The Curious Case of School Prayer: Political Entrepreneurship and the Relative (Im)permeability of Legal Institutions

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Introduction

School prayer represents a curiosity of Reagan-era politics. Reagan and the social conservative movement secured numerous successes in accommodating religious practice and faith in the public sphere. Yet, when it came to "restor[ing] the right of individuals to participate in voluntary, non-denominational prayer in schools…"[1] conservatives never succeeded in securing the judicial victory that they sought. If anything, the Supreme Court became more skeptical of devotional exercises in public educational settings[2] even as it permitted public monies to flow to theistic organizations[3] and allowed the government to display religious symbols on public property.[4] The question of why conservatives scored victories on some of its religious agenda but not prayer provides insight for those interested in the activities of political entrepreneurs, political regimes, and the permeability of legal institutions.

This paper is an attempt to reconcile Reagan era successes with Reagan era failures by utilizing the insights of scholarship on political entrepreneurship. The study of entrepreneurial activity dates back at least to Robert Dahl and his seminal work *Who Governs?* Dahl identified a host of activities consistent with transformative effects on policies and institutions. Dahl and many of his scions were primarily concerned with stability and equilibrium. However, as Adam Sheingate observed, attention to entrepreneurial activity can highlight how "political and institutional complexity shape prospects for change" (186). Scrutinizing the way political actors attempt to alter policies and institutions "focuses our attention on the boundaries between institutions and the complex characteristics of the American political system as a whole" (186). The boundaries between law and politics become that much more clear by scrutinizing the efforts of the Reagan Administration to bring about change to prayer policy. Whereas Reagan and his congressional allies were able to secure a limited victory in the legislative arena when it secured the Equal Access Act of 1984, it failed to overturn *Engel v. Vitale* and its lineage despite targeted judicial selection and institutional change in the Solicitor General's office. This failure highlights how legal institutions can be less permeable to regime objectives—a phenomenon that is yet under-theorized in the budding regime politics literature.

This paper will proceed by first identifying how the entrepreneurial activity by President Ronald Reagan and congressional Republicans resulted in passage of the Equal Access Act.

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[1] Republican Party Platform of 1980 http://www.presidency.ucsb.edu/ws/index.php?pid=25844

[2] See *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman* 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

[3] See *Mueller v. Allen*, 463 US. 388 (1983); *Bowen v. Kendrick* 487 U.S. 589 (1988); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Rosenberger v. The Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[4] See *Lynch v. Donnelly*, 465 U.S. 688 (1984); but see *County of Allegheny v. American Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573 (1989).

Second, the paper will examine institutional changes in judicial selection and the Office of the Solicitor General designed to bring about changes to school prayer jurisprudence. Third, the paper identifies reasons why these institutional reforms failed to bring about change. Finally, the paper concludes with a brief discussion of why the failed transformation matters for the partisan regime literature in political science.

Entrepreneurship in Legislation

Reagan reached office during a time of overlapping and uncertain political orders. First, the New Deal-Great Society political order finally deteriorated and stood ready to be transformed into a more tempered era of renewed federalism, deregulation, and fiscal conservatism. Second, Reagan entered this transformative moment in the midst of the era of divided government and a thickened institutional context.[5] Transformation of the political order would necessarily need both to win over Democratic congressional majorities throughout much of Reagan's tenure in office (although not initially) and overcome deeply entrenched institutional pathways adept at resisting change. Finally, Reagan rode the crest of the social conservative movement that cobbled together a new coalition mobilized for fights over school prayer, abortion, and the like. Thus, Reagan's task was to create what Sheingold has referred to as "creative recombinations" that would restore "a fundamental part of our American heritage and privilege."[6]

On school prayer, Reagan sought change in ways consistent with the modern plebicitarian presidency and his transformative position. Unable to rely solely on partisan or ideological support in the Congress, Reagan pushed his agenda through a combination of direct popular appeals, grassroots mobilization of the New Religious Right, and direct legislative lobbying. In virtually every speech Reagan delivered addressing school prayer, Reagan called upon his audience to contact members of the House and Senate and inform them of their support.[7] The policy did not appear to be merely symbolic as public opinion polls at the time showed overwhelming popular support for the amendment, which Reagan also regularly noted in his stump speeches. Reagan's direct appeals echoed the campaigns of religious organizations such as the Moral Majority, Christian Voice, Concerned Women for America and the network of broadcast evangelicals that urged their followers to contact their senators (Hertzke 1988, 165). The strategy netted results so overwhelming that the Senate installed new phone lines to handle the call volume.

