

CHAPTER 1

INTRODUCTION

The Political Story of Policy Precision

In August of 2012 a fight erupted between the Internal Revenue Service and congressional Democrats over how to interpret the word “affordable” in a provision of the Affordable Care Act regarding coverage for low-income individuals. In a letter to the administration, Democrats warned that “The effect of this wrong interpretation of the law will be that many families remain or potentially become uninsured.”¹ A 2010 *New York Times* article on sweeping financial reform notes that the legislation is “written so broadly that the agencies have wide discretion in drafting rules.” Former Securities and Exchange Commission attorney Justin Daly argues, “If you look at a lot of the important provisions, Congress delegates authority to the agencies to make the really tough determinations.”² California’s landmark Global Warming Solutions Act (AB 32), enacted in 2006, prompted legal disputes between the Air Resource Board and environmental advocacy groups over appropriate interpretation of the bill’s language. Contested phrases are markedly ambiguous: “all relevant information pertaining to greenhouse gas emission reduction programs,” and “maximum technologically feasible and cost-effective reductions in greenhouse gas emissions.” Texas and Delaware laws on insurance coverage for contraception contain similar exemptions

for religious employers, but while the Texas statute (Texas Insurance Code, § 1369.108, 2001) mandates notification in “(1) the plan’s coverage document; (2) the plan’s statement of benefits; [and] (3) plan brochures,” Delaware’s less precise provision requires that employees receive “reasonable and timely notice” (Del. Code Ann. tit. 18, § 3559 2000).

As the aforementioned examples illustrate, the level of detail in a given law can have dramatic consequences for how that law is interpreted and applied. Vague laws necessitate rules and regulations, and sometimes provoke litigation, to elaborate on their meaning and resolve inconsistent interpretations; in effect, to fill in the blanks. More precisely worded policy provides more direction and less discretion to bureaucratic and judicial actors. The wording of a statute is, in turn, critically dependent on the interplay of institutional arrangements and political conditions that define a system of government. Examples of these dynamics can be found across policy arenas and at different levels of government.

Why do some laws end up precise and others vague? This book examines the causes of policy precision and ambiguity, focusing on the dynamics of social policy construction in the U.S. states. I argue that, all else being equal, the more fragmented the conditions, the more ambiguous the policy. There are important exceptions, but the preponderance of evidence from this project indicates that the fissures produced by partisan discord, interest group density and diversity, and pluralistic executive branches promote imprecise policy. I further demonstrate that the effects of fragmentation are more pronounced for high-salience policies, and that fragmentation is a more powerful driver of ambiguity than limits in technical expertise or legislative capacity. Put simply, on important and controversial legislation, ambiguity serves as a vehicle for compromise when key participants disagree over details. These findings challenge the conventional wisdom that higher-salience policies tend to encourage less delegation to unelected actors (McCubbins 1985; Calvert, McCubbins, and Weingast 1989; Bawn 1997; Gormley 1986, 1989; Spence 1997; Epstein and O’Halloran 1994; Reenock 2001; Ringquist, Worsham, and Eisner 2003). More broadly, this project engages the enduring questions of legitimacy, responsiveness, and accountability posed by policy-making in a democracy.

FRAGMENTATION AND AMBIGUITY

Policy textbooks frequently make passing reference to the dangers or advantages of policy ambiguity. Often, the subject arises in discussions of the role of the courts and bureaucracies in influencing policy outcomes. In *Politics and Public Policy* (2001), for example, Van Horn, Baumer, and Gromley introduce the sections on both bureaucratic and judicial politics by noting that the power of those branches is, in part, derived from statutory wording:

Many agencies carry out policies based on broad, vague statutes . . . this discretionary power is a vital component of bureaucratic politics. (88–99)

When politicians are silent or ambiguous, judicial action involves more than just policy implementation. (193)

Supreme Court justices themselves have complained about the lack of direction provided by ambiguous statutes. In Ruth Bader Ginsburg's words, "The national legislature expresses itself too often in commands that are unclear, imprecise or gap ridden" (Ginsburg and Huber 1987, quoted in Miller and Barnes 2004, 57). Years earlier, Felix Frankfurter argued:

A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts . . . laws can measurably be improved with improvement in the mechanics of legislation, and the need for interpretation is usually in inverse ratio to the care and imagination of drafts-men. . . . Moreover, government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding. (Frankfurter 1947, 2)

Not surprisingly, judges and legal scholars are predominately concerned with the consequences of ambiguously worded law and the

delegation of policy decisions to judicial actors that it causes. Countless pages in law journals have been dedicated to controversies born of particular examples of vague statutory language and philosophical debates over how judges should attempt to interpret such language (see, e.g., Miller 1956; Goodin 1979).

