Revolt Against Regulation. By Michael Pertshuk. Berkeley: University of California Press, 1982, Pp. 165, $12.95.

Reviewed by EMMA COLEMAN JORDAN*

INTRODUCTION

What could be less controversial than a proposal designed to curtail television advertising to children and curb the number of commercials promoting sugared products?[1] For a seasoned consumer advocate, the FTC's "kid vid" proposal was so attractive and irresistible[2] that it seemed to possess all the markings of an invincible consumer crusade.[3] Yet, it was this proposal perhaps more than any other that motivated a wide spectrum of business interests to challenge the very existence of the Federal Trade Commission,[4] and triggered the unexpected opposi-

---

* Professor of Law, University of California, Davis. B.A., California State University, San Francisco, 1969; J.D., Howard University, 1973.

[1] Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967 (1980) (to be codified at 16 C.F.R. pt. 461) (proposed Apr. 27, 1978). In 1978, the Federal Trade Commission gave notice that it intended to begin consideration of a rule which had three parts: 1. Restriction of television and advertising of any product, when the advertisement was directed to, or likely to be seen by, significant numbers of children who because of their age were unable to evaluate the advertising message. Children under six would be presumed to be too young to understand and evaluate. 2. Ban from programs aimed at children under twelve the advertising of sugar coated products likely to cause tooth decay. 3. Require that when programs targeted for children under twelve run advertisements for heavily sugared products such ads be balanced by separate nutritional and dental counter-ads.

[2] Pertshuk himself confides that "before embarking on the children's advertising initiative, I had indeed made a rough political calculation and concluded that it would be relatively immune from political attack." M. PERTSHUK, REVOLT AGAINST REGULATION 71 (1982) [hereafter REVOLT].

[3] In fact, the FTC proposal could be characterized as the product of a consumer crusade. Note, *Unsafe For Little Ears? The Regulation of Broadcast Advertising To Children*, 25 U.C.L.A. L. REV. 1131, 1132 n.6 (1978) (collection of various petitions for rulemaking, court actions, and congressional hearings, which were initiated by such consumer groups as the Action for Children's Television, Inc., the Center for Science in the Public Interest, and The Council on Children, Media and Merchandising).

[4] The children's advertising proposal led to the collection of a business "war chest" of fifteen to thirty million dollars. REVOLT, note 2 *supra*, at 93 n.39, citing Morris, *Foes of Child Ad Curbs Devised Strategy Here*, Wash. Star, Mar. 7, 1979. In addition,

tion and ridicule of the liberal editorial staff of the Washington Post.[5] What caused the demise of such an apparently harmless proposal? Does the answer lie in the complexity and sensitivity of the parent-child relationship? Is the withdrawal of the proposed ban on children's advertising an exaggerated consequence of an unlucky political miscalculation? Or is the failure of the children's advertising regulation symptomatic of the fundamental vulnerability of the process by which the major proconsumer initiatives of the last decade were developed? In *Revolt Against Regulation*, Michael Pertshuk, the former chair of the Federal Trade Commission and the dean of governmental consumer advocates, has collected his insights on these and other issues. The result is a thoughtful, if somewhat uneven, book about regulatory politics in the world of consumer protection.

Pertshuk's thesis is that the excesses of activist consumer advocates provided the stimulus for businesses, large and small, to reassert their

---

Pertshuk learned that the industry lobbyist coordinating the opposition to the proposed rule had on one occasion met with representatives of 32 separate companies and associations to discuss preventing the regulation of children's advertising.

[5] *The FTC as National Nanny*, Wash. Post, Mar. 1, 1978 at 8, col. 1. One has the sense that the editorial was so wounding that Pertshuk was still smarting with a sense of betrayal when he noted that "[i]t would have been damaging enough had the *Post* raised sober questions . . . but, to trivialize the children's advertising issue was devastating . . . ." REVOLT, note 2 *supra*, at 70. The editorial read in part:

