

**The Pi Sigma Alpha  
Undergraduate Journal of Politics**

Spring 2009

Volume IX

Number I

Sixteenth Edition

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## Table of Contents

Volume IX	Number I	Spring 2009
The “Trinity” of Religion and Congress: Representatives, Roll Calls and Religion Lisa Sanchez, <i>University of New Mexico</i>		1
The Creation of a Terrorist Race: The Racialization of Arabs in America before 9/11 Emily Coffey, <i>Beloit College</i>		28
Union Perspectives on Immigration: Pro-Immigration Scale Proposed to Assess Union Attitudes Michael Snow, <i>University of North Carolina at Chapel Hill</i>		54
Anthony Kennedy: The Roberts Court’s Sandra Day O’Connor? William Dane DeKrey, <i>University of North Dakota</i>		74
Democratic Disunity: Race, Religion and Representation in Tennessee’s 9 <sup>th</sup> Congressional District Chris Chiego, <i>University of Georgia</i>		95

## **Editor's Preface to the Spring 2009 Edition**

We are pleased to present the Spring 2009 edition of *The Pi Sigma Alpha Undergraduate Journal of Politics*. This is the tenth edition of the *Journal* sponsored by Pi Sigma Alpha, the National Political Science Honor Society, and the seventeenth edition since initial publication.

There are many people we wish to recognize. First, we would like to thank the Pi Sigma Alpha Executive Council and the Executive Committee, particularly President James Campbell, Executive Director James Lenge, and Administrator Nancy McManus. The *Journal* would not be possible without these dedicated individuals. Additionally, we wish to acknowledge all of the faculty Advisory Board members, as well as Mr. Pedro Dos Santos for serving as a guest member of the Advisory Board. It is their continual dedication and efforts that make the *Journal* a reality. Finally, we express our gratitude for the unending guidance and enthusiasm of our Faculty Advisor, Zoe Oxley.

This Spring 2009 issue marks our last as Editors of the *Journal*. We hope that you will continue to promote this important outlet for undergraduate political science research with your fellow students and colleagues.

Thank you.

The Editors

## **Submission of Manuscripts**

*The Pi Sigma Alpha Undergraduate Journal of Politics* welcomes submissions from undergraduates of any class or major; submissions from Pi Sigma Alpha members are especially encouraged. Our goal is to publish manuscripts of the highest quality. In general, papers selected for publication have been well-written with a well-developed thesis, compelling argument, and original analysis. The maximum page length for submissions is 35 pages. Manuscripts should include an abstract of approximately 150 words. Citations and references should follow the American Political Science Association *Style Manual for Political Science*. Authors may be asked to revise their manuscript before it is accepted for publication. Submissions must be in the form of a Microsoft Word document and should be e-mailed to [psajournal@union.edu](mailto:psajournal@union.edu). Please include name, university, and contact details (i.e., mailing address, e-mail address, and phone number).

## **The “Trinity” of Religion and Congress: Representatives, Roll Calls and Religion**

Lisa Sanchez, University of New Mexico

*Does the personal religious affiliation of members of Congress affect their roll call voting behavior? Prior research supports the finding that religion matters for certain social issues such as abortion. However, I argue that the effect of religious affiliation on roll call votes extends beyond key social issues such as abortion to all non-salient issues in which ideology becomes the most important voting determinant. I offer a theoretical model in which the significance of personal religious affiliation of members of Congress varies based on the saliency of the issue. Variance is also expected based on the cross-pressuring between religious prescriptions and party platform for some members of Congress. The voting records for members of the 109<sup>th</sup> House of Representatives are analyzed by comparing DW Nominate, National Journal and National Right to Life Committee’s roll call-based ratings. By using regression analysis for each of the three dependent variable models, I find that religion does affect roll call voting behavior for non-salient issues.*

Religion has always held a unique position in American society. Many religious bodies, both traditional and revolutionary, have found respite and growth within the boundaries of the United States. America’s temperate climate for religious practice has fostered a society exhibiting some of the highest religious indicators in the world (Fowler et al. 2004). Despite the prospering of religious bodies in the United States, it is a unique feature of the American system that such advancement has not been brought about by government institutionalization of religion. In fact, Americans subscribe to the unusual doctrine of separation of church and state as established by the First Amendment to the Constitution. Efforts to keep the potent institutions of religion and government separate have proved difficult. A recent ABC News/*Washington Post* poll found that 63.6 percent of a random sample of 1,007 Americans would rather that religion have the same or greater influence in politics and public life (ABC News/*Washington Post* 2005).

In light of Americans’ attitudes toward religion and politics and their high level of religiosity, religious majorities are capable of delivering influential electoral benefits to members of Congress (MCs) with whom they identify. Among the many voting cue

debates in political science currently underway, the debate over the value of descriptive representation has very important implications for congressional representation. Descriptive representatives are those MCs who “in their own backgrounds mirror some of the more frequent experiences and outward manifestations of belonging to a group” (Mansbridge 1999, 628). A more descriptive body of representatives may improve substantive representation because it enriches the quality of deliberation within Congress (Mansbridge 1999). Although empirically untested, religion, a shared experience, is a logical possible descriptive voting cue. It allows religious voters to elect “one of their own” to Congress in the hopes of achieving substantive policy outcomes when MCs cast roll call votes, especially when cast introspectively in the absence of crystallized public opinion (Mansbridge 1999). Therefore, the religious affiliation of MCs, like race and ethnicity, is used as a descriptive voting cue by which Americans predict and achieve substantive policy outcomes congruent with their own personal religious beliefs (Fowler et al. 2004). However, does the personal religious affiliation of MCs affect their roll call voting behavior, and if so, under what conditions?

Although the implications of religion on politics are palpable, research in the area of politics and religion is empirically unclear as to whether the religious affiliation of MCs’ voting cues translates into differential, substantive congressional behavior. Prior research supports the finding that religious affiliation does matter in certain circumstances (Daynes and Tatalovich 1984; Green and Guth 1991). However, the breadth of such research is largely limited to analyzing the effect of religious affiliation on abortion-related roll call votes. In a departure from prior research, I argue that the effect of religious affiliation on roll call votes extends beyond key social issues such as abortion to all non-salient issues in which ideology becomes the most important voting determinant based on Fenno’s (1995) classic prioritization of congressional goals.

### **Literature Review**

The most visible form of legislative participation in the United States Congress is roll call voting, an activity in which every member of Congress must participate or incur electoral consequences. In this way, roll call voting is unique from every other method of participation because members are “forced” to take a position on

nearly all issues that are salient, non-salient, controversial or minor (Mayhew [1974] 2004). Therefore, many factors conflict when each roll call vote is cast. Among the main factors explaining voting behavior are party, district characteristics, personal characteristics of representatives and ideology, each of which can encompass numerous variables.

Many models have been created to explain the voting behavior of members of Congress. Most models portray MCs as purposive actors who make roll call voting decisions in an informed manner based on goals and incentives, rather than in reaction to external forces (Kingdon 1977). One of the leading political scientists in this area is Richard F. Fenno who concludes that MCs are driven by three main goals that are the result of their political environment, personal objectives and relationship to other political actors (Fenno 1995). The three basic goals are reelection, making good public policy and gaining institutional influence (Fenno 1995). MCs' participation decisions, including roll call voting, are the result of prioritization of these goals in response to the political forces and actors involved with the issue at hand. When all political actors encompassed within these goals (constituency, party members, colleagues, presidential administration and personal policy attitudes) agree, the MC simply votes with his or her political environment (Kingdon 1977). However, when any of the political actors' preferences conflict, MCs must decipher which actor is most important.

A great deal of research has been devoted to party affiliation, presidential influence and district influences when explaining vote choice, whereas a smaller portion of research has been devoted to ideology or personal policy attitudes. Kalt and Zupan (1990) empirically test the importance of ideology to legislative behavior and find support for the argument that personal ideology does matter for explaining legislative behavior. Kalt and Zupan (1990, 104) define ideology as a "political actor's personal definitions of the public interest, pursued as a consumption good that yields satisfaction in the form of moral sentiments." Therefore, religion – a personal, moral sentiment and the focus of this article – may be an important factor of ideology.

William Marshall (2000) argues that religion matters for political issues, even when not obviously involved in a specific policy area, because religion encompasses life values that cannot be separated from other political, value-laden decision making criteria. He argues, for example, that religious views on the sanctity of life

affect less obviously related issue areas because religion is part of the social fabric under which serious beliefs are formed (Marshall 2000). Religion in this sense is similar to political ideology (liberal-conservative spectrum) because it encompasses a set of core beliefs held by the adherent which he or she brings to bear on all situations, whether directly or indirectly related. Marshall's theory that religion is a large component of the religious electorate's political behavior across issue areas remains empirically untested.

Only two studies have been conducted to test the existence of any relationship between religion and congressional behavior. Daynes and Tatalovich (1984) find that religious affiliation is significant for roll call votes relating to abortion legislation. They analyze thirty abortion roll call votes during the 93<sup>rd</sup> through 96<sup>th</sup> Congresses. Although supporting the argument that religion is an important determinant for abortion-related roll call voting, this study's limited scope greatly reduces its impact on illuminating the extent to which religion constitutes an ideological framework for decision making.

Similarly, Green and Guth (1991) focus their study of religion and roll call votes on the congruence between MCs' personal religious affiliation and their constituency's religious affiliation. They use district demography of aggregate denominational membership and ADA scores (Americans for Democratic Action's liberal-conservative scoring method) of congressional roll call voting liberalism to understand the relationship between religion and roll call votes. Their findings turn on the assumption that an "ethno-cultural alignment" has caused a liberal-conservative alignment with the denominational spectrum ranging from conservative Evangelicals on the right to Jews on the left (Green and Guth 1991). Additionally, they find a strong correlation between the majority religion in congressional districts and ADA scores. Green and Guth's usage of a single ADA score provides an overall glimpse of the dyadic connections between MCs and their districts based on religion. Their score fails to provide an empirically supported theoretical framework for the idea that a member of Congress's religion matters irrespective of dyadic constituency preferences and demography. Also, singular use of interest group scores, such as ADA scores, suffer from issue selection bias whose criteria often center on an issue's controversiality, which by default often makes an issue salient to the constituency. While the latter succeeds in further illuminating the nuances of dyadic representation, it does not explain the



circumstances under which an MC's personal religious beliefs govern his or her voting behavior.

Therefore, it is necessary to test Marshall's theory that religion matters across issue dimensions. It is also important to further examine Green and Guth's findings to understand under what other conditions religion plays a key role in congressional decision-making.

### **Theory**

Predicting how MCs will behave once in Congress is the primary concern of voters who often operate on limited, speculative information. Increasingly, candidate-centered elections create an environment whereby party platforms have decreased in importance (Fiorina 1989). Therefore, candidate issue stances and personal qualities play a greater role in deciding election outcomes (Cox and Katz 1996). As a result, there is a great deal of scholarly research that delves into the importance of MCs' personal qualities, such as previous political experience, governing style, home-style and ideology, on legislative behavior (Cox and McCubbins 1993). However, there is very little research as to the effect of religious affiliation on legislative behavior.

Extremely important to understanding whether differential policy outcomes are observed through religious affiliation voting cues is understanding the goals members must prioritize and the factors and political actors that play into their goals (Clausen 1973, 14; Hall 1996). MCs' participation decisions are driven by three main goals: reelection, gaining institutional influence and making good public policy (Fenno 1995).

The first goal, reelection, focuses on the relationship between MCs and their constituency. The electoral connection between MCs and their constituency is extremely important for representation, with some saying representatives must act as delegates for conveying the people's wishes. Otherwise, they are not fulfilling their duties as elected representatives and therefore should not be returned to office (Weissberg 1978). David Mayhew ([1974] 2004, 16) argues that reelection is the "proximate goal of everyone [MCs], the goal that must be achieved over and over if other ends are to be entertained." MCs seeking reelection focus all of their participation on meeting the needs of their constituencies by taking favorable positions and claiming credit for tangible, relevant legislative actions (Mayhew

[1974] 2004). Therefore, an MC seeking reelection cannot be expected to spend time on policy issues that are non-salient for the district. According to research by Zaller and Feldman (1992), constituents have the greatest information and crystallized opinions on “doorstep issues,” issues that have bearing on constituents’ every day lives. It is in these instances that the greatest amount of congruence between legislative roll call behavior and constituent public opinion is observed because constituent opinions are the main focus of reelection seeking MCs. Such issues often include social issues such as social welfare, social security, abortion legislation, gay marriage legislation, civil rights and social justice.

MCs’ second goal is to gain influence within Congress (Fenno 1995). MCs who seek to achieve institutional influence are primarily interested in pleasing party leaders and, if they are in the majority party under unified government, the President. Members actively seeking influence within Congress display high levels of party line voting in order to gain favor with party leaders and thus work their way up the institutional ladder, gain preferred committee placements and increase their own ability to enact policy (Fenno 1995). Party affiliation for all members is a strong determinant of roll call voting behavior, alone explaining between seventy and eighty percent of roll call voting behavior regardless of which goal MCs prioritize (Kingdon 1977). MCs seeking institutional influence are likely to pursue party loyalty with increased vehemence (Fenno 1995). As a result, any pressure that is at odds with the party platform should be disregarded.

Finally, MCs are interested in creating good public policy. This goal is often cited as the reason many MCs seek public office to begin with. MCs each have their own understanding of what constitutes “good” public policy. Ideology, policy attitudes and personal characteristics all factor into how MCs define “good” public policy. Although ideology plays an important role in voting behavior, it proves to be an empirically ethereal voting determinant.

Of the three goals, constituency and party demands most often rank highest on MCs’ priorities when determining vote choice. However, there are instances when party and constituency preference decrease in importance and an MC’s personal ideology becomes the main voting criteria. Reelection-seeking MCs allow their ideology to govern their vote choices mainly when doing so will not adversely affect their chances for reelection or institutional achievement. Issue saliency affords the latter opportunity. When issues are non-salient to

voters, voters are not likely to pay attention or hold crystallized opinions which they expect their MCs to follow (Zaller and Feldman 1992). Moreover, constituent preferences on non-salient issues are volatile and inconclusive, even if constituent cues do exist (Canes-Wrone and Shotts 2004).<sup>1</sup> Therefore, MCs who seek to make “good” public policy in this area have more freedom to do so based on whatever criteria they deem most applicable. When an MC legislates based on his or her own perception of what is “right” and in the best interest of the constituency, personal values play an influential role (Clausen 1973; Mansbridge 1999). Party demands also decrease for non-salient issues and issues that do not constitute cornerstones of the party platform. Non-salient issues do not reap electoral benefits because voters are not paying attention to these issues; therefore, non-salient issues do not help the party achieve its goal of achieving a majority in the chamber (Cox and McCubbins 1993, 4; Hall 1996).<sup>2</sup>

Given the abundance of roll call votes cast during each Congress and the limited number that receive enough media attention to make them salient, many roll call votes can be classified as non-salient (Sidlow and Henschen 2004). Therefore, it is important to understand what factors influence an MC’s personal ideology. Although scholars have devised several methods of measuring political ideology, very few measures are independent of roll call voting. Poole and Rosenthal (2007) created a statistical scoring mechanism based on roll call votes that has made inroads into an MC’s latent ideological beliefs. However, when roll call voting is the

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<sup>1</sup>Although issue salience is important to the study of dyadic relationships, not every district maintains similar levels of saliency on a given issue set. However, abortion, a legislative issue to be measured within the context of this research, is an issue on which highly crystallized opinions exist due to the vast amount of media attention afforded to this topic. Indeed, abortion legislation is of a highly polarizing nature with opinions that are stable over time. Therefore, it is reasonable to assume that abortion legislation is ideal for the study of the intersection of religion and politics because constituents have crystallized opinions about abortion and various religions maintain doctrine specific to this practice. In addition, salience on an issue that is highly visible becomes a moot point because MCs are constrained whether a given district is characterized by heterogeneous or homogenous political opinions toward the issue of abortion based on their need to be responsive to their constituents.

<sup>2</sup>Although MCs are afforded a good deal more freedom concerning vote choice when not fully constrained by party and constituency, they are still semi-constrained by these forces because the last thing they want is for a non-salient issue to suddenly become salient and have voted completely against what constituency and party would dictate for that issue (Mayhew [1974] 2004).

dependent variable, ideology cannot be accounted for with such a measure.

Another common measure for ideology is interest group ratings (Green and Guth 1991). As previously stated, interest group ratings are dependent on roll call votes and are highly subjective in their inclusion of key votes used to score each member. In addition, roll call votes are a poor measure of ideology when defined as “a system of beliefs in which one or more organizing principles connect an individual’s views on a whole range of issues” (Fiorina et al. 2005, 532). Roll call votes account for a behavior, not necessarily the belief system that is the impetus for those actions.

I argue that religion is an important component in understanding MCs’ ideological leanings when voting based on their own conceptions of what constitutes “good” public policy on non-salient issues.

H1: Religion as an ideological voting determinant should matter for non-salient issues.

Each religion has a distinct set of religious precepts that are meant to govern the actions of religious adherents. These views combine to create a unique world view that is brought to bear on everything with which the individual adherent comes into contact (Wald 1987).<sup>3</sup> In this way, theological beliefs are connected to politics in a very subtle manner – one that aligns religious ideology with political ideology (Wald 1987). Because the American religious environment is highly pluralistic, there are two doctrinal organizing principles that assign religious bodies to either conservative or liberal ideological positions: individualism and modernism (Parenti 1967; Wald 1987).

The first religio-political aligning principle is individualism. Each religion holds a unique doctrinal belief about the nature of salvation and its relation to society. In general, liberal and conservative religions differ on the means by which salvation is achieved. Liberal religions are primarily concerned with bringing the kingdom of God to earth, and stress that salvation consists of a

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<sup>3</sup>For the purpose of theoretical modeling, it is assumed that to profess a religious affiliation is to firmly and fully believe in and act upon its code of morality.

“moral commitment to the worldly social betterment of mankind” (Parenti 1967, 268). Liberals’ commitment to social salvation and good works in their communities translates to political liberalism with an emphasis on the collectivist role of the state. Liberal religions often align with liberal governmental practices that seek to equalize social injustice through greater governmental involvement. Perhaps the best example would be liberal religions’ support of social welfare initiatives. Liberal religions have historically led many social movements, and indeed view leadership of social change as a duty to God (Wald 1987).

In contrast, conservative religions’ conceptions of salvation call adherents to accept personal salvation from a higher deity. Conservative religions view their time on earth as mere preparation for eternal salvation, and therefore believe that material equality and social justice are of less importance when compared with the personal battle for the eternal salvation of the individual’s soul (Parenti 1967; Wald 1987). In terms of political ideology, this translates to the rugged individualism characterized by political conservatives who aspire to decrease the size of government and increase the individual’s responsibility just as they prefer to singularly guard against temptations and corruption of the soul in the spiritual realm. Of course there are religions which fall in the middle, which view salvation as the individual’s eternal battle for the soul, but also believe that performing good works in society are necessary as a means of praise to and salvation from a deity. Religious moderates are analogous to political moderates in that they prefer government to step in and provide aid and promote equality and justice when absolutely necessary, but still wish to maintain a highly individualistic society over which the government has limited dominion.

The second religious determinant of ideology is modernism. In religious terms, modernism refers to the extent to which doctrine is malleable to social change and open to interpretation and expansion through reason and intellectual investigation (Parenti 1967). Conservative religions largely believe in the fixed, timeless inerrancy of the Bible and other relevant scripture. Simply because society changes does not render biblical doctrine erroneous; rather it is society which dabbles in inaccuracies. It is through this link that religion finds its highest profile role in politics. As technology and scientific study advance, they create new moral and ethical dilemmas which society must accept or reject. Religious conservatives compare

these modern dilemmas with what they view as the timeless truths in the Bible; if compatible they are accepted and if not, the new technology is rejected on moral grounds. Issues such as the sanctity of life, gay marriage, and cloning take on a spiritual, moral rhetoric whose basis is found in the Bible. The way in which conservative religious bodies view modernism's link to the Bible is very similar to the way in which strict constructionists view the Constitution of the United States: unchanging but containing all of the necessary tools. In addition, belief in an inerrant, fixed authority also leads conservative religious bodies to promote obedience over reasoned dissent (Wald 1987).

Liberal religions easily embrace new technology brought about by modernism and accept the ever changing nature of the world as it is slowly revealed by God and more clearly understood by humans. Intellectual values and technological advances are highly prized and embraced despite the moral and ethical misgivings others might find problematic with such advancement. Non-mainstream causes are also supported by liberal religions through their views of modernism. Some recent examples include support for the non-traditional family and the expansion of rights for homosexuals. The lack of a fixed authority allows religious liberals a great deal of latitude to support social causes as they see fit. Consequently, religious liberals align with political liberals in their support of changing social mores and the utilization of technological advances to their fullest extent for the purported betterment of humankind.

For the purpose of analyzing religion, I have divided American religions professed by MCs in the 109<sup>th</sup> Congress into five categories: Catholic, Jewish, Mainline Protestant, Evangelical and Other.<sup>4</sup> Figure 1 shows the religio-political alignment for the Catholics, Jews, Mainline Protestants and Evangelicals<sup>5</sup> based on the religious determinants of political ideology.

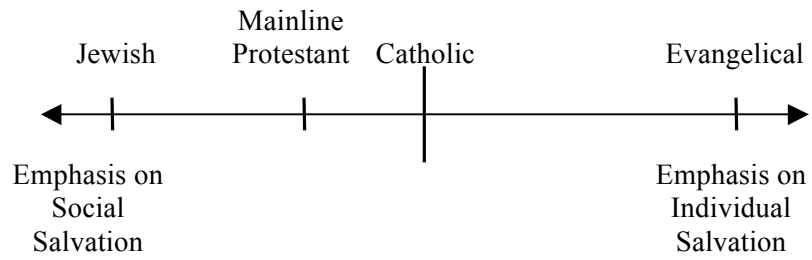
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<sup>4</sup>The last religious category "Other" comprises professed denominations that could not be included in any of the other religious categories and had too few adherents to warrant their own category.

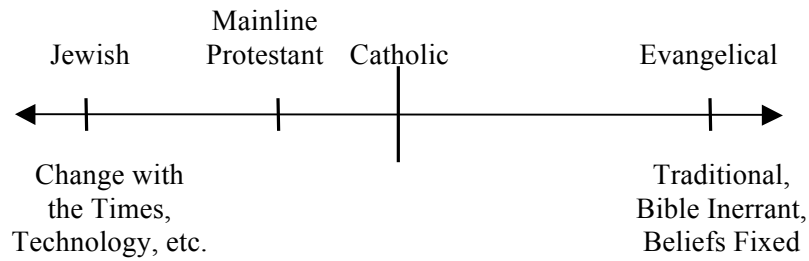
<sup>5</sup>All religions professed in the 109<sup>th</sup> House of Representatives are divided into five categories in order to create the least number of categories while still maintaining theological and denominational integrity. Catholics and Jews are homogenous categories, while Mainline Protestants, Evangelicals, and Other are heterogeneous categories based on the belief system of each denomination, historical roots, and the conference of churches with which they affiliate.

**Figure 1:** Religious Determinants of Political Ideology

Individualism: Action v. Belief

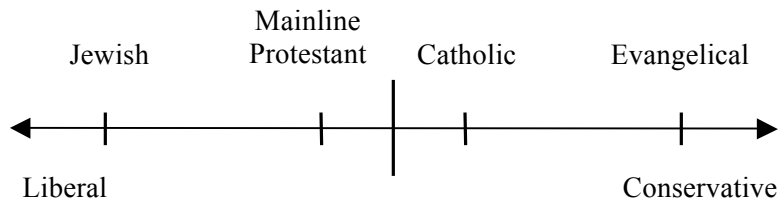


Modernism



When modernism, individualism and obedience to a central authority are taken in the aggregate, the four religious categories can be placed on a political ideology spectrum. Figure 2 shows Jews on the far left, followed by Mainline Protestants, Catholics in the middle and Evangelicals on the far right.