These legal texts and articles do sometimes note that political pressure and institutional obstacles shape the language of law. With important exceptions, discussed in more detail in the next chapter, the relationships are offered as a given, without empirical support. When the political story is engaged, often in a footnote or an aside, the argument is made that laws sometimes end up vague because American politics is contentious and fractured and requires compromise. Rarely is the question pushed further. Does more fragmentation lead to more ambiguity? What kinds of fragmentation are important for the level of ambiguity of laws and under what conditions?

We know that this ambiguity matters, yet few empirical investigations focus on *why* such ambiguity exists and *how* it is constructed. Where work has been done, in treatments of the delegation of policy-making decisions to courts and bureaucracies, the role of ambiguous language is often tangential, and the conclusions are seemingly incongruous. Some scholars contend that disagreement begets policy detail, while others argue that disagreement leads to more ambiguity. These contradictory theories on statute precision present a puzzle with important pieces missing. Core components of institutional and political fragmentation are neglected. No direct measure of what constitutes specificity has been offered. This book fills in that lacuna with a demonstrably reliable method for measuring policy specificity and a multipronged approach toward explaining its causes.

In *The Devil Is in the Details*, I explain the impact of institutional and political fragmentation on policy specificity, defined as the degree to which a bill includes details on program mandates or restrictions, rather than leaving these components vague, undefined, or delegated to other branches. I combine detailed content analysis of over 250 bills passed in 44 states in the 1990s and 2000s with in-depth interviews with policy-making elites. The results indicate that, on balance, higher levels of fragmentation and contention contribute to more ambiguous policy. When actors disagree with one another on policy specifics because of partisan conflict, heterogeneous interest groups, or a fragmented executive branch, they tend

to craft policy that is less precise in order to achieve compromise. This is especially true when policy is high salience. For high-salience policies, policy-makers face higher pressure to pass legislation, and higher pressure to appear responsive to a wider array of interests. When policies or aspects of policies are lower profile, or when the opposition is contained and can be easily appeased with exemptions, this relationship is more tenuous and, at times, inverted, with contention producing more specificity.

This volume offers a comprehensive analysis of the impact of fragmentation on policy specificity. Beyond adjudicating between existing theories, this project offers a new theory of the influence of fragmentation conditioned by salience. Furthermore, I illustrate that the most influential variables in determining the level of policy specificity are factors that have never been tested in the states (e.g., party polarization, party division, strength of party leadership, and interest group environment) or previously found to have no effect (e.g., gubernatorial power). The book looks beyond divided government and capacity to the myriad ways in which actors are driven to make policies specific or vague. It treats specificity head-on by directly measuring bill language.

THE LANGUAGE OF LAW

Statutes are political documents. Like all political outcomes, they are the products of compromise, negotiation, calculation, deliberation, hedging, and luck. Although the politics of policy-making is the subject of considerable scholarly work, less attention in political science has been paid to the policy that is produced. This is especially true when it comes to the precise wording of the law. In considering the struggles around deliberation, enactment, and implementation, particularly outside of law journals or in-depth analyses of particular policies, we too often neglect the language of the laws themselves. Where work has been done—in treatments of the delegation of policy-making decisions to courts and bureaucracies—the conclusions are seemingly incongruous.

The roles of courts and bureaucracies as policy-making institutions have deservedly received a sizeable amount of attention in recent decades. This scholarship has analyzed how courts and bureaucratic agencies exercise their policy-making authority but has

also raised questions about how and why they possess such authority in the first place. By blurring the standard constitutional division of powers—legislative policy-making, judicial interpretation, and executive implementation and enforcement—policy-making by the bureaucracy and the courts poses a serious challenge for democratic governance. Few would dispute that judicial and bureaucratic roles in policy-making are important. But why does delegation of policy-making authority to these branches occur, and how can it be reconciled with a meaningful theory of the legislative process?

