14. 1 *BLAND, BROWN & TAWNEY, ENGLISH ECONOMIC HISTORY* 155 (1920).

A. *The Consumer's Need for Information*

While extensive government intervention in the economy, partly designed to aid the consumer, has been apparent for about seven centuries, the *caveat emptor* philosophy has dominated both the legislatures and the courts since the nineteenth century.¹⁵ The ascendance of this philosophy should not be regarded as an indication that public authority has shown no real concern for consumer problems in this period; it has, however, helped create a widening gulf between the realities of the contemporary retail market and judicial and legislative action. The changing character of retail markets, both in terms of the range and type of products available for sale and the conditions of trade, has generated new problems for the individual consumer, to which government has only tardily and haphazardly responded.

Even though the *caveat emptor* doctrine has recently become less rigid, existing consumer policy fails to meet the central issues presented by the marketplace of the 1960's. The law of fraud and misrepresentation is a good example. Courts and legislatures have gradually expanded their definition of fraud to include statements or representations that, although literally true in themselves, are misleading due to the failure to state additional relevant facts. This approach has helped curtail some advertising abuses. For example, in 1965 the Supreme Court upheld a Federal Trade Commission decision that an advertisement which purported to offer two cans of paint for the price of one ("buy one, get one free"—"every second can free") was unfair and deceptive when the product had never been sold at the stated single-can price.¹⁶ While recent enlargements of the fraud doctrine have helped contribute greatly to consumer protection, the fact is that most advertisements and related promotional techniques still are not regarded as deceptive.¹⁷

15. "Not until the nineteenth century did judges discover that *caveat emptor* sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice." Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1186 (1931).

16. FTC v. Mary Carter Paint Co., 1965 Trade Cas. ¶ 71194. The Commission reasoned that since the seller had no history of selling single cans of paint, its practice of allocating the price of two cans to one can and calling the other "free" amounted to misrepresentation. A majority of the Court found that there was substantial evidence to support the Commission finding.

17. Occasionally a court will impose liability for economic harm sustained as the result of deceptive advertising. For example, in one recent case a court awarded damages to the buyer of a new car who claimed that the manufacturer had breached its warranty as defined by advertisements that represented its cars to be trouble-free, economical, and of high quality. The court felt that "the protection of the defenseless

The factor that most frequently renders an advertisement misleading is not the character of the statements that it contains, but rather the information that is omitted. To make wise purchase decisions, the consumer needs more factual information about products than he now is given. At present, sellers of consumer goods deliberately refrain from providing many essential facts, since such information often would run counter to advertising claims that their products are distinctive. For instance, a producer finds substantial economic advantage in conveying the message that a product like Clorox is considerably more effective than Purex or other brands of liquid bleach when, in fact, they are chemically indistinguishable. However, producers will not disclose the fact that the chemical composition of such products is identical, and this type of deliberate omission tends to confuse and mislead consumers. The law of fraud and deceit, even though enlarged by the courts, legislatures, and administrative agencies, is simply out of touch with market realities. This situation is evident from the fact that the concepts of fraud and deceit focus on statements actually made in advertisements, whereas the consumer needs information which sellers now fail to disclose.

A related problem exists with respect to several other governmental policies that are often said to benefit the consumer. For example, weights and measures are rigorously controlled by governments, but if a seller of a consumer product is not required to state the weight of his goods, the ability of the National Bureau of Standards to define and measure a "pound" with scientific precision is irrelevant. Even if a manufacturer states the weight of his product on the containers but does so in fractional terms (such as $13\frac{3}{8}$ ounces in a small box, $19\frac{7}{16}$ ounces in a medium size box, and $28\frac{17}{32}$ ounces in a large box), the purchaser, trying to make a judgment as to the "best buy" on a cents-per-ounce basis, is effectively frustrated.

Similarly, the ineffectiveness of current governmental controls is evident in regulations dealing with the adulteration of foods and other products. While existing law prohibits certain additives, it does not always require the manufacturer to state the ingredients in an intelligible way. In fact, contents frequently do not have to be revealed at all. And when they are, manufacturers may reveal

consumer has proved its value as a cornerstone in the structure of our national administration of justice." *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 141, 209 N.E.2d 583, 588 (1965).

only part of their story; it can be very important to consumers whether the amount of water in a particular food mixture is one per cent or fifteen per cent of the total. Again, the law is out of touch with market realities, largely because it is essentially negative rather than affirmative in its approach—it forbids rather than requires.

When physical injury is sustained through use of a dangerous product (sometimes, one that seems not so dangerous), the courts in recent years have been increasingly willing to impose liability on the manufacturer. The scope of implied warranties has been markedly expanded, and for this reason, as well as the curtailment or outright abolition of the privity element, sellers have been held liable for harm sustained in the use of a growing list of goods.¹⁸ Moreover, the strict liability doctrine has been expanded to provide relief in tort for injury caused by unreasonably dangerous products.¹⁹ However, while the much-discussed evolution of doctrine in these areas has afforded consumers (and others) additional relief for physical injuries they have sustained, related economic losses have been given practically no attention. It seems fair to say that consumers "lose" far more each year through the deception inherent in the sophisticated means of modern merchandising and by being effectively denied the information needed to make wise purchases than they do as the result of physical harm. Surveys show, for instance, that buyers pay about ten per cent more for most goods purchased in supermarkets than they would if they bought only the most economical (price adjusted for quantity) packages of such products.²⁰ Even more

18. The recent developments are surveyed in Ray, *Products Liability—A Symposium: Introduction*, 19 Sw. L.J. 1 (1965). As an instance of the expansion in the law's coverage, see *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965) (bystander allowed recovery for an injury caused by defective shotgun ammunition). For general comments, see Kessler, *The Protection of the Consumer Under Modern Sales Law: A Comparative Study*, 74 YALE L.J. 262 (1964); Southwick, *The Disenchanted Consumer—Liability for Harmful Products*, 18 MICH. BUS. REV. 5 (Jan. 1966); Wall Street Journal, Sept. 9, 1965, p. 1, col. 6.

19. For a discussion of the developments, see Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

20. This was the conclusion drawn from a carefully administered test in which thirty-three young married women were instructed to select the most economical package for each of twenty products on sale at a supermarket. Based on the results of this survey, it appears that the typical economy-minded shopper would spend between nine and ten per cent more than one who was in fact consistently able to select the most economical packages. See Friedman, *Truth in Packaging in an American Supermarket* (mimeo. 1965). (A brief version of this paper was presented at the 1965 annual meeting of the American Psychological Association.)

striking, if consumers disregarded trade names and purchased products on the basis of objectively determined values, without regard to trade name, savings of as much as fifty per cent could be realized.²¹ Since American consumers are currently spending about \$100 billion annually for retail food purchases alone,²² the size of their loss is considerable. If provided meaningful information that would permit informed purchase decisions, consumers would save a considerable sum of money, and yet the Government has shown very little concern for this economically vital aspect of consumer protection.

B. Governmental Activities

To appreciate more fully the inadequate and haphazard character of current consumer protection activities calls for a review of existing programs at the federal and state levels. The following assessment will reveal the large number of consumer-related activities and will also disclose their disorderliness.

The most complete available tabulation of federal consumer programs, compiled in 1961, showed that thirty-three of the thirty-five principal departments and agencies of the federal government were involved in some activity that protected or promoted consumer interests.²³ Several of the agencies were responsible for only a single activity, but others were engaged in a sizable number of consumer programs—ranging from twenty in the Department of Commerce to fifty in the Department of Agriculture.²⁴ In the performance of those activities which the departments and agencies regarded as “directly” protecting and promoting consumer interests (118 of the 296 activities identified), the Government spent less than a billion dollars in 1961.²⁵ Even though this figure amounted to only about one per cent of the federal budget and to less than one third of one per cent of total personal consumption expenditures, it is seriously

21. Oxenfeldt, *Consumer Knowledge: Its Measurement and Extent*, 32 REV. ECON. & STAT. 300 (1950).

22. The nation's families spend an average of slightly less than 20% of their after-tax income for “food prepared at home.” Murphy, *Spending and Saving in Urban and Rural Areas*, 88 MONTHLY LABOR REV. 1169, 1171-72 (table 1) (1965). Consumer expenditures in 1965 reached the \$450 billion mark (see note 4 *supra*) and will climb close to \$500 billion in 1966.

23. House Comm. on Government Operations, *Consumer Protection Activities of Federal Departments and Agencies*, H.R. REP. No. 1241, 87th Cong., 1st Sess. (1961). The committee's survey was based on questionnaires sent to thirty-five departments and agencies. Their detailed responses are contained in the House report. *Id.* at 63-338.

24. *Id.* at 23 (table 1).

25. *Id.* at 24 (table 2).

overstated, since it includes the compensation of workers who devoted some of their time to other job assignments.²⁶

More important than their number is the diffuse nature of federal consumer activities. The great bulk of these governmental programs deal with classical forms of fraud and deception and with the enforcement of laws banning the sale of adulterated, unsafe, or untested products, almost exclusively foods and drugs. As in the case of court-made doctrine, there is a marked emphasis on activities with a negative quality—the prohibition of certain practices and the suppression of conduct which could inflict bodily harm. Few programs call for the affirmative disclosure of information essential to informed purchase decisions.