> The Federal Trade Commission has now agreed to consider imposing major restrictions on television advertisements aimed at young children. The primary goal of the proposal is to reduce the amount of sugar children eat. Few people, least of all thoughtful parents, will disapprove that goal. But the means the [FTC] is considering are something else. It is preposterous intervention that would turn the agency into a great national nanny. . . .
>
> Now, it is true that children watch many hours of television and see thousands of advertisements that cause them to demand that their parents buy certain products, mostly candy and cereals with huge amounts of sugar in them. And parents often yield to those demands, with the result that children eat more sugar than is good for them — from which the FTC's staff concluded that government must do something about the ads to protect the children.
>
> But what are the children to be protected from? The candy and sugar-coated cerals that lead to tooth decay? Or the inability or refusal of their parents to say no? The food products will still be there, sitting on the shelves of the local supermarket after all, no matter what happens to the commercials. So the proposal, in reality, is designed to protect children from the weaknesses of their parents — and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess — if you can afford one. It is not a proper role of government.

Wash. Post, Mar. 1, 1978, at 8, col. 1.

political power by exploiting the diffuse public dissatisfaction with government and regulation.[6] In short, he concludes that "the consumer movement [was] laid low by the reaction and revolt of business."[7] In the aftermath of this revolt, Pertshuk identifies three basic lessons in "regulatory humility" for potential consumer activists.[8] He recommends: First, a respect for and greater sensitivity to the full spectrum of the costs of regulation. Without surrendering policy judgments to cost-benefit analysis, consumer advocates and regulators must be held accountable for the costs of proconsumer proposals.[9] Second, there must be a recognition of the social value of entrepreneurs and marketplace incentives as sources of creativity, without permitting these incentives to sweep aside the moral and ethical restraints that mark a civilized society.[10] And finally, Pertshuk recommends recognition of the fallibility of bureaucratic judgment, without abandoning faith in the role of government in a democratic society.[11]

Much of the book is devoted to a description of the initiatives of the Senate Commerce Committee during the Chairmanship of Senator Warren Magnuson,[12] the Federal Trade Commission during Pertshuk's

---

[6] REVOLT, note 2 *supra*, at 137.

[7] *Id.*

[8] *Id.* at 139.

[9] *Id.* at 138, 140. A recent example of the continuing division of opinion on the role of cost-benefit analysis in consumer protection law is provided by the debate between Professors Whitford and Priest. Their disagreement centers on the validity of a theory which predicts whether consumers or manufacturers will be the most efficient insurers of losses from defective products. *See* Priest, *A Theory of Consumer Product Warranty*, 90 YALE L.J. 1297 (1981); Whitford, *Comment on a Theory of the Consumer Product Warranty*, 91 YALE L.J. 1371 (1982); Priest, *The Best Evidence of Products Liability on the Accident Rate: Reply*, 91 YALE L.J. 1386 (1982).

[10] REVOLT, note 2 *supra*, at 138.

[11] *Id.* at 150.

[12] These include: To promote highway safety, Pub. L. No. 88-466, 78 Stat. 564 (1964); to regulate labeling of cigarettes, Federal Cigarette and Labeling Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965); to provide a coordinated national safety program and establish safety standards for motor vehicle accidents in interstate commerce, National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718; to amend Hazardous Substances Labeling Act, and to ban hazardous toys and articles intended for children, Child Protection Act of 1966, Pub. L. No. 89-756, 80 Stat. 1303; to establish a national commission on product safety, Pub. L. No. 90-146, 81 Stat. 466 (1967); to increase the protection afforded consumers against flammable fabrics, Flammable Fabrics Act Amendments, Pub. L. No. 90-189, 81 Stat. 568 (1967); to authorize a fire research and safety program, Fire Research and Safety Act of 1968, Pub. L. No. 90-259, 82 Stat. 34; and to establish a motor vehicle accident compensation system, Pub. L. No. 90-313, 82 Stat. 126 (1968). In addition, there was an aborted proposal by Senators Magnuson and Stevenson to create a federal oil and

chairmanship,[13] and his current service as a minority commissioner.[14] Pertshuk's collection of lectures[15] contains a candid view of landmark consumer legislation and regulation.

---

gas corporation to compete with energy companies in developing reserves on publicly owned lands. *See* S. 2506, 93d Cong., 2d Sess. (1974).

