# Congress, the Supreme Court, and the Flag

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Congress frequently seeks to reverse the policies of the U.S. Supreme Court. Much is known about the circumstances in which lawmakers confront the Court and whether they are likely to succeed. Still, we do not know how individual members of Congress make these decisions. Why do some members defer to judicial policymaking, while others openly oppose it? The case of the Flag Protection Amendment of 1990, considered in response to the Court's decisions on the issue of flag burning, provides an illustrative setting in which to examine this question. Despite evidence that congressional reaction to judicial policy is distinctive, our model of the vote suggests that the nature of institutional conflict does not shape the decision. Rather, members largely reflect ideological and constituent preferences when deciding whether to reverse the Court.

Once the Supreme Court decides statutory or constitutional issues, Congress can, and frequently does, respond. By constitutional design, the legislature has a number of practical prerogatives (Murphy 1962; Pritchett 1961). In most instances, Congress seeks to reverse the Court's interpretation of statutes (Henschen 1983), but on occasion Congress has successfully overturned the Court by initiating amendments to the Constitution itself (O'Brien 1993: 363).

A good deal is known about the circumstances that give rise to such institutional conflict as well as the factors affecting the outcome (see, e.g., Bawn and Shipan 1993; Eskridge 1991; Henschen and Sidlow 1989; Ignagni and Meernik 1994; Marshall 1989). What remains unclear, however, is why individual members of Congress respond as they do to these specific opportunities. That is, when Congress attempts to override the Court, what is the basis

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for individual decision making? Does the decision to overrule the Court turn on factors that are peculiar to interbranch relations, or are members motivated by the same goals that govern other substantive decisions? Using data from the 101st Congress, we apply the standard assumptions of legislative decision making to one significant illustration of such conflict–the vote on the Flag Protection Amendment of 1990–considered by Congress in the wake of the Court's decisions on flag burning. The results suggest that, despite evidence that unique considerations govern Congress' relationship to the Court, the forces that dominate congressional decisions generally in fact provide a clear account of how members of Congress respond to the policymaking of the justices.

## Members' Response to the Court

Notwithstanding the separation of powers, both the judiciary and the legislature play a role in the interpretation of federal law (Fisher 1988). Naturally, the Supreme Court provides authoritative construction to the Constitution, statutes, regulations, and the like, but Congress increasingly has sought to undo many of the Court's policies (Eskridge 1991: 335-38; Henschen 1983: 445). This alacrity that the institution has shown for tinkering with judicial decisions belies the concern that many individual lawmakers have about preserving interbranch respect–maintaining the Court's legitimacy as an independent policymaker–by deferring to the justices despite disaffection with their judgments (Miller 1992). Consequently, understanding how members of Congress make decisions about judicial oversight is a matter of considerable importance.

One way to investigate this issue is to locate an appropriate context in which Congress clearly and directly confronts the Supreme Court and assess whether and why members respect or reject the Court's judgment.[1] Perhaps the most glaring of such contemporary congressional challenges sprang from the justices' ruling in *Texas* v. *Johnson* (1989), a decision invalidating, on First Amendment grounds, a Texas law that forbade the desecration of the American flag. Clashing squarely with public preferences, the case prompted swift legislative reaction, and within a short time Congress approved the Flag Protection Act of 1989, legislation designed to preserve the national symbol without running afoul of the constitutional limits established in the Court's decision (Biskupic 1989). The federal law, however, met a similar fate less than a year

[1] Of course, this is by no means the only way of approaching the question. One might analyze, for instance, roll-call data for those bills designed to reverse or modify the justices' interpretation of federal law. Another approach might involve a comparison of general congressional voting against voting on Court-curbing measures.

later in *U.S.* v. *Eichman* (1990), and serious attention then focused on a constitutional amendment as a means of reversing both decisions. As measured by the resolve of the House, this was no trivial confrontation with the Court; not only was the Flag Protection Amendment of 1990 brought to a vote–an action rarely taken with proposed amendments–it also garnered the backing of a substantial majority of members, though falling short of the necessary two-thirds support (Biskupic 1990). With this vote, Congress arguably came closer to reversing a constitutional decision of the Supreme Court than it had in any previous instance over the preceding two decades.[2] Why?

