
THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Working Paper¹

November 2018

Bootleggers & Baptists

The Experience of Another Regulatory Economist

Susan E. Dudley, Director²

The George Washington University Regulatory Studies Center

ABSTRACT

Bruce Yandle conceived the theory of Bootleggers and Baptists based on his experience working in government as a young economist in the late 1970s and 1980s. Forty years later, his insights regarding the forces that converge to support government intervention continue to explain many regulatory observations. This article reviews the theory and applies it to the author's own experience in government across several administrations and to the deregulatory environment of today. It finds that while the B&B phenomenon is universal, the nature of winning Baptist arguments can vary dramatically depending on administration, and that regulatory institutions can reinforce or counteract B&B pressures. It also observes that, despite general support for less

¹ Written for a forthcoming book honoring the scholarship of Bruce Yandle, to be edited by Donald Boudreaux and Roger Meiners. This working paper reflects the views of the author and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

² Director of the GW Regulatory Studies Center and distinguished professor of practice in the Trachtenberg School of Public Policy & Public Administration. I am grateful for the research and analysis of Juliana Balla, graduate research assistant with the Regulatory Studies Center and feedback from my colleagues, Bridget Dooling and Brian Mannix as well as participants in the Mercatus Festschrift, "Reflecting on the Work of Bruce Yandle," September 2018.

regulation among companies, B&B coalitions are often motivated to resist individual deregulatory measures.

Over the last sixty years, the number and scope of federal regulations has grown dramatically. In 1960, the Code of Federal Regulations occupied around 70,000 pages; today it is more than 178,000. In 1960, 57,000 full-time federal regulators worked to develop and enforce regulations; in 2018 their numbers exceed 280,000.³ Concern over the continuously changing and progressively intrusive nature of the administrative state may have been one contributor to the surprise election of Donald Trump in November 2016. Voters were increasingly concerned that regulations were serving well-connected interests at the expense of everyday Americans.

This paper examines some recent trends in regulation through the lens of Dr. Bruce Yandle’s “Bootlegger and Baptist” (B&B) theory of regulation. Illustrations from my own experience in government and a review of regulatory and deregulatory activity during the first 18 months of the Donald Trump administration suggest that, while Baptist arguments may change from one administration to the next, the combination of moral and economic forces continue to influence regulatory policy.

Origins of the Bootlegger and Baptists Theory

Why do we regulate and when? Normative approaches to regulation call for government intervention when competitive conditions are not met, and markets fail to allocate resources efficiently.⁴ Positive approaches, on the other hand, focus not on when regulation “should” occur, but on theories explaining observations of “when” it occurs and “why.” One theory of regulation, the “public interest” theory or “normative-analysis-as-positive theory,”⁵ assumes that regulators are sufficiently informed and publicly motivated to serve the public interest by regulating only when necessary to correct “market failures”—intervening to internalize externalities, clarify property rights, regulate monopolists, or provide information.⁶

However, the public interest theory offers no mechanism by which the optimal regulations will occur and fails to explain real world evidence. Observing that laws and regulation do not

³ Susan Dudley & Melinda Warren, [FY 2019 Regulators’ Budget: More for Homeland Security, Less for Environmental Regulation](#), a joint report of the GW Regulatory Studies Center and the Weidenbaum Center at Washington University in St. Louis. May 14, 2018.

⁴ “Circular A-4.” *The White House*, www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf, (Sept. 17, 2003): 4-5.

⁵ Paul L. Joskow and Roger G. Noll, “Regulation in Theory and Practice: An Overview,” in Gary Fromm, ed., *Studies in Public Regulation*, (MIT Press, 1981), 1-65. See also W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust*, (MIT Press, 2005), 375-378.

⁶ Susan E. Dudley and Jerry Brito, *Regulation: A Primer*, (the Mercatus Center and the George Washington University Regulatory Studies Center, 2012), 12-14.

necessarily correspond to industries characterized by market failures, and that many regulations seem to subvert the public interest and favor private interests, political scientists and economists in the 1960s offered an alternative hypothesis. They suggested that politicians and regulators are often “captured” by special interests, usually the producers whom they regulate. As a result, laws and regulations serve, not the public interest, but those special interests.

While the capture theory better explains the occurrence of regulation than the public interest theory, it too is incomplete. Many regulations do not appear to serve the industry being regulated. The capture theory fails to explain *why* regulators would get captured and by *whom*.

George Stigler’s 1971 article “The Theory of Economic Regulation” offered a clear, testable theory that explained the presence of regulation in different industries.⁷ It also raised awareness of the incentives and wealth-redistribution consequences of economic regulation. Stigler started with the basic premises that the government’s main resource is the power to coerce. Thus, a rational, utility-maximizing interest group that could convince the government to use its coercive power to the group’s benefit could improve its well-being at the expense of others.

With this foundation, Stigler hypothesized that regulation is supplied in response to the demands of interest groups acting to maximize their own well-being. He observed that legislators’ behavior is driven by their desire to stay in office, which requires that they maximize political support. Regulation is one way to redistribute wealth, and interest groups compete for that wealth by offering political support in exchange for favorable legislation.

This theory implies that regulation (and enabling legislation) are likely to be biased toward benefiting interest groups that are well organized and that stand to gain from the wealth redistribution. Hence, regulation is likely to benefit small interest groups with strongly felt preferences at the expense of large interest groups with weakly felt preferences.

The economic theory of regulation has proven better at explaining why and when regulation occurs than either the public-interest or simple capture theory, but it raises two questions. First, why do politicians and interest groups resort to regulation to transfer wealth from the general public to private interests when direct cash transfers would be less costly to all concerned? Second, why do politicians often rely on public interest rhetoric when imposing regulations that transfer wealth to a small group?

⁷ George Stigler, “The Theory of Economic Regulation,” *The Bell Journal of Economic and Management Science* 2, no. (1971): 3-21.

