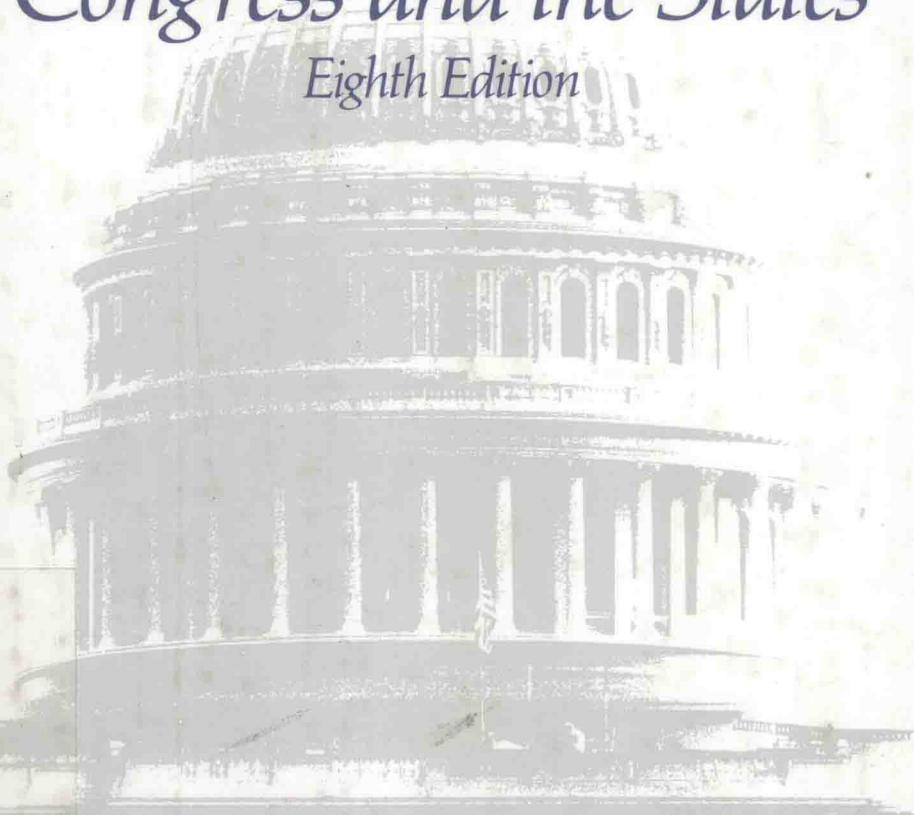


THE AMERICAN LEGISLATIVE PROCESS

Congress and the States

Eighth Edition



WILLIAM J. KEEFE • MORRIS S. OGUL

eighth edition



*The
American
Legislative Process*

*Congress
and
the States*

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To Martha and Eleanor



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Preface

The American legislature is the first branch of government—the center of lawmaking authority. It is the legislature that decides which policy proposals, regardless of their source, will be taken up, shaped, and transformed into public law. New policy ventures require legislative approval; earlier political settlements rest on legislative forbearance. The ultimate responsibility for the thrust and scope of public programs thus lies with the legislature. It is a remarkably open and accessible institution, however, and the legislature's decisions may well be influenced by the preferences of outside interests and actors.

More than any other institution of government, the legislature reflects the range and reality of American politics—in the behavior of the politicians who do business there, in the conflicts that arise and are resolved there, and in the struggles that take place there to gain the benefits that government can allocate or to avoid the penalties that it can impose. The legislature is a microcosm of all democratic politics. Inevitably, it holds a fascination for attentive observers and other democrats.

American legislatures warrant careful examination for a reason that goes well beyond the fascination of observers. They are changing institutions: their popularity fluctuates; media attention to them vacillates; events help to shape them; election outcomes influence them; strong leaders bend them; new members may alter their character. Legislatures also change by themselves—sometimes self-consciously and independently, sometimes in

response to pressures from the outside, sometimes simply to serve symbolic purposes.

The American legislatures of the 1990s are by no means the same as those of earlier decades. Nor is what we know about them quite the same. The need to examine the evolving legislatures and to take account of the new literature on the legislative process provides the main justification for the preparation of this eighth edition.

