The "Post-Attitudinal Moment": Judicial Policymaking Through the Lens of New Institutionalism

Anne Bloom

Lee Epstein and Jack Knight, *The Choices Justices Make.* Washington, DC: Congressional Quarterly Press, 1998. Pp. xviii + 200. $24.95 paper.

Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons.* New York: Cambridge University Press, 1998. Pp. xv + 490. $74.95 cloth; $24.95 paper.

In the last several decades, the view that American judges are policymakers has become all but axiomatic among political scientists. The dominance of this view stems from C. Herman Pritchett's publication of *The Roosevelt Court* (1948), in which he argued convincingly that Supreme Court Justices were motivated primarily by their own policy preferences. Many political scientists were further swayed by Segal and Spaeth's publication of *The Supreme Court and the Attitudinal Model* (1993), in which they offered powerful empirical support for Pritchett's contention that the legal rulings of the Supreme Court could be predicted on the basis of the Justices' personal policy preferences. Despite the dominance of this view among political scientists, the legal profession and the legal academy have never quite accepted this characterization of judicial behavior. Although the political scientists piled up more and more empirical support for their claim that judges are primarily policymakers, legal scholars continued to maintain that judicial decisionmaking should not and, in fact, did not consist primarily of judges acting to maximize their own policy preferences but was instead highly constrained by an adherence to legal precedent.

For many of us (especially those of us in the social sciences), the difference of opinion between the two camps seemed reduci-

Address correspondence to Anne Bloom, Department of Political Science, Box 353530, University of Washington, Seattle, WA 98195 (e-mail blooma@u.washington.edu).

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ble to a classic conflict between *is* and *ought*, with the political scientists describing the "is" of empirical reality and the legal scholars philosophizing about how things "ought" to be. A few years ago, however, some political scientists began to call for public law scholarship that might go some way toward bridging the gap between the schools of thought. Among the most influential of these voices was Rogers Smith, who argued in 1988 for a "new institutionalist" turn in public law scholarship, by which he meant that political scientists should spend more energy understanding how "institutional" factors—such as the limitations of judicial office and the constraints of precedent—might inhibit judicial policymaking. More recently, two prominent public law scholars operating from relatively opposite sides of the methodological spectrum wrote separately to announce and encourage a "post-attitudinal" turn in judicial behavior scholarship (Gillman 1996–97; Baum 1997).[1]

The Choices Justices Make (1998) by Lee Epstein and Jack Knight and *Judicial Policy Making and the Modern State* (1998) by Malcolm M. Feeley and Edward L. Rubin are two excellent examples of this "post-attitudinal" moment. Although grounded in very different methodological perspectives and focusing on the nature of judicial behavior in different settings, both books examine how institutional structures shape and constrain judicial policymaking. Moreover, in both books the message is clear: If we want to understand judicial behavior—and especially the judiciary's role in shaping public policy—we need to look much further than judicial attitudes.

In *The Choices Justices Make*, Epstein and Knight start with the observation that Justices on the Supreme Court change their minds or join opinions that do not reflect their personal policy preferences in more than half of all cases that they hear. As an example of this type of behavior, Epstein and Knight tell the story of *Craig v. Boren* (1976), in which the Supreme Court adopted the heightened scrutiny standard for sex discrimination. At the initial conference vote on *Craig v. Boren*, the Justices were deeply divided on issues of both standing and the appropriate constitutional standard to apply. Through a series of negotiations initiated by Brennan, however, a majority eventually reached agreement on the question of standing and on adopting the intermediate constitutional standard of heightened scrutiny. What this story tells us, Epstein and Knight contend, is that the attitudinal model is incomplete. Justices may be motivated primarily by their policy preferences, but they plainly are constrained in their attempts to implement those preferences.