Here's where Bruce Yandle's colorfully-named "Bootleggers and Baptists" (B&B) theory comes in.⁸ Yandle observed that special interest groups cannot expect politicians to push through legislation that simply raises prices on a few products so that the protected group can get rich at the expense of consumers. Like bootleggers in the early twentieth century South who benefited from laws that banned the sale of liquor on Sundays, special interests need to camouflage their efforts to obtain special favors by advancing public interest stories. In the case of Sunday liquor sales, the Baptists, who supported the Sunday ban on moral grounds, provided that public interest support. While they vocally endorsed the ban on Sunday sales, the bootleggers worked behind the scenes and quietly rewarded the politicians with a portion of their Sunday liquor sale profits.⁹ As a result, Yandle concluded, "durable social regulation evolves when it is demanded by both of two distinctly different groups."¹⁰

The Education of a Regulatory Economist

Yandle conceived of his B&B theory while working as a young economist in the federal government, first on the staff of the President Jimmy Carter's Council on Wage and Price Stability in 1977 and then as Executive Director of the U.S. Federal Trade Commission in 1983.¹¹ This was a time when old forms of "economic" regulation (that established controls on prices, quantities, etc.) were being removed,¹² but new forms of "social" regulation (aimed at environmental, health and safety goals)¹³ were in ascendance. Yandle asked himself:

Why was command-and-control, technology-based regulation the dominant form of regulation preferred by the new social regulators? Why not economic incentives, taxes, and market processes? Why did most social regulation require less stringent

⁸ Bruce Yandle, "Viewpoint: Bootleggers and Baptists—The Education of a Regulatory Economist," *AEI Journal on Government and Society*, (AEI, 1983), www.aei.org/publication/viewpoint-bootleggers-and-baptists-the-education-of-a-regulatory-economist/.

⁹ Dudley and Brito, *Regulation: A Primer*, 19.

¹⁰ Bruce Yandle, "Bootleggers and Baptists in Retrospect," *Regulation* 22, no. 3, (Cato Institute, 1999), object.cato.org/sites/cato.org/files/serials/files/regulation/1999/10/bootleggers.pdf, 5.

¹¹ Bruce Yandle. "Bootleggers and Baptists in the Theory of Regulation," *Handbook on the Politics of Regulation*, (2011).https://www.researchgate.net/publication/267785761_Bootleggers_and_Baptists_in_the_Theory_of_Regulation, 2.

¹² This was due, in part, to acceptance of the economic theory of regulation, and bipartisan recognition across all branches of government that economic regulation tended to benefit incumbent firms at the expense of consumers. See Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future" 65 *Case W. Res. Law Rev.* 4 (2015), <https://scholarlycommons.law.case.edu/caselrev/vol65/iss4/7>.

¹³ For discussion on the development and rationale of U.S. regulation, see Murray L. Weidenbaum, *Business and Government in the Global Marketplace*, 6th ed., (Prentice Hall, 1999), 23–41.

rules of existing firms than for new ones? Why were environmental regulations generally more rigorous for newly developing regions than for older regions?¹⁴

He concluded that “successful lobbying efforts and durable regulation emerge when one interest group, labeled the Baptists, takes the moral high ground while another group, the bootleggers, use the Baptists for cover as they pursue a narrow economic end.”¹⁵ He noted that while both parties seek the same outcome, they do not necessarily cooperate.

Reflecting on his theory 16 years later, he wrote:

It is worth noting that it is the details of a regulation that usually win the endorsement of bootleggers, not just the broader principle that may matter most to Baptists. Thus, for instance, bootleggers would not support restrictions on the Sunday *consumption* of alcoholic beverages, although Baptists might. Bootleggers want to limit competition, not intake. Important to the theory is the notion that bootleggers can rely on Baptists to monitor enforcement of the restrictions that benefit bootleggers.¹⁶

Yandle and his grandson, Adam Smith, extended the theory in 2014, identifying different modes of interaction that comprise successful coalitions, including a “covert” mode, where bootleggers make Baptist arguments; a “non-cooperative” mode, where bootleggers and Baptists operate independently but toward the same end; a “cooperative” mode, where the bootlegger supports the Baptists; and a “coordinated” mode, where the government operates to coordinate the players.¹⁷

Another Regulatory Economist Gets an Education

I arrived in Washington in the mid-1980s myself, as an idealistic recent graduate with a passion for the environment. I got my education at the Environmental Protection Agency (EPA) and the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

The Hazardous Waste Treatment Council – the Good Industry

In those days, the Hazardous Waste Treatment Council (HWTC) was an influential organization. Congress passed the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act in 1984, and according to a Senate staffer who worked on hazardous waste issues at the time, “the staffers who were the most instrumental in writing the bill were extremists who

¹⁴ Ibid., Yandle, (2011), 6.

¹⁵ Ibid., 10.

¹⁶ Ibid., Yandle, (1999).

¹⁷ Adam Smith and Bruce Yandle, *Bootleggers & Baptists*, (Cato Institute, 2014).

relied on the environmental lobbies and the Hazardous Waste Treatment Council for most of their information.”¹⁸ The HWTC, which represented waste-treatment companies, was also actively involved in the regulations EPA issued under the Act. It successfully argued for technology-based standards over risk-based standards, “pushing the EPA to impose the most stringent treatment standards,” and denouncing “the agency to the press when its regulations [were] less than draconian.”¹⁹ Its members were frequent witnesses in hearings held on EPA’s restrictions of waste disposal on land, and were cited often in the press as representing “the good industry” that supported more regulation. Rarely did legislators or the media acknowledge that regulations requiring the incineration of waste directly benefited HWTC members.²⁰

The HWTC worked with environmental organizations in what Yandle and Smith might call a “cooperative mode,” including collaborating with the Natural Resources Defense Council (NRDC) to bring a lawsuit against EPA over its decision not to list used oil as a hazardous waste. EPA had based its decision on analysis that suggested such a listing would have discouraged the recycling of used oil, which offered environmental benefits; but, siding with the HWTC and NRDC, the D.C. Circuit remanded the rule to EPA.²¹

My years working on the waste-related regulations opened my eyes to the rent-seeking involved. I had expected analysis of costs and public benefits (environmental and health risk reductions) to drive policy decisions and was surprised by the regulatory outcome—an absolute ban on the land disposal of hazardous waste. I had not heard of Yandle’s theory at the time, but true to the B&B prediction, the form of the regulation mattered to HWTC; a risk-based performance standard for waste disposal would not have ensured that all wastes would require treatment.²² For HWTC, an absolute ban, which environmentalists also supported and EPA eventually issued,²³ was necessary to funnel business to its members’ companies.

¹⁸ James Bovard, “A Hazardous Waste,” *Reason*, (Nov. 1, 1989), <http://reason.com/archives/1989/11/01/a-hazardous-waste/print>.

