Deference or Dissent?
Congress Responds to *U.S. v. Eichman*

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Since *Marbury v. Madison* (1803)[1], the role of the Supreme Court as the final arbiter of the meaning of the U.S. Constitution has been largely accepted by both mass and elite publics. However, on occasion those interpretations have been the subject of heated dispute, often with the states, the executive, or the legislative branch. The Court's 5–4 decision in *Texas v. Johnson* (1989)[2] raised such a dispute with all three of these parts of government, when it found state and federal laws forbidding the desecration of the U.S. flag to be unconstitutional infringements on the right of free speech embodied in the First Amendment. Congress first enacted a new law that might pass constitutional muster, the Flag Protection Act of 1989[3]; however, this law was also found to be unconstitutional by the Court, again by a 5–4 margin, in *U.S. v. Eichman* (1990)[4]. Congress then proposed a constitutional amendment to give the states and Congress the power to enact such a law; while the proposed amendment[5] attracted majority support in both chambers, in neither did it attain the two-thirds majority required to send the amendment to the states for ratification.

Congress' voting on the Flag Protection Amendment has been examined at least once before. Clark and McGuire (1996) found that ideological and constituent preferences, rather than institutional conflict, shaped the vote in the House of Representatives on the amendment. This paper differs from theirs in several important respects. First, this paper seeks to explain why members who supported the Flag Protection Act would subsequently oppose the proposed amendment. Clark and McGuire analyze the vote

[1] 5 U.S. (1 Cranch) 137
[2] 491 U.S. 397
[3] Public Law 101-131
[4] 496 U.S. 310
[5] 101st Congress, S.J. Res 332; S.J. Res 180 was similar but preceded S.J. Res 332 and attracted less support.

on the amendment exclusively, not taking into account the obvious changes in position that must have occurred in many members. Secondly, this paper incorporates the Senate's voting, as well as that of the House of Representatives, to get better leverage on the question of the electoral connection: members up for reelection just months after the amendment vote may have behaved differently than those who were not accountable until 1994, by which time the issue may have declined in salience. Finally, this paper uses Poole and Rosenthal's W-NOMINATE scores for members of Congress, rather than the ADA scores used by Clark and McGuire. Nonetheless, this paper similarly finds that ideology played an important role in the decision, although partisanship, the competitiveness of the member's last race and (in the case of the Senate) the proximity to the next election did have an impact as well.

Theoretical Background. Under the Constitution, the Congress is vested with the authority to make laws of general application, subject to the veto power of the president. When the Supreme Court overturns an act of Congress, it justifies these decisions in terms of either a different interpretation of the text of the statute than that assumed by Congress, or balancing the Article I authority of Congress with the government's obligations under other sections of the Constitution. Given Congress' broad scope of authority under the "elastic clause" (Article I, Section 8, Paragraph 18), and the similarly broad guarantees of fundamental freedoms found elsewhere (such as in the Bill of Rights and the 14th Amendment), the two institutions will often be drawn into conflict over statutory law.

The Congress' responses to these conflicts will vary; most notably, this variation

depends on whether the conflict is over statutory or constitutional interpretation. Of course, Congress may decide not to act and let the Court's decision stand (in essence, deferring to the Court's judgment). It may alternatively dissent from the Court's interpretation and actively seek to overturn that decision. Congress may override the Court's interpretation of statutes by enacting new laws that clarify the meaning of those already passed (Hausegger and Baum 1999; Segal 1997; Ignagni and Meernik 1994), a relatively simple procedure, particularly if the president of the day concurs. However, its options in dealing with constitutional interpretations are more limited: senators may seek to mold the Court by only confirming justices who will reinterpret the Constitution in a different way (presuming, of course, that they will not respect *stare decisis*, cfr. Segal and Spaeth 1993), in the hopes that the justices will revisit their decision at some future point; Congress may attempt to justify its position by reference to a specific grant of authority in the Constitution (presuming the court is *not* attitudinally-motivated to oppose the position of the Congress); or Congress can propose a constitutional amendment to force a new interpretation of the Constitution in light of the amendment (cfr. *Oregon v. Mitchell*[6] and the 26th Amendment).

