

A POLICYMAKING CHECKLIST FOR THE LEGISLATIVE PROCESS

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I. INTRODUCTION

How public policy is made has long been of interest to those who study politics and law. Public policy takes the form of legislation, executive orders, local ordinances, court decisions, administrative rulemaking, and other actions taken by public institutions. Given our constitutional framework and representative democracy, much of our interest in policymaking focuses on the legislative process, whether in Congress or in statehouses across the nation. Among the subjects to be considered in relationship to legislative processes and politics is the manner in which legislation is developed. There is a substantial interest in studying the process by which policy evolves from an idea to finished form. In this regard, a priority is to understand the nature of the policymaking process and the features of its landscape. A very popular approach has been to map the stages of policy development through issue definition or agenda setting, to proposal development, and subsequent phases of policy adoption, implementation, and evaluation.¹ This heuristic has influenced

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¹ The depiction of policymaking as a process involving agenda setting, policy formulation, adoption, implementation, and evaluation is a widely and long used model in policy studies, political science, and public administration. It draws its roots from decision making theory.

both theoretical analyses and practical guides to policymaking. The foci of attention and the intended audiences of these works vary, but when considered collectively, distilled into common principles, and adapted to the realities of legislative policymaking, they can be very helpful in developing a “checklist” to aid in developing legislation. This article provides a checklist of twelve diagnostic questions that combines an appreciation for the underlying institutional, political, and practical matters that shape the development of legislation. Further, the checklist encourages those developing policy to be searching in considering analogs, comparative experiences, and in forecasting policy implementation needs to aid in creating and proposing legislation.

II. THE CHECKLIST

The purpose of this Article is to provide those advocating or considering proposed policy action with a set of twelve diagnostic questions. The list draws on the policy process model described above as well as various descriptions and guides to how policy *should* be made, analyzed, and evaluated.² This checklist can be a useful aid in making sound policy decisions and in evaluating proposals that are put forth by others. The Checklist comprises of the following questions:

Charles Lindblom discusses four stages of the rational decision making process these being “(a) preliminary appraisal of or inquiry into the problem, (b) identification of goals or objectives, (c) canvassing of possible policies to achieve the goals, and (d) choice of decision.” CHARLES E. LINDBLOM, *THE POLICY-MAKING PROCESS* 4 (Prentice-Hall 1968). These elements have become a foundation of discussion of decision and policymaking and still retain their popularity. *Id.* For further illustration and discussion in the application of the model to policy analysis see MICHAEL E. KRAFT & SCOTT R. FURLONG, *PUBLIC POLICY: POLITICS, ANALYSIS, AND ALTERNATIVES* 97–122 (Cong. Quarterly Press 2010); GROVER STARLING, *MANAGING THE PUBLIC SECTOR* 209–10 (Harcourt Brace Coll. Publishers 1998). For a discussion of how the model is used to describe policymaking stages see JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (Harper Collins 2d ed. 1995) and Paul A. Sabatier, *Toward Better Theories of the Policy Process*, 24 PS: POL. SCI. & POL. 144 (1991).

² A number of very helpful guides to policymaking have emerged in recent years and have proven valuable in the preparation of this Article. These include: EUGENE BARDACH, *A PRACTICAL GUIDE FOR POLICY ANALYSIS: AN EIGHTFOLD PLAN FOR MORE EFFECTIVE PROBLEM SOLVING* (Cong. Quarterly Press 2011); RICHARD NATHAN, *SOCIAL SCIENCE IN GOVERNMENT: THE ROLE OF POLICY RESEARCHERS* (Rockefeller Inst. Press ed. 2000); BERYL RADIN, *THE ACCOUNTABLE JUGGLER: THE ART OF LEADERSHIP IN A FEDERAL AGENCY* (Cong. Quarterly Press 2002); GEORGE E. SHAMBAUGH IV & PAUL J. WEINSTEIN JR., *THE ART OF POLICYMAKING: TOOLS, TECHNIQUES, AND PROCESSES IN THE MODERN EXECUTIVE BRANCH* (Longman 2003); CATHERINE SMITH, *WRITING PUBLIC POLICY: A PRACTICAL GUIDE TO COMMUNICATING IN THE POLICY-MAKING PROCESS* (Oxford Univ. Press 2005). TOMMY NEAL, *MAKING YOUR CASE: HOW TO WIN IN THE LEGISLATURE* (Nat’l Conference State Legislatures 2005) [hereinafter NEAL 2005a] and TOMMY NEAL, *LEARNING THE GAME: HOW THE LEGISLATIVE PROCESS WORKS* (Nat’l Conference State Legislatures 2005) [hereinafter NEAL 2005b] provide quick digests for policy development and advocacy in the state legislative context. The complexities of the lawmaking process are reviewed in ALAN ROSENTHAL, *HEAVY LIFTING: THE JOB OF THE AMERICAN LEGISLATURE* (Cong. Quarterly Press 2004).

