

The Cross-currents of American Regulatory Governance since 1980

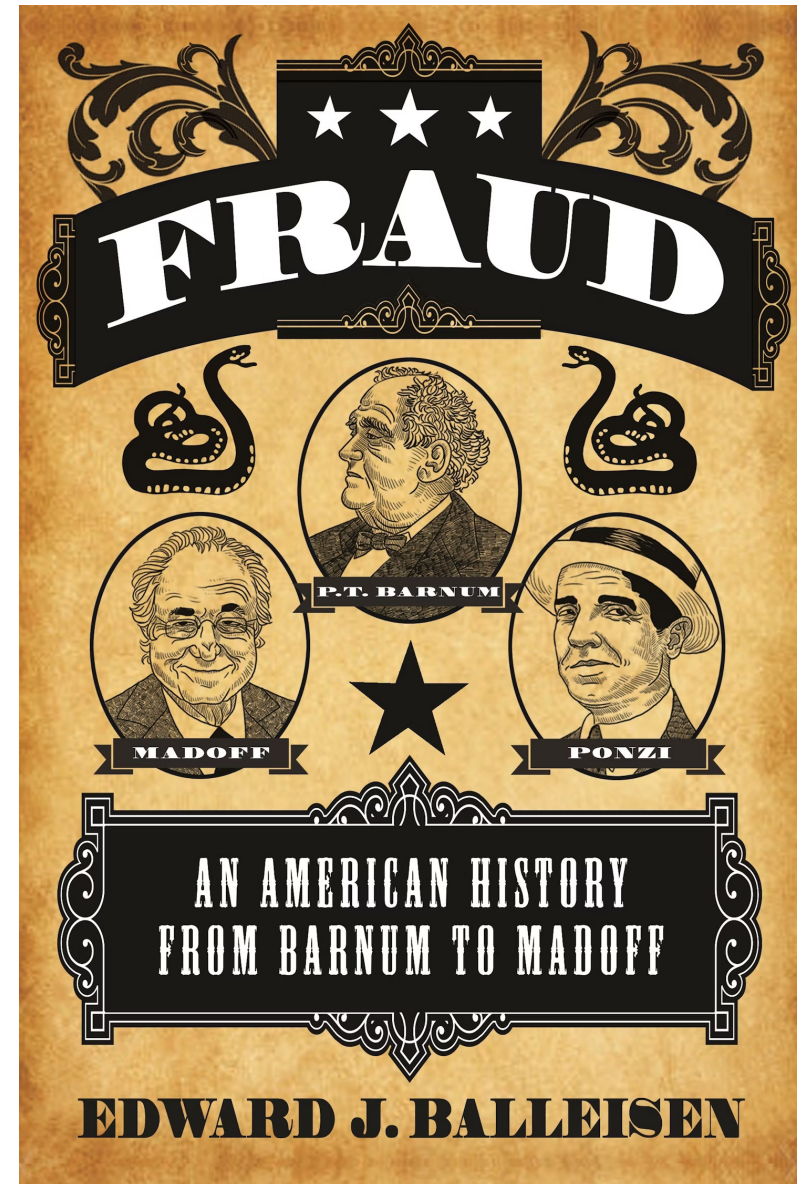
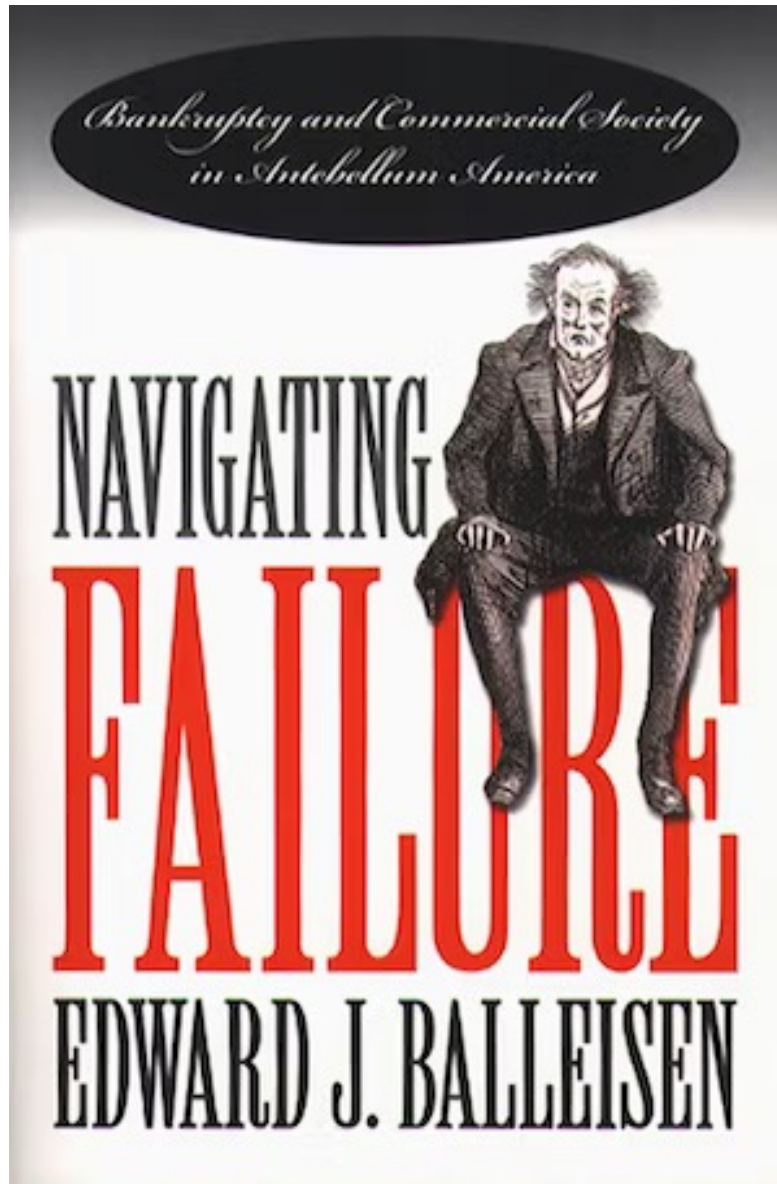
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A presentation to the IOEA Summer School
Cargèse, France
May 17, 2023

Roadmap for the Talk

- My approach to political economy and organizational culture
- Much deeper dive – evolution of American regulatory governance since 1980
- Role for historical expertise in regulatory decision-making (if time)