Not only is this decision made by Congress as a whole; it is also made by each chamber, and by members of each chamber, if given the opportunity to do so. Senators and representatives may individually decide whether to support the Court's decision (defer) or actively seek to overturn it (dissent).

Accounts of the Flag Protection Act's legislative history indicate that the statute was designed to maximize the possibility that it would pass constitutional muster (Lock-

[6]400 U.S. 122 (1970)

hart et al. 1996: 687), despite Clark and McGuire's assertion that the act was a mere example of a "symbolic stand against the Court" (1996: 773, fn. 3). Thus, we can consider the Flag Protection Act as an attempt to overturn a statutory decision (that, after all, only invalidated a *state* law), while the Flag Protection Amendment was an effort to overturn the constitutional decision reached in *Eichman* invalidating the Act. The decision by a large number of members to support the Act but not support the Amendment giving the legislative branch the authority to implement such an act provides an interesting contrast between responses to statutory and constitutional interpretations *on the same issue*. Our central question is thus what motivated members to defect from the "flag protection coalition"—if they were even part of such a coalition in the first place[7].

There are two probable explanations for defection: either defecting members had a non-ideological interest in maintaining the integrity of the Constitution, or they simply opposed the amendment on ideological grounds. If defectors were not motivated by ideology, we would expect the effects of ideology to be nonexistent; however, if defectors were motivated by ideology, we would expect a strong and visible effect of ideology on their decision.

However, ideological motivations alone do not explain the behavior of legislators. Mayhew (1974) characterized members of Congress as "single-minded seekers of re-election" and thus we might expect the electoral connection to attenuate the effects of ideology on the behavior of members, particularly when public sentiment is opposed to members' ideological orientations. In the case of *Eichman*, there was widespread

[7]It is possible that many supporters of the Act did believe the law was purely symbolic in nature and would be quickly overturned by the Court, supporting it for strategic reasons despite sincere beliefs to the contrary; cfr. Edelman 1985.

outrage among not only conservatives but also from veterans and their relatives of all ideological orientations. Members of the veterans' affairs and armed services committees would be expected to be more sympathetic to these beliefs than other members (see Clark and McGuire 1996: 775).

We might also expect some partisan effects on the decision to defect; all four justices who sided with the minority in *Texas v. Johnson* and *U.S. v. Eichman* were Republican appointees, so we might expect Republicans to be more likely (and Democrats correspondingly less likely) to oppose the narrow majority, particularly in response to a direct challenge to the authority of the Congress.

Additional effects are suggested by Clark and McGuire and other scholars; they suggest that lawyers and members of the Judiciary Committee would be more likely to uphold the Supreme Court's decision, *ceteris peribus*. Clark and McGuire also hypothesize that members from districts with higher levels of median education are more likely to support the Court's decision.

Hypotheses. From the preceding discussion, the following hypotheses about the behavior of senators and representatives can be tested:

HYPOTHESIS ONE (Supreme Court as ultimate arbiter): Senators vote on the basis of deference to the Supreme Court. No pattern of ideological voting or response to electoral factors should be expected.

HYPOTHESIS TWO (Members as ideologues): Members vote on the basis of their ideological orientations. Ideology and perhaps partisanship will affect their defection rates. However, electoral considerations should not be significant in their decision process.

HYPOTHESIS THREE (Members as re-election seekers): Members vote on the basis of perceived electoral threat. Members whose seats are in jeopardy and (in the case of the Senate) those facing re-election soon will make a greater attempt to conform with the median voter in their district, whereas members with a longer-term time horizon will behave as outlined in Hypothesis One or Hypothesis Two. Members who serve on the reelection-oriented committees of Armed Services and Veterans' Affairs would also be expected to be more opposed to flag burning (and thus less likely to defect from the coalition). Members may also see district-level support for President Bush as a proxy for "patriotic" values among district voters. Finally, members from districts with higher levels of median education are more likely to consider the views of college-educated voters, who tend to be more supportive of expansive interpretations of civil liberties.

HYPOTHESIS FOUR (Members as partisans): Members vote to support their party's position on the Court, with Republicans siding with the minority and Democrats siding with the majority.

HYPOTHESIS FIVE (Traditional judicial supporters): Members of the bar and members of the judiciary are expected to be more deferent to the Supreme Court's rulings and thus more likely to defect from the flag coalition.