1. How do *you* define the issue you are addressing?
2. Why is the issue important now?
3. Is legislative action the best means of addressing the matter?
4. If legislative action is in order, what is the purpose or intent of your proposal?
5. How can your proposal be informed by comparable actions taken on this or similar issues?
6. Are there potential negative “spill-over effects” or “unintended consequences” of your proposal that can be identified and addressed now?
7. What is your time frame for adopting the proposal as policy?
8. Does your proposal take into account the realities of the legislative arena?
9. Does your proposal complement existing policies, institutional arrangements, and practices?
10. Specifically, what types of “policy tools” are part of your proposal that will influence and alter behavior toward desired ends?
11. Does the proposed legislation contain well-defined objectives and benchmarks that will allow for future policy review and assessment?
12. Is your proposal superior to others?

This Article addresses each of the questions by exploring them under three broad organizing themes. The first, second, third, and fourth questions invite consideration of the manner in which problems and solutions are interpreted and constructed in the legislative context. A second theme involves the need for policy advocates to do “due diligence” in researching and developing policy proposals, which will benefit by adhering to points five and six in the checklist. As sound as any proposal might be in terms of policy logic, advocates must also consider how political and governmental arrangements will be navigated. Here, the points raised in questions seven through eleven are worth considering. The final question in the checklist—“Is your proposal superior to others?”—is contingent on how well the previous questions have been taken into consideration.

III. POLICY ISSUES AND POLICY RESPONSE: THE IMPORTANCE OF DEFINITIONS, TIMING, AND CONTEXT

The first question for a policy advocate is “*how do you define the issue you are addressing?*” Much of what we call politics is issue definition—persuading others of the need to address a matter of concern, setting the agenda for action, and convincing others that a proposed policy solution or response is the best course of action. It was long ago observed that, “issue definition is by no means an *a priori* given. The conflicting parties will not necessarily agree how the issues are to be defined.”³ It has also been noted that, “[i]deas are at the center of all political conflict. Policymaking, in turn, is a constant struggle over the criteria for classification, and the definition of ideals that guide the way people behave.”⁴ It follows that how an issue is defined will also influence the character of the policies that are developed to address the matter. We should consider the observation that, “The definition of alternatives is the supreme instrument of power” in politics and policymaking.⁵

Understanding the construction of issue definitions and answers helps improve our understanding of, and contributions to, the policymaking process. The casual observer of current events will see issue definition activities at play on a regular basis. For example, in Appalachia the future of the coal industry is in question. While the evidence is clear that coal production is declining in our state, different interests offer competing interpretations of the reasons why this is happening. For some, the problem is the product of onerous federal regulations hobbling the coal industry. For others, the problem is a reflection of changing market conditions where coal can be more inexpensively mined elsewhere or where alternative forms of energy, such as natural gas, are seen as more viable for end users, such as power plants. The definition of the problem in turn influences solutions and remedies. For those who see the problem primarily as regulatory, the appropriate policy response is to force action to soften or rescind policy.⁶ For those who see more systemic forces at work, the solutions focus on adopting policies that will assist in transitions to more diverse and sustainable economic activities.⁷

³ ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 101 (Johns Hopkins Univ. Press 1983).

⁴ DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 7 (1988).

⁵ E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA 68 (Dryden Press 1975).

⁶ For reviews of how the future of the coal industry has been defined see John Cassidy, *Obama’s “War on Coal” is Worth Fighting*, THE NEW YORKER (June 2, 2014), <http://www.newyorker.com/news/john-cassidy/obamas-war-on-coal-is-worth-fighting>; Michael Grunwald, *Inside the War on Coal*, POLITICO (May 26, 2015, 11:45 PM), <http://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002>.

⁷ See, e.g., Valerie Volcovici, *In Kentucky, Talk of ‘War on Coal’ Gives Way to Hope for New Economy*, REUTERS (June 4, 2015, 9:39 PM), <http://www.reuters.com/article/2015/06/05/us-coal-usa-kentucky-insight-idUSKBN0OK0CE20150605#rxRVdfumrVzhTc3L.97>.

