

February 2007

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### Repository Citation

Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 Wm. & Mary Bill Rts. J. 837 (2007), <https://scholarship.law.wm.edu/wmborj/vol15/iss3/4>

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# ANTI-ZIONISM AS RACISM: CAMPUS ANTI-SEMITISM AND THE CIVIL RIGHTS ACT OF 1964

Kenneth L. Marcus\*

## INTRODUCTION

The recent resurgence of anti-Semitic incidents at American colleges and universities<sup>1</sup> has revealed a significant ambiguity in anti-discrimination law and raised questions regarding the scope of prohibited racial and ethnic discrimination in American educational institutions. Title VI of the Civil Rights Act of 1964 (the “1964 Act”) prohibits discrimination on the basis of race, color, or national origin in federally funded programs or activities, including most public and private universities but does not explicitly prohibit religious discrimination.<sup>2</sup> Since anti-Semitism may be based on ethnic, racial, or religious animus, the question arises as to whether anti-Semitism is covered and to what extent. Recent high-profile incidents of alleged anti-Semitic behavior on American college campuses have focused attention on this question and on the efforts of federal agencies to answer it. The issue is complicated by the politically charged atmosphere in which these incidents arise, in which alleged harassment is often closely connected to speech activities relating to matters of significant public import, such as the Israeli-Palestinian conflict.

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\* Staff Director, U.S. Commission on Civil Rights. The author was previously delegated the authority of Assistant Secretary of Education for Civil Rights. Some of the materials in this Article were presented at Columbia University, the University of Michigan at Ann Arbor, Boston College, Wayne State University, the Congressional Working Group on Human Rights and Religious Freedom, and in seminars conducted by the Institute for Jewish and Community Research in Washington, D.C., and Los Angeles. The Article has benefited from conversations with colleagues at the Civil Rights Commission and Department of Education, including Abigail Thernstrom and Jennifer Braceras; astute comments from Eugene Volokh; and research conducted by Eric DaLeo, David Leeman, and John Blakeley. The views presented here are the author’s alone and may not reflect the positions of either the Civil Rights Commission or the Department of Education.

<sup>1</sup> See U.S. COMM’N ON CIVIL RIGHTS, FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS REGARDING CAMPUS ANTI-SEMITISM 1 (2006), available at <http://www.usccr.gov/pubs/050306FRUSCCRRCAS.pdf> [hereinafter FINDINGS AND RECOMMENDATIONS] (finding that “[m]any college campuses throughout the United States continue to experience incidents of anti-Semitism” and that “[t]his is a serious problem which warrants further attention”). The author is the principal draftsman of the Findings and Recommendations.

<sup>2</sup> Specifically, Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000(d) (2000).

Until late 2004, the U.S. Department of Education's Office for Civil Rights (OCR) largely avoided anti-Semitism cases based on two concerns, both of which have strong intuitive appeal. First, Jews are not considered to constitute a distinct "race" as that term is used in contemporary social science or in common public usage.<sup>3</sup> Second, Congress elected not to prohibit religious discrimination in Title VI, and anti-Semitism is, among other things, a form of religious discrimination.<sup>4</sup> Until 2004, OCR did not recognize that Jews also form an ethnic or ancestral group and that the scope of legislatively prohibited "racial" discrimination may not be limited by either social scientific or colloquial use of that term. In late 2004, OCR finally determined that Title VI of the Civil Rights Act of 1964 prohibits anti-Semitic harassment at federally funded public and private universities, except to the extent that the harassment is exclusively based on tenets of the student's religious faith.<sup>5</sup> In other words, OCR policy now treats anti-Semitic harassment as prohibited racial or ethnic harassment except when it is clearly limited to religious belief rather than ancestral heritage.

This new OCR policy has been controversial.<sup>6</sup> Critics contend that OCR overstepped its jurisdictional bounds and that the federal government lacks the authority to prevent anti-Semitic incidents even at tax-payer funded educational programs and activities.<sup>7</sup> The U.S. Commission on Civil Rights, in a divided vote, confirmed OCR's 2004 interpretation and urged vigorous enforcement of Title VI to protect Jewish

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<sup>3</sup> U.S. Department of Health, Education and Welfare, Office for Civil Rights (HEW-OCR), Undated Summary of Policy [hereinafter HEW-OCR], *quoting* Memorandum from Cindy Brown, Deputy Dir., HEW-OCR, to Dir., OCR Region VII (Sept. 19, 1977).

<sup>4</sup> *Id.*

<sup>5</sup> The author served as head of OCR at that time and was responsible for issuing the OCR policy guidance on anti-Semitism. See Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Delegated the Auth. of Assistant Sec'y of Educ. for Civil Rights, U.S. Dep't of Educ., to Colleague, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* <http://www.ed.gov/print/about/offices/list/ocr/religious-rights2004.html> [hereinafter 2004 OCR Dear Colleague Letter]; Letter from Kenneth L. Marcus, Delegated the Auth. of Assistant Sec'y of Educ. for Civil Rights, U.S. Dep't of Educ., to Sidney Groeneman, Ph.D., Senior Research Assoc., Inst. for Jewish & Cmty. Research (on file with author) [hereinafter IJCR Letter]. OCR issued approximately 20,000 copies of the Dear Colleague Letter to colleges, universities, school districts, state departments of education, and other recipients of federal education funds and formally apprised Congress of this action. See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS 1, 20 (2004), *available at* <http://www.ed.gov/about/reports/annual/ocr/annrpt2004/annrpt2004.doc> [hereinafter OCR ANNUAL REPORT 2004].

<sup>6</sup> See, e.g., Meghan Clyne, *Education Department Backs Away from Anti-Semitism Safeguards*, N.Y. SUN, Mar. 29, 2006 ("Against a backdrop of alleged anti-Semitism at some of the nation's top universities, including Harvard and Columbia, the federal Department of Education is said to be backing away from a 2004 policy of protecting Jewish students against discrimination and harassment on campus.").

<sup>7</sup> See, e.g., Jennifer Jacobson, *Civil-Rights Panel Urges Federal Monitoring of Campus Anti-Semitism*, CHRON. OF HIGHER EDUC., Apr. 14, 2006, at A27.

students from harassment.<sup>8</sup> By way of disclosure, the author served as head of OCR at the time that it issued its 2004 policy and director of the Civil Rights Commission at the time that it issued both its findings and recommendations on campus anti-Semitism and its full report on that topic.

This Article will argue that anti-Semitic harassment at federally assisted programs and activities, including post-secondary institutions, constitutes racial discrimination prohibited by Title VI when sufficiently severe, pervasive, and objectively offensive as to deny equal educational opportunities to Jewish students. This argument runs counter to commonly held intuitions for the two reasons that long delayed OCR's decision to extend civil rights protections to Jewish students: reluctance to characterize Jews as a race (with all of the nineteenth century pseudo-scientific and mid-twentieth century anti-Semitic connotations with which that designation is laden)<sup>9</sup> or to resist Congress's presumed intention to exclude religious groups from Title VI protection. Nevertheless, this Article will show that the scope of Title VI prohibition on racial discrimination encompasses anti-Semitism to the same wide extent as does the Fourteenth Amendment and the Civil Rights Act of 1866 (the "1866 Act"). This follows from the 1964 Act's basic purpose to provide new mechanisms to enforce previously established rights, not to create new rights or to provide enforcement mechanisms that apply only to a subcategory of the groups protected under the Fourteenth. The fact that Jews are not considered a racial group, as that term is now understood, is simply not relevant.

While the long legislative history of Title VI is generally sparse on anti-Semitism, it does demonstrate congressional intent that the scope of prohibited racial discrimination should be coextensive with existing constitutional protections, particularly those provided in the Equal Protection Clause of the Fourteenth Amendment. The framers of the Fourteenth Amendment in turn crafted that clause to constitutionalize the anti-discrimination protections already contained in the 1866 Act, which prohibits racial discrimination in the making of contracts and enjoyment of property.<sup>10</sup> The

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<sup>8</sup> FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 1; U.S. COMM'N ON CIVIL RIGHTS, CAMPUS ANTI-SEMITISM: BRIEFING REPORT 72 (2005), available at <http://www.usccr.gov/pubs/081506campusantibrief07.pdf> [hereinafter CAMPUS ANTI-SEMITISM]. The author supervised the preparation of CAMPUS ANTI-SEMITISM, *supra*.

