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

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Abstract:

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 restoring voluntary school prayer, conservatives never succeeded in securing the judicial victory that they sought. Herein, we attempt to reconcile Reagan era successes with Reagan era failures by utilizing the insights of scholarship on political entrepreneurship. Identifying Reagan’s entrepreneurial activities in his attempt to alter national social policy reveals the relative (im)permeability of legislative and legal institutions. Reagan’s efforts to change national school prayer policy gained some measure of legislative success by securing the Equal Access Act but it failed to garner a change in school prayer jurisprudence. We conclude by noting that attending to the relative (im)permeability of legal institutions has implication for the study of law and courts in regime politics perspective.
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…” 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 even as it permitted public monies to flow to theistic organizations and allowed the government to display religious symbols on public property. 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.

Herein, we 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 his academic scion 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.” 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.” The boundaries between law and politics become that much more clear by examining the efforts of the Reagan Administration to bring about change to school 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.

We proceed by first identifying how the entrepreneurial activity by President Ronald Reagan and social conservatives resulted in passage of the Equal Access Act. Second, we examine institutional changes in judicial selection and the Office of the Solicitor General designed to bring about changes to school prayer jurisprudence. Third, we identify reasons why these institutional reforms failed to bring about change. Finally, we conclude with a brief discussion of why the failed transformation matters for the partisan regime literature in political science.

**Reagan as Legislative Entrepreneur**

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. 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.
Reagan desired to restore school prayer as “a fundamental part of our American heritage and privilege” and sought to do this by introducing innovations to existing institutions and convincing coalitions of organized interests and politicians of the restorative project’s value. This made the Reagan Administration distinctly entrepreneurial. First, as president, Reagan occupied a unique rhetorical position that enabled him to frame school prayer in broad, inclusive, and traditionalist ways. The debate over school prayer was not new but Reagan helped shape the political landscape through the bully pulpit. Second, the Reagan White House invested significant political capital and human resources in the attempt to craft new prayer policy. As will be shown below, this effort included promoting nascent religious interest groups inside and outside of DC and fostering a cross-party legislative coalition of social conservatives. Third, Reagan’s embrace of constitutionalized school prayer policy reflected a desire to entrench protection for the sacred in public schools. Administration efforts to secure change were multifaceted, including both constitutional and legislative change, but, as will be demonstrated below, the end game was change consolidated under First Amendment protection.

The first cut at change was arguably the most difficult to secure. Constitutional amendment was in part necessitated by Supreme Court jurisprudence that cast doubt as to the permissibility of prayer in public schools. However, social conservatives also desired to consolidate prayer policy by enshrining its permissibility in the Constitution. The overwhelming popular support for prayer provided significant fodder for Reagan and, in virtually every speech he delivered addressing school prayer, he called upon his audience to contact members of the House of Representatives and Senate and inform them of their support. The president used his unique position, first, to frame the issue, and, second, to focus on-going mobilization efforts by
groups such as the Moral Majority, Christian Voice, Concerned Women for America, and the growing network of broadcast evangelicals.  

Yet, despite a national voice, a notable feature of early mobilization was its unidimensionality. The efforts of religious conservatives occurred almost exclusively at the grassroots level and it lacked an effective, coherent lobby that proves vital at the micro-legislative level. The religious lobby had yet to fully institutionalize their participation inside the Beltway and, as a result, depended on sectional-based popular mobilization. The result was that well-organized lobbying groups opposed to a school prayer constitutional amendment, such as the American Civil Liberties Union and the National Education Association, provided “effective and articulate opposition” to the prayer amendment. The primary source of direct legislative pressure came from the Reagan Administration but Reagan’s traditionalist framing of school prayer ultimately failed to convince several senators from states with weak fundamentalist and evangelical movements. The constitutional amendment on school prayer mustered a simple majority of 55 but fell well short of the two-thirds majority needed.

