

# **Living Legislation**

*Durability, Change, and the  
Politics of American Lawmaking*

EDITED BY JEFFERY A. JENKINS  
AND ERIC M. PATASHNIK

THE UNIVERSITY OF CHICAGO PRESS      CHICAGO AND LONDON

JEFFERY A. JENKINS is associate professor in the Woodrow Wilson Department of Politics at the University of Virginia.

ERIC M. PATASHNIK is professor of politics and public policy and associate dean of the Batten School of Leadership and Public Policy at the University of Virginia.

The University of Chicago Press, Chicago 60637  
The University of Chicago Press, Ltd., London

© 2012 by The University of Chicago

All rights reserved. Published 2012.

Printed in the United States of America

21 20 19 18 17 16 15 14 13 12 1 2 3 4 5

ISBN-13: 978-0-226-39644-6 (cloth)

ISBN-13: 978-0-226-39645-3 (paper)

ISBN-10: 0-226-39644-4 (cloth)

ISBN-10: 0-226-39645-2 (paper)

#### Library of Congress Cataloging-in-Publication Data

Living legislation : durability, change, and the politics of American lawmaking / edited by Jeffery A. Jenkins and Eric M. Patashnik.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-226-39644-6 (cloth : alkaline paper)

ISBN-10: 0-226-39644-4 (cloth : alkaline paper)

ISBN-13: 978-0-226-39645-3 (paperback : alkaline paper)

ISBN-10: 0-226-39645-2 (paperback : alkaline paper)

I. Legislation—United States. 2. United States—Politics and government.

I. Jenkins, Jeffery A. II. Patashnik, Eric M.

KF384.A2L585 2012

328.73'077—dc23

2011032937

Ⓢ This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper).

CHAPTER TWELVE

## Lawmaking as a Cognitive Enterprise

David R. Mayhew

**I**nspired is the volume that can combine, as this one does, so many illuminating takes on an important subject. They are a pleasure to read and ruminates about. I would like to add an additional view that builds on and reacts to these presentations.

It is that lawmaking, whatever else it may be, is a cognitive enterprise. At least it is that very often. It was wise to position William Novak's chapter on the crafting of the legislative state a century ago as the keynote to this volume. Note Novak's language: Law in modern times would be "a product of conscious and increasingly determinate human will." There would be "policymaking efficacy." We would see "instrumental aims . . . achieved by a modern sovereign state passing positive laws." We would see "active, instrumental, and inventive statecraft."<sup>1</sup> Key to these ends would be an embedding of instrumental rationality in government. In the right kind of legislative processes, problems would be identified, causal connections would be examined, solutions would be devised. Lawmaking would not consist of just updating the common law, enacting feel-good rhetoric, or adding wish lists to the statute books.

That was heady exhortation. Yet to switch to a positive (that is, explanatory) mode, the idea of lawmaking as a reach for instrumental rationality, in the minds of the Progressive reformers—or, for that matter, the Romans or Alexander Hamilton before them—has an obvious component of good sense. An X is put on the books to achieve a Y. This idea has such obvious good sense that as analysts we tend to assume it and overlook it. Not that it lacks appreciation entirely. Eric Patashnik in this volume writes of "nonincremental, efficiency-oriented legislation"—an

especially ambitious exercise of instrumental rationality, or, to use another term, design.<sup>2</sup> At a workaday level of lawmaking, Keith Krehbiel has theorized legislative activity in general to be a quest for the right information needed to achieve with maximum effectiveness the policy aims of the median legislator.<sup>3</sup>

It is a matter of emphasis. Other size-ups can be given to legislative processes. They can be seen, for example, as venues where values are expressed, constitutionality is interrogated, or tastes or interests are registered in more or less brute fashion. Here I emphasize a cognitive size-up. In theory and empirics, that means an alertness to perceptions of problems and searches for solutions. Not necessarily implied is a pattern of smoothly greased paths to consensual decisions. As an empirical matter, lawmaking often amounts to vigorous combat between advancers of perceptions and causal stories that clash. Yes, a problem exists. No, a problem doesn't exist. This bill in front of us, once enacted, will cause gratifications A, B, and C. Not so fast! It won't do that, and instead it will cause disasters D, E, and F. This kind of disputation is intrinsic to legislative activity as we, the society, see it. It accommodates an embracing of the society at large, not just the members of a legislature, into ongoing, interactive considerations of what the social realities are out there and what they might be made to be. There is a touch of John Dewey.