At this point, scholars have developed no encompassing scheme for analyzing the legislative process useful enough to justify its exclusive adoption. In this respect, political scientists who engage in research in this field work under the same burdens shared by political scientists in all fields. Within this limitation, this book proposes to describe and analyze the American legislative process. We have sought to wring the most that we can from a variety of approaches and have drawn upon a wide-ranging assortment of studies—of legal, behavioral, normative, and historical dimensions. The only test invoked has been of their apparent appropriateness to a better understanding of the behavior of legislators and the functioning of legislatures.

The three major assumptions made in this work are central to effective analysis. First, we believe that legislative institutions should be viewed in relationship to larger environments and inclusive political systems. Accordingly, we have given the role of “outsiders”—political parties, interest groups, chief executives, and courts—at least as much attention as the legislative institution itself. Second, we believe that a comprehensive study of the legislative process requires careful examination of state legislatures as well as Congress. In each chapter, analysis moves between state and nation, depending upon the nature of the inquiry and the availability of data or interpretation. Third, we believe that legislative institutions and processes can be illuminated by stressing such aspects of legislative life as the roles, norms, and perceptions held by the legislators.

Some account of the authors' perspectives may be of interest. Most important, we have tried to keep this volume from becoming disabled as a result of carrying a heavy load of our personal preferences and the incantations that they would tend to produce. Here and there a determined reader may encounter clues that suggest that the authors (1) hold a bias in favor of legislative institutions that are responsive to majority opinions and impulses in the institution and the electorate; (2) believe that American legislatures today are to be neither extolled nor disparaged in the abstract and that specific analysis should precede assessment; and (3) conclude that there is nothing inevitable about the present ordering of American legislatures, even though major change probably will be associated with major alterations in the broader political system. Given this primary assumption, our analysis inevitably moves toward ascertaining the relevance of contemporary trends in American society for the legislative process.

American legislatures are not static institutions. Many changes have taken place in them in recent years, and this eighth edition examines these

changes carefully. Among the topics that receive new or expanded analysis are the following: declining public support for legislatures, term limits, legislative ethics, new emphasis in reapportionment cases, member recruitment and elections, campaign finance, PAC involvement in financing campaigns, committee power, committee-floor relations, leadership powers and problems, partisanship, party impact on policymaking, party-committee relations, interest group influence, lobby regulation, legislative-judicial interactions, oversight of intelligence activities, oversight of the political activity of bureaucrats, the effectiveness of oversight, and legislative reform.

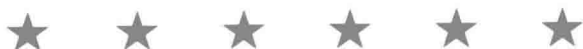
Humor is an important feature of legislative life. In legislatures as elsewhere, humor diminishes tedium and tension. We have let it slide into our pages here and there—in accounts, for example, involving crab racing, Shamu, the Apache Belles, the cat versus bird controversy in Illinois, the albino deer of Pennsylvania, the real estate business of U.S. Steel, the front porch ruminations of Ethel and Homer concerning discharge resolutions in West Virginia, and legislative oversight in Kentucky. (“If you grab them by their budgets, their hearts and minds will follow.”) The justification for tapping into the amusing world of legislators is, of course, to extract elements for the development of middle-range theories of the legislative process.

A number of colleagues, friends, and students assisted us in the preparation of earlier editions: Holbert N. Carroll, Edward F. Cooke, Joseph Cooper, Martha Ellis Crone, Charles S. Hyneman, Charles O. Jones, Kathryn Keefe, David C. Kozak, Thomas Mann, Albert J. Ossman, Albert Papa, Lynette Perkins, Philip Powlick, James A. Robinson, Myron Rubinoff, Deborah L. Solomon, and Sidney Wise. In the preparation of this edition, we received valuable assistance from Stan Berard, Lisa Campoli, Holbert N. Carroll, David Fitz, Brooke Harlowe, Karl T. Kurtz, and Fiona Ross. Martha Keefe typed much of this edition. We want to thank Karen Horton, Marianne Peters, and Dolores J. Mars of Prentice Hall for their assistance in the preparation of this edition.

Finally, a word is appropriate about the division of labor in writing this book. Chapters 1 through 10 and Chapter 14 were written by Keefe, while Chapters 11 through 13 were written by Ogul. Each author made numerous contributions to the other's work to develop an integrated book, consistent in approach, content, and style.