Nevertheless, some federal laws and programs have the effect of providing a consumer with facts that can be useful in buying products at retail. Food and drug labels must disclose the net weight, contents, and manufacturer's identity,²⁷ and under the 1962 Drug Act Amendments,²⁸ drugs must bear their generic names as well as their trade names. The labels of textile,²⁹ wool,³⁰ and fur³¹ products must also specify content, and disclosure requirements for the sale of securities are now common.³² Prices for new automobiles must be displayed in accordance with the Automobile Information Disclosure Act of 1958.³³ Although it is not mandatory, most meat packers avail themselves of the grade-labeling service provided by the Department of Agriculture. Finally, standards of identity are prescribed for some food products, and standards have occasionally been established to control the size and shape of packages in which such products as bread and milk may be sold.³⁴

26. Moreover, it is clear that some of the activities which the sponsoring departments and agencies feel protect or promote consumer interests do not do so. Indeed quite the opposite. For example, the Department of Agriculture asserted that its regulation of milk supply and control of sugar production—both of which have the effect of raising prices—help the consumer! *Id.* at 93-95.

27. See 52 Stat. 1047 (1938), 21 U.S.C. § 343 (1964) (food); 52 Stat. 1050 (1938), 21 U.S.C. § 352 (1964) (drugs).

28. 76 Stat. 785 (1962), 21 U.S.C. §§ 301-60 (1964).

29. Textile Fiber Products Identification Act, 72 Stat. 1717 (1958), 15 U.S.C. §§ 70-70k (1964).

30. Wool Products Labeling Act of 1939, 54 Stat. 1128, 15 U.S.C. §§ 68-68j (1964).

31. Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1964).

32. See Securities Act of 1933, 48 Stat. 74, 15 U.S.C. §§ 77a-aa (1964).

33. See 72 Stat. 325, 15 U.S.C. §§ 1231-33 (1964).

34. For a description of the Department of Agriculture's various activities dealing with the marketing of food products, see H.R. REP. No. 1241, *op. cit. supra* note 23, at 63-114. For a more general discussion of the Government's current role in the marketplace, see MASSEL, *COMPETITION AND MONOPOLY* 51-54 (Anchor Book ed. 1964); WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* ch. 8 (rev. ed. 1960).

Thus it can be seen that certain specific problems have been identified, and occasionally specific remedies have been devised for their resolution. Federal meat inspection was required only after the shocking conditions in the country's meat packing plants were so starkly revealed by Upton Sinclair in *The Jungle*. Deaths and horrible injuries attributable to drugs brought about enactment of the first federal drug act in 1906 and the subsequent amendments in 1938 and, following the thalidomide catastrophe, in 1962.³⁵ Similarly, scandal in the securities industry resulted in the pervasive scheme of federal legislation, which is designed to provide investors with more information and to permit them to sue for losses incurred through issuers' misstatements.³⁶

Several pages could be filled with a recitation of the specific situations which gave rise to each of the federal consumer-related activities, but for present purposes it is enough to emphasize that governmental policy as it relates to the consumer is random, being responsive to narrowly-defined needs rather than the product of any comprehensive effort to assess the situation and develop appropriate, generalized corrective programs. This aimless policy is reflected in—and in some respects caused by—the absence of any administrative apparatus in the federal government designed to view the consumer problem as a whole.

When the National Recovery Administration was created in the summer of 1933, a Consumers Advisory Board was appointed to assert the interests of the consuming public in the industry code-making process. Similarly, at the behest of the Secretary of Agriculture, a Consumers Counsel was appointed in 1935 by the Agricultural Adjustment Administration. Likewise, in both the Bituminous Coal Conservation Act of 1935 and its successor, the National Bituminous Coal Act of 1937, specific statutory provision was made for an Office of the Consumers Counsel. The Counsel was charged with the responsibility of protecting the interest of the consuming public in all proceedings of the National Bituminous Coal Commission.³⁷

Although the establishment of consumer spokesmen in the NRA,

35. The widespread use by women during early pregnancy of a sleeping pill, generally known as thalidomide, resulted in the birth of more than seven thousand deformed babies. This disaster and its role in the passage of drug legislation is considered in HARRIS, *THE REAL VOICE* 154, 181-93 (1964).

36. For a discussion of the background to the adoption of federal securities legislation, see 1 LOSS, *SECURITIES REGULATION* 119-28 (1961).

37. The New Deal experience is thoroughly considered in CAMPBELL, *CONSUMER REPRESENTATION IN THE NEW DEAL* (1940).

AAA, and the Bituminous Coal Commission was an unequivocal attempt to fill the need for assertion of the consumer interest, this effort failed to achieve its purpose. The reason for this failure is quite apparent. The three agencies to which these spokesmen were attached were principally engaged in carrying out programs that were designed to assist defined producer groups by artificially raising prices that the consumer was expected to pay. While consumer spokesmen may have helped somewhat in curtailing the excesses of specific agency programs, the facts are that the NRA "codes of fair competition" usually called for or brought about price increases; that the AAA curtailed farm production with the goal of boosting farm income by raising commodity prices; and that the principal means of dealing with the bituminous coal industry called for a complicated system of price-fixing. As a result of these circumstances, the consumer view was generally provided no more than a polite audience, and sometimes not even that. Indeed, by the time of the outbreak of World War II, formal representation of the consumer within the federal government was all but nonexistent, just as it had been before the 1930's.

Since 1962 there has been renewed governmental interest in the consumer's plight. Steps have been taken by both Presidents Kennedy and Johnson to give the consumer a spokesman. In 1962 President Kennedy, declaring that consumers have a "right to be heard" and to have their interests given "full and sympathetic consideration in the formulation of Government policy," created a Consumers' Advisory Council as an adjunct to the Council of Economic Advisers "to examine and provide advice to the Government on issues of broad economic policy, on governmental programs protecting consumer needs, and on needed improvements in the flow of consumer research material to the public."³⁸ The Council was given somewhat more formal status by an Executive Order issued by President Johnson on January 3, 1964.³⁹ In addition to the Council, which is composed of twelve private citizens, President Johnson has also established a Committee on Consumer Interests.⁴⁰ The Committee is composed of the private citizens who serve on the Advisory Council and representatives of ten governmental agencies. A Special Assistant for Consumer Affairs was appointed by the President early

38. *Message on Consumers' Protection and Interest Program*, H.R. Doc. No. 364, 87th Cong., 2d Sess. (March 15, 1962).

39. Exec. Order No. 11136, 29 Fed. Reg. 129 (1964).

40. *Ibid.*

in 1964.⁴¹ The holder of this position, currently Esther Peterson (who is also an Assistant Secretary of Labor), is the principal spokesman for the consumer in the federal government and serves as chairman of the Committee on Consumer Interests.

This conglomeration of councils, committees, and special assistants that supposedly represent consumers at the federal government's highest policy-making levels resembles the disorganized and random assortment of activities that are carried out by the thirty-five principal departments and agencies. Groups and individuals have been hurriedly assembled to meet a vaguely felt need, but there is no clear sense of purpose. Although both a Committee on Consumer Interests and a Consumer Advisory Council exist, it is difficult to determine the separate functions which they serve. The Committee's responsibility is to "consider" federal "policies and programs of primary importance to consumers," while the Council has been directed to "advise the Government on issues of broad economic policy of immediate concern to consumers." Both groups are served by the same staff, which in turn reports directly to the Special Assistant, and the holder of that office is chairman of the Committee and an ex officio member of the Advisory Council. If the Committee implemented programs developed by the Council and approved by the President, its function would be understandable. However, the Committee's job is not to implement, but rather to advise, and that is a responsibility also of the Advisory Council. The point at which one ends and the other begins is a puzzle, like so much governmental activity in the consumer area.

Perhaps the single most important weakness in the entire scheme is the lack of authority noticeable in both the Council and the Commission, as well as in the Special Assistant. Each organization is charged with the responsibility of "advising," "reviewing," or "consulting," but none has the power to modify, execute, or instigate any program of its own. Existing programs designed to aid the consumer are in a state of disarray and reveal many deficiencies, but the Advisory Council and the Committee can do no more than hope

41. In taking steps to appoint consumer representatives in the executive branch of the Government, President Johnson, in a message delivered to the Congress on February 5, 1964, noted that "for far too long, the consumer has had too little voice and too little weight in government. As a worker, as a businessman, as a farmer, as a lawyer or doctor, the citizen has been well represented. But as a consumer, he has had to take a back seat." H.R. Doc. No. 220, 88th Cong., 2d Sess. 1 (1964). More recently, in both his 1966 State of the Union Address and in his Economic Report, the President has endorsed legislation designed to assist the consumer. 112 CONG. REC. 129, 131 (daily ed. Jan. 12, 1966); ECONOMIC REPORT OF THE PRESIDENT 19 (Jan. 1966).

that their recommendations will induce the President and Congress to take corrective action.

Occasional proposals have been made to create a central consumer agency to implement and coordinate the numerous federal programs, but they have not been seriously considered. Moreover, past proposals have not really promised to meet the need for better organization. Creation of a Department of Consumers was urged by Senator Kefauver, but his bill was accorded only a single day of hearings and then promptly forgotten.⁴² A group of eighteen senators is currently supporting a bill that would establish an independent agency to be known as the Office of Consumers.⁴³ This proposed agency would be under the direction of a Consumers Counsel, and the Office's principal function would be "to protect and promote the interests of the people of the United States as consumers." However, as in the case of the current Advisory Council and the Committee on Consumer Interests, the proposed Office of Consumers would lack the authority to plan and carry out programs on behalf of consumers and would not encompass any of the nearly three hundred separate consumer activities now carried out in many governmental departments and agencies. If such an office is to play a meaningful role, it must have the power to act on its own and to coordinate existing consumer activities.

