Bootleggers, Baptists and e-cigarettes

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E-cigarette users should be concerned about proposed Food and Drug Administration regulations that may eliminate most brands of these potentially life-saving cigarette alternatives, leaving only those products marketed by large tobacco companies with the resources to complete expensive FDA applications.

Who is responsible for the pending e-cigarette regulatory nightmare?

A brilliant analysis of e-cigarette regulation titled "Bootleggers, Baptists and E-Cigarettes" has been published online by economists and legal scholars from Clemson University (Bruce Yandle), the University of Texas at Arlington (Roger Meiners), Case Western Reserve University (Jonathan Adler) and George Mason University (Andrew P. Morriss, now at Texas A&M University). A shorter version, with Adler as lead author, appeared last year in the Cato Institute's flagship publication, *Regulation*. I'll use quotes from both in this column.

According to Yandle and colleagues:

> *Durable regulation emerges most often when there are two distinctly different special interest groups that seek the same policy outcome. One group takes the moral high ground by pursuing a public-interested goal [Baptists] and gives the cooperative politician the ability to justify his actions on normative grounds. The other [Bootleggers], seeking the same policy outcome, is motivated by pecuniary interests, hopes to feather its nest, is often willing to share some of the gains with the politicians who deliver the goods, and does not generally conspire with its publicly interested counterpart that seeks the same regulatory goal.*

Yandle developed this concept in 1983, and he recently authored a comprehensive book on the subject. He labeled the two groups:

> *…in homage to the political pairing of unlikely interests that was successful in championing laws that shuttered liquor stores on Sunday…the two interest groups would never form a visible coalition in the strict sense of the word. They merely sought the same outcome and were willing to struggle mightily to succeed. At the height of its success, this powerful pairing entirely shut down the legal sale of alcoholic beverages in counties, states, and—during Prohibition (1920-1933)—the nation as a whole.*

Yandle and colleagues identify the Baptists and the Bootleggers undermining the nascent e-cigarette market:

> *Private and public health officials…are the Baptists in this story… Based on what is known about the health effects of e-cig use, it would seem e-cigs might be hailed as an advance in public health insofar as they offer cigarette smokers a safer product. Even small reductions in the number of smokers or the amount of tobacco products smokers consume would likely produce substantial gains for public health. Yet e-cigs have been greeted with scorn by health researchers who focus on what is not known about e-cig health effects rather than what is known.*

The Bootleggers are a more diverse group. They consist of cigarette manufacturers, which "have an incentive to either enter the e-cig market themselves, suppress competition from upstart e-cig manufacturers, or both." They are joined by:

> *Pharmaceutical companies that make NRT products…They have benefited from government encouragement that smokers use their products to aid in smoking cessation and* ***government limitations on information on tobacco harm reduction through the use of e-cigs or smokeless tobacco products.*** *[Emphasis mine] Insofar as e-cigs are an alternative for smokers to satisfy their nicotine cravings, they are a threat to the profitability of NRT products. This is particularly so given recent research suggesting that NRT products do not help many smokers quit.*

Perhaps more surprising, state governments are also Bootleggers, as "Tobacco sellers have become, in effect, tax collectors." The booty includes excise taxes, which have skyrocketed over the past 10 years, and payments made from smokers to cigarette manufacturers to the states courtesy of the 1998 Master Settlement Agreement. Yandle, et al., note that:

> *Some states securitized all or part of the MSA cash flow by selling tobacco revenue bonds so they could immediately spend the present value of the future revenue. The sale of tobacco bonds created a new group of Bootleggers—the bondholders and the state agencies that issued the bonds—with intense interest in the future fortunes of the tobacco companies, their sales, and any competitor that might reduce those revenues.*

This is a powerful coalition arrayed against e-cigarettes:

> *There is an obvious irony here. To the extent that e-cigs provide a less hazardous alternative to consumers who seek to break their smoking habit, Bootlegger/Baptist induced regulations that limit e-cig competition and evolution bring with them a social cost measured in lost opportunities to improve human health. Going further, regulatory actions that limit e-cig marketability introduce uncertainty for yet-to-be-discovered smoking alternatives that might also threaten the market share of traditional tobacco and smoking cessation products. For the sake of human health and freedom of choice, such innovation should be welcomed, not chilled.*

The Campaign for Tobacco-Free Kids, the American Cancer Society, the Centers for Disease Control and Prevention, the National Institutes of Health and the Food and Drug Administration (Baptists) are aligned in a powerful coalition with tobacco and pharmaceutical manufacturers and state governments (Bootleggers) against e-cigarettes. There is more than just irony here. The e-cigarette is a “disruptive innovation” that not only “threatens the established order,” but holds the potential to help millions of smokers quit.

If this unholy alliance triumphs, public health is doomed.