¹⁹ *Ibid.*

²⁰ *Ibid.* The *Washington Post* and other major news organizations have gobbled up the council's statements as if they were gospel. Reporters rarely, if ever, note that the group is about as objective as an agricultural lobby calling for more farm subsidies.”

²¹ *Hazardous Waste Treatment Council v. U.S. EPA*, 861 F.2d 270, 1988 U.S. App. LEXIS 13909, 274 U.S. App. D.C. 37, 19 ELR 20059, 28 ERC (BNA) 1305 (D.C. Cir. October 7, 1988). The American Petroleum Institute also joined in the lawsuit, presumably because used oil provided competition to its products.

²² Both the composition of the waste and the characteristics of the site in which it is disposed affect the potential for human exposure and the hazard if exposed.

²³ “Land Disposal Restrictions for Hazardous Waste,” EPA, <https://www.epa.gov/hw/land-disposal-restrictions-hazardous-waste#keys>.

Bootleggers and Baptists at “Midnight”

Fast forward to 2007, when I became the administrator of OIRA, the office responsible for reviewing all significant regulations of executive branch agencies before they are published. With less than two years remaining in the George W. Bush administration, I was the presidential appointee in charge of overseeing the completion of President Bush’s regulatory priorities. I knew it was too late to initiate new regulatory policies and I was fully aware that the approaching end of a presidency magnifies the pressure to regulate.²⁴ Historically, the regulatory activity between Election Day and Inauguration Day—dubbed the “midnight regulation” period—is 17 percent greater, on average, than during those calendar days in non-election years.²⁵ Determined to resist this tendency, the OIRA staff and I worked closely with agencies starting in early 2007, reminding them that issuing a regulation from start to finish takes more than a year, and encouraging them to focus on completing their regulatory priorities, rather than commencing new ones. In May 2008, President Bush’s chief of staff, Josh Bolten, supported our efforts in a memorandum to agencies admonishing them to “resist the historical tendency of administrations to increase regulatory activity in their final months” and setting a November 1, 2008 deadline for completing rules except in extraordinary circumstances.²⁶

As I’ve recounted elsewhere,²⁷ these actions had mixed success. While the Bush 43 administration succeeded in issuing significantly fewer regulations during the November to January post-election quarter than previous administrations (100 vs. 143 significant final rules and 21,000 vs. 27,000 Federal Register pages compared to the Clinton administration), the final year of regulatory activity was 7% higher than the previous year.²⁸

As Smith and Yandle say in their 2014 book, “When the pace of regulation accelerates, Bootleggers and Baptists are sure to barbecue while the political fire pits are hot.”²⁹ OIRA reviewed more than 650 final rules during the last two years of the Bush administration when I

²⁴ Dudley, “Reversing Midnight Regulations,” *Regulation*, (2001)

²⁵ Susan E. Dudley, “Bush at Midnight,” *Regulation*, (2008); Sofie E. Miller and Daniel R. Pérez, “The Final Countdown: Projecting Midnight Regulations,” *GW Regulatory Studies Center*, (July 2016), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Midnight_The-Final-Countdown-2016_Miller_P%C3%A9rez.pdf.

²⁶ Joshua B. Bolten, “Issuance of Agency Regulations at the End of the Administration,” *The White House*, (May 9, 2008), <http://www.nodpa.com/Bolton-memo-regs-5-9-08.pdf>.

²⁷ Susan E. Dudley, “Prospects for Regulatory Reform in 2011,” *Engage*, Volume 12, Issue 1, (Federalist Society, 2011).

²⁸ *Ibid.*

²⁹ Smith and Yandle, 170.

was administrator; 121 of them were expected to have impacts of \$100 million or more in a year.³⁰ Below are a few B&B stories during that time with which I had first-hand experience.

Genetically-Engineered Animals

On January 15, 2009 (five days before “midnight”), FDA published guidelines defining genetically-engineered (GE) animals with heritable recombinant DNA (rDNA) constructs as “new animal drugs” under the Food, Drug & Cosmetic Act. Biotechnology companies had been using rDNA techniques to breed animals that are leaner, produce less waste, are more resistant to disease, or reach maturity more quickly than their traditional counterparts. The promising AquaAdvantage Salmon, for example, grew more quickly (and using fewer resources) than farm-raised Atlantic salmon due to the insertion of genetic sequence from the Chinook salmon and ocean pout.³¹

In reviewing the guidance, OIRA analysts objected that defining each animal so engineered as a “new animal drug” was not only a contrived interpretation of FDA’s statutory authority, but also that the evidence was too thin to justify subjecting these animals to extensive premarket regulation and examination. We argued for a risk-based approach focused on the potential risk of the modified animal, rather than imposing regulations based on the process by which it was produced.³² We understood that anti-GMO activists objected to any process that would allow genetically-modified animals to be marketed. However, it was representatives from the Biotechnology Industry Organization³³ (BIO) who called for a meeting to convince me that FDA’s proposed approach was necessary. Their argument was that, while their products did not pose risks that differed from traditional products, consumers would be reassured by FDA oversight. BIO generally represented larger firms, which tend to have the experience and capacity to deal with FDA regulations, where smaller and start-up firms do not. As Yandle’s theory predicted, they supported increased barriers to entry in the form of premarket approval regulation rather than performance-based regulation. They were the bootleggers operating in what Smith & Yandle might call a “non-cooperative” mode with support from the anti-GMO activists’ Baptist arguments.

Product Self-Certification vs. Certification by National Testing Laboratory

During my OIRA tenure, I served as the U.S. lead of the EU-U.S. High Level Regulatory Cooperation Council seeking to find ways to reduce regulatory barriers to trade. A European priority for these negotiations was that the U.S. Occupational Safety and Health Administration

³⁰ Data available through RegInfo.gov search function.

³¹ FDA AquaAdvantage Fact Sheet. December 2017.

<https://www.fda.gov/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/GeneticallyEngineeredAnimals/ucm473238.htm>

³² Equivalent products produced by breeding are exempt from regulation.

