Review

Reviewed Work(s): Unequal Under Law: Race in the War on Drugs by Doris Marie Provine

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political dynamics of reform as on "agency" problems associated with bureaucratic implementation. More specifically, the case studies presented suggest that policy design, political dynamics, and elected officials threaten the sustainability of reforms at least as much as "runaway bureaucrats" and probably more.

Patashnik's analyses also leave some questions unanswered. While he identifies factors that contribute to the sustainability of reforms, the relationships among these factors remain uncertain. At one point, Patashnik suggests that positive feedback mechanisms matter "most of all" (26), but it is not entirely clear why this is the case. Elsewhere, he says that reform requires—"at a bare minimum"—altered rules and legal frameworks (3). Could one therefore argue that institutional reform is the key building block that either gives rise to positive feedback or not, depending on the design of the reform? Could well designed institutional reforms be *the* necessary condition for long term sustainability (i.e., to what extent can the design of reform dictate subsequent policy dynamics?)? Thus, while Patashnik does focus on the unintended consequences of reform, the relationship between policy design and subsequent political dynamics could still benefit from further clarification. He does a commendable job of defining key variables that appear to affect the sustainability of reforms, but there is still work to be done if we are to understand fully the relationships among the variables that he identifies.

There are also normative questions. Democratic institutions allow us to enact general interest reforms, but they also allow us to correct reforms that prove to be ill-advised. Patashnik recognizes that sustaining reforms and good government are not identical concepts (176), but he does not fully address the tension between this position and his argument that sustaining reforms is desirable (5–6). For example, he suggests that the Employee Retirement Income Security Act (ERISA) has been largely sustained over time, but he also says that it constrains state level efforts to implement health care reforms (83). Sometimes, sustainable general interest reforms may not yield policy impacts that are entirely positive.

In defense of Patashnik's position, one can point to collective action problems (Olsen 1965), and the fact that they tend to result in the underrepresentation of general interests in policymaking processes. Because of this underrepresentation, there is frequently good reason to sustain public interest reforms after their enactment, even if this may not be true in all cases. However, the normative challenge is to distinguish between these two situations, and Patashnik's book does not fully address this issue.

Even so, *Reforms at Risk* does provide a useful framework for thinking productively about sustaining public interest reforms through policy design (178). Policy reformers, Patashnik suggests, should cultivate clienteles to support reforms after their enactment and create "sunk costs" for key actors that are tied to continuance of their reforms (176–78). He also suggests that reforms should seek to harness the power of market forces and "change the game" by reconfiguring rules and the political stakes associated with them. Our leaders in Washington would do well to consider these insights as they address the reform challenges that our country now faces.

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Unequal Under Law: Race in the War on Drugs. By Doris Marie Provine. (University of Chicago Press, 2007.)

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Marie Provine's *Unequal Under Law* is elegantly written and stands as an exemplar of the best of law and society scholarship. It offers a nuanced and kaleidoscopic examination of the persistence of racism in America and exposes the roles and responsibilities of the law in sustaining racism. In this way, *Unequal Under Law* also works as a case study of the capacity of law to achieve progressive social change, with important insights into the social and political conditions which constrain legal results.

The starting point of Provine's analysis is America's contemporary war on drugs and the startling imprisonment rates of African Americans it has created. At the level of bare facts, this story is well known, and Provine draws on our ways of knowing it to provoke and surprise us. She works throughout the book against the twinned myths of higher rates of criminality and color blind law, challenging the stock explanations of both ends of the American political spectrum. In short, Provine takes a simple storyline and complicates it, exposing the failures that arise from simple understandings. Despite this, by deft maneuvering she also manages to prescribe a way for the law to address this complexity, a solution to which I shall return shortly.

The central work of *Unequal Under Law* is to demonstrate that the criminalization of illicit drugs has, since its inception in the United States, been intertwined with a demonization of racialized groups.