<sup>9</sup> Through the first half of the twentieth century, in judicial opinions, as in both scientific and colloquial discourse, Jewish people were routinely referred to as a "race," often without anti-Semitic connotation. *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943); *Near v. Minnesota*, 283 U.S. 697, 703, 724 (1931); *Orth v. United States*, 142 F.2d 969, 973 (4th Cir. 1944); *Baumgartner v. United States*, 138 F.2d 29, 33 (8th Cir. 1943), *rev'd*, 322 U.S. 665 (1944); *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288, 290 (2d Cir. 1941), *aff'd*, 316 U.S. 642 (1942); *Rosenthal v. United States*, 45 F.2d 1000, 1003 (8th Cir. 1930); *Gleckman v. United States*, 16 F.2d 670, 672 (8th Cir. 1926); *Skuy v. United States*, 261 F. 316, 320 (8th Cir. 1919); *United States v. Claassen*, 56 F. Supp. 71, 73 (N.D. Ind. 1944); *Dearborn Pub. Co. v. Fitzgerald*, 271 F. 479, 483 (N.D. Ohio 1921).

<sup>10</sup> 42 U.S.C. § 1982 (2006).

1866 Act prohibited racial discrimination broadly, not limiting its terms to the protection of groups that would in today's lexicon be deemed "racial." In *Shaare Tefila Congregation v. Cobb*, the Supreme Court correctly established that Jews, like Arabs and other ethnic minority groups, are protected from "racial" discrimination under the 1866 Act.<sup>11</sup> Accordingly, Jewish students are protected from racial discrimination under Title VI, the Fourteenth Amendment, and the 1866 Act, just as OCR has declared. In other words, it is a simple corollary of the unity of anti-discrimination law—the equal scope of racial discrimination law in the civil rights legislation of both the Reconstruction era and the Civil Rights era—that the 1964 Act bars anti-Semitic acts to the same extent as does the 1866 Act.

This Article will explain whether, and to what extent, Title VI is available as a means of ensuring that federally funded educational institutions do not tolerate harassment of Jewish students. Part I of the Article describes the background, nature, sources, extent, and major recent manifestations of American campus anti-Semitism and governmental responses to this phenomenon. This Part will demonstrate the seriousness of the current situation on many American campuses and explain the emerging strands in recent anti-Semitism that distinguish it from traditional variants. As with recent incidents of anti-Semitism globally, recent incidents on American college campuses emerge from numerous divergent sources, but the conspicuous growth in anti-Semitism has been in incidents related to anti-Zionism and anti-Israelism. Part II assesses the application of Title VI to anti-Semitic harassment, concluding that Title VI prohibits anti-Jewish discrimination as a form of racial discrimination, subject to a narrow exception for discrimination based exclusively on the tenets of Jewish religious belief. In the course of this analysis, the Article will present surprising findings regarding the decision by Congress to delete "religion" from the prohibited forms of discrimination under Title VI. Part III examines the scope of Title VI prohibition of anti-Semitism, arguing that the coverage of harassment law generally is somewhat narrower than OCR's policy suggests but that it is nevertheless sufficiently broad to encompass the most serious allegations that have been made of recent campus anti-Semitism. This last Part will also address First Amendment limitations on harassment law, concluding that they are neither more nor less stringent than those that apply to other analogous areas of harassment law.

It should be noted that many recent campus activities, although arguably anti-Semitic, do not rise to the level of harassment and are therefore outside of the scope of this Article: divestment movements,<sup>12</sup> anti-Israeli or anti-Zionist academic

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<sup>11</sup> 481 U.S. 615, 617–18 (1987). Since *Shaare Tefila*, Jewish people have established standing to pursue § 1981 claims in various cases. See, e.g., *Sinai v. New England Tel. & Tel. Co.*, 3 F.3d 471 (1st Cir. 1993), *cert. denied*, 513 U.S. 1025 (1994); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1330–31 (D. Colo. 1997).

<sup>12</sup> On September 17, 2002, then-Harvard University President Lawrence H. Summers famously identified anti-Semitic overtones in the campaign to divest from Israel, stating that "[s]erious and thoughtful people are advocating and taking actions that are anti-Semitic in their effect if not their intent." Lawrence H. Summers, President, Harvard Univ., Address at

literature,<sup>13</sup> Holocaust denial,<sup>14</sup> intimidation of pro-Israeli speakers,<sup>15</sup> anti-Zionist bias in programs of Middle East studies,<sup>16</sup> anti-Israel boycotts,<sup>17</sup> and refusal to provide religious accommodations to Jewish students.<sup>18</sup> This Article will focus, rather,

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Morning Prayers (Sept. 17, 2002), available at <http://www.president.harvard.edu/speeches/2002/morningprayers.html>. As Summers explained, “some here at Harvard and some at universities across the country have called for the University to single out Israel among all nations as the lone country where it is inappropriate for any part of the university’s endowment to be invested.” *Id.* Several commentators have joined in Summers’s condemnation of the divestment movement. See, e.g., GARY A. TOBIN, ARYEH K. WEINBERG & JENNA FERER, *THE UNCIVIL UNIVERSITY* 180–83 (2005). Others, of course, have disagreed and defended the divestment movement, which now appears to have waned considerably. See, e.g., Will Youmans, *The Divestment Campaign*, in *THE POLITICS OF ANTI-SEMITISM* 69, 69–72 (Alexander Cockburn & Jeffrey St. Clair eds., 2003) (arguing that divestment “is not a knee-jerk, anti-Israel reaction as critics maintain” but “an objective, nonpartisan American policy”). One commentator has observed that the “bitter attack[s]” that some have leveled at Summers for those comments demonstrates the heatedness of this debate. WALTER LAQUEUR, *THE CHANGING FACE OF ANTI-SEMITISM: FROM ANCIENT TIMES TO THE PRESENT DAY*, at ix (2006).

<sup>13</sup> The most controversial recent example may be John Mearsheimer & Stephen Walt, *The Israel Lobby*, *LONDON REV. OF BOOKS*, Mar. 23, 2006, at 3, available at [http://www.lrb.co.uk/v28/n06/mear01\\_.html](http://www.lrb.co.uk/v28/n06/mear01_.html) (arguing that U.S. Middle East policy is driven primarily by the “Israel Policy” and is contrary to American interests). See also Posting of Jefferson Morley to World Opinion Roundup blog, [http://blog.washingtonpost.com/worldopinionroundup/2006/03/global\\_divide\\_on\\_israel\\_lobby.html](http://blog.washingtonpost.com/worldopinionroundup/2006/03/global_divide_on_israel_lobby.html) (Mar. 31, 2006, 10:07 EST) (surveying recent responses to Mearsheimer-Walt article, including positive European response and negative American and Israeli response).

<sup>14</sup> See generally Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 *DICK. L. REV.* 71 (1996) (detailing incidents of Holocaust denial among college professors).

<sup>15</sup> See TOBIN ET AL., *supra* note 12, at 172–76 (describing bomb threat to Natan Sharansky at Boston University, vilification of Ehud Barak at the University of California at Berkeley, and mistreatment of other Israeli and pro-Israeli speakers at various campuses); Ismail Khald, *The Bedouin Activist*, *JEWISH WORLD*, Oct. 24, 2004, [http://www.aish.com/jewishissues/jewishcommunity/The\\_Bedouin\\_Activist.asp](http://www.aish.com/jewishissues/jewishcommunity/The_Bedouin_Activist.asp) (“[T]he situation I encountered on many of the campuses in North America and Canada was horrifying. . . . In my years of speaking to people, I’ve never received threats or personal attacks like I did speaking on campuses.”).

<sup>16</sup> See TOBIN ET AL., *supra* note 12, at 155–68 (describing politicization and anti-Zionist bias in Middle East Studies Departments). Such perceptions have led some to question whether the federal government is fueling campus anti-Semitism by funding anti-Zionist projects in Middle East Studies programs under Title VI of the Higher Education Act. See, e.g., *International Programs in Higher Education and Questions of Bias: Hearing Before the H. Subcomm. on Select Educ. of the Comm. on Educ. and the Workforce*, 108th Cong. 9–11 (2003) (statement of Stanley Kurtz, Research Fellow, Hoover Inst., and Contributing Editor, Nat’l Review Online). *But see id.* at 13–15 (statement of Terry W. Hartle, Senior Vice President, Government and Public Affairs, American Council on Education).