Data, Model, and Methods. The data for this paper come from four sources. Roll call votes and identifying information for representatives and senators are taken from the ICPSR archive (ICPSR 1991); W-NOMINATE scores for the 101st Congress are taken from data provided on the Internet by Keith Poole (Poole n.d.); district and state levels of education were taken from the 1980 census (*Congressional Districts in the 1980s*, 1983),

and information on members' popular vote, terms of office, committee assignments, background, and constituency support for the president are taken from the 1990 edition of the *Almanac of American Politics* (Barone and Ujifusa 1989). These data were merged and analyzed together.

The independent variables in the model include:

W-NOMINATE Scores First dimension W-NOMINATE scores are used for the 101st Congress. These scores are calculated by Poole and Rosenthal (1997) and are derived from roll-call votes in the Senate during this Congress. The first dimension corresponds to a liberal-conservative continuum (with positive values indicating conservatism), while the second appears to distinguish among senators on civil rights issues (with positive values indicating "race liberalism"), perhaps somewhat corresponding to a "libertarian-authoritarian" or "new politics" orientation scholars have found elsewhere (Inglehart 1990). W-NOMINATE scores are similar to D-NOMINATE scores, but are not comparable across Congresses or chambers.[8] Only the first dimension was used in this analysis, to better reproduce the model of Clark and McGuire.

Senator up in 1990 *Senate model only.* Dummy variable indicating whether the senator faced re-election in the fall of 1990.

Senator up in 1992 *Senate model only.* Dummy variable indicating whether the senator faced re-election in the fall of 1992.

Victory margin Percentage of the popular vote received by the senator or representative in her last election campaign, minus 50.[9]

Median ed Median years of schooling (including postsecondary education) in the district or state, according to the 1980 Census.

Bush vote Percentage of the vote received by George H.W. Bush in the 1988 presidential election in the state or district.

Lawyer Coded 1 for members who had a law degree (generally, J.D., LL.B., or LL.M.) or had served as an attorney.

[8]The use of W-NOMINATE scores gives rise to a minor endogeneity problem, as the votes analyzed here are used in the generation of the scores themselves. However, as only two votes are used and the first dimension scores correlate highly with those of traditional ideological measures, this problem should have minimal effects on the validity of these results.

[9]Clark and McGuire used a dummy variable indicating whether or not the representative had received less than 55% of the vote in the past election. As they note, it performed poorly in their (unpublished) Senate model, perhaps due to the greater volatility in Senate elections.

Judiciary Ctte Coded 1 for members of the House and Senate committees on the Judiciary.

Armed Svcs Ctte Coded 1 for members of the House and Senate Armed Services committees.

Vet Affairs Ctte Coded 1 for members of the House and Senate Veterans' Affairs committees.

Democrat Coded 1 for members who are affiliated with the Democrats. During the 101st Congress, all members of both houses were Democrats or Republicans, so no members are excluded from the analysis.

Two models were estimated for each chamber. The first model replicated Clark and McGuire's analysis by using members' votes on the Flag Protection Amendment (Senate: V0450; House: V0560) as the dependent variable. The House vote was 249–175, while the Senate vote was 57–41.[10]

The dependent variable in the second model is whether or not the senator is a "defector." Members who supported the Flag Protection Act (Senate: ICPSR variable V0237; House: V0226) were classified as defectors or non-defectors based on their vote on the Flag Protection Amendment (Senate: ICPSR variable V0450; House: V0560); members who opposed the original Act were omitted from this analysis. Senators and representatives voting against the Flag Protection Act are omitted from the analysis. In the House, 150 members (of 379 who supported the Act) defected, while 35 (of 89) defected in the Senate.

As the dependent variable in the model is dichotomous, the probit estimator (Aldrich and Nelson 1984) is appropriate. Estimates were produced in Stata 7 with predicted probabilities produced by the built-in `predict` command. Classification correct-

[10]The vote totals reported here only include members who are included in the full model.

ness estimates and reduction-in-errors estimates were calculated using the `epcp` command[11].

Findings. The probit estimates for the Senate models are presented in Table 1 and for the House models in Table 2, below.

[Table 1 about here.]

[Table 2 about here.]