Her thesis is a strong one, positing that without racism, the strong criminalization approach to illicit drugs would not be possible. Her evidence is compelling. She traces the intertwining of race with the rise and demise of prohibition, and with subsequent responses to opium, heroin, and cocaine. A key counterpoint is provided by her analysis of the "whitening" of marijuana use. Her careful analysis and her mastery of extensive historical source material demonstrate what is old and what is new about the contemporary war on drugs and the central place of crack cocaine within it. Indeed her analysis leads the reader to the conclusion that the methamphetamine story introduced in the epilogue will result either in persistent legislative failure or in a not-yet-visible linking of meth use with a particular racialized or ethnic minority group.

My favorite Chapter, because it taught me the most, is titled "Congress on Crack." It documents the construction of the legislative framework for crack cocaine penalties and highlights the near incestuous relationship of lawmakers and the media in developing it. Here we see media reporting that relies on error or on nothing at all and Congress reading such reports into its records. This chapter contains some of the most important and nuanced conclusions of this work. Provine writes, "The United States appears to have sincerely accepted racial diversity as a desirable goal, but without coming to terms with its racist history and class prejudices." Regarding the trajectory through the 1960s and 1970, she states, "It is no accident that changes in legislation concerning heroin and marijuana occurred at the high point of the modern civil rights movement." Finally, in examining the congressional record on crack penalties she concludes, "The fact that this large body of decision makers moved quickly and in virtual unanimity to create especially harsh penalties for crack reveals a common mindset."

Provine draws on scholarship in history, sociology, criminology, and politics to construct her fine-tuned analysis, but her insight is sharpest when dealing with the law. This is what law and society scholarship does best, it brings interdisciplinary engagement to law, with a focus on law at a level of analysis that will satisfy the most exacting legal practitioner. While this work sets out a critique of state agencies including the police, state and federal law makers, enforcement bureaucrats, and political parties, her strongest praise and sharpest criticism is for judges.

A starting point for the book is to query how the racist parameters of the war on drugs can be upheld in the face of constitutional commitment to equal protection under law. Constitutional commitments lead us to judges: "The silence of the Supreme Court on the role of unconscious racism is unfortunate because jurisprudence can sometimes provide Americans with a helpful vocabulary for talking about fundamental governing values, offering concepts that take issue to another level of consideration. But the Supreme Court has done nothing to discourage Americans from continuing to treat words like *racism* and *racist* as moral insults, rather than conditions based in social structures and institutionalized norms." The individual heroes in Provine's account are the judges who struck down mandatory crack sentencing provisions (only to be reversed on appeal), who took early retirement or quit, or who refused to sit on these cases. And although it is key to Provine's argument that it is unfruitful to single out individual villains, it is clear that courts at the highest level have not done what they could have.

The focus on law and judges leads directly to Provine's prescription for the current ills: a change in the judicial approach to analysis of discrimination. In her final Chapter, she argues that judges in the contemporary drug war are caught in the same position that their predecessors were when called to enforce the Fugitive Slave Law. These are fighting words, and she chooses them carefully. She asserts that the intentionalist framework for discrimination findings should be abandoned in the same way that the "separate but equal" doctrine was overturned in *Brown v. Board of Education.* In short, she invokes the high water marks of American judicial engagement with racism and calls upon the Supreme Court to see in the present moment the urgency of another. Her conclusion states, "A comforting myth about the American system of government is that, over time, judicial decisions help us move progressively closer to our nation's foundational values. The way the Supreme Court has handled the problem of racial discrimination, however, belies that myth. Instead of broadening and deepening American understanding of discrimination in line with our core commitment to racial equality, the Court has narrowed and rigidified its approach in the past two decades." Provine's analysis is too subtle to suggest that judges hold *the* answer, but their actions do hold *an* answer, one that few are currently prepared to give.