**Figure 2:** Religions on an Ideological Spectrum



Jews constitute the most liberal religious category based on their collectivist beliefs about salvation and their firm belief in the malleability of truth revealed by God. American Jews' main goal is to bring the kingdom of heaven to earth.<sup>6</sup> They hold an unshakable faith in the triumph of reason over human problems and injustice and material inequity. Their beliefs about salvation are so collectivist that the Jewish faith is relatively silent about the soul's life after death (Wald 1987). Jewish political scholar Lawrence Fuchs (1984, 70) characterizes the Jewish faith's call to social action for liberal causes as:

The view that man and his environment are malleable, that he is much more the creator of history than its creature. Implicit, too, is the notion that man's environment and his polity are made for him. Implicit is the dynamic view of law, that it is changing and made for man. And especially implicit in such a style is the belief that what happens in this life on this earth is very important, what happens here and now matters.

The theme of social change is so implicit in the Jewish faith that researchers have found that Jewish voters occasionally have supported activist liberal Christians over more conservative Jewish candidates despite strong religious ties to the latter (Leventman and Leventman 1976).

H2: Jewish Representatives should be more liberal than non-Jewish Representatives.

Mainline Protestants' ideological holdings have been gradually shifting throughout the last decade. Mainline Protestants have been associated with the Republican Party and with conservative ideals; however, over the last decade, Mainline Protestants have become increasingly liberal (Wald 1987). In terms of individualism, Mainline Protestants are moderates with a slightly leftist bend. For Mainline Protestants, the church is meant to encourage fellowship among members and improve society around them; however, their beliefs about salvation are fairly conservative in that heavenly rewards are

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<sup>6</sup>The majority of American Jews are reformed Jews who hold dramatically different beliefs than their conservative, Hasidic Jewish brethren (Fowler et al. 2004).



so highly sought that personal earthly suffering is of little consequence (Wald 1987). In terms of modernism, Mainline Protestants are becoming increasingly liberal. Their beliefs about social mores are changing, especially in regard to gay rights. A good example is the American Episcopalian church, which is on the verge of splitting into separate denominations over the acceptance of gay ministers.

H3: Mainline Protestant representatives should be slightly more liberal than non-Mainline Protestants.

The Roman Catholic faith is fairly moderate in terms of both individualism and modernism. The Catholic Church holds that earthly life is preparation for eternal salvation after death. However, simply living a moral life by resisting personal temptation is not sufficient. Catholics believe that preparation also involves “good works” of service to others in society who are in need (Fowler et al. 2004). Although the Catholic Church ascribes to the inerrancy of the Bible, they also have a mechanism whereby modern technological advances and changing social values can be evaluated for their congruence with Catholic doctrine. The Pope acts as the modernizing force for the Catholic Church by interpreting modern social dilemmas through biblical and spiritual inspiration. However, most recent social issues have been rejected as incompatible with the Bible and divine inspiration. Therefore, the Catholic faith should be slightly to the right on a scale which only includes recent modernism indicators.

H4: Catholic Representatives should be moderate, with a slight conservative slant when compared with non-Catholic Representatives.

Finally, Evangelicals are the most conservative religious category. Their beliefs about the nature of salvation encourage a highly individualized path to salvation which urges adherents to resist modern temptations. Evangelical denominations accept the doctrine of “faith alone, grace alone, Bible alone” (Fowler et al. 2004, 37). All point toward a singular relationship with God and a belief in the inerrancy of Biblical scripture. Their focus is on achieving the glory of heaven, and therefore they resist change which is not directly supported by Biblical passage (Wald 1987).

H5: Evangelical Representatives should be more conservative than non-Evangelical Representatives.

Within the realm of American politics, these liberal-conservative ideological predispositions are further complicated by partisan holdings. For most religions, Jews, Evangelicals and Mainline Protestants, specific party proscriptions and religious proscriptions agree with one another. Therefore, MCs are easily able to fulfill both obligations when they cast ideologically driven votes on non-salient issues. Jews and Mainline Protestants have coalesced around the Democratic Party and hold fairly steadily in their affiliations (Wald 1987). Likewise, Evangelicals have begun to coalesce around the Republican Party (Wald 1987). The ideological leanings of these religions agree with the party platform with which they tend to associate. However, Catholic beliefs and party affiliation do not exhibit congruence on many issues. Since party identification explains between 70% and 80% of voting behavior, it is an important factor to include in the theoretical model. In particular, Roman Catholic representatives who are members of the Democratic Party are cross-pressured on many social issues, especially on abortion legislation. The latter provides a dilemma for Roman Catholic representatives because their religion espouses the pro-life stance on abortion, whereas the Democratic Party platform espouses the pro-choice position (Democratic National Committee 2004; United States Catholic Conference 1997). However, Catholic Republicans who act in the absence of this religious-party cross-pressure do not have such a dilemma. As a result, variance is expected based on party lines for the religiously and ideologically moderate Catholics.

H6: Catholic Democrats should be more liberal than non-Catholic Democrats, but Catholic Republicans should appear no different than non-Catholic Republicans due to their lack of cross pressuring.

### **Research Design**

For the purpose of this research, the members of the United States House of Representatives in the 109<sup>th</sup> Congress (2005-2006) will be studied in terms of the effect that their personal religious affiliations have on their roll call voting behavior, utilizing three different

dependent variables: DW Nominat scores, National Journal Composite Scores and National Right to Life Abortion interest group ratings. The 109<sup>th</sup> Congress will be studied because it provides the most recent and complete data set available. The 435 members of the House, espousing 29 distinct religious denominations, afford greater breadth of data than that of the United States Senate with 100 members and 17 religious denominations and is therefore the subject of analysis. More statistically robust findings will result due to the large number of observations within each religion's categories. The greater plurality of religious denominations in the House more closely resembles the United States population at large, thereby strengthening dyadic links between representative and constituency.

### *Dependent Variables*

The dependent variable is roll call voting behavior, which will be measured using three different dependent variables in three separate models. The first model will use DW Nominat scores as the dependent variable, which comprises all roll call votes cast during the 109<sup>th</sup> session of the House of Representatives. It is the most comprehensive score and allows for analysis on both salient and non-salient issues and is found in the 2008 *Almanac of American Politics*. DW Nominat scores Range from -1 to +1. Negative numbers denote liberalism, and positive numbers denote conservatism. These numbers were transformed by multiplying by 100 so that they have the same magnitude as the dependent variables from the other models, both of which have an upper value of 100. Religion variables in this model should reap statistically significant variables because this measure includes all roll call votes cast and it does not suffer from a selection bias, which has the propensity to include only salient issues.

The second model will use National Journal ratings found in the 2008 *Almanac of American Politics* and the February 2005 edition of the *National Journal*, both produced by the National Journal Group ("2005 Vote Ratings" 2005; Barone and Cohen 2007). The National Journal Group compiled a list of 109 key votes<sup>7</sup> cast during the 109<sup>th</sup> Congress and categorized them into three categories: social (35

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<sup>7</sup>In 2007, the National Journal Group selected 109 votes for House analysis. Each year, key votes are gathered based on such factors as which issues generated the most controversy among House members and which votes helped most to define ideological distinctions among members during the year (Cohen 2008).

bills), economic (44 bills) and foreign (28 bills) (Barone and Cohen 2007).<sup>8</sup> These bills are then checked statistically for interrelation and weighted. MCs are each given a score ranging from zero to 100, which ranks their ideology relative to the rest of the chamber. The higher the score, the more conservative the MC is in relation to the rest of the chamber. MCs' National Journal ratings are calculated separately for each of the two years (2005 and 2006) of the 109<sup>th</sup> Congress. National Journal "global" scores within each policy domain are calculated by averaging the two yearly ratings, resulting in one total score. This model should reap results of limited statistical significance because issues are handpicked due to their controversial nature or their ideologically distinctive natures. As a result, most issues included are salient and therefore, MCs are not likely to be voting based on their own personal ideology.

The last model will use National Right to Life Committee's interest group ratings as the dependent variable for roll call votes (National Right to Life Committee 2008). National Right to Life compiled a list of all "sanctity of life" related roll call votes cast during the 109<sup>th</sup> Congress and assigned a score based on the degree to which the MC's voting record reflected the pro-life position. Scores range from zero to one hundred, with 100 denoting a completely pro-life position. Although many studies find support for the effect of religion on "sanctity of life" related roll call votes, such votes are highly salient, and should not reap statistically significant results based on MCs' reelection goal.

### *Independent Variables*

The primary independent variable to be tested is representative's personal religious affiliation. House members professed a total of 29 religious affiliations during the 109<sup>th</sup> Congress. Data on representative's personal religious affiliations are derived from the 2006 *Almanac of American Politics* (Barone and Cohen 2005). Religious affiliations are divided into five categories: Catholic, Mainline Protestant, Evangelical, Jewish and Other. Five categories were created in an effort to use the smallest number of categories

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<sup>8</sup>Votes are classified relating to economic, social or foreign policy. Generally, "economic" votes deal with aspects of the economy (i.e. wealth, poverty, federal spending, and taxes, and corporate versus labor influence). Social issues deal with law and civil liberties. Foreign issues relate to the U.S. role in the world (i.e. defense, national security, and international trade) (Cohen 2008).

while still maintaining denominational and theological integrity (Steensland et al. 2000). Table 1 lists the religious bodies that constitute each religion category along with the number of representative adherents.

**Table 1:** Religious Affiliations Comprising Five Religion Categories

Catholic	Mainline Protestant	Evangelical	Jewish	Other
Roman Catholic	African Methodist Episcopal (2)	Assembly of God (3)	Jewish	Antioch Orthodox Christ'n (1)
	Baptist (65)	Christian (12)		Christian Scientist (5)
	Congregationalist (2)	Christian Reformed (2)		Greek Orthod. (1)
	Episcopalian (29)	Church of Christ (1)		Later Day Saints (1)
	Lutheran (15)	Disciples of Christ (2)		Mormon (11)
	Methodist (41)	1st Assembly of God (1)		None (7)
	Presbyterian (37)	Nazarene (1)		Serbian Orthod. (1)
	Southern Baptist (1)	Protestant (23)		Unitarian (2)
	United Methodist (8)	Seventh Day Adventist (2)		
		United Church of Christ (1)		
130	200	48	26	29

The Catholic category encompasses only those affiliating with the Roman Catholic Church. There were 130 Catholic Representatives in the 109<sup>th</sup> House, therefore this highly homogenous group warrants its own category. Catholics appear in

Table 2 as the variable *Catholic Representatives*.

The Mainline Protestant category consists of Mainline protestant bodies that bear the “mainline” label because of their historic role in American society as the dominant Protestant expression in the United States (Fowler et al. 2004). Their theological doctrine tends to be more liberal than that of Evangelical Protestants. Mainline Protestants tend to be highly proactive on matters of social and economic justice and embrace gradual doctrinal changes with the development of scientific advances and modernity in general (Steensland et al. 2000). In fact, the split between Mainline Protestants and Evangelicals crystallized in the 1920s over Evangelicals’ rejection of Darwinism and Mainline Protestant acceptance of Darwinism (Fowler et al. 2004).

Although it is very difficult to definitively divide American Protestants into Mainline and Evangelical categories, most churches self identify by joining a conference of churches. The mainline churches included in the Mainline Protestant category are all members of the mainline National Council of Churches or stem from a religious tradition brought to the United States upon creation, or with strong roots early in United States history (“Member Communion and Denominations” 2008; Szasz 2008; Wald 1987).

Although African American Mainline Protestants differ in important ways from white Mainline Protestants in their emphasis on freedom and justice, their similarities bear the greatest resemblance to the white Mainline Protestants. African American Mainline Protestants are best served statistically when included with white Mainline Protestants rather than in a category of their own due to their small number of observations (27) among House members. Mainline Protestants appear in Table 2 as the variable *Mainline Protestant Representatives*.

Similarly, all religious bodies included in the Evangelical category are members of the National Association of Evangelicals or have self identified as Evangelical bodies (Steensland et al. 2000; Wald 1987; Wunthow 1998). Evangelical Protestants are analyzed as their own category because their beliefs and subsequent behavior differ greatly from Mainline Protestants. Evangelicals tend to separate themselves from the broader culture and focus on strict adherence to religious doctrine and missionary service (Steensland et al. 2000).

Within this category also exist those Protestants and Christians who are “non-denominational” in that they do not affiliate with

specific religious traditions. Such adherents are often associated with geographically bound “Bible Churches” and accept much Evangelical dogma (i.e. the inerrancy of the Bible) but do not associate with larger denominational structures (Steenland et al. 2000). Evangelical is the variable of comparison and therefore it does not directly show up in Table 2.<sup>9</sup> However, all coefficients in Table 2 are relative to their Evangelical counterparts.

The Jewish category is comprised of self-identified Jews. Jews appear on Table 2 as the variable *Jewish Representatives*. The final religion category is coded as other and comprises all religions which have too few observations to provide meaningful statistical analysis and which do not fit denominationally and theologically within the other four religion categories. Those espousing “no religious affiliation” are also included within the variable *Other Representatives*.

The personal religious affiliation of each representative is coded using a dummy variable. One represents affiliation with a religion and therefore all other religious variables for that MC are coded as zeros. For example, a Catholic representative is coded one for *Catholic Representatives* and zero for all other religion variables.

Since party identification explains between 70 and 80% of voting behavior, it is an important factor to include in the three theoretical models. Party affiliation is coded one if representatives were Democratic and zero if they were Republican. Independents were coded based on the dominant party with which they caucus. Additionally, party and religion are expected to produce interesting outcomes based on the incongruence between some religious precepts and party platforms. In particular, Roman Catholic representatives who are members of the Democratic Party are cross-pressured on many social issues, especially on abortion legislation. The latter provides a dilemma for Roman Catholic representatives because their religion espouses the pro-life stance on abortion, whereas the Democratic Party platform espouses the pro-choice

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<sup>9</sup>The variable *Evangelical Representatives* was chosen as the variable of comparison due to the fact that it has the lowest mean value of all other variables, therefore making the comparison across dummy variables easier to interpret. Other possibilities for comparison could have been the highest mean category, *Catholic Representatives*, but as a matter of choice, was kept in. The *Other Representatives* variable was not chosen as the dummy variable of comparison because the range of unclassifiable religions within its domain would unduly increase the variance within the model and skew the results.

position.

While religious affiliation is the primary independent variable to be theoretically tested, prior research on congressional decision-making supports the inclusion of several other independent variables that affect roll call voting behavior. State characteristics that provide a dyadic link between representatives and their districts are included as control variables in the models. They are *District Median Income*, *District Percent Black*, *District Percent Hispanic*, *District Percent Urban* and *Southern Location*. See appendix A for coding criteria.

To test my hypotheses about the relationship between roll call voting and religion based on ideology and issue salience, I use regression analysis, which will generate coefficients that denote how well the data fit my regression equation (Henkel 1976).

## Results

The results of the analyses of religious influence on roll call voting appear in Table 2. The results generate some support for my theoretical hypotheses. My first hypothesis, that religion should only matter for non-salient issues, appears well founded. Although all three models reached statistical significance, only the DW Nominate model, which includes all roll call votes, allowed a religion variable in the model to reach statistical significance at the .05 level.

The DW Nominate model fared well, explaining 90 percent of the variance at a significance level of less than .001. However, the only religion variable that reached statistical significance was *Catholic Representatives*. In contrast to expectations, Catholic representatives are 6 points more conservative than the Evangelical representatives with whom they are compared. This finding seems counterintuitive given that the majority of Catholics tend to be Democrats and establish liberal roll call voting records. Cross-pressured Democrat Catholic representatives also prove to be statistically insignificant. The lack of statistical significance for cross-pressured Catholic MCs also goes against expectations. The unexpected findings for Catholic MCs may be explained by the fact that the 2004 elections are an anomaly in terms of modern electoral trends. The 2004 elections are the first time since random sample polling began in the 1930s that Republican affiliation has equaled Democratic affiliation at 37% (Barone and Cohen 2005). In addition, the 2004 elections mark the most conservative electorate since polling data has been available with 34% of voters self identifying as



**Table 2:** Religious Influence on Representative's Voting Scores

	DW Nominate Model	National Journal Model	National Right To Life Model
Democrat	-83.50***	-39.77***	-0.65***
Tenure	-0.40***	-0.09	-0.00
District % Urban	-0.10	-0.03	-0.00
District % Black	-0.20*	-0.02	0.00
District % Hispanic	-0.00	-0.11	-0.00
District Median Income	-0.00	-0.29**	-0.01
Southern Location	10.80***	6.81**	0.09
Race	-2.10	-7.67	-0.32*
Woman	-5.50**	-4.17	-0.14
Catholic Rep's	6.00*	1.55	0.01
Catholic Dem. Rep's	-1.80	1.44	-0.02
Mainline Prot. Rep's	4.20	2.72	0.06
Jewish Representatives	4.30	4.81	0.09
Other Religious Rep's	4.30	0.36	0.01
Constant	53.50***	17.18**	1.34***
Number of Cases	433	427	433
R-Squared	0.904	0.653	0.399
p-Value	<0.001	<0.001	<0.001

Note: Column entries are regression coefficients. Significance levels are noted as follows: \*\*\* $p < .001$ ; \*\* $p < .01$ ; \* $p < .05$ .

conservatives and only 21% identifying themselves as liberals (Barone and Cohen 2005). The Bush campaign, and the Republican Party in general, worked hard to tap religious groups as a means of grassroots networking. In particular, Evangelicals, Catholics and Orthodox Jews were targeted as potential Republican swing voters (Barone and Cohen 2005). This electoral strategy was successful in increasing Catholic support for Republicans to 52%, up from 47% in 2000 (Barone and Cohen 2005). The latter is particularly telling given that Catholic voters have a long established tendency to vote for Democratic candidates despite the fact that these voters tend to be economically liberal and socially conservative. This increased support for Republican candidates and platforms in the 2004 elections may have put pressure on Catholic MCs to vote increasingly conservative given the strong conservative national trend. Despite the unexpected findings, the statistical significance of

Catholic religion's influence on roll call voting supports my hypothesis that religion does matter for roll call voting behavior across all issues, albeit in a different direction than expected.

All other religion variables were insignificant at the .05 level. However, the latter may be the result of a homogenous beliefs requisite in the denominationally diverse categories of Mainline Protestant representatives, other representatives and Evangelical representatives. Additionally, many of the control variables were significant, further supporting prior research on the determinants of roll call voting behavior. Party affiliation, tenure, the percentage of blacks in a district and southern location were all significant and behaved according to normally set standards. It is especially notable that gender proved significant to voting. Similar to recent research conducted on the effect of gender on roll call voting in the House of Representatives, the coefficient for women in my model denotes an increase in voting liberalism based on their negative correlation with conservative roll call voting (Welch 1985). Research on gender's effect on roll call voting is mixed; therefore, it is possible that the gender gap present in my model may or may not be a result of methodological design (Swers 2001).

All religion variables in the National Journal model proved to be insignificant as expected because of the scores' bias toward salient roll call votes. Unlike the DW Nominate model, only two control variables proved significant: party affiliation and district median income. The model as a whole is successful, explaining 65 percent of the cases at a significance level of less than .001.

In stark contrast to prior research, the National Right to Life model was insignificant for all religion variables, including *Catholic Representatives*. The latter could be a result of the saliency exhibited by "sanctity of life" issues. Therefore, MCs may not be able to exercise religious freedom when deciding roll call voting stances. MCs must now listen to voters who are knowledgeable about such policy issues. The National Right to Life Committee model was fairly successful in explaining roll call voting behavior on sanctity of life issues, alone explaining 40 percent of variance at a significance level of less than .001. Since only party, race and gender controls reaped significant *p*-values, it is likely that party platform plays an extremely large role deciding how MCs vote on sanctity of life legislation. As prior research suggests, race has a strong effect on roll call votes related to abortion and euthanasia (Welch 1985).

Overall, the models provide support for the main hypothesis of

this article: religion does matter under certain circumstances. Based on the existence of statistical significance for Catholic religion categories, there is a greater likelihood that the null hypothesis that religion does not affect roll call voting behavior is unsupported.

### **Conclusion**

The intersection of religion and politics in the person of each member of Congress constitutes the combination of two of the most powerful animating forces in existence. The foregoing theoretical model and statistical results speak to their interrelation in reference to the making of public laws by roll call vote. Although scholarly research acknowledges the importance of religious affiliation in the political arena, few have researched religion as a roll call voting determinant for members of Congress. Those who have researched the relationship limit their studies to social issues explicitly related to religious beliefs such as abortion.

It is undeniable that religion constitutes a set of core beliefs, which guide the decisions of adherents. However, studies of religious MCs have previously failed to recognize the effects of religion across all policy areas in the form of non-salient policy issues. This research broadens the study of religion as a roll call voting determinant by finding support for the influence of religious affiliation across policy areas with variation by issue saliency. My results demonstrate that religion is an important determinant for Catholic MCs. The study hinges on two very important assumptions: that all professed religions are firmly adhered to and practiced by MCs and that most roll call votes are non-salient and therefore not included in scoring methods that hand-pick key votes for analysis. These are two assumptions that may or may not be true, but require further data and research to confirm their validity. However, this study does lend overall support to the theory that religion does matter to congressional voting.

Since this study is one of the first of its kind to illuminate the role of religion as a roll call voting determinant, there are many opportunities for further research. One of the most important additions would be to add religiosity of MCs as another independent variable. Prior research on religion and constituency voting shows that those who attend church regularly behave differently than those who affiliate with a religion but have limited involvement with that religion (Fowler et al. 2004). Therefore, it would be extremely useful

to add religiosity of MCs to the analysis. Unfortunately at this time, survey data of representatives does not include religiosity. Therefore, religiosity indicators do not exist for the United States Congress. This study looked solely at the United States House during the 109<sup>th</sup> Congress. It would be useful to study both chambers across several Congresses. The latter would improve the generalizability of the findings as well as account for time bound shifts within religious bodies. Finally, adding state level data for religious majorities to the data set would further explain how MCs' focus on reelection as a primary goal affects the influence of their personal religious beliefs on roll call voting. However, this study is a first step in understanding the link between church and state, in the person of representatives, which can never be fully separated.

#### **Appendix: Other Independent Variables Known to Affect Roll Call Voting Behavior**

Religious adherents are highly correlated with socio-economic status; therefore, median income is included in the models in order to control for this factor (Fowler et al. 2004). District median income is included as a continuous variable measured in thousands of dollars.

Like median income, race is also correlated with religious bodies. Immigration, in particular, increases the religious pluralism unique to the United States. As a result, many religions have predominant races associated with them. In addition the percent of African Americans in a district increases the Democratic nature of that district, and thus the voting behavior of the representative (Fowler et al. 2004). To control for these effects and improve the fit of the models, *Percent Black* is included in the model as the percentage of a representative's district population that is African American. *Percent Hispanic* is correlated with religion and party in the same manner as *Percent Black*. Therefore, it is included in the model as the percentage of a representative's district population that is of Hispanic descent.

The percentage of urban population also has a profound effect on religion and party affiliations; therefore, it is also included as a control variable (the percentage of a representative's district population that lives in an urban location). This variable is labeled *District Percent Urban*.

Southern location is coded using a dummy variable with one representing Southern location and zero representing other locations.

Southern location is included as a control variable for the difference between voting behaviors of Southern Democrats and non-Southern Democrats that traditionally occurs (Fowler et al. 2004). For all district level variables, data is derived from the 2006 *Almanac of American Politics* (Barone and Cohen 2005).

Finally, prior research has found that gender affects the roll call voting behavior of MCs. Female representatives tend to vote more liberally on social issues, specifically abortion-related social issues (Swers 1998; Welch 1985). Therefore, I expect gender to be significant, especially for the social model. Gender data was obtained from the 2006 *Almanac of American Politics*, with one being female and zero being male.