Again, it is a matter of emphasis. In congressional studies today, a particular alternative exists to the thrust I am arguing for here. I have employed it elsewhere myself. It is represented in this volume in the skilled analyses by Christopher Berry, Barry Burden, and William Howell, and Forrest Maltzman and Charles Shipan.<sup>4</sup> It is an analytic frame with three parts. First, lawmaking is a contestation between ideological or partisan tastes of, for analytic purposes anyway, a timeless quality. Second, policy outcomes vary with the arithmetic shares of elective politicians (including presidents) bearing those tastes. Third, the society sends its policy signals to Washington, D.C., only through biennial elections, thus structuring for a while those taste-bearing shares. This kind of frame can bring a large sweep of convincing illumination. The point is not at issue. Yet a good deal of dark territory remains. Here, I would like to complement, not contradict, this frame of taste-bearing shares in taking up a frame of cognition.

In a developmental treatment of lawmaking, two distinct questions arise: How and why do laws get enacted in the first place? What happens

to them after that? On the first question, I see three good reasons for paying attention to the cognitive side.

First, a campaign to pass a law, which might end in the passage of one, very likely owes to somebody's perception that a problem exists. Note that very little insight into the existence, perception, or solution of problems is available in the arithmetic of partisan or ideological shares. Problems, once they surface, may *map onto* these never-ending cleavages or dimensions (although not always; voting rights for African Americans in the 1940s through the 1960s did not), but that is all. To get a good view of the political life of the society, a more sensitive empiricism is needed. Hence, for example, the value of Jeffrey Cohen and Matthew Eshbaugh-Soha's chapter, which looks into White House legislative agendas since 1799.<sup>5</sup> Presidents are major perceivers, or at least proclaimers, of problems. I recommend a close inspection of their figure 3.1, which shows an enormous expansion of White House legislative requests starting in the mid-1940s. In all of U.S. history, nothing matches that surge, which seems to have had little to do with the preceding New Deal. This pattern jibes with other contemporary scholarship pointing to those war-ending years as a hinge-point in many respects, no doubt at least because they were seen to be saturated with problems. Policy historians would do well to expand their focus from the 1930s to the 1940s.

A surge in the perception of a problem can raise a legislative issue from nowhere, or least from the back pages, into a prominent long-running sequence of attempted or successful lawmaking. Much of U.S. legislative history in recent decades has followed this pattern. The lessons of World War II, registering in sync with Cohen and Eshbaugh-Soha's figure 3.1, seem to have had this effect for civil rights, public housing, national health insurance, and federal aid to education.<sup>6</sup> A surge in crimes worries, as discussed by Vesla Weaver in her chapter, triggered the Safe Streets and Crime Control Act of 1968 and a line of follow-up measures.<sup>7</sup> Activists or intellectuals can generate a sense of problem. Note thus the consumer, feminist, and environmentalist critiques that sparked a burst of regulatory legislation in the late 1960s and 1970s, and the efficiency arguments voiced by economists that levered a quarter-century-long series of industry-specific deregulatory laws beginning in the mid-1970s—including airline deregulation, as discussed by Patashnik in chapter 8. An energy crisis brought responsive legislation under Nixon and Carter. Deficit reduction owing to seemingly out-of-control budgets was

a chronic mission from 1981 through 1997. Concern over rising illegal immigration brought a quarter century of legislative drives, and some laws, starting in 1986. For U.S. officialdom, the Middle East erupted into a new kind of problem area around 1990, yielding such measures as—these were legislative instruments, too—the Persian Gulf Resolution of 1991 and the Iraq Resolution of 2002. Even taxation is not just a constant concern: The tax cuts of both Reagan in 1981 and Bush in 2001 followed on postwar peaks, which were no doubt experienced by taxpayers, in total federal revenue take.

In the instances cited here, note that any voter signals sent in elections were at best a contributing cause, and sometimes a vanishingly recessive one, of legislative activity. Signals that politicians may anticipate in future elections are another matter, but that case can be tenuous. The proximate spurs, at least, to legislative action have often come between or independent of elections.