There are, no doubt, many ways of thinking about this complex and contentious question. This book focuses on one aspect of this question that implicitly pervades the literature on policy-making in the bureaucracy and the courts and yet strangely receives little explicit treatment. What is the nature of the policy passed on to courts and agencies by the legislative branch, and what is the role of institutional and political fragmentation in shaping the formulation of legislation and thereby shaping policy? Interestingly, when the relationship between fragmentation and policy specificity is treated in both the public law and public administration literatures, the results are not only mixed, but contradictory. Stated simply, two broad approaches emerge. One camp argues that fragmentation, including divided government,³ leads to less statute specificity⁴ because it encourages policy-making that is pluralistic and frequently dependent on compromise between opposing parties. The statutes produced, therefore, are often ambiguous or disjointed, inviting litigation and leaving room for substantive court interpretation (Melnick 1994; Kagan 2001; Lovell 2003; Atiyah and Summers 1987). A second camp argues that fragmentation leads to *more* specificity, as legislative majorities craft statutes to be more specific and prescriptive in order to assure the permanence of otherwise temporary victories (Moe 1990; Huber and Shipan 2002; Epstein and O'Halloran 1999). According to this view, when the legislative branch is controlled, wholly or partially, by a different party than the executive branch, legislators will have more incentive to write very precise policy that delegates very little power to implementing agencies. For the sake of simplicity, I will refer to the former as the public law camp and the latter as the public administration camp. As I will explain in more detail in the next chapter, the various arguments made in each camp are neither entirely mutually exclusive from the other, nor wholly internally aligned. Yet there are important differences in

terms of methodology, assumptions, and analysis that lead to different conclusions about the ways fragmentation shapes statutory language.

SOCIAL POLICY IN THE STATES

The study of state politics and policy in the United States has witnessed a renewed enthusiasm of late. A number of recent studies have enriched our understanding of policy diffusion (Karch 2007; Boushey 2010; Shipan and Volden 2006; Mooney 2001), the effects of term limits and legislative professionalism (Kousser 2004) and interstate competition (Bailey and Rom 2004). State investigations have improved our appreciation of the impacts of party strength on legislative voting behavior and coalition building (Wright and Schaffner 2002) and the prioritizing of district over statewide policies (Gamm and Kousser 2010). From a comparative perspective, state-to-state variation in institutional design and political environment is ideal: significant enough to serve as fertile ground for testing meaningful research questions, but not so great that it precludes appropriate controls and generalizability. My empirical focus on state-level policy-making in the United States takes advantage of this variation. It also allows me to consider issues where most states acted at relatively the same time on the same policy—an “apples to apples” comparison. Thus, I am able to analyze similar policies crafted under different conditions. Combining qualitative and quantitative approaches, I employ a three-stage, multimethod research design, focusing primarily on health and welfare policy.

The importance of state governments and state-level politics in shaping health and welfare policy in particular has been well established. A number of important studies have explored a range of political and institutional conditions in influencing policy outcomes, priorities and budgeting (see, e.g., Volden 2002; Tolbert and Steunagel 2001; Weissert 2004; Weissert and Silberman 2002; Weissert and Weissert 2000; Kousser 2002; Winston 2002). This work builds on those analyses by focusing on the level of precision within policy. In addition to the multiple advantages of comparing states to one another, analysis of state policies allows us to better understand how state policy-making differs from, is informed by, and influences policy-making at the federal level.

While health and welfare policy have long been central concerns for policy scholars, and especially for scholars of state policy-making, the current political and economic climate gives these topics a particular urgency. Significant and controversial health insurance reform at the federal level⁵ has prompted renewed attention to ongoing debates about the appropriate role of government in ensuring and regulating health provision. Of particular relevance, much of that controversy stems from the polarized positions of central actors involved in crafting the reform and the many ambiguities in the legislation itself. The economic downturn has contributed to both increased demands on welfare programs and cuts to those programs due to anemic state budgets. How health and welfare policies are articulated and which institutions are empowered to interpret them has tremendous, sometimes life and death, consequences for program consumers and recipients. Thus, the policy areas treated in this book are empirically rich and timely.