As an alternative to the attitudinal model, Epstein and Knight offer an account of judicial behavior in which Justices act strategi-

[1] The phrase is Howard Gillman's (1996–97).

cally and in response to the preferences of other Justices and institutional constraints. As they acknowledge, this strategic view of judicial behavior is not really new. In 1964, Walter Murphy offered a similar conception of judicial decisionmaking in *Elements of Judicial Strategy* (1964). Murphy's account, however, relied primarily on anecdotes that he pulled from Court memoranda and the Justices' personal papers. Although the anecdotes were intriguing, *Elements* lacked the sort of systematic evidence that most social scientists find to be persuasive, particularly when compared against the more statistically sophisticated evidence that Segal and Spaeth offered in support of the attitudinal model. Perhaps as a result, Murphy's conception of judicial decisionmaking did not achieve the same level of popularity.

In *Choices*, Epstein and Knight aim to provide a much stronger empirical footing for the strategic perspective. Although they draw upon many of the same sources that Murphy relied upon, the anecdotes in the analysis are buttressed with aggregate data drawn from the Burger Court years. Among other things, Epstein and Knight examine the number of times that Judges make explicit bargaining statements in judicial memos to other Justices. Consistent with Murphy's anecdotally based claims, they found explicit bargaining statements were made quite frequently and, somewhat surprisingly, were especially common in areas of the law where the Justices would be expected to have fairly inflexible policy perspectives. Along these lines, one of the more interesting findings is that in over two-thirds of the landmark cases of the 1970s and 1980s, at least one Justice tried to strike some sort of bargain with the Justice writing the lead opinion. Epstein and Knight suggest that the existence of these bargaining statements indicates that the Justices believe they have something to gain by engaging in strategic behavior. Other data collected by Epstein and Knight appear to confirm this insight: in more than a quarter of the landmark cases, one or more Justices changed their position in the course of the opinion-writing process.

Epstein and Knight also demonstrate how the decision on whether to accept certiorari provides the Justices with an especially important and challenging setting for strategic behavior. Of particular significance here is the so-called Rule of Four, according to which the Supreme Court does not accept review of a case unless four Justices vote affirmatively to grant certiorari. Among court-watchers, it is commonly believed that a Justice will vote in favor of review only when he or she is confident of having the votes to support the preferred outcome on the merits. But, as Epstein and Knight point out, it is often difficult for Justices to anticipate other Justices' expected positions on the merits at this early stage. Still, to the extent that they have this information, they may be expected to behave strategically to increase the likelihood of obtaining the policy outcome that they prefer.

Institutional norms governing the assignment of opinions provide yet another important opportunity for strategic behavior. Because the lead opinion writer sets the stage for subsequent bargaining, the designated opinion writer can significantly affect the policy outcome in the case. According to Court norms, the Chief Justice is vested with the power to assign opinions unless it is clear from the initial conference vote that the Chief Justice is in the minority, in which case the power to select the opinion writer goes to the senior associate. Epstein and Knight present strong evidence to suggest that the Chief Justice is quite cognizant of the strategic importance of this role. Among other things, they produce data showing that Chief Justice Burger voted to "pass" in conference more than any other Justice, presumably so he could control who authored the majority opinion in the case.

The "Rule of Four" and the norms governing the assignment of opinions are examples of internal Supreme Court rules that force Justices to act strategically to increase the likelihood that their policy preferences will ultimately be adopted. But Justices are also constrained by external actors and institutions, such as other governmental actors and public opinion. Here, again, Epstein and Knight offer some compelling aggregate data. Relying on conference memoranda that have been coded for attention to the preferences of other government actors, they found that Justices expressed concern about the views of other governmental institutions in more than half of the cases they reviewed. When the case does not involve a constitutional question, this number jumps to 70%. At a minimum, this is strong evidence that the Justices are concerned about potential conflicts with the policy positions of other governmental institutions. Epstein and Knight cite this and other data to make an even bolder argument that the separation-of-powers system essentially operates as a check on judicial policymaking.