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## **The Creation of a Terrorist Race: The Racialization of Arabs in America before 9/11**

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*The September 11 terrorist attacks have been used to justify the selective targeting of Arabs in America, but the transformation of the Arab community from a proximity to whiteness to an inferior position began years before then. The focus of this article is to explore the conflation of Arab and terrorist in the years leading up to the attacks. Through an exploration of the Los Angeles Eight case, in which Arab immigrants were targeted for deportation because of their political opinions, and the racial reaction to the Oklahoma City bombing, initially thought to be the work of Arab terrorists, I show how Arabs in America have been constructed into a suspect racial category. Through the use of critical race theory, I examine this racial construction through changes in American foreign policy and the discriminatory implementation of seemingly colorblind legislation.*

Arabs in America have historically been in a state of racial limbo. During the Civil Rights Movement, Arabs were considered to be white by other minority groups, but not always by those of European descent. As such, Arabs have been excluded from both the privileges that whiteness brings and also those from affirmative action and other race-conscious programs. Accordingly, Helen Samhan (1999, 220) has referred to the historical racialization of Arabs in America as “white, but not quite.” Since the 1960s, the exclusion of Arab voices has been continually reinforced in mainstream society through governmental policy. This has become evident with the United States’ increased involvement in the Arab world, now a focal point in U.S. foreign policy, and the increasing role that terrorism has played in domestic and foreign policy concerns (Moore 1999). The creation of a morally defensible way to distinguish between insider and outsider, friend and enemy, has become vital to the establishment of Arab-sponsored terrorism as the leading threat to national security. This threat has come to justify collective exclusion and discriminatory targeting based on the political beliefs and cultural affiliations associated with a group of individuals deemed to be terrorist sympathizers. Terrorism is not viewed as the work of a select few extremists. It is seen, rather, as a byproduct of the irreparable cultural and civilizational backwardness and ‘otherness’ of the Arab world. Today, Arabs are the primary group subject to



anti-terrorism laws, but even before September 11, Arabs were often considered guilty until proven innocent, which is not the case for white sponsors of terrorism. Judgment has become contingent on the identities of this unpopular group of foreigners rather than by the actions of individual members of the group. The transformation of the Arab community from “white, but not quite” to an inferior position shows the unclear position that Arabs in America have been historically subjected to.

In this article, I will focus on the racial construction of the Arab as a terrorist before the events of September 11 through an exploration of the Los Angeles Eight case and other previous reactions to the terrorist threat. By focusing on the media and government-sponsored depiction of Arabs as terrorists, I seek to show, through the use of critical race theory, that the racialization of Arab Americans as terrorists is linked to institutionalized racism in the law and the selective implementation of seemingly colorblind statutes on the Arab community. I will explore the racialization of Arabs in America, rather than solely the erroneous conflation of Arab, Muslim and terrorist, because many Arabs are not Muslim and the most populous Islamic countries are Indonesia, Pakistan and Bangladesh, all outside of the Arab world.<sup>1</sup> I will also explore the disproportionate targeting of the Arab community in America as the main terrorist threat, despite the dangers that domestic militia groups and the Irish Republican Army (IRA) have played domestically and internationally in order to show the clearly racialized targeting of Arabs. I will examine all of these historical examples in order to show that Arabs have been racialized for U.S. foreign policy initiatives as well as to demonstrate the socially constructed and constantly evolving essence of race.

### **A Brief Overview of Arab Immigration**

In placing the Arab experience in the context of U.S. history, I seek to show that society has repeatedly targeted and stigmatized this

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<sup>1</sup>“Arab” has historically referred to countries in which the dominant language spoken is Arabic, but Arab nationalist movements since World War II have created a kind of Arab national identity, strengthened through the creation of the Arab League in 1945. Arab refers to countries currently in this League, including Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. The Palestinian territories are also a part of this League.

immigrant group and ethnic minority. The racialization progression of Arabs in America is distinct from that of any other group of immigrants to the United States. Historically, Arab immigrants were granted some of the privileges of whiteness and their subjugation has been much more recent. Arab immigration before the Second World War was limited, but those who did immigrate were often classified as 'white' under most readings of the Naturalization Act of 1790. This Act made citizenship contingent on white status. In 1909, a federal court in Georgia granted a Syrian man the right to naturalize because he was considered to be a member of the Caucasian race (Lopez 1996). This was echoed twice more in 1910 in Massachusetts and Oregon courts. In 1914, however, a South Carolina court found that "Syrians might be free white persons, but not that particular free white person to whom the act of Congress had donated the privilege of citizenship" in 1790 (Samhan 1999, 217). Arabs were consistently found to be not white in every subsequent interpretation of the law (Lopez 1996). The disparity between all of these rulings helps to show that race is a social construction and points to the questionable status that Arabs in America have been historically subjected to.

Arabs came to America in two distinct waves of immigration. The immigrants subjected to an inferior status by the 1790 Naturalization Act were in the first major wave, which began in the 1870s and continued until World War I. It consisted primarily of Christian Syrians and those from present-day Lebanon. The second wave began immediately after World War II and continues today. It consists more heavily of Muslim immigrants from throughout the Arab world, though many Christians are also represented in this wave (Suleiman 1999). The first wave was often poor and uneducated and often came to the United States to seek refuge from religious persecution, while the second wave consisted of primarily wealthy and educated immigrants who emigrated as a result of regional conflicts, civil wars and religious revolutions. The immigrants in the first half of the century were often considered to be white as a result of their Christian status, light skin and proven ability to assimilate into mainstream America, but, as readings of the 1790 statute have shown, even that status was contingent on the sentiments of individual judges (Naber 2008). More recent immigrants have been viewed even more differently—as a dangerous 'other' in 'white' America.

The experience of Arab immigrants has changed dramatically since World War II as a result of the creation of the Jewish state of

Israel in the midst of the Arab world. This heightened the sense of Arab nationalism in the region and amongst Arabs in America. Regional conflicts in the area soon persuaded many wealthy Arabs to seek refuge in the United States. As a result, most of the second-wave immigrants, many of whom were educated in the Western world, came to the United States for its democratic tradition. Their educational background gave them an advantage in becoming active in American politics and assimilating into mainstream America. Although these immigrants have been able to overcome many of the burdens of poverty in fighting their subordinate status, their level of education and frequent support for democracy has allowed them to become vocal in their opposition to American foreign policy objectives in the Middle East, specifically its pro-Israel stance. Their political opinions have often been counter to U.S. foreign policy goals, which have changed substantially with the establishment of Israel and the increasing political influence of mainstream Jewish organizations with Zionist sympathies in American politics.

After the 1967 Arab-Israeli War, relations between the United States and the Arab world became increasingly conflict-ridden. This marked a turning point in American foreign policy with the Arab world, confirming its Cold War alliance with Israel and intensifying U.S. military, political and economic intervention in the region. Relations between the United States government and Arab-American communities have worsened substantially since then. In response to an act of terrorism at the 1972 Munich Olympics, in which Palestinian terrorists took Israeli athletes hostage and killed several, President Nixon authorized FBI agents to develop profiles based on an Arab ethnicity, heritage or appearance of community activists. This order was named "Operation Boulder" and was an initial effort to prevent terrorism from coming to the United States. Regardless of the fact that at the time of the Munich Olympics there had been no acts of Arab-sponsored terrorism on U.S. soil, President Nixon authorized the program to develop profiles of Arabs exclusively rather than anyone with strong ties to extremist organizations (Akram and Johnson 2002). Whether or not the act of terrorism at the games were used as an excuse to target Arabs in America for both domestic and foreign policy purposes is up for debate (Akram 2002), but the order itself helped set the tone for the disproportionate targeting of Arabs in America, as I will soon show. Ever since this operation commenced, the United States government has made a substantial effort to stifle the participation of Arab groups in

American civil society. I will explore this in more detail to follow, but first it is important to understand the process of the racialized construction of the terrorist threat.

### **Critical Race Theory in Racial and Otherness Construction**

Critical race theory recognizes the endemic quality of race to American life as a result of America's racist history. Theorists contend that race is a social construction rather than an innate characterization of members of a racial group. Despite this, they insist on the continued application of race because of its entrenchment in American society. Race is not an "objective, inherent or fixed" state corresponding to "biological or genetic reality" (Delgado and Stefancic 2001, 7). Instead, racial categories are invented and shaped by society and are manipulated when convenient for those in a position of power. Theorists are thus skeptical of legal claims of race neutrality and color blindness. A seemingly colorblind statute can discriminate on racial lines through the purpose behind its enactment and its disproportionate implementation against certain groups.

Through the relationship between racialization and established power structures, critical race theorists seek to explain the role that law and the legal system have historically played, and continue to play, in the racialization of certain groups. Racialization is the conception of race viewed in a socially contrived manner that continually evolves as the political climate finds necessary. This theory is based on the features of a racial reality experienced by disenfranchised groups, highlighting the individual voices of the oppressed in order to target wider racial concerns. The stories of oppression expressed by these individuals are the result of a systematic, structural and cultural project to ingrain racial thinking throughout society. Theorists use them to reflect critically on the law and politics in an effort to alleviate the racial injustices still present in contemporary America (Delgado and Stefancic 2001).

Critical race theorists explore how victimized groups are viewed and treated in academic circles, public policy and society at large. Recognizing the realities an oppressed group faces increases with the rise in study and media coverage of this group along with the acknowledgment of politicians and policy makers of this group-based discrimination. This treatment (or lack thereof) is either visible or invisible, with visibility requiring that a community be seen as a

potential victim of racism and considered a racial minority. The level of visibility a minority group faces is a power-laden undertaking that results in the stifling of victims' voices in instances of state-sanctioned discrimination (Delgado and Stefancic 2001). Invisible minority groups often face different problems than traditional minority groups. Rather than facing poverty or lack of education, Arab immigrants are members of a relatively small group representing an ambiguous location in America's racial schema. Arabs in America have become much more visible minorities in the past several decades and the increase in study of this group following the September 11 attacks shows that this group has become much more visible. Previously, Arabs in America, when recognized at all, were considered invisible within the dominant discourses on race and ethnicity, though it is clear that the racialization of this group began well before the attacks. The Arab community's recent increase in visibility has led to an increased study and recognition of Arab issues, increasing the evidence of the inferior position Arabs in America have been historically subjected to. This level of visibility also demonstrates the historical and visible limits of racialization and the general flexibility of racism and whiteness. An exploration of the process of racialization also shows that it is a social construction, indicating that the process can also be reversed. Although September 11 did not mark the beginning of Arab subjugation by the United States government and its polity, it certainly has resulted in an increased interest in the necessity of recognizing Arabs as a distinctly persecuted group, increasing their visibility.

Just as race and the creation of a demonized 'other' are social constructs, the alien is a legal construction, juxtaposed against the construct of citizenship. In the United States, citizenship implies an array of privileges and protections that make an individual a full member of society. The individual rights citizens possess are the hallmark of American society, which prides itself on its national ideals of liberty and equality of opportunity. Unfortunately, this often falls short for the alien and certain groups of racial minorities. Citizens are protected from deportation, one of the most severe state-sanctioned punishments. Aliens, however, may be deported for even the smallest infraction, whether or not they have a country and home in which to return. The creation of the alien has played a large role in the identity construction of the citizen (Moore 1999). 'We' citizens are a part of American culture and have access to its privileges, while alien 'others' are foreigners who can be excluded at will because

they represent who 'we' are not (Johnson 1997a). This distinction between 'us' and 'them' appears morally defensible under the guise of citizenship law. The ease with which the suspect alien's vilification through the law can occur should be understood not merely as a means of easing domestic insecurities through the creation of a demonized 'other,' but also as a way of defining civil society itself.

The vilification of those excluded from American civil society has been a constant throughout U.S. history. The enemy 'other' has shifted over time and has included the Japanese, Eastern European communists and Arab terrorists, among others. This identity construction is contingent on domestic and foreign policy concerns. It can be viewed as both a means of easing domestic insecurities through the creation of an image of who the enemy is and also as a means of defining what it means to be a true American. The creation of a morally defensible way to distinguish between insider and outsider, friend and enemy, has become vital to the establishment of Arab-sponsored terrorism as the leading threat to national security. It is apparent that the current un-American activity is an affiliation with terrorism. Through the contemporary delineation of insider and outsider, the distinction between 'us' and 'them' appears morally defensible under the guise of anti-terrorism law, rather than solely immigration law. A more intensive examination of these laws will follow, but it is clear that seemingly colorblind counterterrorism and immigration statutes have been implemented disproportionately against Arabs in America. Changes in both foreign policy and domestic anti-terrorism policy have played a large role in the racial undertaking of creating the Arab terrorist. Arabs in America have become the 'other,' the product of an irreparable cultural backwardness that 'we' are not affiliated with.

Critical race theory is a useful and important tool for exploring racism within the framework of the American legal system and its indirect impact on societal discrimination. September 11 highlighted the consolidation of Arab and Muslim into a single category of a dangerous alien 'other' and clearly exacerbated the already present discrimination and persecution of the Arab community. It is important to examine why it was acceptable following the attacks to target the entire Arab community because of the actions of a few radical individuals, a backlash rooted in the socially constructed, anti-Arab climate years in the making. Post-September 11 anti-Arab policies must be explored through complex histories of Western

dominance and intervention in the region as well as decades of state-sponsored harassment of politically active Arabs in America. Exploring this racialization, alienization and discrimination against Arabs in America illustrates that racism can be defined by numerous, changing and coinciding designations of 'otherness,' such as that relating to religion, culture and national origin. In the case of Arabs in America, racialization has developed as a result of perceived international and domestic terrorist threats as well as an imagined necessity to define who 'we' are versus who 'we' are not. In utilizing critical race theory, I seek to place Arab marginalization within a recent history of exclusion and evolution of the alien enemy 'other' over time while rejecting other popular discourse on Arab difference.

### **Racism in Civilizational Discourse**

Samuel Huntington's (1993) view of the "Clash of Civilizations," in which cultures are perpetually at odds with one another, has become an important scholarly discourse in international relations. This positions Arabs (and the Muslim world in general) as an 'other' in a seemingly colorblind light. Louise Cainkar (2008), however, argues quite the opposite. Although cultural and religious, rather than racial, differences are invoked because appeals to race-based differences have lost their legitimacy since the Civil Rights Movement, she observes that all of the components of a racial project are present in Huntington's model. This can be seen by the "the assertion of innate characteristics held by all members of a group." 'Us' versus 'them' is thus attached to the perceived inherent nature of a group and are used to "inform, reward, control and punish" individual members of that group, or 'civilization' (Cainkar 2008, 48). This racialization is provoked by a perceived clash in values, further exacerbated through cultural ethnocentrism based on assumptions and stereotypes (Jamal 2008).

The inferiority associated with the Arab is a creation resulting from the social construction of alleged inherent differences amongst human beings. Arabs have become represented as a group, not of individuals, but as a civilization with intrinsically different values from white Americans. 'They' are seen as having contempt for women's rights, as hating 'our' democratic values and as wanting to destroy everything else that 'we' allegedly stand for. Racism has become contingent on differences in culture, while physical differences merge with misassumptions about these supposed

inherent differences. Because ‘they’ are from a backward cultural civilization and often appear physically different from white Americans, stereotypes about their predisposition to unwanted opinions and cultural practices have become conflated with their innate nature. Race has permeated American society and remains a dominant force in American culture, so these perceived cultural differences have taken a markedly racial turn.

### **The Racialization of Arabs**

Racism against those considered to be Arab corresponds with a recurring practice of the construction of the racialized ‘other’ within American politics. Enduring trends of racial exclusion have historically been intensified in moments of crisis, as occurred with the internment of Japanese immigrants and citizens during World War II. Relying on an assumption that ‘they’ are threats to national security and American culture, this juxtaposition justified intervention in the region long before the events of September 11 (Jamal 2008). The loss of white status for Arabs in America can be linked to three factors: (1) the United States’ emergence as a global superpower; (2) the growing importance of oil to the American economy; and (3) the growing influence of Jewish lobbies and politicians (Cainkar 2008). All of these factors are concurrent with the beginning of anti-Arab governmental policies, growing perceptions of Arabs as nonwhite ‘others’ within popular American culture and the increased stifling of political opinions in opposition to Israeli interests. After the 1967 Arab-Israeli War, the United States was vying to secure its superpower status over the former quintessential ‘other,’ the Soviets, particularly in regard to securing its access to oil within the region and alliance with Israel. As a result, the racialization of Arabs must be seen as an ongoing process contingent on U.S. foreign relations with the Arab world and the popular depictions of Arabs in America.

Although the racialization of Arabs is closely tied to U.S. foreign policy, it cannot be reduced solely to international actions. On the domestic front, the public must consent to Arab exclusion in order to justify anti-Arab measures taken abroad, as they are vital to sustaining international policies through material and electoral support. Governmental biases must penetrate society in order to foster consent, a process Susan Akram (2002) deems “deliberate mythmaking.” An examination of the representations of Arabs in



film and media, the selling of foreign policy objectives through the creation of stereotypes, as well as a “public susceptibility to images identifying the unwelcome ‘other’ in their midst,” she argues, have created the myth of the Arab terrorist (Akram 2002, 12). Although it may not be possible to prove the “deliberate” nature of this “mythmaking” without knowing the actual intentions of the media’s creators, the evidence of Arabs’ vilification in the media is overwhelming. Jack Shaheen’s (2001, 2008) film analysis in the periods before and after September 11 is the most convincing evidence of the ‘deliberate’ vilification of Arabs. Of these films, Arabs and Muslims (oftentimes one in the same) are portrayed in a negative light 95% of the time. Arabs are most often presented as the ‘bad guy’ in films, children’s cartoons and television dramas, perpetuating their stereotypical nature as a threat to the American public. According to Shaheen (2001), since the 1970s, 14% of all movies have been filmed in Israel or by Israeli crews and part of the explanation for these ‘deliberate’ depictions is the result of a political agenda. As previously mentioned, the intent of these filmmakers, although they may have a bias in the Arab-Israeli conflict, cannot be proven and speculations are extraneous, but the clear anti-Arab bias in film is especially pertinent to the discussion at hand. Films are a valuable means of delivering information to a wide and interested audience. Perpetuating the myth of the evil Arab terrorist while neglecting to show many of the positive aspects of a group of predominantly peaceful people only serves to perpetuate harmful stereotypes. These stereotypes have led to the often unconscious biases of law enforcement officials, policymakers and those who commit hate crimes, among others.

Anti-Arab imagery has also permeated other facets of the media. Arabs are represented unfavorably on newscasts, particularly through the tumultuous depictions of the Arab world and the persistent emphasis on the War on Terrorism. Perceived policy ‘experts’ are also vital in the stereotyping of the Arab world as being both all Muslim and engaged in a jihad against the United States. Edward Said (1996) explains the motivation of perceived experts like Samuel Huntington as having an interest in making sure that the ‘threat’ is kept before our eyes. This allows us to condemn Islam and individual Arabs for their perceived tyrannical and violent nature, while assuring the ‘experts’ “profitable consultancies, frequent TV appearances and book contracts” (Said 1996). The most significant aspect of the depictions of Arabs and Muslims in the media,

however, is their omission as ordinary people with families not very different from white Americans. Critical race theorists see the best way of overcoming racism in society through the humanization of individual members of a demonized group. An important way of accomplishing this is through the continued positive depiction of individual group members through the film industry and other mediums.

Positive political activism is another way through which critical race theorists seek to overcome racism. Arabs have also often been denied a political voice through the disproportionate governmental targeting of peaceful activists, which stifles objection to these one-sided depictions of Arabs. Certain practices, such as honor killings and suicide bombings, have often been conflated to be part of all Arab and Muslim cultural practices and accepted by all members of these groups. This has been integral in the stereotypical characterization of individuals as essentially subhuman. The conflation of Arabs and terrorists has legitimized the violation of both Arab and Arab American rights by the U.S. government. Arab and Muslim cultural practices have been distorted and perverted as a result of the myth of the magnificent America positioned against the evil, deranged Arab terrorists. All of these points can be tied to the desire to define 'us' as the opposite of the backward, murderous, terrorist 'them' through a disenfranchisement of dissenting Arab voices. This is particularly evident with the prosecution of the Los Angeles Eight.

### **The Los Angeles Eight**

The Los Angeles Eight case exemplifies the process by which the Arab has been socially constructed as a potential terrorist. It also highlights the government's deliberate targeting of the Arab American community. In 1987, the Los Angeles Eight, seven Palestinian men and one of their wives (a Kenyan woman), were arrested for raising money for and distributing literature of the Popular Front for the Liberation of Palestine (PFLP), a Marxist faction of the Palestinian Liberation Organization (PLO). Two of the eight were lawful permanent residents and the other six were legal immigrants here on various types of visas. As a result of their alien and 'othered' status, the eight immigrants were targeted for deportation because of their affiliation with this political and charitable organization. The PLO was known throughout the 1960s

and 1970s for sponsoring terrorist attacks against Israeli targets throughout the world, including the hijacking of aircrafts and bombing of dozens of military and civilian sites. This activity subsided during the 1980s and became the work of the more militant factions associated with the overall organization (Naber 2008). Many Palestinians view the PLO as the legitimate representatives of the Palestinian people and a group that primarily administers humanitarian aid to millions of displaced Palestinians. Demonization of the PLO by the American news media and by the federal government has helped perpetuate the myth that all members of the PLO are sympathizers of violent actions. At the case's onset, the PFLP was a designated communist organization, but as the Cold War was drawing to a close, it became redefined as a terrorist organization. Throughout these twenty years, the case was reworked in order to reflect changes in both immigration and anti-terrorism laws as the perceived threat shifted from the communist 'other' to the terrorist 'other' with the Soviet Union's demise.

Initial interest was sparked against the eight following a fundraiser celebrating the PFLP's eighteenth anniversary. This fundraiser sought to raise money for medical supplies and schooling in Palestinian refugee camps. Another charge against the eight was the distribution of *al-Hadaf*, the PFLP magazine widely available throughout the United States, including in the Library of Congress (Naber 2008). The case began in January 1987 with the eight's initial arrest. It then stagnated in immigration court, propelling up through the federal district courts all the way to the U.S. Supreme Court and then back down again, finally ending for all involved in 2007. The eight were initially charged with violating the 1952 McCarran-Walter Act, which allowed the deportation of alien individuals who raise money for groups or distribute literature promoting the "doctrines of world communism" (Akram and Johnson 2002). These charges were eventually changed to correspond with the evolving anti-terrorism legislation, which imposed fines, imprisonment or deportation on an individual if they "knowingly provide material support or resources to a foreign terrorist organization" (Whidden 2001, 2845). No matter the charges, however, the government remained unable to prove that the eight meant to support international communism or terrorism in their material support for the demonized PFLP. Although the PFLP has, in fact, utilized violence and terrorist tactics, they and the PLO are also well known in the Arab world for their humanitarian work in assisting the

Palestinian people. The eight claimed to have donated money for humanitarian purposes and the U.S. government was never able to prove otherwise. They appear to have been peaceful activists whose only crime was advocating a politically disfavored viewpoint—the Palestinian right to a homeland—and being a part of a group of undesirable immigrants. They were targeted because of their affiliation with a demonized group of people, which led law enforcement officials to assume that prayers in Arabic were congruent with an inclination towards terrorism, therefore legitimizing the targeting of these activists (Akram and Johnson 2002). Showing the overt racism behind the targeting of the Los Angeles Eight must be understood through the racialization of Arabs in America and its evolution alongside other acts of terrorism. The racial reactions to the two major acts of terrorism on U.S. soil before September 11, the Oklahoma City Bombing and 1993 attacks on the World Trade Center, are important examples showing the deep seated acceptance of the construction of the Arab terrorist.

### **The Racial Reaction to the Oklahoma City Bombing**

On April 19, 1995, eight years after the eight's initial arrest, the deadliest terrorist attack on U.S. soil before the events of September 11 occurred in Oklahoma City. An act protesting the U.S. government, the attack killed 168 people and injured over 800 more. The attack was immediately linked to international terrorism because the media and police assumed that the attack was the work of Arab terrorists. This assumption was based on the now instinctive prejudices in the testimony of witnesses resulting from popular culture, media and government depictions of Arabs. As a result of this misassumption, sketches of "Middle Eastern looking" suspects were circulated on the nightly news, further entrenching the status of Arabs as terrorists (Moore 1999). Within the three days following the bombing, 222 hate crimes against those appearing to be Arab were recorded in the United States (Whidden 2001). It soon became apparent, however, that white, homegrown American terrorists had perpetrated the attacks. Following this realization, a *Newsweek* opinion piece nicely summarizes a particular take on the reaction:

Had 'they' been responsible, as so many suspected, the grief and anger could have been channeled against a fixed enemy, uniting the country as only an external threat can

do. We might have ended up in a war, but what a cathartic war it would have been! Or so it felt, in brief spasms of outrage, to more Americans than would care to admit it. And if we couldn't identify a country to bomb, at least we could have the comfort of knowing that the depravity of the crime—its subhuman quality—was the product of another culture unfathomably different from our own (Alter 1995, 55).