A second question that must be asked is, “*Why is the issue important now?*” Most issues have been in circulation for some period of time. It’s really quite difficult to imagine a completely new issue that has not been discussed, considered, or even acted on before. Various factors precipitate attention and focus toward an issue. The catalysts can be readily apparent or more subtle. In the case of the former, an unexpected event, such as a natural or manmade disaster, can concentrate interest on an issue. Political scientists tend to call such events “triggering devices” or “focusing events” that disrupt established order and generate policy attention and issue deliberation.⁸ Unfortunately, West Virginia is no stranger to disaster. Two recent examples illustrate the case in point. In January 2006, the mine explosion at the Sago Mine in Upshur County, West Virginia, focused policy and public attention on mine safety and the need to pass legislation strengthening mine safety. In the winter of 2014, a chemical spill in the Elk River that threatened the Kanawha Valley’s water supply led to the adoption of legislation aimed at regulating chemical, fuel, and other storage tanks. Both events, occurring at the start or early in legislative sessions disrupted set agendas and focused attention on policy responses. In January 2006, Senate Bill 247, “The Mine and Industrial Accident Rapid Response System” was passed into law.⁹ In January 2014, Senate Bill 373 was passed into law and focused on water protection through the establishment of the Aboveground Storage Tank Water Resources Protection Act and through amendments to the Water Resources Protection and Management Act.¹⁰

More discrete events—perhaps signifying a problem and occurring over time—can culminate and force attention. Momentum for action gradually builds. This has been described as reaching the “tipping point.”¹¹ For example, the culmination and convergence of concerns over juvenile justice systems has led to a proliferation of legislation across the states aimed at reforming these systems by reexamining past legislation and policies that were more punitive in nature.¹²

⁸ For a discussion of triggering mechanisms and their effect on policy arrangements, see COBB & ELDER, *supra* note 3, at 84–85 (1983), and FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 99–105 (Univ. of Chi. Press 1993). For a discussion of focusing events, see JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (Little, Brown 1984).

⁹ S. 247, 77th Reg. Sess. (W. Va. 2006) (enacted), http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=SB247%20SUB1%20enr.htm&y r=2006&sesstype=RS&i=247.

¹⁰ S. 373, 81st Reg. Sess. (W. Va. 2014) (enacted), http://www.legis.state.wv.us/Bill_Text_HTML/2014_SESSIONS/RS/pdf_bills/SB373%20SUB2%20ENR%20PRINTED.pdf.

¹¹ MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (Little, Brown & Co. 2000).

¹² SARAH ALICE BROWN, *TRENDS IN JUVENILE JUSTICE STATE LEGISLATION, 2011–2015*, NCSL (2015), http://www.ncsl.org/documents/cj/Juvenile_Justice_Trends.pdf.

A policy decision or action taken by another political institution can focus attention on an issue. For example, the United States Supreme Court's decision in *Kelo v. City of New London*¹³ regarding eminent domain did less to settle a policy question than to reframe it as a matter for state and local consideration.¹⁴ Between 2005 and 2011, 42 states passed legislation or adopted ballot measures aimed at regulating eminent domain practices.¹⁵

Similarly, political movements at the national level may influence the agendas of state legislatures. For example, in recent decades, issues relating to abortion rights and gun control are evidence of national issues at work in the state legislative process.¹⁶ As these issues evolve and change with time, so does the tenor and content of policy debate. Thus in the 2015 regular session of the West Virginia legislature, two controversial bills were passed only to be vetoed by the governor. One bill, Senate Bill 347, the "Creating Firearms Act of 2015" focused on loosening concealed weapons permit requirements.¹⁷ Another, House Bill 2568, "The Pain Capable Unborn Child Protection Act" echoed and reflected sentiments being expressed in other states and at the national level.¹⁸ Citing concerns over the constitutionality of the bill, West Virginia's Governor Earl Ray Tomblin (Governor Tomblin) vetoed the legislation.¹⁹ In a rare move, the legislature overturned the veto.²⁰

Policy advocates should not be too quick to assume that new legislation is the solution. It is important to ask, "*Is legislative action the best means of addressing the matter?*" Developing public policy requires an appreciation for context and practicality. Will the new law, policy, or program be workable and effective? Among the basic questions of governance that need to be taken into account when considering proposed policy action are: (1) whether the matter is one that is appropriate for government action, (2) assuming that it is so, determining the level of government to be responsible for the action, and (3) determining the methods that should be utilized to implement the policy.²¹ Realizing that legislation may not always be the best answer is important.

¹³ 545 U.S. 469 (2005).

¹⁴ *Id.*

¹⁵ Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NCSL (Jan. 2012) <http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx>.

