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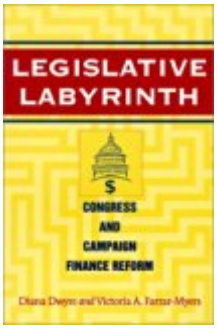
Diana Dwyre, Victoria A Farrar-Myers. *Legislative Labyrinth: Congress and Campaign Finance Reform.* Washington, DC: Congressional Quarterly Press, 2001. xii + 246 pp. $22.95 (paper), ISBN 978-1-56802-568-1.



Reviewed by Bradley A. Smith (Capital University Law School)
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The Legislative Process: Lost in the Labyrinth

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Most of us with an interest in legislation have, at some point, run across a single sheet diagram entitled "How a Bill Becomes Law." This diagram traces the formal path of a bill from its introduction through various formal steps (referral to committee; committee hearings; referral to floor; sent to other house; etc.) ending with the signature of the executive. Typically illustrated by running cartoon men, similar to those on "Chance" cards in Monopoly, hustling the bill from place to place, or by a speedy paper scroll with arms and legs dashing from one locale to another, the diagram has undoubtedly given thousands of American youngsters (and perhaps adults) the notion that legislating in the United States is a rather straightforward, simple process. Of course, those who devote even minimal time to public affairs soon realize that the path of legislation is anything but a straightforward, simple process. However, as authors Dwyre, associate professor of political science at Cal State University, Chico, and Farrar-Myers, assistant professor of political science at the University of Texas, Arlington, point out, there is a "lack of readable, interesting, and lively books about the modern legislative process"; their goal is to "help fill this gap" (p. xi).

The book takes the form of a case study of the tortuous, and ultimately unsuccessful, path of the Bipartisan Campaign Reform Act, better know to the public as the McCain-Feingold bill (in the Senate), the Shays-Meehan bill (in the House), or more generically, as campaign finance reform, through the Senate and House during the 105th Congress (1997-98).[1] The study draws on the authors' training as political scientists, and their positions as American Political Science Association Congressional Fellows in the U.S. House of Representatives during the 105th Congress.[2]

At first glance, the book would seem to have enormous potential. Dwyre and Farrar-Myers are talented, respected young political scientists, and, they were intimately involved with efforts to pass the Shays-Meehan bill in the House. Campaign finance reform is a well-studied issue and one on which most congressional representatives hold strong opinions. Though polls consistently show the issue to be a very low priority with voters, it presumably makes for a more entertaining read for the general public, or college students, than many other issues that congress must deal with, such as bankruptcy reform or ergonomics rules.

Unfortunately, there are also a number of conceptual problems with *Legislative Labyrinth*, of the type that only become clear in retrospect, and these ultimately overpower the book's pluses. For example, although the authors' positions as Congressional Fellows undoubtedly did provide them with "extraordinary access to the process, the players, and the events that shaped this contentious and hard-fought legislative battle," it may have brought them too close to the issue. Both worked for congressmen who were strongly in favor of the legislation (indeed, Prof. Farrar-Myers worked for lead sponsor,

Rep. Christopher Shays), and the two "attended meetings with the reform coalition members.... assisted in crafting legislation, produced supporting documents, conducted extensive background research, wrote numerous floor speeches for our House members, composed press releases, and made posters, voting cue cards, and other materials for use on the House floor during the campaign finance reform debates" (p. x). Just as the soldier in the trenches is usually less prepared to analyze the course of a battle than someone above the fray, the analysis in *Legislative Labyrinth* is often limited. The authors' closeness to one side may have given them extraordinary access to some elements of the fight, but it almost certainly closed off access to other elements and information. A collaboration between congressional fellows working on opposite sides of the legislation might have yielded more.