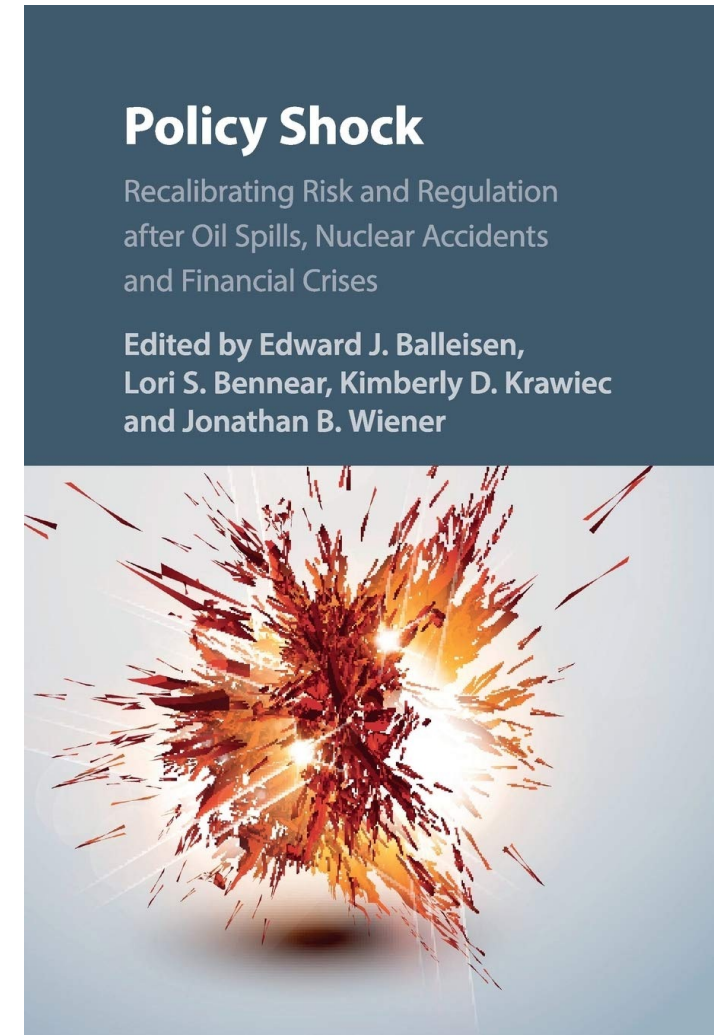
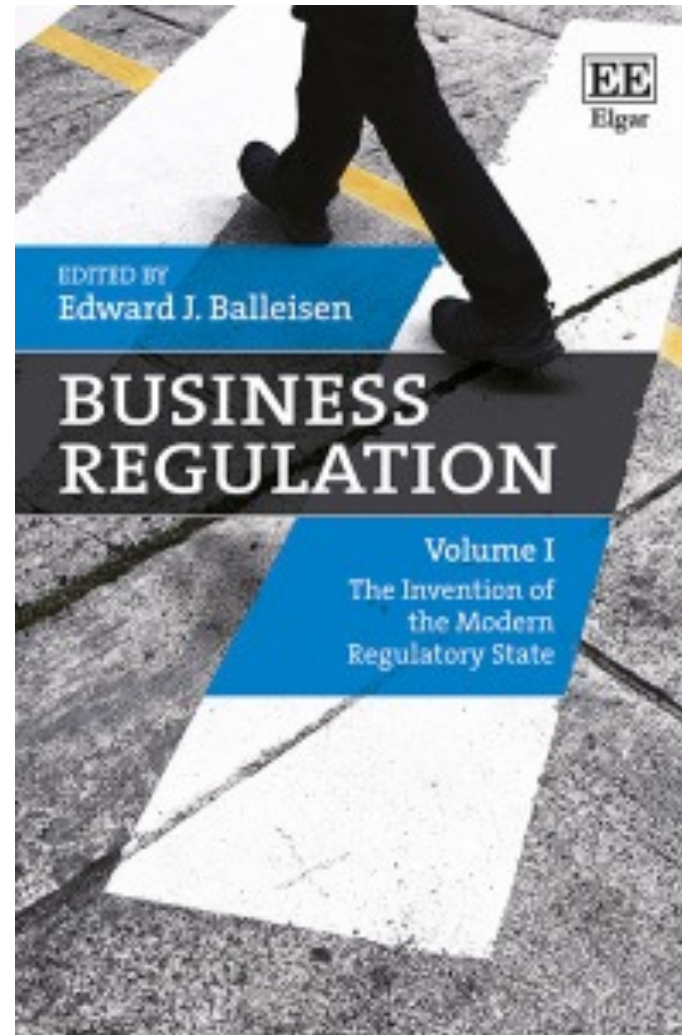
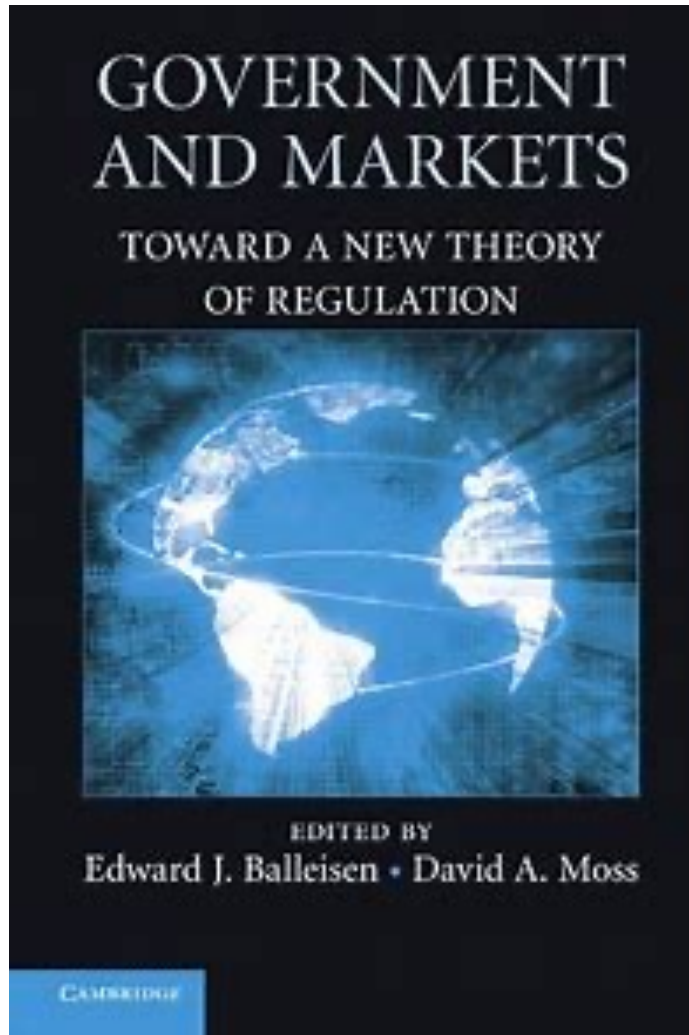
More Traditional Historical Work