[13] The FTC proposed only three new rules during the time Pertshuk chaired the Commission: the Home Insulation Rule, 42 Fed. Reg. 59,678 (1977) (to be codified at 16 C.F.R. pt. 460) (proposed Nov. 18, 1977); the Standards and Certification Rule, 43 Fed. Reg. 57,269 (1978) (to be codified at 16 C.F.R. pt. 457) (proposed Dec. 7, 1978); and the Children's Advertising proceeding, 43 Fed. Reg. 17,967 (1978) (to be codified at 16 C.F.R. pt. 461) (proposed Apr. 27, 1978). In addition, Pertshuk, as a senior staff member for Senator Magnuson, has been credited with the unprecedented acceleration of rule making which followed in the wake of the Magnuson-Moss Act of 1975, 15 U.S.C. §§ 2301-11 (1976 & Supp. V 1981): the Credit Practices Rule, 40 Fed. Reg. 16,347 (1975) (to be codified at 16 C.F.R. pt. 444) (proposed Apr. 11, 1975); Proprietary Vocational and Home Study Schools Rule, 40 Fed. Reg. 21,048 (1975) (to be codified at 16 C.F.R. pt. 438) (proposed May 15, 1975); the Food Advertising Rule, 40 Fed. Reg. 23,086 (1975) (to be codified at 16 C.F.R. pt. 437) (proposed May 28, 1975); the Mobile Home Rule, 40 Fed. Reg. 23,334 (1975) (to be codified at 16 C.F.R. pt. 441) (proposed May 29, 1975); the Retail Price Disclosure for Prescription Drug Rule, 40 Fed. Reg. 24,031 (1975) (to be codified at 16 C.F.R. pt. 447) (proposed June 4, 1975); the Hearing Aid Rule, 40 Fed. Reg. 26,646 (1975) (to be codified at 16 C.F.R. pt. 440) (proposed June 24, 1975); the Cellular Plastics Rule, 40 Fed. Reg. 30,842 (1975) (to be codified at 16 C.F.R. pt. 439) (proposed July 23, 1975); the Health Spa Rule, 40 Fed. Reg. 34,615 (1975) (to be codified at 16 C.F.R. pt. 443) (proposed Aug. 18, 1975); the Funeral Industry Practices Rule, 40 Fed. Reg. 39,901 (1975) (to be codified at 16 C.F.R. pt. 443) (proposed Aug. 24, 1975); the Advertising and Labeling of Protein Supplements Rule, 40 Fed. Reg. 41,144 (1975) (to be codified at 16 C.F.R. pt. 454) (proposed Sept. 5, 1975); the Advertising for Over-the-Counter Drug Rule, 40 Fed. Reg. 52,631 (1975) (to be codified at 16 C.F.R. pt. 450) (proposed Nov. 11, 1975); and an Amendment to the Holder in Due Course Rule, 40 Fed. Reg. 53,506 (1975) (to be codified at 16 C.F.R. 433) (proposed Nov. 18, 1975).

In 1976, the commission made four new rule making proposals: the Used Car Rule, 41 Fed. Reg. 1089 (1976) (to be codified at 16 C.F.R. pt. 455) (proposed Jan. 6, 1976); the Eyeglasses Advertising Rule, 41 Fed. Reg. 2399 (1976) (to be codified at 16 C.F.R. pt. 456) (proposed Jan. 16, 1976); amendments to the original 1971 Care Labeling of Textile Products Rule, 41 Fed. Reg. 3747 (1976) (to be codified at 16 C.F.R. pt. 423) (proposed Jan. 26, 1976); and the Advertising for Over-the-Counter Antacid Rule, 41 Fed. Reg. 14,534 (1976) (to be codified at 16 C.F.R. pt. 451) (proposed Apr. 6, 1976).

[14] After the elections of 1980, Pertshuk has remained on the commission. He no longer serves as its chairman, a position appointed by the President with Senate confirmation.

[15] REVOLT AGAINST REGULATION consists of a series of five lectures delivered to the Graduate School of Business Administration of the University of California, Berkeley, beginning in the Fall of 1981.