W.J.K.
M.S.O.

Pittsburgh, Pennsylvania



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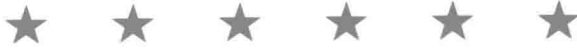
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chapter 1



The Legislative Task

Complex social systems require institutions that will establish and maintain the legal order, receive and settle conflicts, set priorities, make and legitimize policies, and adapt existing rules of society to new conditions.¹ These tasks are familiar to all democratic legislatures, though they are not assigned exclusively to them. The legislature is only one part of the apparatus for making authoritative social decisions. Constitutions, laws, and customs require it to share power and responsibility with the chief executive, the courts, the bureaucracy, the political parties, and in some cases, the public. Time, place, and leaders help shape the relations between the legislature and these other institutions. The legislature may choose to follow their lead, to join with them, to ignore them, to try to pit one against the other, or to struggle against them. In a word, the legislature is tightly linked in a web of complex and ever-changing relationships with other branches and political institutions.

An appraisal of the legislature that focuses on the institution as a separate legal entity may contribute to forming valid and useful distinctions, but it is certain to fall short of imparting a full sense of the character and the dimensions of the legislative process. The legislature does not and cannot maintain an independent group life. Instead, it is involved in an elaborate network of external relations, some of which it has designed and

developed for its own purposes and others of which have been thrust upon it. Legislative oversight of the administrative branch, for example, is calculated to strengthen the position of the legislature and to help it secure from the bureaucracy certain attitudes and behavior perhaps best described as "responsible administration." In contrast, executive initiative in the legislative process—an intrusion neither chosen by the legislature nor easily accepted by its members—often functions to stimulate the legislature to action, contributing to the development of new programs or to the abandonment or revision of old ones. No legislature chooses independently all the roads it wants to go down, though it may be able to determine the speed at which it prefers to travel. About the same thing can be said for those institutions dependent in some way on the legislature or susceptible to its influence: The course of their affairs as well as their effectiveness may in large measure be attributable to steady legislative interest and back-stopping.

The legislature functions within a larger political system. It is linked with other institutions in various ways, and its decisions often reflect these interrelationships. Interest groups make claims upon it. Executive officials help shape its agenda and interpret and implement its legislation. The judiciary may be called on to explicate the meaning of its statutes or to examine their constitutionality. In its relationship with the executive branch and the courts, the legislature may have neither the first word, as represented in the origination of ideas for legislation, nor the last word, as represented in the determination of the constitutionality of its legislation. Within the legislature itself the process of reconciling the demands of competing groups and of choosing among alternatives may be influenced as much by outsiders as by legislators.

Linkages between the legislature and the general political-constitutional system may have major bearing on the behavior of legislators. The traditions, processes, and political cultures associated with elections and representation affect the kinds of people who are recruited as legislators, the conditions under which they hold office, the roles they select to play as members of the legislature, and the clienteles (organized private interests, the chief executive, the party, and others) to which they turn for information, cues, instructions, or support. Constituency interests may dominate the attention of some legislators or represent only one force among many for others. Members may be more responsive to constituents on some issues than on others, and be more receptive to the initiatives of the chief executive on some issues than on others. Members elected in districts or states of intense party competition may behave differently from members elected in districts or states of limited party competition. Legislators from one region may vote in a distinctive way regardless of their party affiliations. The overall political-constitutional system may be designed to make it difficult for public sentiment to find its way intact to the legislature; it may be relatively uncommon, for example, for one party to capture both houses of

the legislature and the executive at the same time. If arrangements rule out party control, party management of the legislature and party responsibility for a policy program are similarly ruled out.

The legislature is not an isolated institution. The struggle to gain the advantages it can allocate (or to avoid the penalties it can levy) takes place both inside and outside its walls. Eventually, conflicts are likely to be brought to the legislature because arrangements made outside are inconclusive, precarious, or unsatisfactory, or because the legislature is in a position to contribute formulas for settlement and legitimacy to the provisions of settlement. The major decisions of the legislature ordinarily represent a temporary accommodation between private and public groups holding different objectives. As circumstances change and as elections upset old alliances and help to create new ones, consensus is impaired. A change in power relations gives rise to multiple demands that the legislature produce new settlements; "business as usual," whether in the way the legislature is organized or in the character of the policy output, may be entirely unsatisfactory to those newly come to power.