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[5] Stephen Skowronek, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH (1993), 442-446.

[6] Reagan, Message to Congress Transmitting Proposed Legislation on a Constitutional Amendment on Prayer in School, May 17, 1982. Available at http://www.reagan.utexas.edu/search/speeches/speech_srch.html (Visited on February 2, 2009).

[7] See Ronald Reagan, REMARKS AT A WHITE HOUSE BRIEFING FOR THE NATIONAL ALLIANCE OF SENIOR CITIZENS, February 29, 1984; REMARKS AT A WHITE HOUSE LUNCHEON FOR ELECTED REPUBLICAN WOMEN OFFICIALS, March 2, 1984; REMARKS AT THE ANNUAL CONVENTION OF THE NATIONAL ASSOCIATION OF EVANGELICALS IN COLUMBUS, Ohio, March 6, 1984.

Yet, an important feature of this early mobilization was its unidimensionality. Early mobilization efforts of religious conservatives occurred almost exclusively at the grassroots level. The movement lacked an effective and coherent lobby that proved vital at the micro-legislative level.[8] The religious lobby had as of yet failed to fully institutionalize their participation inside the Beltway and, as a result, depended on sectional-based popular mobilization. The result was the well-organized lobby of groups opposed to a school prayer constitutional amendment such as the ACLU and the NEA provided "effective and articulate opposition."[9] The primary source of direct legislative pressure came from the Reagan Administration but it was unable to frame the issue in a way consistent with the interests and philosophies of Senators from states where the fundamentalist and evangelical movements were weak. The constitutional amendment on school prayer mustered a simple majority of 55 but fell well short of the two-thirds majority needed.

While a constitutional amendment was out of reach, the networks and channels established in the effort created a powerful combination of forces that netted social conservatives the Equal Access Act. The Equal Access Act represented a more modest attempt to accommodate religious activities in public educational settings by guaranteeing that religious groups would have the same access to public school facilities as secular organizations. Opponents of the legislation labeled it an attempt to bring prayer "through the back door using the soothing and apparently neutral language of equal access."[10] Among these opponents ranked lawmakers in key veto position such as Speaker of the House Tip O'Neill and Don Edwards, Chairmen of the House Judiciary Subcommittee on Civil and Constitutional Rights. Despite powerful opposition, Reagan and socially conservative legislators were able to secure passage of the Act by utilizing previously established policy network of legislators, interest groups, citizens, and administration officials.

Prior to the failure of the school prayer amendment, Reagan laid the foundation for mission-shift to the equal access act. In his speeches on the prayer amendment, Reagan regularly mentioned equal access legislation. Immediately following the Senate's vote on the prayer amendment, he urged congressional action on equal access.[11] A coalition of Republican and Bible Belt Democrats responded and sponsored several different bills that contained the same rights of access although differed on enforcement mechanisms. Through a series of parliamentary maneuvers O'Neill and Edwards managed to kill off one bill that would have cut off federal education monies to noncompliant schools. However, as the movement appeared to be stymied, the grassroots campaign machine, forged to secure the prayer amendment, was

[8] Allen D. Hertzke, REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY (1988), 70-87.
[9] *Id.*, 166.
[10] Congressman Don Edwards (CA-D) as quoted in Paula Schwed, *Congress renews debate over religion in school.* UNITED PRESS INTERNATIONAL, March 28, 1984.
[11] Ronald Reagan, STATEMENT ON SENATE ACTION ON THE PROPOSED CONSTITUTIONAL AMENDMENT ON PRAYER IN SCHOOLS, March 20, 1984.

employed to even greater effect. Perhaps more importantly, the small network of religiously affiliated interest groups already in DC, (e.g. the Baptist Joint Committee and the National Association of Evangelicals) worked with both legislators and opposition groups (e.g. the ACLU) to draft a bill that minimized constitutional objections of those with "back door" concerns —such as extending access protections to political, philosophical, *and* religious groups. The bill was amended to an educational funding bill and, once access was guaranteed only before or after school hours, passed the Senate 88-11. On the House side, after some procedural wrangling with the still opposed Speaker O'Neill, the bill passed 337-77 and Reagan signed the bill into law two weeks later.

