

Bootleggers, Baptists, and Tobacco Regulation

BY JOSEPH A. ROTONDI

Members of both houses of Congress have introduced identical bills to include tobacco under the Food and Drug Administration's regulatory umbrella. FDA chairman Andrew von Eschenbach opposes this legislation. Altria, the largest U.S. cigarette producer with 51 percent of the market, supports it. This seeming paradox grows from and is explained by tobacco roads paved with "bootlegger-Baptist" coalitions.

THEORY Pioneered by Bruce Yandle in this magazine in 1983, "bootleggers and Baptists" is an important addendum to public choice theory. It draws its name from stories behind states' enactment of Sunday alcohol sale prohibition laws. To wit: for moral reasons, Baptists advocated bans on Sunday alcohol sales. Bootleggers quietly and willingly went along for the higher prices and enhanced profit that would result from halted competition. The theory's essence, then, is that durable social regulation forms when two very different groups demand regulation: Baptists' public interest cloaks bootleggers' naked greed, the invisible coalition greases government machinery, and voilà.

The history of U.S. tobacco regulation is rife with these alliances. It has taught some public health advocates, as well as some tobacco companies, that "bootleggers" will likely benefit from FDA control.

EARLY BOOTLEGGERS Before the 1964 surgeon general's report on smoking's perverse health effects, the cigarette industry largely avoided regulation for two main reasons. First, smoking was a popular and accepted habit. During World War I, the U.S. troop commander in France cabled Washington that "tobacco is as indispensable as the daily ration; we must have thousands of tons of it and without delay." During World War II, tobacco farmers stayed home because their crop was deemed essential to the war effort. After the war, cigarette popularity increased even more, with famous athletes and movie stars lighting up.

Second, industry power pervaded government. Members from tobacco-producing states chaired one third of House committees and nearly a quarter of Senate committees in the early 1960s. In 1957, one House subcommittee introduced a bill that would have both set limits on tar and nicotine levels in cigarettes and granted the Federal Trade Commission injunctive powers to prevent deceptive advertising. Directly thereafter, the subcommittee chairman lost his post and his subcommittee

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was disbanded altogether. The bootleggers had simply flexed their muscle without concern for Baptist cover.

But in February 1960, the FTC announced it had negotiated a "voluntary agreement" with the industry to cut all tar and nicotine claims from cigarette advertising. Public health Baptists, whose ranks had grown with mounting medical evidence that smoking causes cancer, claimed victory. The FTC chairman called the agreement "a landmark example of industry-government cooperation in solving a pressing problem." But bootleggers had won. While FTC intent was to improve the market for safer cigarettes, the ban forced tobacco companies to stop competing on the health claim margin. As a result, they cut costs and increased profit.

BAPTISTS RALLY, BOOTLEGGERS WIN In 1964, the surgeon general issued a major report that linked smoking to lung cancer, chronic bronchitis, and coronary disease. It dramatically changed the political debate on tobacco and stoked Baptist fervor. The FTC quickly issued a rule that would require cigarette ads and packages to say "Cigarette Smoking is Dangerous to Health and May Cause Death from Cancer and Other Diseases."

The bootleggers took control of this Baptist revival. Through congressional maneuvering, the tobacco industry helped pass a bill that gave the FTC specific authority to regulate health claims and nicotine content in advertising but watered down the FTC warning to read "Caution: Cigarette Smoking May Be Hazardous to Your Health." More importantly, it preempted any fur-

ther FTC, state, or local government-mandated cigarette package warnings and prohibited any such requirement in cigarette advertising until 1969. The legislation, which on its surface appeared to advance a health policy goal, aided tobacco interests in avoiding seriously damaging regulation.

As adverse health data proliferated, the FTC reversed its ban on tar and nicotine level advertising and created a laboratory to produce standard tar and nicotine measures in various brands. After it published the tar and nicotine data, the companies together agreed in 1971 to disclose those levels in their advertising. This public health regulation once again helped, rather than hurt, tobacco. Publishing federally-certified numbers seemed to imply that the federal government was exercising oversight and that the yields were not severely troubling. Moreover, working with the FTC helped tobacco stave off more threatening FDA regulation.

