FIRST AMENDMENT DOCTRINE AS REGIME POLITICS

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Note to schmooze participants: Some of you have already submitted tickets that are the equivalent of box seats behind home plate at Yankee Stadium during the World Series. My ticket is worth a bit less; it's more like a bleacher seat at a Tigers-Padres game, on a Wednesday afternoon, the fifth week of the season. Needless to say, please do not cite or circulate without permission.

In my work lately I have been considering whether we can get a better perspective on constitutional development and Supreme Court decision making by placing the Court and its policies/doctrines/interpretations in the larger context of "regime politics." I have no technical definition of regime politics; I am just referring to the various ways in which governing coalitions organize their power and advance their political agenda within a system of institutions. Within the political science literature I am using Dahl and Shapiro's work as points of departure, and the "new institutionalism" literature (discussed by Kersch in his ticket) as a template.

From the point of view of governing coalitions, courts can be seen as similar to executive branch agencies. What these institutions have in common is that they are staffed by politically-appointed office holders who have policy-making responsibilities over issues that are of interest to party leaders and their constituents. This means that there is a routine and ongoing interest in shaping the "decision-making bias" of these institutions. The main differences between these institutions are that courts (a) have much more political insulation (and thus decision-making independence) and (b) have much broader policy-making jurisdiction. Of course, courts and agencies also generate different internal institutional norms that may impose different constraints or institutional viewpoints upon officeholders.

What can be done with this starting point? In some recent essays I have tried to examine certain periods in American constitutional development that are best understood as the by-product of "partisan entrenchment," that is, an effort on the part of the President and Senate leaders to protect a potentially vulnerable political agenda by shaping the decision-making bias of the federal judiciary (and especially the Supreme Court). The two case studies I have looked at so far relate to the post-Reconstruction efforts of the Republican Party to promote an agenda of conservative economic nationalism, and the efforts of Democratic leaders in the 1960s to reshape the federal judiciary so that it

reflected the values of the Great Society. The point would be to see whether certain developments in constitutional law can be traced, not just to the individual policy preferences of judges, but to the agendas of political parties.

In other words, when we think about the Lochner era, it may be more useful to think a little less about the specific jurisprudence and life histories of the individual justices and more about the attitudes of the post-Reconstruction Republican Party about how courts fit into their general agenda. This echoes Powe's point that the Warren Court is better seen as politically constructed to be a functioning partner in the promotion of the Great Society rather than as a creature of judicial whimsy. All of this is linked to other work that people around the table are doing on what might be called "the political construction of judicial power."

This effort to tie developments in constitutional law to politics outside the Court works best when one can show that governing coalitions have an interest in a specific area of constitutional decision making. There is good evidence that post-Reconstruction Republicans cared about the treatment received by national corporations in the judiciary (after all, they changed the federal judiciary's jurisdiction it possible to remove cases from state courts into the federal courts) and about the larger legal-constitutional context for the development of a national industrial economy. There is good evidence that Johnson cared about having the courts there to protect/promote a civil rights agenda.

On the other hand, courts have very broad policy-making jurisdiction, and so it is inevitable that judges will be addressing issues that were of very low salience to the policy-conscious party leaders who selected them. When this happens, how accurate is it to attribute the constitutional decision making to partisan entrenchment, or to some other extra-judicial feature of regime politics?

Constitutional law governing free speech may be a useful focal point for this question. There is little evidence that Supreme Court appointments in the twentieth century have been driven specifically by a governing coalition's interest in advancing a certain understanding of free speech doctrine. Still, at various times in the 20th century, the nature of free speech doctrine has been an important matter for important political constituencies associated with governing coalitions. As Kersch points out in his schmooze ticket, free speech law had important implications for the labor movement during the New Deal and for the civil rights movement in the years leading up to the Great Society, and there is good reason to think that "the shape of free speech law commonly reflects substantive regime commitments, expanding in certain areas and being trimmed in others."

At a time when national party leaders had no real interest in extending special national protections to non-economic personal liberties, and when national elites of both parties favored corporate rights and were hostile to labor demands, it is no surprise that Supreme Court justices (chosen largely because they were reliable economic conservatives) would articulate first amendment principles that were hostile to labor marches, pickets, or boycotts. By 1938 there was a different political context, and national political elites were more committed to accommodating labor interest,

constitutional doctrine was being modified to incorporate labor picketing as qualifying for federal constitutional protection. Among other things this enabled the national government to supervise the treatment afforded to union organizers by local officials such as Mayor Frank "I Am Law" Hague, who was notorious in using municipal permit ordinances against labor.

However, it may be a mistake to interpret the Court's decision in *Hague v. CIO* (1939) in terms of an effort on the part of New Deal Democrats to fortify Roosevelt's political agenda and serve the interests of a prominent constituency of the Democratic Party. (As you know, Kersch does not make this claim.) Three of the justices in the majority—Stone, Hughes, and Roberts—were appointed by Republican presidents; they were joined by FDR's first two appointments, Black and Reed (over the dissents of the vestiges of the old guard, McReynolds and Butler). Rather than tie the decision to a party coalition it would be more appropriate (as Kersch notes) to look back to the passage of the Norris-LaGuardia Act in March of 1932, passed by a Republican Congress during the last year of the Hoover presidency. The Act barred the federal courts from issuing injunctions against peaceful strikes, boycotts (including secondary boycotts), and picketing (including peaceful mass picketing) in labor disputes. Thus, Hoover Republicans (like Hughes and Roberts) were the ones who were willing to associate themselves to the proposition that "it is necessary that he [the worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." By 1939 a bi-partisan coalition of justices was willing to transfer this agreed-upon principle into the domain of constitutional policy making. (One might even call Norris-LaGuardia an act of coordinate construction, since many unionists believed that the act merely recognized and protected worker rights that were already guaranteed by the United States Constitution.) Thus, rather than view this development as an example of *partisan entrenchment*, it would be more accurate to see the Court reflecting a bi-partisan *regime consensus* in national politics over the wisdom of granting workers protections for their expressive activities. By the time *Thornhill v. Alabama* was handed down a year later this regime-consensus was extended to make it clear that picketing could be curtailed if labor activism threatened production. (As Kersch notes, the Court would eventually adopt a similar approach to employer speech, distinguishing coercive from non-coercive expressions.)