Knowing that this violence was not a product of our way of life would have reassured 'us' of the inhumane character of this attack, rather than cause 'us' to question our own value as the society that had created such a monster. This analysis shows that if 'we' could ascertain that 'they' were monstrous 'others,' the exact opposite of who 'we' are, exclusion of 'them' would be justified and even celebrated as sweet vengeance. This is certainly linked to anti-Arab racism consistent with the anti-Arab bias that has permeated society.

Timothy McVeigh, the lead conspirator of the bombings, was part of a militia movement of armed extremists who oppose what they view as the tyrannical U.S. federal government. They are part of a broader movement in favor of xenophobia, white supremacy and isolationism and are violently opposed to abortion and homosexuality (Whidden 2001). These frightening views are not too different from those expressed by Arab and Muslim extremists that invoke jihad in order to justify their own merciless acts of terrorism. The main distinction is that the former is a view held by white birthright citizens, while Arab foreigners hold the latter.

After the 1993 attack on the World Trade Center, in which six people were killed and 1,042 more were injured, six Arabs were convicted in organizing the bombing and thirteen others were convicted on broader conspiracy charges for plotting to destroy other New York City sites (Whidden 2001). Although this reaction was certainly justified, the Oklahoma City bombing was found to be solely the work of two individual American extremists, rather than as part of the overall militia movement that has bombed abortion clinics and been responsible for an untold amount of 'hate crimes' that could also be defined as acts of terrorism. The Oklahoma City bombing did not justify the increased surveillance of white members of the militia movement. Instead, the eventual trial of Timothy McVeigh and Terry Nichols, McVeigh's coconspirator, was portrayed to be the work of two bad apples, driven crazy by their

foolish aversion to the government's liberal policies. Arabs, however, remain inextricably linked to the extremist Timothy McVeighs of their homeland.

### **Legal Justification for Selective Targeting**

The Oklahoma City bombing, coupled with the 1993 attack on the World Trade Center, prompted President Clinton to sign the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 in an effort to fight acts of *international* terrorism. Clinton, along with many members of Congress, admitted that it was quickly adopted in an effort to fight international terrorism in response to the Oklahoma City bombing (Moore 1999). AEDPA supporters reacted to Oklahoma City by targeting international terrorism rather than the more dangerous threat of domestic terrorism. This occurred regardless of the reality that between 1984 and 1998 domestic terrorists committed 95% of all terrorist attacks on U.S. soil and plotted 96% of all potential attacks (Whidden 2001). Domestic groups that many would consider terrorist organizations, such as the Ku Klux Klan and organized supporters of Timothy McVeigh, are not classified as terrorist organizations under this act. As opposed to identifying the primary terrorist threat as groups of domestic extremists and burdening them with restrictive legislation, or even targeting all violent extremists regardless of their national origin, politicians opted to target solely the more politically sound group of foreigners.

The AEDPA has further legitimized the federal government's selective targeting of Arabs in the United States without making much of an impact on domestic terrorist organizations. The targeting of solely international organizations has resulted in the disproportionate targeting of Arab groups, which comprised fourteen of the twenty-eight designated terrorist organizations (Whidden 2001). Under this act, the government sought to combat terrorism by deporting aliens suspected of terrorism and fining or arresting citizens who financially support or are affiliated with international terrorist organizations. It also effectively limited due process to include only very limited disclosure of classified information against aliens in deportation proceedings. It created a new court to deal with these cases behind closed doors in order to facilitate the deportation of suspected alien terrorists, while limiting the ability of these individuals to defend themselves or even respond to the claims

against them.

The AEDPA should not be viewed separately from the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Together, these acts have changed the way suspected alien terrorists are treated in the United States. The Immigration and Naturalization Service (INS) has used the AEDPA to expand powers under its own less restrictive immigration regulations regarding secret evidence. These acts have created sweeping immigration, law enforcement and criminal provisions that have been heavily criticized for dangerously expanding the powers of law enforcement with minimal judicial scrutiny. After the passage of these two acts, the INS initiated around two dozen deportation proceedings around the country. It charged and detained immigrants on secret evidence that it refused to reveal, claiming national security concerns. Although the INS maintained that it did not selectively use secret evidence against only Arabs, it was unable to name a single secret evidence case involving a non-Arab individual (Akram 2002). These acts also seriously curtailed civil liberties and restored the use of ideological exclusion in immigration law (Johnson 1997b). All of this can be seen as a result of the increased public support for detaining the alleged dangerous ‘other’ perceived to be in our midst (Akram 2002).

Together, the AEDPA and IIRIRA, despite their seemingly colorblind language, have been used to selectively target Arab immigrants. An important provision of IIRIRA bars federal courts from hearing selective prosecution claims in immigration cases, and made this provision retroactive in all pending deportation cases. The Los Angeles Eight were the only ones affected by this provision. Two lower courts ruled that it was unconstitutional to strip the federal courts of jurisdiction over constitutional selective enforcement charges and that the First Amendment protects material support to the PFLP unless intent to further unlawful terrorist activities could be shown. In 1999, however, the Supreme Court reversed these decisions and upheld the constitutionality of selective enforcement of immigration legislation in *Reno v. American-Arab Anti-Discrimination Committee (Reno v. AADC)*. Justice Scalia, writing for the majority, ruled that the federal government is free to selectively enforce any immigration statute. He ruled that “the Executive should not have to disclose its ‘real’ reasons for deeming nationals of a particular country a threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on the country’s nationals” (*Reno v. AADC* 1999, 20). Despite the

government's actual motivation behind excluding political and racial undesirables, this ruling means that the government can use any minor visa violation to deport an immigrant. This arose from the prosecution of six of the Los Angeles Eight when they were charged with minor visa violations after the government was unable to sustain its other claims that the eight had meant to raise money for terrorist purposes. This ruling was a blow to all immigrants who hold views unpopular to U.S. foreign policy priorities or are members of a group unpopular in its foreign policy endeavors. It effectively determined that aliens do not have First Amendment rights if they have committed any small infraction while residing in the United States (Akram and Johnson 2002). This ruling is a prime example of the judicial system reinforcing discriminatory policies against those unpopular with the United States government despite the obviously unjust targeting of certain individuals based on their racial classification.

Utilizing immigration courts allows the government to avoid actually charging someone with terrorist activity, which requires a higher burden of proof (Whidden 2001). Normally, there is very little judicial oversight over immigration law, resulting in the consolidation of immigration power by the executive branch of the federal government. The Justice Department oversees immigration courts, meaning that one department of the executive branch controls all aspects of a deportation proceeding. This results in the lack of a systematic check against abuses and possible mistakes. James Woolsey, former CIA Director, gained previously classified information while representing a group of detained Iraqis and found "serious errors" in Arabic-English translation, stereotyping on the basis of religion and ethnicity and accusations derived from rumors and inter-group rivalries (Whidden 2001). Regardless of the individual intentions of the prosecutors, giving the executive branch the power to deport a group of immigrants with few legal constraints can, and does, exacerbate the negative impacts of disproportionate, racialized enforcement of immigration law.

In 1987, just as the Los Angeles Eight were in the national spotlight, the *Los Angeles Times* uncovered a government document entitled the "Alien Terrorists and Undesirables: A Contingency Plan." In the event of an Arab-sponsored terrorist attack, according to this plan, Arabs would be detained in an internment camp similar to the camps that detained Japanese and Japanese American citizens during World War II based on their alleged racial predisposition to



be conspiring against the United States. In an effective blueprint for the mass arrest of thousands of suspected alien terrorists and undesirable Arabs, this plan stipulated that, in the event of a terrorist attack, Arab (and Iranian) immigrants in America would be detained in a camp in Oakdale, Louisiana, until they could be deported (Naber 2008). Arabs and Iranians were to be subjected to indefinite detention until they would eventually be deported for no reason other than their racial and civilizational identity. Deportation would be contingent on an affiliation with terrorism if that could be substantiated, but technical immigration violations would be used if other charges could not be sustained (Whidden 2001). It also suggested the potential implementation of an ideological exclusion in immigration laws in order to detain and remove noncitizens already in the United States prior to an attack, even hinting at the possible inclusion of American citizens with Middle Eastern sympathies (Akram and Johnson 2002). A major aspect of this plan included the registration of all citizens and noncitizens of Arab descent with the federal government as a safeguard against a large-scale terrorist attack on the United States. This registration could have effectively been used to monitor Arabs assumed to be terrorists and provide an easy tool for a massive race-based arrest in the event of a terrorist attack. This plan highlights the possible consequences of consolidating too much power into the hands of a select few members of the government with no checks by the other branches of government.

This INS document was created by the Alien Border Control Committee, a secret inter-agency task force in the Reagan Administration with a mission to “expedite deportation proceedings against Libyan, Iranian, and PLO activists who have violated their visa status” (Committee 4 Justice 2006). With the leaking of this Plan, it had become clear that the targeting of the Los Angeles Eight was not an exceptional case. The government was already spying on politically active Arabs in the United States, but this plan would have allowed the government to conduct monitoring on an even wider-scale. The document also directed the INS to supplement its political charges against detainees with technical immigration violations, such as those used to target the Los Angeles Eight, in order to have charges to fall back on. Overall, the methods outlined in the INS Contingency Plan were exactly those used to prosecute the Los Angeles Eight case, albeit on a much smaller scale (Butterfield 1999).

Although there was public outcry against this plan, the very fact that members of the United States government speculated on it and researched the possibility to the extent that they had found a feasible location indicates the readiness and willingness with which the government has speculated on extreme racial policies in modern times (Akram and Johnson 2002). The case against the Los Angeles Eight appears to have been a test run for this plan, but the public outcry against it, although nominal, hindered the federal government's ability to continue such measures on a wider scale. The Reagan Administration was quick to come out with a response that this plan was merely speculative and was not a part of their actual policy objectives because of the public's widespread objection to the general use of blatantly racist policies. Had a similar plan been leaked about the government professing to round up and detain white citizens of the militia movement or white, foreign members of the Irish Republican Army (IRA), outcry certainly would have been much more substantialized. While many Americans hold stereotypical views about Arabs in America, the public's objection shows that the implementation of statutes against those who may have sympathies to the 'backward' Arab (and Iranian) governments must be much less explicit. The government must instead use other, less blatant, means for excluding and persecuting Arabs in America by using seemingly colorblind legislation against individual members of disliked groups. The failure to target most groups through aforementioned legislation, however, shows the racism still present in the implementation of these laws. This is clearly evident with the omission of the IRA from the list of designated terrorist organizations under the AEDPA.

### **Failure to Target Terrorists of a Different Color**

One of the most obvious instances of racism in the AEDPA lies in its failure to include the IRA as a designated international terrorist organization. Had the government tried to deport Irish immigrants who had raised money for the IRA, David Cole (2003, 169), legal defender of the Los Angeles Eight has said that "the popular outcry would have almost certainly have been much more substantialized." According to the State Department, the IRA was not included because of the group's recent peace negotiations and cease fire. Factions of the PLO remained on the list of terrorist organizations, however, despite the fact that they had completed three peace

agreements with Israel at the time and were viewed as the legitimate representatives of the Palestinian people by most members of the United Nations (Whidden 2001). This inconsistency in treatment may be partially attributable to the differences between the Arab-Israeli and Irish-English conflicts and the United States' foreign policy priorities. Neither the IRA nor the PLO, however, had perpetrated any act of terrorism on U.S. soil, yet members of the PLO were barred from raising money in the United States while supporters of the IRA were not.

Michael Whidden (2001) has compared the treatment of three convicted Irish terrorists residing in the United States with that of a Palestinian immigrant in order to highlight the racism behind the persecution of Arabs. Three Irish immigrants, Gabriel Megahey, Noel Gaynor and Malachy McAllister, have all been convicted of acts of terrorism. They were not merely accused of committing acts of terrorism as many detained Arabs are; these three men had actually been convicted of not only supporting a terrorist group financially, but for actively working for its aims through violent actions. Megahey served five years in a U.S. prison for smuggling guns to the IRA in the 1980s, yet he was never deported to Ireland. Gaynor was convicted as an accomplice to the brutal murder of a police officer in Northern Ireland prior to coming to the U.S., but he, too, was never deported or even barred from entering the United States. McAllister was convicted in the U.K. under similar charges and also of conspiracy to commit murder of another police officer. His status is the only of the three that remained undetermined as of 2007, yet even he was never detained for extended periods of time on the basis of secret evidence as Arabs continually have been.

The case against Arabs in America following the passage of AEDPA is much dimmer. From May 1997 through December 2000, Mazen Al-Najjar, a former professor of Arabic at the University of South Florida, was detained after he had been issued a deportation order, which he intended to appeal. This deportation order came as a result of his association with the Palestinian Islamic Jihad, an identified terrorist organization. After declaring his intent to file an appeal, he was detained without charges on the basis of secret evidence. But Najjar was not the only one. From 1996 until 2001 at least nineteen Arab immigrants were detained on the basis of secret evidence, though they were never charged with committing or plotting to commit a terrorist attack (Akram 2002). This may be partially explained by the terror caused by the 1993 attack on the

World Trade Center, as this was a more direct threat than any IRA sponsored act of terrorism. Alleged al-Qaeda members, however, were not the only Arabs targeted as a result of this attack, nor were they the prime Arab terrorist organization as stipulated by the AEDPA. While al-Qaeda is a powerful international terrorist organization and there are legitimate grounds for targeting its members and fundraisers, it is not the only designated Arab terrorist organization nor are many of the detained Arabs even charged with an affiliation with al-Qaeda (Whidden 2001). This disparity between the targeting of Arabs and the failure to target even convicted white terrorists may also be a result of the political strength of the Irish in America juxtaposed against the political weakness and public suppression of Arab groups as a result of clearly racialized targeting.

The Los Angeles Eight were certainly not viewed as white birthright citizens, as financial contributors of the IRA often are. The eight were, rather, undeniably foreigners, apart from mainstream America. The driving reason for the outcome of this case was the Los Angeles Eight's political affiliations and the history of exclusion that Arab Americans have been subjected to. William Webster, former FBI director, admitted that "if these individuals had been United States citizens, there would not have been a basis for their arrest" (Akram and Johnson 2002, 319). As my previous discussion of the creation of the 'other' through the conjunction of the social construct of the citizen and the social construct of race as justification for exclusion has shown, the targeting of foreigners is frequently a guise for racial policies. United States history and Arabs' current treatment suggest that anti-Arab racism is a primary cause of such contrasting treatment in regards to both their alien and Arab statuses. The selective targeting of Arab communities within the United States, particularly surrounding the Los Angeles Eight case and those like it, are blatant examples of the racism that continues to permeate the legal system and mainstream American society.

Webster also asserted that the eight were targeted as a direct result of their political affiliations in opposition to U.S. interests. The taint of these political affiliations, deemed unwelcome by the U.S. government and mainstream media, represents a shift in the designation of feared 'others' from a blatant, pre-civil rights race-based expression, in which an individual could express their race-based hatred outright, to a contemporary civilization-based expression of inferiority, which Samuel Huntington's work has

helped make popular. Because Arabs are quick to be viewed as demonized 'others,' they have been treated in a way that most citizens and white immigrants could not be. Prohibiting the raising of money for a charitable organization that has been conflated with a terrorist group because of its affiliation with acts of terrorism in the Palestinian conflict, while failing to deport convicted Irish terrorists is telling of the continued racism in the implementation of U.S. laws. This disparity in treatment has also been explained through the direct targeting of Arab foreigners following an attack committed by white, American terrorists, as was seen with the Oklahoma City bombing.

### **Conclusion**

Americans are purported to hold liberal ideals in which individual rights override group-based rights. A belief in individual responsibility, however, has continually failed to extend to those who do not fit in with a European look. Minorities remain to be portrayed as irrational, uncivilized and backward, even as the language of race has fallen out of favor. In the case of Arabs in America, Arabs are viewed as sympathizers of terrorism, generally unsafe to the public. The violence committed by a small group of Arabs has been used to portray all Arabs in this racialized sense. Arabs and Muslims, even before the September 11 attacks, have been situated in a subordinate status through laws and policies specifically geared toward them, as is evident in the Los Angeles Eight case. These policies reinforce the underlying idea that it is appropriate to discriminate against a group for the actions of a few individuals, so long as the group is backward and anti-American. These policies essentially criminalize Arabs in the United States for nothing but their presumed propensity to irrational, violent behavior. They have been constructed as innately different and somehow flawed, less civilized and more violent than other socially constructed groups. In utilizing critical race theory, I have shown that racial policies have been carried out and reinforced by those in power, whether or not it is counter to American values. The racialization process of creating an 'other' ought to be recognized in order to substantiate American claims of individual liberty and equality for all.

State discourses have shaped what it means to be Arab over time. From a historical proximity to whiteness to a dangerous 'other,' the shaping of Arab identity has been strongly linked to governmental policy. The federal government's persistent efforts to

remove the Los Angeles Eight demonstrate the extremes to which it will resort in order to both create a demonized 'other' for the public and to deport political dissidents from the United States. This is also particularly telling of the abuse that occurred at Abu Ghraib prison in 2005. Although the torture and humiliation of 'insurgents' in the prison was viewed by mainstream America as despicable, the actions, like the terrorist attacks perpetrated by the IRA and Timothy McVeigh, were explained as the work of a few misled individuals. Their treatment as individuals gone wrong is linked to their white, American and military status. Attributing guilt to these individuals assuages the guilt of those in power and the governmental structure that have condoned and encouraged such practices. The disproportionate targeting of Arabs in America, however, remains linked to their non-white and foreign status, though it would be much more warranted to target any individual who may perpetrate violent acts of terrorism.

While the overtly racist days of the Naturalization Act of 1790 may be over, notions of civilization-based collective responsibility have justified assigning collective guilt to Arabs and Muslims for the September 11 attacks perpetrated by a tiny minority within the constructed group. While these attacks marked a turning point in policy against Arab Americans, I have shown that discrimination against Arabs in America is nothing new. In fact, the stigmatization that all Arabs are guilty until proven otherwise that has escalated since the attacks is telling of the dormant racial sentiments at large in American society. As individuals of an allegedly different civilization, Arabs have become the white Americans' antithesis and a dangerous menace to society. Religious, linguistic and cultural differences play a role in the racialization of Arabs, but the suspicion and unequal treatment of Arabs by the justice system is more significantly tied to the perception that 'they' are foreign enemies of the United States. Following the attacks, public opinion was generally in favor of racial profiling and legislation specifically targeting Arabs, such as identification cards solely for those of Arab descent. The readiness of Americans to consent to the political and social exclusion of Arabs is a compelling illustration of a racial project years in the making. A new enemy has emerged for 'us' to define ourselves against. 'We' are not backward terrorists. Instead, 'we' are just the opposite, be it freedom fighters or the saviors of democracy. Policies that discriminate against a group for the actions of individual group members, despite the unintended affiliation of

individuals to an identity that they are born into, however, are counter to the ideals that Americans profess to uphold.

The United States' foreign policy ambitions in the Middle East and the resulting persecution of Arabs in America have been effectively covered up by America's continued War on Terrorism. Notions of Arab inferiority have been manufactured and marketed to the American public through the construction of 'otherness' in order to create a public justification for global policies. Political and legal discourse, as well as depictions in the media, has constructed America to be on the side of good and persons perceived to be Arab or Muslim on the side of evil. Since September 11, this has justified the continual racial profiling, deportations, detentions and torture of Arabs and Arab Americans without evidence of illegal activity. Although national security concerns were certainly behind the backlash of the September 11 attacks, Arabs in America have been continually subject to collective responsibility for the actions of a few radical individuals. The collective nature of the *group* that resulted in the selective targeting of those appearing to be Arab or Muslim both in non-government sanctioned hate crimes and by law enforcement officials makes the seemingly race-neutral policies enacted in response clearly racialized. Had Arabs not already been raced as having a predisposition to be the perpetrators of acts of terrorism, these specific terrorists would have been viewed as members of the IRA or Timothy McVeigh have been, as radicals, drastically apart from the mainstream from which they deviated. Instead, the racialization process has rendered the Arab community in America guilty as an entire race, religion and civilization.

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## **Union Perspectives on Immigration: Pro-Immigration Scale Proposed to Assess Union Attitudes**

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*With union membership rates declining and low-wage immigration on the rise, the position of organized labor toward immigration policy is changing. This study quantitatively analyzes the perspectives of active unions in the U.S. toward immigration over the period of 2006 to 2008 through collection of data from official union websites. Fifty-six unions were studied and a pro-immigration scale developed based on five indicators. Four union characteristics, the independent variables, were analyzed based on the pro-immigration scale. Multiple regression analysis showed that Change to Win unions, industrial unions and large unions were significantly related to pro-immigration perspectives. While debates over specific policies such as amnesty and guest worker programs continue, unions are more pro-immigration now than in the past. This shift in the relationship between unionism and immigration has meaningful implications for both groups that will be analyzed qualitatively.*

The purpose of this study is to analyze the current relationship between unions and immigration in the United States. Throughout the majority of the 20<sup>th</sup> century, unions generally had negative views towards immigrants entering the American workforce. The unions supported restrictionist immigration policy, such as controls and ceilings, for economic reasons that included the assumption that reducing the flow of labor into the country would improve wages and working conditions for the workers already in the country (Briggs 2001). In 1924, for instance, the American Federation of Labor (AFL) declared support of a “total suspension of immigration for a period of five years or longer” (Haus 2002, 3). The 1924 National Origins Act became law that same year and contributed to slowing down immigration from Eastern and Southern Europe (Kwong 1997).

Throughout the 20<sup>th</sup> century, the restrictionist policies that unions had supported repeatedly failed. Unions sat in the restrictionist policy camp because of a seemingly obvious economic reason that if the supply of immigrant labor is reduced, then wages and benefits for native workers will be positively affected. However, the government’s attempts to stop immigration were consistently futile. Leah Haus (2002) posits that increasing economic

internationalization inhibited the government's ability to actually restrict immigration into the United States, which caused the labor movement to react by moving away from the restrictionist policy camp.

While the union movement was very strong in the 1930s, the second half of the century saw a drop in American unionized workers from 35% in 1955 to 11% in 1995 (Briggs 2001). Many analysts believe structural changes in the American economy contributed to this change. The shift in the economy from a manufacturing-based one to a service economy, in large part due to the outsourcing of jobs to areas with cheaper labor, contributed to the decline. Unions could not reproduce the organizing success of the manufacturing fields of the past with the increasingly present white-collar and service fields (Richards 2008). Kim Moody (2007) views the key turning point in the decline of the American labor movement as the years 1980-81. During this time, union membership began to fall in absolute numbers, and unions turned toward a number of defensive reactions to the structural economic changes. These included the rise in union mergers, the increased use of concessions as a mode of collective bargaining, and the use of labor-management cooperation schemes as an attempt to save jobs (Moody 2007). These retreats and continuing economic changes that challenged labor only further weakened the American labor movement.

The changing economic condition continued to attract immigrants to the United States in the second half of the 20<sup>th</sup> century, who now came mainly from Latin America and Asia (Kwong 1997). In the early and mid-1990s, certain unions started to shift their policies toward immigration. The Immigration Committee of the Los Angeles Federation of Labor, AFL-CIO, stated in 1993 that, "We are living in an era where the movement of labor, like capital, is increasingly common and difficult to regulate. The world has become a smaller place and organized labor is adjusting" (Haus 2002, 3). Labor Economist Vernon M. Briggs (2001, 177) continued this sentiment when he said:

In the rapidly changing labor market environment of the late 1990s and early 2000s—involving globalization, technological change, and mass immigration pressures—the one sector of the economy that might be receptive to concentrated union organization is the low-skilled labor market, which is infused with a growing supply of

immigrant workers.