I. CONSUMER MOVEMENT OR MIRAGE?

There are few unifying theories available to explain the dramatic increase in the number and importance of federal legislation affecting consumer relationships with business between 1967-1980. Pertshuk, in this void, has turned to political scientist James Q. Wilson for definitional clarity,[16] and has adopted Wilson's explanation of the relationship between the variables which affect regulatory politics. Under this model, the range of political behavior concerning regulation can be classified into four major patterns, each reflecting distinct distributions of the costs and benefits of a given regulatory scheme: a) Majoritarian Politics — occurs when costs and benefits are both *widely* distributed;[17] b) Interest Group Politics — occurs when both costs and benefits are *narrowly* distributed;[18] c) Client Politics — occurs when costs are widely distributed, while benefits will be highly concentrated;[19] and d) Entrepreneurial Politics — arises when benefits are widely distributed and costs will be highly concentrated in the regulated entity.[20]

Pertshuk has adopted Wilson's last category of regulatory politics as the framework for analyzing the emergence of a coalition of "entrepreneurial consumer advocates."[21] Despite the originality of Wilson's typology, its application to the wide spectrum of issues covered by Pertshuk leaves large expanses of consumer protection regulatory politics unexplained. In Pertshuk's view, it is doubtful whether a true movement ever existed. He concludes that if it once existed, its power is severely reduced today.[22]

---

[16] THE POLITICS OF REGULATION (J. Wilson ed. 1980) [hereafter Wilson]. For a comprehensive analysis of this collection of nine essays, see Schuck, Book Review, 90 YALE. L.J. 702 (1981).

[17] Wilson, note 16 *supra*, at 367-68. The Social Security Act is the leading example of the result of this political combination of costs and benefits of regulation. Social Security Act of 1935, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1394 (1976 & Supp. V 1981)).

[18] Wilson, note 16 *supra*, at 368. Labor legislation typifies this category in that highly activated, directly affected interest groups seek to determine the outcome of rule making.

[19] *Id.* at 369-70. Professional and occupational licensing laws are examples of this category. The regulated group will encounter little opposition, because it is benefited by legislation which affects wide portions of the public but affects no single sector too greatly.

[20] *Id.* at 370-71. Typical consumer legislation in the areas of the environment, civil rights, and auto or product safety laws provide examples of this combination of costs and benefits.

[21] REVOLT, note 2 *supra*, at 9-10.

[22] The concept of successful consumer advocacy as an example of 'en-

Pertshuk attributes the emergence of a politically powerful consumer "impulse" to the interaction of five distinct subsets of consumer "entrepreneurs": consumer advocates among members of congress;[23] activist members of congressional staffs;[24] advocacy journalists;[25] labor;[26] and independent consumer "entrepreneurs" such as Ralph Nader. It is this diverse coalition, unified by a common interest in advancing consumer initiatives, which placed consumer protection on the national agenda.

> trepreneurial politics' serves another useful analytical purpose. It has become customary to refer to the 'consumer movement.' However, if we understand a movement to reflect not only widespread popular support but, like the 'populist movement' of the late nineteenth century, an organized grass roots effort that, for its members, transcends all other political identity or involvement, it cannot be said that a consumer movement has ever existed. For consumer issues by their nature — unlike wages and job security in the labor movement, for example — rarely assume priority among citizens' competing economic concerns. Consumer issues may dominate the political agenda under special circumstances, as in rent strikes and campaigns for rent control laws, or, in locally organized campaigns to combat red lining in mortgage loans or auto insurance. For certain groups, in particular the elderly on fixed incomes, whose principal economic concern is stretching static limited income, consumer issues may indeed loom large. But by and large the individual consumer stake in the pursuit of consumer laws and regulations lacks the motivating energy of true political movements. The reasons that this is almost inevitably so do not reflect public ambivalence about consumer initiatives, but the limited economic stake each consumer has in each of the discrete issues that, taken together, have been viewed as consumer legislation.

REVOLT, note 2 *supra*, at 10 n.8.

[23] Senator Warren Magnuson, for whom Pertshuk began work in 1964 as an assistant counsel for consumer legislation to the Senate Commerce Committee, is the archetype of this category. *Id.* at 23-26.

[24] Not surprisingly, Pertshuk and his former colleagues on the staff of the Senate Commerce Committee serve as the prototypes of consumer activist staff members. *Id.* at 26-28.

[25] Drew Pearson and his protege and successor Jack Anderson are described as "perhaps the most feared and hence the most potent journalistic guardians against what they perceived and characterized as a subversion of Congress by special interests." *Id.* at 34.