Approach to Historical Analysis

- Topics – Fault lines of capitalism (threats to *trust*); evolution of institutional responses to those threats
- BOOKS; ethnographic method; wide range of sources (public; archival); exploring many things
- Conceptual scavenging (illustrative examples)
 - institutional/organizational economics (principal-agent structures; interplay of formal & informal institutions); behavioral economics
 - sociology of: organizations, business entrepreneurship
social movements (including elites)
 - dynamics of bureaucratic entrepreneurship; advocacy coalitions
 - legal culture (norm creation; enforcement strategies)
- Developing historical explanations at varying scales
 - micro case studies to engagement with long-term societal patterns
 - emphasis on identification of, explanation for, turning points

Interdisciplinary Research on Regulatory Governance



Value of Historical Perspective to Institutional Economics/Social Science

- Historical insights and social science theory building
 - evidentiary check
 - puzzle identification
- Identification of relevant case comparisons, apparent patterns, and typologies
 - geographic & cultural contexts; sectors; policy “recipes;” chronology
 - sharpening questions
- Evolution of norms, patterns of behavior
 - analogous to cultural anthropology
- Great potential for collaborations (but challenges)

Regulatory Cross-Currents in American Regulatory Governance since 1980: a Quick Overview

- A few preliminary observations
- Key historical context:
 - an era of regulatory confidence: 1960s-1970s
 - sharpening critiques of prevailing regulatory institutions
- Since the late 1970s
 - an era of regulatory redirection and restraints
 - the many guises of deregulation
 - introduction or intensification of many other institutional checks
 - counter-movements and counter-currents
- Partial explanation for the complex pattern: structural dissonance in public opinion

Preliminary Observations

- Decentralized Nature of American Governance
 - national, regional, state, county, city jurisdictions
 - 1000s of regulatory bodies
 - extensive delegation to quasi-public and private entities
- Extraordinary variety of regulatory objectives, strategies, and tools
- A view from 30,000 (300,000?) feet
 - broad patterns and trajectories
- Audience – volume on global governance since 1980
 - value of a high-level historical synthesis, especially for non-Americanists
- Striking the right balance? Too inclusive? Missing key elements?

The Post-World War II Decades: An Era of Regulatory Confidence

Selected National Statutes Expanding Regulatory Authority, 1960-1980	Selected Major New Regulatory Agencies, 1965-70 (economy-wide reach)
Food & Drug Amendments, 1962 (pre-market effectiveness)	Equal Employment Opportunity Commission (1965)
Civil Rights Act, 1964 (non-discrimination in employment)	Occupational Health & Safety Administration (1970)
Truth in Lending, 1968 (disclosure requirements for consumer loans)	National Highway Transportation Safety Administration (1970)
Clean Air Act, 1970; Clean Water Act, 1972 (wide-ranging environmental standards)	Environmental Protection Agency (1970)
Federal Trade Commission Amendments, 1975 (bestowal of rule-making authority)	Consumer Product Safety Commission (1970)
Superfund Law, 1980 (mechanisms to clean up hazardous waste sites)	

- State governments often moving first and serving as models (e.g., California and air quality)

Roots of Expanding Regulatory Authority

- Post-World War II American Prosperity
- Related Trust in American Government
- In Some Cases, Triggering Events
 - media amplification

Scientific Advances

- identifying and quantifying societal harms
- framing policy solutions
- Ascendant Liberal Political Coalition
 - waxing interest groups and social movements
 - bipartisan nature of reforms



Thalidomide-induced birth defects, late 1950s

Carson's expose of pesticide risks, 1962



Cuyahoga River catches fire, 1969



Simultaneous: Growing Critiques of Regulatory Institutions

- Older complaints:
 - insufficient fidelity to the rule of law and respect for freedom
 - concerns over undemocratic, unaccountable decision-making
- Newer focus: documenting “regulatory capture”
 - case studies by economists, historians
 - Stigler & Kolko; Olin Foundation & Nader’s *Public Citizen*
- **Significance of 1970s economic shocks**
 - oil crises and stagflation
 - tougher global competition
- Response of American business community
 - focus on accumulation of burdens/costs with economy-wide risk regulation
 - new organizations (e.g. Business Roundtable) & coordination

Wide-ranging Institutional Adaptations (1976-2000s): An Era of Redirection and Restraints

- Modes of Deregulation
- Modes of Meta-Regulation
 - judicial
 - executive
 - legislative
- Preferences for Market-Enhancing Regulatory Tools
 - performance standards and tradeable permits
 - self-regulation or co-regulation
- Inaction in Prominent Areas

Most Dramatic Examples of Deregulation, 1975-2005

Railroad, Trucking, and Bus Rates and Fares, Market Entry, late 1970s-early 1980s

Airline Fares and Routes, late 1970s

Telecommunication Rates, Mergers, and Access to Markets (telephone, equipment, satellite access, cable television), late 1970s-90s

Financial Services (e.g., Broker Commissions, Interstate Branching, Removal of Interest Rate Caps, Comingling of Business Lines, Preemption of State Regulation of National Banks) 1970s-2000s

Energy Pricing (Natural Gas, Oil, Electricity), late 1970s-1980s

- Most prominent action at the national level
- Parallel action among subnational jurisdictions (electricity pricing; repeal of interest rate caps)

Bipartisan in Inception

- Carter Administration leading the way
- Support from Ralph Nader, liberal champions in Congress (Ted Kennedy)



*Carter signing
1978 legislation to
deregulate air
travel*

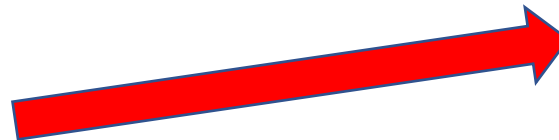
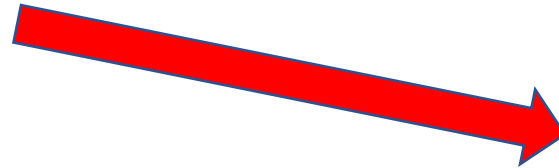
Meta-Regulation: Heightened Judicial Scrutiny