The legislative process is much more than a legal system for taking inchoate ideas and turning them into firm statutes. In its most fundamental aspect, the legislative process is the center of critical struggles for political, economic, and social advantages. The process is routine only when the questions are routine. To bring the process into focus requires the observer to understand the legislature's relationships with other major institutions and environmental forces, including political parties, interest groups, constituencies, the executive, the bureaucracy, the judiciary, and the electoral-representative system. These elements receive much more emphasis in this book than those that might be described as uniquely legislative.²

DISCONTENT OVER THE LEGISLATURE

Legislative assemblies have long been experiencing difficult days. Where totalitarian movements have been successful in gaining power, the independence and autonomy of legislatures have been diminished or lost altogether. Elsewhere, under democratic conditions, legislatures have declined in popular esteem, at times to the point of disrepute. American legislatures without exception no longer enjoy as great a measure of public confidence as was theirs in the early days of the republic. How great their fall from virtue has been is surely disputable, but there is no doubt that it has taken place.

The reasons for the decline of the legislature's prestige are more easily detected than weighed for significance. Discontent over the performance of the legislature appears to stem from a number of interrelated complaints. Briefly treated here and at length in later chapters, they are as follows.

The Legislature Is Not Sufficiently Responsive to Majority Preferences Either in the Electorate or Within the Institution Itself. Of all the charges laid against the legislature this one has been pressed most often and insistently. In years past the malapportionment of legislative districts was typically cited as the leading obstacle to majority rule in American legislatures. Majority sentiments in the electorate, according to this argument, could not find expression in the legislature because of a faulty system of representation in which rural and sparsely populated areas held a disproportionate number of seats at the expense of populous urbanized areas. Allegedly this imbalance resulted in the formation of public policy inimical to the interests represented by urban legislators. Today the malapportionment issue is of slight significance. A series of Supreme Court and state court decisions during the 1960s and 1970s firmly established the doctrine that legislative districts must be fairly apportioned, consistent with the principle of "one man—one vote," and in 1986 gerrymanders came under the review of the Court. In *Davis v. Bandemer*, the Court warned that redistricting plans will be invalidated "when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."³

The lament that legislatures are not responsive to their own majorities, however, continues to be heard. At times criticism focuses on the fragmentation of legislative power that results from the weaknesses of the parties as instruments for building reliable majorities. Coalition politics may come to the fore when the parties are splintered. In the 101st Congress (2nd session), for example, the "conservative coalition" (a voting alliance of Republicans and southern Democrats aligned against northern Democrats) won 82 percent of the roll-call votes on which it appeared.⁴

The committee system is also a point of controversy. It is easy to find examples of committees whose composition and policy orientations are unrepresentative of the chamber as a whole and to identify committee and subcommittee leaders who are out of step with the main elements of their party. (See Chapter 6.) Intensely individualistic members and the growing power of lobbies also take a toll on the legislature's cohesiveness and its capacity to serve broad public purposes. The gap between votes and seats may lead to the persistent underrepresentation of certain party and other interests; the Republican party's share of the U.S. House seats from the 1950s to the 1990s, for example, usually lagged between 2 percent and 10 percent behind its proportion of the overall House vote.⁵ (See Chapter 3.) Finally, of related concern, there are the frustrations that accompany divided control of government, with one party in control of the executive branch and the other party in control of one or both houses of the legislature. Under such circumstances, it is all but impossible for even the most attentive observers to estimate the responsibility for policies adopted, problems ignored, and things left undone. In recent decades divided control of government has become a chronic condition of both national and state politics. At any one time about half of all state governments will be operat-

ing under conditions of divided party control. At the national level, every Republican president since the 1950s (Eisenhower, Nixon, Ford, Reagan, and Bush) has faced Democratic majorities in one or both houses of Congress.