<sup>17</sup> See Kenneth Lasson, *Scholarly and Scientific Boycotts of Israel: Abusing the Academic Enterprise*, 21 *TOURO L. REV.* 989 (2006).

<sup>18</sup> See Joshua C. Weinberger, Comment, *Religion and Sex in the Yale Dorms: A Legislative*

on incidents that may rise to the level of discrimination or harassment under federal anti-discrimination law.

## I. THE RESURGENCE OF CAMPUS ANTI-SEMITISM

### A. Recent Anti-Semitic Incidents

#### 1. Background and Context

The series of troubling incidents that have emerged on college campuses in recent years have been conspicuous, not because they reflect a broader atmosphere of hostility towards Jews, but because they have been ugly exceptions in an environment that has been welcoming in other respects to Jewish students.<sup>19</sup> The United States has in recent years enjoyed a period of almost philo-Semitic tolerance for Jews,<sup>20</sup> in contrast to the experience of Jews elsewhere in the world.<sup>21</sup> Similarly, many college campuses have provided numerous accommodations to Jewish students, such as excused absence for religious holidays, kosher dining facilities, chaplaincy services, Hillel, and Jewish studies courses.<sup>22</sup> By and large, Jewish students no longer face institutional

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*Proposal Requiring Private Universities to Provide Religious Accommodations*, 147 U. PA. L. REV. 205 (1998) (proposing legislation to ensure that colleges provide reasonable accommodations for students' religious practices).

<sup>19</sup> Chaim Seidler-Feller, *Advocacy and Education as Divergent Strategies in the Effort to Support Israel on Campus*, in *AMERICAN JEWRY AND THE COLLEGE CAMPUS: BEST OF TIMES OR WORST OF TIMES?* 32 (Deborah E. Lipstadt et al. eds., 2005) (describing the current period as a "golden age" for Jews on American campuses); see also Anti-Defamation League, Statement to U.S. Commission on Civil Rights: Anti-Semitic Incidents on College Campuses (Nov. 18, 2005), [http://www.adl.org/main\\_Anti\\_Semitism\\_Domestic\\_incidents\\_on\\_college\\_campuses.htm](http://www.adl.org/main_Anti_Semitism_Domestic_incidents_on_college_campuses.htm) [hereinafter ADL Statement] (describing as "paradoxical" the emergence of "the American college and university campus . . . as a flashpoint for anti-Jewish animus and a site for the expression and dissemination of anti-Semitism" at a time when Jewish students have "found the American campus to be a positive environment" in other respects).

<sup>20</sup> According to Dr. Gary Tobin of the Institute for Jewish and Community Research, "[p]ositive perceptions of Jews have been steadily growing over the last forty years, while negative perceptions of Jews declined precipitously following the Great Depression and World War II." TOBIN ET AL., *supra* note 12, at 81.

<sup>21</sup> See, e.g., ALL-PARTY PARLIAMENTARY GROUP AGAINST ANTISEMITISM, REPORT OF THE ALL-PARTY PARLIAMENTARY INQUIRY INTO ANTISEMITISM (2006), available at <http://thepcaa.org/Report.pdf> [hereinafter ALL-PARTY PARLIAMENTARY] (documenting the recent rise of anti-Semitic incidents in the United Kingdom); MICHAEL MCCLINTOCK & JUDITH SUNDERLAND, ANTISEMITISM IN EUROPE: CHALLENGING OFFICIAL INDIFFERENCE (2004), available at [http://www.humanrightsfirst.org/discrimination/antisemitism/antisemitism\\_report\\_22\\_april\\_2004.pdf](http://www.humanrightsfirst.org/discrimination/antisemitism/antisemitism_report_22_april_2004.pdf) (reporting on anti-Semitism in Europe on behalf of Human Rights First); GABRIEL SCHOENFELD, THE RETURN OF ANTI-SEMITISM (2004); U.S. DEP'T OF STATE, REPORT ON GLOBAL ANTI-SEMITISM (2004), available at <http://www.state.gov/g/drl/rls/40258.htm>.

<sup>22</sup> ADL Statement, *supra* note 19; American Jewish Committee, Statement to the U.S.

discrimination in academic admissions,<sup>23</sup> undergraduate housing,<sup>24</sup> faculty selection,<sup>25</sup> and club membership<sup>26</sup> that they experienced for a significant part of the twentieth century.<sup>27</sup> On the other hand, allegations of anti-Semitic activity appear to have increased on college campuses in recent years and have included physical assault, stalking, intimidation, vandalism, and various forms of hate speech.<sup>28</sup> In 2006, the U.S.

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Comm'n on Civil Rights, in the form of a Letter from Kenneth Stern, Program Specialist on Anti-Semitism & Extremism, to Chairman Gerald A. Reynolds (Nov. 18, 2005) [hereinafter AJC Statement]; Israel on Campus Coalition, Statement to the U.S. Comm'n on Civil Rights, in the form of a Letter from the ICC Steering Committee to the Members of the U.S. Comm'n on Civil Rights (Nov. 17, 2005) [hereinafter ICC Statement]. Signatories of the ICC Statement include representatives of Aish Hatorah, the American Israel Public Affairs Committee, the Anti-Defamation League, the Charles and Lynn Schusterman Family Foundation, the Conference of Presidents of Major American Jewish Organizations, Hillel: The Foundation for Jewish Campus Life, the Jewish Council for Public Affairs/United Jewish Communities, and current undergraduate students.

<sup>23</sup> Formal restrictions on academic admissions of Jewish students began in the 1920s and continued to the mid-century. As early as 1914, Dean Frederick Paul Keppel from Columbia University decried the multiplication of Jewish students on his campus, which he believed threatened to render Columbia "socially uninviting." LEONARD DINNERSTEIN, *ANTI-SEMITISM IN AMERICA* 85 (1994). Administrators expressed similar concerns at Williams, Yale, Princeton, and the University of Pennsylvania. *Id.* Harvard University President, A. Lawrence Lowell, recommended restrictions on Jewish admissions to address their burgeoning enrollment at selective institutions. *Id.* at 84. At Harvard, "the percentage of Jewish undergraduates had tripled from 6 percent in 1908 to 22 percent in 1922." *Id.* Following Harvard's lead, restrictions on Jewish enrollment were established at Yale, Princeton, Columbia, Cornell, Rutgers, Barnard, Adelphi, Johns Hopkins, Northwestern, Penn State, Ohio State, Washington and Lee, and the Universities of Cincinnati, Illinois, Kansas, Minnesota, Texas, Virginia, and Washington. *Id.* at 85–86. At Harvard, geographic diversity was developed as an admissions criterion specifically to reduce Jewish admissions, based on the assumption that Jewish students were disproportionately located in Northeastern urban hubs. *Id.* at 86.

<sup>24</sup> For example, Jews were housed separately from Christian students at Syracuse University from 1927 to 1931. *Id.* "Ohio State segregated Jews in some female dormitories while Gentile students at the Universities of Michigan and Nebraska were advised against associating with Jewish males." *Id.*

<sup>25</sup> Discrimination in faculty employment reflected a larger practice of anti-Semitic employment discrimination in the twentieth century. In 1927, Yale, Princeton, Johns Hopkins, and the Universities of Chicago, Georgia, and Texas each included one token Jew on their faculty. *Id.* at 87. Those few academics who were selected for faculty positions were described by their supporters as lacking the characteristics which make other Jews offensive. *Id.* at 88.

<sup>26</sup> During the early-to-mid-twentieth century, most college fraternities shunned Jewish pledges. *Id.* at 87.

<sup>27</sup> ADL Statement, *supra* note 19 ("Institutional anti-Semitism, discrimination, and quotas against Jewish students and faculty is largely a thing of the past.")