¹⁶ ROSENTHAL, *supra* note 2, at 70–71.

¹⁷ S. 347, 82d Reg. Sess. (W. Va. 2015) (enacted), http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/pdf_bills/SB347%20SUB1%20enr%20PRINTED.pdf.

¹⁸ H.B. 2568, 82nd Reg. Sess. (W. Va. 2015) (enacted), http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=2568&year=2015&sessiontype=RS.

¹⁹ Letter from Earl Ray Tomblin, Governor, W. Va., to Tim Armstead, Speaker, W. Va. House of Delegates (Mar. 2, 2015), <http://www.governor.wv.gov/Documents/HB2568veto.pdf>.

²⁰ Gwen Wygal, *Legislature Unites to Protect the Unborn*, W. VA. LEGISLATURE: WRAP-UP (Mar. 6, 2015) http://www.legis.state.wv.us/Wrapup/2015/issue_06/wrapup.cfm.

²¹ RADIN, *supra* note 2, at 45.

There may be other remedies available which are more practical and suitable to the situation at hand. For example, the courts, the administrative process, or the market arena may prove to be better venues.

Intergovernmental context is of considerable importance to state level policy makers and policy advocates. It may well be that the more appropriate level of action is at the federal level. Regardless, at the state level, the influence and constraints of the federal government must constantly be taken into account. It is not unusual for policies to be proposed that may be held unconstitutional under the United States Constitution or contradict existing federal law. Thus, in vetoing House Bill 2568, Governor Tomblin expressed concerns that it was “unconstitutional under controlling precedent of the Supreme Court of the United States.”²² Because legality and constitutionality are often in the eyes of the beholder, the advocate for a new course of legislative action should always have in mind potential legal challenges that may arise in the course of legislative development and its enactment. Be it in regard to federal or state law, it is crucial to consider whether the proposed legislation complies with or contradicts existing law.

Along with constitutional and legal compatibility, many policy analysts agree that issues relating to the fiscal and administrative feasibility of proposed policy actions should be given consideration.²³ The capacity to govern and serve is directly related to the availability of revenue and resources. At both the state and federal level, there is mounting concern over the capacity and ability of government to spend and obligate itself to new programs. The fiscal implications of proposed legislation must be considered. In many states, such as West Virginia, proposed legislation requires a “fiscal note.” Apart from this legal and technical requirement, debates over proposed legislation are more often than not likely to turn on matters of cost—whether they be appropriated or whether they are born as “unfunded mandates” by other governmental entities, by citizens, or the private sector.

Relatedly, the practicality of the proposed legislation in terms of its eventual implementation and management needs to be considered. To be successful, law must be implemented effectively. The challenge to successful implementation is whether policy design can be translated into action and adapted to changing contexts and needs. The complexities of governance require that policy implementation be delegated to other actors, such as agencies, lower levels of government, and private contractors. Effective policy design should include safeguards to provide guidance to these actors.

The chances of any piece of legislation becoming law are exceedingly small. Far fewer bills are passed than introduced, and this has long been the

²² Letter from Earl Ray Tomblin, Governor, W. Va., to Tim Armstead, Speaker, W. Va. House of Delegates (Mar. 2, 2015), <http://www.governor.wv.gov/Documents/HB2568veto.pdf>.

²³ See BARDACH, *supra* note 2, at 31–34; KINGDON, *supra* note 1, at 131–39; KRAFT & FURLONG, *supra* note 1, at 116; RADIN, *supra* note 2, at 45.

case in American public policymaking.²⁴ It is for this reason, policy advocates should ask, “*If legislative action is in order, what is the purpose or intent of your proposal?*” The mortality rate for proposed legislation is high. For example, during the 2015 regular legislative session in West Virginia, 1,607 bills were introduced in the House and Senate combined. Of these bills, 262 were passed and 18 were subsequently and successfully vetoed by the Governor. Thus the success rate was little better than 15%.²⁵ This pattern is consistent across the states and across time.²⁶ Given these odds, policy advocates need to carefully consider the purposes of their legislative proposal.

Legislation may be introduced to place an item on the legislative agenda and to engender discussion in the body and in the general public. A bill can serve as a foundation of a hearing and extended deliberation on a topic of concern. This can help in framing an issue, its various elements, and in sketching-out some potential solutions and actions to address a problem or issue.²⁷ Similarly, a bill can serve as a counter weight or counter attack in the legislative process. Legislation may be proposed to counter a proposal already under consideration. Legislation may be introduced to offer alternative ideas and recommendations for those contained in a bill already under consideration. A variety of alternatives placed in circulation are often combined in the final legislation that emerges.