While constitutional amendment proved 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 (EAA). The EAA 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.” Several members of the opposition were lawmakers in key veto position such as Speaker of the House Tip O’Neill and Don Edwards, Chairman 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. Following the Senate’s vote on the prayer amendment, he urged congressional action on equal access. 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 employed to even greater effect. Perhaps more importantly, Reagan’s framing of equal access as open and egalitarian (i.e. enabling religious and non-religious groups the same rights of access) created greater resonance among religious and civil libertarian organizations. 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. In essence, the Reagan Administration was able to persuade a diverse coalition of organized interests and politicians of the value of their ideas.19

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,”20 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.

**Reagan as Litigation Entrepreneur**

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 Reaganized by 1988?21 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.”22 If the “Reagan judiciary” acted in a way consistent with a conservative White House and a mostly Republican controlled Senate,23 then we should expect equal, or perhaps greater,24 traction for school prayer in the national courts. However, if anything, school prayer moved further from
constitutional sanction during the Reagan and post-Reagan era. This hostility occurred despite the desire to change, an institutionalized 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**

Reagan’s aspirations for the national judiciary included both the appointment of “transformative” justices and creating what Stephen Teles referred to as a “transformative bureaucracy.” These were not mutually exclusive. The Administration “formalized the judicial selection process by institutionalizing interactive patterns and job tasks that…in previous administrations were more informal and fluid.” Reagan made explicit the motivations for these new institutional pathways when he campaigned to appoint conservative jurists who would carry forth a conservative agenda. Social issues loomed particularly large in the context of judicial selection and the Administration asserted greater control over the selection process to ensure that these ends would be achieved.

Institutionalization was two-fold. First, the Administration created the Office of Legal Policy (OLP) in the Department of Justice. The OLP was given primary responsibility for screening potential selections and it did so by systematized, extensive interviewing process. Two new positions were created—the assistant attorney general for legal policy and special counsel for judicial selection—to ensure that Administrative objects would have priority in the OLP. Second, Reagan created the President’s Committee on Federal Judicial Selection (CFJS). The CFJS was tasked with identifying political, philosophical, and ideological concerns and general congruity with Administration values. The CFJS also located discussions over selection
in the White House rather than outsourcing it solely to the Department of Justice. The overlapping scrutiny helped to ensure that nominees “would be sympathetic to the social agenda positions of the administration.”

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.” 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 Reagan legacy on the courts.”

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. 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 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.
Bator’s impact was notable in the area of the religion clauses. He led the SG’s efforts in *Lynch v. Donnelly*, 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* 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.

*(Im)permeability: Judicial Selection and the Supreme Court*

While the Reagan Administration created new means of securing judicial ideologues and was 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…” In essence, Reagan injected one additional variable into his judicial calculus and the results were notable. Reagan’s ultimate selection, Sandra Day O’Connor, proved reliably conservative on issues like federalism and criminal due process but was significantly less doctrinaire on social issues including school prayer. O’Connor’s potential for moderate social jurisprudence was well-known before her selection and netted protests from prominent social conservatives like Jerry Falwell, John Willke, and Jesse Helms. 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.\textsuperscript{35}

Second, at the moment when Reagan had his greatest opportunity for success, his ability to secure a transformative justice was most constrained. 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. 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. The failure of Bork’s nomination (and the implosion of Ginsburg’s brief nomination) revealed that the Administration could not press its judicial agenda in the same way as the previous six years. The nomination of Anthony Kennedy, a well-regarded, uncontroversial center-right moderate,\textsuperscript{36} proved detrimental to altering school prayer jurisprudence as Kennedy repeatedly voted against efforts to bring prayer back into public educational settings.\textsuperscript{37} In essence, the permeability of courts was constrained by the role of the Senate and the possibility of divided government. Electoral instability within American regime politics limits the degree to which regime objectives can be transferred to the national judiciary. Sustained change in American politics comes only through sustained electoral victories, in part, due to the difficulty of capturing all departments of government. The loss of the Senate in the Administration’s final two years tempered the scope of success.

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.”

Paul Bator 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.”

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.”

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.”

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
Providence is an unconstitutional one.”

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.”

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.\textsuperscript{44} 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.