So perhaps the constitutional law of free speech is sometimes best understood as serving partisan agendas and sometimes serving broader regime agendas—with the caveat that "broader regime agendas" may just be another way of characterizing a fortuitous bi-partisan consensus among national elites.

How far can we push this approach? There should be very little controversy in explaining the Warren Court's 1960s free speech/free press jurisprudence with reference to the sympathies of moderate Republicans and northern Democrats to the civil rights movement, which was utterly dependant on broad protections for expressive activity for

the success of its political tactics. Moreover, as Powe's history of the Warren Court makes it clear, the justices began to sour on demonstrations after urban rioting. (As he put it, "*Cox* and *Brown*, while reversing convictions, indicated that the era of seeing demonstrations as pristine exercises of First Amendment rights had passed. It was now the era of mobs and anarchy. Whether one looked to Berkeley or to Watts or to the Student Non-Violent Coordinating Committee in the South, there seemed unfortunate confirmation.") The continuing splits on the Court (in cases like *Adderley*) mirrored developing splits among national elites about whether civil rights demonstrators were getting "out of control" and "sowing the seeds" of urban riots or whether they were simply pushing their legitimate agenda; Black, Clark, Harlan, Stewart, and White reflected the position of more moderate national leaders (and, for that matter, the results of the "law and order" midterm elections in 1966, where Republicans gained 47 House seats and 3 Senate seats) while Warren, Douglas, Brennan, and Fortas continued to align themselves with King and company. *U.S. v. O'Brien* (a 7-1 decision) came down less than two months after the riots following the assassination of King (with Powe adding that "while students at Columbia University were 'liberating' the president's office—by occupying it and trashing it—and closing down the university").

Is it possible to place the Court's obscenity decisions from the 1960s within this "regime politics" rubric? On the one hand it seems clear that the Court was not a partner with national party leaders in moving toward a liberalization of obscenity law; the Court did not receive the same public support from elected officials on its obscenity decisions that it did for its civil rights decision making. On the other hand, national opinion on obscenity was certainly changing in the late 1950s and 1960s, with moderates in both parties becoming uncomfortable with local prosecutions against material that they considered protected by the first amendment (mostly *Lady Chatterley's Lover*, *Tropic of Cancer*, and *Fanny Hill*). Both Powe and Klarman would view this as an example of elite national opinion sometimes being at odds with regional practices that were increasingly viewed as "outlier" positions. The split on the Court probably mirrored the sense of national elites on the best course of action: justices such as Brennan and Stewart felt it was appropriate to extend some federal protection by nationalizing the criteria for what counted as obscene, while Harlan and Warren believed it best to let the states handle these sorts of traditional "vices." There may have been a more robust national debate about the problem except that elected officials felt constrained about embracing the liberalizing position. Thus, as Powe reports, when a President's Commission on Obscenity recommended in 1970 that laws should reflect a consenting-adults position, the Senate immediately voted 60-5 ("with the normal liberals nowhere to be found") to reject the report.

Thus, as an example of "regime politics," the Court's obscenity jurisprudence may be best understood as an example of Graber's point about how courts (like independent regulatory commissions) are sometimes valuable to a regime to the extent that they can address issues that present political challenges for elected officials.

I suppose would be easy enough to extend this approach to an understanding of the Court's jurisprudence on campaign finance, hate crime legislation, unlawful advocacy, protection for "subversives," regulation of the airwaves, abortion protestors,

commercial speech, the establishment and free exercise clauses, and so on. In each case we could locate the justices' "policy" views on free speech within the prevailing range of views that existed among contemporaneous national policy makers. The justices and their law clerks may come up with their own technical-legal justifications for why a particular policy is appropriate, but (on this view) these justifications are no more the explanation of the policy then (for example) are the justifications offered by the staff of the new Republican dominated Environmental Protection Agency in support of new approaches for assessing whether industries are in compliance with air pollution standards.

And so I end with a set of related questions rather than a proved hypothesis:

What would be the evidence for the proposition that free speech doctrine, as articulated by the U.S. Supreme Court, is anything other than a highly stylized translation of the conventional political preferences of national elites? To what extent are splits on the Court best understood as technical-theoretical disagreements within first amendment jurisprudence, and to what extent are they merely a reproduction of familiar disagreements among conventional policy makers? If we acknowledge that the development of the constitutional law of the first amendment is always forged within the parameters established by American political development (and by the preferences of members of the national governing coalition), then what precisely is the relationship between the academic practice of first amendment theory and the first amendment policy making of the U.S. Supreme Court? Or, to put the point in a more constructive light, what is the best way to reconcile political science accounts of constitutional lawmaking with the traditional normative-theoretical practices of the law professorate?