The values and expectations of the American people are yet another constraint on the Court and one that has been fairly well-studied. Though past research has tended to approach this question in terms of how closely judicial policymaking tracks public opinion polls and the local enforcement of Supreme Court edicts, Epstein and Knight take a somewhat different tack. Instead of focusing on public opinion polls and judicial impact studies, they argue that the most important constraint that the American people impose on Supreme Court policymaking has to do with perceptions about what are and are not legitimate Court functions. To maintain legitimacy in the public's eye, Epstein and Knight contend, the Court must at least appear to be following past precedent and avoid deciding issues that have not been raised by the parties. In legal jargon, these legitimacy-producing norms are known as the doctrines of *stare decisis* and *sua sponte*. Epstein and Knight have no trouble demonstrating that the Jus-

tices adhere to these norms. They are somewhat less convincing, however, when they insist that the Court's adherence to these norms is strategic behavior that is ultimately aimed at helping individual Justices achieve their policy goals.

Another potential explanation for what is going on when the Justices adhere to these norms is the one offered by many law school professors and the Justices themselves, and that is that adherence to the norms of *sua sponte* and *stare decisis* stems from their professional (and perhaps ideological) commitment to the substantive content of those norms. Epstein and Knight reject this possibility, and it is not entirely clear why, although one suspects that it has to do with their assumption that policymaking is the primary objective of the Justices. Like Segal and Spaeth (and virtually all other political scientists working in the post-Pritchett vein), Epstein and Knight start with the assumption that members of the Court are motivated primarily by a desire to influence public policy. In their view, "no serious scholar" would assume otherwise (p. 12). But one result of this assumption is that, at times, some of the explanations in the book feel a bit forced, such as when they describe the Justices' adherence to the doctrines of *sua sponte* and *stare decisis* as solely a "means to an end," with the end being the achievement of a particular policy outcome (p. 12).

One might also raise questions about an implicit assumption that runs through the book concerning the relative stability of the Justices' policy preferences. In Epstein and Knight's account, judicial votes change as a strategic response to what is possible, but the fundamental policy preferences remain fixed, despite the best attempts of their colleagues and the parties to sway them. This conception seems much too static, particularly in light of work in other fields that suggests that policy preferences tend to be unstable and responsive to framing (see, e.g., Zaller 1992). It is also at odds with an alternative interpretation of Epstein and Knight's own data, which is that the changes in votes that they observed between the initial conference vote and the final vote on a case are the result of genuine changes in the Justices' policy preferences, rather than purely strategic behavior.

These caveats aside, Epstein and Knight's strategic account of Supreme Court decisionmaking is extremely convincing. After reading their book, it is difficult to doubt that strategic interactions play an important part in the behavior of members of the Court. It is equally clear that Supreme Court Justices are somewhat constrained by other institutional actors and legal norms in their attempts to engage in policymaking. The broad implications for law and legal policy that they draw from these findings are also well-grounded and persuasive. Because of institutional constraints on Supreme Court Justices, Epstein and Knight deduce, law is not the coherent articulation of principles or policy

that many observers claim it to be. Instead, law as generated by the Supreme Court is "the long-term product of short-term strategic decisions"; as a result, the Supreme Court is able to bring about changes in public policy in only a "slow and incremental" way (p. 183).

Like Epstein and Knight, Malcom F. Feeley and Edward L. Rubin are interested in how institutional norms and legal doctrine influence judicial policymaking. In *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998), Feeley (a political scientist) and Rubin (a lawyer) tackle these questions in the context of an in-depth analysis of prison reform litigation that took place between 1965 and 1990. From the perspective of many observers, these cases represent one of the most flagrant examples of judicial policymaking ever witnessed in the lower courts. In 1964, no U.S. court had ever attempted to use its authority to change prison conditions. By 1975, however, judges had issued orders mandating prison reforms in 25 states. By 1995, judicial orders had been issued in every state, and in ten states the entire correctional system had been placed under court order. In many instances, the court orders were comprehensive and covered everything from the acceptable size of a prison cell to how many showers a prisoner should be permitted to take. In short, this was judicial policymaking of the most intrusive kind and, surprisingly, it took place in the absence of a Supreme Court ruling announcing a change in public policy. Feeley and Rubin study this litigation as the starting point for understanding how judges make policy.