Legislative Politics and Public Policy Formation Are Dominated by Organized Special-Interest Groups. This assessment will be recognized as a variant of the first. It holds that the "public interest" is not often uppermost in the minds of legislators bent on favoring (or placating) a multitude of pressure groups. When agricultural policy is under consideration, farmers' organizations arrive with drawn specifications; when labor-management legislation is at stake, labor and business organizations lock horns; when trade legislation is under review, "protectionist" and "free trade" interests stumble over one another in their zeal to defend their positions; when campaign finance legislation makes its way to the agenda, each party moves quickly to its conventional interest-group position—for Democrats, support for limits on spending coupled with public funding, and for Republicans, support for curbs on PAC (political action committee) spending and increased spending by political parties;⁶ when legislation to protect the environment is introduced, producer interests arrive, ready to do battle with conservationists.

To many observers, it appears that legislators fail to distinguish between private interests and the public good. All too frequently, some critics say, public policy overrepresents the interests of the most organized elements of the population. E. E. Schattschneider described the problem in this way:

American government has grown great by meeting the demands made upon it. The catholicity and versatility of the governmental response to the demands made upon it seem at times to have been based on the assumption that all claims ought to be met regardless of their merits. . . . [Yet] sooner or later it becomes necessary . . . in any political system to *discriminate* among the demands. This involves the establishment of a public policy. No public policy could ever be the mere sum of the demands of the organized special interests. For one thing, the sum of the special interests, especially the organized special interests, is not equal to the total of all interests in the community, for there are vital common interests that cannot be organized by pressure groups. Government by organized special interests, without some kind of higher integration, must break down of its own weight.⁷

An appraisal of the Texas legislature illuminates the problem of securing legislation to assist the disadvantaged and poorly organized elements of society:

The legislature's [priorities] are most clearly seen in its biannual appropriations bill. Compare \$400,000 for a moss-cutter on Lake Caddo with nothing for bilingual education. A healthy chunk of money for an old folks' home in the district of the chairman of the House Appropriations Committee, but

nothing for the state's only black law school. Money to air-condition a National Guard armory, but no money to air-condition the state school for the mentally retarded. When it's a question of malnutrition, hookworm, or illiteracy against new equipment for the Texas Rangers, the Rangers always get what they need. In a state with no corporate income tax, no corporate profits tax, no natural resources severance tax, wellhead taxes on natural gas and oil that fall below the national average, and a light corporate franchise tax, where does the largest chunk of Texas' money come from? From a regressive 4 percent state sales tax.⁸

Legislatures are frequently tarnished by accusations that special interests dominate policy outcomes. When the 98th Congress (1983–84) blocked the imposition of a withholding tax on interest and dividend income, it was accused of caving in to the banking industry, which had orchestrated a massive campaign for repeal of the law. "The conduct of some members of the American Bankers Association," said one House member, "is absolutely outrageous—frightening the elderly and poor into intimidating Congress." The House's action, observed another member, "will send a signal that the Congress of the United States is a patsy for a very well organized lobby."⁹

The influence of interest groups, conventional wisdom asserts, is linked to the strength of the legislative parties. Senator David F. Durenberger (R., MN) recently offered this observation: "Party discipline doesn't matter because parties don't matter. There's no discipline, just 30,000 special interests that we're all serving in one way or another."¹⁰

The belief that special interests exert unusual influence on legislatures has intensified as a result of the growing involvement of organized groups in financing congressional election campaigns. In the 1989–90 election cycle, the political action committees of interest groups contributed \$151 million to candidates for Congress, with many candidates receiving more than half of their funds from this source. In comparison, in the 1978 election, PAC gifts to congressional candidates were only \$34 million. Contributions by PACs to House candidates in 1990 totaled 38 percent of their campaign receipts, the highest percentage yet. For Senate candidates the figure was 22 percent. A striking fact in election after election is that congressional incumbents receive, on the average, seven or eight times as much money from PACs as do their challengers.¹¹ Not surprisingly, some observers wonder whether the growing dependency of members on PACs compromises their role as representatives of the general public. A number of members also worry about the PAC problem. To quote former Congressman Richard L. Ottinger (D., NY):

It is fundamentally corrupting. At best, people say they are sympathetic to the people they are getting money from before they get it; at worst, they are selling votes. But you cannot prove the cause and effect. I take the money from labor, and I have to think twice in voting against their interests. I shouldn't have to do that.¹²