³³ Now renamed the Biotechnology Innovation Organization. <https://www.bio.org/>

(OSHA) reopen its rulemaking that required low-risk workplace electrical equipment to be certified by a “nationally recognized testing laboratory.” The EU allowed manufacturers to self-certify that their products complied with regulations, and the U.S. third-party testing requirement added an additional burden for any products sold in U.S. markets. OSHA was reluctant to revisit a settled rule even though the risks of the European approach were not higher than theirs. OSHA’s position was supported by the U.S. testing laboratories,³⁴ which argued aggressively on safety grounds against self-certification. It was a classic illustration of Smith and Yandle’s “covert” mode, where self-interested actors use “Baptist” language to obscure their bootlegger motive. To my knowledge, no workplace safety advocates raised concerns with the European approach. To this day, OSHA requires 3rd-party certification.

Tobacco, Food, Toy, and Energy Bootleggers

Although it didn’t reach the point of regulation during my tenure at OIRA, I observed other rent-seeking behavior camouflaged in public interest rhetoric. Tobacco companies endorsed legislation (also supported by antismoking advocates) that would have required cigarettes to seek FDA approval before they could be marketed, which would make it harder for new brands to enter the market. Food and toy companies lobbied for more regulation to ensure their products’ safety, thereby keeping out foreign competitors who may not be as able to demonstrate their products meet the same standards. Energy companies joined with national environmental organizations to push for carbon cap-and-trade,³⁵ which would confer financial benefits on the holders of grandfathered emission allowances.³⁶

Pushback Against B&B Arguments

OIRA was able to claim some small successes against B&B pressures during those midnight years. We resisted entreaties from a domestic cruise line and the U.S. Merchant Marine to restrict foreign-owned cruise line activities at American ports. Their covert Baptist argument was two-fold, that U.S.-flagged ships were inherently safer (not supported by evidence) and that restricting foreign-flagged ships would protect American jobs (an argument that might have more salience in the current administration).

³⁴ Underwriter Laboratories comments on Docket No. OSHA-2008-0032, January 20, 2009. <https://www.regulations.gov/contentStreamer?documentId=OSHA-2008-0032-0072&attachmentNumber=1&contentType=msw8>

³⁵ Bruce Yandle, “Bootleggers, Baptists, and Global Warming” in Retrospect PERC Reports, Volume 28, No.2, Summer 2010 <https://www.perc.org/2010/06/01/bootleggers-baptists-and-global-warming-in-retrospect/>

³⁶ While cap-and-trade regulation is superior to command-and-control regulation, well-organized incumbent firms generally have an advantage in how caps are set, and who is entitled to the tradable permits. See Brian Mannix comments on EPA’s notice, “State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units.” <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Mannix-EPA-CPP-Replacement-w-Appendices.pdf>

Despite strong lobbying from the pesticide industry, I returned a draft regulation that would have mandated recycling of used pesticide containers.³⁷ The Ag Container Recycling Council (ACRC), an initiative of the pesticide manufacturing industry, had established a network of designated drop-off locations to facilitate recycling of used pesticide containers. Supported by the Council's manufacturers, the program was free to farmers and retailers, but the ACRC was dissatisfied with participation rates. Rather than rely on market incentives to encourage greater participation, it lobbied EPA to require retailers of pesticides to recycle certain plastic pesticide containers, and EPA obliged. EPA's draft proposed rule also would have required pesticide container recycling programs to meet the American National Standards Institute and American Society of Agricultural and Biological Engineers Standard S569 for "Recycling Plastic Containers from Pesticides and Pesticide-Related Products," a standard the ACRC's recycling centers presumably met. This might meet the Smith and Yandle definition of "coordinated" mode, with EPA taking a supportive role. In announcing its plan to issue the regulation, EPA said it was "intended to protect human health and the environment by reducing the risk of unreasonable adverse effects to public health and the environment that may be associated with the improper disposal of certain nonrefillable pesticide containers and their associated residues."³⁸ Yet, as my letter returning the rule indicated, the claims of health and environmental benefits were unsubstantiated, yet the costs were real.³⁹

Importance of Institutions in Countering or Amplifying B&B Behavior

As these few successes illustrate, the value of an institution like OIRA lies in its cross-cutting perspective and its focus on understanding tradeoffs and consequences, intended and unintended. It is less susceptible to pressure from both bootleggers and Baptists than single-mission agencies.⁴⁰ Other White House offices, like the National Economic Council or Domestic Policy Council that are headed by directors with the title of Assistant to the President, have typically had similar cross-cutting missions, and serve as a check against agencies and political appointees that may be captured by well-organized groups. But presidents sometimes add specialized "czars" with narrowly focused, issue-oriented missions to the White House staff. Not only are these presidential advisors less accountable to Congress and the public (they do not require Senate confirmation and are not expected to testify before Congressional oversight committees), but the advice they offer the president can be heavily influenced by special interests.

³⁷ Susan E. Dudley, "Letter to the Environmental Protection Agency on 'Pesticide Container Recycling,'" *Office of Information and Regulatory Affairs*, (July 3, 2008), https://www.reginfo.gov/public/return/Epa_Return_letter_7_03.pdf.

³⁸ Environmental Protection Agency, "Pesticide Agricultural Container Recycling Program," RIN: 2070-AJ29, (Fall 2008), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200810&RIN=2070-AJ29>.

³⁹ *Ibid.*, Dudley.

⁴⁰ Susan E. Dudley, "Lessons Learned, Challenges Ahead," *Regulation*, Vol. 32, No. 2, (Summer 2009), 6-11. Available at SSRN: <https://ssrn.com/abstract=1431488>.

In the Bush administration, the Homeland Security Council became a focal point for interests involved in security; it generally aligned with the Department of Homeland Security in policy disputes and prioritized preventing and deterring terrorist attacks over other goals (such as privacy, welcoming lawful immigrants, etc). President Obama abolished the Homeland Security Council and created a Whitehouse Office of Energy and Climate Change Policy, which attracted B&B interests of its own.⁴¹ President Trump has created an Office of Trade and Manufacturing Policy, headed by anti-trade economist, Peter Navarro. These “czars” are well-positioned to coordinate bootleggers and Baptists in support of their preferred policies, as the Trump administration’s tariffs (to protect American jobs), followed by subsidies to farmers hurt by the tariffs, illustrates.