C. *The Inadequacy of State Regulation*

At the state level, consumer representation presents a pattern of activity which resembles that at the federal level. Most states have some sort of program that protects or promotes the consumer interest; as is true at the federal level, however, the focus is almost entirely on the suppression of fraud and on the inspection of food and other products for human consumption. Even in these respects, the states' programs are considerably less effective than the corresponding activities of the federal government. For example, only eighteen states have meat inspection laws which are similar to the

42. For a brief history of congressional efforts to establish a special consumer agency, see 111 CONG. REC. 2254 (Feb. 9, 1965).

43. See S. 1052, 89th Cong., 1st Sess. (1965). Senator Hart, chief sponsor of S. 1052, has also urged the creation of a national commission to anticipate the problems consumers will face in the future. Testimony, *supra* note 2, at 5-6. Another proposal, embodied in a resolution offered by Senator Javits and supported by eighteen other senators would establish a Select Senate Committee on Consumers "to conduct a continuing comprehensive study and investigation with respect to the nature and extent of economic problems of consumers within the United States." S. Res. 84, 89th Cong., 1st Sess. (1965). In 1966 a bill (H.R. 7179) was introduced in the House that would create a Department of Consumers.

federal regulations for meat shipped in interstate commerce.⁴⁴ Drugs are subjected to some sort of inspection and control in most states, but the level of effort is generally so limited as to suggest that the programs are extremely inadequate. A survey completed in 1963 showed that the states at that time were spending approximately \$1.7 million a year for the regulation of drugs.⁴⁵ However, nearly a third of this amount was spent in California and New York, and, as a group, the states spent only about one cent per capita per year in this effort. It is also interesting to note that while various industry practices specifically aimed at consumers are recognized as a serious problem, only fourteen states have established a special enforcement unit to deal with the diverse problems of consumer protection.⁴⁶

A few states, though, have been alert to the merchandising atmosphere in which we now live and to the resulting needs of consumers. South Carolina, for example, has attempted to regulate some packaging practices that may be deceptive or misleading by imposing standards governing size, shape, and label contents. Unfortunately this initiative has not been generally followed, and South Carolina officials acknowledge that there must be a broader-based effort if the problem is to be dealt with adequately.⁴⁷

Once, therefore, we lay aside questions of outright fraud and adulteration, governmental policy is a maze of specific requirements. At both federal and state levels there is no uniformity with respect to such important matters as standards of identity, disclosure of weight and content, quality grading, or packaging requirements. Nevertheless, each of these subjects is of material significance to the consumer who wishes to make purchases on a rational basis rather than by a combination of luck and guesswork.

44. "Although all the states have some legal requirements concerning the sanitation of slaughtering and processing facilities and the adulteration and misbranding of meat products, in only 30 is there legal authority for ante and post mortem inspection and in only 18 is such inspection mandatory." House Comm. on Government Operations, *Consumer Protection Activities of State Governments*, H.R. REP. No. 921, 88th Cong., 1st Sess., pt. 2, at 17 (1963). About 20% of the commercially slaughtered meat in the United States is not subject to existing federal meat inspection regulation because it moves only in intrastate commerce.

45. House Comm. on Government Operations, *Consumer Protection Activities of State Governments*, H.R. REP. No. 921, 88th Cong., 1st Sess., pt. 1, at 12 (table 2-A) (1963).

46. In 1965 special consumer protection officials were provided for by statute in Hawaii and North Dakota. Such offices also exist in California, Michigan, New York, Ohio, Pennsylvania, and several other states. See *State Government News*, Oct. 1965.

47. The South Carolina experience is discussed in *Hearings on Packaging and Labeling Legislation Before the Senate Subcommittee on Antitrust and Monopoly*, 88th Cong., 1st Sess., pt. 1, at 220-28 (1963).

The failure to provide an organizational apparatus that can deal with consumer matters deliberately and comprehensively is itself compelling evidence of the weakness in the entire effort to secure government recognition of consumer problems. However, the lack of effective organization is not so much a cause as it is a symptom of other deficiencies. The arguments advanced in support of pleas for the consumer are themselves typically disorganized and random, stemming from a variety of divergent assumptions and philosophic positions that are generally unsystematic in their analysis and conclusions.

II. CONSUMERS' INTEREST V. PRODUCERS' INTEREST

A. *The Traditional Arguments for Consumer Protection*

Although it has been said that "the question of the protection of the consumer is one of perennial interest of history,"⁴⁸ governmental assistance, as the preceding discussion shows, has been notably erratic, leaving a continuing appearance of inadequacy. The blame, if that is the right word, appears to lie less in the inattentiveness of politicians than in the insufficiency and inconsistency of the traditional arguments offered by many proponents of governmental aid for the consumer.

Many of the pleas for the consumer, for example, have come from critics who appear to be fundamentally hostile to a market system in which resources are allocated through a price mechanism, although they rarely phrase their argument in this fashion. Logically, however, such critics reject programs designed to increase the efficiency of our current market system and call instead for a radical overhaul of the economic order. To be specific, if one accepts the view that contemporary society is either "a network of rackets," as did the late C. Wright Mills,⁴⁹ or a world in which "producers have secured power" that they use "to rob the rest,"⁵⁰ or in which advertising causes us to buy goods "we do not want at prices we cannot pay and on terms we cannot meet,"⁵¹ it is unlikely that minor institu-

48. LEVETT, *op. cit. supra* note 8, at 15.

49. Mills' views are discussed in MASTERS, *THE INTELLIGENT BUYER'S GUIDE TO SELLERS* 91 (1965).

50. See BENN, *PRODUCER V. CONSUMER* 25 (1928). The feeling of exploitation on the part of the consumer is sometimes justified by the seller's stated intentions. Walton Hamilton quotes the head of a large department store as saying, "God created the masses of mankind to be exploited. I exploit them; I do his will." Hamilton, *supra* note 15, at 1135 n.7.

51. This is an excerpt from a statement by Robert Hutchins, quoted in MASTERS, *op. cit. supra* note 49, at 87. Testifying in 1961, Marya Mannes said that "as a house-

tional adjustments would be an adequate remedy. Similarly, if consumers are viewed as being pitted against producers in a bloodless class war⁵² (one writer proposed as a motto, "Consumers of the World, Arise! United We Stand, Divided We Pay More!"), a revolution is needed rather than consumer legislation of the kind that is usually suggested.

Some Socialists and the New Radicals have openly conceded that in their opinion the only answer to the problems faced by the consumer lies in control of production itself. Nineteenth century leaders of the consumer movement in England spoke of "getting the whole profit of production, out of the hands of the manufacturer and trader, for the consumer."⁵³ This position makes very good sense if a capitalistic system is looked upon as essentially an instrument of exploitation. On the basis of this assumption, no effort to aid the consumer can be successful, for no other group can be permitted to retain control over the productive process.

Reflecting a similar position, but with a far less rational expression of opinion, the so-called New Radicals, as one member of this school of thought recently stated, regard "political free enterprise . . . as illusory as the economic, largely *because* the economic model is a fraud. . . . Much of the sham of pluralism stems from the unchallenged domination of the values of the marketplace, the fact that profit still motivates production, communication, education."⁵⁴ Naturally enough, this position dictates radical reform. However, whereas the classical Socialists had a system to advance as a substitute for the *status quo*, the New Radicals have nothing specific to suggest. For example, the author of the foregoing quotation concluded his message with the useless generalization that "the great corporations should, somehow, be made responsible to workers and consumers."⁵⁵

wife I buy what is sold to me. It is packaged. I buy it on faith. This is why, these days, the word 'consumer' is sometimes spelled 's-u-c-k-e-r.'" *Hearings on Packaging and Labeling Practices Before the Senate Subcommittee on Antitrust and Monopoly*, 87th Cong., 1st Sess., pt. 1, at 24 (1961). Seventeen hundred years ago Diogenes Laertius commented that "the market is a place set apart where men may deceive each other." Quoted in *Consumer Reports*, July 1965, p. 346. However, "without some dissimulation no business can be carried on at all," noted the Earl of Chesterfield. Quoted in *MASTERS*, *op. cit. supra* note 49, at 89.

52. See PEI, *THE CONSUMER'S MANIFESTO* (1960).

53. WEBB, *THE DISCOVERY OF THE CONSUMER* 11 (1928). This statement is attributed to J. T. W. Mitchell, a leader in the nineteenth century British cooperative movement.

54. Gitlin, *Power and the Myth of Progress*, *The New Republic*, Dec. 25, 1965, p. 19.

55. *Id.* at 21.

Although the views of many persons who seek governmental aid for the consumer implicitly call for a fundamental change in the existing economic system, most consumer spokesmen tend either to limit their proposals to the narrow and specific or to phrase their arguments in such vague terms as to offer no real policy guidance. No consistent effort has been made to identify underlying causes and to assess the full range of government responses.