Further, while there is no question that the authors aim for an impartial discussion of the issues and devote substantial space to their opponents' arguments, in the end their intimate role in working for passage of the legislation leads the underlying substantive debate to be presented through the eyes of campaign finance reform partisans. For example, the book often refers to campaign activity as "technically legal," (see, *e.g.*, pp. 2, 22), as if candidates, campaign committees, and interest groups are doing something wrong when they comply with the law as written by Congress and interpreted by the courts. This is a favorite rhetorical trick of public advocates for reform who wish that the law regulated far more activity than it does, but in an academic book such phrases do more to mislead than to enlighten. This problem grows more acute when the authors take on the very difficult task of attempting to summarize and explain the thick layer of constitutional law that restricts and shapes efforts to regulate campaign financing.

For example, the U.S. Supreme Court, attempting to strike a balance between free speech and anti-corruption efforts, has held that the government may only regulate "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[3] Understanding this judicial compromise is essential to understanding the development of the law in the years since. The Court held that the compelling state interest in preventing corruption is sufficient, in those limited circumstances where the threat of corruption is greatest, to justify restrictions on what the Court recognized, correctly, as political speech. However, the Court severely restricted the reach of such regulation to direct contributions to candidates and to independent advertisements that contained these "express terms" of advocacy of election or defeat. Beyond that, the Court has held that citizens must be free to discuss political issues uninhibited by regulation, even though such speech (generally referred to as "issue ads") might influence election results. Further, because even the threat of prosecution can chill such political speech, any statute purporting to regulate political speech must include a bright line standard, so that speakers will know what is allowed and what is prohibited. For that bright line, the Court settled on the use of "express terms" that "advocate the election or defeat" of a candidate. Supporters of the Shays-Meehan bill have argued that this standard allows far too much political activity to escape regulation, and whether the Court's jurisprudence in this area is right or wrong is certainly open to debate.[4] Nevertheless, the standard, though controversial, is coherent and intellectually defensible. In what is probably best described as an effort to avoid addressing the important free-speech issues involved in this compromise, however, many in the campaign finance reform movement have taken to ridiculing the Supreme Court's test as requiring certain "magic words" to be uttered before speech can be regulated. Unfortunately, Professors Dwyre and Farrar-Myers adopt this interpretation and language, arguing that speech is only regulated if it contains certain "magic words" (*e.g.*, pp. 24-25, 42, 49-50).

The problem is that no appellate court in the United States has ever accepted a "magic words" test for determining whether or not an advertisement falls within the scope of regulation, and several have explicitly rejected such a test. As a result, such references do more to obscure than to enlighten the reader as to the important constitutional issues at stake and the difficult legal landscape within which regulatory efforts must operate. Of course, the authors are not experts in constitutional law, and so presumably relied on the work of regulatory proponents in this area. The result is that they accepted a description of the law which the courts have emphatically rejected, and this shapes the analysis that follows. It is hard to imagine such an error being made had the authors not been so close to the rhetorical arguments of regulatory proponents with a vested interest in discrediting, as a prelude to overturning, the legal status quo.

The authors' failure to understand the Supreme Court's test for determining express advocacy leads them to a misunderstanding of the Ninth Circuit's 1986 decision in *Federal Election Commission v. Furgatch*. They therefore state that the Ninth Circuit's standard for issue advocacy differs from that endorsed by the Fourth Circuit in *Federal Election Commission v. Christian Action*

Network, a 1996 case. In fact, while this has been the interpretation offered by various reform advocacy groups, the courts have rejected this analysis. Most specifically, the Fourth Circuit noted that the two cases are indeed in harmony, and that any opinion to the contrary is a "misreading of the Ninth Circuit's decision in *Furgatch*" and a "profound misreading" of *Buckley v. Valeo*.[5] Having interpreted *Furgatch* in a manner contrary to the courts, the authors are led to misunderstand the constitutional and legal background involved elsewhere, as when, for example, they argue that the Federal Election Commission had adopted *Furgatch's* test of "express advocacy" in its regulations (p. 52). In fact, the FEC regulation in question has been repeatedly struck down by federal courts precisely because it does not properly adopt the *Furgatch* test, but instead relies only on part of *Furgatch*.[6] There are, of course, respected legal scholars who share the interpretation the authors give to these court decisions – I do not suggest that these are silly or specious interpretations. But such interpretations have clearly been rejected, to date, by the federal courts, and understanding what the courts are doing is necessary to understand the constitutional background against which campaign finance reform has played out.