As the rise of immigration has continued, along with the decline of union membership, this study attempts to determine whether the unions have “adjusted” their perspectives toward immigration and what those perspectives are.

The struggles of organized labor culminated in a split of the historically dominant AFL-CIO. The issue was primarily over organizing workers. A coalition of unions within the AFL-CIO wanted to promote mass organization through centralizing the union structure into a smaller number of large unions and through increasing the dues rebate that unions would receive for a true commitment to organizing. Ultimately, at the 50<sup>th</sup> anniversary of the AFL-CIO convention in July of 2005, the Change to Win coalition wanted unions to get a 50% rebate, while the AFL-CIO president offered no higher than 25% (Moody 2007). In September of the following year the Change to Win Federation representing seven unions and 6 million members met as an independent federation for the first time.

Since organizing workers was a key issue in the split of the AFL-CIO federation, a union’s affiliation will be an important focus of this study. Other characteristics of unions that will be analyzed and that are important to understand include: industrial versus craft unions and private-sector versus public-sector unions. Lipset and Marks (2001, 90) distinguish between craft and industrial unions based on the “job characteristics of their members, differences in membership, and, above all, their contrasting labor market strategies.” Craft unions have often been seen as exclusive organizations because they historically sought to restrict membership to a particular occupation and were originally limited to workers who had been apprenticed in the craft. Industrial unions on the other hand use mass organizing of an industry or a collection of industries and embrace the strength of large numbers as their primary bargaining tool (Lipset and Marks 2001). Some examples of the trades organized by craft unions include carpenters, electricians, ironworkers and bricklayers, while industrial unions, for example, represent service-industry workers or agricultural workers. Although these distinctions have in some respects been blurred in recent decades, these basic guidelines will be followed in this study.

Private-sector unions represent employees of private businesses such as agricultural laborers, mineworkers, or autoworkers. The

International Brotherhood of Teamsters (IBT) is an example of a private-sector union. Public-sector unions represent employees of all levels of government such as teachers or firefighters. The American Federation of Government Employees (AFGE) is an example of a public-sector union.

### **Hypotheses**

In addition to determining if organized labor has continued to shift from the historically antagonistic relationship with immigrants, this study will analyze what types of unions are more likely from 2006-2008 to be pro-immigration. The study will test four hypotheses, as outlined below.

If the pro-immigration scale is related to union affiliation, then Change to Win unions will be more supportive of immigration than AFL-CIO or unaffiliated unions. This is hypothesized because a significant reason that Change to Win split from the AFL-CIO in 2005 was over concerns about the expansiveness and effectiveness of organizing campaigns (Moody 2007).

If the pro-immigration scale is related to the industrial union versus craft union variable, then industrial unions will be more supportive of immigration. This is plausible because the structure of industrial organization stresses the common interests of workers, while craft unions emphasize the specific skill set of particular workers. Many immigrants to the United States undertake jobs with “low wages and poor working conditions” because such employment is often seen as “being considerably better than those they previously experienced in their homelands” (Briggs 2001, 177). These low-wage jobs would seem to be more conducive to industrial organizing and therefore industrial unions would be more pro-immigration.

If the pro-immigration scale is related to union size, then larger unions will be more supportive of immigration than smaller unions. This is perhaps because larger unions have a more expansive network of organizing, and may have the resources available to recruit immigrants into their ranks. Smaller unions may have a limited organizing structure available to recruit immigrant workers; bringing in these workers likely involves new recruitment methods, such as Spanish-language recruitment.

If the pro-immigration scale is related to the private-sector unions versus public-sector union variable, then private-sector unions will be more supportive of immigration than public-sector

unions. This hypothesis is likely because the government employers of public-sector union members may have more rigorous documentation of citizenship requirements than certain private employers. Since more private-sector unions may have undocumented members, they may be more supportive of these immigrants than public-sector unions. For instance, policemen and firefighters are required to follow stricter government documentation checks than agricultural laborers for private employers. Thus a union that represents government employees, such as the International Union of Police Associations (IUPA), would have less to gain from advocating for and organizing potentially undocumented workers.

### **Method**

The study consists of data from the official websites of 56 current unions functioning in the United States. Only data from the period 2006 to 2008 was collected. The unions chosen for the sample included every union with over 100,000 members and a sampling of unions with fewer than 100,000 members chosen in no particular pattern. The list information came from the Department of Labor. The list of unions studied appears in the Appendix section.

On the official union websites, a search for five indicators of pro-immigration perspectives was undertaken to create a pro-immigration scale. This scale determines how supportive of immigration each union is. The first indicator is whether or not the website is available in Spanish. For instance, if the website gives the visitor an option of selecting an icon that says "*español*," it is available in Spanish. In order to code this indicator, if the website were available in Spanish, it received a 1 and if it not, it received a 0. This variable represents a positive stance towards immigration because of the rising percentage of Latin American, Spanish-speaking immigrants (Kwong 1997). If the website is available in Spanish, then it is more accessible to these immigrants.

The second dependent variable is whether or not the union has an official policy statement supporting immigrant workers on the website. This variable was determined in two ways. First, certain websites had tabs to "Policies" or "Issues" that explained the immigration policy. Second, many websites had search boxes that led the viewer to the policy by searching "Immigration" or "Immigration policy." The policies were considered "pro-immigration" if the union made general statements about supporting

“immigrant rights” or if the union supported specific measures, such as creating a path to citizenship. For example, a general statement from the National Postal Mail Handlers Union (2004) says, “the United States should embrace immigrants for the diversity and values they bring, rather than fear immigrants as a threat to American values or jobs.” On the other hand, specific support of immigration policy by the American Federation of Teachers (2006) says, “reforms must provide a reasonable path to permanent residency for the currently undocumented workers.” A policy supportive of immigration rights or reform received a 1 when coding, and if there were no policy, the union received a 0.

The third indicator is whether or not the union has undertaken lobbying in support of immigration reform. The lobbying pertained to federal bills under construction, review or vote by the Congress. Over the period studied, 2006 to 2008, two comprehensive immigration bills were heavily debated in both the legislature and the media, but ultimately failed. The *Comprehensive Immigration Reform Act of 2006* and the *Comprehensive Immigration Reform Act of 2007* were the primary sources of lobbying from unions over the period. If the unions lobbied Congress in an attempt to create a path to citizenship for undocumented immigrants, an element in both the 2006 and 2007 acts, the union was viewed as pro-immigration. Lobbying against “immigration raids,” where federal agents arrive at businesses without warning and detain illegal immigrants, was considered pro-immigration. Although both bills were complex in nature and included aspects that could be viewed as supporting or detracting from immigration reform, since new paths to citizenship were underlying standards of the two bills, support of the acts in general was considered pro-immigration. A debate over “guest worker” programs, where foreign workers legally come to work in the United States for temporary periods, also included in the two bills, exists between unions and will be analyzed further in the discussion section of the study. A union that lobbies for a path to citizenship, but against the “guest worker” programs, was coded under “pro-immigration.” However, if a union opposed the acts, exclusively citing the “guest worker” programs, with no mention of supporting a path to citizenship, their lobbying was not considered pro-immigration.

An example of pro-immigration lobbying from the American Federation of State, County and Municipal Employees (2006) explains, “AFSCME opposes the House-passed immigration bill

(H.R. 4437) that would criminalize and deport all 11-12 million undocumented workers and build high walls along the U.S.-Mexico border.” An example of lobbying that does not support immigration is shown by the International Union of Bricklayers and Allied Craftworkers (2007):

This legislation would have allowed hundreds of thousands of unskilled foreign workers to enter the U.S. without ensuring adequate wage protections for U.S. workers. This controversial guest worker program, which promised to erode wages and reduce benefits for BAC and other building trades members, was one of the major reasons BAC opposed the legislation.

Lobbying that supported immigration received a 1 and lobbying that did not support immigration received a 0. If the union provided no information whatsoever about immigration regarding any of the five indicators, it received a period in the coding, denoting no perspective toward immigration in either direction.

The fourth indicator is whether or not the union has had protests, rallies or marches in support of immigration rights or reform. This variable was determined by finding information on the official union websites; however, collateral sources in the form of newspapers and local union websites were also searched in order to determine if the union protested. This variable was in many ways framed in a similar way as lobbying, and sometimes the two were intertwined. This is because the protests or marches were often supporting immigration rights or reform when the Comprehensive Immigration Reform Acts were garnering public debate. The protests often attempted to lobby people for or against the acts in a more general way of raising support for immigrants, instead of detailing specific policy measures. Also, if a union local protested and this was displayed on their website, it was included in the coding. Protests for a path to citizenship or against “immigration raids” on businesses were coded as pro-immigration.

An example of a pro-immigration protest by the International Association of Machinists and Aerospace Workers (2007) union was shown by the following: “IAM members in Painesville, Ohio, took part in a Father’s Day march and prayer vigil in support of Latino fathers who were forcibly separated from their families as a result of the government’s Operation Return to Sender.” If unions protested in



support of immigration they were coded as a 1; if their protests were not pro-immigration they received a 0.

The fifth variable is whether or not, according to the website, the union provides services to members that are specifically directed toward immigrants. These services could include access and cheaper rates for an immigration lawyer, the provision of information to members on complicated immigration regulations, workshops to train union organizers to represent immigrants, or other services. An example of an immigration-specific service, provided by the American Federation of Government Employees (2008), is a free initial consultation with an immigration lawyer and then 30% of his or her flat fees and hourly wages thereafter. The search for immigration services highlights a limitation in the official website research that will be analyzed further in the discussion section, which is that some of the unions may provide these services and not explain them on the website. If the union website provided immigration services it was coded as a 1 and if it did not, it was coded as a 0.

The five indicators were used to determine where particular unions fell on a spectrum of immigration sentiments. However, in order to come to conclusions about what types of unions are more pro-immigration, four independent variables were also analyzed. These include: union affiliation (AFL-CIO, Change to Win or unaffiliated), industrial or craft, large or small and public-sector or private-sector. In order to collect information for each of these variables, the official union websites or the Department of Labor website was used.

In 2005, the Change to Win federation split from the AFL-CIO. All of the unions studied are either in the Change to Win federation, AFL-CIO federation, or unaffiliated. The split-off of Change to Win and the implications for the labor movement will be explored further in the discussion section. However, it is important to note that the new Change to Win Federation consisted of seven major unions that included: the International Brotherhood of Teamsters (IBT), the Laborers' International Union of North America (LIUNA), the Service Employees International Union (SEIU), the United Brotherhood of Carpenters and Joiners of America (UBC), the United Farm Workers of America (UFW), the United Food and Commercial Workers International Union (UFCW) and UNITE HERE. The AFL-CIO continued to include over 60 member unions, with the American Federation of State, County, and Municipal Employees (AFSCME) as the largest union. For this first

independent variable, Change to Win and AFL-CIO were coded in two different columns. For these two columns, a 1 denotes, “yes,” the union is affiliated with this specific federation, while a 0 denotes “no,” the union is not affiliated with the federation. Unaffiliated unions have a 0 in both the Change to Win and AFL-CIO columns.

The second independent variable is whether the unions are industrial or craft unions. As previously explained, an industrial union is defined as “a labor union that admits to membership workmen in an industry irrespective of their occupation or craft” (Gove 1981, 528), while a craft union is defined as “a labor union whose membership is limited to workmen following the same craft” (Gove 1981, 1155). In the data table, industrial unions were assigned a 1, while craft unions were assigned a 0.

The third independent variable is union size. For this study, unions with over 50,000 members were defined as large, while unions with fewer than 50,000 members were defined as small. Large unions were coded with a 1 and small unions were coded with a 0.

The fourth independent variable is whether the union is a public-sector or private-sector union. Public-sector unions represent government employees, such as municipal policemen. Private-sector unions represent employees of non-governmental businesses, such as automobile manufacturers. Some unions represent both public-sector and private-sector employees. For instance, the International Union of Security, Police and Fire Professionals of America (2008) represents security professionals employed by the Department of Defense and the Walt Disney Company. Public-sector unions were designated a 0, while private-sector unions, or unions that employ both private-sector and public-sector employees, were given a 1. This coding decision, to group private-sector unions and unions that represent members from both sectors together, was made because unions that represent both types generally represent more private-sector than public-sector employees. An example is the Service Employees International Union (SEIU).

## **Results**

For this study, the data was interpreted using the software program SAS (Statistical Analysis Software) and the method of analysis was a multiple regression analysis. During data collection, the five indicators of pro-immigration attitudes (Spanish, policy, lobbying,

protest and services) were assumed to be related, in order to create a pro-immigration scale. The SAS program determined the five indicators were actually significantly correlated based on the Cronbach coefficient alpha of 0.83.

Since the indicators are related, the pro-immigration scale, which will be called the sum score for the purposes of data analysis, measuring from 0-5, can be created. It is necessary to reiterate that AFL-CIO and Change to Win were interpreted as two different independent variables during the data analysis, so if a union was affiliated with the AFL-CIO they received a 1 in that column and a 0 in the Change to Win column.

A multiple regression was run to determine whether the sum score of the five indicators (Spanish, policy, lobbying, protest and services) could be predicted by the independent variables (AFL-CIO, Change to Win, industrial or craft, large or small and public-sector or private-sector). It appears that these independent variables significantly predict positive feelings towards immigration,  $F(5,51) = 10.7$ ,  $p < .05$ . Overall, 47% of variance in the five indicators was predicted by these five independent variables. The results from the regression analysis appear in Table 1.

**Table 1:** Types of Unions Related to Pro-Immigration Perspectives

Variable	Coefficient	<i>p</i> -value
AFL-CIO	-.479	.2688
Change To Win	1.478	.0216
Industrial/Craft	1.415	.0001
Size	1.116	.0020
Private-sector /Public-sector	.389	.4408
Intercept	-.549	.3554
Number of Observations		56
Adjusted R-Squared		.465
<i>p</i> -value		<.001

In order for the independent variable to show significance in regards to the pro-immigration scale (the sum score), the *p*-value must be less than .05. AFL-CIO was not significantly related to the sum score ( $p = .27$ ). Change to Win was significantly related to the sum score (coefficient = 1.478,  $p < .05$ ). Therefore, the Change to Win unions studied were more pro-immigration than the AFL-CIO unions

and the unaffiliated unions.

Industrial unions were significantly related to the sum score (coefficient = 1.415,  $p < .001$ ). Industrial unions were coded with a 1 and craft unions with a 0; therefore, the industrial unions studied were more pro-immigration than the craft unions. Since large unions were coded with a 1 and small unions with a 0, large unions were significantly more pro-immigration than the small unions (coefficient = 1.116,  $p < .001$ ). Finally, the private-sector unions and unions that represent both private- and public-sectors were not significantly related to the sum score ( $p = .44$ ).

## Discussion

The data results show that Change to Win, industrial and large unions are more likely to be pro-immigration than AFL-CIO, craft and small unions, respectively. The data also demonstrate that there is no relationship between public-sector, private-sector, or unions that represent both sectors, and pro-immigration stances. Throughout the discussion section, the study will analyze some of the debates over immigration policy that exist between parts of organized labor, in addition to providing possible explanations of the results.

Given that the Change to Win federation split off from the AFL-CIO in 2005, these results in large part serve to test how effective Change to Win has been at solving a problem they did not believe the AFL-CIO was handling properly, membership numbers. Kim Moody (2007, 5) frames this debate: “The issue was organizing the unorganized, itself a question of future power. If unions failed to change their ways and organize by the hundreds of thousands, the dissidents argued, organized labor would disappear as a force in American life.” Over the period, 2006 to 2008, the Change to Win federation appears to be acting in line with the complaints about “organizing the unorganized” as reflected by its strong pro-immigration stance. The result from the study supports the hypothesis and appears to reflect the issue of organization that contributed to the 2005 split.

The result of industrial unions being more supportive of immigration than craft unions again supports the hypothesis and seems consistent with the different structure of the two types of unions. Whereas craft unions often have smaller numbers and are more exclusive, based on the necessary apprenticeship and skills expectations, industrial unions tend to be larger and more diverse in

skill sets. It may be that larger unions have a more extensive organizing capacity that is conducive to bringing in large numbers of immigrant workers. For instance, as early as 1995, the SEIU was reported to spend 30% of its budget on organizing, published information in a number of Latin American and Asian languages, and had organizers that spoke 14 languages (“Unions and Immigrants” 1996). Thus, the larger industrial unions would be predisposed to being pro-immigration because they have a better chance of actually organizing immigrant workers. This result supports the hypothesis.

In addition to lacking a broad organizing structure, many small unions simply did not register any interest in the immigration debate. The observation that, “the nature and severity of the environmental threats and challenges differ between countries as well as between unions,” applies to the differences between large and small unions (Sverke 1997, 3). Despite how profound the effects of immigration and immigration policy are for some unions, for others like the Atomic Trades and Labor Council (2008), with a membership of 2100, immigration does not appear to be a crucial issue.

The results show that private-sector unions or unions that represent both private-sector and public-sector workers were not significantly related to being more pro-immigration. However, despite the fact that the *p*-value shows an insignificant relationship, the parameter estimate shows private-sector or unions that represent both private-sector and public-sector unions, are perhaps slightly more likely to be supportive of pro-immigration than public-sector unions alone. Therefore the original reasoning, that government employees go through more rigorous testing regarding citizenship documentation status than certain private business employees, may hold some footing. This process may dissuade the undocumented constituency of immigrants from pursuing government jobs. Thus, the suspected reasoning could be an explanation for the slight advantage of private-sector or unions that represent both private-sector and public-sector workers over just public-sector unions, but the advantage is not statistically significant and thus, the result does not support the hypothesis.

Over the studied period, 2006-2008, the most divisive debate within the labor movement was over the issue of guest worker programs. The term “guest workers” is “an official designation for state-authorized, temporary foreign workers who must ultimately return to their countries of origin when their legal status expires”

(Alfredo Posas 2006, 162). The United States established a formal guest worker program with Mexico between 1942 and 1964 that was called the *Bracero* program, which allowed for temporary migration of agricultural workers. One analyst from the *Washington Post* believes this program made immigrants “beholden to farm bosses ... under which they picked sugar beets, cotton and other crops for long hours and low pay.”<sup>1</sup> In fact, the United Farm Workers union formed in 1965 as a reaction to the injustices of the *Bracero* program (United Farm Workers 2008). After 1964 a limited type of guest worker program called the H-2 program continued. This program allowed foreign workers to fill temporary jobs in the agriculture, hotel and restaurant businesses. The current system for temporary workers required on a seasonal, peakload, or intermittent basis is divided into two parts, the H-2A visa for agricultural workers and the H-2B visa for non-agricultural workers (United States Department of Labor 2007). James Parks, a journalist on staff with the AFL-CIO, said on May, 12, 2008, that the “current law caps the number of guest workers allowed to enter the country each year at 66,000 under the H-2B visa program” (Parks 2008).

The Comprehensive Immigration Reform Acts of 2006 and 2007 both attempted to expand the guest worker program. Two large industrial Change to Win Unions that supported the expansion of the program included the SEIU and UNITE-HERE (Bacon 2007). Eliseo Medina, the executive vice president of the SEIU, said, “Workers that come here would have full protections of our labor rights, including the right to organize, and they would have an independent method of enforcing those rights.”<sup>2</sup> These unions support a guest worker program that would let workers change jobs, join unions and petition for permanent residency. However, the AFL-CIO disagrees with these unions and thinks the guest worker programs suggested would be “modern-day *Bracero* Programs.”<sup>3</sup> One congressional motion supported an expansion of the guest worker program to 400,000 workers.<sup>4</sup> In *The AFL-CIO Policy on Immigration* (AFL-

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<sup>1</sup>Krissah Williams, “Unions Split on Immigrant Workers,” *Washington Post*, 27 January 2007, pg. D01.

<sup>2</sup>Krissah Williams, “Unions Split on Immigrant Workers,” *Washington Post*, 27 January 2007, pg. D01.

<sup>3</sup>Krissah Williams, “Unions Split on Immigrant Workers,” *Washington Post*, 27 January 2007, pg. D01.

<sup>4</sup>Darryl Fears, “Discord on the Immigration Accord,” *Washington Post*, 21 May 2007, pg. A03.

CIO 2008) the federation supports “A broad legalization program providing permanent residence status, rather than a large new guest worker program.”

The standpoint of the AFL-CIO seems to be distinguished from other unions that do not vocalize supporting a path to citizenship, but adamantly oppose the guest worker program. For instance the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (2007) said, “The bill’s large guest worker program, which does not include proper protections for American workers, could drive down wages and benefits in the construction industry — and in fact throughout our economy.” This quotation, and specifically the fear of driving down wages and benefits, appears to mirror the historical perspective of unions toward immigration that existed throughout most of the 20<sup>th</sup> century. However, the union is referring specifically to the guest worker program and not immigration in general.

Thus, three main perspectives toward the guest worker program seem to exist. First, the SEIU and UNITE HERE perspective is that a guest worker program could create the opportunity for immigrants to have a path to citizenship. Second is the AFL-CIO perspective that supports legalization of many undocumented immigrants, but does not see the guest worker programs as contributing to this cause. Third is the perspective of the Boilermakers and certain other unions. Their main focus in policy formation regarding the comprehensive immigration laws is to oppose the guest worker program, without supporting paths to citizenship.

It is important to recognize the limitations of the web-based research that was used in this study. By using only the official union websites (and some collateral sources like newspapers), the true perspectives of the unions may be obscured. Even though the union website does not explicitly say it supports a specific policy, this does not mean that this type of official policy does not exist elsewhere. For instance, the official policy statement regarding immigration may be explained in more depth in other union resolutions. Also the unions may vary on what information they want to release on their website. Perhaps some unions that were coded as not lobbying have in fact lobbied for immigration, but not released this information on the website. Some unions may keep this information for members only. The data collected from this study is contingent upon the unions having sophisticated and useful websites. Certain smaller unions may have less informative websites because of a lack of funds

directed toward website creation. Also, unions vary based on how effective they believe websites are to their current or potential members. Expanded research of a union's immigration policy would probably entail collecting data from official resolutions and constitutions or perhaps by interviewing union officials.

### **Conclusion**

Despite the limitations, certain important conclusions about the current relationship between unions and immigration policy can be drawn and additional questions about the future of the relationship can be raised from the study. In his book *Forbidden Workers*, Peter Kwong (1997, 15) implored, "the well-being and living standards of all Americans depend on a successful labor reform movement that rises from a broad, from-the-bottom-up mobilization campaign encompassing the entire working class: the people of color, the immigrants, and the illegal aliens." This study suggests that the dynamics of the historical 20<sup>th</sup> century relationship between unionism and immigration have changed and continue to change. The study identifies the leaders of this movement as large, industrial and Change to Win unions. However, throughout organized labor, the debate over immigration appears to be shifting toward the perspective that immigration can be viewed as an opportunity instead of a burden. The major federations, Change to Win and the AFL-CIO, are in agreement that providing a path to citizenship for the roughly 12 million immigrants "living in the shadows" is an opportunity to expand membership and to support immigrant rights. The transition to recognize "the need for organizing immigrant workers—and for finding unique and creative models adapted specifically to their particular needs," has not yet reached all of organized labor (Jayaraman and Ness 2005, 5).

One question for the future is whether the pro-immigration shift in unions' policies will continue. With two recently failed comprehensive immigration reform laws and a new political leadership directing the country starting in 2009, the immigration debate will no doubt soon resurface. The perspectives of unions will impact the debate in the coming years. After completion of this project, but before publication, there was a major development in labor's perspective on immigration. Change to Win and the AFL-CIO came out with a joint immigration reform framework to present to Congress. Whereas the two rival federations could not agree on a



common position during the immigration reform debates of 2006 and 2007, they now stand together. One Change to Win leader noted, “Today’s unity statement is a recognition of the dire need to have immigration laws that work and work for all workers” (Change to Win 2009). Bridging the differences between the two federations clearly shows how important the issue of immigration is for labor. If this transformation of the relationship continues, the organized labor movement could be reinvigorated with large numbers of immigrant workers. This may in turn improve rights for all workers. On the other hand, a return to the historical negative perspective of unions toward immigrants could play a role as a contributing factor in the continued loss of members and the decline of organized labor in the United States.