To recap, the Reagan Administration sought but ultimately failed to secure a constitutional amendment on school prayer but the network of grassroots activists, religious lobbyists, and conservative lawmakers proved vital for securing the Equal Access Act of 1984, which created greater accommodation for religious activity in public schools. Reagan pledged policy change on religion in American public education and he employed his unique, transformative position to overcome entrenched resistance. Despite "unrealistic" chances of "even incremental legislation in support of Reagan's social policies,"[12] the "creative recombination" on display above proved formative. The legislative effort to secure school prayer yielded the EAA and demonstrated that legislating the social conservative agenda could bear fruit.

Entrepreneurship in Litigation

If Reagan managed to secure a notable victory in the legislative arena where opponents occupied crucial veto points, why did the Reagan Administration (and subsequent conservative administrations) fail to transform school prayer's constitutionality through the federal judiciary that had been highly Reagonized by 1988?[13] The question becomes that much more curious in light of the "political regime" literature, which posits that judicial power is employed in much the same way as "legislative delegations to executive or quasi-executive agencies."[14] If the "Reagan judiciary" acted in a way consistent with a conservative White House and a Republican majority in the Senate,[15] then we should expect equal, or perhaps greater,[16] traction for school prayer in the national courts. However, if anything, school prayer moved further from constitutional sanction during the Reagan and post-Reagan periods. This hostility occurred

[12] David Alistair Yalof, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (2001), 133.
[13] Henry Abrams, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (1999), 281
[14] Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891* (2002), 512.
[15] The Republican Party held control of the Senate only until 1986 so it did not last for the entirety of Reagan's Administration.
[16] We would expect greater traction if the Reagan White House and conservative Senate could capture veto points in the national judiciary like the swing seat on the U.S. Supreme Court.

despite the desire to change, an effort to secure change through judicial appointment, and institutional change at the Office of the Solicitor General designed to facilitate a conservative legal argument before the High Court.

Institutional Change and Reagan's Judicial Strategy

The Reagan Administration's desire to transform the national judiciary has been well documented and need not be rehashed fully here. However, the attempt to shift the national judiciary to the right contained notable institutional changes. The Office of Legal Policy created a systematized, extensive interviewing process for potential judicial nominees.[17] Moreover, the Administration created the President's Committee on Federal Judicial Selection, which was tasked with identifying political, philosophical, and ideological concerns. The overlapping scrutiny helped to ensure that nominees "would be sympathetic to the social agenda positions of the administration."[18] By the end of his second term, Reagan had appointed 47% of the federal judiciary and vetted his selections to ensure they embraced "strict construction of the Constitution rather than a liberal agenda based on a concept of judicial activism."[19] Scholars of judicial appointments credit Reagan with being highly successful in ideological transformation of the federal judiciary. As Sheldon Goldman observed in 1989, the administration—particularly under the leadership of Attorney General Edwin Meese—successfully "fine tun[ed] the selection process to place on the bench younger, vigorous, more aggressive supporters of the administration's judicial philosophy that would indeed constitute a lasting Regan legacy on the courts."[20]

Institutional Change and the Office of the Solicitor General

Transforming Supreme Court jurisprudence is aided greatly by the development of more sophisticated legal arguments. Administrations rely heavily on the Office of the Solicitor General to develop winning legal arguments consistent with administration preferences. Yet, the Office of the Solicitor General is almost exclusively staffed with career lawyers, not political officials. Leading Reagan Administration officials believed that career lawyers were hampering the Solicitor General (Rex Lee) in crafting arguments in line with Reagan's preferences.[21] To give the Administration greater presence in the SG's office, the position of Counselor to the Solicitor General and Deputy Solicitor General was created. The new position, initially filled by

[17] Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, JUDICATURE (April-May 1989), 319.
[18] *Id.*, 327
[19] Abrams, *supra* note 13, at 281.
[20] Goldman, *supra* note 17, at 327.
[21] Notably, the case that seemingly served as the catalyst to the creation of this position was *Bob Jones v. United States*, which was, in part, a religion case. The unwillingness of Lawrence Wallace, a career lawyer in the SG's office who ran the case due to Solicitor General Rex Lee's conflict of interest, to directly challenge the Internal Revenue Service's denial of Bob Jones University's tax-exempt status due to racially discriminatory policies caused great discomfort among social conservatives in the Department of Justice who believed that the IRS's position exemplified legislating by an administrative agency.