<sup>28</sup> For example, the ADL's 2005 audit of anti-Semitic incidents reports ninety-eight anti-Semitic incidents on American campuses in 2005, an increase of nearly one-third from 2004. *Id.* According to the ADL, anti-Semitic incidents in the United States declined last year. *Id.*



Commission on Civil Rights concluded that these incidents pose a “serious problem which warrants further attention.”<sup>29</sup>

## 2. Sources of Campus Anti-Semitism

These episodes are not unrelated to the outbreak of incidents that have been chronicled elsewhere in the world, particularly in Western Europe and the Middle East.<sup>30</sup> The U.S. State Department has provided a helpful analysis of this global outbreak, finding that recent global anti-Semitism has had four major sources:

- Traditional centuries-old European anti-Jewish prejudice, associated with stereotypes of Jewish control of government, the media, international business, and the financial sector;
- Aggressive “anti-Israel sentiment that crosses the line between objective [political] criticism of Israeli policies and anti-Semitism”;
- Muslim anti-Semitism, common among Europe’s growing Muslim population, based on age-old hatred of Jews, as well as Muslim opposition to Israel and American policies in Iraq; and
- Anti-American and anti-globalist anger that “spills over to Israel, and to Jews,” who are identified with Israel, globalism and America.<sup>31</sup>

The same forms of anti-Semitism may also be found on American college campuses, except that two additional forms have also been found in the American post-secondary context: black anti-Semitism, including incidents associated with the Nation of Islam<sup>32</sup> and fundamentalist intolerance, exemplified by allegations at the United States Air Force Academy.<sup>33</sup> By and large, however, the most significant recent episodes of campus anti-Semitism have been associated with anti-Zionism,<sup>34</sup> arising partly in response to the second *intifada* in 2000 and the continuing Israeli-Palestinian crisis.<sup>35</sup>

## 3. The Ideology of the New Campus Anti-Semitism

The recent increase in campus anti-Semitism has been closely associated with increasing anti-Zionist sentiments and with liberal or left-wing elements at many

<sup>29</sup> FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 1.

<sup>30</sup> *See, e.g.*, SCHOENFELD, *supra* note 21, *passim*.

<sup>31</sup> U.S. DEP’T OF STATE, *supra* note 21.

<sup>32</sup> ABRAHAM H. FOXMAN, NEVER AGAIN? THE THREAT OF THE NEW ANTI-SEMITISM 160–93 (2003).

<sup>33</sup> *See, e.g.*, Editorial, *Zealots at the Air Force Academy*, N.Y. TIMES, June 11, 2005, at A12.

<sup>34</sup> SCHOENFELD, *supra* note 21, at 152; AJC Statement, *supra* note 22, at 1.

<sup>35</sup> SCHOENFELD, *supra* note 21, at 152.

American universities. The relationship among these phenomena has been a source of considerable controversy.<sup>36</sup> In general, the relationship between anti-Semitism and anti-Zionism is both close and complex, and it has been presented differently in various places and periods. To the extent that liberal or progressive voices have come to adopt anti-Zionist rhetoric, they have taken with it the anti-Semitic attitudes from which much anti-Zionism has been inseparable.

Commentators have articulated the present North American relationship between these attitudes in different formulations, each of which appears to contain at least a kernel of truth. Many commentators argue that (i) anti-Zionism is anti-Semitic in its essence and in most, if not all, of its manifestations;<sup>37</sup> (ii) anti-Zionism and anti-Semitism are both analytically and historically distinct, but the two ideologies have merged since 1948;<sup>38</sup> (iii) anti-Zionism and anti-Semitism remain distinct, but anti-Zionism occasionally crosses the line into “outright anti-Semitism,”<sup>39</sup> while anti-Semitism often pollutes anti-Zionist discourse;<sup>40</sup> and/or (iv) anti-Zionism is

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<sup>36</sup> This has been evident, for instance, in the emotional public response to Professor Alvin Rosenfeld’s cogent essay on “‘Progressive’ Jewish Thought and the New Anti-Semitism.” See, e.g., *Essay Linking Liberal Jews and Anti-Semitism Sparks a Furor*, N.Y. TIMES, Jan. 31, 2007, at E1.

<sup>37</sup> See, e.g., Irwin Cotler, *Human Rights and the New Anti-Jewishness*, FRONTPAGE MAG., Feb. 16, 2004, <http://frontpagemag.com/Articles/ReadArticle.asp?ID=12191> (“[C]lassical or traditional anti-Semitism is the discrimination against, or denial of, the right of Jews to live as equal members of a free society; the new anti-Semitism—incompletely, or incorrectly, [described] as ‘anti-Zionism’ . . . —involves the discrimination against, denial of, or assault upon the right of the Jewish people to live as an equal member of the family of nations. What is intrinsic to each form of anti-Semitism—and common to both—is discrimination. All that has happened is that it has moved from discrimination against Jews as individuals—a classical anti-Semitism for which there are indices of measurement (e.g., discrimination against Jews in education, housing, or employment)—to discrimination against Jews as people—a new anti-Semitism—for which one has yet to develop indices of measurement.” (omissions in original)). Those who hold this position must account for the fact that some Jewish individuals hold views sharply critical of Israeli policy; a small number of Haredi groups, such as *Neturei Karta*, oppose the existence of a state of Israel (prior to the arrival of the Messiah) on theological grounds; and there are also some secular Jews who oppose the State of Israel on anti-nationalist grounds.

<sup>38</sup> See, e.g., Robert Wistrich, *Anti-Zionism and Anti-Semitism*, 16 JEWISH POL. STUD. REV. 27–28 (2004), available at <http://www.jcpa.org/phas/phas-wistrich-f04.htm>.

<sup>39</sup> Deborah E. Lipstadt, *Strategic Responses to Anti-Israelism and Anti-Semitism*, in AMERICAN JEWRY AND THE COLLEGE CAMPUS, *supra* note 19, at 5, 23.

<sup>40</sup> ALL-PARTY PARLIAMENTARY, *supra* note 21, at 18 (“Anti-Zionist discourse that has become polluted by antisemitic themes or content is also difficult to identify because it is often based on at least partial truths which have become inflated or exaggerated to the point that they are held to be typical of all Jews or demonstrative of an antisemitic Jewish stereotype. . . . An example of this would be remarks about the Israel lobby. . . . [I]n some quarters this becomes inflated to the point where discourse about the ‘lobby’ resembles discourse about a world Jewish conspiracy.”).

analytically distinct from anti-Semitism, but much apparent criticism of Israel or Zionism is in fact a thinly veiled expression of anti-Semitism.<sup>41</sup> Relatively few commentators have taken the more extreme position that all anti-Zionism is anti-Semitism.

Several government agencies, officials, and other commentators have developed frameworks to distinguish this political anti-Semitism from legitimate criticism of Israel,<sup>42</sup> including the U.S. Commission on Civil Rights,<sup>43</sup> the U.S. Department of State,<sup>44</sup> the European Union Agency for Fundamental Rights, formerly known as the European Monitoring Centre on Racism and Xenophobia of the European Union (EUMC),<sup>45</sup> the United Kingdom's All-Party Parliamentary Group Against

<sup>41</sup> See, e.g., *id.* (“[A]nti-Zionist discourse . . . can be used deliberately as a way to mask or articulate prejudice against Jews.”); FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 1 (“Anti-Semitic bigotry is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism.”). Unsurprisingly, recent research has shown a close correlation between anti-Israeli views and anti-Semitic views based on a survey of citizens in ten European countries. Edward H. Kaplan & Charles A. Small, *Anti-Israel Sentiment Predicts Anti-Semitism in Europe*, 50 J. CONFLICT RESOLUTION 548 (2006).

<sup>42</sup> See generally New Antisemitism, WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/New\\_antisemitism](http://en.wikipedia.org/wiki/New_antisemitism) (last visited Mar. 20, 2007) (detailing some of the entities and persons who have discussed this issue).

<sup>43</sup> The U.S. Commission on Civil Rights has identified the use of “traditional anti-Semitic elements” as a distinguishing feature of anti-Israelism or anti-Zionism that crosses the line into anti-Semitism:

On many campuses, anti-Israeli or anti-Zionist propaganda has been disseminated that includes traditional anti-Semitic elements, including age-old anti-Jewish stereotypes and defamation. This has included, for example, anti-Israel literature that perpetuates the medieval anti-Semitic blood libel of Jews slaughtering children for ritual purpose, as well as anti-Zionist propaganda that exploits ancient stereotypes of Jews as greedy, aggressive, overly powerful, or conspiratorial. Such propaganda should be distinguished from legitimate discourse regarding foreign policy. Anti-Semitic bigotry is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism.

FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 1.

<sup>44</sup> See U.S. DEP'T OF STATE, *supra* note 21.

<sup>45</sup> According to the EUMC,

Examples of the ways in which antisemitism manifests itself with regard to the state of Israel taking into account the overall context could include:

Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor. Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

Using the symbols and images associated with classic antisemitism (e.g. claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis. Drawing comparisons of contemporary Israeli policy to that of the Nazis.

Antisemitism,<sup>46</sup> Canadian Minister of Justice Irwin Cotler,<sup>47</sup> Israeli (former Minister of Diaspora Affairs and Jerusalem<sup>48</sup>) Natan Sharansky,<sup>49</sup> and Professors Bernard Lewis<sup>50</sup> and Robert Wistrich.<sup>51</sup> In general, government agencies and academic commentators have identified these characteristics to distinguish political anti-Semitism from legitimate criticism of Israel:

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Holding Jews collectively responsible for actions of the state of Israel.

European Monitoring Centre on Racism and Xenophobia, Working Definition of Antisemitism (Mar. 16, 2005), <http://eumc.europa.eu/eumc/material/pub/AS/AS-WorkingDefinition-draft.pdf> [hereinafter EUMC Working Definition]. The EUMC has been careful to stress, however, that “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.” *Id.*

<sup>46</sup> ALL-PARTY PARLIAMENTARY, *supra* note 21, at 5 (endorsing the EUMC Working Definition).

<sup>47</sup> Cotler identifies “discrimination against, denial of, or assault upon the right of the Jewish people to live as an equal member of the family of nations” as the distinguishing feature of what he, like some other commentators, refers to as the “new anti-Semitism.” Cotler, *supra* note 37.

<sup>48</sup> ADL Statement, *supra* note 19.

<sup>49</sup> Sharansky has suggested a “3D” test to distinguish one from the other:

The first D is the test of demonization. . . . Jews were demonized for centuries as the embodiment of evil. Therefore, today we must be wary of whether the Jewish state is being demonized by having its actions blown out of all sensible proportion. . . . The second D is the test of double standards. For thousands of years a clear sign of anti-Semitism was treating Jews differently than other peoples, from the discriminatory laws many nations enacted against them to the tendency to judge their behavior by a different yardstick. Similarly, today we must ask whether criticism of Israel is being applied selectively. . . . The third D is the test of deligitimation [sic]. In the past, anti-Semites tried to deny the legitimacy of the Jewish religion, the Jewish people, or both. Today, they are trying to deny the legitimacy of the Jewish state, presenting it, among other things, as the last vestige of colonialism.

Natan Sharansky, *Anti-Semitism in 3D*, JERUSALEM POST, Feb. 23, 2004, available at [http://www.ncsj.org/AuxPages/022304JPost\\_Shar.shtml](http://www.ncsj.org/AuxPages/022304JPost_Shar.shtml); see also ADL Statement, *supra* note 19 (citing approvingly Sharansky’s analysis).

<sup>50</sup> Bernard Lewis has also identified two of the common features that distinguish anti-Semitism from legitimate criticism of Israel: demonization of Israel and the use of double standards. Bernard Lewis, *The New Anti-Semitism: First Religion, then Race, then What?*, 75 AM. SCHOLAR 25, 26–27 (2006).

<sup>51</sup> Robert Wistrich’s “litmus test” is to determine whether anti-Zionist criticism argues for dismantling Israel, engages in demonization, and uses “classic anti-Semitic stereotypes.” Correspondence from Robert Wistrich, Dir., Vidal Sassoon Int’l Ctr. for the Study of Anti-Semitism, Hebrew Univ. of Jerusalem, to Brian Klug, Senior Research Fellow, Oxford Univ. (2005), available at <http://sicsa.huji.ac.il/klug.html>.

- (1) Using “*classic anti-Semitic stereotypes*” to characterize Israel,<sup>52</sup> which may also include “demonization” of Israelis, similar to older characterizations of the Jewish people as the “embodiment of evil.”<sup>53</sup>
- (2) “*Applying double standards* [which may involve] requiring behavior of [Israel] not expected . . . of any other” nations<sup>54</sup> or denying the Jewish people rights and legitimacy afforded other nations, including the right of self-determination.<sup>55</sup>
- (3) “*Drawing comparisons*” *between Israel and Nazi Germany*.<sup>56</sup> This criterion may be viewed as an application of the first two criteria (demonization and double standards), but it appears frequently enough to merit separate mention.
- (4) “*Holding Jews collectively responsible*” for Israeli actions and policy, regardless of actual complicity.<sup>57</sup>

Discourse exhibiting these characteristics, even if cloaked as criticism of Israel, has been characterized more properly as anti-Semitism. Whether these forms of anti-Semitism may, in conjunction with other conduct, form the basis for a civil rights claim is of course a separate and exacting inquiry, requiring consideration not only of the parameters of Title VI protection but also of First Amendment limitations.

Unlike some prior forms of anti-Semitism, which were associated with right-wing political groups, this burgeoning new form of anti-Semitism has been associated more with certain forms of liberal or left-wing activism, which have sometimes embraced anti-Semitism together with support for Palestinian causes both in Europe and in the United States.<sup>58</sup> Although progressive voices have typically stood for equal rights and social progress, many progressives have found common cause with Arab and Muslim anti-Zionists, however “illiberal” those groups may be, based on shared anti-American and anti-capitalist convictions as well as a belief that Palestinian Arabs are the underdog in their conflict with Israel.<sup>59</sup> In some cases, this progressive anti-Zionism,

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<sup>52</sup> Wistrich, *supra* note 51; *see also* FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 1; U.S. DEP’T OF STATE, *supra* note 21; EUMC Working Definition, *supra* note 45;.

<sup>53</sup> Sharansky, *supra* note 49; *see also* Lewis, *supra* note 50, at 27–28; Wistrich, *supra* note 51.

<sup>54</sup> EUMC Working Definition, *supra* note 45; *see also* Lewis, *supra* note 50, at 26–27.

<sup>55</sup> Sharansky, *supra* note 49; Wistrich, *supra* note 51; EUMC Working Definition, *supra* note 45.

<sup>56</sup> U.S. DEP’T OF STATE, *supra* note 21, at 1; EUMC Working Definition, *supra* note 45.

<sup>57</sup> EUMC Working Definition, *supra* note 45.

<sup>58</sup> LAQUEUR, *supra* note 12, at 147–50; SCHOENFELD, *supra* note 21, at 85–100; *see also* ALL-PARTY PARLIAMENTARY, *supra* note 21, at 32 (“We heard evidence that contemporary antisemitism in Britain is now more commonly found on the left of the political spectrum than on the right. Professor Cesarini submitted that this has made it harder to define and contest ‘because it no longer has any resemblance to classical Nazi-style Jew hatred, because it is masked by or blended inadvertently into anti-Zionism, and because it is often articulated in the language of human rights.’”).

<sup>59</sup> LAQUEUR, *supra* note 12, at 147–48; TOBIN ET AL., *supra* note 12, at 72–78. The irony

embraced by some Jewish progressives as well as by non-Jews, has merged with older European traditions of anti-Semitism that have surfaced from time to time in progressive movements.<sup>60</sup> As Walter Laqueur has cautioned, however, “[i]t would be an exaggeration to maintain that contemporary antisemitism is predominantly left wing in character, just as in previous ages it would have been an exaggeration to apportion all the responsibility for antisemitism to conservatives.”<sup>61</sup>

How have college campuses become “prime propagators” of anti-Semitism,<sup>62</sup> ironically, at a time when the general public holds entirely different views?<sup>63</sup> This phenomenon has resulted from a “perfect storm”<sup>64</sup> in which campus anti-Zionism and anti-Semitism have emerged from the confluence of a number of factors including:

- The politics of many American college campuses have become overwhelmingly liberal;<sup>65</sup>
- Extremist voices are disproportionately influential on college campuses and are frequently able to “capture organizational” apparatuses even when they do not command majority support;<sup>66</sup>

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here is that this form of bigotry may arise within an ideology which purports to be anti-racist. The All-Party Parliamentary Group Against Anti-Semitism points out that “[m]any on the left are firm in their condemnation of racism and would almost certainly not accept that they were guilty of antisemitic discourse” and offers, rather generously, that “[i]gnorance of the history of anti-Jewish prejudice means that some perhaps do not even realise that the language and imagery they have used has resonances of a long tradition of anti-Jewish discourse and stereotypes.” ALL-PARTY PARLIAMENTARY, *supra* note 21, at 33. In fact, the phenomenon may at times result from conscious manipulation as well as historical ignorance. *Id.* at 38 (“[W]hen left wing or pro-Palestinian discourse around the Middle East is manipulated and used as a vehicle for anti-Jewish language and themes, the antisemitism is harder to recognise and define and Jewish students can find themselves isolated and unsupported, or in conflict with large groups of their fellow students.”).