OVERVIEW OF THE BOOK

This book explains variation in policy precision in state health and welfare law as a function of political and institutional conflict. Chapter 2 situates my work in existing scholarship and explains my novel theory of conditional fragmentation and my approach for understanding the sources of statute specificity. I argue that fragmentation—in the form of party conflict, interest group hyper-pluralism, and plural executives—promotes greater ambiguity in high-salience policies because there is pressure to enact legislation even when key parties disagree. For low-salience policies, where there is less pressure to act and more space to negotiate away from public and media scrutiny, fragmentation has a less predictable effect—sometimes leading to more specificity, and sometimes producing little change in statutory language.

How do we know if a policy is ambiguous or specific? A core argument of this book is that policies can be meaningfully ranked and compared in terms of their level of detail. Chapter 2 expands on my methodological approach, identifies key variables, presents hypotheses, and addresses sampling and measurement issues. I define the dependent variable of statute specificity conceptually as the extent to which a statute explicitly sets forth program requirements rather

than leaving these parameters ambiguous or undefined. The use of content analysis affords an operational definition of statute specificity that is comprehensive, quantifiable, reliable, and replicable. It allows me to draw conclusions, not just about the overall specificity of bills, but also about different types of specificity based on different aspects of policy. For each of the three quantitative chapters, I develop a unique coding scheme based on the policy or policies at hand.

Chapter 3 explains statutory language from the perspective of the policy-makers themselves. This chapter relies on in-depth interviews with relevant elites (members of the legislature, legislative and gubernatorial staffers, bureaucrats and interest group representatives) from California and Massachusetts, states with similar levels of legislative capacity but distinct levels of partisan polarization and gubernatorial power. The interviews provide valuable insights on conflicting motivations in crafting bills, what policy specificity and ambiguity look like, and how and why they occur. It offers lessons on policy-making from various stages and vantage points in an effort to animate the quantitative chapters that follow.

Conversations with lobbyists, staffers, and legislators make clear that when key players have different positions but want to pass a bill, they often compromise on general, open-ended wording. A substantial number of interviewees argued that fragmentation and disagreement over the details was a motivating factor to keep bills vague. The interviewees also indicated that compromise sometimes came, albeit less often, in the form of specificity, particularly when exempting a group from a requirement or punishment could remove their opposition. Elaborating on the role of salience, it appears that when the opposition is motivated by particular concerns regarding a bill's direct impact on a discrete affected group, then appeasement can be accomplished by introducing specificity that carves that group out of the bill. In contrast, when the opposition's concerns are more abstract or ideological, and the affected groups more diffuse, it becomes more expedient to eschew specificity and strive for vague language that at least *appears* to please all sides.

The next chapters (4 and 5) consider cross-sectional comparisons of two policies across most states—mental health parity and individual development accounts. I selected these topics for a number of reasons. First, similar policy activity occurred in many states during a relatively limited time period, allowing me to control, to a

certain degree, for policy learning effects. Second, as discussed earlier, health and welfare policy is critical both in terms of its impact on daily life and as a fruitful area of study within state policy-making in particular. Finally, as I will elaborate on in later chapters, these policies have somewhat comparable structures but very different levels of salience. For each of these policies I provide a background on the evolution of the issue, explore the motivation for adoption, and discuss the controversies, or lack thereof, that framed statute construction. The bills are analyzed based on their overall specificity and on the varying precision of twelve separate components (e.g., eligibility, service area, time limits).

Chapter 4 presents an analysis of a high-salience, polarized, and redistributive policy, mental health parity, passed in most states during the late nineties. The activism of mental health advocates, along with developments in scientific discovery, provoked a shift in the public consciousness regarding mental illness. Diseases ranging from schizophrenia to depression are now widely regarded as diagnosable medical conditions. Advocates contend that mental illness is deserving of the same insurance coverage as physical ailments. The specificity of mental health insurance laws vary on several fronts including which illnesses are covered, to what extent illnesses are covered (e.g., amount of co-pays), and what type of providers are affected by the law. My analysis of these bills demonstrates that fragmentation—specifically polarized parties, high levels of interest group diversity, and pluralistic executive branches—significantly contributed to more ambiguous mental health bills.