In deciding how to respond to the Supreme Court, are members motivated by conventional forces or are lawmakers prompted by a sense of institutional respect, willing to defer to judicial decision making even when it runs counter to their own policy views or provokes adverse public reaction? In light of the passionate dialogue over the Court's decisions on flag burning–a debate within Congress and among the mass public, as well–we think that the vote on the Amendment provides an especially attractive lens through which to view how individual members of Congress balance their regular pressures against interbranch considerations.[3] Naturally, the empirical model we formulate is guided by a number of theoretical considerations.

We begin by assuming that members are largely purposive in nature and that their voting behavior is predicated on seeking to maximize certain goals (Kingdon 1981). Prominent among them are the intertwined objectives of representing constituent preferences (Fiorina 1989) and securing reelection (Mayhew 1974), as well as the desire to craft effective public policy (Fenno

[2] The last time Congress successfully sought to amend the Constitution as a means of reversing the Court was in 1971; following the ruling in *Oregon* v. *Mitchell* (1970), which established that Congress could not establish the voting age in state elections, Congress approved and sent to the states the 26th Amendment (O'Brien 1993: 397).

[3] One might reasonably suggest that the vote on the Flag Protection Act of 1989 would be an equally appealing candidate for such inquiry. We do not regard the vote on the legislation, however, as an appropriate context to ply our analysis. From a theoretical perspective, the legislation cannot reasonably be regarded as a measure designed to reverse the Court's decision in *Texas* v. *Johnson* (1989). After all, the Court's decision in that case was a matter of constitutional—not statutory—interpretation. Since the Constitution always trumps legislative enactments, the law strictly speaking could not overcome the Court's ruling (i.e., Congress cannot, by statute, undo the meaning of the First Amendment). This does not mean that the Flag Protection Act was unimportant; rather, it must be regarded as a symbolic stand against the Court as opposed to an outright reversal (see Taylor 1990). Moreover, from a methodological perspective, the vote on the legislation was quite lopsided and therefore liable to frustrate reliable statistical inference.

1973).[4] So, for example, districts that manifest greater support for civil liberties–typically districts with higher levels of education–should signal their representatives to be cautious in amending the Bill of Rights (Gallup and Newport 1990; McClosky and Brill 1983); in contrast, insecure lawmakers from competitive districts and members from districts in which President Bush–an outspoken supporter of the constitutional amendment–enjoyed substantial support would both likely face voters with considerable enthusiasm for squelching the Court (Fiorina 1974). Quite apart from their attention to parochial preferences, members might also act on the basis of their own policy objectives (see, e.g., Norpoth 1976; Poole and Daniels 1985; Smith 1981); to that end, liberals should tend to be protective of the interests of free expression while conservatives should evince greater concern for the preservation of the flag as a national symbol.[5]

At the same time, it is instructive to recognize that other potentially important factors may govern congressional decisions about interbranch relationships. After all, despite enormous public pressure, many members of Congress were clearly loath to pursue constitutional change (Taylor 1990). Thus, it is a plausible assertion that the standard forces that guide congressional decision making may be mediated by a concern for maintaining the Court's legitimacy as an independent policymaker. Lawyers within the legislature, for instance, are disproportionately supportive of the judicial function and averse to disturbing the Court's rulings, even unfavorable ones (Felice and Kilwein 1993; Miller 1993a, 1993b; but see Green et al. 1973). Moreover, members from different types of committees vary considerably in their views of and reactions to Supreme Court decisions (Bawn and Shipan 1993). On the one hand, some committees, such as the Judiciary Committee, strive to be particularly deferential to the Court; indeed, as one staff member remarked,

[4] Of course, seeking influence within Congress is another important element of congressional behavior (see Fenno 1973). It strikes us as unlikely, however, that this goal would manifest itself in any single vote, particularly a vote of this kind (but see Lascher, Kelman, and Kane 1993).