Paul Bator of Harvard Law School, bore the moniker of political deputy and helped ensure that Reagan Administration positions had equivalent voice to the careerist choir.[22]

Bator's impact was notable in the area of the religion clauses. He led the SG's efforts in *Lynch v. Donnelly*,[23] which netted Reagan a victory when the Court reached the rather counterintuitive conclusion that a crèche display fulfilled a secular legislative purpose and, therefore, survived the Lemon test. Bator also played a major role in crafting the SG's in *Wallace v. Jaffree*[24] and arguing it before the Court. But *Wallace*, as will be demonstrated below, is informative as to the degree to which the boundaries of legal institutions are less permeable to regime preferences than other agencies that sit more directly in the stream of American politics.

Judicial Transformation: An Incomplete Success

While the Reagan Administration created new means of securing judicial ideologues and were quite successful in doing so, there were at least three intervening factors that limited the impact of transformation in Supreme Court school prayer jurisprudence. First, Reagan made a critical choice while campaigning in 1980. He pledged, "One of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find…"[25] In essence, Reagan injected one additional variable into his judicial calculus and the results were notable. O'Connor proved reliably conservative on issues like federalism and criminal due process but was significantly less doctrinaire on social issues including school prayer. And O'Connor's moderate social jurisprudence was well-known before her selection and netted protests from prominent social conservatives like Jerry Falwell, John Willke, and Jesse Helms.[26] In essence, Reagan's first-order social goals clashed with his electoral strategy (i.e. broadening his electoral coalition by wooing women) and the result was the selection of a justice less reliably conservative on the Administration's social priorities than subsequent selections.[27]

Second, the permeability of courts is constrained by the role of the Senate and the possibility of divided government. For Reagan, six of his eight years in office saw Republican control of the Senate. In the final two years, the Democrats controlled the Senate and Reagan's difficulties filling Justice Powell's seat demonstrated how formidable this constraint could be.

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[22] Charles Fried, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT, 28.
[23] 465 U.S. 668 (1984).
[24] 472 U.S. 38 (1985).
[25] As quoted in Abrams, *supra* note 13, at 282.
[26] See Yaloff *supra* note 12, at 140; Abrams, *supra* note 13, at 284.
[27] O'Connor had the highest Segal-Cover ideology score of any Reagan nominee to the Supreme Court indicating she was the least conservative. The scores are as follows: O'Connor (.415), Rehnquist (.045), Scalia (.000), Bork (.095), Ginsburg (.000), Kennedy (.325). Available at http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf (visited on February 12, 2009).

The nomination of Robert Bork indicated the Reagan Administration's commitment to push the Court further to the right but it also failed to account for Democratic resolve to place what limitations they could on the transformation. Further adding to the difficulty of railroading Bork through the Senate was Reagan's vulnerability in the wake of the Iran-Contra Affair. The failure of Bork's nomination (and the implosion of Ginsburg's brief nomination) taught the Reagan Administration that pressing its judicial agenda in the same way it had in its first six years would not work. The nomination of Anthony Kennedy, a well-regarded, uncontroversial center-right moderate,[28] proved detrimental to altering school prayer jurisprudence as Kennedy repeatedly voted against efforts to bring prayer back into public educational settings.[29]

Third, Reagan's desire to reconstruct the national judiciary was born not simply out of raw policy preference but also a philosophical commitment that privileged judicial restraint over judicial activism. As Reagan opined in 1985, "I'm very proud of our record of finding highly qualified individuals who also adhere to a restrained and truly judicious view of the rule [sic.] of the courts—or the role of the courts under our Constitution."[30] Paul Bestor put it this way, "We ask that [judges] be scrupulous *not* to rule, *not* to act, to leave the exercise of power to others, where the law does not justify judicial intervention."[31] Grover Rees, special assistant to Attorney General Meese, stated it slightly differently, "We look for judicial philosophy, not ideology. We don't want judges enacting conservative ideology from the bench any more than we want them enacting liberal ideology."[32]