Several factors help explain why the problems encountered by consumers have not been assayed systematically. Initially, since everyone is a consumer, it is frequently difficult to distinguish between the interests of consumers and those of society as a whole. As General Hugh S. Johnson, head of the NRA, once stated, "The consumer interest is the public interest, and I represent the public."⁵⁶ Businessmen, laborers, farmers, and producer groups in general seem to be more easily identified than consumers. Related to this problem of identification is the fact that consumers are "straddlers"—they are often both consumers and producers, simultaneously, and their interests often conflict. A steelworker's demand for a pay raise may lead to an increase in the price of steel and products made largely from steel, like autos and refrigerators.

Moreover, with the possible exception of cooperatives (which have not attracted many adherents in the United States), consumers have never been effectively organized. On the other hand, workers, businessmen, farmers—again, the producing groups—have combined in organizations that aggressively assert the interests of their members. Trade associations, which are well-financed and staffed by persons who are capable of bringing their full weight to bear at the most critical points in the governmental process, are common throughout industry. In light of the additional fact that consumers have never had a government agency to speak in their behalf (again, this may be less a cause than a result), it is easy to understand why governmental efforts in aid of the consumer have been limited, erratic, and more responsive than creative.

B. *Producers' Self-Protection Through Restriction of Competition*

In contrast to the consumer, whose needs have been ill-defined⁵⁷ and on whose behalf governmental action has been inadequate and

56. Quoted in CAMPBELL, *op. cit. supra* note 37, at 263.

57. As late as 1929 at least one author felt that "the consumer in history . . . [is] a subject never before treated." LEVETT, *op. cit. supra* note 8, inside cover. The situation

generally peripheral,⁵⁸ producers have recognized that their economic interest lies in the restriction of competition. Farmers, laborers, and corporations have all seen that their rewards can be increased (at least in the short run) by curtailing supply or otherwise impeding the operation of the market mechanism. As well, these groups have realized, quite correctly, that government can be used as an instrument of monopoly if it is properly manipulated.⁵⁹ Thus, farmers have secured active government aid in checking output, thereby boosting the prices of farm products to the consumer. Growers of domestic sugar and tobacco have perpetuated a system that rigidly controls output, to the detriment of the ultimate consumer. Under the guise of "fair trade," many states have allowed manufacturers to maintain resale prices, thus denying the consumer the substantial benefits of retail price competition. The federal government's participation in the international coffee cartel and in the International Air Transport Association means higher prices and raises an umbrella over the heads of inefficient producers. Entry into air transportation is tightly restricted, resulting in much higher fares on heavily traveled routes than would otherwise prevail.⁶⁰ Oil import quotas severely limit the importation of oil from abroad, even

has improved somewhat, but consumer affairs still receive only limited attention. Current research by economists, psychologists, sociologists, and others is largely confined to a sophisticated examination of consumer behavior and accords little attention to the practical problems of the consumer or the appropriate role of governmental action.

58. Although he regarded consumption as "the sole end and purpose of all production," Adam Smith observed that "the interest of the consumer is almost constantly sacrificed to that of the producer; and [the economic system] . . . seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce." SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 625 (Modern Library ed. 1937).

59. Government's role as a begetter of monopoly and as a foe of competition is considered in ADAMS & GRAY, *MONOPOLY IN AMERICA* (1955); WILCOX, *op. cit. supra* note 34, pt. III.

60. As one illustration, the weekday fare aboard the Eastern Air Lines shuttle between New York and Washington, a distance of 216 miles, is eighteen dollars. Entry is restricted in this market, and Eastern accounts for about 80% of the traffic. By contrast, along the Los Angeles-San Francisco route, where entry is unrestricted, the fare is now twelve dollars, although the distance between the two points is 347 miles. While operating conditions are not entirely the same, the difference in fare is much too large to be explained by these factors alone. A more plausible reason is that the Los Angeles-San Francisco fare is competitively determined. For a careful examination of the facts and an assessment of policy implications, see Levine, *Is Regulation Necessary?—California Air Transportation and National Regulatory Policy*, 74 *YALE L.J.* 1416 (1965). Other relevant material may be found in *The New Republic*, Jan. 15, 1966, p. 8; 111 *CONG. REC.* 16735-43 (1965). Viewing the problem more generally, it is apparent that fares on heavily traveled air routes are used to generate revenue from which low-density routes may be internally subsidized. See Barber, *Airline Mergers, Monopoly, and the CAB*, 28 *J. AIR LAW & COMMERCE* 189, 235-36 (1962).

though it could be delivered to East Coast refineries at a saving of a dollar or more per barrel over domestic oil.⁶¹

American industry, however, does not always need the affirmative assistance of government to achieve monopolistic objectives. Such objectives may also be attained if government is merely held at bay—if enforcement of the antitrust laws is subdued so that markets can be dominated by one firm or by a small number of firms. If output can be restricted to one or a very few firms, the “competitors” can exercise power over price and obtain a profit substantially in excess of that attainable under competition. Of all governmental practices or omissions that have had the effect of hurting the consumer, probably the most grievous lies simply in the failure to enforce the antitrust laws with sufficient vigor and imagination to curtail monopolistic selling power. The federal government’s nonfeasance in this respect has permitted dominant firms in most of the country’s manufacturing industries to inflict a toll on consumers, in the form of noncompetitive prices, that is no doubt vastly larger than any losses they have sustained through practices that form the subject of most consumer complaints.

III. THE CONSUMER IN A CHANGING ECONOMY: THE NEED FOR GOVERNMENTAL ACTION

Most of the arguments offered in support of governmental aid for the consumer have been so misdirected and unsystematic that an effort must be made to restate the problem, placing it in its larger economic perspective. This task calls for some reflection on the basic features of a competitive system, for it is only by understanding the fundamentals of the situation that a rational remedial program can be devised.

A. *The Decline of Competitive Markets*

Many people seem to think that the United States has a competitive economy in which resources are allocated according to the patterns described by the classical theorists. To a certain extent this assumption is correct, but in most markets one seller or a small group of sellers account for the bulk of the output. Under these circumstances, meaningful price competition does not exist, and prices and

61. Adelman, *Efficiency of Resource Use in Crude Petroleum*, 31 *SOUTHERN ECONOMIC J.* 101 (1964); Burck, *U.S. Oil: A Giant Caught In Its Own Web*, *Fortune*, April 1965, p. 202. Since domestic oil now sells for approximately three dollars per barrel (the exact price, of course, depends on the grade), the cost of the import oil program to the consumer is by no means insignificant.

profits are generally above the competitive level.⁶² Most important, for present purposes, the character of inter-firm competition in such monopolistic and oligopolistic markets makes it extremely difficult for the consumer to perform his critical allocative function, since he is denied the information necessary to make informed decisions.

Classical economists focused their attention on the production function, but they also assumed that just as producers would endeavor to maximize their returns, so too would the consumer seek to maximize the amount of satisfaction or utility that he could obtain from his income. According to the marginalists—Jevons, Menger, and Walras—the consumer would achieve that objective by adjusting his outlay for each good or service in accordance with the price and the satisfaction it provides him.⁶³ While this is perfectly sound theory, it is important to examine the underlying assumptions about the market in which the buyer makes his selections.

The designers of the classical model reasoned that there would be optimal allocation of resources if markets were competitively structured, if buyers and sellers possessed adequate information about prices and the availability of goods, and if sales were made without artificial restrictions of any form. Moreover, it was assumed that all goods of the same type were fungible. If all of these conditions are present, so the theory goes, utilities are maximized, and the society secures the fullest possible benefit out of its resources. In effect, a perfect balance is struck; producers (sellers) and consumers (buyers) are on an equal footing, and neither group will be able to take advantage of the other.

Today the essential conditions for competition do not exist, and as a result the consumer has been placed in a disadvantageous position. The classical economists assumed that each industry would always have a large number of sellers, with the result that no individual seller would have sufficient economic power to control prices. However, in reality many industries are dominated by a few large sellers, and typically these dominant concerns act jointly like a monopolist. Moreover, even though many products of a particular type are in fact physically homogeneous, they are effectively portrayed as distinctive items through the instruments of modern mer-

62. The character of competition in oligopolistic markets is examined in FELLNER, *COMPETITION AMONG THE FEW* (1949); MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION*, chs. 11-15 (1952). The relationship between structure and performance is assessed in BAIN, *INDUSTRIAL ORGANIZATION* 406-27 (1959).

63. See LEFTWICH, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* 49-68 (1955); MARSHALL, *PRINCIPLES OF ECONOMICS* 83-137 (8th ed. 1948); STIGLER, *THE THEORY OF PRICE* 42-95 (1952).

chandising propaganda. Finally, prices—the vital mechanism for proper resource allocation—are often ambiguous or, for a variety of other reasons, not subject to ready comparison. In short, the cornerstones of competition have been pulled out. Nevertheless, at least some of those cornerstones, and perhaps all of them, can be replaced with the aid of the Government if we identify the forces that brought about their destruction.

B. *The Effect of Trade Names and Advertising*

Throughout a large part of our industrial history, retail goods of the same type were regarded as fungible. However, in the late nineteenth century, manufacturers, whose number was declining as a result of consolidation, saw that it was to their economic advantage to differentiate their wares, not in terms of quality or content, but rather under cover of a trade name. In 1899 the National Biscuit Company brought out its Uneeda brand of crackers, making the cracker barrel a part of American folklore. About the same time the cigarette companies intensified their emphasis on brand names. This emphasis on trade names spread very rapidly to nearly all consumers' goods industries, and by the middle 1920's certain trade names had acquired great value. For example, during this period the trade names "Jell-O" and "Maxwell House" were sold for \$35 million and \$42 million respectively.⁶⁴

Today advertising is ubiquitous. Indeed, advertising revenues practically support the mass media, as evidenced by the fact that in 1964 advertisers spent nearly fourteen billion dollars in promoting their wares.⁶⁵ Modern advertising techniques are annoying to many people, but, more important, these techniques have played a large and effective role in differentiating physically interchangeable products, thus making consumer purchase decisions complex and inefficient and, at the same time, creating and ensconcing the monopolistic positions held by many manufacturers.