<sup>60</sup> SCHOENFELD, *supra* note 21, at 92–96; *see also* LAQUEUR, *supra* note 12, at 171–89.

<sup>61</sup> LAQUEUR, *supra* note 12, at 150.

<sup>62</sup> SCHOENFELD, *supra* note 21, at 123. Schoenfeld argues that the disproportionate rise in campus anti-Semitism reflects “an unexpected twist in the helix of anti-Semitism’s DNA,” in which “the most vicious ideas about Jews are primarily voiced not by downtrodden and disenfranchised fringe elements of society but by its most successful, educated and ‘progressive’ members.” *Id.* at 3–4. Hence, Schoenfeld argues, “[o]ne is less likely to find anti-Semites today in beer halls and trailer parks than on college campuses and among the opinion makers of the media elite.” *Id.* at 3.

<sup>63</sup> Harold Shapiro & Steven Bayme, *Foreword* to AMERICAN JEWRY AND THE COLLEGE CAMPUS, *supra* note 19, at 1, 2.

<sup>64</sup> This metaphor has been invoked by both Lipstadt, *supra* note 39, at 19, and Gary A. Tobin, *Uncivil University: Anti-Semitism and Anti-Israelism in Higher Education*, in CAMPUS ANTI-SEMITISM, *supra* note 8, at 27, 32.

<sup>65</sup> Lipstadt, *supra* note 39, at 19.

<sup>66</sup> Tobin, *supra* note 64, at 33 n.8.

- Contemporary anti-Israeli and anti-Zionist ideologies mesh well with anti-Western, anti-American, and anti-war ideologies, and ideologies that are also common on college campuses;<sup>67</sup>
- Anti-Israel groups have targeted campuses as “an arena for the anti-Israel agenda,”<sup>68</sup> just as, in fairness, pro-Israel groups have targeted campuses for a pro-Israel agenda;
- “Since the collapse of the Oslo accords . . . Israel has been depicted in much of the press as the ‘oppressor.’”<sup>69</sup>
- Many universities have failed to take appropriate action to prevent the spread of anti-Semitism, largely as a result of bureaucratic inertia;<sup>70</sup>
- Many figures who have the authority to stand up to the perpetrators of anti-Semitic incidents (*e.g.*, administrators, trustees, faculty) fail to exercise appropriate leadership for fear of “rock[ing] the boat,” “appear[ing] overzealous, or interfering with academic freedom.”<sup>71</sup>

This perfect storm has erupted in several high-profile incidents on campuses around the country over the last few years, which generally fall under the rubric of the “new anti-Semitism.” These incidents have had several ingredients in common: (i) Jewish students have been singled out, either by other students or by faculty, for adverse treatment, (ii) the perpetrators have been outspoken critics of Israel, and (iii) the alleged anti-Semitic conduct has been intertwined with anti-Israeli or anti-Zionist rhetoric.

#### 4. Case Study “A”: San Francisco State University

On May 7, 2002, an ugly incident at San Francisco State University awakened public attention to this new emergence of an ancient prejudice. At that campus, which had already developed a reputation in some circles as an unwelcoming place for Jews, over “[f]our hundred Jewish students held a . . . ‘Sit-in for Peace in the Middle East’, [sic] hoping to engage the pro-Palestinian students . . . in ‘dialogue.’”<sup>72</sup> As the rally concluded, “pro-Palestinian students surrounded the 30 remaining Jewish students,” shouting death threats.<sup>73</sup> Professor Laurie Zoloff, a witness to the event, reported that, “[c]ounter demonstrators poured into the plaza, screaming at the Jews to ‘Get out or we will kill you’ and ‘Hitler did not finish the job.’”<sup>74</sup> Others reported shouts of

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<sup>67</sup> *Id.* at 33.

<sup>68</sup> *Id.* at 32.

<sup>69</sup> Lipstadt, *supra* note 39, at 19.

<sup>70</sup> Tobin, *supra* note 64, at 32.

<sup>71</sup> *Id.* at 32–33.

<sup>72</sup> Sarah Stern, *Campus Anti-Semitism*, in *CAMPUS ANTI-SEMITISM*, *supra* note 8, at 22.

<sup>73</sup> *Id.*

<sup>74</sup> TOBIN ET AL., *supra* note 12, at 172.

“F\_\_\_ the Jews!” and “Die racist pigs!”<sup>75</sup> Police allegedly refused to take any action other than to surround the Jewish students and community members, who were reportedly trapped while an angry mob chanted for their death.<sup>76</sup> The San Francisco police then marched the Jewish group to the Hillel House and remained on guard.<sup>77</sup> Some rally participants reported feeling “very threatened” and fearing that violence would ensue but for the police presence.<sup>78</sup> The May 7 rally was hardly the only anti-Semitic episode at San Francisco State that year. “In April, a flyer advertising a pro-Palestinian rally . . . featured a picture of a dead baby, with the words, ‘Canned Palestinian Children Meat—Slaughtered According to Jewish Rites Under American License . . . .’”<sup>79</sup> This flyer explicitly revived the centuries-old “blood libel that Jews eat gentile children.”<sup>80</sup>

San Francisco State’s President, Robert A. Corrigan, responded firmly to these incidents.<sup>81</sup> Responding to the “blood libel” flyers, Corrigan wrote “strong letters” to the responsible student groups, insisting that the flyer “‘is no political statement,’” that it is “‘hate speech in words and image,’” and that its language “‘echoes a type of ugly myth that has been used through the centuries specifically to generate hatred.’”<sup>82</sup> He further announced that “[t]he flier was much more than an offense to the Jewish community; it was an offense to the entire University community and all that we stand for—most especially our ability to see the humanity in those with whom we disagree.”<sup>83</sup> Then, in a strongly worded letter to all members of the university community, he condemned the demonstrators who “behaved in a manner that completely violated the values of this institution and of most of you who are reading this message.”<sup>84</sup>

##### 5. Case Study “B”: Columbia University

At Columbia University, a number of students have come forward claiming that they feel intimidated and fearful in courses in Columbia’s Middle East and Asian Languages and Cultures (MEALAC) program. The documentary film *Columbia Unbecoming*, “produced by a group of Columbia students under the guidance of the David Project,” details a pattern of anti-Semitic activities at Columbia University.<sup>85</sup> The most high-profile reports of bias recently involved MEALAC. In one famous

<sup>75</sup> Stern, *supra* note 72, at 22.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> CAMPUS ANTI-SEMITISM, *supra* note 8, at 60–64.

<sup>82</sup> *Id.* at 61.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 62.

<sup>85</sup> ADL Statement, *supra* note 19.



incident described in the film, a Columbia student described an encounter that she had with Columbia University Professor George Saliba:

Towards the end of the semester, Professor Saliba showed what I felt was an anti-Israel film, showing the contemporary conflict between Palestinians and Israelis with a very one-sided view. The film and Saliba presented a view that Arabs have a prior claim to the land of Israel. And I felt very differently about that. And I was sure to express my opinion. For a few minutes, we discussed it inside the classroom and then George Saliba sort of drew me outside the classroom, and told me to walk with him this way out. . . . He said, "You have no voice in this debate." So I said, "Of course, I'm allowed to express my opinion." He came really close to me. . . . [H]e said, "See, you have green eyes." He said, "You're not a Semite." He said, "I'm a Semite. I have brown eyes. You have no claim to the land of Israel."<sup>86</sup>

In another notorious allegation discussed in the film, Professor Joseph Massad "spent a class recounting the 'massacre' by the Israelis in Jenin. When a student raised her hand to ask [whether] Israel often gives warnings ahead of time before striking terrorist strongholds, Professor Massad [allegedly] screamed back at her, 'I will not have you deny Israeli atrocities in my class!'"<sup>87</sup> In a third incident, Professor Hamid Dabashi is said to have written, on September 23, 2004, that Israelis have "a vulgarity of character that is bone-deep and structural to the skeletal vertebrae of [their] culture."<sup>88</sup>

A faculty committee commissioned to investigate the matter found that there were no anti-Semitic activities.<sup>89</sup> The committee was, from the beginning, accused of bias, and Columbia's president was charged with selecting committee members who lacked objectivity.<sup>90</sup> Columbia acknowledges identifying "inconsistencies and weaknesses in the avenues available for students to raise concerns about faculty conduct," and maintains that these problems were addressed by clarifying and strengthening the university's "procedures for adjudicating grievances and establish[ing] additional

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<sup>86</sup> Stern, *supra* note 72, at 24–25.