[26] Esther Peterson, a former organizer for the International Ladies Garment Workers Union, who joined the Kennedy Administration as Assistant Secretary for Labor and Special Assistant to the President for Consumer Affairs, personifies the integration of the lobbying strength of the traditional labor movement applied to consumer issues. Another example is Carol Tucker Foreman, who served as Executive Director of the Consumer Federation of America, an umbrella coalition for other national and local consumer organizations. Joan Claybrook, the indefatigable and talented head of Nader's Congress Watch, later Administrator of the National Highway Traffic Safety Administration, is yet another example of the "not for profit consumer entrepreneurs."

What role is reserved for individual citizens in this process? The idea that individuals exert no important influence is strictly a view from Washington. Pertshuk's thesis is that individual injury and outrage are only a small, if not insignificant, part of the predicate for successful legislation. In discussing the significance of individual injury as a motivating factor for congressional support for consumer legislation, he notes the relative unimportance of the individual or unorganized groups of individuals. For example, Pertshuk suggests that what made consumer safety initiatives such as flammable fabric standards and auto safety attractive to the political entrepreneurs was not the images of burned and scarred infants or drivers impaled on "spearlike steering columns," but rather the "marketability" of these individual misfortunes. Pertshuk may be only the faithful messenger revealing the truisms of his profession. This fact does not, however, diminish our disappointment in the revelations. His report of manipulative prowess deployed on behalf of consumers only by chance, has the ring of regrettable truth.

In the Wilson/Pertshuk marketplace model of consumer activism, politicians and the media achieved a collaborative success by selling themselves as advocates of attitudes and values which a broad spectrum of the public would buy.[27] Although this entrepreneurial model helps to explain the operation of leadership coalitions, it does not fully account for the responsiveness of the American public. In some ways, it is a matter of emphasis. In part, we can attribute public receptivity to consumer initiatives to the antiestablishment, antiauthoritarian, cultural revolution of the late 1960s.[28] The political ascendency of protests against the Vietnam War and efforts to insure credible and accountable government control of corporate misdeeds were certainly additional factors which enhanced the attractiveness of consumer protection philosophies.

I concur with Pertshuk that the consumer "impulse" encountered what initially appeared to be an irreversible wave of public and congressional opposition, and that this opposition, in turn, led to the present hiatus in proconsumer legislation. It is only by comparison to the heady 1960s that the contemporary status of public interest and consumer advocates appears lacking. We have, however, seen tenacious

---

[27] "[T]he Post editorial served notice that we consumer advocates and regulators were losing our hold on the *symbols of debate*, at least in Washington." REVOLT, note 2 *supra*, at 71 (emphasis added); *see also id.* at 20.

[28] The psycho-social aspects of this cultural revolution and its aftermath have been chronicled in the scathing critique, C. LASCH, THE CULTURE OF NARCISSISM (1979).

public insistence on enforcement of the laws which insure basic safety in manufactured products, the environment, and services. For example, opinion polls have shown unflagging public support, even at the height of the business revolt, for product safety and environmental laws.[29] Although Pertshuk has recognized the ambivalence of public support for the business revolt against regulation, he has chosen to deemphasize the real successes of the consumer movement.

The real measure of the success of consumer advocates is not confined to the number of laws which they were able to lobby through Congress. The true measure is qualitative, not quantitative. Remarkably, the expectations of an entire generation have been changed. In the aftermath of the national debate prompted by consideration of landmark legislation such as the Magnuson-Moss Warranty Act, the Flammable Fabrics Act, and the National Traffic and Motor Vehicle Safety Act,[30] the importance of governmental standards in these fields is generally conceded. However, support for flammable fabric legislation does not necessarily translate into support for regulation of children's television advertising. Consumers appear to be quite sophisticated in drawing distinctions between those regulations intended to protect and advance basic health and safety values, and those which intrude governmental judgment into areas traditionally reserved for private discretion.