The sale of soap and other cleaning products offers a good illustration of the role which advertising plays in the market process. For example, liquid household bleach is a 5.25 per cent sodium hypochlorite solution, regardless of the trade name it bears. However, by

64. For a study of the early use of brand names and their steeply rising value, see Lynd, *The People as Consumers*, in II RECENT SOCIAL TRENDS IN THE U.S. 874-76 (1933). Chamberlin has taken note of the role that trademarks (and related aspects of legally protected product differentiation) play in the protection of monopoly. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION*, app. E, at 270 (7th ed. 1956).

65. See *Printers' Ink*, Feb. 12, 1965, p. 12.

a deluge of advertising, sellers have succeeded so well in differentiating one trade-named bleach from another that sales of a particular product are largely governed by the size of the seller's advertising expenditures. As a result of the strong consumer identification of the best-known brands of liquid bleach, like Clorox and Purex, it has been possible to sell them at prices above those of lesser-known brands possessing identical chemical properties.⁶⁶

The Monsanto Company discovered this effect of advertising when it tried to sell All, a low-sudsing detergent, in competition with experts in big-time advertising. Monsanto soon learned that it was not product quality, but rather advertising that was required to compete effectively with Procter & Gamble, makers of Dash, and Colgate-Palmolive, makers of Ad. However, apparently Monsanto did not fully appreciate the importance of advertising, for between 1955 and 1956 it reduced its advertising outlay from twelve million dollars to nine million dollars, and during this same period its share of the market fell promptly from seventy-nine per cent to fifty-five per cent. Shortly thereafter Monsanto sold All to Lever Brothers, a firm that could better appreciate the realities of a market in which advertising is the difference between survival and oblivion.⁶⁷

Although it is a fact of modern life, advertising is nevertheless itself only a symptom of the kind of nonprice competition that exists in many American industries, including soaps. In the soap industry three companies, each producing a broad line of products, account for nearly ninety per cent of total sales. With a tight oligopolistic structure such as this, theory indicates—and observation confirms—that the dominant firms prosper through the covert elimination of price competition, confining their rivalry to other strategies.⁶⁸

66. The manifestations and implications of nonprice competition in the sale of liquid household bleach were thoroughly considered by Commissioner Elman in his opinion for the FTC in the *Procter & Gamble-Clorox* proceeding. 3 CCH TRADE REG. REP. (1963-65 transfer binder) ¶ 16673. The Commission held that Procter & Gamble's acquisition of Clorox violated § 7 of the Clayton Act. See also *General Foods Corp.*, 3 *id.* ¶ 17161 (1964).

67. Monsanto's experience with All and related aspects of competition in the low-suds detergent market came to light in the trial of a Government suit challenging the legality of the Lever Brothers acquisition. *United States v. Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963). See also Klaw, *The Soap Wars: A Strategic Analysis*, *Fortune*, June 1963, p. 122.

68. For example, soap companies have competed in the amount of suds that their cleaning products can be made to produce. So "successful" were they in this endeavor that housewives were conditioned mistakenly to equate the quantity of suds with cleaning efficiency. Whiteside, *The Suds Conflict*, *The New Yorker*, Dec. 19, 1964, p. 42.

This situation is not necessarily the result of a conscious policy, for the very structure of an oligopolistic market inhibits price competition. While advertising seems unreasonably costly in many instances (for example, Procter & Gamble spent \$161 million on advertising in 1964, a sum equal to about eight per cent of its sales and 120 per cent of its after-tax profits), it enables the dominant firms to sell their wares at a price that yields a comparatively high return on investment. Procter & Gamble's fifteen per cent return on its invested capital in 1964 was nearly twice as great as that earned by manufacturing companies generally.⁶⁹ In addition, advertising accentuates product differentiation and thereby creates an important barrier to entry by potential competitors.⁷⁰ Thus, advertising both epitomizes "competition" in oligopolistic industries—like soaps, cigarettes, many foods, personal products, and assorted durable goods—and serves as a weapon that prevents encroachment on the position held by the dominant firms. These implications are of obvious importance to the consumer, for they mean that he must deal with quasi-monopolists on disadvantageous terms, particularly with respect to price. A factor which aggravates the situation still more is that advertising is "both the major medium of information for consumers and the major method of misinformation."⁷¹ In short, the retail purchaser must depend on the seller for the information he needs to make a purchase decision, and in oligopolistic markets the seller uses advertising to confuse the buyer, not to inform him.

C. *The Impersonality of Modern Markets*

The problems of the consumer in dealing with the realities of the marketplace are accentuated by the changing nature of retailing itself. The rise of the supermarket and, more recently, the discount

69. Data on Procter & Gamble's profits and sales are derived from *Fortune*, July 1965, p. 150 (the *Fortune* Directory of the 500 Largest U.S. Industrial Corporations). Advertising data are from *Advertising Age*, June 28, 1965, p. 46.

70. "The most important barrier to entry discovered by detailed study is probably product differentiation." BAIN, *BARRIERS TO NEW COMPETITION* 216 (1956). It was the risk of creating a higher barrier to entry that led the FTC to condemn Procter & Gamble's acquisition of Clorox. 3 CCH TRADE REG. REP. (1963-65 transfer binder) ¶ 16673, at 21570-72, 21579-80. The quantity discounts available to large advertisers greatly reduce their cost of advertising and give them a significant advantage over smaller rivals. See Blake & Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 *YALE L.J.* 1339 (1965).

71. NORRIS, *THE THEORY OF CONSUMER'S DEMAND* 181 (1952). Newspapers, it has been hypothesized, are read as much for the advertisements they carry as for the news they present. See FERGUSON, *THE ADVERTISING RATE STRUCTURE IN THE DAILY NEWSPAPER INDUSTRY* (1963).

store has meant that retailing has become intensely impersonal. At one time the retailer was a source of information about the products he sold, but the modern supermarket—offering as many as 7,500 products—is a symbol of the impersonality which has been the basis for so many complaints. In fact, as a result of the character of contemporary retail establishments, the vastly increased number of consumer products, and the misleading, deceptive, and generally uninformative aspects of advertising and packaging, the consumer simply lacks the information necessary to enable him to buy wisely.

D. *Deceptive Pricing*

Prices, supposedly the common denominator in a free economy, are no longer stated clearly. Packages marked "five cents off regular price" tell the buyer very little, since there is no "regular price." Moreover, even when a price is not stated ambiguously, it frequently cannot be compared with prices for other brands of the same product, since the physical characteristics of the products may be unknown, and since advertising accentuates the supposed differences among products rather than revealing their physical similarities. Indeed, the stated prices for various package sizes of the same product are often very difficult to compare. For example, it would be hard for a typical shopper to select the best price-per-ounce size from among the following packages of the same brand of cookies: one pound for forty-nine cents, eleven ounces for thirty-four cents, and 6.5 ounces for twenty-five cents. In many cases it is cheaper to buy two smaller units of a given product than one "giant economy size." When prices cannot be directly compared, it is fiction to talk of the allocative efficiencies of a price system.

To sum up, modern consumer markets are a long way removed from those that classical economics presupposed. Sellers are few and confine their rivalry to nonprice factors. Products, though fungible, are differentiated through advertising, packaging, and other tricks of contemporary merchandising. Price data are often vague or misleading. Finally, the growing impersonality of retailing makes the situation worse. If the consumer, now drifting aimlessly on a great sea of irrelevant information, is to be placed in a position where he can make informed purchase decisions, governmental action is essential. However, such action must be carefully designed to meet the problem at its source and not be oriented simply to the eradication of a few symptoms.

IV. GOVERNMENT AND THE CONSUMER: A PROGRAM FOR ACTION

"The awful bewilderment of consumers," as Henry C. Simons once stated, can best be corrected by developing, through governmental action, some means of "protective coloration for the buyer."⁷² In addition, it appears that more competition must be created by reducing the existing high levels of concentration that characterize many of the industries which make and sell consumer products. A vigorous, imaginative program of antitrust enforcement must be an integral part of any effort to help the consumer.

Basically what the consumer should have is more factual information about the products he buys—about their price, package contents, quality, and the relative merits of one brand as compared with another of the same general type. Knowledge is the key to the consumer problem if it is made available in readily comprehensible form at the time of the purchase decision. Only then will the consumer be placed in a position to make decisions rationally rather than on the basis of guesswork, thereby allowing the price system to perform the vital allocative function it should.