Expansion of Legal Standing:
Public Interest Groups

Close Assessments of
Agency Engagement with
Notice & Comment Process

Close Assessments of
Fidelity of Rules to
Statutory Parameters

1970s-1980s



More intense attention to
public participation by
agencies

Steady increase in time to
complete rule-making
process

1980s-2020s

Meta-Regulation: Executive Oversight

White House Office of Information & Regulatory Affairs

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graph TD; A[White House Office of Information & Regulatory Affairs] --> B[Ex Ante Review of Major Proposed Regulations]; A --> C[Ex Post Review of Existing Regulations];
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Ex Ante Review of Major Proposed Regulations

Origins with Nixon, Ford,
& Carter; formalized
under Reagan

Ex Post Review of Existing Regulations

Origins with Reagan, Bush,
Clinton, and Bush II;
formalized under Obama

- Cost-benefit and risk analysis
- Consideration of policy alternatives
- Mediating conflicting rules from multiple agencies
- Building up staff of economists, scientists

*Parallel developments in most
state governor's offices*

Partisan Flavors of Executive Meta-Regulation

Republican Presidents

- Benefits “exceed” costs
- Trump: 2 out for 1 in rule

Democratic Presidents

- Benefits “justify” costs
- Attention to distributional issues
- Biden: impact on future generations

Partisan Flavors of Executive Meta-Regulation

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- Biden: impact on future generations

*Shared public focus:
the visual trope of
cutting burdens,
paperwork, “red
tape”*



Reagan Administration
Officials



Clinton & Gore



Obama



Trump

Meta-Regulation: Heightened Congressional Scrutiny

- When legislating: more detailed and prescriptive statutory language
- 2002 mandate for consolidated website (regulations.gov) to facilitate public participation in rule-making process
- 1996 Congressional Review Act
 - notice to Congress of agency rule-making
 - 60 day window to disallow rule
 - extension at beginning of new Presidential Administration
 - only 20 disallowances (most at beginning of Trump Administration)
 - > 200 resolutions introduced: shadow bargaining
- Greater attention to political appointments: independent regulatory agencies
 - % of commissioners at those agencies with experience in Congress (elected member or staffer)
 - 1980: 9%
 - 2018: 48% -- Feinstein & Henderson, 2021

Refocusing Regulatory Strategy and Tools: Greater Focus on Market-Enhancing Approaches

- Environmental Regulation: emphasis on flexibility with intent to foster innovation
 - performance standards (automobile and manufacturing emissions)
 - cap and trade permits (EPA – sulfur dioxide regime since 1990)
(regional compacts – greenhouse gases since 2009)
- Consumer Protection: emphasis on information disclosure
accentuating a long-term policy focus
 - state-level anti-predatory lending laws (late 1990s, early 2000s)
 - Home Mortgage Disclosure Act (2004)
 - Consumer Financial Protection Bureau (2010-)
ongoing efforts to improve framing and details of loan disclosures

Refocusing Regulatory Strategy and Tools: Accentuating Self-Regulation and Co-Regulation

- Nuclear Safety (since late 1970s)
 - Institute of Nuclear Power Operators as first line of standard-setting, training, inspection
- Handling of Hazardous Chemicals (since late 1980s)
 - Chemical Industry Responsible Care Program
- Food Safety (since early 1990s)
 - widespread adoption of Hazard Analysis Critical Control Point (HACCP) principles by food companies
- Internet domain governance: ICANN (since late 1990s)
- Oversight of Corporate Accounting and Auditing (since 2003)
 - non-profit Public Corporation Accounting Oversight Board
- Some degree of government oversight increasingly common

The Significance of Regulatory Inaction: Especially at the National Level

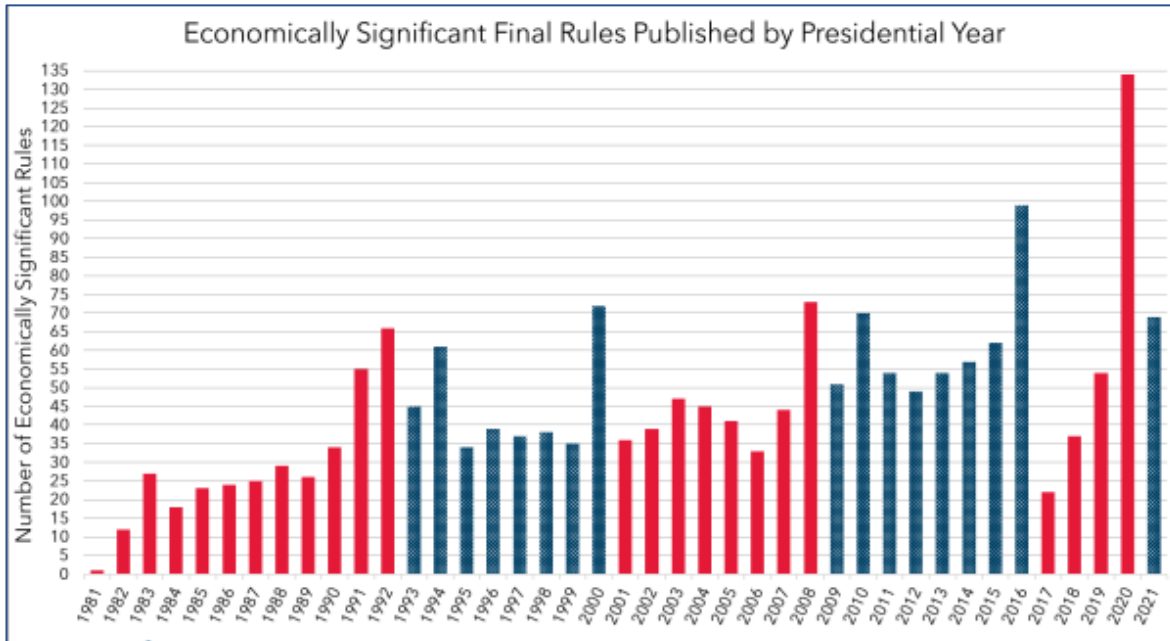
- **Permissive stances toward contexts of far-reaching innovation**
 - early internet commerce (late 1990s to early 2000s)
 - financial securitization of residential mortgages (1990s to 2000s)
 - social media companies (2000s to 2010s)
 - gig platform companies like Uber & Lyft (2010s)
 - cryptocurrencies & digital assets (2010s to early 2020s)

Fears: strangling transformative new industries in their cribs
in some cases, losing business to international competitors
- **Impact of political gridlock**
 - Climate Change (deflection of Obama's 2015 Clean Power Plan)
 - Dramatic Growth in Corporate Concentration across Economy