Second, approached from a cognitive standpoint, a new law is often an experiment or a gamble. Who can guarantee the effects of adding words to parchment? For one thing, the causal stories that animate a measure may grip into reality, or they may not. A promising new law is not all that different from a promising new commercial product (although it is easier to get rid of products). Going back in U.S. history, Reconstruction of the South, discussed in this volume by Stuart Chinn, was a gamble.<sup>8</sup> As of 1867, given the uncertain horizons of opinion, costs, and resistance, who could know whether military occupation of that region could achieve its aims? The Eighteenth Amendment authorizing the prohibition of liquor comes down to us as a “noble experiment.” In the Depression crisis of 1933, Franklin D. Roosevelt called exactly for experimentation. During recent decades, a list of enactments of an experimental cast might include the National Security Act of 1947 (was that an apt way to reconfigure the high military?), the Atomic Energy Act of 1954 (could a viable private industry be coaxed into existence by law?), the Civil Rights Act of 1957 (would it really help to ensure the vote?), the antipoverty act of 1964 (would its effects bear out its label?), the Kennedy tax cut of 1964 (would it really spur the economy?), model cities in 1966 (could some cities serve as showcases for the rest?),<sup>9</sup> the Emergency Petroleum Allocation Act of 1973 (how would that plan play out?), the Earned Income Tax Credit of 1975 (would that kind of idea “take” as a welfare-state device?), airline deregulation in 1978 (an invitation to disorder, as described by Patashnik), the synfuels program of 1980 (could coal lique-

faction be an energy winner?), and banking deregulation in 1999 (we are still arguing about its effects). At their own lofty level of gamble are the war resolutions: Tonkin Gulf in 1964, Persian Gulf in 1991, Iraq in 2002.

Third, to press an earlier point, struggles over causal stories are often at the center of drives to enact legislation. The stories need to be merchandised—not only on Capitol Hill but before the general public. Congress may be stumbling block enough: Nixon’s Family Assistance Plan, for example, was judged not to compute once its likely incentive effects were examined in Senate hearings. But the public is there, too. When a proposal reaches a question-mark point in public opinion—when its stories about felicitous effects are not selling—it risks serious trouble on Capitol Hill. Clinton’s plan for health-care reform ran into that barrier in 1994, as did George W. Bush’s plan to partly privatize Social Security in 2005. Sour public opinion of this sort may not be fatal for a bill, but it is not helpful. For political scientists, although not journalists, this is an underinvestigated topic of legislative studies.

So much for the process of initial enactment. Once measures are on the books, how can a cognitive frame illuminate their subsequent history? I find it hard to get around the idea that at least some laws are judged to be successes or failures. As Patashnik writes, “It matters whether policies work when set on the ground.” Laws can work or not work. An X is causing or not causing agreeable Ys. This is an imprecise assertion. It is not clear who might be doing the judging. It is not clear what the criteria might be. The aims and causal stories associated with a measure at birth might supply the yardstick, yet experience afterward might bring additional or replacement yardsticks. Still, little is more central to the proceedings of a democratic society than an evolving sense that its laws are working or not working.

Let me start with a broad brush and some contrasting examples and then proceed to some particular arguments.

Since World War II, setting aside the exact meaning of the question, although the view of the median voter is one aspect, what are some especially plausible instances of successful legislative measures? Here are some candidates: the Taft-Hartley Act of 1947 (as a remedy for the incessant strikes of that decade),<sup>10</sup> the Marshall Plan in 1948, the creation of the National Science Foundation in 1950, the Federal Highway Act of 1956, food stamps in 1964, Medicare in 1965, the Voting Rights Act of 1965, the Clean Air Act of 1970, Pell grants in 1972, airline deregulation in 1978 (all else aside, consumer benefits did ensue), 14k pensions

in 1978, the Persian Gulf Resolution of 1991, welfare reform in 1996, the Children's Health Insurance Program (CHIP) of 1997, possibly the omnibus deficit-reduction measures of 1990, 1993, and 1997.

At the other extreme, certain statutes have been iconic failures. Cases in earlier history would include the Kansas-Nebraska Act of 1854 (it aided slavery, alienated the North, and helped trigger the Civil War) and the Smoot-Hawley Tariff of 1930 (it helped ruin the world economy), not to mention the Eighteenth Amendment. In recent times, Three Mile Island ended the ambitions of the Atomic Energy Act of 1954. Dynamite administered to huge buildings in Chicago and St. Louis ended the aspirations of a lineage of public housing enactments. Gas lines undermined the energy regulation of the 1970s. A resonant fiction of "welfare queens" came to tag the Aid to Families with Dependent Children section of the Social Security Act of 1935 as it evolved to its close in 1996. Senior citizens beating up on Congressman Dan Rostenkowski's car brought down the Catastrophic Health Insurance Act of 1988. The Silverado collapse came to symbolize the savings-and-loans crisis invited by the banking deregulations of 1980 and 1982. Perhaps the helicopters on the Saigon roof were a coda to the Tonkin Gulf Resolution of 1964.