A governmental program designed to provide the consumer with product information must have several elements, but one essential element is that consumers must be informed about the physical properties of products they are buying, such as weight, volume, and number of units. Such information should be immediately available at the time of purchase; it should be expressed clearly and without qualifications that might tend to mislead. These facts should be presented in a prominent place on the package or container and in a form that is legible and free from graphic distortion. In addition, a product's ingredients should be revealed, both by name and by percentage of composition. It may make a great deal of difference, for example, whether a chemical additive constitutes one per cent rather than ten per cent of a given product's contents. Such matters are so basic that it is hard to see why anyone would object to insistence on their publication. However, in spite of the fact that the publishers of *Advertising Age*, probably the leading trade journal,

72. Simons, *The Requisites of Free Competition*, 26 AM. ECON. REV. 68, 73 (Supp. March 1936). J. M. Clark took essentially the same view, finding that "customer competence . . . [is] a pre-requisite to healthy competition and does not take care of itself in an age of new products and applied science, but affords many problems of policy and implementation." CLARK, *COMPETITION AS A DYNAMIC PROCESS* 466 (1961). More than a century ago John Stuart Mill, who was certainly not a proponent of government intervention in the economy, spoke out in favor of state action whenever the customer is not "a competent judge of the commodity." MILL, *PRINCIPLES OF POLITICAL ECONOMY*, bk. V, ch. XI, § 8 (1848).

conceded that "it does seem reasonable to ask manufacturers to standardize their multiplicity of sizes and to present pertinent contents data in a prominent enough position (on their packages), so that consumers can be spared unnecessary confusion,"⁷³ Senator Hart's Truth-in-Packaging Bill, which would impose such a disclosure requirement, has been as bitterly opposed by food, soap, and other producers as if it threatened to control prices.⁷⁴

Although a consumer must have accurate information about the physical content of a package, this knowledge alone is not adequate to put him in a position to make an intelligent purchase decision. He must also know something more about the product itself, especially its quality. The person in the best position to provide that information is the manufacturer. Under existing conditions, however, most manufacturers will not reveal this kind of information, preferring to hide behind a well-advertised trade name that emphasizes their product's supposed uniqueness. It is in this type of situation that the Government must intervene by requiring publication on a package's label of certain essential information about the product itself.

What information should be disclosed, and what form should it take? First, the general characteristics of a product should be described by its generic name. A household liquid bleach, though it may bear the name Purex or Clorox, should also state on its label that it is "household liquid bleach." Generic labeling is now re-

73. March 25, 1963, p. 16.

74. First introduced in 1962 at the end of the Eighty-seventh Congress and then proposed again, in revised form, in the Eighty-eighth (S. 387) and Eighty-ninth Congresses (S. 985), the Truth-in-Packaging Bill (technically termed the Fair Packaging and Labeling Act) would make it mandatory for the FTC and the FDA to promulgate regulations requiring the net quantity of contents to be stated upon the front panel of packages containing consumer commodities, establishing minimum standards with respect to the prominence of statements of the net quantity of contents, prohibiting the addition of any qualifying words or phrases to such statements of net quantity of contents, forbidding any representation that consumer goods are being offered for retail sale at a price lower than the ordinary retail sale price, and preventing the placement upon any package of any pictorial matter which is likely to deceive retail purchasers in any material respect as to the contents of that package. In addition, when certain preliminary conditions are satisfied, the bill authorizes additional regulations to be issued pertaining to, among other things, the weight and volume of containers in which a commodity may be distributed. The bill has been the subject of extensive hearings. See *Hearings on Packaging and Labeling Practices Before the Senate Subcommittee on Antitrust and Monopoly*, 87th Cong., 1st Sess., pts. 1-3 (1961); *Hearings, id.*, 87th Cong., 2d Sess., pts. 1-3 (1962); *Hearings, id.*, 88th Cong., 1st Sess., pts. 1-3 (1963); *Hearings on Fair Packaging and Labeling Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. (1965). Perhaps the best single explanation of the bill is Senator Hart's 1965 statement before the Senate Commerce Committee. *Id.* at 719-32. The bill was reported to the Senate by the Commerce Committee on May 13, 1966, and was passed by the Senate on June 9 in a form somewhat different from that introduced.

quired for drugs, pursuant to the 1962 Drug Amendments Act.⁷⁵ Second, where products of a certain type vary in quality, as is often the case, they should be graded, and the label should designate the appropriate classification. Product grading is now done for meats and certain other food products, but the concept should be extended to a wide range of other household commodities. Third, where necessary to avoid deception and to minimize confusion, packages should be standardized in terms of size and, perhaps, container design.⁷⁶ Fourth, a package's physical content and the product's ingredients should be stated in a prominent place on the label.⁷⁷ One specific procedure to implement this suggestion, now in wide use in Sweden,⁷⁸ would call for such information (and no other) to be placed in a black-bordered square or rectangle that would occupy not less than twenty-five per cent of the container's surface area. The remainder of the package could contain any matter that the manufacturer might wish to provide, such as the product's trade name and other traditional merchandising representations.

If the foregoing requirements, particularly those relating to generic designation and quality grading, are to be satisfied, the federal government will have to play an active role with, it is hoped, industry cooperation. Minimum standards and basic definitions will have to be agreed upon and promulgated in the form of regulations. At present the Food and Drug Administration promulgates standards of identity for many products, and meats and certain other foods are graded by the Department of Agriculture.⁷⁹ Similarly, for

75. *Hearings on Packaging and Labeling Legislation Before the Senate Subcommittee on Antitrust and Monopoly*, 88th Cong., 1st Sess., pt. 3, at 956-57 (1963).

76. See MASTERS, *op. cit. supra* note 49, at 157. The need for some standardization of packaging is acute in the sale of certain products. For instance, potato chips are now sold in seventy-one different weight packages, all of which are under $3\frac{1}{2}$ pounds.

77. The British Committee on Consumer Protection made a similar recommendation in its final report in 1962, stating that "readily available, adequate and accurate product information is of the first importance to the consumer. It should be given by label in standard form." FINAL REPORT OF THE COMMITTEE ON CONSUMER PROTECTION 303-04 (1962).

78. The Swedish VDN system is sponsored by the Institute for Informative Labeling (Varudeklarationsnamnden), a private organization partly subsidized by the Swedish government. When a label is approved it bears the Institute's symbol. For a general description of the system, see *id.* at 26-27. The British are now using a technique called Teltag Informative Labeling, which is sponsored by the Consumer Council. See note 92 *infra*. This labeling technique reveals information about a product's construction, performance rating, and other physical and qualitative features. Council on Consumer Information Newsletter (Dec. 1965).

79. For a description of the many programs carried out by the Department of Agriculture, the FDA, and other agencies in the areas of labeling, product standardization, and grading, see House Comm. on Government Operations, *Consumer Protection Activities of Federal Departments and Agencies*, H.R. REP. No. 1241, 87th Cong., 1st Sess. 63-65, 68-70, 73, 141, 144-45, 161-62, 197, 221, 274, 329 (1961).

forty years the Department of Commerce has cooperated with industry in the formulation of commodity standards.⁸⁰ Comparable efforts have been made in the standardization of packages and containers.⁸¹

While a compulsory program of the kind outlined above would very likely engender industry opposition, the fact that the proposals are not very radical provides hope that at least some segments of the business community would cooperate willingly. Those sellers who feel that their product is as good as a widely advertised brand would have much to gain from a program that emphasizes objective features and thus permits a shopper to buy on the basis of price and other meaningful criteria. A private-brand seller or a lesser-known producer of liquid bleach would be placed in a position where he could compete far more effectively with the popular brands such as Clorox or Purex.⁸² But whatever the opposition, consumers *must* have factual information of the type indicated above, and they will not get it if the Government stands on the sidelines while buyers make their purchases under conditions of ignorance and deception.⁸³

80. The Commerce Department's commodity standards program is designed to establish quality levels for manufactured products. More than five hundred commodity standards have been promulgated. Compliance is voluntary. H.R. REP. NO. 1241, *op. cit. supra* note 79, at 141-42. For a general discussion of quality grading and standardization, see CAMPBELL, *THE CONSUMER INTEREST*, ch. VIII (1949).

81. The Department of Agriculture, for example, has prescribed a standard pack for various fresh fruits and a standard fill for containers. Many states (including New York, Michigan, and California) require the use of standard packages for the sale of such products as milk, bread, and flour. *Hearings, supra* note 75, at 852, 883, 899, 910.

82. Irston Barnes feels that the availability of qualitative information "would do much to equalize competitive opportunities between firms of disparate size, for the small firm is frequently capable of achieving competitive standards of cost in production but is quite unable to sustain the burden of unlimited competitive advertising." *Hearings on Packaging and Labeling Legislation Before the Senate Subcommittee on Antitrust and Monopoly*, 88th Cong., 1st Sess., pt. 1, at 384 (1963). See also note 70 *supra*. It should be emphasized that while efforts to provide the consumer with more information may necessitate some quality grading and standardization, care must be taken so that this program does not unduly eliminate significant varieties of price and nonprice competition. Sellers are always ready to cooperate with government in any effort that would eliminate competition. However, there is adequate room in which to achieve quality grading and product and package standardization without curtailing seller competition.

83. "Objective standards and informative labels . . . would tell the consumer exactly what he was getting, direct his attention to quality and performance, and facilitate comparisons. And if such standards were generally available, the consumer might come to rely upon them more and to believe in advertising less." WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 206 (1960). Brand-name manufacturers and their supporters would probably view the proposals advanced in the text as bordering on the revolutionary. However, in reality these proposals represent a very conservative approach to the consumer problem, since they would not directly restrict advertising, but rather would simply help provide the retail buyer with vital information. Some observers, of course, would regard this as far too cautious an approach. They would

While industry cooperation would greatly simplify the matter, the present administrative process is capable of adapting to the challenges of a comprehensive program for the labeling and grading of consumer products. Existing agencies—the Food and Drug Administration and the Federal Trade Commission—could perform this function by issuing appropriate regulations.⁸⁴ Alternatively, a new agency could assume the responsibility.⁸⁵ Such a program would naturally demand greater financial support than is now accorded federal consumer activities, but in an economy where nearly a half trillion dollars is spent annually by consumers, it can hardly be suggested that the cost would be unduly burdensome. Indeed, such a program would easily pay for itself by increasing the efficiency of consumption.