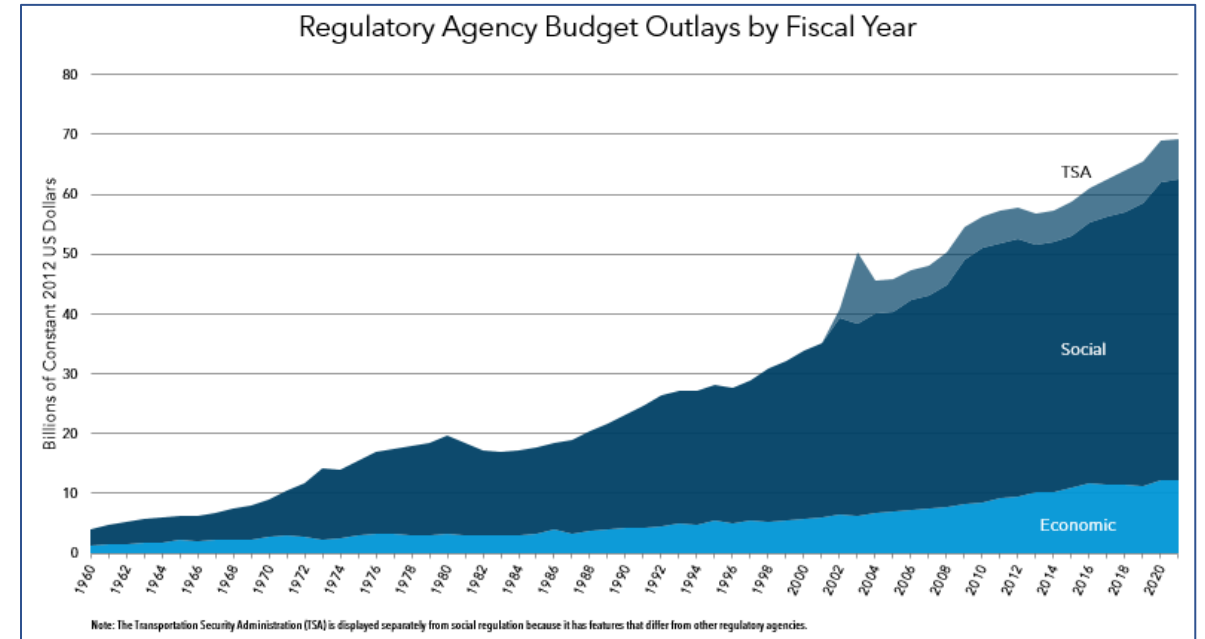
Countercurrents and Counter-movements: Crises & Post-1980 Expansions of Regulatory Authority

- **The Shock of 9-11**
 - massive reconfiguration of transportation security and immigration
 - new agencies (Transportation Safety Administration; Bureau of Immigration & Customs Enforcement)
 - creation of Department of Homeland Security
- **Corporate Accounting Scandals of Early 2000s**
 - Sarbanes-Oxley Act of 2002 (tougher corporate accounting standards)
- **Global Financial Crisis of 2007-08 => Dodd-Frank Act**
 - new entities (Consumer Financial Protection Bureau; Financial Stability Oversight Council; Office of Financial Research)
 - expanded powers to existing agencies (FDIC; Federal Reserve)
 - new rules around securitization; financial stability (some rolled back in 2018)
- **COVID Pandemic and Exercise of Emergency Regulatory Powers**
 - lockdowns; masking; vaccine and drug authorizations (court challenges)

Countercurrents and Counter-movements: On Balance, Overall “Stock” of National Regulations Remains Robust



Steady Pace of Rule-Making



Overall Agency Budget Spending Has Grown in Rough Proportion to Economic Growth

- No dramatic rollback of environmental, health, and safety regulations
- Significant turn by many agencies to informal “guidance”

Countercurrents and Counter-movements: Conservative Social Movements and Republican Regulatory Agendas

- Republican voters and leaders
 - skeptical of technocratic regulation by unelected experts
 - not necessarily “anti-regulation”
- Support for strict limits on flows of immigration and rights for immigrants
 - significance of Pete Wilson governorship in California, and denial of rights to undocumented immigrants (1990s)
 - centerpiece of Trump agenda
- Longstanding priority of extending various kinds of statutory moral regulation
 - abortion restrictions and more recently prohibitions
 - opposition to same-sex marriage (bathroom bills)
 - more recent legislation focused on restrictions for trans individuals
 - last 18 months – attacks on “woke” education (K-12, public universities)

Countercurrents and Counter-movements: Regulatory Action in States and Cities (especially with Democratic majorities)

- Climate Change as leading example:
 - regional cap & trade frameworks
 - state solar interconnection standards
- Minimum Wage increases across growing number of states and cities
- Role of State Attorneys General in Enforcement Actions:
Multi-state class action lawsuits
 - Consumer Protection
 - Environmental Protection
 - Antitrust

The Rise of Multi-state Class Action Lawsuits

- Many settlements with far-reaching terms
- Restitution +

Multistate Class-Action Lawsuits	1983-1990	1991-2000	2001-2010	2011-2020
Consumer Protection				
# of Settlements	19	105	142	165
Average # of Participating States	11.9	17.7	24.5	25.0
Antitrust				
# of Settlements	6	38	52	45
Average # of Participating States	20.7	20.2	21.4	15.0
Environmental Protection				
# of Settlements	0	5	29	29
Average # of Participating States		7.8	5.8	4.6

Calculated from the National Association of Attorneys General Multistate Settlements Database:
<https://www.naag.org/news-resources/research-data/multistate-settlements-database/> (Excludes a small number of cases in the database either with no date or no entry for # of participating jurisdictions; in some cases, other jurisdictions, like the District of Columbia or Puerto Rico, also participated)

Countercurrents and Counter-movements: The Pull of Global Coordination

- Globalization as a break on American regulatory action
 - also prod to policy-making
- Harmonization of international rules to facilitate trade
 - especially important for agencies like Food & Drug Administration, linked to export sectors (from 1980s)
- Challenges of enforcement spilling over jurisdictional boundaries
 - Securities & Exchange Commission and cross-border investment frauds
 - enforcement MOUs with international counterparts (1980s-2000s)
 - 2002 MOU with IOSCO (now > 100 signatories)
 - ensuring regular exchange of information, cooperation in investigations, enforcement actions