[5] Consistent with prior research, we operationalize these measures along the following lines: We measure education as the median level of education of the member's district, according to the 1980 census (*Congressional Districts in the 1980s*, 1983). Lawmakers are considered to come from competitive districts (coded as 1) if the member's percentage of the two-party vote in the 1988 general election was 55 percent or less, 0 otherwise, while support for the President is gauged by the percentage of the two-party vote received by George Bush within the member's district in the 1988 presidential election. In addition, we code Democrats as 0 and Republicans as 1, while ideology takes the form of the 1989 voting scores calculated by Americans for Democratic Action (ADA) (see Duncan 1989).

"Even in the flag burning case, the Judiciary Committee took great pains not to attack the courts as an institution" (Miller 1992: 960). On the other hand, members of Congress who serve on reelection committees attentive to issues that tap sentiments similar to those aroused by the flag burning issue–such as Armed Services, with its broad emphasis on military issues, and Veterans Affairs, with its concern for the interests of former military personnel–would be disposed to react in accord with the general tendencies of those committees and be more willing to overturn the Court. Thus, deference to judicial policy should be concentrated among those members whose professional and educational backgrounds lead them to afford the Court institutional respect generally.[6]

### Analysis

To test these predictions, we gathered data on the appropriate district, policy, personal, and institutional characteristics of the House members of the 101st Congress (1989-90) and constructed a probit model of the vote on the Flag Protection Amendment of 1990, estimating the probability of voting in favor of the amendment (Aldrich and Nelson 1984). The dependent variable–the roll-call vote on the proposal of the Flag Protection Amendment–is coded as 1 for yea and 0 for nay.[7]

[6] Here, we regard a legislator as a lawyer if that member had a law degree (coded as 1, and 0 otherwise). For committee memberships, we coded these predictors as 1 if the member sat on these respective committees–Judiciary, Armed Services, and Veterans Affairs–during the 101st Congress, 0 otherwise.

[7] One might reasonably ask why we do not undertake to provide a similar model for the Senate. After all, the Senate also voted on this very same proposal, and our analytic case might be strengthened considerably if we were to document comparable forces at work in the upper chamber. We do not report such results for two reasons: First, the vote in the Senate was purely symbolic; this does not mean that the vote had no relevance or consequences for senators, but the House, having failed to pass the measure by the requisite two-thirds majority, rendered moot any meaningful decision by the Senate. Consequently, the Senate vote fails to meet our theoretical threshold as a vote to overturn the Supreme Court. Second, from an empirical perspective, when the same model is applied to the Senate, multicollinear effects frustrate a parallel estimation. This is not to suggest, of course, that a similar estimation provides no meaningful information. Indeed, an analogous model reveals that the same forces that influenced House members shaped the decision making in the Senate. Unfortunately, this is only true when the measure of political ideology is omitted from the Senate's equation. When the full model for the House is replicated for the Senate, the results would lead one to conclude, we think erroneously, that ideology was the exclusive determinant of the Senate vote; the complication is that virtually all of the variance in Senate ideology can be explained by the remaining predictors, a pattern that does not prevail in the House.

Our results, reported in Table 1, reveal that the model performs quite well. Overall, the equation is significant and represents a 66 percent reduction in error over the null model, and the fit, as measured by the pseudo-$R^2$, is a respectable .70. More importantly, the results suggest confirmation of at least some of our primary hypotheses.