Short of iconic but still viewed as failures might be the "maximum feasible participation" sector of Johnson's antipoverty program (it generated controversy and died away); Nixon's revenue-sharing program (it didn't catch hold); the War Powers Resolution of 1973 (it hasn't worked); the Magnuson-Moss product warranty act of 1974 (it didn't take); the anti-tax-breaks thrust of the Tax Reform Act of 1986 (see Patashnik's chapter 8); the immigration reforms of 1986, 1990, and 1996 (they are widely seen as proof that illegal immigration cannot be restricted by statute); and agriculture deregulation in 1996 (it didn't last long).

Some enactments bring on disputes about their effects that never seem to end. The arguments become staples of partisan politics. They energize intellectuals. They take root in competing think tanks. What were the long-term consequences of the Reagan tax cuts of 1981?

Insofar as a cognitive approach can pertain to postenactment histories, what are the implications for analysis? I see seven.

First, from the standpoint of what U.S. society might be interested in, there does not exist any simple, clipped, or sure indicator of the future fortunes of an enactment. Formal amendments or repeals are worth tracking, but they stop well short of a full account. For one thing, other formal correctives such as court decisions and appropriations decisions

can apply. As Maltzman and Shipan write, there exist "alternative vehicles for changing the law." For another thing, new statute B can impinge on the equilibrium of existing statute A without formally altering A. As Patashnik writes, "We need to examine the impact of the full *range* of policy changes than can affect a policy's durability over time, and not only the influence of formal amendments." In addition, beyond these formal terrains, I do not believe that there is any substitute for a sensitive attention to context. Statistics need to be framed by stories. Whatever the formal record might say, we should not be ignoring Three Mile Island, the downslope of the trajectory of synfuels, or the dynamiting of the big housing projects. In another consideration, a statute might "fail" in terms of its authors' aspirations yet continue to occupy a niche in the attic of government programs, as so often happens. That is a kind of failure in which X has not caused Y.

Second, as a coding matter, there is good reason to differentiate among statutes in tracking their future fortunes—perhaps into categories of progressive (in the sense of a progressive research design), stable, or regressive change. Amihai Glazer notes in this volume that support for a law once it is enacted can dramatically increase or decrease.<sup>11</sup> Patashnik argues that "it is crucial to distinguish between the *existence* and the *direction* of [postenactment] change." Any such coding requires judgment. It cannot be done routinely. But it is worth the effort. What has it meant to "amend" the Social Security Act of 1935? Leaving aside welfare reform in 1996, this amending has been overwhelming progressive. It has supplied one of the signal lawmaking patterns of the last three-quarters of a century. Data from it should not be allowed anywhere near a coding regimen that implies, or that a reader might take to imply, that policy change means policy reversal. The distinction is critical. Expansion implies a judgment of success. The Ys that X has been generating are so pleasing that we should have more of their kind.

Third, again from the standpoint of what U.S. society might be interested in, there is good reason to code for, or otherwise attend to, the *importance* of statutes. Regarding the late 1860s and early 1870s, for example, Americans might have said, "Tell me about the postenactment effects of the Reconstruction statutes, and you can forget about the rest." This is an extreme example, but it makes the point. Also, it is not clear whether, or to what degree, the trajectories of statutes of high importance or salience can be reflected in the workings of large-*N* data sets.

Fourth, a cognitive interpretation can figure in Berry, Burden, and

Howell's exceptionally interesting figure 5.1. This is their exhibit of "program hazard functions" clocking the likelihood of any spending program's mutation or death across several postenactment decades. That likelihood rises for eight years or so and then begins a long unending decline. Here is an intuition. To the degree that we look on laws as wait-and-see, trial-and-error enterprises that call for monitoring and assessment, eight years seems to make ballpark sense as a rethink peak. Consider the policy environment of 2010. Comment on the Sarbanes-Oxley Act of 2002 regulating the accounting industry had been mounting. In light of the 2008 election, the campaign finance reform act of 2002 was dwindling to irrelevance. Criticism of the No Child Left Behind Act of 2002 seemed to be climaxing as Diane Ravitch, a leading promoter of the original act, made up her mind that it wasn't working: "Scholar's School Reform U-Turn Shakes Up Debate."<sup>12</sup>