### **Appendix: Full Names of Unions Studied**

National Education Association (NEA)  
Service Employees International Union (SEIU)  
American Federation of State, County, and Municipal Employees  
(AFSCME)  
International Brotherhood of Teamsters (IBT)  
United Food and Commercial Workers International Union (UFCW)  
American Federation of Teachers (AFT)  
United Steelworkers of America (USWA)  
International Brotherhood of Electrical Workers (IBEW)  
The Laborers’ International Union of North America (LIUNA)  
International Association of Machinists (IAMAW)  
United Auto Workers (UAW)  
Communication Workers of America (CWA)  
United Brotherhood of Carpenters and Joiners of America (UBC)  
UNITE HERE  
International Longshore and Warehouse Union (ILWU)  
International Union of Operating Engineers (IUOE)  
The United Association of Plumbers and Pipefitters (UA)  
The National Association of Letter Carriers (NALC)  
American Postal Workers Union (APWU)  
International Association of Fire Fighters (IAFF)  
National Postal Mail Handlers Union (NPMHU)  
American Federation of Government Employees (AFGE)  
The Amalgamated Transit Union (ATU)  
American Nurses Association (ANA)

Sheet Metal Workers International Association (SMWIA)  
International Union of Painters and Allied Trades (IUPAT)  
International Association of Bridge, Structural, Ornamental and  
Reinforcing Iron Workers  
Transport Union Workers of America (TWU)  
American Association of Classified School Employees (AACSE)  
National Rural Letter Carriers' Association (NRLCA)  
Air Line Pilots Association (ALPA)  
American Train Dispatchers Association (ATDD)  
The Bakery, Confectionery, Tobacco Workers and Grain Millers  
International Union (BCTGM)  
Glass, Molders, Pottery, Plastics & Allied Workers International  
Union (GMP)  
International Association of Heat and Frost Insulators and Allied  
Workers  
International Brotherhood of Boilermakers  
International Longshoremen's Association (ILA)  
International Union of Bricklayers and Allied Craftworkers (BAC)  
National Writers Unions (NWU)  
International Association of Journeymen Horseshoers and Allied  
Trades (IUJHAT)  
International Union of Police Association (IUPA)  
United Mine Workers of America (UMWA)  
United Union of Roofers, Waterproofers and Allied Workers  
Utility Workers Union of America (UWUA)  
Brotherhood of Locomotive Engineers (BLE)  
United Farm Workers (UFW)  
Coalition of University Employees (CUE)  
International Workers of the World (IWW)  
International Union of Security, Police and Fire Professionals of  
America (SPFPA)  
Retail, Wholesale and Department Store Union  
United American Nurses (UAN)  
International Union of Elevator Constructors (IUEC)  
Union Millwrights (UM)  
Office and Professional Employees International Union (OPEIU)  
Seafarers International Union (SIU)  
Aircraft Mechanics Fraternal Association (AMFA)  
Atomic Trades and Labor Council (ATLC)  
Writers Guild of America, East  
International Union of Allied Novelty and Production Workers

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## **Anthony Kennedy: The Roberts Court's Sandra Day O'Connor?**

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*The U.S. Supreme Court no longer belongs to Justice Sandra Day O'Connor. Against a backdrop that includes a new Chief Justice in John Roberts and Associate Justice in Samuel J. Alito, O'Connor's position as the Court's swing vote now belongs to Justice Anthony Kennedy. In this article, I explore what this transition from O'Connor to Kennedy may mean for the Court. The project employs both quantitative and qualitative methodology. Quantitatively, I performed a series of statistical analyses to model how the justices decide cases. Qualitatively, I selected two ideologically divisive cases from the 2006 term in which Kennedy demonstrates his swing vote role. In concert, this approach provides a useful framework with which to study the Roberts Court. My findings are that in 2006 Kennedy voted with the Court's conservative wing more than two-thirds of the time. Kennedy's brand of conservatism, however, was one of minimalism, as he scaled back on but never overturned precedent. I conclude that in 2006, Kennedy transformed into the Roberts Court's swing vote, effectively making him the Court's new O'Connor.*

Since his ascension to Chief Justice in 1986 and until his death in 2005, William Rehnquist presided over the U.S. Supreme Court, the nation's high court of review. The real chief of the Rehnquist Court, however, was Sandra Day O'Connor, whose swing vote secured the majority in numerous landmark cases. It was O'Connor, after all, who provided the all-important fifth vote that on more than one occasion upheld the essential holding in *Roe v. Wade*,<sup>1</sup> votes that came with intense scrutiny from the Reagan Administration that nominated her to become the first female justice in Court history. O'Connor's gradual shift in jurisprudence from that of strict constructionism to a more pragmatic, case-by-case approach defined the legacy of the Rehnquist Court, a legacy of small victories in the economic realm of the conservative agenda but major defeats in the social realm.

Everything changed in 2004, however, as O'Connor and

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<sup>1</sup>*Roe v. Wade*, 410 U.S. 113 (1973); see also *Akron v. Akron Center for Reproductive Rights*, 462 U.S. 416 (1983); *Webster v. Reproductive Health Services*, 420 U.S. 490 (1989); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (upholding *Roe* while limiting its scope).

Rehnquist, Stanford classmates and fellow Arizonans, both left the Court. O'Connor left to take care of her ailing husband, who suffered from Alzheimer's disease, while Rehnquist passed away after a year-long battle with cancer. While their departure brought forth speculation as to the future of the Court without O'Connor and Rehnquist, it was equally important to remember the impact the two had, on the Court and on one another. Their similar voting patterns, as well as their influence on one another, according to legal scholar Douglas W. Kmiec (2006, 495-96), epitomized their relationship and effect on the Court:

Chief Justice Rehnquist and Justice O'Connor gave important new life to a jurisprudence that answered questions and solved problems, even as they parted company on the implication of a non-textual abortion right and differed on the use of race for diversity. It is fair to infer that O'Connor heightened Rehnquist's sensitivity to gender discrimination and that Rehnquist influenced O'Connor's thinking, at least in part, toward greater religious accommodation and the protection of private property.

Rehnquist and O'Connor's relationship proved to be a microcosm of their influence on the Court. Their similar voting patterns suggested that while they agreed with one another and voted conservatively in most instances, they could not and did not reach consensus on numerous ideologically divisive cases. Thus, with positions open for a Chief Justice and an Associate Justice, and with the nominations belonging to the same Republican Party that nominated both Rehnquist and O'Connor, it seemed President George W. Bush had an opportunity to succeed where his conservative predecessors had failed: to nominate two justices committed to actually supporting the Republican Party's conservative judicial agenda.

In this article, I explore the decisions of the newly constructed Roberts Court for the 2006 term. Specifically, I focus on Justice Anthony Kennedy, who emerged as the Court's swing vote. A transition in swing vote status from Justice O'Connor to Justice Kennedy may mean a shift in the Court's ideology and future jurisprudence. I begin by providing an overview of the transition from the Rehnquist Court to the Roberts Court. Next, I quantitatively

explore the voting patterns of the justices in 2006 using statistical analyses. I then explain Justice Kennedy's vote in two cases which exemplify his emergence as the Court's swing vote. Finally, I draw some broader conclusions based on my findings.

### **Background**

With the successful appointments of Chief Justice John Roberts and Associate Justice Samuel J. Alito, the newly comprised Roberts Court voted strikingly more conservative than liberal in 2005. According to legal scholar Lori A. Ringhand (2006), who analyzed the Court's 2005 decisions, two noteworthy statistics emerged: the percentage of conservative cases decided and the near identical voting patterns of Roberts and Alito. Ringhand's research found that in 2005, the inaugural Roberts Court voted conservatively 56 percent of the time and liberally just 39 percent of the time. Given the dynamics of the first year under a new Chief Justice, however, such disparity in decisions was not as concerning to Ringhand as was Roberts' and Alito's voting similarities. Ringhand (2006, 629) explains, "the extremely high alignment rate of the Court's two newest justices shows that these justices may have more in common with each other than with the other conservatives on the Court, an intriguing possibility that warrants ongoing attention as these Justices continue to serve together in coming years."

A probable explanation for Roberts' and Alito's alignment in 89 percent of cases in 2005 goes back to the Reagan Administration, when conservatives first attempted to radically change the ideological direction of the Supreme Court with its "conservative movement" of the 1980s, during which time Sandra Day O'Connor and Antonin Scalia were appointed Associate Justices and William Rehnquist was appointed Chief Justice. But differences in the justices' definitions of conservatism froze any attempts at consensus and the conservative movement came and went. But Roberts and Alito, according to Court reporter Lyle Denniston (2006, 65), are "the 'sons of the Reagan Revolution,' a cadre of smart, young legal professionals who had populated the Justice Department under Edwin Meese in the Reagan years, were now grown-up, accomplished lawyers and judges who—by all appearances—were still true believers in the cause."

Roberts was the movement's poster boy, not necessarily because of his ardent conservative judicial philosophy, but because



of his almost too-perfect reputation as a judge. Simply put, there was nothing controversial or troublesome about Roberts. Alito was a different story. During Robert's confirmation, little was uncovered from his past that might have indicated his future jurisprudence on the Court, nor did anyone know for sure just how "red his conservative blood flowed." With Alito, there was no debate – he was a conservative's conservative from head to toe.

According to Supreme Court analyst and author Jeffrey Toobin (2007), documents had been uncovered that spoke volumes about how Alito might approach a position on the Court. Most notably, a 1985 application for a promotion in the Reagan Justice Department, in which Alito began by making his ideological philosophy clear, saying "I am and have always been a conservative" (Toobin 2007, 310). He continued: "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion" (Toobin 2007, 312).

Despite his attempts to distance himself from the content of the application, it was relatively certain what kind of justice Alito would be if confirmed. Moreover, his record as a Circuit Court of Appeals judge showed his willingness to administer a strict brand of conservatism. Toobin (2007, 312) summarizes Alito's time on the lower bench this way: "As a lower court judge for the past fifteen years, Alito had no right to overturn these precedents [*Regents, Roe*],<sup>2</sup> but he gave every indication that he would if he could." Now on the Supreme Court, with five votes, Alito can.

### Literature Review

The secrecy of the U.S. Supreme Court is no secret. Justices rarely field interviews, they mostly refrain from explaining decisions further than in their opinions, and they almost never make their prospective vote on future cases known. For these reasons, when literature on the Court is printed, it is arguably the most useful information available on the subject, thus making it an invaluable research tool. For the Rehnquist and Roberts Courts, the "insider" texts are Mark Tushnet's *A Court Divided* and Jeffrey Toobin's *The Nine*. Collectively, the texts detail the transition of the Court from

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<sup>2</sup>*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Rehnquist to Roberts.

*A Court Divided: The Rehnquist Court and the Future of Constitutional Law*

The composition of the Supreme Court—nine individuals with nine judicial philosophies—makes predicting forthcoming rulings exceedingly difficult. Thus, Tushnet offers in *A Court Divided* a qualitative analysis of the inner workings of the Rehnquist Court. Tushnet (2005) makes the convincing argument that the real division of the Rehnquist Court, the division that kept its most conservative justices in check, was not between conservatives and liberals, but between conservatives themselves.

Tushnet (2005) focuses his study on the Rehnquist Court in the years leading up to Justice O'Connor's retirement and Justice Rehnquist's death. By understanding where the Rehnquist Court stood on issues such as abortion, race and education and affirmative action, one is able to make logical sense of the Roberts Court's decisions in 2006. Further, Tushnet's (2005) analysis of the justices' philosophies offers a qualitative component that illustrates what the justices think of an issue and how they may proceed given an opportunity to respect or overturn precedent. By combining Tushnet's qualitative analysis of the justices from the Rehnquist Court who now comprise the Roberts Court [Antonin Scalia, Clarence Thomas, David Souter, Ruth Bader Ginsburg, Anthony Kennedy, John Paul Stevens and Stephen Breyer] with the quantitative analysis of the Robert Court's first full term in 2006, an explanatory mechanism for the Court's 2006 jurisprudence emerges.

*The Nine: Inside the Secret World of the Supreme Court*

Toobin in *The Nine* focuses his discussion of the Court on three areas of emphasis: personalities and ideologies of the justices pre-*Bush v. Gore*;<sup>3</sup> the justices' changing personalities and ideologies post-*Bush*; and most importantly for my research, the events leading up to and preceding the assembly of the Roberts Court.

Toobin (2007, 336) argues that the justices appointed to the Court by Republican presidents in the past 20 years have failed to advance the hard-line conservative agenda, specifically, to "expand

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<sup>3</sup>*Bush v. Gore*, 531 U.S. 98 (2000).

executive power. End racial preferences intended to assist African Americans. Speed executions. Welcome religion into the public sphere. And, above all, reverse *Roe v. Wade* and allow states to ban abortion.” Even the Rehnquist Court, once comprised of seven Republican appointees, never made the sharp turn to the “right” that many conservatives had been seeking for a generation. Thus, after years of appointments, failures, more appointments and more failures, conservatives came to the conclusion that control of the presidency was the only way to control the Court (Toobin 2007).

In 2000, conservatives won the office of the presidency with the election of George W. Bush. For nearly four years of the Bush Administration, the Court's makeup remained the same. Then in 2004, the Rehnquist Court began to crumble. First O'Connor retired, then Rehnquist passed away, and hard-line conservatives found themselves in the position for which they had been waiting for almost 20 years: a Court with two vacant positions and a President committed to making the conservative judicial agenda a reality. In 2005, President Bush was in a unique position. Whereas in 1987 Ronald Reagan came under intense political fire for his nomination of outspoken conservative Robert Bork, Bush, according to Toobin (2007), faced far less pressure – his biggest risk was nominees that were not conservative enough.

In 2005 and 2006, President Bush appointed John Roberts and Samuel J. Alito to the positions of Chief Justice and Associate Justice, respectively. Both were active conservatives in the Reagan Administration, and with their successful appointments, alongside Justices Scalia and Thomas, the Court now had four relatively certain conservative votes. The question then was where would Justice Kennedy align himself – with the Court's four liberals or four conservatives? In 2006, Kennedy sided with the conservatives. Toobin (2007) explains Kennedy's alignment to be a product of the Republican Party's drive to organize, mobilize and care more about the Court than liberals. While the Republican Party undoubtedly played a critical role in the ideological direction of the Court in 2006, my research focuses on answering the question left unanswered by Toobin: What else made Kennedy vote the way he did in 2006?

### **Methodology**

To answer this question, my research first quantifies the Court's voting patterns in 2006, focusing specifically on Justice Kennedy's,

and then qualitatively explains his swing vote in two ideologically divisive cases.

### *Quantitative Research*

Spaeth analysis, created by Harold J. Spaeth of Michigan State University, separates the decisions of the Supreme Court into two ideological categories – liberal and conservative. This has come into fairly wide use to help political scientists study how judges decide cases, or what is known as the study of judicial behavior. This liberal-conservative determination, according to Ringhand (2006), follows current political preferences: decisions in favor of individuals claiming constitutional rights are coded as liberal, except reverse race discrimination in which a decision in favor of the claimant is coded as conservative; decisions in favor of the federal government or judicial power, unions, injured plaintiffs and debtors are coded as liberal; and decisions favoring states' rights, compelled arbitration and property owners are coded as liberal.<sup>4</sup>

Further, the analysis separates decisions into ten issue areas to determine the ideological direction of the Court in a particular year on a particular issue. The ten issue area groupings include: criminal procedure, economic activity, civil rights, judicial power, First Amendment, due process, federalism, miscellaneous, privacy and attorneys.

Because completion of a comprehensive Spaeth analysis of a Court term is explanatory rather than predictive, analyses are usually published a year after the term is completed, meaning the coded 2005 term is published at the end of the 2006 term and so forth. However, because my research focuses specifically on the ideological shift of the Roberts Court in 2006, I used the Spaeth analysis in a targeted way. Pursuant to my analysis, I acquired three pieces of quantitative information about the Roberts Court's 2006 term:

- 1) The percentage of cases heard in each of the ten issue areas. This provided insight as to what types of cases the Roberts Court accepted for review.
- 2) The number of decisions in which Justice Kennedy

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<sup>4</sup>Says Ringhand (2006, 610) further, "Cases that do not fit any of Spaeth's ideological codes are considered uncodable, as are cases with such fractured opinions so no single ideological direction can fairly be assigned to the opinion."

voted conservatively and liberally and the number of times his vote secured a majority. This was the central emphasis of my quantitative research.

- 3) The percentage of cases that resulted in 5-4 decisions and the number of those decisions that were coded conservative and liberal.

Lastly, I performed a series of statistical analyses with the dataset to determine if correlations existed between the voting patterns of the nine justices. I used SPSS analytical software and its cross-tabulation function to determine possible correlations between justices. If correlations did or did not exist, I explained what this meant for the 2006 term. The ultimate goal of my quantitative research was to determine which justices were voting statistically similar to which justices, and more importantly, if justices with correlated voting patterns made up the Court's liberal and conservative wings. Because justices with correlated voting patterns presumably possessed similar ideological preferences, the analysis determined with which ideological wing Justice Kennedy most associated. The answer to this question most accurately explained the Court's jurisprudence in 2006.

#### *Qualitative Research*

From my Spaeth quantitative data and analyses, I employed the qualitative research discussed in my literature review to offer my best explanation as to the Court's voting patterns in 2006. Moreover, I analyzed the votes of Justice Kennedy on two of the term's most ideologically divisive cases, which I chose using Ringhand's (2006, 620) objective measures: "the number of amicus curiae briefs filed in each case and the amount of media attention generated by each case." Further, having become intricately familiar with the 2006 term, I also employed my own discretion in the selection of the cases.

I analyzed the voting of the justices in this manner because on the most contentious cases that come before the Court, justices often possess their strongest feelings on the issue being presented, such as Justice Scalia on abortion and Justice Thomas on federalism. By analyzing on which side of the ideological spectrum the justices fell in 2006 on these types of cases, one gets an idea where the Court went, who commanded the majority, and why.

The Court was sharply divided during the 2006 term – 24 of 67 cases were decided by a 5-4 vote. In each case, the majority vote belonged to Justice Kennedy. Because of this, I selected two cases that were decided 5-4 and analyzed them using primarily the works of Tushnet and Toobin to explain the reasons for which the justices voted. Further, because I believe an ideological shift occurred in 2006, namely on the part of Justice Kennedy, I tethered my case selections to what I believe are the Court's most ideologically divisive issues: abortion and race and education.

## Results

### *Quantitative Research*

In 2006, the Court heard oral argumentation and issued opinions in 67 cases. Table 1 categorizes the Court's decisions in each of the ten Spaeth issue areas.

**Table 1:** Cases by Issue Areas, 2005 and 2006 Terms

Issue Area	2005 Term	2006 Term
Criminal Procedure	29.0%	29.9%
Economic Activity	23.2	17.9
Civil Rights	13.0	7.5
Judicial Power	13.0	17.9
First Amendment	8.7	6.3
Federalism	4.3	7.5
Due Process	2.9	3.0
Miscellaneous	2.9	3.0
Privacy	1.4	3.0

Table 2 is a breakdown of the Court's vote margins in 2006. Notice the increase in 5-4 decisions in 2006, as it is indicative of the extent to which the Court was divided. In 2005, for example, the Court voted 9-0 a plurality of the time. In 2006, by contrast, the most common vote margin was 5-4. Whether this trend continues will be telling as to the future cohesion, or lack thereof, of the Court.

**Table 2:** Vote Margins, 2005 and 2006 Terms

Vote Margin	2005 Term	2006 Term
5-2	1.4%	0.0%
5-3	4.3	1.5
5-4	14.5	35.8
6-2	2.9	1.5
6-3	11.6	3.0
7-0	0.0	1.5
7-1	2.9	3.0
7-2	8.7	10.4
8-0	17.4	0.0
8-1	2.9	9.0
9-0	33.3	31.3

Table 3 shows the Court's ideological outcomes of decisions from 2000 to 2006. Statistically, in 2006 the Court voted conservatively more than two-thirds of the time. It was the Court's highest percentage of conservative voting since the turn of the century and far and away the Roberts Court's most conservative term.

**Table 3:** Ideological Outcome of Decision, 2000-2006

Term	Conservative	Liberal
2006	68.7%	31.3%
2005	56.5	39.0
2004	46.0	53.0
2003	52.0	48.0
2002	55.0	45.0
2001	59.0	41.0
2000	49.0	51.0

While the increase in conservative decisions by the Court in 2006 is significant, of more significance is the role of Justice Kennedy in this shift. With 24 cases decided 5-4 in 2006, Kennedy's vote was the single driving force behind the Court's ideological shift, as he voted conservatively in 20 of the 24 cases, or 83 percent of the time.

To attempt to explain Kennedy's conservative alignment in 2006, I performed statistical analyses of the voting patterns of the nine justices to determine if correlations existed. From greatest to least, correlations existed between Kennedy's voting pattern and that of Justices Roberts,<sup>5</sup> Alito (correlation = .500,  $p < .01$ ),<sup>6</sup> and Stevens (.362,  $p < .05$ ). Of the remaining six justices, disregarding statistical significance, from greatest to least, Kennedy's voting patterns were most correlated to that of Justices Souter (correlation = .347), Breyer (.265), Scalia (.213), Ginsburg (.190) and Thomas (.179).

Thus, sans the incalculable statistic between Kennedy and Roberts, Kennedy's voting patterns are most analogous to Alito's. To compare the strength of the Kennedy-Alito correlation, I then calculated analyses of other justices that might have corollary voting patterns. I paired justices using a purely subjective process – based entirely on my personal knowledge of the Court's makeup. The results from greatest to least were as follows: Justices Scalia and Thomas (correlation = .738,  $p < .01$ ), Breyer and Ginsburg (.626,  $p < .01$ ), Roberts and Alito (.571,  $p < .01$ ) and Souter and Stevens (.540,  $p < .01$ ).

Functionally, this makes sense, as the correlations between justices existed almost strictly along ideological lines. Statistically speaking, the Court in 2006 drew a distinct line between its ideologically conservative and liberal justices, with Scalia, Thomas, Alito and Roberts on the conservative side and Breyer, Ginsburg, Souter and Stevens on the liberal side. Kennedy hovered somewhere in the middle, closer to the conservative camp's most moderate justice in Alito (correlation = .500,  $p < .01$ ) than liberal counterpart in Stevens (.362,  $p < .05$ ), but not to the degree that the Court's conservative wing had gained a reliable fifth vote.

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<sup>5</sup>Because my correlations were derived from chi-square statistics, there must be values (no fewer than five) in each cell of the matrix. In this instance, there are several cells which have fewer than five values; consequently, the statistic cannot be calculated. In other words, the voting patterns of Kennedy and Roberts were too alike for a traditional correlation for nominal data, based on the chi-square statistic, to be calculated.

<sup>6</sup>*P*-values represent the significance level of the correlation, meaning the chance that the correlation is explained by chance. For the Kennedy-Alito correlation,  $p < .01$  means that there is a less than 1% chance that the correlation can be explained by chance. Alternatively, for the Kennedy-Stevens correlation,  $p < .05$  means that there is less than a 5% chance that the correlation can be explained by chance, thereby making the Kennedy-Alito correlation not only greater (.500 > .362), but also with greater statistical significance.



Finally, I performed analyses between the Court's two justices with voting patterns most similar to Kennedy in 2006 – Alito and Stevens (correlation = .390,  $p < .05$ ). This means that the Court's three centrists in 2006, Kennedy, Alito and Stevens, all had correlated voting patterns.