The first several chapters of the book are dedicated largely to presenting a history of the prison reform litigation. For many readers, this historical account will seem worth the price of the book itself. By focusing first on two of the most significant prison reform cases and then on three variations on the prison reform theme that emerges in those two cases, Feeley and Rubin offer a comprehensive account of one of the most fascinating transitions in American legal history. The stories are rich with detail and contrasts, and together they give an excellent flavor of the complex array of factors that influenced the direction of prison reform. Feeley and Rubin self-consciously offer these complex case histories as an alternative to the appellate case studies that are typically the focus of law students and many legal scholars. Their aim is to demonstrate that no legal dispute is self-contained but is rather a product of interactions with other political and social forces.

In the second half of the book, the stories become the basis for theorizing about the nature of judicial policymaking. Although recognizing the seemingly extraordinary role of federal judges in the prison reform litigation, Feeley and Rubin argue that judicial policymaking should be viewed as ordinary and legit-

imate judicial behavior. Judges have always engaged in some amount of policymaking, the authors maintain, and it should not be treated with suspicion or viewed as improper. They also argue, however, that the methods and rules of judicial policymaking are distinct from the methods and rules that are followed by the other branches of government. To demonstrate this, Feeley and Rubin draw upon three different approaches to understanding policymaking processes: the "classic" view, incrementalism, and the hermeneutic approach.

In the "classic" conception, policymaking involves five steps: problem definition, goal identification, consideration of alternatives, selection of policy, and implementation. According to Feeley and Rubin, judges followed this "classic" approach to policymaking through the first two steps in the prison reform context. Specifically, a problem was identified ("state prisons, particularly those in the South, were being run in violation of national standards" [p. 147]) and a goal was decided upon (the imposition of national standards). When it came to the third step, however, judges did not seriously consider any policy alternatives but proceeded directly from their goal to the implementation of the national standards solution. To describe this process of implementation, Feeley and Rubin employ the incrementalist view of policymaking. As its name suggests, the incrementalist approach argues that policymaking is accomplished in incremental steps and according to the intuitive judgments of policy leaders. Feeley and Rubin argue that this approach best describes the implementation phase of the prison reform litigation because of the institutional constraints on judicial policymaking. Before the courts could impose the national standards solution, they needed to develop a legal doctrine that supported the imposition of national standards. This legal doctrine was necessarily developed incrementally.

Finally, Feeley and Rubin utilize the hermeneutic view of policymaking to explain the timing and motivation of the judges in the prison reform litigation. According to the hermeneutic perspective, policymaking is best understood as an interactive process between specific considerations and overall goals. This understanding of policymaking best describes the timing of the prison reform litigation because the "prison reform cases were part of a wide-ranging, nationally initiated attack on southern institutions" (pp. 158–59) that coincided with the enforcement of the Civil Rights Act and a national commitment to enforce a particular set of social values. Thus, the timing was right for policymaking in the area of prison reform because the judges' specific goal of implementing national standards interacted favorably with a broader national commitment to civil rights. Similarly, Feeley and Rubin demonstrate that the motivations of the judges are best understood in terms of a complex interaction

between the judges' personal policy preferences and their understanding of themselves as judges operating within a particular legal institution.

Feeley and Rubin's reading of the policymaking processes in the context of the prison reform litigation prompts them to draw a number of conclusions that, in several instances, correspond to the findings of Epstein and Knight. Although they are studying the lower courts, which arguably operate quite differently than the Supreme Court, Feeley and Rubin agree with Epstein and Knight's conclusion that it is a mistake to claim (as many proponents of the attitudinal model have) that judges engage in policymaking without regard for legal precedent. Instead, Feeley and Rubin argue that judicial policymaking is best understood as "a complex process that engages and connects with legal doctrine, and that expresses its results in terms of legal doctrine, but that the doctrine does not explicitly control or constrain" (p. 340). As in *Choices*, precedent is not the only institutional factor influencing the direction of judicial policymaking. Professional role expectations, the degree of coordination with other judges, and the surrounding political environment are also factors. Because of these institutional factors, Feeley and Rubin conclude, like Epstein and Knight, that judicial policymaking is largely incremental in nature.