In the matter of school prayer jurisprudence, perhaps it is no great surprise when justices, selected—at least in part—due to their restrained judicial philosophies, act restrained in the application of precedential line of cases dating back to 1947. Justices O'Connor and Kennedy noted this deference to precedent in opinions they either penned or joined. In *Wallace v. Jaffree*, Justice O'Connor rejected Justice Rehnquist's argument that the Court's school prayer jurisprudence should be discarded because it is inconsistent with Framer's intent. Rather, she argues that the Court should uphold and refine the *Lemon* test to create "a principle for constitutional adjudication…that is also capable of consistent application."[33] In *Lee v. Weisman*, Justice Kennedy wrote, "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of

[28] In his confirmation hearing, Kennedy distanced himself from Bork and other conservative jurists on First Amendment issues. See John Hanrahan. *Kennedy frowns on arch-conservative legal ideas*. UNITED PRESS INTERNATIONAL, January 22, 1988.
[29] See *Lee v. Weisman; Santa Fe Independent School District v. Doe* (2000).
[30] Ronald Reagan, REMARKS DRUING A WHITE HOUSE BREIFING FOR UNITED STATES ATTORNEYS, October 21, 1985.
[31] As quoted in Lincoln Caplan, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987), 63.
[32] As quoted in Bernard Weinraub, REGAN SAYS WE'LL USE VACANCIES TO DISCOURAGE JUDICIAL ACTIVISM. *The New York Times*, October 22, 1985.
[33] 472 U.S. 38, 69.

Providence is an unconstitutional one."[34] Justice O'Connor joined Justice Souter's concurrence that in reference to the *Engel* line, "Such is the settled law. Here, as elsewhere, we should stick to it absent some compelling reason to discard it."[35] By the time the Court decided *Santa Fe Independent School District v. Doe*, the adherence to the *Engel* line is so entrenched that the majority opinion, authored by Justice Stevens and joined by O'Connor and Kennedy, does not even bother to take up the need to follow precedent despite Chief Justice Rehnquist's familiar originalist complaint in dissent.[36] Judicial restraint was part of Reagan's transformative vision but restraint as a judicial philosophy also limited the impact of his transformative agenda in the national judiciary.

Multiple Commitments and Limits on the Solicitor General

The addition of a political deputy to the Solicitor General's staff was a provocative and useful innovation. As Rex Lee observed, "It just makes sense to have someone other than the solicitor general himself who…is not only a very fine lawyer but also comes from a politically sensitive background and who regards as part of his or her responsibilities not just the legal aspects of the job but the broader governmental ones as well."[37] However, even with a greater political presence in the SG's office, their ability to craft transformative arguments is constrained by its unique position in a president's administration. The SG's office is tasked with multiple commitments that can be in tension with one another. One scholar notes that the SG "must pay heed to the justices, legal norms, the politics of the administration, public opinion, and the needs of other agencies and divisions."[38] Moreover, the SG must protect its unique institutional relationship with the high court. Administration priorities can conflict with upholding legal norms and protecting the prestige of the office. In other words, political actors may prefer to use the law as a resource to change policy whereas careerists may prefer to use the law as a resource for maintaining relationships and institutional prestige.

School prayer was case in point. Reagan Administration desires to change school prayer jurisprudence conflicted with the way SG lawyers normally selected cases.[39] The SG's office took a particularly cautious approach to school prayer because many SG lawyers believed the issue was underdeveloped.[40] Moreover, circumstances surrounding *Wallace v. Jaffree* gave rise

[34] 505 U.S. 577, 586-587.
[35] *Id.* at 611.
[36] 530 U.S. 290 (2000)
[37] Rebecca Mae Salokar, THE SOLICITOR GENERAL: THE POLITICS OF LAW. Philadelphia, Temple University Press, 1992, 62.
[38] *Id.* at 69.
[39] Assistant SG Kathryn Oberly stated, "So it's hard for me, personally, to see what the federal interest is in how the Court decides those cases [school prayer]. And without a clear federal interest, I found it more questionable about whether the government should be filing those briefs." As quoted, *Id.* at 76.
[40] Bator argued had the SG's office taken the position on school prayer preferred by the Reagan Administration, "It would put to the Court an issue for which the intellectual preparation had not been done. You go to the Court when there are lower-court decisions and law-review articles and other expressions in the legal culture showing serious

to concerns that, if the SG's office argued that the lower court was correct in upholding Alabama's school prayer act, it would "encourage lawlessness on the part of lower-court judges."[41] The SG's office needed to consider more than just the Administration's preferences, they needed to uphold the rule of law and they concluded adherence to the strictures of *stare decisis* is a pillar of the rule of law. Norms of process and principles impacted the vigor with which the SG pursued school prayer jurisprudential change. Not even the addition of the political deputy significantly altered commitment to these norms.[42]

Conclusion

Reagan's entrepreneurial activity recast the judicial selection process and the organization of the SG's office. The Administration's commitment to ideological transformation was notable for its intensity and priority. Reagan's working group on judicial selection was adopted by both the Bush and Clinton Administrations. Scholars note that the SG's office became increasingly politicized following the Reagan Administration generally and the creation of the political deputy specifically.