TABLE 1

PROBIT MODEL OF CONGRESSIONAL VOTE ON THE FLAG PROTECTION AMENDMENT

| Variable | b | t |
|---|---|---|
| Constant | 1.52 | 1.97* |
| Level of education in district | -.19 | -2.99** |
| 1988 Bush vote in district | .03 | 2.71** |
| Marginal district | .65 | 2.10* |
| Political party (Republican=1, Democrat=0) | -.03 | -.10 |
| 1989 ADA score | -.03 | -6.97*** |
| Lawyer | -.03 | -.16 |
| Judiciary Committee | .02 | .06 |
| Armed Services Committee | .31 | 1.10 |
| Veterans Affairs Committee | .41 | 1.14 |

* $p < .05$ ** $p < .01$ *** $p < .001$

Note: $N$ = 423 (249 yeas, 174 nays); dependent variable equals 1 for yea, 0 for nay

McKelvey Pseudo-$R^2$ = .70

-2LLR = 301.47 ($p<.001$)

Percent correctly predicted = 86.2%

Percent "yea" correctly predicted = 87.1%

Percent "nay" correctly predicted = 85.1%

Proportional Reduction in Error over Modal Category = 66.4%

Our expectations were that institutional deference would be greater for lawyers in general as well as for members of the Judiciary Committee more specifically, but the results indicate no support for either hypothesis: Lawyers showed only a negligible antipathy for modifying the Constitution as a means of reversing the Court, and those serving on the Judiciary Committee–a group that typically affords the Court a high degree of deference (Miller 1992)–responded no differently than any other members of Congress, all things being equal.[8] Members of the Armed Services and Veterans Affairs Committees were predictably more supportive of overturning the justices but only marginally so.

In contrast, voters in different congressional districts appear to have influenced their representatives in several different ways. Vulnerable members

[8] Naturally, such behavior could well be found across a wider range of roll votes.

in marginal districts, for example, evidenced significantly greater levels of support for the amendment. A vote against the amendment would have supplied potential fodder for challengers in the impending election; marginal members, therefore, did not stray from mass opinion. Likewise, President Bush's base of electoral support seems to have affected how members responded to this issue, as members from districts in which the President ran well in the election of 1988 were also staunch supporters of the Flag Protection Amendment.

Stated in probabilistic terms, a member from a safe district would be generally disposed to favor reversing the Court, the likelihood of voting for the amendment being .64 (constraining all other predictors to their mean values). For a member whose reelection was insecure, however, the chances of voting to overrule the Court were considerably greater (.84). Furthermore, if that same electoral vulnerability were coupled with a solid showing by the President in the district–say, 65 percent of the vote–the probability increases to .92. Establishing that George Bush's success had such a pronounced effect on the voting on this issue is, we believe, particularly telling, since many voters in 1988 were strongly influenced by the President's appeals to patriotism and the flag during the campaign (Sullivan, Fried, and Dietz 1992). Evidently, powerful electoral forces shaped the decision making of a good many members.[9]

The importance of constituent-based effects can also be seen in the impact of education within the districts. As expected, members who represented more sophisticated populations mirrored the greater support for civil liberties held by their constituents. Of course, this is a guarded interpretation, since we infer a host of demographics and companion attitudes from only a single estimator.[10] Still, the data that we do bring to bear suggest that the instructed-delegate model has some validity when it comes to overturning the Court.[11]

Aside from the effects that emanate from the districts, members based their decisions in no small measure upon their own political predilections.

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[9] One might expect constituent opinion to be particularly salient for legislators from marginal districts. The introduction of multiplicative interactions (Bush's vote margin and district education level with marginality) into the model did nothing to explicate this relationship, however.

[10] Other relevant indicators—income and the proportion of the district in white collar occupations, for instance—are, not surprisingly, highly correlated with level of education. So, as a statistical matter, multicollinearity does not permit their introduction into the equation.

[11] An intriguing—and highly plausible—alternative interpretation of this effect is that better educated districts extend their representatives greater latitude in their voting decisions, a view more consonant with the role of members as trustees. Given the known

Our model, while showing no patterns of partisanship in the voting, demonstrates that ideology had a measurable impact on congressional members. Indeed, the coefficient for ideology is the single most significant in the model.[12] Naturally, ideology is not wholly independent of district opinion (Fiorina 1974), but we have attempted to control for district opinion with our other variables. So, aside from any constituency pressures that might have been provoked by this issue, much of the voting on whether to overrule the Court was driven by the members' own views regarding freedom of expression (see also Lascher, Kelman, and Kane 1993). The more liberal a member, the greater the probability of voting against reversing the Court.