Legislation may be introduced as a means of sending a message or signal to an agency or bureau to correct a problem in policy implementation. This signaling can result in new administrative behaviors, heightened sensitivity to a particular issue among the public and by the media, and subtle messaging to the courts about policy preferences. Proposing legislative action may have the desired effect of prompting response and corrective action by other institutional actors. A clear message can be sent when a bill is introduced that threatens the autonomy, discretion, or resources of an agency. In short, proposed legislation and its attendant activities can be a very powerful oversight tool.

Self-promotion and self-preservation play a role in the legislative process. Legislation may be offered to draw attention to a legislator seeking higher visibility or attention in the institution and in the public arena or simply reassurance to constituents that the he or she is on the job. Standing tough on an issue or otherwise being associated positively with an issue can be as much a claim to success as actually shepherding a bill through the legislative process. Demonstrating this ability and effort can be quite important at election time.

²⁴ DAVID VOGLER, *THE POLITICS OF CONGRESS* 29 (Brown & Benchmark 6th ed. 1993).

²⁵ See generally *Bill Status—2015 Regular Session*, W. VA. LEGISLATURE, www.legis.state.wv.us/Bill_Status/bill_status.cfm (Last visited Jan. 13, 2016).

²⁶ ROSENTHAL, *supra* note 2, at 60–61.

²⁷ See COBB & ELDER, *supra* note 3; KINGDON, *supra* note 1.

IV. DUE DILIGENCE IN POLICY DESIGN: LEARNING FROM OTHERS AND ANTICIPATING CONSEQUENCES

In crafting new legislation, policymakers seek to learn “across both time and space” in order to fashion new policy.²⁸ An essential question to ask in policy development is, “*How can your proposal be informed by comparable actions taken on this or similar issues?*” There are many resources to draw on in developing and designing policy. An inventory of sources of legislative influence and inspiration in bill drafting and policy development for state legislation include (1) experiences in other states; (2) experiences at other levels of government in our system and abroad; (3) past experience drawn from a state’s own history or from the history of others; (4) experience from outside of the public sector, such as found in the for-profit and non-profit sectors, may be relevant as well; and (5) the personal beliefs and experiences of those shaping legislation. Reviewing prior experience also allows us to consider if and how an issue has been dealt with before.

A number of political scientists and policy analysts have offered advice to help us in both understanding and practicing public policy development. In her guide to policy writing, Catherine Smith stresses that advocates should identify, among other things, commonalities between the proposed action and others.²⁹ Eugene Bardach suggests to the policy analysts that options or alternatives should be developed and that careful assessment should be given as to which one is superior to others.³⁰ John Kingdon reminds analysts that many ideas that appear popular now have been advocated and tried before.³¹ Because new issues are rare, most have long histories or close analogs. Various guides and handbooks for policy development stress the importance of gathering information, presenting evidence, and developing background on the issue at hand.³² What will most likely be found in this process is that the issue has been discussed, and perhaps addressed, in one way or the other. Understanding legislative antecedents and analogous statutes is essential to developing a new policy proposal. A review of the legislative record can help uncover whether and how the issue has been addressed in the past.³³ It will also provide further context on how the proposed legislation might interact with preexisting law and policies.³⁴ The reach of this research should extend beyond the immediate legislative arena where the policy is to be considered to include administrative

²⁸ RICHARD ROSE, LESSON DRAWING IN PUBLIC POLICY: A GUIDE TO LEARNING ACROSS TIME AND SPACE 16 (1993).

²⁹ SMITH, *supra* note 2, at 66.

³⁰ BARDACH, *supra* note 2, at 52–53.

³¹ KINGDON, *supra* note 1, at 139–43.

³² See BARDACH, *supra* note 2; SMITH, *supra* note 2.

³³ See SMITH, *supra* note 2, at 42–44

³⁴ *Id.* at 42.

and judicial actions, as well as actions taken elsewhere in other states and levels of government.³⁵

There are many sources of policy knowledge that can contribute to shaping legislation. These include members of the legislature, legislative staff, legislative auditors and research organizations; the chief executive and his or her staff; administrative agencies; scholars and think tanks; interest groups; and citizens.³⁶ In addition, it is now common for consultants to be retained by legislatures and agencies to develop programs and policies. Professional associations and groups that represent state actors and interests are another important resource for policy development. For example, the National Governors Association tracks and takes positions on policies and studies program implementation.³⁷ The National Conference of State Legislatures (NCSL)³⁸ and the Council of State Governments (CSG)³⁹ provide a conduit for interaction and communication for legislators and legislative staff across the states. Each conducts studies on state trends and legislation, maintains archives of legislation for research and study, and provides insights on what is happening in state legislatures. These and other organizations are dedicated to inventorying best practices and providing model legislation and practices for others to consider.