Baptists tried another tack. In June 1967, the Federal Communications Commission ruled that the “fairness doctrine” applied to cigarette commercials. That is, radio and television stations that aired cigarette advertisements had to provide free, each week, “a significant amount of time for the other viewpoint.” In 1968 alone, the major networks aired 1,300 anti-smoking messages. When per-capita cigarette sales dropped somewhat, the FCC in 1969 issued a new proposal that would have completely prohibited cigarette advertising on television and radio. Around the same time, the FTC proposed a rule to require that all cigarette advertising contain perhaps the most direct and stern warning yet: “Cigarette Smoking is Dangerous to Health and May Cause Death From Cancer, Coronary Heart Disease, Chronic Bronchitis, Pulmonary Emphysema, and Other Diseases.”

Congress again intervened. Representatives of tobacco-producing states introduced bills to prevent the stronger warning label and make permanent the temporary ban on state and federal regulation of cigarette advertising. This time, however, the situation had changed — health legislation was becoming good politics. Thus, after extensive negotiations, the bill that emerged banned all cigarette advertising on electronic media and mildly strengthened the package warning. Baptists had ostensibly won.

In keeping with the prevailing pattern, however, bootleggers gained in at least four ways. First, banning TV ads eliminated the fairness doctrine-mandated public service announcements. Second, eliminating TV ads saved the industry the \$200 million annually spent on advertising at the time. Third, the TV ban enabled existing producers to maintain market share because the legislation denied competitors an effective means to establish a brand. Finally, cigarette sales actually increased following the legislation.

In essence, each time Baptist public health advocates gained ground during this period, the large tobacco bootleggers slid in to benefit from cost savings, decreased competition, and the like. But the biggest bootlegger triumph was yet to come.

MASTER SETTLEMENT AGREEMENT By the mid-1990s, class actions and leaked incriminating documents had cracked tobacco’s armor and ended 40 years of plaintiff suit losses against “Big Tobacco.” In 1996, Liggett Tobacco Company settled a case and became the first cigarette company ever to do so. That same

year, an individual plaintiff won a \$750,000 jury award. By 1997, the six largest tobacco companies spent \$600 million per year on legal bills, and half of the nation’s largest law firms worked tobacco defense. At the same time, anti-tobacco Baptist crusader and FDA chairman Dr. David Kessler independently asserted regulatory jurisdiction over tobacco. (The Supreme Court overturned this attempt in 2000.)

Pressure mounted when a large majority of state attorneys general and their hired private law firms sued the tobacco companies to recover past state Medicaid payments to treat smoking-related diseases. The final result topped all previous bootlegger-Baptist coalitions. In November 1998, 46 state attorneys general and the four largest tobacco companies signed the Master Settlement Agreement (MSA), which gave state governments more than \$200 billion over 25 years, attorneys general (often looking for elevation to governor) white knight reputations for taking down an “evil” industry, and politically-connected plaintiffs’ attorneys more than \$11 billion. These “televangelists” rallied Baptist health interest groups to their cause in supposed opposition to the bootlegger industry.

But the MSA, through a series of measures designed to penalize non-participating companies, created an industry cartel that allowed signatory companies to raise prices in concert to cover yearly payments to states. Essentially a cigarette tax through litigation, the price increases meant continued industry profits and transfer of wealth from the least represented party in the settlement — consumers — to states and private attorneys. Baptists cried foul. But after the dust settled and the spoils had been distributed, the televangelists had disappeared to more lucrative pulpits. Though the MSA has since come under attack in courts and has shown minor holes even for the bootlegger companies (e.g., a small but significant decrease in market share), the episode largely allowed them to prevent catastrophe.

IMPLICATIONS The current bill in Congress has support from Baptists such as the Campaign for Tobacco-Free Kids and the American Heart Association, former FDA chairman Kessler, and 77 percent of American voters. Even the Southern Baptist Convention’s president wants the legislation.

In contrast, current FDA chairman von Eschenbach seems to have learned from the mistakes of FCC, FTC, and FDA chairmen past. FDA regulation will likely be dominated by the most politically connected tobacco companies, which will be able to increase or at least maintain market share as regulation does what it usually does when bootleggers and Baptists connect: cut competition. Further, FDA regulation may have the soothing effect that the FTC’s published tar and nicotine statistics had in the early 1970s; as von Eschenbach notes, “What I don’t want to see happen is that we are in a position where we are determining that a cigarette is safe.”

In the current debate, members of Congress must decide whether they want victory for the largest U.S. cigarette producers at consumer and perhaps even Baptist expense. While they choose, they should bear in mind the historical reality that in the tobacco context, as Baptist fervor fomented, bootleggers rake in the alms. **R**