A reasonable inference that one might make in light of these results is that members appear to approach their relationship with the Supreme Court largely on a case-by-case basis. That is, when Congress is faced with an opportunity to supersede the justices, members respond primarily to the substance of the decision, not to the larger institutional context. Thus, liberals in Congress who might otherwise oppose the conservatism of the Rehnquist Court are perfectly willing to defer to the justices, provided that those decisions are consistent with their own policy preferences. Taken together, these policy and constituent considerations account for most of the decision making on the flag protection issue.

## Conclusions

We think our results reveal a good deal about the character of the relationship between the Congress and the Supreme Court. Our model offers an intuitively plausible account of why members of Congress choose to overturn the rulings of the high court. As expected, the explanations we have offered for the vote on the constitutional amendment to reverse the Court's flag-burning decisions comport well with standard explanations of roll-call behavior. Indeed, despite evidence to the contrary, when it comes to curbing the Court, members respond to much the same pressures and considerations that govern their behavior in other areas of the legislative agenda, an interpretation buttressed by similar analyses (see, e.g., Shipan 1992). Accordingly, whatever professional or institutional characteristics might have informed a member's

link between education and support for civil liberties, we suspect that lawmakers were probably mirroring voter preferences. At the same time, however, we think that future research on the impact of education on other types of votes may help to establish which is the more compelling explanation.

[12] ADA scores were unavailable for eight members, who are therefore excluded from the analysis.

decision, they simply were subsumed by the urgencies of ideological and constituent constraints.

It bears emphasizing that we do not here claim to provide a comprehensive account of how members of Congress respond to the Supreme Court; further investigation is needed to develop a more general model of how Congress normally reacts. At the same time, we believe that the controversy over these decisions may well be instructive in pursuing that end; after all, existing models of congressional-judicial interactions would predict that *Texas* v. *Johnson* and *U.S.* v. *Eichman*, while prime candidates for congressional attention (see Eskridge 1991), would ultimately be resolved in favor of the Court (see Marshall 1989). This, as it turns out, is precisely what transpired. We are reasonably confident therefore that, based upon this path of institutional actions, we can offer some guarded generalizations about the nature of the individual member's response. In brief, within any given issue area, members bring well-defined sets of predispositions that govern their voting behavior. When the Court runs so far afoul of Congress' collective preferences that Congress seeks an override, it is these factors that dictate how members respond.[13] Applying similar models to other instances of congressional reassertion over the Court, therefore, would provide a fruitful line of future inquiry.

The vote on the Flag Protection Amendment simply appears to magnify one feature of the conflict that frequently exists between these two branches. Congress, of course, rarely undertakes constitutional change as a mechanism for overcoming the Court, but when it does it would appear that members treat the justices no differently than they do other political actors.

## References

Aldrich, John H., and Forrest D. Nelson. 1984. *Linear Probability, Logit and Probit Models*. Beverly Hills: Sage.

Bawn, Kathleen, and Charles R. Shipan. 1993. "Congressional Response to Supreme Court Decisions: An Institutional Perspective." Presented at the annual meeting of the American Political Science Association, Washington, D.C.

Biskupic, Joan. 1989. "Senate Amends, Then Passes Bill on Flag Desecration." *Congressional Quarterly Weekly Report* 47: 2646.

_____. 1990. "Critics of Measure Win Fight, But Battle Scars Run Deep." *Congressional Quarterly Weekly Report* 48: 2063–64.

*Congressional Districts in the 1980s*. 1983. Washington, DC: CQ Press.

[13] Naturally, the Court's decisions in other, less salient areas, such as foreign affairs or government regulation of economic activity, might illicit different structures to the vote choice.