This type of unintentional bias shows up repeatedly. Proposed amendments to the Shays-Meehan bill are labeled "poison pill[s]" (p. 53); opponents' amendments are not referred to by their sponsors' designations, but rather as, for example, "*so-called* paycheck protection" (p. 53) (emphasis added). Similarly, the book references "so-called issue advocacy" (p. 51); a proposed amendment to the bill by Congressman John Doolittle, an opponent of the legislation, is described as an effort to " 'fix' " a problem, with "fix" placed in quotation marks as if it were a foreign word (p. 159), and no apparent thought was given to the possibility that Rep. Doolittle actually hoped to improve the bill. (The Doolittle Amendment went to the question of "express advocacy" versus "issue advocacy," the core issue in cases such as *Furgatch*. Thus the failure to appreciate the reigning judicial interpretation of *Furgatch*, discussed above, may have lead to excessive skepticism about Doolittle's efforts.) I am not attempting to nitpick here. Rather, these examples are symptomatic of an approach that accepts the reform advocates' arguments more or less at face value, while questioning the motives and arguments of opponents. All of this would be fine if the book were intended to be an advocacy piece. But it is a serious weakness in a book that wants to be an objective study of why a bill advanced as far as it did, why it eventually failed, and how the legislative process works.

Having been thoroughly engaged in the partisan efforts on the same side of the legislation, the authors miss things that they ought to see. To give one substantive example, they argue that support from wealthy business executives Jerome Kohlberg, Warren Buffett, Raymond Plank and others "sent a message to the Republicans that leaders in the business community, perhaps the most important GOP constituency, strongly supported campaign finance reform" (p. 96). Having such support may have been a propaganda coup for Shays-Meehan with the general public, which may accept a cartoonish caricature in which all businessmen are Republicans. However, anyone with access to the Republican leadership knows that that leadership was not much impressed to find that the reform movement had garnered the support of such businessmen, all of whom were well known as political liberals and as substantial donors to both liberal causes and Democratic Party politicians (Plank being a donor to candidates on both sides of the aisle). Warren Buffett is simply not part of any GOP constituency, let alone its "most important" constituency. *Legislative Labyrinth* might have ameliorated this deficiency in perspective by looking elsewhere, but although the book does quote extensively from arguments raised in public by the bill's opponents in Congress, the book's notes, its index, and its acknowledgements (there is no bibliography) are nearly void of names of, or titles of works by, prominent academic, legal, or journalistic critics of reform.

Another unanticipated problem for the book may be the campaign finance issue itself. Campaign finance is not a typical issue, and may therefore be a particularly bad issue from which to try to draw general lessons about the legislative process. Unlike issues such as abortion, social security, or tax policy, it is of little interest to the broad public–opinion polls consistently rank it at the bottom of any list of voter priorities. Neither is it an issue, such as a tariff, that may be off the radar screen of the public but heavily fought over by lobbyists representating competing economic interests. However, unlike most issues, it draws the intense interest of the press (in the first seven months of 2001 the *New York Times* ran over thirty editorials on campaign finance reform). And unlike most issues, every member of congress presumes to be an expert in the field, and, as the authors note (p. 101), each has a direct interest in the shape of the legislation. Granted, every issue differs from all others in some way; yet we can still fairly say that debates on campaign finance reform are truly unique in ways that debates over other issues are not. Thus I am not certain that the lessons

learned in *Legislative Labyrinth* can be generalized.