Chapter 5 presents a similar cross-state analysis of a lower profile, less controversial policy— Individual Development Accounts (IDA). The basic purpose of IDAs is to encourage poor persons to build assets by providing matching monies for savings dedicated toward sustainable investments, such as the purchase of a home or the pursuit of a degree. The passage of comprehensive welfare reform at the federal level in the mid-1990s provided for IDA funding through Temporary Assistance for Needy Families block grants. Although the states were given some direction by the federal government, the details of IDA programs were not mandated. States acted quickly to develop IDA programs. However, there is considerable variation across states in terms of the specificity of key aspects of the statute, such as who is eligible for matching monies and how recipients can spend the money.

The relationships unearthed in the IDA analysis demonstrate that a less salient policy reacts very differently to fragmented conditions than a higher profile one and in some cases becomes more precise. This finding is consistent with the narratives presented by policy elites. Once again, the factors that are central in explaining variation in IDA specificity—party polarization, party leadership powers, and gubernatorial powers—have either never been tested or have been deemed not significant by prior scholarship.

In chapter 6, I turn from cross-sectional comparisons to an over-time analysis of California health and welfare policy since the early nineties. California offers the necessary breadth in policy activity and variation in party and interest group environment. The bills considered here constitute a stratified random sample of social policy legislation passed over the course of six two-year sessions between 1993 and 2004; 186 bills in total. This approach facilitates consideration of “bill specific” factors such as committee and floor vote tallies, amendments, and the party and experience of a policy’s author, while avoiding potential confounds that may emerge from state culture by confining my analysis to one state. The bills included in my sample cover a broad range of topics including emergency medical services, patient disclosure requirements, maternity benefits, school immunizations, foster care, day care facilities, unemployment insurance, and mentoring programs. The results reinforce findings from earlier chapters: ambiguity is a function of political environment, not a lack of capacity or expertise. Higher levels of interest group density and party division diminish the specificity of wording in California bills, regardless of policy type. Senate unity and unified government promoted a slight increase in policy precision. Expertise and capacity variables such as the author’s years of experience on the job or the bill’s chamber of origin are not significant. In general, greater fragmentation resulted in less specific legislation, demonstrating once again that ambiguity allows for compromise when participating parties cannot agree on precise policy decisions. This chapter further expands on and reinforces the salience story by demonstrating that low-salience policies are less susceptible to the effects of fragmentation than their high-salience counterparts.

In the final chapter, I review the findings on the sources of specificity and revisit the implications of these findings for our understanding of policy construction and implementation in a fragmented context. I also engage the normative issues raised by this project.

Since the Founding, scholars and political observers have debated the dangers of congressional delegation of policy-making authority and the appropriateness of entrusting policy-making to often unelected judges and bureaucrats. Worries about legislative branches shirking their policy-making role coincide with worries that judges and bureaucrats are overstepping their bounds in making policy. In this book, I argue that policy delegation is, in part, a function of the precision of statutes—the more ambiguous or open-ended the statute, the more decisions are delegated to agencies and the courts. Statutory ambiguity is more likely under conditions of political and institutional fragmentation, particularly when the policy in question is high profile. These fragmented conditions are common, and in some cases inherent, in American policy-making. The more contentious and significant the policy, the more likely disagreement will be resolved not by democratically elected legislatures but through regulation and litigation.

This project constitutes a meaningful contribution to several political science literatures. It speaks to a growing body of work on divided government by asking not just how much policy gets through but what kind. In using the states as “laboratories” to treat the effects of political dynamics on policy construction, it engages scholarship on state politics, legislative and executive politics, and the policy-making process. In discussing the specificity of statutes passed on to the courts and bureaucracies for interpretation and implementation, it helps political scientists and policy-makers better understand how and why those branches serve as policy-making institutions.

More broadly, this book aims to engage policy consumers and scholars by explaining how constitutional design and political context contribute to the variation in the quality of statutes. Understanding the causes of statute specificity matters not just to political scientists but to students of public policy and the law, elected officials, lawyers, judges, and, more broadly, every stakeholder affected by a law. Elites and laypersons alike grapple with the pros and cons of making policy decisions in the judicial and bureaucratic arenas—this project will help explain why policy is delegated to those branches.