Although the declining number of new consumer initiatives may be unsettling to some, it is important to take account of the pervasive change in public attitudes about the efficacy of laws already in effect.[31] I prefer to measure the continued vitality and effectiveness of the consumer movement both by the profound changes in the quality of life it has wrought, and our expectations of the government's role in assuring continuation or enhancement of that quality, rather than by the lessening volume of new legislation submitted to Congress. I conclude that while Pertshuk's analysis of the consumer movement is exceptionally astute, and therefore a valued source of explanation about the problems encountered by consumer activists, he has wrongly chosen to overemphasize the difficulties, and accord less weight to more deep-seated attitudinal changes that are stubbornly resistant to the political fads which seem to sweep Washington.

---

[29] 1 GOVERNMENT RESEARCH CORPORATION, NATIONAL JOURNAL OPINION OUTLOOK BRIEFING PAPER, no. 19, at 2 (Aug. 24, 1981); 2 GOVERNMENT RESEARCH CORPORATION, NATIONAL JOURNAL OPINION OUTLOOK BRIEFING PAPER, no. 5, at 3-5 (Mar. 15, 1982), *cited in* REVOLT, note 2 *supra*, at 48.

[30] *See* legislation cited in notes 12 and 13 *supra*.

[31] *See, e.g., id.*

II. ANTIREGULATORY REVOLT OR BUSINESS AS USUAL

The observation that organized business interests enjoy an unnatural advantage of access to elected representatives is a relatively uncontroversial proposition. This advantage exists even when businessmen do not actively pursue direct political action. The relationship between legislators and business is symbiotic; if the economy prospers, the legislator will benefit indirectly from the good fortune of constituents. More importantly, corporations enjoy financial resources which, if committed to political influence, can provide an unmatchable source of campaign contributions.[32] Further, that businessmen have always enjoyed some degree of concerted clout is also an uncontroversial observation. Against these observations, we must weigh Pertshuk's view that there was a revolt against regulation which was qualitatively distinct from the customary advantage which business enjoys.

Revolt makes the point that business, operating against a backdrop of economic distress and the vague antigovernmental mood of the public at large, was able to exploit these anxieties.[33] In the period between 1967-1980, there were both new consumer protection statutes and aggressive implementation of these statutes by agency regulation and enforcement. It was this dramatic increase in the number of laws that had a direct effect on both large and small businesses, and that awakened the sleeping giant. As Pertshuk correctly observes, small businessmen became involved in, and motivated to resist, the adoption of regulations that they perceived as harmful to their survival.

Pertshuk's second major thesis concerning the rise of business influence is that in the late 1960s and throughout the 1970s a new intellectual climate arose, which was more sympathetic to business' resentment of government regulation. With this observation, Pertshuk makes an important contribution to our understanding of the intellectual climate that nurtured the business revolt against regulation.[34] First, he observes

---

[32] Although direct contributions by corporations are illegal, in 1976 the Federal Election Campaign Act (FECA), 2 U.S.C. § 441b (1976 & Supp. V 1981) authorized the establishment of political action committees (PACS) as corporate surrogates for the solicitation and administration of contributions to a separate fund to be used for political purposes during federal elections. *See* Sproul, *Corporations and Unions in Federal Politics: A Practical Approach to Federal Election Law Compliance*, 22 ARIZ. L. REV. 465 (1980).

[33] REVOLT, note 2 *supra*, at 47-68.

[34] *Id.* at 63. Pertshuk included a marvelous quote from Grant Gilmore: "There has always been a symbiotic relationship between the academic establishment, which provides the theories, and the economic establishment, which appreciates being told that the relentless pursuit of private gain is the best way of serving the public interest." G.

that the free market economists of the Chicago School added an authoritative voice to the calls for deregulation.[35] By providing a theoretical foundation for the claims of business that overregulation was responsible for sagging productivity, the free market economists and law professors removed the stigma of self-interest from business lobbying efforts.[36] These economists charged that regulation was inefficient and ineffective, arguing that unregulated market mechanisms were superior to the restrictions on pure competition which were imposed by agencies.[37]

Second, and more importantly, Pertshuk notes that these free market economists provided an attractive rationale for congressional liberals to support the removal of regulation in select transporation industries, in which regulations served to maintain oligopoly power.[38] To illustrate the point, Pertshuk recalls the bipartisan support for airline and trucking deregulation. As a result of the combined effect of the economists' and congressional liberals' views, the concepts of proconsumer deregulation, and deregulation which would ultimately prove adverse to consumer interests, came to be confused in the public's mind. The stigma of partisan politics was thus removed as a hurdle to acceptance of the antiregulation activities.