### *Qualitative Research*

I selected two cases to analyze from 2006 in order to help explain the Court's voting patterns on the term's most ideologically divisive cases: *Parents Involved in Community Schools v. Seattle School District #1, et al.* and *Gonzales, Attorney General v. Carhart, et al.*<sup>7</sup> The rationale for selecting these cases from other ideologically divisive ones was because at issue in both cases are bedrock constitutional rights: the right to procure an abortion and the issue of race and public education. Thus, if the Court were to overrule precedent in both cases, it would signify a tangible ideological shift. Both cases were argued in front of the Court in 2006 and full opinions were issued later that same term. Because the focus of my analysis is on Justice Kennedy, I narrowed my discussion to his concurring opinion in *Parents* and his majority opinion in *Carhart II*,<sup>8</sup> because in both cases one gets a sense of Kennedy's command of the Court, specifically that his vote in both cases decided their outcomes.

At issue in *Parents* is the use of race by public school districts in the placement of students by the city of Seattle. Seattle's school district implemented four tiebreakers to place students in various undersubscribed schools throughout its district with the goal of achieving equal student dispersion. The tiebreakers included: 1) students with siblings already attending the requesting school remained together; 2) the race of the student applying; 3) distance between students' homes and the school to which they seek admission, with those who lived closest admitted first; and 4) a

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<sup>7</sup>*Gonzalez, Attorney General v. Carhart, et al.*, 550 U.S. 124 (2007); *Parents Involved in Community Schools v. Seattle School Districts, et al.*, 551 U.S. 701 (2007).

<sup>8</sup>It is important to note that *Carhart II* is different than a similar abortion case, *Stenberg, Attorney General of Nebraska, et al. v. Carhart*, 530 U.S. 914 (2000). In *Carhart I*, the Court struck down a Nebraska restriction on an abortion procedure known as intact dilation and extraction, or its politically charged name, "partial-birth abortion."

random lottery (rarely used). In essence, Seattle's policy in question used race as a determining factor in the placement of students in district schools.

The second case chosen involved abortion, because as Toobin (2007, 36) puts it: "there are two kinds of cases before the Supreme Court: there are abortion cases – and there are all the others." In *Carhart II*, at issue before the Court was an act of Congress that prohibited a rarely used abortion procedure known as intact dilation and extraction, or as it is known by its politically charged moniker, "partial birth abortion." The central issue of the case was whether or not the Partial-Birth Abortion Ban Act of 2003 was unconstitutional because it violated *Roe's* and *Casey's* requirement that abortion restriction laws contain a health exception that allows for abortions necessary to save the pregnant woman's life in case of medical emergency.

### **Discussion**

From my research, the following questions need addressing and answering: Why did the 2006 term occur? What can best explain Justice Kennedy's voting patterns? Lastly, what conclusions can be drawn from 2006's results?

#### *Quantitative Research*

On its face, the outcome of the 2006 term is startling, not only for liberals, who view 2006 as an ideological steamrolling courtesy of the Republican Party, but also for conservatives, eager to see if 2006 was just a flash-in-the-pan, or a glimpse into the future direction of the Court. Regardless of ideology, 2006 is important because it shows a marked shift in the voting patterns of the Court. More specifically, it shows a conservative shift in the voting patterns of the Court's most important justice – Anthony Kennedy. This gives rise to a question of critical importance: Did the 2006 term signify a fundamental shift in Court jurisprudence or was it a unique set of cases that allowed for 2006's minimal conservative victories?

The numbers do not lie. In 2006, the Court was the most conservative it has been since the turn of the century. More than two in three cases were decided conservatively; moreover, of the Court's 24 5-4 decisions, 20 were decided conservatively. In these 24 decisions, the controlling vote belonged to Justice Kennedy, as his

position on the Court can be best described as the “swing vote.” So why in 2006 did he swing conservatively?

To Clarify Precedent. One explanation could be that in the ideologically divisive cases with which Kennedy sided with the Court's conservatives, he did so to clarify precedent in areas of personal importance to Kennedy – none more so than abortion. Before her departure, Kennedy was forced to caucus with O'Connor, the Court's other moderate, when deciding abortion cases. Now, with O'Connor gone, Kennedy is the Court's lone “decider” in abortion cases; ultimately, what he thinks should be upheld is upheld and what he thinks should not be upheld is not.

To Fit Kennedy's Jurisprudence. A second explanation could be that while voting conservatively, what Kennedy really did was shape the law to fit his jurisprudence. In 2006, that just so happened to be more in line with his conservative colleagues than his liberal ones. For example, Kennedy voted conservatively in an abortion case, but only to a specific and narrow extent. Had 2006 really been a conservative rout, he might have overturned *Roe* and *Casey* completely; instead, he proceeded incrementally and with caution. Similarly, in a case involving whether race could be used in placement of students in public schools, Kennedy voted conservatively but did not overturn precedent.

The 2006 Docket. A third explanation could be that the cases heard by the Court in 2006 pandered to Kennedy's most conservative preferences, including abortion and race and education. By contrast, had the cases in 2006 encompassed questions that paralleled Kennedy's liberal preferences, he may have sided with the Court's liberals instead of its conservatives. For example, Kennedy is known to consult international law in his decision making process, and for the most part, international law looks favorably upon gay rights and unfavorably on the application of the death penalty.<sup>9</sup> As such, in two recent cases, a Kennedy-led Court shaped American law to be more compatible with international law. In *Lawrence v. Texas*,<sup>10</sup> the Court overturned a Texas sodomy law that criminalized homosexuality. In

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<sup>9</sup>For comparison's sake, Justice Thomas outright disregards any form of law other than the U.S. Constitution for guidance in his decision making process. In fact, he has often criticized Justice Kennedy for his imposition of international law, saying once in a brief opinion that the Supreme Court should never “impose foreign moods, fads, or fashions on Americans” (Toobin 2007, 193).

<sup>10</sup>*Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>11</sup>*Atkins v. Virginia*, 536 U.S. 304 (2002).

*Atkins v. Virginia*,<sup>11</sup> the Court ruled that executing the mentally retarded violated the Eighth Amendment's prohibition of cruel and unusual punishment. Thus, had 2006 had cases involving gay rights or the death penalty,<sup>12</sup> based on Kennedy's voting history in the areas, there would have been a reasonable chance that he would have voted liberally.

The Roberts-Alito Judicial Philosophy. A fourth explanation could be that the judicial philosophies of the Court's new justices, Roberts and Alito, were more attractive to Kennedy than the Court's liberal moderates, Souter and Stevens. To be clear, I am not arguing that Kennedy's philosophy is changing based on the Roberts-Alito's philosophy, as this would need to be measured over time instead of for a single term, as conducted in my analysis. What I mean simply is that based on the strength of correlations between Kennedy and the Roberts-Alito bloc versus the Stevens-Souter bloc, a rational argument could be made that a moderately conservative judicial philosophy is more similar to Kennedy's than a moderately liberal one. To what degree Kennedy's conservatism really extends has yet to be determined, but in 2006, it was the most conservative it has ever been.

#### *Qualitative Research*

I now turn my focus to Kennedy's concurring opinion in *Parents* and majority opinion in *Carhart II*, as in both cases, Kennedy exhibits his swing vote status in 2006.

*Parents Involved in Community Schools v. Seattle School District #1, et al.* At issue in the Seattle plan is the placement of students using race as a factor, thus the Court is jurisprudentially compelled to review the law using strict scrutiny. Thus, the Court must ask itself two questions: First, is a "racially diverse student body" a compelling government interest at the secondary level as it is at the university level? Second, depending on that answer, is the Seattle plan narrowly tailored enough to achieve a diverse student body? In answering these questions, Kennedy's control of the Court emerges.

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<sup>12</sup>Of note, 2007 has a series of cases involving the death penalty, primarily whether or not the application of lethal injection could be administered less painfully. Kennedy's vote in these cases could be telling as to whether his 2006 voting was a snapshot in time or indicative of his future jurisprudence.

On June 28, 2007, the Court announced in a 5-4 opinion that the Seattle plan violated the Fourteenth Amendment Equal Protection Clause for white students, and was thus unconstitutional. While Kennedy joined the majority in the case, he also filed his own concurring opinion, which meant that while he agreed with the outcome of the case, he disagreed with the majority's logic in reaching its outcome. In his concurrence, Kennedy did three things: (1) He rejected the majority's assertion, articulated by Chief Justice Roberts, that "accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society."<sup>13</sup> In doing this, he effectively saved *Grutter* from being gutted.<sup>14</sup> (2) Saving *Grutter*, which was written by then Court centrist O'Connor, was symbolic of Kennedy's ascension into this role. Similar to when O'Connor outlined the narrow way in which race could be used at the university level in *Grutter*, Kennedy reiterated in *Parents* that racial integration in society is a potentially compelling interest per the context. "A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."<sup>15</sup> (3) Most importantly, by agreeing in outcome but not rationale, Kennedy showed just how important his vote was in 2006. Further, it showed his ability to comply with or overturn precedent. While the Roberts-led majority in *Parents* did not express its willingness to overturn *Grutter* outright, it was prepared to effectively make it null and void. Kennedy prevented this from occurring.

If *Parents* is a window into the future jurisprudence of the Court, a trend seems to be beginning to emerge – the constitutionality of laws that come before the Roberts Court will be decided by which ideological wing of the Court most appeals to Kennedy. While Kennedy's influence on the Court has yet to be entirely determined, according to Toobin (2007, 372), its scope and breadth is unmistakable:

At the Court, suddenly, it was up to Anthony Kennedy.  
Even more than O'Connor had over the previous decade,

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<sup>13</sup>*Parents Involved in Community Schools v. Seattle School District #1, et al.*, 551 U.S. 701 (2007), Slip. Op., at p. 5.

<sup>14</sup>*Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>15</sup>*Parents Involved in Community Schools v. Seattle School District #1, et al.*, 551 U.S. 701 (2007), Slip. Op., at p. 101.

Kennedy now controlled the outcome of case after case. During the Rehnquist years, O'Connor and Kennedy had had idiosyncratic enough views that it wasn't always clear whose vote would turn out to be dispositive. But the Roberts Court had four outspoken conservatives – Roberts, Scalia, Thomas and Alito – and four liberals, at least by contemporary standards – Stevens, Souter, Ginsburg, and Breyer. Kennedy, always, was in the middle. And he loved it.

*Gonzales, Attorney General v. Carhart, et al.* On April 18, 2007, in another 5-4 decision, the Court for the first time in its history affirmed an abortion prohibition law that contained no health emergency exception for the pregnant woman. While such a potentially precedent-shifting opinion may have come as a shock to some, according to legal scholar Erwin Chemerinsky (2006, 544), a shift in abortion rights was years in the making: “even though I learned long ago that he who lives by the crystal ball has to learn to eat ground glass – I will give you a prediction here. I predict that both of these cases [*Gonzalez v. Carhart* and *Gonzalez v. Planned Parenthood*] will be 5-4 decisions with Justice Kennedy on the majority.”

The reason Chemerinsky (2006) set aside conventional wisdom and correctly predicted the outcome of the 2006 term's abortion cases was because he understands Kennedy to be the Court's new swing vote. And given Kennedy's feelings regarding this type of abortion procedure, most telling from his fiery dissent in *Stenberg v. Carhart*, there was little doubt that Kennedy would overturn *Carhart I* given the chance.<sup>16</sup> Toobin (2007, 544) qualifies Chemerinsky's prediction in his discussion of Kennedy's disbelief over *Carhart I*:

Kennedy felt betrayed by O'Connor and Souter, his fellow members of the *Casey*-troika. He thought that case had delineated the outer limits of abortion rights, but now the Court was, in Kennedy's view, going much farther. He wrote that Nebraska, “... chose to forbid a procedure many decent and civilized people find so abhorrent as to be

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<sup>16</sup>*Stenberg, Attorney General of Nebraska, et al. v. Carhart*, 530 U.S. 914 (2000).

among the most serious of crimes against human life, while the state still protected the woman's autonomous right of choice as reaffirmed in *Casey*."

In *Carhart II*, Kennedy got exactly what he wanted: *Carhart I* overturned.

### **Conclusion**

The Supreme Court in 2006, led administratively by John Roberts but in actuality by Anthony Kennedy, answered a question that has been postulated recently by a number of Court observers: Does the Supreme Court still matter? That answer was yes, the Court indeed still matters. One needs look no further than the 2006 term's decisions for proof. To name a few: a woman's rights to privacy, namely her right to procure a safe abortion, was curtailed in 2006; a governmental interest in achieving a racially diverse student body in public schools was ruled unconstitutional; and religious groups were constitutionally allowed to receive federal funds to carry out social services, thus blurring the line between the separation of church and state.

I am not sure, however, that 2006 needs to be viewed by liberals with widespread panic. Yes, 2006 was definitely a conservative term; there is no disputing that. Yes, 2006 was Justice Kennedy's coming out party – if there was any doubt before 2006 who would be the Court's new centrist, it is abundantly clear now. However, as I alluded to earlier, I believe that in many respects 2006 was a product of a variety of factors that dovetailed to produce 2006's semi-startling results. These factors include:

The voting pattern of the Court's opinions in 2006. The Court was unprecedentedly divided in 2006, with more than one in three cases decided by a 5-4 majority. While I agree that the most important law of the Court is the "law of five," I am hesitant to view the Court's 5-4 split in 2006 to mean that it will translate in years forthcoming regardless of what sorts of future cases come before the Court.<sup>17</sup> Ideology matters, but I have to believe that the conservative

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<sup>17</sup>The law of five is a term believed to be coined by Justice Brennan, referencing the idea that all that is needed to change Court jurisprudence is five votes, no matter how good or poor the logic behind the decision may be. Further discussion can be found in Bob Woodward and Scott Armstrong's *The Brethren: Inside the Supreme Court*. Note there is no specific page in which Woodward and

justices, or at least Kennedy, will base future decisions on more than the Republican Party's agenda.

The types of cases that came before the Court in 2006. Put simply, almost every ideologically divisive case in 2006 pandered to Justice Kennedy's more conservative notions. Had the cases been different, the outcomes could very well have been different. In fact, I think 2007 will be more telling as to a possible ideological shift by Kennedy, as before the Court is a group of cases questioning the humanity of the procedure of lethal injection in the application of the death penalty. If Kennedy really is becoming the Court's fifth conservative, he will have to buck his tendency to consult international law in his decision making process and affirm the current application of the death penalty in the United States. I am not predicting his vote in these cases; I am saying they will be a good litmus test of his post-2006 jurisprudence.

The minimal scope of Kennedy's decisions in 2006. I find this particularly interesting, as Kennedy wrote his opinions similarly to his swing-vote predecessor, O'Connor. In a variety of cases, he had the opportunity to overturn Court precedent, but he did not. Further, precedent he could have overturned protected some of the Court's most fundamental civil rights and civil liberties, including those protected in *Flast v. Cohen*,<sup>18</sup> *Roe* and *Casey* and *Grutter*.<sup>19</sup> If Kennedy really had turned the corner conservatively, he would have overturned these cases. I believe Kennedy's reluctance should be interpreted to mean that while he may have a more conservative philosophy than O'Connor, he is still the Court's centrist, and to date is unwilling to pick an ideological wing with which to consistently side.

Given the current age demographics of the Court, and given the recent election in which Barack Obama was elected President, I think the only way we are going to see a dramatic shift back to a more

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Armstrong explicitly reference Brennan telling them of this "rule," rather they learn of it through their conversations with Brennan's current and former clerks.

<sup>18</sup>*Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>19</sup>Furthermore, I do not think Kennedy will ever *completely* overturn *Roe* or *Casey*. Yes, Kennedy voted to restrict a particular abortion procedure, but lest you forget that he was part of the *Casey*-troika that outlined the current legal procedures regarding a woman's right to an abortion. I am highly skeptical that he will simply undermine his own opinion and render abortion unconstitutional, as his more conservative colleagues Scalia, Thomas and (presumably) Alito, would like. In short, abortion was dealt a blow in 2006, but not a fatal one.



liberal-minded Court is if Justices Scalia or Thomas abruptly retires.<sup>20</sup> Otherwise, with a fairly cohesive conservative unit comprised of Scalia-Thomas-Roberts-Alito and what was in 2006 a relatively certain fifth vote in Kennedy, the current Court seems to belong to the conservatives. But again, I do not think we are going to see a full-on assault on the Court by the Republican Party. I think Kennedy may scale back in areas such as abortion, race and education, and church and state relations, but I find it unlikely that he will allow himself to become the face of the conservative revolution. Kennedy is not a Scalia or a Thomas, who are hell-bent on judicial consistency; he seems more concerned with voting what he thinks is right rather than being consistent. Because of this, while 2006 was undoubtedly a shift in the Court's jurisprudence, I think so long as Kennedy remains the Court's swing vote, the most this shift will entail is a trimming back of liberal Court precedent, not outright reversal.

Justice Kennedy in 2006 ascended into Sandra Day O'Connor's swing vote role. Unlike O'Connor, however, Kennedy jurisprudence appeared more compatible with the Court's conservative justices on ideologically divisive issues such as abortion and race and education. But Kennedy tempered his votes by displaying a jurisprudence of minimalism. Time will only tell if Kennedy continues this trend of incremental decision making, or instead, spearheads a shift in Court ideology and jurisprudence away from a moderate and toward a hard-line brand of conservatism. With one vote, Kennedy has the opportunity to change the direction of the Supreme Court. In 2006 he proved this true.

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<sup>20</sup>The oldest liberal justice, John Paul Stevens, is 87, while the oldest conservative justice, Antonin Scalia, is 72.

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## **Democratic Disunity: Race, Religion and Representation in Tennessee's 9<sup>th</sup> Congressional District**

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*The 9<sup>th</sup> congressional district of Tennessee encompasses the entire city of Memphis and is currently represented by a congressman unique for a district that is predominantly black, Christian and female. Representative Steven Ira Cohen is a white, Jewish male who barely won the nomination in the Democratic primary in 2006 amid a racially heated campaign. In 2008, Cohen faced more challenges to his re-election which, despite a sterling progressive voting record in this overwhelmingly Democratic district, seemed in doubt for a time. This article examines how Cohen managed to win the 2006 Democratic primary contest as well the 2008 general election. Using demographic and voting data as well as reporting from the major news sources in Memphis, this research attempts to trace, in the absence of adequate exit polling data, the sources of support for Cohen and his opponents and how Cohen sought to address the issues of race and religion. Through a combination of legislative and symbolic efforts geared towards the African American community, Cohen was able to effectively expand his base of support and fend off racially charged challenges, becoming one of the few white congressmen to represent a majority black district.*

“He’s not black and he can’t represent me, that’s just the bottom line”

—Rev. Robert Poindexter

Should members of Congress be substantive representatives, implementing policy favored by their constituents? Or should they be descriptive representatives, sharing the same ethnic background and life experiences as their constituents? To study this question of representation, this research uses, as a case study, Tennessee's 9<sup>th</sup> congressional district where, for the first time in U.S. history, a non-incumbent white man was elected to represent a majority-minority district. While Steven Ira Cohen's first election victory came against divided African American opposition, Cohen managed to win a strong re-election victory against a consensus African American opponent the next year. By tracing the tactics Cohen used to win and examining how Cohen responded to racially charged attacks, this article details one possible answer to the question of how a representative who differs in ethnic and religious background from

his or her constituents can survive electoral challenges and win the backing of a majority of constituents.

### **Race and Congressional Representation**

Only two white representatives had been elected in majority-black congressional districts before 2006 and both came into their majority-minority districts as incumbents before the redistricting. When Lindy Boggs' (LA-2) district was redrawn in 1974 to create a black majority, she faced a strong racial challenge from a local black judge who ran almost entirely on the basis that the district needed descriptive representation by an African American (Swain 1995, 173-175). Boggs won by responding with extensive constituent outreach and a willingness to engage with the African American community. As Swain (1995, 175) writes, "Inside black churches, [Boggs] sometimes tapped her feet and swayed and rocked with the music ... she did not appear to be an outsider to the blacks in her district." Boggs eventually retired and an African American (William Jefferson) won the seat.

Pete Rodino (NJ-10) was a longtime veteran of the House, having been first elected in 1948. In 1980, after extensive redistricting, three African Americans ran and split the black vote scaring Rodino into increasing his outreach efforts. In 1986 another African American candidate, with the support of national figures like Jesse Jackson, challenged Rodino in the primary. Rodino was shocked, especially when some prominent African Americans who had supported him for years turned against him, but Rodino received support from black leaders in Congress as well as many loyal members of his district and won 60 percent to 36 percent. Rodino had been helped by his seniority on committees, which helped him bring more funding into the district, and he had also been a major supporter of the Civil Rights movement. Still, Rodino felt compelled to announce his retirement after his next term in 1986 because of the fervor of the opposition. A black candidate was elected to replace him (Swain 1995, 185-187).

African Americans representing majority-white districts have also faced some racial opposition, but those candidates who appealed to racial commonalities and paid close attention to the needs of their district such as Alan Wheat (KS-5) usually succeeded in forming a strong enough biracial coalition to stay in power. Fenno (1978) noted that a congressman's career typically goes through an expansionary

and then protectionist stage. Immediately after election, representatives hope to expand their constituent base and then after successfully winning re-election they hope to protect their coalition of voters and demonstrate their links to their constituency. As an example of how to quantify some of these links, Canon (2002) cites the location of district offices and the racial composition of the congressman's staff.

There appears to be at least some evidence for substantive differences between districts represented by blacks and those represented by whites. As Tate (2004) notes, the 1996 National Electoral Studies survey found that black constituents overwhelmingly felt that black representatives did a more effective job of representing them and their districts than did minority constituents in districts represented by whites. Canon (2002, 245) also finds that black representatives do a better job of being accountable to what Canon calls "black interests," as defined as introducing and voting on legislation that affects primarily minorities or involves racial issues. Thus, while there are some substantive differences between black and white representation, there have also been some examples in the past of candidates able to overcome those differences and maintain the support of a biracial coalition of constituents by expanding their political base across color lines.

### **Tennessee's 9<sup>th</sup> District: A Brief Overview**

The 9<sup>th</sup> congressional district of Tennessee includes the whole of the city of Memphis and some of the environs of surrounding Shelby County, extending from the North Memphis neighborhoods of Frayser east to the Bartlett and Germantown suburbs and south to the strongly majority-black neighborhoods of Whitehaven. Within its borders, the district is largely urban, black and poor. According to estimated 2005 figures, the racial makeup of the 9th district is 34.9% white, 59.5% black, 1.5% Asian, 3.0% Hispanic and the remainder is compromised amongst multiple racial groups (Barone and Cohen 2008). The median income is \$33,000 and the district has the highest poverty rate of any congressional district in Tennessee. Racial divisions remain, as exemplified by the Memphis City Schools' disproportionate racial makeup (87% black). The white residents are concentrated in a roughly-shaped "fan" that begins in the rapidly gentrifying areas of downtown, expands east through the progressive arts districts of Midtown, and fans out through East

Memphis until it blends into the white-flight suburbs of Germantown, Collierville and Bartlett. The district voted 70% for John Kerry in the 2004 election, making it solidly Democratic. Any white candidate hoping to win the district must attract a significant percentage of black support in addition to winning a large majority of whites.

### **Major Players in Local Politics**

The 9<sup>th</sup> district was represented by one of the first Republicans elected in the South, Dan Kuykendall, until Harold Ford, Sr., won it in 1974, becoming the first black representative from Tennessee (Barone and Cohen 2008). In a 1994 incident indicative of the geographic and racial divisions in Memphis, Ford Sr. raised eyebrows by lambasting the “devils” of “East Memphis,” a majority white area of the district, for backing an opponent in a primary.<sup>1</sup> When the elder Ford retired in 1996, his hand-picked successor was his son, Harold Ford, Jr., who easily won the Democratic primary over Steve Cohen, a white state senator from Memphis. During the race, Cohen attacked the dominance of the Ford family dynasty, which has historically played a major role in Memphis politics, and tried to contrast Ford Jr.’s inexperience with Cohen’s many years of service in office. Cohen lost by 25 points, then bitterly complained, “the fact is, I’m white, and it doesn’t matter what you do.”<sup>2</sup> Cohen stayed in the state senate, where his District 30 represented a large portion of southeast Memphis within the I-240 loop and contained a diverse array of strongly Democratic constituents. He made a name for himself in the state senate as a tough-talking progressive and was the guiding force behind the idea of a state lottery for education, which was passed in 2002. During his time in office, Cohen was well-liked by his mostly progressive constituents and even introduced a bill to legalize medical marijuana, a stance that put him squarely at odds with moderate Democratic governor Phil Bredesen and well to the left of Harold Ford, Jr. who compiled a relatively moderate voting record as a U.S Representative (Office of the Clerk, U.S. Capitol 2008).