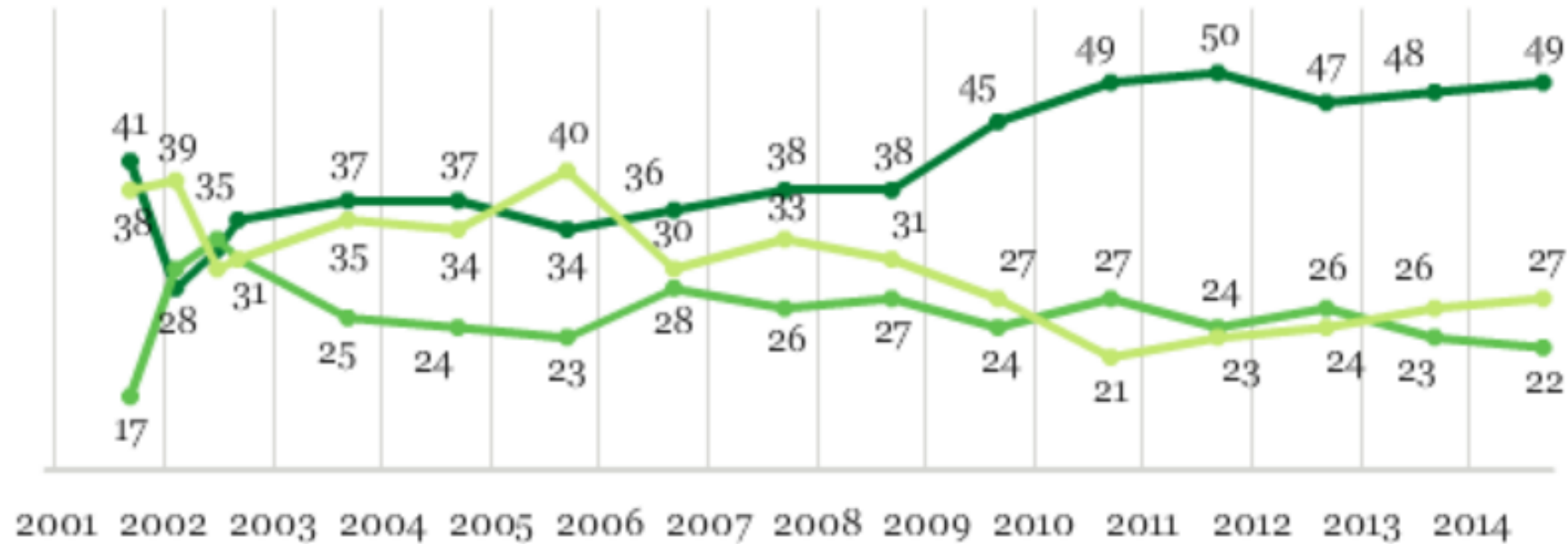
How to explain the cross-currents?

- Undoubtedly a more complex regulatory ecosystem
- Many micro-stories
 - incentives for political parties
 - significance of business interests
 - consequences of technological innovation
 - impact of social movements
 - at least some influence of scholarly research
 - tactical adjustments by regulatory institutions
- Additional explanation/context -- public opinion
- Enduring conflict and ambivalence about regulatory governance
- Declining trust in government (like other perceived elites)

Americans' Overall Perceptions on Government Regulation of Business

In general, do you think there is too much, too little, or about the right amount of government regulation of business and industry?

■ % Too much ■ % Too little ■ % Right amount

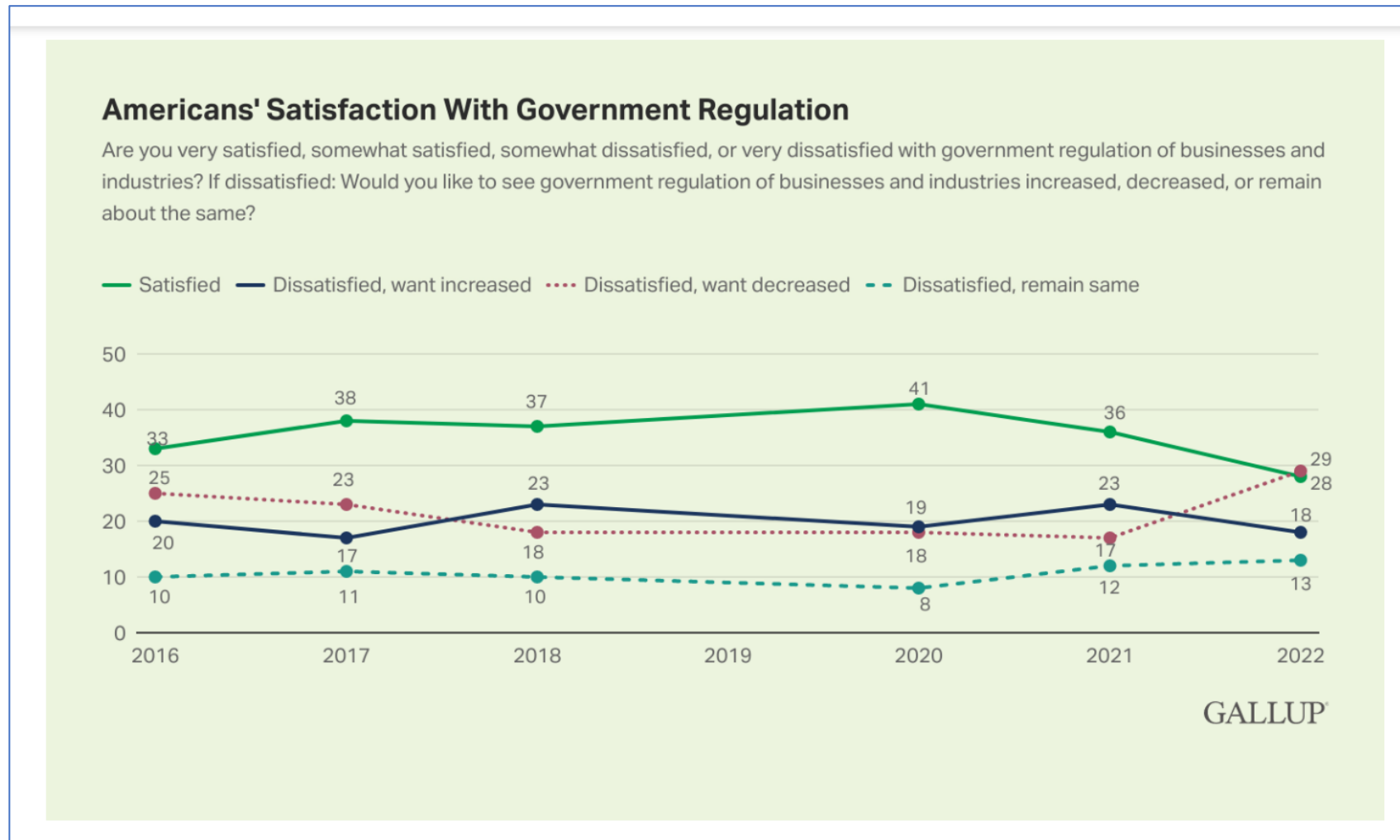


GALLUP®

American Public
Opinion with
Regard to
“Regulation” in
General, 2001-15

Source : <https://news.gallup.com/poll/176015/few-americans-gov-regulation-business.aspx>