In other respects, however, the two books are quite different. Perhaps the most critical difference is that, in Feeley and Rubin's account, judges are not always policy-minded. Recall that in *Choices*, judges are primarily policy seekers and, as a result, their behavior is nearly always aimed at achieving implementation of their personal policy preferences. Feeley and Rubin, in contrast, maintain that there are certain circumstances when judges engage in the classic judicial function of interpreting legal texts. Feeley and Rubin do not attempt to quantify how much time judges spend making policy versus how much time they spend interpreting legal text, but the authors do view policymaking as a practice that is distinct from the interpretation of legal doctrine. In their work, the key indicator of this distinction is whether the court relies on outside information to decide the case. When the court does so, the court can be said to be engaging in policymaking rather than simply a liberal interpretation of legal doctrine.

Moreover, even when judges are engaging in policymaking, Feeley and Rubin contend, the behavior of judges is not always aimed at achieving implementation of their personal policy preferences. Instead, Feeley and Rubin describe a somewhat more complex set of motivations at play. This is perhaps easiest seen in their characterization of how the federal judges deciding the prison reform cases responded to the opinions of other federal courts. Because judges identify strongly as members of an institution, Feeley and Rubin suggest, they responded to the views of

other judges not because it was strategically useful for them to do so in terms of their own policy preferences but because they were professionally committed to the notion of coordinated institutional doctrine. In the context of the prison reform litigation, this played out in the form of an informal judicial network favoring doctrinal change. After a few policy leaders published opinions that opened the door to national standards, other judges borrowed and adapted them to their local situations. Gradually, a consensus emerged and federal judges began to almost unanimously issue opinions in support of national standards for federal and state prisons. The judges who adopted this perspective did so in part because of their personal attitudes but also because of their professional understandings and commitments.

Yet another key difference is that Feeley and Rubin draw upon their findings to make normative claims about the appropriateness of judges making policy. Among other things, they argue that judicial policymaking should not be viewed as either aberrational or improper judicial behavior. Like policymaking by the other branches, they argue, judicial policymaking should be understood as a normal and legitimate judicial function and should be studied in much the same way. More radically, Feeley and Rubin suggest that judges should be encouraged to engage in more policymaking. To facilitate this, they urge that the legal doctrines of federalism and separation of powers be largely abandoned.

Like the rest of their contentions, this rather provocative argument is grounded in their assessment of the prison reform litigation, where they found that it was necessary for the lower court judges to ignore the doctrines of federalism and separation of powers before they could engage in effective policymaking. Had judges been unwilling to disregard these doctrines in the prison reform litigation, they argue, the federal courts would never have been able to achieve the reforms that they did. The appointment of special masters, which was necessary to implement the prison reforms, for example, quite obviously ran afoul of the separation-of-powers doctrine (by trampling on the jurisdiction of the executive branch) and could not have been carried out had the courts maintained a rigid adherence to that doctrine. Similarly, an unyielding commitment to the principles of federalism would have absolutely precluded federal intervention into the management of state-run prisons. In order to implement widespread prison reform, Feeley and Rubin argue, federal judges had no choice but to disregard these principles.

Instead of the usual hand-wringing about the undemocratic nature of judicial policymaking, Feeley and Rubin applaud the federal bench for taking this route and argue that it is a rational and pragmatic response to the realities of the modern administrative state. Federal judges were willing to abandon the doc-

trines of separation of powers and federalism in the context of the prison reform litigation, Feeley and Rubin maintain, because they recognized that the doctrines were no longer serviceable in the current context. In Feeley and Rubin's assessment, this conclusion was appropriate. Given the realities of the administrative state, they argue, it is appropriate for judges to view the doctrines of federalism and separation of powers as "managerial strategies" that may be ignored when it makes sense to do so (p. 351). Although Feeley and Rubin recognize that this rather cavalier approach to hallowed legal principles will trouble some readers, they insist that it is part and parcel of the administrative state. To attempt to revive the principles is, in their view, futile. As they put it,