<sup>87</sup> ADL Statement, *supra* note 19.

<sup>88</sup> Stern, *supra* note 72, at 69. *But see* CAMPUS ANTI-SEMITISM, *supra* note 8, at 59 (relating Professor Dabashi's partial denial of Stern's claims).

<sup>89</sup> The ADL, interestingly, has not used the term "anti-Semitism" against Columbia and has argued that this designation was a "red herring" and that "anti-Semitism had never been the core issue at hand." ADL Statement, *supra* note 19.

<sup>90</sup> *Id.* According to the ADL, "two of the five members [of this committee] had signed Columbia's divestment petition, one had been the thesis advisor of Joseph Massad and instrumental in [hiring him], and one had written a paper blaming Israel" for increasing global anti-Semitism. *Id.*

[opportunities] for students” to communicate with university administrators.<sup>91</sup> The committee report has been criticized as a “white-wash” (or at least “clumsy”<sup>92</sup>), and critics argue that it yielded nothing more than “a very slight slap on the wrist” for one faculty member and recommendations for better grievance procedures.<sup>93</sup> Others argue that a “close reading of the report makes it clear that the committee was using [the one episode it criticized] to send a broader message,” namely: “Anything doesn’t go anymore.”<sup>94</sup>

## 6. Case Study “C”: The University of California at Irvine

At the University of California at Irvine, numerous anti-Semitic allegations have been raised over the last few years.<sup>95</sup> In 2000, a Jewish student was told to, “Go back to Russia where you came from” and called a “F\_\_\_ing Jew.”<sup>96</sup> In January 2004, a rock was thrown at a Jewish student wearing a tee shirt that said “Everybody loves a Jewish boy,” barely missing him.<sup>97</sup> The rock was thrown from the direction of a student group, which was using rocks as paper weights.<sup>98</sup> In February 2004, two students uttered an Arabic phrase which translates as “Slaughter the Jews” when they saw an Arabic-speaking Jewish student wearing a pin on his sweatshirt emblazoned with American and Israeli flags.<sup>99</sup> During the heated exchange which followed, the Jewish

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<sup>91</sup> Transcript, U.S. Comm’n on Civil Rights Meeting of Nov. 18, 2005 apps. at 1–2 (Letter from Alan Brinkley, Provost, Columbia Univ., to Kenneth L. Marcus, Staff Dir., U.S. Comm’n on Civil Rights (Nov. 15, 2005)), available at <http://www.uscrr.gov/calendar/trnscript/1118uscrrwappx.pdf>. Columbia also emphasizes its efforts to create a welcoming environment for Jewish students. *Id.*; see also Lipstadt, *supra* note 39, at 5 (“[M]any pundits have spoken about the problems at Columbia University while ignoring, almost willfully, the fact that it is also home to one of the most multifaceted and vibrant Jewish student communities.”).

<sup>92</sup> Lipstadt, *supra* note 39, at 15.

<sup>93</sup> ADL Statement, *supra* note 19. *But see* Lipstadt, *supra* note 39, at 15 (arguing that Columbia had “put MEALAC into academic receivership” even before the matter became public, “essentially stripping members of the department of any control over its internal affairs”).

<sup>94</sup> Samuel G. Freedman, *Keeping Things in Perspective*, in AMERICAN JEWRY AND THE COLLEGE CAMPUS, *supra* note 19, at 27–28.

<sup>95</sup> See, e.g., Marc Ballon, *Jewish Students and Activists Call UC Irvine a Hotbed of Anti-Semitic Harassment*, JEWISH J., Mar. 11, 2005, available at <http://www.jewishjournal.com/home/preview.php?id=13779>; Kimi Yoshino, *Fresh Muslim-Jewish Discord on Campus: Program Titles are Considered Anti-Semitic by Some at UC Irvine, Site of Civil Rights Probe*, L.A. TIMES, May 12, 2006, at B3.

<sup>96</sup> Zionist Organization of America (ZOA), Mem. in Supp. of Its Title VI Claims Against the University of California, Irvine 11 (Case No. 09-05-2013) (on file with William & Mary Bill of Rights Journal). The dean allegedly told the student that “there was nothing that the administration could do, unless ‘a student was specifically threatened physically.’” *Id.*

<sup>97</sup> Susan B. Tuchman, *Statement Submitted to the U.S. Commission on Civil Rights Briefing on Campus Anti-Semitism*, in CAMPUS ANTI-SEMITISM, *supra* note 8, at 13, 17.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

student was “surrounded and threatened” by other students.<sup>100</sup> In March 2004, “this same Jewish student was . . . called a ‘dirty Jew’” and denigrated with “threatening language and hurtful ethnic slurs” by other students.<sup>101</sup>

In recent years, the campus has also experienced anti-Semitic vandalism, as well as anti-Semitic hate speech posted in campus signs, published in student newspapers, and presented at student-sponsored public lectures.<sup>102</sup> For example, in 2002 a UC Irvine student publication argued “that Jews are genetically different . . . from non-Jews.”<sup>103</sup> That same year, “signs began being posted on campus, picturing the Star of David dripping with blood, and equating [that Jewish symbol] with the swastika.”<sup>104</sup> “In 2003, . . . a Holocaust memorial on the UC” Irvine campus was either “destroyed” or “disturbed”—depending on conflicting accounts of the incident.<sup>105</sup> In early 2004, one student-sponsored speaker announced to a UC Irvine audience that “there are good Jews and bad Jews.”<sup>106</sup> Lecturing from behind a lectern bearing the UC Irvine emblem, the speaker explained that Jews exhibit an arrogance based on both white supremacy and the doctrine that Jews are the chosen people.<sup>107</sup> Numerous other university-sponsored public lectures have criticized Jews, Zionism and Israel. Students have posted “signs equating Zionism with Nazism, signs with the Star of David dripping with blood, signs equating Israeli Prime Minister Sharon with Hitler, and signs of Prime Minister Sharon with a monkey face” next to signs advertising the Jewish Sabbath dinners.<sup>108</sup> Another sign posted on campus read, “Israelis Love to Kill Innocent Children.”<sup>109</sup> At least two UC Irvine students have recently left that campus because they perceive that it has developed a “hostile environment for Jewish students.”<sup>110</sup>

UC Irvine students have alleged, in unusual detail, the impact that this harassment has had on their educational opportunities at Irvine. According to the Zionist Organization of America (“ZOA”), some students have feared for their physical safety, have asserted that anti-Semitic hostility has adversely affected their academic performance, have feared identifying themselves as Jews, have avoided clothing that identifies them as Jews or supporters of Israel, have avoided affiliating with Jewish programs or activities on campus in which they would otherwise have participated, and have transferred to other universities to escape the anti-Semitism they allege at UC Irvine.<sup>111</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 14.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Compare *id.* (stating that memorial was destroyed), with CAMPUS ANTI-SEMITISM, *supra* note 8, at 65–66 (providing a statement from Diane Fields Geocarlis, Counsel for the University of California at Irvine, that claimed the monument was disturbed).

<sup>106</sup> Tuchman, *supra* note 97, at 15.

<sup>107</sup> *Id.*

<sup>108</sup> ZOA, *supra* note 96, at 9.

<sup>109</sup> *Id.* at 10.

<sup>110</sup> Tuchman, *supra* note 97, at 17.

<sup>111</sup> ZOA, *supra* note 96, at 4.