**Impermeability: The Multiple Commitments of 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.”\textsuperscript{45} However, even with a greater political presence in the Office of the Solicitor General (OSG), its ability to craft transformative arguments is constrained by its unique position in a president’s administration. The OSG is tasked with multiple commitments that can be in tension with one another. One scholar notes that the OSG “must pay heed to the justices, legal norms, the politics of the administration, public opinion, and the needs of other agencies and divisions.”\textsuperscript{46} Moreover, the OSG 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 OSG lawyers normally selected cases.\textsuperscript{47} The OSG took a particularly cautious approach to school prayer because many of their lawyers believed the issue was underdeveloped.\textsuperscript{48} Moreover, circumstances surrounding *Wallace v. Jaffree* gave rise 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.”⁴⁹ The Office of the Solicitor General, by its nature, considered more than just the Administration’s preferences. It needed to uphold the rule of law and, in the case of school prayer, the OSG concluded adherence to the strictures of *stare decisis* was a pillar of the rule of law. Norms of process and principles impacted the vigor with which the OSG pursued school prayer jurisprudential change. Not even the addition of the political deputy significantly altered commitment to these norms.⁵⁰

**Conclusion**

Reagan’s entrepreneurial activity helped fashion a legislative coalition and institutionalized pathways for the transmutation of Administration preferences into national legal policy. The combination of Reagan’s egalitarian-laced rhetorical on equal access and the nascent religious lobby secured a legislative coalition willing to pass the Equal Access Act. Reagan’s creation of the Office of Legal Policy and the Committee on Federal Judicial Selection prioritized policy and philosophical criteria in judicial selection and ensured Reagan judges would be reliably conservative. Establishing a political deputy in the Office of the Solicitor General ensured greater administration presence in legal advocacy before the Supreme Court, thereby, providing a counterbalance to OSG careerist perspectives. Despite these innovations, Reagan’s creative recombinations netted less than desired for the social conservative agenda. Reagan clearly targeted school prayer along with the likes of abortion and affirmative action 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 staffed by politically appointed office holders who have policy-making responsibilities over issues that are of interest to party leaders and their constituents.”

Scholarship generated in this vein (1) explains why courts are “active” on issues such as economic regulation in the Lochner era and civil rights during the New Deal/Great Society; (2) how parties empower courts as a means of entrenching ideological commitments; (3) how courts serve as cover for elected officials unwilling or unable to render policy in a highly controversial area; (4) how courts can announce elite consensus on constitutionalized issues.

This study invites another category. Courts are invited, encouraged, and 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. Much as “autonomous bureaucracies are politically differentiated from the actors who seek to control them,” so too are courts. Legal institutions are vested with unique features and consider different incentives and norms when crafting policy. Reagan Administration efforts to transform school prayer activity make clear that courts are not merely executive or quasi-executive agencies. They are autonomous institutions that may be less willing or able to carry the administration’s water.
An acute focus on entrepreneurial activity designed to bring about changes to constitutional policy brings into focus limitations on the capacity of political regimes to realize their first-order preferences through courts. Scrutinizing the relationship between political entrepreneurs and the American legal system also identifies exogenous and endogenous forces for change and exogenous and endogenous sources of resistance to that change. In so doing, we move beyond a treatment of courts as akin to agencies and toward a richer understanding of the boundaries and limitations of courts within the dominant national coalition.

16 Hertzke, *Representing God*, 166.
23 The Republican Party held control of the Senate only until 1987 so it did not last for the entirety of Reagan’s Administration.
24 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.
26 Goldman, “Reagan’s Judicial Legacy,” 327
29 Notably, the case that seemingly served as the catalyst to the creation of this position was *Bob Jones University v. United States*, 461 U.S. 574 (1983), 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.
35 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](http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf) (visited on February 12, 2009).
41 472 U.S. 38, 69.
42 505 U.S. 577, 586-587.
43 505 U.S. 577, 611.
44 530 U.S. 290 (2000)
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.” Salokar, *The Solicitor General*, 76.

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 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, *The Tenth Justice*, 101-102.

Paul Bator as quoted in Caplan, *The Tenth Justice*, 100.

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, *The Tenth Justice*, 42.