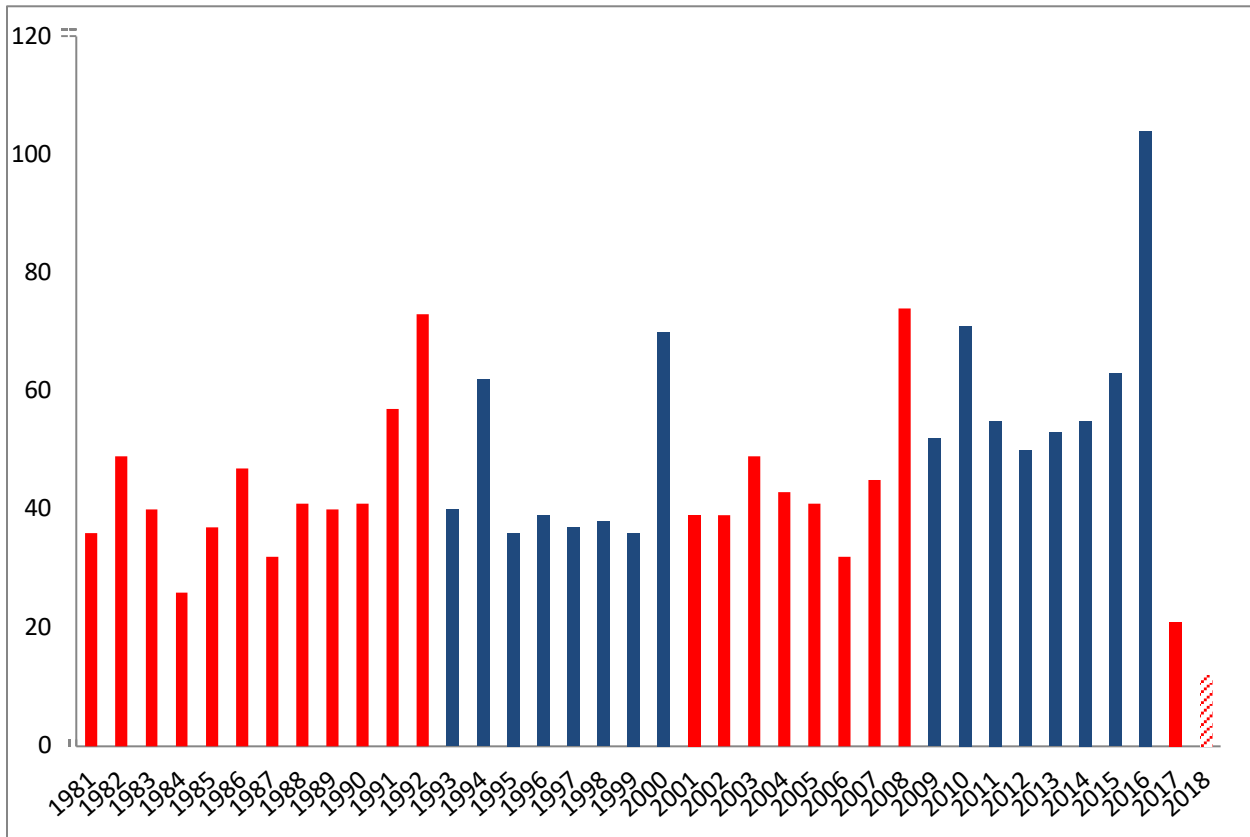
B&B in a Deregulatory World

The eight years following my tenure as OIRA administrator witnessed a sharp increase in regulatory activity. During President Obama’s two terms, executive branch agencies issued 503 economically-significant final regulations, compared to 362 and 358 issued during the tenures of Presidents Bush and Clinton, respectively.⁴² See Figure 1.

⁴¹ Bruce Yandle, “When Industries Love Regulation,” *PERC Reports*, Vol. 36, No. 1, (PERC, Summer 2017), <https://www.perc.org/2017/07/27/when-industries-love-regulation/>.

⁴² Economic significance is defined as having “an annual effect on the economy of \$100 million or more...” “E.O. 12866 Regulatory Planning and Review,” Section 3(f)(1), *Federal Register*, Vol. 58, No. 190, (1993). https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

Figure 1.
Economically Significant Final Regulations by Presidential Year



Source: Author’s analysis of data available at RegInfo.gov. “Presidential years” run from January 20th to January 19th. Data for presidential year 2018 covers January 20th through July 19th.

The inauguration of President Trump in January 2016 brought an abrupt change to the pace of regulation, however. During his second week in office, Trump signed Executive Order 13771,⁴³ requiring agencies to offset the costs of new regulations by removing existing burdens and to eliminate two regulations for every new one they issue. At the end of February, he issued E.O. 13777,⁴⁴ requiring regulatory agencies to designate an agency official to be the Regulatory Reform

⁴³ “Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs,” *The White House*, (January 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

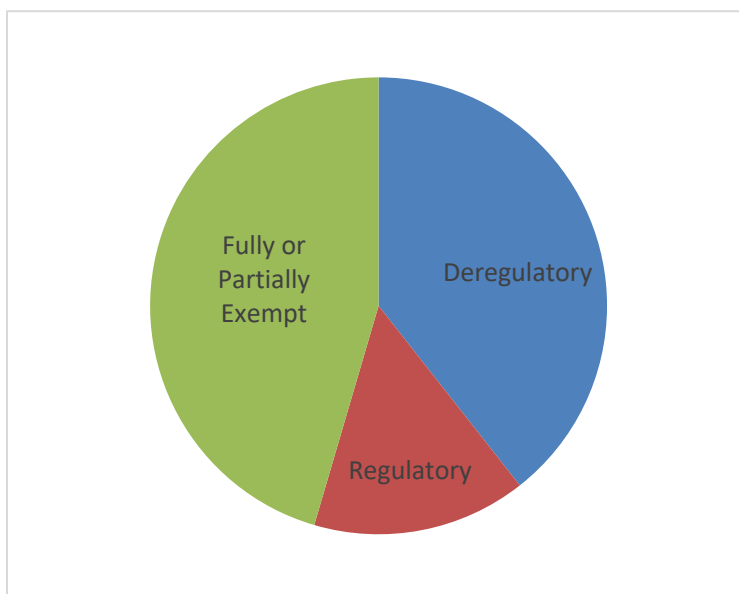
⁴⁴ “Executive Order 13777: Enforcing the Regulatory Reform Agenda,” *Federal Register*, (February 24, 2017), <https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda>.