However, no program to help the consumer can be complete if products are not continuously tested and the results made generally available. Business firms would not think of buying goods without previously ascertaining their quality and fitness for the intended purpose. Firms establish elaborate testing operations or secure such information from independent organizations; the Government follows the same procedure. The Department of Defense (which sets the standards for most goods bought throughout the Government) and the General Services Administration, using their own resources and those of the National Bureau of Standards, gather the facts necessary to intelligent choice.⁸⁶ In contrast, the consumer is left largely on his own; he is denied even the information which his own Government has collected in its testing.⁸⁷

Although the two principal nonprofit testing organizations, Con-

either ban or inhibit advertising, just as the British government has decided to forbid cigarette advertising on television. See 111 CONG. REC. 2285-86 (Feb. 9, 1965).

84. The power to issue binding regulations is absolutely essential. If enforcement agencies are required to proceed on a case-by-case basis—as is now generally true—they will not be able to deal effectively with the dynamics of the marketplace. For a review of the inadequacies of existing legislation, see statement by Senator Hart, in *Hearings on Fair Packaging and Labeling Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 722-25 (1965).

85. See text accompanying notes 92-94 *infra*.

86. Most specifications for products purchased by the federal government are established by the Department of Defense pursuant to the Defense Standardization Program, on the theory that it is the biggest user of goods within the Government. The Department's principal objective has been the correlation of product quality with physical and chemical characteristics, which is the type of information that would be of interest to the consumer-taxpayer. The General Services Administration also is active in the testing and evaluation of diverse products. For a discussion of the Government's activities as a purchaser, see H.R. REP. No. 1241, *op. cit. supra* note 79, at 152.

87. For a critical discussion of this subject, see *Big Secret: Federal Government's Consumer Reports Service*, *The New Republic*, May 22, 1965, p. 7.

sumers Union and Consumers Research, provide much helpful information in their monthly publications, their resources are limited, and they are not able to test as extensively as conditions demand.⁸⁸ Furthermore, the fact that both organizations derive most of their revenue from subscriptions to their publications means that their effective audience is sharply limited in size—seldom reaching the poor, who may need assistance more than anyone else.⁸⁹

Both Consumers Union and Consumers Research forbid any commercial use of their test findings or comments.⁹⁰ While this policy may make sense from their point of view (it is thought to ensure integrity of their findings), it severely restricts the dissemination of the best existing information about the comparative value of competing products.

If there is to be a broader testing program and greater circulation of test results, the federal government must actively enter the picture. The Government should promptly make available the results of the tests it has itself performed.⁹¹ In addition, it should establish a major testing agency to test extensively and make available its findings systematically, doing so, of course, in the most objective manner possible. The procedures developed by Consumers Union might serve as a useful guide.

88. For its 1964 fiscal year, Consumers Union reported income of \$4.2 million. Of this amount only about \$700,000 was spent by the Technical Department, which carries out its testing program. *Consumer Reports*, Nov. 1965, p. 569. The technical director of Consumers Union has implicitly acknowledged that more work should be done in many product categories, including automobiles, foods (where many newer products have not been tested), textiles (adequate testing often requires mass panels of users), and assorted home products. Letter to Author From Colston E. Warne, CU President, Feb. 1, 1966, enclosing a memorandum from the organization's technical director.

89. Indigents have numerous problems, of course, and the provision of more knowledge about consumer products would be only one element in a program of meaningful aid—but an important one. At present "most poor people do not possess the necessary knowledge, skill, and time to get full value for their dollars." REPORT OF THE (U.S.) PANEL ON CONSUMER EDUCATION FOR PERSONS WITH LIMITED INCOMES, at vi (June 1965). See generally CAPLOVITZ, *THE POOR PAY MORE* (1963).

90. Each issue of *Consumer Reports* carries this warning: "Neither the ratings nor the reports may be used in advertising or for any commercial purpose of any nature. Consumers Union will take all steps open to it to prevent or to prosecute any such uses of its material or of its name or the name of Consumer Reports." In one instance the FTC, at Consumers Union's request, ordered a major appliance company to cease using advertising material which made reference to the results of certain Consumers Union tests. *Consumer Reports*, Sept. 1965, p. 425.

91. A quasi-official group has recommended that an "interdepartment study group" be established by the Department of Commerce for the purpose of identifying and publicly disseminating governmental information which might be useful to consumers. REPORT TO THE PRESIDENT FROM THE REGIONAL CONSUMER CONFERENCES 10-11 (March 1965). The Conferences were sponsored by the Office of the Special Assistant for Consumer Affairs.

A comprehensive program of the type outlined here—incorporating expanded labeling requirements, quality grading, and extensive product tests—would provide the consumer with the information needed to buy intelligently. However, if such a program were to be implemented forcefully and efficiently, it would require the direction of a new governmental agency. To divide the program into pieces and distribute them among a number of existing governmental units, along with the three hundred consumer-related activities now under the supervision of more than thirty separate departments and agencies, would blunt the effectiveness of the over-all effort by destroying the interdependence of its constituent elements. Furthermore, many of the agencies now concerned in greater or lesser degree with consumers deal principally in the negative aspects of trade practices, such as the enforcement of prohibitions on business behavior that is viewed as detrimental to the public interest. This negative function is true of both the FDA and the FTC; typically they confront a situation only when its deleterious effect has been or is about to be felt.

By contrast, a meaningful consumer program of the kind sketched here, which is oriented to the distribution of knowledge, requires an affirmative posture designed to equip the consumer with the information he requires to buy wisely, rather than the services of a policeman. It is doubtful that either the FTC or the FDA could adapt to the required approach with the necessary speed or spirit. A new agency, charged with responsibility for carrying out the program described, appears to be the best answer. Its exact location within the Government and its precise name are comparatively minor matters. Nevertheless, such an agency could be designated as the Consumers Protection Service, and it could be placed in the Department of Health, Education, and Welfare.⁹²

92. The agency's title is considerably less important than the fact that the agency must be a permanent unit of the government empowered by law to perform certain specific functions. In the past, recommendations and state legislation for the establishment of an Office of Consumers (see note 46 *supra* and accompanying text) have been vague as to the exact duties it was to carry out. For example, the 1959 California law establishing a Consumer Counsel merely stated that the Counsel will "advise the Governor as to all matters affecting the interests of the people as consumers" and "recommend" such legislation as is deemed necessary to "protect and promote" the interests of consumers. In the absence of more specific statutory responsibilities, it is doubtful that a Consumer Counsel can play an effective role in aiding the consumer. The Counsel can, however, contract for surveys, economic information, and such similar services as may be "necessary and proper." CAL. CODE §§ 12050-57. Other states have formed similar offices. Washington did so after its Consumer Advisory Council concluded in 1960 that "'caveat emptor' as the maxim of the market place is no longer realistically applicable in an economic society of electronic and mechanical

Upon the creation of a Consumers Protection Service, an effort could be made over a period of time to transfer to it many of the consumer-related activities now found throughout the Government. A complete centralization of consumer affairs in the new agency would be neither possible nor desirable, but a large number of such activities could be transferred without impairing the ability of the departments in which they are now found to carry out their missions. After the formation of the Service, the existing office of the Special Assistant for Consumer Affairs could be abolished, and the Consumer Advisory Council, now an accessory to the Executive Office of the President, made an adjunct of the new agency. The Committee on Consumer Interests would be preserved for purposes of interagency coordination, with the head of the Service serving as its chairman.

In addition to implementing the specific programs mentioned here, the new Service would have to assume a general role in aiding the consumer. Among other functions, this responsibility would call for the support of research directly related to consumer affairs. At the present time, the federal government spends more than fifteen billion dollars per year for research and development, but it devotes practically nothing to consumers' problems, despite the fact that consumers are the largest single component of the nation's economic activity.

Much careful study is also needed if the Government, acting on behalf of the consumer, is to be in a position to deal with new products and with novel sales devices that are certain to be used in the future. Behavioral scientists have already demonstrated their ability to invent highly sophisticated—some would say fiendish—techniques to influence buyers subconsciously (subliminal advertising is only one example of what is to come).⁹³ The Government must be aware

complexes, chemical formulas, packaged meals, and an infinite variety of financing devices and interest variations." State Government News, Oct. 1965. The British Committee on Consumer Protection was instrumental in the establishment of a Consumer Council. See REPORT, *op. cit. supra* note 77, at 314-15. The Council was admonished "to inform itself fully about the consumer's problems."