When Ford Jr. decided to run for Tennessee’s U.S. Senate seat

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<sup>1</sup>Wendi Thomas, “Even in Ford Family, Race Divides Generations,” *The Commercial Appeal*, 19 March 2006.

<sup>2</sup>Jackson Baker, “‘With Friends Like These...’ Cohen’s Advantage Over Tinker,” *The Memphis Flyer*, 20 February 2006.

in 2006, Cohen entered the race for the newly vacant 9<sup>th</sup> congressional district seat. But with a very rare open House seat, a large number of candidates jumped into the race, including many younger black candidates. There were a number of moderately strong African American candidates within the field, including FedEx attorney Ed Stanton, California lawyer Joe Ford, Jr., the son of long-time Shelby County Commissioner Joe Ford Sr., who moved to the district just in time for the filing deadline, and county commissioner Julian Bolton.<sup>3</sup> Foremost among these was Nikki Tinker, an Alabama native who had moved to Memphis and served as general counsel for Pinnacle Airlines, a subsidiary of Northwest Airlines, whose major hub is in Memphis (Tinker for Congress 2008). Tinker had experience in politics from an early age, interning on Capitol Hill and working as a lobbyist in Alabama. She only moved to Memphis in 2000, but quickly became involved in the political elite, working for Harold Ford Jr.'s re-election campaigns.<sup>4</sup> Her campaign was "top-heavy" with stars like Morgan Freeman helping her fundraise and massive billboard spending to raise her name recognition. She also enjoyed the support of a number of African American ministers, but since many of the other black candidates did as well, her share was not overwhelming.<sup>5</sup> Twelve of the fourteen candidates other than Cohen, however, were black, prompting fears that Cohen would cruise to victory as the black candidates split the black vote. The other white challengers, in contrast, were extreme unknowns, thus ensuring that Cohen would be the overwhelming favorite.

### **The 2006 Democratic Primary**

The 2006 campaign was fierce from the start. Cohen's status as a frontrunner quickly attracted the attention of the other candidates, many of whom turned their fire directly on Cohen. Julian Bolton aired a solemn attack ad bashing Cohen for his perceived lack of "family values." A push poll by Ed Stanton noted the difference between Christianity and Cohen's own Jewish beliefs, playing on anti-Semitic fears (Daily Kos 2006). One of the more controversial in-print ads that appeared during this campaign period came from

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<sup>3</sup>Jackson Baker, "Ford Sr., Wharton, Pony Up for Julian Bolton," *The Memphis Flyer*, 28 July 2006.

<sup>4</sup>Florence Howard, "Who is Nikki Tinker and Where Did She Come From?" *The Tri-State Defender*, 11 January 2006.

<sup>5</sup>Jackson Baker, "Cohen for Congress?" *The Memphis Flyer*, 10 January 2006.

EMILY's List, the national abortion-rights group, which strongly endorsed Tinker. The EMILY's List flier claimed that Cohen had a poor attendance record in the state senate, opposed funding K-12 education, and favored sex shops.<sup>6</sup> Tinker somewhat distanced herself from the ad after Cohen responded with a strong denunciation of "outside forces" that were "trying to buy your vote," and denied the flier's claims vigorously. Cohen also won the endorsement of the daily *Commercial Appeal*. Polling put Cohen out in front by at least some degree, but in the face of the strong attacks and the demographics of the area, few knew exactly what to expect on August 3<sup>rd</sup>, 2006, when voters went to the polls for the primary.

On August 3<sup>rd</sup>, 76,359 Memphians voted in the Democratic primary for the 9<sup>th</sup> district and Cohen emerged with a narrow lead.<sup>7</sup> Cohen took 23,629 votes, or 31% of the total, while Tinker finished second with 25% and 19,164. Below them came Joe Ford, Julian Bolton and Ed Stanton who each took 12%, 11% and 9%, respectively. The other candidates rounded out the field. Since Tennessee's political system does not provide for runoffs, Cohen's six-point plurality was enough for him to win the Democratic nomination. Studying the geographic breakdown of votes by precinct reveals the extent to which race polarized the electorate between the two leading candidates. Tinker held an edge<sup>8</sup> over Cohen in 127 precincts while Cohen had the lead in 83 out of a total of 210 precincts. All but three of Tinker's 127 precincts were majority black while 71 of Cohen's 83 were majority white. Cohen won 60 of his 83 precincts by a clear majority while Tinker only held majorities in two, with pluralities in several others. The lack of a strong base of support undercut Tinker's efforts to distance herself from the rest of the black candidates. In contrast, Cohen was able to cut into some majority-black areas to at least edge Tinker's vote total in many precincts and even picked up a plurality in a few.

Cohen essentially maxed out his potential votes in a number of areas he won; in some heavily white precincts in East Memphis, he won with over 80% of the vote. The white "fan" across Memphis

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<sup>6</sup>Jackson Baker, "Tinker Declines to Repudiate Anti-Cohen Mailer," *The Memphis Flyer*, 27 July 2006.

<sup>7</sup>Source for this and most of the other election statistics is the Tennessee Secretary of State's website (<http://www.state.tn.us/sos/election/results/>).

<sup>8</sup>"Edge" defined in this case as simply having more votes than the candidate being compared to. Thus, Tinker could get 9% in a precinct and still have an "edge" over an 8% Cohen.



was easily Cohen's strongest area of support. Yet he ran well in areas along the periphery of the fan, edging Tinker in a number of areas, and ended up receiving as much as 15% of the black vote in some strongly majority-black districts.<sup>9</sup> Tinker's strongest support came from the airport area of south Memphis, where the support of the Pinnacle/Northwest Airlines union was probably crucial to her campaign. She also did surprisingly well amongst the southeastern edge of the district, edging Cohen in middle-class suburban areas like Collierville and Forest Hill. This pattern of suburban black support was also suggested by her relatively strong showing in the middle-class precincts along the northeastern border with Bartlett. Tinker's support in North Memphis, however, was disappointing, as she won a plurality in only four precincts and also did not do well in southwest Memphis. While the tepid support for Tinker was certainly attributable to the presence of a number of other strong black candidates, including a member of the Ford family, her own shallow roots in the district and the presence of numerous minor candidates may have prevented her from reaching other potential supporters.

### Primary Aftermath

Immediately after the results were announced, Cohen's victory sparked controversy. Tinker briefly considered a write-in campaign in the general election, but soon backed off and unofficially began preparing for another run in 2008. Many of Cohen's primary opponents refused to endorse him for the general election. Cohen had more reason to worry when Jake Ford, one of Harold Ford Jr.'s brothers who had the backing of family patriarch and former congressman Harold Ford, Sr., registered to run as an independent for the 2006 general election. Some political leaders and ministers made overt racial appeals by suggesting that Ford was the last chance the district had to elect a black congressman.<sup>10</sup> Fortunately for Cohen, Ford's arrest sheet, which included a physical assault on Ford's own father, turned out to be far longer than his nearly blank political resume.<sup>11</sup> Though Ford ostensibly raised \$168,000, 81% of that was self-donated (Center for Responsive Politics 2006).

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<sup>9</sup>Jackson Baker, "Everything's Steve!" *The Memphis Flyer*, 4 August 2006.

<sup>10</sup>Chris Davis, "No Cheap Shot," *The Memphis Flyer*, 9 August 2006.

<sup>11</sup>Jackson Baker, "Jake Ford's Attacks on Family, Both Physical and Verbal," *The Memphis Flyer*, 12 October 2006.

Cohen took no chances for the general election, continuing to fundraise and airing TV ads reminding voters of his long public service record. In contrast, Ford began complaining of media bias and primarily relied on his father, Harold Ford, Sr. and a coalition of black ministers to tangle with Cohen. One in particular, Rev. LaSimba Gray, implied that the single Cohen might be a closet homosexual, a fact Cohen repeatedly denied.<sup>12</sup> Ford Sr. also attacked Cohen for supporting gay marriage and lashed out at the local media for their coverage of Jake Ford's arrest records. "He [Cohen] is too liberal!" thundered Ford Sr. in one speech, castigating Cohen on a bevy of issues from medical marijuana to the lottery.<sup>13</sup> Meanwhile, Cohen picked up key endorsements from some former enemies, including Tennessee governor Phil Bredesen, as well as Mayor Herenton of Memphis and Mayor A.C. Wharton of Shelby County.<sup>14</sup> Another complicating factor was the presence of Republican businessman Mark White on the ballot. Even though Bush had managed less than 30% of the vote against Kerry in the 9<sup>th</sup> district in 2004, a candidate who could cut into Cohen's support amongst white voters in East Memphis was at least some cause for worry in the Cohen campaign.

### **General Election 2006: Racial Showdown**

On November 7<sup>th</sup>, 2006, Cohen decisively won the 9<sup>th</sup> district in a blowout, winning 103,341 votes out of 172,686 total as well as 198 of the 212 precincts. Cohen also easily outpaced Republican Mark White in the white suburban areas with White winning only 6 precincts and having pluralities in 3 although White did have 31,002 votes. Every area that White won had gone overwhelmingly to Cohen in the primary and Cohen and White essentially split the general election votes in those precincts. The three precincts that Ford won were areas where Tinker had only edged Cohen, so that seemed to indicate discontented Tinker voters were not the primary source of support for Ford, who managed only 38,243 votes total. Out of the 74 majority-white precincts, Cohen won or had a plurality

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<sup>12</sup>Chris Davis, "The Third Man," *The Memphis Flyer*, 9 November 2006.

<sup>13</sup>Harold Ford, Sr., "Senior on the Stump," *The Memphis Flyer*, 16 October 2006.

<sup>14</sup>Under the Shelby County system, Wharton has control of the county areas while Herenton has control over the city proper; both are African American. See: Jackson Baker, "Cutting to the Chase," *The Memphis Flyer*, 12 October 2006.

in 66. In the 138 majority-black precincts, Cohen dominated Ford, winning 61,703 votes to Ford's 34,205. Although White ran a relatively well-funded campaign, raising over \$234,000 and performing better than the last sacrificial lamb sent up against Ford in 2004, he made no inroads into the overwhelmingly Democratic areas of midtown Memphis and posed little threat to Cohen.

### **Aftermath and Cohen's Struggles**

Though Cohen had won a strong victory in the general election, he immediately sought to buttress his position in the black community. One of his first moves was to follow through on a campaign pledge by attempting to join the Congressional Black Caucus, but he was rebuffed by the Caucus' membership (Hearn 2007). Cohen embarked on building up his support amongst his black constituents in a number of ways, including hiring a large number of minority members on his staff and sponsoring bills to rename federal buildings in Memphis after prominent African Americans from the local area.<sup>15</sup> His activism did not go unnoticed, as the Congressional Black Caucus' *Monitor* lavished praise on Cohen and declared him to be a more effective representative than the relatively conservative Ford Jr. had ever been.<sup>16</sup> Cohen stayed active in constituent services, spending a great deal of time attending events back in Memphis, prompting Tinker, who was openly preparing to run again in 2008, to snarkily question Cohen's penchant for social events.<sup>17</sup> This stage of Cohen's career fits nicely into Fenno's characterization of the expansionist phase of a young congressman's career as Cohen attempted to build a broader constituency for re-election. Cohen also secured a number of congressional earmarks for Memphis including popular local projects like the Blue Crush police campaign and hospital expansions.<sup>18</sup> Nationally, Cohen gained fame from an appearance on the *Colbert Report* and has become a talk-show circuit regular.<sup>19</sup> Indeed, Dr. Marcus Pohlmann, a professor of

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<sup>15</sup>Blake Fontenay, "Cohen Faces Racial Test," *The Commercial Appeal*, 18 June 2007.

<sup>16</sup>Jackson Baker, "NAACP Praises Cohen for Hate Crime Stand," *The Memphis Flyer*, 1 October 2007.

<sup>17</sup>Jackson Baker, "Mayoral Shuffling," *The Memphis Flyer*, 30 August 2007.

<sup>18</sup>Alex Doniach, "Cohen Files for Re-Election," *The Commercial Appeal*, 31 March 2008.

<sup>19</sup>Bartholomew Sullivan, "Cohen Facing Test of Support," *The Commercial Appeal*, 27 August 2007.

political science at Rhodes College in Memphis and author of several works on Memphis politics, said in a May 2008 interview, “I don’t know what else he [Cohen] could do to appeal to them [his black constituents].”

Despite all his achievements, Cohen ran into a land mine during the middle of his term in August 2007 when he sought to publicize his support of a hate crimes bill. That bill, while lauded by the NAACP, was decried by a number of prominent Memphis black ministers for including homosexuality. Though Harold Ford, Jr., had supported similar legislation, Cohen attracted unprecedented opposition to his stance and at a meeting with the predominantly black Memphis Baptist Ministerial Association Cohen was booed and derisively called “boy” by some of the ministers.<sup>20</sup> At that meeting, Rev. Poindexter of Mt. Moriah Baptist Church bluntly asserted, “He [Cohen] is not black and he can’t represent me, that’s just the bottom line.” Sensing an opportunity, Tinker slammed Cohen for his support of the hate crimes bill and accused him of being “divisive,” but then backed off her remarks once a large number of different Memphis ministers and politicians rallied to Cohen’s support. The Memphis media attacked Tinker for her ungracious remarks and gave Cohen relatively positive coverage in the weeks afterwards.<sup>21</sup>

Cohen’s religion soon became an even larger sticking point in his re-election bid. A flier entitled “Steve Cohen and the Jews Hate Jesus,” sponsored by Rev. George Brooks from Murfreesboro, TN, was mailed to many members of the 9<sup>th</sup> district in February 2008. The flier accused Cohen of not believing in Jesus and emphasized that “Black Christians” needed to unite to support “ONLY one” black candidate to avoid a repeat of the divided primary in 2006 (Akers 2008). Again, the local media strongly condemned both the flier and Tinker’s lackadaisical reaction to the news of it. Though she denied having any involvement with it, Tinker did not explicitly criticize the flier either.<sup>22</sup> Tinker also apparently engaged in some push-polling, attempting to tie Cohen to the adult film industry and the failures of Congress as a whole. Though Tinker denied being directly responsible, the out-of-state phone calls were clearly

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<sup>20</sup>James Dowd, “Cohen: Race is ‘Wedge,’” *The Commercial Appeal*, 30 August 2007.

<sup>21</sup>John Branston, “What Does Tinker Think?” *The Memphis Flyer*, 29 August 2007.

<sup>22</sup>“Editorial: Race Baiting in the 9<sup>th</sup>,” *The Commercial Appeal*, 13 Feb. 2008.

intended to lower support for Cohen.<sup>23</sup>

### **2008: The Rematch**

At the filing deadline of April 4<sup>th</sup>, 2008, Cohen and Tinker made their ongoing candidacies official along with three other minor candidates and Jake Ford decided to run again as an independent in the general election. This time, Ford was determined to play overt racial politics. “Jake Ford is Black, the 9<sup>th</sup> district is black, tell them Issac Ford said that,” said Jake’s brother Issac Ford to a reporter as Jake Ford filed to run in April 2008. Tinker too called for more racially divisive politics, albeit in more coded language: “We only have one district in the state of Tennessee where we can elect African Americans. I would think for diversity purposes ... we would at least want to have one black in Congress representing the state.”<sup>24</sup>

Though the conventional wisdom held that Cohen faced an uphill battle—in an interview in May 2008 Dr. Pohlmann called Cohen the “underdog”—a poll that came out on May 21<sup>st</sup> placed Cohen firmly in the lead, nearly 55 points ahead of Tinker. According to the findings of the poll, conducted on behalf of Cohen, 66% of those potential voters surveyed would re-elect Rep. Cohen over any other challenger. In the opening salvos of the campaign, Cohen publicly pointed to his legislative achievements in the run-up to the election, including renaming several government buildings in Memphis after prominent African Americans and passing a resolution apologizing for slavery in the House. These examples of congressional actions matched those that Canon (2002) pointed out as examples of how black representatives differed from whites, but in this case a white representative had passed. Cohen also sent out many fliers to his constituents with pictures of his local congressional office staff, of whom 9 out of 11 were African American, and held town hall meetings in diverse areas including the heavily African American Orange Mound area.

Perhaps buoyed by the strong result from the polling, the Cohen campaign did not pull any punches in attacking Tinker on the race issue. In a May 22, 2008 interview with Cohen’s campaign manager,

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<sup>23</sup>“Fundraising Totals for Cohen, Tinker, Issued,” *The Commercial Appeal*, 17 October 2007.

<sup>24</sup>Alex Doniach, “Race Question Back for Cohen,” *The Commercial Appeal*, 4 April 2008.

Jerry Austin, Austin said the following: “Tinker has said nothing worth listening to. She’s had the opportunity to be critical of the Congressman’s voting record. She wants people to vote for her because of the color of her skin rather than the content of Steve Cohen’s character.” When asked about how Cohen responded to the adversity encountered at some local black churches, Austin said that the congressman “Really liked that kind of stuff, it gets his juices flowing.” Austin was enthusiastic about his candidate’s chances, emphasizing that Cohen had a large amount of labor support as well as the support of several members of the Congressional Black Caucus. Attempts to reach the Tinker campaign were less successful, though her website showed her planning on making a number of community appearances in the run-up to the election.<sup>25</sup>

Financially at least, Cohen had a substantial lead going into the 2008 election. This was a huge change from the 2006 election where over 90% of Cohen’s contributions were Memphis metro area and he was out-raised by several competitors (Center for Responsive Politics 2006, 2008). Unusually, Cohen’s contributions early in the 2008 race included a substantial number of out-of-state supporters, including a large number of donations from gamblers in the Las Vegas area. Though while Cohen appeared to have a large lead in fundraising, whether or not that support came from individuals in the Memphis community remains a large question.

Tinker picked up some support from the Armenian American community, some of whom detest Cohen for refusing to recognize the Armenian genocide and proudly striking down House resolutions that would do so. A YouTube video of Cohen pushing an Armenian Tinker supporter out of Cohen’s house sparked minor controversy on the eve of the election, but in the end, as Dr. Pohlmann noted, there were “Not enough Armenians to matter, and no one else gave a shit about that issue.” Tinker notably did not attract many endorsements from the major African American politicians in Memphis like Mayors Herenton or Wharton. As Memphis *Commercial Appeal* politics reporter Blake Fontenay noted in a September 19, 2008 interview, the lack of a public endorsement from Herenton or Wharton “was tantamount to endorsing Cohen.” This time around, Harold Ford, Sr. and Harold Ford, Jr. stayed out of the race for the most part, although Ford Jr.’s wife donated to the Tinker campaign.

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<sup>25</sup>Source: [www.tinkerforcongress.com](http://www.tinkerforcongress.com), accessed on May 23, 2008. I attempted to contact the Tinker campaign several times via emails and phone calls but was unable to.

Tinker also received a hefty \$5,000 donation from the Congressional Black Caucus as well as support from EMILY's List again.<sup>26</sup>

In the last week of the campaign, Tinker uncorked two attack ads on local TV stations that made her infamous nationwide. One featured former Shelby County Commissioner Walter Bailey, a prominent African American leader in Memphis politics, standing in front of a statue of Confederate General Nathan Bedford Forrest in a Memphis park named after Forrest and containing Forrest's body. The ad faded to a scene of a KKK cross burning and then to a picture of Cohen shouting angrily as the ad questioned why Cohen voted against a plan to rename the park and disinter Forrest's remains. Another ad, voiced by a distinctly African American female, questioned why Cohen was attending "our" churches and attacking "our" schools. These ads earned Tinker the scorn of left-wing commentator Keith Olbermann who named Tinker the "Worst Person of the Day" for his Countdown show on August 6<sup>th</sup>, the day before the election. Tinker was also reprimanded by Democratic presidential candidate Barack Obama and she lost the support of EMILY'S List on the day of the election, August 7<sup>th</sup>.<sup>27</sup>

Although polls had shown Cohen with a significant lead, his final margin of victory was an astounding 60 percentage points in a 79% to 19% victory. Examining the precinct-by-precinct breakdown of the election results shows that Tinker won zero precincts and performed poorly in all areas of the district. Cohen won areas of East Memphis by large margins as expected, but also accumulated large margins of victory nearly everywhere else as well. His 49,935 votes were over double the total he received in the previous Democratic primary. Total turnout of 62,874 was down from the 76,359 who had voted in the 2006 primary, but many of the candidates who ran in 2006 may have had their own built-in constituencies which helped boost turnout. Cohen's victory was especially convincing in that there were no pockets of support for Tinker like there had been for Ford in the 2006 general election; this suggests that few influential community leaders had thrown their support to Tinker.

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<sup>26</sup>Cheri DelBrocco, "Harold Ford's New Wife Contributes to Tinker," *The Memphis Flyer*, 16 July 2008.

<sup>27</sup>Jackson Baker, "Obama Denounces Tinker Ads," *The Memphis Flyer*, 7 August 2008.

## Implications and Conclusion

Cohen appears to have effectively expanded his base during his years in Congress, doing everything possible to appeal to the black community. His hard work has paid off with many local African American ministers rallying to his defense in the 2008 election and the crushing defeat he inflicted on Nikki Tinker. It appears that the voters of Memphis are happy with a representative who may not look like them, but is an effective supporter for their preferred policies.

Is Cohen safe for good? Dr. Pohlmann does not believe so. In a September 2008 interview, Pohlmann said, “Even one significant gaffe could thrust [Cohen] into a serious race the next go round. Or, if he were to face a viable black opponent, e.g., an A.C. Wharton [the popular mayor of Shelby County], or Harold [Ford], Jr. (or even a WWH [Memphis mayor Willie Herenton]), he could be in trouble.” The *Commercial Appeal*'s Blake Fontenay was more hopeful, but still cautious: “I like to think that we’re making progress, but it’s a fragile situation ... Mayor Herenton’s most recent re-election campaign was as racially divisive as any I’ve ever seen. It wouldn’t take much to stir up racial divisions in a campaign, which some candidate in the future is almost certainly going to try to do.”

These fears came to pass in April 2009 when Mayor Herenton unexpectedly announced plans to form an exploratory congressional campaign committee to face Cohen in 2010 and wrote in an opinion column in the *Commercial Appeal* stating that “it remains a fact that the 9th Congressional District provides the only real opportunity to elect a qualified African American to the all-white 11 member delegation representing Tennessee in Washington.”<sup>28</sup> Compared to Tinker, Herenton is a far more skilled campaigner and an icon of Memphis politics, having been elected to five terms as mayor. Even though Herenton is now dogged by a federal investigation into his activities as mayor and faces declining popularity, he is probably the most formidable challenger left in the district. Despite those advantages, an opinion poll done in April 2009 showed Cohen with an approximately 65-35 percent lead over likely voters in the district and Cohen has vowed to continue to represent the 9<sup>th</sup> district no matter who the challenger.<sup>29</sup>

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<sup>28</sup>Willie Herenton, “Mayor Hears Higher Calling to National Stage,” *The Commercial Appeal*, 8 May 2009.

<sup>29</sup>Zach MacMillan, “Poll Finds Cohen Ahead of Herenton,” *The Commercial Appeal*, 28 April 2009.



If Cohen can maintain the support of his African American constituents against this formidable threat, he will pose a major challenge to current theories of descriptive representation. Cohen's openness about racial issues is also unusual; he publicly accused his opponent of using race unfairly and fought back fiercely against racial and religious criticism. His political survival thus far is a testament to the power of substantive representation as few voters in his district share much in common physically with the former Jewish lawyer but many support his policies. Cohen has succeeded by reaching out to represent African American interests and has been fortunate thus far in drawing relatively unattractive opponents. Whether or not he has come far enough to truly trump the politics of race and religion in the 9<sup>th</sup> district remains to be seen in 2010.

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