The overall performance of each of the models appears to be quite satisfactory; in addition, the goodness-of-fit and classification measures of the models compare favorably to the House model presented in Clark and McGuire. In particular, the proportional reduction in error statistics suggest that the Senate model performs remarkably well, while the House model also performs significantly better than we would expect by chance.[12]

The independent variables, taken individually, provide little support for any Congressional norm of deference to the Court's judgment. To the contrary, supporters of the amendment and non-defectors were overwhelmingly more likely than amendment opponents (and, by extension, defectors) to be conservative, providing substantial support for the ideological behavior hypothesis in both chambers.

The reelection hypothesis fared very poorly in the House, with no significant impact except a slight tendency for Republicans in marginal districts to be less supportive

[11] This command, as a Stata `.ado` file, is available for download at the author's website. Despite Herron's (2000) advice, the traditional (not probabilistic) measures of classification accuracy and improvement are presented, mainly to ease comparisons with Clark and McGuire (1996).

[12] The relatively small number of cases in the Senate models may be some cause for concern. Omitting the rather poorly-performing dummy variables suggested by Clark and McGuire from the Senate model produces little change in the substantive results, suggesting that the small number of cases is relatively unproblematic.

of the amendment (as might be expected in a Democratic-leaning district); however, House members from districts that strongly supported President Bush were more likely to support the amendment and less likely to defect. As in Clark and McGuire, the evidence of committee effects is weak to nonexistent.

The results of the reelection hypothesis in the Senate were quite strikingly different. The effect of Bush's support in the state was small, insignificant, and in the wrong direction, perhaps due to the independence of senators from presidential coattails. The effects of partisanship interacted in interesting ways with marginality for senators; as we might expect, Republicans with smaller victory margins tended to be more reluctant to overturn the court, while Democrats who had faced strong challengers were more willing to overturn the court's decision. Senators who faced reelection in 1990 were significantly less likely to support the amendment; however, this effect was tempered by past victory margins, as senators with more electoral support who faced reelection in 1990 were more likely to support the amendment; this appears to be a completely counterintuitive finding, as the flag amendment vote would probably be most salient at the next election.

The effects of partisanship alone appear to be counterintuitive as well; however, when coupled with the interactions of electoral security, the negative sign of the Republican dummy should be taken as a deviation from the baseline in an even race. Using this interpretation, it is fairly obvious that Republicans in close races should be more likely to oppose the amendment (in order to appeal to the median voter in their constituencies), as Democrats in close races would be less likely to oppose the amendment.

In the House, the effects of partisanship appear to be minimal.

Finally, the effects of district-level education on support for the amendment should be explicated. As Clark and McGuire found, the median education level in the district was a significant predictor of member vote choice in the House; however, the effects were insignificant in the Senate, perhaps due to the low variance in this indicator between states (the range of the variable is only 12.1–12.8).[13]

Comment and Conclusions. As mentioned at the outset, the results produced here largely confirm the findings of Clark and McGuire, with additional evidence for reelection effects that they are unable to observe in the House, due to the varying time horizon of the electoral connection for senators. Legislators in both chambers appear to be attitudinally-motivated actors, rather than deferential toward the positions of the Supreme Court, even in the when faced with questions of constitutional interpretation.

One particularly surprising result is the significant, but wrongly-signed, effect of being up for reelection in 1990 (and its companion, wrongly-signed, interaction with marginality). The results suggest that members who faced reelection in 1990 were *less likely* to support the flag amendment, and thus more likely to defect from the flag protection coalition, than members with longer-term time horizons; furthermore, the interaction suggests that members with wider victory margins were *more likely* to support the amendment. A possible explanation is that members up for election in 1990 viewed their flag vote as more defensible in that context; members facing election in 1992 and

[13] Using the percentage of the state's population that had four or more years of college instead produced a significant finding in the expected direction, suggesting that measurement was an important issue for this indicator. This measure is highly correlated with median education ($r = .794$, $p < .001$). This alternative measure also performed similarly to median schooling in the House model.

1994 might have more difficulty justifying their votes without the context of the flag burning debate. Another possibility is that the results are simply an artifact of the small number of senators in the sample and the subsample.