93. Noting that behavioral research may be employed to "capitalize on human weaknesses" of consumers, one author has concluded that "the ability to influence consumption via behavioral analyses is potentially too dangerous to remain unchecked. If intimate knowledge about human behavior is used to exploit consumers and contributes to greater concentration of economic power, some means of insuring market freedom becomes necessary. Prophylactic rather than therapeutic control . . . may be needed." Peterson, *A Critique of Interdisciplinary Analysis of Markets*, 6 BUSINESS & SOCIETY 25, 31-32 (1965). For a discussion of psychological techniques used in the sale of consumer goods, see DICHTER, CONSUMER MOTIVATIONS: THE PSYCHOLOGY OF THE WORLD OF OBJECTS (1964); PACKARD, THE HIDDEN PERSUADERS (1957).

of the developments in the area of new products and advertising techniques, so that it can devise appropriate responses before the associated problems assume serious proportions. Likewise, the increasing international sale of consumer products means that governments must begin to work together more closely to develop compatible regulatory and promotional programs.⁹⁴ Also needed is a stepped-up, broader-based effort to make the nation's consumers, especially the poor, more fully aware of the realities of the marketplace and of the information they can use in making their purchases.

In carrying out all of these activities, the new Consumer Protection Service could do a great deal on its own, but it is perfectly apparent that the Government must also encourage the growth of private research organizations. For example, the membership fee in Consumers Union or other similar nonprofit organizations could be made a deductible item for the individual taxpayer in the same manner that a business can deduct "ordinary and necessary" expenses. In dealing with consumer problems, there is abundant opportunity for both private activity and a large increase in governmental participation.

Assuming that the proposed program and administrative organization set forth here would provide considerable aid for the consumer and contribute to a more efficient economy, nevertheless a determination must be made with regard to whether these ideas are politically salable. Unfortunately, in answering that question, one cannot be particularly optimistic. Any program that might help the consumer buy more intelligently conflicts sharply with one or more producer interests. As noted earlier, producers are typically well organized, heavily financed, capably staffed, and prepared to defend the status quo aggressively. Throughout this century, manufacturers have resisted almost every effort to protect the consumer. Passage of the Food and Drug Act of 1906 was delayed for more than ten years due to the opposition of the Proprietary Association of America. In fact, pressure from an emotionally aroused public was eventually required for its enactment. A similar situation existed in the 1930's; only the deaths of almost one hundred persons who had consumed elixir sulfanilamide created the climate in which

94. Some limited efforts at international cooperation are under way. For instance, the Codex Alimentarius Commission, established in 1962 under the auspices of the United Nations Food and Agricultural Organization and the World Health Organization and composed of representatives from forty-five countries, is attempting to develop uniform foods standards. For a description of the Commission's activities, see *Wall Street Journal*, Oct. 6, 1965, p. 16, cols. 4-5.

amendments to the 1906 act could be enacted. Once more, in 1962, the thalidomide scandal provided the spark that provoked additional protective drug legislation; even then, the original proposals were watered down considerably before enactment.⁹⁵

As Senator Hart has pointed out, any legislative proposal that deals with labeling, packaging, or other aspects of modern merchandising attracts critics just as flypaper attracts insects.⁹⁶ The big companies (with their vast stake in trade-name merchandising), the major advertising agencies, and the mass media, which are financed primarily by advertising, quickly line up in opposition.⁹⁷ Proponents of reform are obligated to fight continuously and are allowed to make no gains without the bitterest opposition. Under these conditions even the most zealous reformers are usually rebuffed.⁹⁸

The only way that the producer interests can be subdued and substantial reform achieved is by confronting their large and well-

95. The story of the 1962 drug amendments legislation is told in a brilliant fashion in HARRIS, *THE REAL VOICE* 154, 181-93 (1964). Harris also comments on the background to the 1938 drug act. *Id.* at 181-83.

96. See Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255 (1966).

97. Major advertisers generally make it clear to the media that they expect full support, right down to the suppression of news and opinion that they view as hostile to their economic interests. Most of the media cooperate fully. See *A Story for Our Times*, Consumer Reports, March 1965, p. 118. Commercial support of educational television threatens to close that medium as an objective source of news and comment, even though the benefactors insist they make their contributions without strings. Jack Gould, TV editor of the New York Times, has commented realistically that "the man who spends the dollar wants to have something to say about how it is spent, and the door of educational TV might [therefore] be opened to the very commercial pressures which the medium is designed to resist." N.Y. Times, Jan. 16, 1966, § 2, p. 19, cols. 1-5 (city ed.).

98. The recent battle over a cigarette cancer warning is a good example. When a link between cigarette consumption and cancer was reported by the Public Health Service, various proposals were made to deal with the problem. Some people urged an outright ban on the sale of cigarettes; others urged an end to cigarette advertising (see note 83 *supra*); still others insisted that all cigarette advertisements should carry a warning about the risk of cancer. When the battle was ended, and the hordes of lobbyists had departed, all that remained was a requirement that cigarette packages (but not advertisements) carry the following warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health." The cigarette companies and the advertising media had clearly won. For a review of the encounter, see Consumer Reports, Oct. 1965, p. 488. The story was much the same with respect to the 1962 drug amendments legislation. HARRIS, *op. cit. supra* note 95, at 154, 181-93. Similarly, because of intense opposition, and in spite of formal presidential support, the so-called Truth-in-Lending Bill (S. 2275, 89th Cong. (1965)) has been blocked. This bill, which was offered by Senator Douglas, would require that anyone who lends money or extends credit must supply the borrower or credit user with a statement of the total finance charge in dollars and cents and a statement of the finance charge expressed in terms of a true annual rate on the outstanding unpaid balance of the obligation. These two requirements would enable the consumer to compare the cost of credit from various sources. For a more detailed explanation of the bill, see 111 CONG. REC. 15848-55, (daily ed. July 12, 1965).

equipped forces with an equally powerful opposition. A president like Theodore Roosevelt (who provided active support for the original Food and Drug Act and for the Meat Inspection Act of 1907) can make an excellent general in charge of the forces of reform. However, most presidents prefer not to run to the center of the battle until they determine whether they have an army, and this is another major reason why the consumer has been so unsuccessful in securing government aid. Unlike the farmer, the laborer, and the businessman, the consumer has never been effectively organized; in the absence of organization, political response is slow to come, if it comes at all.

While the lack of organization among consumers is a serious handicap, nevertheless it can be overcome if political leaders are willing to take the initiative in advocating programs to aid the consumer. The politician's dream, of course, is to rush to the head of a line that has already formed, but in the past there have been many social reformers who initially assumed an exposed position and then built their support. Senator Hart's introduction of truth-in-packaging legislation in 1961 has had precisely this effect. He has received several thousand letters urging passage of his bill, and the publishers of *Consumer Reports* feel there is more public interest in truth-in-packaging than any other consumer issue in the thirty-year history of their publication. The debate has been accentuated by the outspoken opposition of manufacturers and their supporters, which has served to intensify consumer acclaim for the bill. This increasing public support is a good example of the way in which efforts to defeat legislation can have the opposite effect of that intended.⁹⁹ Moreover, with the mobilization of public opinion behind truth-in-packaging legislation, additional political voices have been raised in aid of the consumer. Finally, Presidents Kennedy and Johnson added their endorsements to this consumer legislation.

Just as the lack of organization does not necessarily preclude legislation designed to aid consumers, there is also precedent for the Government to create an agency to help represent consumers' interests. Labor and agriculture provide two examples; in both cases Congress set up a special agency to deal with problems before the members of these groups had formed powerful organizations of their own. A Department of Agriculture was formed in 1862,¹⁰⁰ but effective

99. See Hart, *supra* note 96, at 1267-68.

100. 12 Stat. 387 (1862). The Department of Agriculture was administered by a Commissioner of Agriculture until 1889. In that year the Department's powers and

organization of the nation's farmers did not come until the 1870's with the spread of the Granger movement. Similarly, a Bureau of Labor was created in 1884,¹⁰¹ which was well before the Knights of Labor reached their peak of power and many years prior to the rise of the American Federation of Labor.

In spite of the difficulties, therefore, it should be politically feasible to establish a special consumer agency in the federal government and to adopt and execute a program of the kind outlined here—provided that there is continued support by political spokesmen who have so far taken an active interest in the problem. However, one cannot assume that these spokesmen will necessarily continue to be active in the future. As previously noted, there has been a marked tendency in the past to be content with the eradication of a few symptoms of the consumer problem without seeking a comprehensive, systematic solution. Even if a Truth-in-Packaging bill is enacted into law this year, much more must be done if the consumer is to be placed in a position where he can buy wisely and deal effectively with the realities of the contemporary marketplace.

This article, which may have helped place the consumer problem in its larger economic and political perspective, has suggested the ingredients of a program of governmental action that would satisfy consumers' needs. The precise details of these proposals are relatively unimportant, but it is essential to appreciate the problems they are designed to meet and to recognize that the job of putting the consumer in a position to purchase intelligently has only begun. These considerations have not been adequately recognized before, and, of course, it is an open question whether they will be now. If they are not, the consumer will continue to occupy a "back seat" in the formulation of the Government's economic policy.¹⁰²

duties were enlarged, and it was made the eighth executive department in the federal government, with the Commissioner becoming the Secretary of Agriculture. 25 Stat. 659 (1889), 5 U.S.C. § 512 (1964).

101. Originally the Bureau of Labor was under the Interior Department. Later the Bureau became independent as a Department of Labor without executive status. In 1903 it reverted to bureau status under the Department of Commerce and Labor (32 Stat. 827 (1903)). Finally, in 1913, it attained separate standing as an executive department. 37 Stat. 736 (1913), 5 U.S.C. § 611 (1964).

102. The characterization is that of President Johnson. See note 41 *supra*.