American Public Opinion with Regard to “Regulation” in General, 2016-22



Source: Gallup -- <https://news.gallup.com/poll/389519/low-satisfaction-gov-regulation-businesses.aspx>

**Durability of
American Support
for Regulation in
Specific Domains:
1995 and 2012**

Most Say Strengthen or Keep Regulations the Same

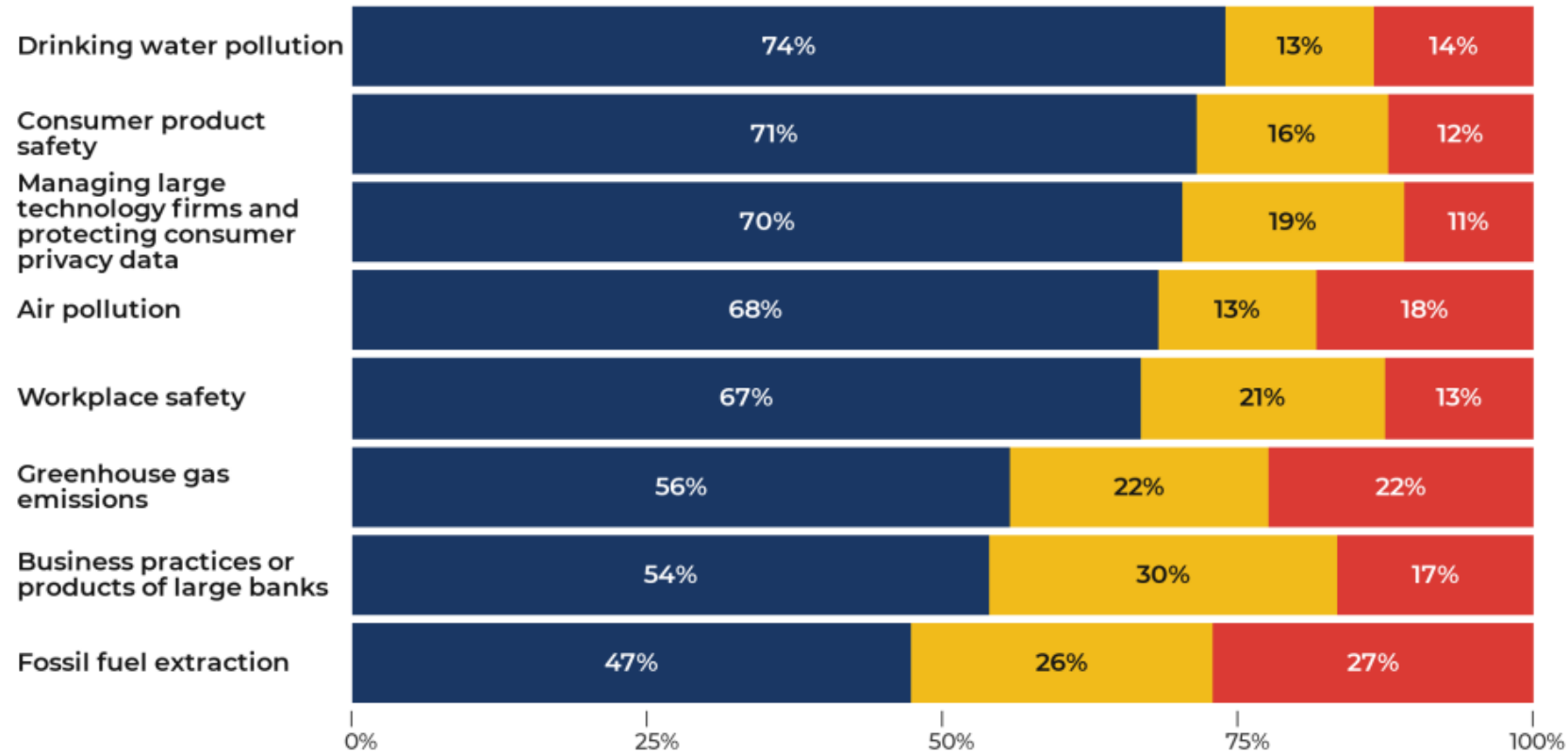
<i>What should the federal gov't do when it comes to regulating...</i>		July 1995	Feb 2012	<i>Feb 2012 among...</i>			
		%	%	Rep	Dem	Ind	D-R gap
Food production & packaging	Strengthen	56	53	44	63	52	+19
	Keep same	34	36	43	29	36	-14
	Reduce	8	7	9	3	9	-6
Environmental protection	Strengthen	53	50	28	64	53	+36
	Keep same	26	29	30	28	32	-2
	Reduce	19	17	36	6	15	-30
Car safety & efficiency	Strengthen	--	45	33	57	44	+24
	Keep same	--	42	49	35	44	-14
	Reduce	--	9	14	5	10	-9
Workplace health & safety	Strengthen	47	41	25	52	43	+27
	Keep same	40	45	52	42	43	-10
	Reduce	12	10	18	4	11	-14
Prescription drugs	Strengthen	37	39	31	41	40	+10
	Keep same	30	33	37	36	31	-1
	Reduce	29	20	24	16	21	-8
N		499	730	222	224	254	

PEW RESEARCH CENTER Feb. 8-12, 2012. Q62.
July 1995 data from NBC/Wall Street Journal.

Voters Want More Regulations On A Number Of Issues

Do you think we need more or less regulations for each of the following issues:

More Not sure Less



Jan 6 to Jan 7, 2021 survey of 1156 likely voters

DATA FOR PROGRESS

**Durability of
American Support
for Regulation in
Specific Domains:
2021**

Source: Data for Progress, <https://www.filesforprogress.org/memos/dfp-building-a-progressive-regulatory-agenda.pdf>

Even when framed as a trade-off

-- salience/priority?