Duncan, Phil, ed. 1989. *Politics in America 1990*. Washington, DC: CQ Press.
Eskridge, William N., Jr. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101: 331–455.
Felice, John D., and John C. Kilwein. 1993. "High Court-Legislative Relations: A View from the Ohio Statehouse." *Judicature* 77: 42–48.
Fenno, Richard F., Jr. 1973. *Congressmen in Committees*. Boston: Little, Brown.
Fiorina, Morris P. 1974. *Representatives, Roll Calls, and Constituencies*. Lexington, MA: Heath.
_____. 1989. *Congress: Keystone of the Washington Establishment*, 2nd ed. New Haven: Yale University Press.
Fisher, Louis. 1988. *Constitutional Dialogues: Interpretation as Political Process*. Princeton, NJ: Princeton University Press.
Gallup, George, Jr., and Frank Newport. 1990. "Americans Back Bush on Flag-burning Amendment." *Gallup Poll Monthly*, June pp. 2–4.
Green, Justin J., John R. Schmidhauser, Larry L. Berg, and David Brady. 1973. "Lawyers in Congress: A New Look at Some Old Assumptions." *Western Political Quarterly* 26: 440–52.
Henschen, Beth. 1983. "Statutory Interpretations of the Supreme Court: Congressional Response." *American Politics Quarterly* 11: 441–58.
Henschen, Beth M., and Edward I. Sidlow. 1989. "The Supreme Court and the Congressional Agenda-Setting Process." *Journal of Law and Politics* 5: 685–724.
Ignagni, Joseph, and James Meernik. 1994. "Explaining Congressional Attempts to Reverse Supreme Court Decisions." *Political Research Quarterly* 47: 353–71.
Kingdon, John W. 1981. *Congressmen's Voting Decisions*, 2nd ed. New York: Harper & Row.
Lascher, Edward L., Jr., Steven Kelman, and Thomas J. Kane. 1993. "Policy Views, Constituency Pressure, and Congressional Action on Flag Burning." *Public Choice* 76: 79–102.
Marshall, Thomas R. 1989. "Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?" *Western Political Quarterly* 42: 493–507.
Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven: Yale University Press.
McClosky, Herbert, and Alida Brill. 1983. *Dimensions of Tolerance: What Americans Believe about Civil Liberties*. New York: Russell Sage Foundation.
Miller, Mark C. 1992. "Congressional Committees and the Federal Courts: A Neo-Institutional Perspective." *Western Political Quarterly* 45: 949–70.
_____. 1993a. "Lawmaker Attitudes toward Court Reform in Massachusetts." *Judicature* 77: 34–41.

_____. 1993b. "Lawyers in Congress: What Difference Does It Make?" *Congress and the Presidency* 20: 1–23.

Murphy, Walter F. 1962. *Congress and the Court*. Chicago: University of Chicago Press.

Norpoth, Helmut. 1976. "Explaining Party Cohesion in Congress: The Case of Shared Policy Attitudes." *American Political Science Review* 70: 1156–71.

O'Brien, David M. 1993. *Storm Center: The Supreme Court in American Politics*, 3rd ed. New York: Norton.

*Oregon* v. *Mitchell*. 1970. 400 U.S. 122.

Poole, Keith T., and R. Steven Daniels. 1985. "Ideology, Party, and Voting in the U.S. Congress, 1959–1980." *American Political Science Review* 79: 373–99.

Pritchett, C. Herman. 1961. *Congress versus the Supreme Court*. Minneapolis: University of Minnesota Press.

Shipan, Charles R. 1992. "Individual Incentives and Institutional Imperatives: Committee Jurisdiction and Long-Term Health Care." *American Journal of Political Science* 36: 877–95.

Smith, Steven S. 1981. "The Consistency and Ideological Structure of U.S. Senate Voting Alignments, 1957–1976." *American Journal of Political Science* 25: 780–95.

Sullivan, John S., Amy Fried, and Mary Dietz. 1992. "Patriotism, Politics, and the Presidential Election of 1988." *American Journal of Political Science* 36: 200–234.

Taylor, R. Neil III. 1990. "The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision." *University of Cincinnati Law Review* 58: 1477–1508.

*Texas* v. *Johnson*. 1989. 491 U.S. 397.

*United States* v. *Eichman*. 1990. 496 U.S. 310.

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