In legislative development, it is common to utilize “model legislation.” Developed by professional associations, interest groups, and others, these serve as templates that guide legislative development for a specific policy or program. For example, in the 1990s, the National Association of Insurance Commissioners developed model legislation for establishing high-risk health insurance programs in the states. The template included elements familiar to those involved in bill drafting. There were dedicated sections to definitions and administrative responsibilities, as well as specific provisions relating to authority, funding, and effective dates of enactment.⁴⁰ This model legislation guided the development of high-risk pools in many states, including West Virginia which utilized the model legislation in developing Senate Bill 161, the “Creating Model Health Plan for Uninsurable Individuals Act” in 2004.⁴¹ However, it is important to remember that model legislation must be tailored to specific state contexts and conditions. Such was the case in West Virginia

³⁵ SMITH, *supra* note 2, at 45.

³⁶ ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 231 (Cong. Quarterly Press 7th ed. 2000).

³⁷ See NATIONAL GOVERNORS ASSOCIATION, <http://www.nga.org> (last visited Jan. 12, 2016).

³⁸ NCSL, <http://www.ncsl.org> (last visited Jan. 12, 2016).

³⁹ CSG, <http://www.csg.org> (last visited Jan. 12, 2016).

⁴⁰ See COMMUNICATING FOR AGRIC. AND THE SELF-EMPLOYED, INC., COMPREHENSIVE HEALTH INSURANCE FOR HIGH RISK INDIVIDUALS: A STATE-BY-STATE ANALYSIS 269–86 (18th ed. 2005).

⁴¹ S. 161, 76th Reg. Sess. (W. Va. 2014) (enacted), http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=SB161%20SUB1.htm&yr=2004&sesstype=RS&billtype=B&houseorig=S&i=161.

where the Act was subject to technical corrections and clarifications as Senate Bill 3005 during the third special session of the legislature in 2004.⁴²

The question of what works and what fits is at the heart of policy learning and emulation. Those who believe that policy can be taken directly off the shelf are likely to be disappointed with implementation. Without adjustment and amendment, what works in one context might not necessarily work in another context. When seeking inspiration in policy design it is not enough to consider the design of other legislation alone. It is crucial to gain insight on the implementation experiences of others who have developed policies and programs similar to those which are at hand. Policy advocates should avoid the “bandwagon effect” that assumes that new policy will be successful without having credible evidence from implementation experiences.

Because of the risk of failure or negative impact it is important for policy advocates to ask, “*Are there potential negative ‘spill-over effects’ or ‘unintended consequences’ of your proposal that can be identified and addressed now?*” The implementation experiences of similar or analogous policies and programs should be reviewed in order to prevent potential design flaws. Eugene Bardach has noted that “projecting outcomes” is crucial.⁴³ One means of considering potential difficulties in implementation and negative consequences is to consider the feasibility of applying policy change. An early authority in the study of policy implementation, Richard Elmore, encouraged “backwards mapping” in policy analysis. This conceptual approach encourages tracing policy experience from application back to creation. By evaluating the experiences of other policies, we can anticipate some of the possible bottlenecks, pitfalls, and obstacles in designing and implementing a new policy.⁴⁴

V. NAVIGATING THE POLITICAL AND GOVERNMENTAL LANDSCAPE

A handbook on policy advocacy by the National Conference of State Legislatures counsels lobbyists and other stakeholders in policy advocacy to exercise patience and that “Some legislation, especially if it represents a new approach or a significant departure from the way things have always been done, can take several years to win the support necessary for enactment.”⁴⁵ Thus, it is practical to ask, “*What is your time frame for adopting the proposal as policy?*” Advancing new policy ideas requires a considerable investment of resources,

⁴² S. 3005, 76th Leg., 3d Spec. Sess. (W. Va. 2004), http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb3005%20enr.htm&yr=2004&sesstype=3X&i=3005.

⁴³ BARDACH, *supra* note 2, at 38.

⁴⁴ Richard Elmore, *Backward Mapping, Implementation Research and Policy Decision*, in *STUDYING IMPLEMENTATION: METHODOLOGICAL AND ADMINISTRATIVE ISSUES* 18–35 (Chatham House Press 1982).