This is a fascinating study demonstrating the importance and complexity of racial divisions in the United States. It is also a plea for understanding such divisions in an institutional and psychologically informed manner, for such a deep understanding is required to see any way forward. In Obama's America, this complexity is more urgent than ever. For

even as the new President himself stands as a symbol of racial equality, the long trajectory of his ascent, and the racializing divides it refracted at every turn, must not be forgotten if they are to be redressed. This is a vital moment for the history of racism in America. Marie Provine's *Unequal Under Law* should be part of this moment.

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Friends of the Court: Interest Groups and Judicial Decision Making. By Paul M. Collins, Jr. (Oxford University Press, 2008.)

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In the study of *amicus curiae* or friend of the court briefs filed by interest groups, the examination tends to take the perspective of either the groups or the justices. We investigate the motivations of the group or the justices, yet rarely do our findings for one provide much insight on the other. Collins' book, however, is an exception. Additionally, this thoroughly documented study uses the vehicle of amicus curiae to add to the eternal question in the field of judicial politics—does the law matter when the justices make decisions? If so, how much? Not only does Collins provide insight into the independent influence of amicus on the decision making of the justices, but also contributes to the larger debate about the relative influence of policy preferences and law in judicial decision making. In the end, *Friends of the Court* provides serious fodder for scholars interested in the legal behavior of interest groups.

To set the stage for the influence of amicus briefs, Collins suggests that the justices make their decisions from the bottom up rather than the top down. While acknowledging that policy preferences are active and even dominant in the decision-making processes of the justices (175), he argues that the bottom-up approach allows the justices to consider or be persuaded (83), as Collins calls it, away from their policy preferences as they pursue the "correct" legal answer.

The role that interest groups as amici play in this persuasion is the main focus of the book. Because there is no consensus on what "influence" means, Collins's approach is to operationalize influence in three different ways to test the effect of amici on the justices. In each of the three analyses, he utilizes an extensive dataset containing amicus participation from the mid-1940's through the 2001 term. The power of his argument comes from the combined findings, which point to a significant role for interest groups and their amicus briefs in the judicial decision-making process.

Each analysis is geared toward building the theory of legal persuasion. This theory combines some aspects of role theory with the psychology of decision making. Justices, by training, want to make a good and correct legal decision; the information provided in amicus briefs provides fodder for determining the best legal answer; briefs provide alternative arguments and outside perspectives. Thus, in Chapter 4 Collins examines whether groups' amicus briefs influence the ideological direction of an individual vote. With few exceptions, Collins finds that the number of briefs mediates the effects of ideology, particularly in cases with asymmetric filings.

But, the volume of information provided by the brief can also overload the justices' circuits (120) and produce additional uncertainty. It is this psychological reality that provides the basis for the second analysis of influence. In Chapter 5, the target or dependent variable is the consistency of voting; the presumption is that if amicus briefs are not influential, their presence will not cause instability in ideological voting. Yet, in many cases, a greater number of briefs is associated with greater inconsistency in judicial voting. Again, the findings indicate that amici are affecting the justices' choices and doing so in a way that mediates ideological voting.

Unsurprising, Collins does find that case salience negates the influence of amici. In a salient case, there is less variability or inconsistency in a justice's vote. This finding is well in line with much of the decision-making literature. We expect that ideology will play a larger role in such cases.

Chapter 6 is the weakest of the three data driven chapters due to the minimal effects uncovered, although the anecdotal evidence supplied helps considerably. Here, influence is determined by the effect of amicus briefs on separate opinion writing. Certainly, an explanation for the increases in separate opinion writing is important to understanding the decision-making process, and the role that amicus may play in the continued splintering of judicial opinion is worthy of investigation. However, while the amicus variables obtain statistical significance the practical effect, as evidenced by the change in probabilities, is quite weak. Perhaps the multinomial probit model underestimates the effect of the briefs because the model assumes that the choice between writing a concurrence, special concurrence, or dissenting opinion is not ordinal. I wonder if this is the case. These choices could be ordered in terms of strategic and