Officer overseeing implementation of regulatory reform initiatives and to form a Regulatory Reform Task Force to make recommendations for agency regulatory reforms.⁴⁵

These actions have resulted in a dramatic slowdown in the pace of new regulations (Figure 1). In Trump’s first 18 months in office, OIRA cleared 33 economically significant final rules for publication; dramatically less than the 89 and 57 economically significant rules concluded over the same period in the Obama and Bush administrations, respectively.⁴⁶ Economically-significant rules are those with annual impacts (costs or benefits) of \$100 million or more.

The Trump administration has, for the first time, classified each regulatory action as to whether it is regulatory or deregulatory. Of the 33 economically significant rules issued through July 19, 2018, agencies claim that only 5 added new regulatory burdens. They classify 13 as deregulatory, and the remaining 15 as exempt from the order. (See figure 2) At least four of these actions offer insights into the influence of B&B coalitions in a deregulatory environment.

Figure 2.
Classification of Economically-Significant Final Rules:
1st 18 months of Trump Administration



⁴⁵ “Putting a Cap on Regulation,” *Administrative and Regulatory Law News*, 42:3, (Spring 2017), 4-6. Available at: https://www.americanbar.org/publications/gpsolo_ereport/2017/june_2017/putting_cap_regulation.html.

⁴⁶ Source: Author calculations using data from RegInfo.gov.

Practices Required to Label Meat, Poultry, and Eggs as “Organic”

The Department of Agriculture’s (USDA) regulation regarding organic livestock and poultry practices rescinds a final rule issued on the last day of the Obama administration.⁴⁷ That rule had imposed animal welfare practices as a condition of labeling meat and eggs as “organic.” In rescinding that rule, USDA pointed to the lack of statutory authority, “the high degree of uncertainty and subjectivity in evaluating the benefits . . . , the lack of any market failure to justify intervention, and the clear potential for additional regulation to distort the market or drive away consumers.”⁴⁸ Supporters of retaining the Obama rule, mostly organic producers operating in what Smith and Yandle would likely call a “covert” mode, made public interest arguments to suggest that the requirements would result in healthier animals, meat and eggs.

Interestingly, this “Baptist” argument was insufficient to persuade the new USDA team; the preamble to the final rule disputes those claims in what reads as a direct rebuke to the bootleggers:

AMS [Agricultural Marketing Service—a unit of USDA] will not regulate when statutory authority is insufficient and potential costs do not justify potential benefits, whether there is a pro-regulatory “consensus” or not. As a matter of USDA regulatory policy, AMS should not regulate simply because some industry players believe that more regulations will help their competitive position.⁴⁹

How was this possible? Perhaps the incentives the regulatory budget requirement provided were strong enough to embolden reformers in USDA to stand up to the B&B elements (inside the agency as well as commenters). It may also be relevant that the rule was issued so late in the Obama administration that organic bootleggers were not speaking with one voice. Had the rule been in place for a few years, all organic farms would have either converted to compliant practices or gone out of business, which would have left no support for deregulation.

Revising the Definition of an ‘Employer’ under ERISA for Establishing Association Health Plans

The Department of Labor (DOL) issued a particularly controversial rule in June 2018 allowing employers to group together to form Association Health Plans (AHPs). Under the Affordable Care Act, “individual” and “small group” health insurance markets face more stringent requirements regarding the coverage they must offer their employees than “large group” markets do. As a result, the Trump DOL expressed concern that insurance premiums in the individual and small group markets were significantly higher than the large group market. To address this concern, the rule

⁴⁷ 82 FR 10775

⁴⁸ 82 FR 59988. <https://www.gpo.gov/fdsys/pkg/FR-2018-03-13/pdf/2018-05029.pdf>.

⁴⁹ 83 FR 10780

revises the criteria under the Employee Retirement Income Security Act (ERISA) for determining “when employers may join together in a group or association of employers that will be treated as the ‘employer’ sponsor”⁵⁰ of a health plan. In issuing this rule, the Department argued it “will promote broader availability of group health coverage for these small business owners and self-employed people, and help alleviate their problems of limited or non-existent affordable healthcare options for these small businesses and self-employed people.”⁵¹

The Department received more than 900 comments on its proposal, and the final rule reports that small business owners “were very supportive of the Proposed Rule as a way to expand the options they have to obtain more affordable healthcare coverage for themselves and their employees.”⁵² However, other commenters “believed that a proliferation of groups or associations established for the exclusive purpose of sponsoring an AHP could oversaturate the market, diminishing the value of existing trade and professional groups or associations which, for decades, have focused on building and maintaining relationships with their members and serving their members’ needs on a multitude of issues well beyond health benefits.”⁵³ These commenters expressed concern that the rule “could invite unscrupulous promoters to enter the market with mismanaged and thinly funded AHPs and could increase the prevalence of fraudulent and abusive practices.”⁵⁴

Arguments about “unscrupulous promoters,” “fly-by-night operators,” and similar villainous characters are a pretty reliable indication that someone is attempting a B&B swindle of the regulators. The rule, issued in July 2018, will likely face legal challenge.⁵⁵

Federal Acquisition Regulation (FAR); FAR Case 2017-015, Removal of Fair Pay and Safe Workplaces Rule

On July 31, 2014, President Obama signed EO 13673 “to promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws.”⁵⁶ Several

⁵⁰ 83 FR 28912

⁵¹ 83 FR 28915

⁵² 83 FR 28915

⁵³ 83 FR 28917

⁵⁴ 83 FR 28917

⁵⁵ Two state attorneys general announced their intent to “sue to safeguard the protections under the Affordable Care Act and ensure that all families and small businesses have access to quality, affordable health care.” Jessie Hellmann, “NY, Mass. to sue over Trump health plans skirting ObamaCare requirements,” *The Hill*, (June 20, 2018), <http://thehill.com/policy/healthcare/393255-new-york-massachusetts-will-sue-over-trump-health-plans-that-skirt>.