⁴⁵ NEAL 2005a, *supra* note 2.

patience, and willingness to work with others. It also demands an understanding of the long-term process of making and achieving policy results. A specific legislative proposal is but one step in the process. Proposed legislation, even if not passed, can play a catalytic role in prompting change and action. It may take years for an idea to be transformed into law. Thus a question to be asked is: Are you satisfied with laying the groundwork and setting the agenda to raise awareness and to prepare for future action? Or is there the need for immediate action?

Understanding timing issues is closely related to addressing the question, “*Does your proposal take into account the ‘realities’ of the legislative arena?*” As policy design moves from the conceptual to the practical, more specific consideration needs to be given to the time and place where a proposal is offered. It is crucial to understand the political and institutional context.⁴⁶ It is also important to understand that much of the legislative agenda is already set. There is little on the agenda that is discretionary and competition for time and attention can be intense. This is true at the state and national level, where legislatures must take-up regularly scheduled and major items, such as budget and appropriations bills and the reauthorization of existing laws and statutes. Like many other states, West Virginia has a strong legislative leadership that sets the agenda for a short legislative session. They exercise considerable influence over the calendar and when and if a bill comes to the floor. This control extends to the committee process as well.⁴⁷

Proposed legislation should serve as an effective vehicle for deliberation and action. Complex institutional structures, the nature of democratic bargaining and conflict, fragmented committee structure, and allowances for deliberation and amendment remind us that proposed legislation is more likely to be catalytic than controlling. In other words, introducing a piece of legislation may set into motion a series of events in the policymaking process. A bill is simply a working document that will be shaped in deliberation. A matter worthy of legislative action is likely to generate multiple and often competing policy recommendations. A proposed bill is not likely to survive the legislative process without some form of revision and change. Policy change requires trade-offs, compromises, and the commitment of scarce resources.

The National Conference of State Legislatures advises that understanding the legislative process, its rules and regulations, its traditions and organizational culture, and its current agenda are prerequisites to advancing a policy proposal or agenda.⁴⁸ The Conference also advises those developing

⁴⁶ For excellent overviews of the state legislative environment and process, see ROSENTHAL, *supra* note 2, and RALPH G. WRIGHT, *INSIDE THE STATEHOUSE: LESSONS FROM THE SPEAKER* (Cong. Quarterly Press ed. 2006).

⁴⁷ RICHARD A. BRISBIN, ROBERT J. DILGER, ALLAN S. HAMMOCK & L. CHRISTOPHER PLEIN, *WEST VIRGINIA POLITICS AND GOVERNMENT* 86–89 (Univ. of Nebraska Press 2008).

⁴⁸ NEAL 2005a, *supra* note 2; NEAL 2005b, *supra* note 2.

policy to remember the complexity of the legislative process by noting, “One thing that makes it mysterious, unpredictable and difficult to understand is that it is not a rational process.”⁴⁹

Developing policy for the future requires us to be careful students of history. The past greatly shapes the range of choice. It is essential to ask, “*Does your proposal complement existing policies, institutional arrangements, and practices?*” Current program and policy choices are constrained by policy decisions made in the past.⁵⁰ These constraints can be deeply embedded in our system, such as the constitutional framework that reserves substantial powers to the federal government over state development and implementation of policy. These constraints can be legal, foreclosing options due to existing laws and protections. And these constraints can be linked to resources in context of the monies that have already been obligated, the institutional sources already committed, and the political energies already spent on other policies and programs.

By understanding the underlying landscape of policy action, the type of policy tools to be used can then be considered. “*Specifically, what types of ‘policy tools’ are part of your proposal (e.g. incentives, inducements, sanctions) that will influence and alter behavior toward desired ends?*” Those unfamiliar with public policy may think that legislation tends to be controlling in nature and laced with penalties and sanctions. More often than not, the ends of policy are achieved not by authoritative controls, but through incentives, inducements, and encouragement. In general, it is best to think of government having two broad instruments of influence—the power to spend and the power to regulate. Michael Kraft and Scott Furlong, both well-known authorities in the study of public policy, provide a more nuanced inventory of policy tools that include: (1) regulatory policies that control or influence behavior; (2) government management of programs or benefits through direct service; (3) tax and spending policies that reallocate and distribute resources; (4) market mechanisms which may require government to take a “hands off approach” to the distribution of resources or achievement of policy ends; and (5) education, information, and persuasion aimed at changing behavior of those in society.⁵¹ Specific legislative action may include some combination of these instruments of spending and regulation.