> We are much more likely to turn the clock back 500 million years by bombing ourselves into the protoplasmic slime than we are to turn back 120 years to the pre-administrative era. Federal judges certainly sensed this, which is the reason this middle-aged, middle class, middle-of-the-road group of people was willing to ignore supposedly established doctrine. (p. 341)

As unsettling as this message is, there is a ring of truth in it that resonates far beyond the prison reform litigation that is the focus of Feeley and Rubin's work. In the face of overcrowded courts and multiple vacancies on the federal bench, there is widespread evidence of federal judges experimenting with managerial strategies aimed at moving more cases through the courts more quickly. Among the most controversial of these practices have been attempts to use the class action device to funnel hundreds of thousands of asbestos cases into private claims processing systems. Although the Supreme Court recently struck down two such attempts as inappropriate "judicial legislation," the lower courts continue to experiment with managerial strategies that push the boundaries of the separation-of-powers doctrine, with the aim of increasing the administrative efficiency of the highly congested federal courts. Feeley and Rubin, by reminding us how such practical considerations prompt and shape the direction of judicial policymaking, suggest an important, and largely unstudied, way in which institutional structures influence judicial behavior.

Like *Choices*, Feeley and Rubin's *Judicial Policy Making and the Modern State* challenges our assumptions about judicial behavior and, in particular, about the capacity of judges to use their positions to implement their preferred policy outcomes. By emphasizing the importance of institutional structures, both books open up new avenues of fruitful inquiry that are boldly post-attitudinal in outlook. Of the two books, however, it is Feeley and Rubin's *Judicial Policy Making and the Modern State* that is the more radically post-attitudinal in perspective. In contrast to Epstein and Knight, Feeley and Rubin deny that judicial attitudes are ulti-

mately determinative of judicial behavior and demonstrate convincingly that, even when judges are clearly engaged in an act of judicial policymaking, their personal preferences may take a backseat to institutional concerns.

What is truly post-attitudinal about *Judicial Policy Making and the Modern State*, however, is its authors' suggestion that the main motivation for judicial policymaking in the context of the prison reform litigation was, at least partly, institutional in origin. Among the many questions that Feeley and Rubin tackle in *Judicial Policy Making and the Modern State* is why judges were willing to engage in policymaking on the prison reform issue at the particular point in time that they did. They discovered that institutional factors and the broader social and political context were quite important to understanding the timing of judicial policymaking, in part because these factors have an impact on judicial attitudes. Specifically, the authors found that judges were willing to ignore key legal doctrines and engage in fairly extreme acts of judicial policymaking in the prison reform context, not because of their personal policy preferences, but because the judges' own perceptions changed as the rise of the modern administrative state placed new demands on legal institutions. This conclusion is profoundly post-attitudinal in a way that Epstein and Knight's *Choices* is not because it acknowledges that institutional considerations influence not only the strategies that judges adopt in attempting to implement their policy preferences but also the substance of the preferences themselves.

Paradoxically, the fact that *Judicial Policy Making and the Modern State* is primarily a book about judicial policymaking, rather than judicial behavior more broadly, may have something to do with why its insights into judicial behavior are so valuable. When Feeley and Rubin focused on how and why judicial policymaking takes place, they did not assume (like most judicial behavior scholars) that judges are virtually always policy minded. Perhaps as a result, they discovered both that judges do not always treat their own preferences as paramount and that, as judges consider the broader institutional context in which they are acting, their attitudes undergo change. Because of this, *Judicial Policy Making and the Modern State* sheds a great deal of light on what a truly post-attitudinal moment in judicial behavior scholarship might look like. Like *Choices,* it also demonstrates the much more complex picture of judicial decisionmaking that new institutionalism offers to scholars of judicial behavior. These are excellent and thought-provoking books that should be on the reading lists of all students in the field.

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