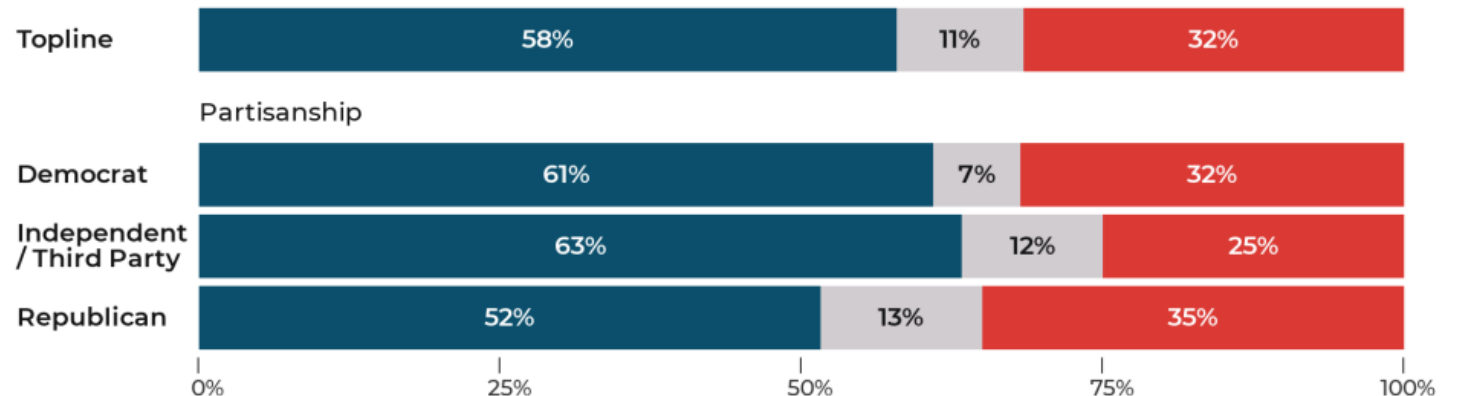
A Majority Of Voters Back Stronger Health and Safety Regulations, Even If It Means Less Economic Growth

When thinking about how regulations are written, which statement comes closer to your view, even if neither is exactly right?

While I don't expect regulations to prevent all harms, I do think we should do the best we can to protect people's health and safety, even if that means we should give up some economic growth. I don't think money can substitute for individual well-being.

Don't know

We must prioritize economic growth and that means accepting that there will be additional deaths or illnesses that might otherwise have been prevented through stronger regulations. If there is additional economic growth by limiting regulations, it would be worth the trade-off.

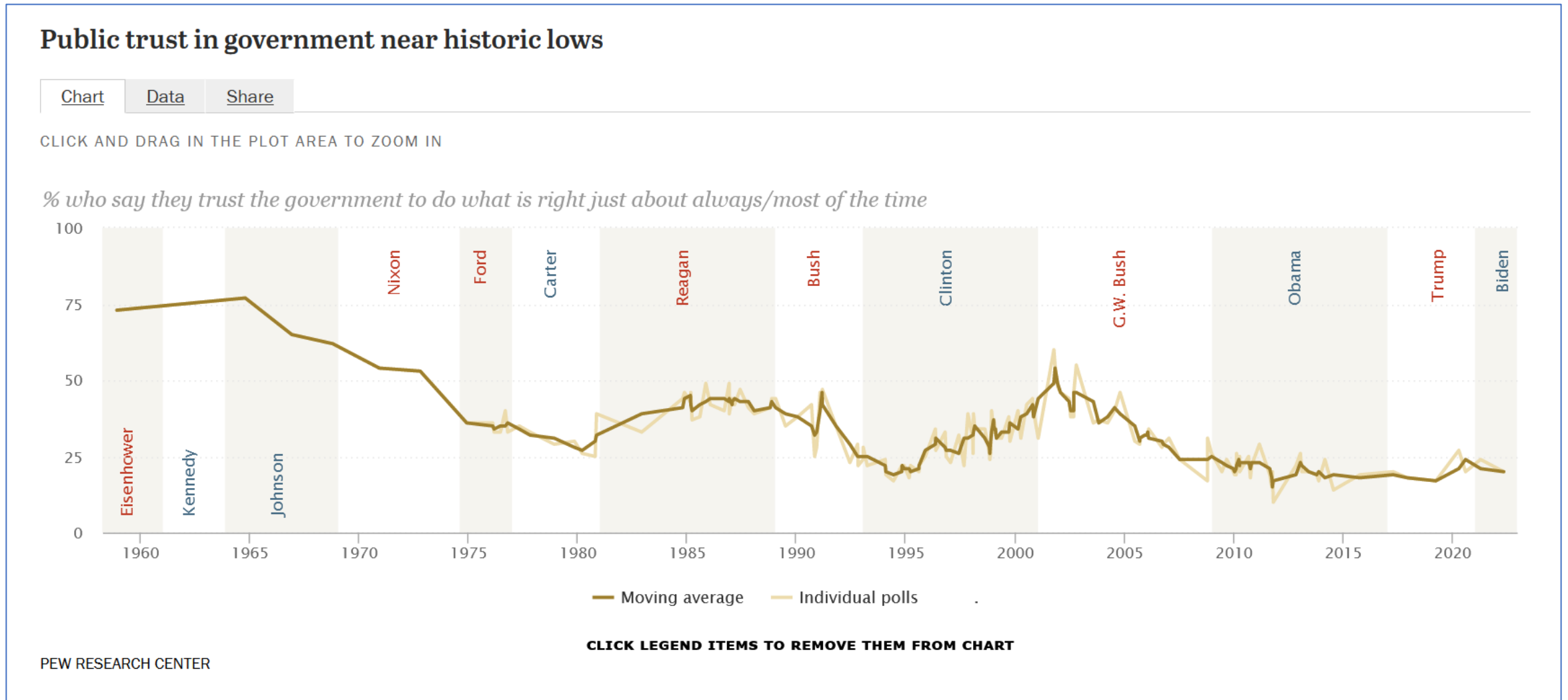


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DATA FOR PROGRESS

Source: Data for Progress, <https://www.filesforprogress.org/memos/dfp-building-a-progressive-regulatory-agenda.pdf>

Longitudinal Survey Data about American Trust in Government – 1958-2022



Source: Pew Research, <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>

Historical Expertise and Regulatory Governance

- Recent in regulatory governance:
 - taking policy impact evaluation seriously (EU, US OIRA, OECD)
- Ex ante forecasting
- Ex post **retrospective** assessment
- Limitations to current thinking about “**retrospective**” analysis
 - expectation of quantitative measures
 - no attention to implementation of policy
 - little attention to qualitative measures
- Grist for historians’ mill
- Challenges – outside and inside historical profession



Questions?