The Affordable Care Act, for example, combines fiscal and regulatory incentives in various statutory provisions requiring acceptance and adherence by states, the private sector, and citizens. In West Virginia, the state’s Medicaid program has been expanded to reach low income populations previously uninsured. Additional federal funding has made this possible, but there are strings attached, such as the types of basic services which are required to be

⁴⁹ NEAL 2005b, *supra* note 2, at 1.

⁵⁰ DAVID B. ROBERTSON & DENNIS R. JUDD, *THE DEVELOPMENT OF AMERICAN PUBLIC POLICY: THE STRUCTURE OF POLICY RESTRAINT* viii–ix (Scott, Foresman, & Co. 1989).

⁵¹ KRAFT & FURLONG, *supra* note 1, at 93–94.

provided. The federal government is involved in the direct operation of the state's "health insurance exchange," where individuals can purchase health insurance, and if qualified, can receive federal tax credits that subsidize their premium costs. These exchanges have been established to encourage market competition among insurance carriers. In encouraging insurance enrollment, the federal government has invested monies in public outreach and education programs.⁵²

Policymakers must also accept the fact that their policies will be implemented by others. The fundamental characteristic of government in our federal system is that it is incremental. The desire for fundamental change will likely be blunted by a decision making and bureaucratic implementation process that favors caution and gradualism in policy and program change.⁵³ Thus, it is essential to ask, "*Does the proposed legislation contain well-defined objectives and benchmarks that will guide implementation and allow for future policy review and assessment?*" New legislation will be entrusted to administrative actors and others to implement. The influence that these players exert over the interpretation and application of law can be great. The role of the legislature in providing direction to these actors and holding them accountable is crucial to the success of governance. Indeed, much of the recent literature in public administration deals with this reality and how, through good policy design and through oversight processes, progress towards policy objectives can be assessed and guided by legislators and others.⁵⁴ In recent years, there has been a growing emphasis on "evidence based" and other empirical approaches to justifying policy action and measuring its results.⁵⁵

Program implementation invites analysis and review. It is a series of questions asked again and again. At the most basic level, we want to consider the efficacy of policies. Are there design flaws? Are the accepted purposes of the policy being achieved? If so, to what degree? If not, to whom should we assign responsibility? More specifically, are the regulations and programs developed and implemented by agencies serving the purposes of legislative-made policy? Are there corrections needed? Can performance be improved? These questions can be more competently addressed when there are clear guidelines and benchmarks in the enabling legislation.

⁵² For a general discussion, see L. Christopher Plein, *An Uncertain Federalism: The States and the Affordable Care Act*, 37 J. HEALTH AND HUM. SERVS. ADMIN. 350 (2014).

⁵³ See among many of Lindblom's works on incrementalism. Charles Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979).

⁵⁴ See DALL W. FORSYTHE, *QUICKER, BETTER, CHEAPER?: MANAGING PERFORMANCE IN AMERICAN GOVERNMENT* (Rockefeller Inst. Press 2001); WILLIAM GORMLEY JR. & STEVEN BALLA, *BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE* (Cong. Quarterly Press ed. 2004); CORNELIUS KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* (Cong. Quarterly Press 3d ed. 2003).

⁵⁵ See Ron Haskins, Christina Paxson & Jeanne Brooks-Gunn, *Social Science Rising: A Tale of Evidence Shaping Public Policy*, THE FUTURE OF CHILDREN (2009), http://futureofchildren.org/futureofchildren/publications/docs/19_02_PolicyBrief.pdf.

VI. CONCLUSION

By considering the questions above you should be able to answer the final question, “*Is your proposal superior?*” In short, is it preferable in terms of costs, feasibility, constitutionality, anticipated agency response, practicality, public acceptance, and other factors. A little humility may add to the superiority of a proposal. Public policy is built on past action, crafted in an arena of deliberation, amendment, and compromise, and must be implemented in a manner that complements existing structures and programs. The measure of superiority takes into account not only past effort and present action, but seeks to anticipate the future as well. Champions of legislation must anticipate that even after passage of a bill that discourse and even challenge will continue. Some of this may be the product of lingering animosity over the law being passed in the first place some may be the product of the implementation experience itself. As Alan Rosenthal has noted, “even after the measure is passed and signed into law, *the issue lives on*,” adding that future legislative sessions may provide the opportunity to amend, adapt, or rescind legislation.⁵⁶

What various observers remind us is that the best proposal is one that will complement and work with the systems, processes, and actors in which it has been introduced. It is not only about the ideas in the proposal, but how the proposal can contribute to the deliberative and decision making process, that is the true measure of superiority.

⁵⁶ ROSENTHAL, *supra* note 2, at 81 (emphasis added).