Fifth, changes in problem perception can shape the fortunes of enactments. Classic examples are afforded by national security crises. On the upswing, to cite an interpretation by Richard A. Posner centering on 9/11: "The USA Patriot Act, which civil libertarians abhor, was passed within weeks of those attacks; it would never have passed, or in all likelihood even have been proposed, had the attacks been thwarted." But then what? In the wake of such crises, Posner argues, U.S. history in general has brought mirroring downswings as "the relative weights of liberty and safety" have come to be traded off differently. "Every time civil liberties have been curtailed in response to a national emergency, whether real or imagined, they have been fully restored when the emergency passed—and in fact before it passed, often long before."<sup>13</sup> Accordingly, since 2001, congressional management of the Patriot Act has offered a textbook case of what might be called cut-point drift. Safety concerns have abated, opposition to the original act has blossomed, and constraints have been loosened (although not ended). But these changes do not owe, or they do not owe chiefly, to renovations in the taste-bearing shares of power enjoyed by parties, politicians, and ideologies in Washington, D.C. Even if support for the Patriot Act mapped originally, and if the coalitional patterns regarding it have mapped since, onto a standard ideological dimension related to party, the important pattern has been a cut-point shift by actors along that dimension engendered by changes in problem perception.

Sixth, Maltzman and Shipan reach a nice result in their finding that, everything else equal, "divisiveness" in the enactment of a statute makes

a difference. The greater the roll-call opposition at that original point, regardless of its coalitional ingredients, the dicier the record of postenactment stability. This is intuitive. Large opposition might either index troubles that are likely to be lasting, or cause them. On the latter count, I see a case for a particular additional coding. How divisive was the original roll-call decision in *partisan* terms? As a theoretical and empirical matter, party versus party—especially when the opposing parties approach unity—might generate a special follow-up scenario. A party (as opposed to a cross-party coalition) is an organization built exactly to generate messages and mobilize voters. A party that loses on a congressional issue, if it was unified in that confrontation and stays angry, may have an incentive to keep the conflict going. There is a cognitive side. "We told you so" can supply a drumbeat of criticism as *ex ante* arguments about Xs causing or not causing Ys are continually brought out during the postenactment years. The reactive activity of losing parties, whether or not it follows this cognitive blueprint, is an underinvestigated topic. In fact, in political science it is embarrassingly underinvestigated. During the health-care debate of 2009–10, probably most of us were asked by journalists, "What does political science have to say about the postenactment fortunes of major statutes placed on the books over the unanimous (or nearly so) objections of opposition parties?" The answer: virtually nothing. Systematic work seems to be lacking.

Seventh, there is the line of analysis offered by Glazer and, in the case of airline deregulation, Patashnik. One reason that statutes stay in place is that consumers and firms adapt to them, get stuck in their adaptations, and resort to politics if necessary to protect those adaptations. This is convincing stuff. It occurs to me that there is a particular cognitive angle. All statutes are efforts to shape future behavior. Thus, all statutes incorporate, at least implicitly, X causes Y plans. If it is astutely crafted, an instrument such as airline deregulation will *plan for* future adaptations by consumers and firms. Those adaptations will be, in a removed but nontrivial sense, intended. To be sure, they will not be foreseen with precision. In 1978, possibly nobody saw a hub-and-spoke system coming. But it was hoped and envisioned that a system of spirited competition among airlines would ensue, and, the ways of firms not being a mystery, it was probably envisioned that the airlines (possibly some new ones, to be sure) would scramble to adapt themselves to their political and economic environments the way American firms ordinarily do. With luck a viable and, on balance, favorable economic sector of a familiar sort

would kick into place. The lawmakers' crystal ball in 1978 was clouded but not opaque. To be sure, many statutes have postenactment stories that are not reached by this kind of analysis. The postenactment trajectories can overwhelm the in-going plans. Yet it is interesting to probe for eyes-open anticipations of adaptation.

A major attraction of this volume is its synergistic variety of approaches, tastes, data sources, and methodologies. One polarity is between case studies and large- $N$  data sets. In general outlook, I tilt toward the latter pole. Yet in reading these chapters, I came out somewhere between the poles. I kept having an urge to embellish data points with empirical or historical information.