Reagan Administration activities pressed a new conservative legal agenda and netted major victories. The jurisprudential fruit born under Reagan's efforts can be tied directly to the effort to transform the legal agenda. The creation of the political deputy placed greater administration presence in the SG's office and provided some counterbalance to careerist perspectives. Reagan's innovations in judicial selection helped place resulted conservative judges on the federal bench. Despite these innovations, Reagan's creative recombinations netted less than desired for the social conservative agenda. Reagan clearly targeted school prayer along with abortion as part of his reconstructive vision. Yet, policy change on these issues was contingent on the cooperation of legal institutions vested with unique norms, rules, incentives, and constituents. These unique institutional features demonstrate the fragmentation in American governance and the difficulties political regimes experience in realizing their objectives across differing political terrain. Part of Reagan's reconstructive agenda was stymied by a judicial system less permeable to the conservative vision for prayer in America's public schools.

There are important lessons here for scholars interested in a regime politics approach to law and courts. Building on the works of the new institutionalism, scholars observe that courts often function much like executive agencies within a political regime in that they both "are

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and thoughtful controversy about a matter. In the case of the prayer decisions, the intellectual preparation had not been done, and more work was still required to make that a question worth bringing to the Court." Caplan 101-102.

[41] Paul Bator as quoted in Caplan, *supra* note 31, 100.

[42] Paul Ayer stated this unequivocally. "The role of the principal deputy is not to carry political water on controversial issues. It is important that he or she pursue the ideals of the office, which include disinterested logical reasoning." As quoted in Caplan, *supra* note 31, 42. However, several scholars have noted that the political deputy has added to the politicization of the SG's office.

staffed by politically appointed office holders who have policy-making responsibilities over issues that are of interest to party leaders and their constituents."[43] Scholarship generated in this vein (1) explains why courts are "active" on issues such as economic regulation in the Lochner era[44] and civil rights during the New Deal/Great Society;[45] (2) how parties empower courts as a means of entrenching ideological commitments;[46] (3) how courts serve as cover for elected officials unwilling or unable to render policy in a highly controversial area;[47] (4) how courts can announce elite consensus on constitutionalized issues.[48]

This brief study invites another category. Courts are invited and encouraged (enticed?) to play a role in realizing a priority of the dominant national regime—one that also enjoys significant popular support—but refuses to do so. The Court's school prayer jurisprudence is consistent with a split in *elite* opinion and it is possible that the divide on the high court is simply further evidence of this elite cleavage but such a conclusion tells us nothing about how institutional rules and norms can motivate and frustrate policy chance and political development. Nor would such a conclusion provide insight into constitutional lawmaking.

An acute focus on entrepreneurial activity designed to bring about changes to constitutional policy can bring into focus limitations on the capacity of political regimes to realize their first-order preferences. Moreover, scrutinizing the relationship between political entrepreneurs and the American legal system identifies exogenous and endogenous forces for change (e.g. institutional changes to aid in altering school prayer jurisprudence and judicial personnel sympathetic to change) and exogenous and endogenous sources of resistance to that change (e.g. rule of law concerns in the SG's office and justices concerned with upholding precedent). In so doing, we move beyond institutionally thin accounts of the courts in regime politics and toward an understanding of the boundaries and limitations of courts within the dominant national coalition.

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[43] Howard Gillman, *First amendment Doctrine as Regime Politics*, THE GOOD SOCIETY (2005), 59.
[44] Howard Gillman, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE (1994).
[45] Lucas A. Powe, THE WARREN COURT AND AMERICAN POLITICS (2000)
[46] Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Gillman, *How Political Parties*, *supra* note 14.
[47] Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*. STUDIES IN AMERICAN POLITICAL DEVELOPMENT (1993).
[48] Ken Kersch, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004).