Finally, Pertshuk concludes by recognizing that the Chicago economists introduced cost-benefit analysis as a method of assessing the impact of regulations.[39] The novelty here did not lie with simply reducing

---

GILMORE, THE AGES OF AMERICAN LAW 66 (1977). On this point, Pertshuck shares the views expressed in Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1 (1979).

[35] *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, (1960); Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386-405 (1937), *reprinted in* R. POSNER & K. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION 3 (1980); Stigler, *A Theory of Oligopoly*, 72 J. OF POL. ECON. 44 (1961), *reprinted in* T. CALVANI & J. SIEGFRIED, ECONOMIC ANALYSIS AND ANTITRUST LAW 121 (1979).

[36] *See, e.g.*, Winter, *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890 (1973).

[37] *See* G. STIGLER & M. COHEN, CAN REGULATORY AGENCIES PROTECT THE CONSUMER? 10 (1971); Pelzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1970); Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J. L. & ECON. 1 (1962).

[38] Indeed the attractiveness of the deregulation arguments for transportation industries proved attractive to academics who otherwise rejected the claim that the market mechanism was superior to agency regulation in insuring optimum consumer protection and choice. *See, e.g.*, Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1689-90 (1975).

[39] Dowie, *Pinto Madness*, MOTHER JONES Sept.-Oct. 1977, at 18, contains a chil-

human injuries to monetary equivalents, a concept with which any personal injury lawyer is familiar, but rather in making cost-benefit concepts a politically acceptable framework for debates about regulatory politics.[40]

Although it cannot be denied that the development of the political action committee (PAC), the establishment of the Business Roundtable, and the revitalization of the Chamber of Commerce are important, these developments seem to be more akin to business as usual than a business revolt. I share Pertshuk's view, however, that the reassertion of business dominance in the regulatory debate, coupled with the intellectual respectability provided by the free market economists and law professors, proved to be a formidable opponent for consumer advocates. With the added element of confusion that arose from the proconsumer transportation deregulation debates, the ascendence of business control over regulatory processes seems inevitable.

III. THE LESSONS OF REGULATORY HUMILITY

Pertshuk's most important contribution lies in his sober reassessment of the role of government regulators.[41] His final chapter concedes the relevance and importance of cost-benefit analysis,[42] but he cautions against unnecessary deference to economic analysis of law.

The vitality and stability of the regulatory process is dependent upon the participation of a wide spectrum of affected interests.[43] In regulation affecting consumers, the need to promote democratic participation by underrepresented interests is paramount. We can assume that this principle is no better served by regulators who purport to know the

---

ling chronicle of perhaps the most notorious application of cost-benefit analysis — the decision to suppress application of a company owned patent for a safer gas tank. The article presents internal memoranda of Ford Motor Company in which the company reasoned that it was not cost effective to make an $11 improvement that would prevent 180 fiery deaths a year if the value of lives lost was set at $200,000. On this basis, the company decided that it was not financially beneficial to comply with proposed safety standards.

[40] *See, e.g.*, M. WIEDENBAUM, THE FUTURE OF BUSINESS REGULATION (1979).

[41] REVOLT, note 2 *supra*, at 137-39.

[42] REVOLT, note 2 *supra*, at 138-41, 146, 151.

[43] Professor Stewart has argued persuasively that we can look to the principle of interest representation as a valuable technique for dealing with the perceived inequities of agency discretion and the problems of administrative justice. In some cases he suggests judicial expansion of the mechanisms to promote participation by "underrepresented" interests. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1807-10 (1975).

public interest than it is by special interest advocates. The democratic integrity of the regulatory decision making process will be enhanced if we can preserve meaningful access to the process for the full spectrum of interests. We can then prevent disruptions caused by dramatic swings in business or consumer entrepreneurial dominance.

For those who despair at the recapture of agency policymaking by business interests, Pertshuk's book offers hope. His tone is conciliatory, in places perhaps excessively so. But his book and his insights are true testimony to the resilience of our administrative institutions. The strength of this book lies in its candor.