As Clark and McGuire conclude, legislators may defer to the Supreme Court, but only when it is in their interests—ideological or strategic—to do so. In analyzing the Senate, we can further examine legislators' strategic interests by isolating the effects of elections on their behavior: as envisoned by the Framers, the staggered nature of senators' terms insulates many of them from the ebbs and flows of public opinion. An interesting prospect for a more direct comparison between the chambers would be to replicate the design of this study for the House, to determine the relative importance of reelection effects in the two chambers and the potential relevance of the "racial issues" dimension in the lower house's decision.

The Court's actions are rarely so controversial, in part because the collective preferences of Congress are rarely so directly challenged by them, and in part because few controversies involving the court raise such powerful public sentiment. Nonetheless we might expect similar patterns of behavior in the response to the invalidation of the Religious Freedom Restoration Act or the Communications Decency Act, both recent instances of the Court running afoul of the preferences of the Congress. Opportunities for future research in this field abound.

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List of Tables

Variable	Coefficients (Robust Standard Errors) Supported Amendment	Did Not Defect
W-NOMINATE 1	5.668***	6.523***
	(1.349)	(1.950)
Up In 1990	–1.406*	–1.404*
	(0.629)	(0.667)
Up In 1992	–0.077	–0.462
	(0.368)	(0.439)
Bush Vote (1988)	–0.054	–0.036
	(0.048)	(0.057)
Republican	–3.952**	–3.299†
	(1.341)	(1.693)
Victory Margin	–0.094**	–0.113**
	(0.030)	(0.039)
Republican × Margin	0.128*	–0.078
	(0.059)	(0.072)
Up in 1990 × Margin	0.106*	0.117**
	(0.041)	(0.046)
Lawyer	–0.654	–0.057
	(0.434)	(0.339)
Judiciary Ctte	–0.864	–0.330
	(0.553)	(0.564)
Armed Svcs Ctte	0.429	0.319
	(0.378)	(0.410)
Vet Affairs Ctte	1.409*	1.258*
	(0.597)	(0.568)
Median Education	–1.584	–2.033
	(1.061)	(1.280)
(Constant)	0.011***	0.018***
	(0.002)	(0.003)
Number of observations	98	89
-2 LLR $\chi^2(13)$	61.27***	38.71***
Pseudo R^2	0.5519	0.6107
Correctly classified	89.8%	92.1%
Prop. Reduction in Error	75.6%	80.0%

- Coefficients are maximum-likelihood (probit) estimates.
- Standard errors are Huber-White heteroskedasticity-consistent standard errors, adjusted for clustering by state.
- *** indicates $p(z) < .001$; ** $p < .01$; * $p < .05$; † $p < .10$ (two-tailed test).

Table 1: Models of amendment support and defection for the Senate

Variable	Coefficients (Robust Standard Errors) Supported Amendment	Did Not Defect
W-NOMINATE 1	4.373***	4.729***
	(0.680)	(0.722)
Bush Vote (1988)	0.030*	0.022†
	(0.012)	(0.012)
Republican	–0.856	–1.093†
	(0.551)	(0.615)
Victory Margin	0.003	0.001
	(0.006)	(0.006)
Republican × Margin	–0.009*	–0.005
	(0.013)	(0.014)
Lawyer	–0.080	–0.144
	(0.168)	(0.167)
Judiciary Ctte	0.044	0.137
	(0.330)	(0.352)
Armed Svcs Ctte	0.316	0.339
	(0.267)	(0.279)
Vet Affairs Ctte	0.202	0.243
	(0.388)	(0.428)
Median Education	–1.008**	–0.862**
	(0.316)	(0.334)
(Constant)	12.682**	11.575**
	(3.884)	(4.014)
Number of observations	424	379
-2 LLR $\chi^2(10)$	280.49***	203.71***
Pseudo R^2	0.5312	0.5003
Correctly classified	85.4%	85.0%
Prop. Reduction in Error	64.6%	62.0%

- Coefficients are maximum-likelihood (probit) estimates.
- Standard errors are Huber-White heteroskedasticity-consistent standard errors, adjusted for clustering by state.
- *** indicates $p(z) < .001$; ** $p < .01$; * $p < .05$; † $p < .10$ (two-tailed test).

Table 2: Models of amendment support and defection for the House