The issue is different from most issues facing congress in another way as well, one that poses another problem for this type of book, and that is in its complexity. Of course, many issues are complex, but few bring the constitutional baggage of campaign finance reform. This creates a very difficult task for the authors. For example, they are forced to devote substantial pages to constitutional issues and court rulings, including the bulk of Chapter Two. Much of this is heavy going for the general reader, and as I've noted, efforts to reduce complex constitutional doctrines to simple phrases such as "magic words" are not always helpful. Yet the book's intended audience seems to be the general public or undergraduate students who have not studied politics extensively. So, for example, we are presented with passages such as this: "this was a first step in a long process to bring together reform members from both sides of the aisle (that is, from both parties)" (p.115). It is unlikely that many readers who would not know the meaning of the phrase "from both sides of the aisle" would read this far in *Legislative Labyrinth*. Similarly, a footnote explains that, " 'GOP' stands for 'Grand Old Party,' a name used for the Republican Party" (n. 28, p. 18). To cite just one more example, on page 145 the authors tell us that "[p]arty leaders generally have an easier time accomplishing the party's collective legislative goals when party unity is high and a more difficult time when it is low...." Indeed.

All of this is an effort to understand why and where this promising book may have gone astray. There is good material here, but it is too often lost in the background. The book is at its best when it is able to shed the baggage of explaining the complicated law or theoretical arguments behind campaign finance reform, and instead is able to focus on the procedural action in the trenches. We see congressmen at their ignorant worst (for example, mistakenly signing on to a discharge petition for the wrong bill), and at their entrepreneurial best – some of the strongest passages are those describing the development of the Shays-Meehan Bill's lead sponsors into "policy entrepreneurs," working both inside congress to garner votes, and outside congress to build public support and pressure. Chapter Six, on the "External Issue Network," is an insightful explanation of the role of interest groups and the press in the process. I would have liked more here, for the role of the press in keeping an issue which evokes little public passion on center stage strikes me as perhaps the most interesting part of the story, but what we do get is quite good.

Certainly no young student or capitol tourist who reads *Legislative Labyrinth* will again be fooled by the cute graphics and straightforward diagrams of "How a Bill Becomes Law." Unfortunately, the difficult task of explaining the complex, underlying substantive issue drags hard on the authors' efforts to keep this a "readable...lively" book. And though their positions in congress did indeed give them access to inside information and detail, the similarities of their experiences–both were working hard to pass the legislation–appear to have limited their appreciation of the arguments and tactics of the bill's opponents, a significant weakness given that the bill ultimately failed to pass. Perhaps the greatest lesson of *Legislative Labyrinth* is that, as difficult as it is to understand the labyrinth from above, it may be even harder to describe the maze when one is feeling one's way through it.

Notes:

(The reviewer is currently on leave while serving as a Commissioner on the Federal Election Commission. The views expressed in this review are solely those of the author and should not be attributed to the Commission or its other commissioners.)

[1]. The bill ultimately did not pass in the 105th Congress. The bill has been reintroduced in various forms in the 106th and 107th Congresses as well, so far without passing.

[2]. The two worked in the House from November 1997 to August 1998.

[3]. See *e.g. Buckley v. Valeo*, 424 U.S. 1 (1976).

[4]. I have argued extensively that on this issue, it is, if anything, underprotective of political speech. Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform*. Princeton, N.J.: Princeton University Press, 2001, pp. 109-166. To further come clean, it should be noted that I testified against the McCain-Feingold legislation in the 105th Congress.

[5]. *Federal Election Commission v. Christian Action Network, Inc.*, 110 F. 3d 1049, 1061-62 (4th Circuit 1997).

[6]. *See e.g. id* at 1054, n. 5; *Virginia Society for Human Life, Inc. v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000) (issuing a nationwide injunction against continued FEC enforcement of the regulation, which is 11 C.F.R. 100.22(b)).

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