⁵⁶ “Executive Order – Fair Pay and Safe Workplaces,” *The White House*, (July 31, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.

agencies⁵⁷ and the Federal Acquisition Regulation Council issued regulations to implement the order, arguing that “ensuring compliance with labor laws drives economy and efficiency by promoting ‘safe, healthy, fair, and effective workplaces.’” The joint final rule issued on August 25, 2016 had three elements. It 1) created “new paycheck transparency protections,” 2) required contractors to “disclose decisions regarding violations of certain labor laws,” which could affect a decision on eligibility for future awards, and 3) limited “the use of predispute arbitration clauses in employment agreements on covered Federal contracts.”⁵⁸ The latter two elements proved very controversial.⁵⁹

In October 2016, in response to an emergency motion for a temporary restraining order and preliminary injunction brought by several associations whose members contract with the federal government, a district court enjoined the government from implementing the requirements to report and disclose labor law violations and from enforcing the restriction on arbitration agreements.⁶⁰ On March 27, 2017, Congress passed, and the president signed, a joint resolution disapproving the rules in their entirety.⁶¹ Following that resolution, the agencies issued a 5-page final rule rescinding the 2016 rule (and President Trump rescinded President Obama’s EO).

While the Obama administration had support for its executive order and implementing regulation, these appeared to be “coordinated” actions initiated by the government, rather than by a concerted coalition of B&B advocates. The fact that supporters of the rule did not file briefs opposing the October 2016 lawsuit brought by contractors may indicate that their preferences were not as strongly felt as the opponents’. The tepidity of the B&B support for the 2016 rule apparently made it unsustainable in the face of opposition from the directly affected parties.

Renewable Fuel and Biomass Based Diesel Volume Standards

The 2007 Energy Independence and Security Act directs EPA to set annual levels of renewable fuels that refiners must blend into transportation fuel, such as gasoline and diesel. The Baptist

⁵⁷ The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration.

⁵⁸ 81 FR 58565

⁵⁹ Violations to be disclosed would have included “non-final administrative merits determinations, regardless of the severity of the alleged violation, or whether a government contract was involved, and without regard to whether a hearing has been held or an enforceable decision issued.” [Order](#), referencing 81 FR 58668. “Memorandum and Order Granting Preliminary Injunction: Fair Pay and Safe Workplaces,” (Eastern District of Texas, 2016).

⁶⁰ *Ibid.*

⁶¹ Public Law 115–11. Yea and Nay votes were largely along party lines.

“H.J.Res.37 - Disapproving the rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation,” 115th Congress, (March 27, 2017), <https://www.congress.gov/bill/115th-congress/house-joint-resolution/37/all-actions?q=%7B%22roll-call-vote%22%3A%22all%22%7D>.

argument for the RFS is that it improves the environment by shifting consumption from fossil fuels to renewable fuels, such as corn-based ethanol and soy-based biomass diesel.⁶² However, research indicates that RFS environmental benefits are modest at best and are likely overshadowed by the environmental costs, including polluting water bodies via nitrogen fertilizer runoff and potentially larger CO₂ emissions than gasoline.⁶³ They also increase consumer costs, not only for transportation fuel but for food. Yet, they persist because they benefit a narrow group of special interests: corn and soy farmers.⁶⁴

In two separate notices in 2017, EPA proposed modest changes to reduce the statutory RFS volume targets for 2018 and 2019. These proposals brought the immediate ire of corn state farmers, and threats from a bipartisan group of senators led by Senator Chuck Grassley (R-IA) to delay confirmation of President Trump's EPA nominees.⁶⁵ President Trump and EPA Administrator Pruitt responded to assure midwestern states of their commitment to the RFS program,^{66,67} and in December 2017, EPA issued final standards higher than those proposed.

The growing evidence of the negative environmental and consumer consequences of mandatory biofuel use has led to the unraveling of the once “cooperative” support for RFS from environmentalists.⁶⁸ Yet the bootlegger pressure remains very powerful, especially given the outsized influence of the state of Iowa in the presidential nomination process. The more “covert” mode of action is evident in the emergence of new “Baptist” argument—protection of rural America and the small farmer.⁶⁹

⁶² Yandle (1999) has some fun with earlier incarnations of these subsidies and mandates. “On hearing the siren call of environmentalism, Secretary of Agriculture Dan Glickman donned Baptist clothing and indicated his strong support for extending the ethanol subsidy, exclaiming that ‘renewable fuels provide an important opportunity ... to lower greenhouse gas emissions.’”

⁶³ Sofie E. Miller, “Oversight of the Renewable Fuel Standard,” *GW Regulatory Studies Center*, (March 2, 2016), <https://regulatorystudies.columbian.gwu.edu/oversight-renewable-fuel-standard>.

⁶⁴ Sofie E. Miller and Susan E. Dudley, “‘Drain The Swamp?’ Trump Opts For Politics As Usual When It Comes To Ethanol,” *Forbes*, (October 27, 2017), <https://www.forbes.com/sites/susandudley/2017/10/27/drain-the-swamp-trump-opts-for-politics-as-usual-when-it-comes-to-ethanol/>.

⁶⁵ <https://www.epw.senate.gov/public/index.cfm/hearings?ID=BD78EA94-E89F-4BF0-8342-4F0C313C91A5>

⁶⁶ <https://www.bloomberg.com/news/articles/2017-10-18/trump-joins-debate-on-epa-ethanol-rule-in-call-to-iowa-governor>

⁶⁷ <http://www.ethanolrfa.org/wp-content/uploads/2017/10/Pruittletter10.18.pdf>

⁶⁸ See, for example, Natural Resources Defense Council, “Choosing the Right Path for Fueling North America’s Transportation Future,” <https://www.nrdc.org/sites/default/files/drivingithome.pdf>. Some environmentalists continue to support the RFS. See, Ben Geman, “Tom Steyer Takes a Side in Environmentalists’ Ethanol Fight,” *The Atlantic*, Aug 19, 2014. <https://www.theatlantic.com/politics/archive/2014/08/tom-steyer-takes-a-side-in-environmentalists-ethanol-fight/447000/>

⁶⁹ <https://action.growthenergy.org/time-protect-rural-america/>

Similar to the Trump administration’s bailout of farmers harmed by tariffs, EPA grants hardship waivers from the RFS to small refiners.⁷⁰ This may dampen influential petroleum companies’ opposition to the standards, but also dilutes their benefits to the corn lobby. According to reports in 2018, EPA granted dozens of waivers to large as well as small refiners,⁷¹ which has incensed the corn lobby.⁷²

Observations

These illustrations lead to a few observations.

The Nature of Baptist Arguments Varies by Administration

Once you start looking for them, Bootleggers and Baptists are everywhere. Different Baptist arguments may hold more sway in different administrations, however. As Smith and Yandle observe, “fervent environmentalists make good Baptists,”⁷³ and their voices carried a lot of weight in the Obama administration, especially regarding efforts to combat climate change.⁷⁴ True to B&B predictions, Obama’s EPA issued regulations that constrained certain industries (coal) to the benefit of others (natural gas, and alternative energy sources). But the Trump administration is much less receptive to environmental concerns; it is more persuaded by Baptist arguments about protecting American jobs, enhancing security, and “winning!” As a result, not only is Trump’s EPA working to reverse the Obama-era “Clean Power Plan” (citing coal jobs among other things), but his Energy Secretary is considering subsidies to keep coal plants operating (citing electric grid security), using a little-used provision of the Federal Power Act aimed at responding to electricity reliability emergencies.⁷⁵

Institutions Matter

Institutions matter. My own experience convinces me that OIRA is quite resistant to B&B influences; its small staff of analysts see a variety of regulatory requests across agencies and have no ties to particular industries or interest groups. Furthermore, its culture values and rewards

⁷⁰ <https://www.gpo.gov/fdsys/pkg/FR-2018-07-10/pdf/2018-14448.pdf>

⁷¹ <https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-epa-gives-giant-refiner-a-hardship-waiver-from-regulation-idUSKCN1HA21P>

⁷² <https://www.reuters.com/article/us-usa-biofuels-savings/u-s-refiners-reap-big-rewards-from-epa-biofuel-waivers-idUSKBN1I91ZG> and <http://biomassmagazine.com/articles/15402/epa-ignores-doe-recommendations-on-rfs-hardship-waivers>

⁷³ P. 109

⁷⁴ Todd Zywicki’s chapter in this volume may offer insights into why different Baptist arguments hold sway in different administrations.

⁷⁵ <https://www.washingtonexaminer.com/policy/energy/rick-perry-ok-with-being-punching-bag-for-saving-coal-nuclear-plants>

objective analysis of benefits, costs, and other metrics, rather than more rhetorical, emotional, or anecdotal policy justifications. Regulatory agencies are more susceptible to both bootlegger and Baptist arguments; they are compelled to respond to crises or issues that are publicly salient, and, because they focus on a narrow mission, tend to succumb to what Justice Breyer called “tunnel vision.”⁷⁶

How the White House is organized can influence the opportunities for B&B coalitions to thrive. Many White House policy offices provide the president the cross-cutting perspective that OIRA does, such as the Council of Economic Advisors or Domestic Policy Council. But, narrowly targeted policy offices, such as Bush’s Homeland Security Council, Obama’s Office of Energy and Climate Change Policy, and Trump’s Office of Trade and Manufacturing Policy, behave quite differently. They are led by “czars” with narrow missions who are well-positioned to coordinate bootleggers and Baptists in support of their preferred policies. When they hold sway in an administration, without checks from more cross-cutting offices, they can steer policies that benefit bootleggers under the cover of Baptist support.

Deregulatory Efforts Face Resistance from Bootleggers as well as Baptists

Interestingly, B&B activity appears to be less evident in the 13 deregulatory actions agencies completed during the first 18 months of the Trump administration. This may not be surprising. Bootlegger activity usually occurs behind the scenes, and in a deregulatory environment may be even less visible because it influences the rules *not* chosen for review. In identifying regulations for removal or modification, agency officials seek input from affected companies, which are unlikely to nominate rules for which they have already made investments, or which protect them from potential competition. Opposition to any change from interest groups who support the goal of existing regulations (e.g., consumer financial protection) combined with behind-the-scenes pushback from affected industry (e.g., larger banks)⁷⁷ make existing regulations “durable” as Yandle predicts, and less likely to be targeted for removal.⁷⁸

To date, most of the claimed deregulatory actions are either recently-issued rules (for which regulated parties have not yet invested in compliance) or minor changes (streamlining reporting

⁷⁶ Stephen Breyer, Breaking the Vicious Circle. <https://www.amazon.com/Breaking-Vicious-Circle-Effective-Regulation/dp/0674081153>

⁷⁷ Larger banks have reportedly raised concerns about proposed changes to the Volcker rule. <https://www.wsj.com/articles/banks-say-no-thanks-to-volcker-rule-changes-1534353932>

⁷⁸ Indeed, conversations with the Regulatory Reform Officers (RROs) responsible for identifying and reforming regulations confirm that they do not pursue deregulatory actions without the endorsement of affected industries. For example, officials expressed surprise that banks did not support major changes to the Dodd Frank regulations. However, with both bank bootlegger and consumer finance Baptists supporting the existing rules, they are unlikely to be revised in ways that might benefit smaller banks or consumers.

requirements, extending compliance deadlines, etc.).⁷⁹ This experience is similar to that in the UK, which has implemented a three-in-one-out policy for regulations.⁸⁰

Once a regulation is in place, efforts to remove it often get little support because firms have either complied or gone out of business, and advocates oppose anything perceived as backtracking on goals they support. The renewable fuel standard is an interesting exception in that environmental advocates have generally abandoned support for ethanol fuels. In this case, the bootleggers have been successful at changing the Baptist argument for the regulations (protect farming communities and jobs) and have maintained political support.

Note that generally, the business community has been supportive of Trump's regulatory policies because they have dramatically slowed the *pace of new* regulations.⁸¹ Regulatory uncertainty is frequently cited as a major concern for companies of all sizes, so efforts to reduce regulatory churn appears to have been welcome, despite concerns raised by Baptists. Nevertheless, when it comes to taking individual deregulatory actions, incumbents are more likely to resist, and welcome the backing of Baptist arguments.

⁷⁹ Susan Dudley, "Report Card on Trump's Deregulatory Activity." <https://www.forbes.com/sites/susandudley/2018/10/17/report-card-on-trumps-deregulatory-activity/>. Forbes. October 17, 2018

⁸⁰ Jitinder Kohli, "What President Trump Can Learn From The UK About Reducing Regulations," <https://www.forbes.com/sites/realspin/2017/01/27/what-president-trump-can-learn-about-reducing-regulations-from-the-uk/#706b83ec4c3a>. January 27, 2017.

⁸¹ Dudley, "Documenting Deregulation," Forbes. August 14, 2018. <https://www.forbes.com/sites/susandudley/2018/08/14/documenting-deregulation/>