The UC Irvine administration has been accused of being “silent and passive” in the face of these various incidents.<sup>112</sup> For example, in 2002 one Jewish student expressed her fears to the Chancellor of UC Irvine and other campus administrators: “Not only do I feel scared to walk around proudly as a Jewish person on the UC Irvine campus, I am terrified for anyone to find out. Today I felt threatened that if students knew that I am Jewish and that I support a Jewish state, I would be attacked physically.”<sup>113</sup> “The Chancellor never responded to [the] student’s letter.”<sup>114</sup> One administrator who did respond recommended that the student seek professional counseling from the university’s Counseling Center.<sup>115</sup>

## 7. Incidents at Other Universities

The incidents at San Francisco State, Columbia and Irvine have come to symbolize the status of campus anti-Semitism around the country, but there have been episodes at other campuses as well.<sup>116</sup> The Anti-Defamation League documented nearly 100 anti-Semitic incidents on American college campuses in 2005 alone.<sup>117</sup> While this figure may overstate the problem in one respect, because many of the incidents may be minor, isolated events, it may also understate the problem in a more important respect because most incidents are probably not reported to the ADL. Commentators disagree as to whether the phenomenon of campus anti-Semitism is “actually limited to a few well-publicized events,”<sup>118</sup> such as the incidents at San Francisco State,

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<sup>112</sup> *Id.* at 5–6.

<sup>113</sup> Tuchman, *supra* note 97, at 15.

<sup>114</sup> *Id.* at 16.

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g.,* Shapiro & Bayme, *supra* note 63, at 2 (noting that the “more widespread and sustained narrative of the integration of Jews and Judaism into university culture [has been] dwarfed by the surfacing of anti-Israel invective or anti-Semitic hostility” and acknowledging “some level of exaggerated fears and sensitivities”).

<sup>117</sup> This represented a significant increase in campus-based anti-Semitic incidents in 2005, even as general reported non-campus-related incidents were declining. Press Release, Anti-Defamation League, Annual ADL Audit: Anti-Semitic Incidents Decline in 2005 but Levels Still of Concern in U.S. (Apr. 5, 2006), available at [http://www.adl.org/PresRele/ASUS\\_12/audit\\_2005.htm](http://www.adl.org/PresRele/ASUS_12/audit_2005.htm). As this Article was going to press, ADL reported that anti-Semitic incidents declined on American Campuses in 2006, after the prior year’s increase. Press Release, Anti-Defamation League, Anti-Semitic Incidents in U.S. Decline in 2006, Despite Year Marked by Violent Attacks (Mar. 14, 2007), available at [http://www.adl.org/PresRele/ASUS\\_12/4993-12.htm](http://www.adl.org/PresRele/ASUS_12/4993-12.htm). ADL’s 2006 U.S. findings contrast with reports in other parts of the world which document increased anti-Semitic incidents, including increased campus anti-Semitism during that year. *See, e.g.,* Bill Gladstone, Anti-Semitism Report in Canada Finds Highest Levels in Two Decades, Mar. 16, 2007, [http://www.ujc.org/content\\_display.html?ArticleID=106107](http://www.ujc.org/content_display.html?ArticleID=106107) (“Perhaps most alarming to Jewish officials is the steep rise of anti-Jewish activities observed on college campuses.”).

<sup>118</sup> Seidler-Feller, *supra* note 19, at 33.

Columbia, and Irvine, or whether these incidents are merely some of the most egregious examples of a problem that is “systemic in higher education and can be found on campuses all over the United States.”<sup>119</sup> The author’s own experience as a civil rights official suggests that the truth lies in between: few American campuses have witnessed the number and intensity of anti-Semitic incidents reported at those three campuses, but dozens of campuses every year experience at least some manifestation of this ugly problem, which is now undoubtedly national in scope.

## 8. Criticism

Critics argue that equating anti-Zionism with anti-Semitism is a ploy to silence one side of a policy debate, deflect attention from legitimate criticisms, and intimidate critics of Israeli conduct and policy; they also admonish that these views of anti-Semitism devalue and discredit the concept, creating a boy-who-cries-wolf-problem.<sup>120</sup> These critics have in turn been charged with turning a blind eye to serious bigotry, developing arguments which may insulate serious charges from condemnation, and, in extreme cases, succumbing to a “pathology” of “anti-Semitism denial,” analogous to the “intellectual disease” of “Holocaust denial.”<sup>121</sup> While some critics argue that defenders of Israel describe any criticism of the State of Israel as anti-Semitism, Professor Alan Dershowitz has characterized this claim as a straw man argument.<sup>122</sup> In fact, many of the commentators who most vigorously condemn anti-Zionist propaganda as anti-Semitic have hastened to emphasize that much criticism of Israel is neither anti-Semitic nor illegitimate.<sup>123</sup>

### B. Governmental Response

#### 1. The Office for Civil Rights

The 1964 Act establishes a remedial system to enforce the promise of equal protection. This system relies upon three pillars: private party litigation in the federal

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<sup>119</sup> Tobin, *supra* note 64, at 35.

<sup>120</sup> See, e.g., Brian Klug, *The Myth of the New Anti-Semitism: Reflections on Anti-Semitism, Anti-Zionism and the Importance of Making Distinctions*, THE NATION, Feb. 2, 2004, at 23, 29, available at <http://www.thenation.com/doc/20040202/klug/5>.

<sup>121</sup> SCHOENFELD, *supra* note 21, at 144–46.

<sup>122</sup> Alan M. Dershowitz, *Making the Case for Israel*, FRONTPAGE MAG, June 1, 2004, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=13590>.

<sup>123</sup> See, e.g., PHYLLIS CHESLER, THE NEW ANTI-SEMITISM: THE CURRENT CRISIS AND WHAT WE MUST DO ABOUT IT 163–68 (2003) (endorsing criticism of Israel’s treatment of women, Arabs, and religious minorities, while arguing that much anti-Zionism is also anti-Semitic); FOXMAN, *supra* note 32, at 195 (distinguishing anti-Semitism from “opposition to Israeli policies and actions” and asserting that “[p]rincipled, fair criticism of Israel and Israeli leaders is always permissible”).

courts, United States Department of Justice enforcement in the federal courts, and administrative enforcement in executive agencies such as the United States Department of Education's Office for Civil Rights ("OCR"). Private party litigation is important because the federal government never has provided sufficient resources to pursue all anti-discrimination cases within its jurisdiction<sup>124</sup> and because federal agencies, by their nature, seldom push the boundaries of the law as aggressively as private parties and public interest advocacy groups are free to do. Justice Department enforcement is also important because actions undertaken by that department—and even the prospect of potential action by that department—have an impact vastly disproportionate to the limited number of "pattern or practice" or public interest cases actually prosecuted.

OCR administrative action is arguably the most critical pillar of civil rights enforcement at educational institutions. The primary reason for this is that the Justice Department's jurisdiction in education matters is principally limited to public university desegregation cases and intervention in pending civil rights litigation of significant public importance, while OCR has jurisdiction over virtually all other federal civil rights cases involving education.<sup>125</sup> For this reason, OCR processes approximately five thousand cases per year, an extraordinary share of the total national civil rights

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<sup>124</sup> See, e.g., U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: THE PRESIDENT'S 2006 REQUEST (2005), available at <http://www.usccr.gov/pubs/crfund06/crfund06.pdf>; U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2005, at 6–8 (2004), available at <http://www.usccr.gov/pubs/crfund05/crfund05.pdf>; U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2004, at 6–8 (2003); U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2000–2003, at 2–5 (2002); U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2000 and Beyond (2001), available at <http://www.usccr.gov/pubs/crfund01/ch1.htm>; U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT (1995).

<sup>125</sup> There are two situations in which the DOJ may exercise jurisdiction over cases involving discrimination on the basis of religion in colleges or universities. Under Title IV of the Civil Rights Act of 1964, the Attorney General is authorized to initiate legal proceedings for relief from discrimination on the basis of religion

[w]henever the Attorney General receives a complaint in writing . . . that [a student] has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin, and the Attorney General believes the complaint is meritorious . . . and that the institution of an action will materially further . . . desegregation in public education.

42 U.S.C. § 2000c-6(a) (2000). Under another provision,

[w]henever an action has been commenced in any court of the United States seeking relief from the denial of equal protection under the fourteenth amendment . . . on account of race, color, religion, sex or national origin, the Attorney General . . . may intervene . . . if the Attorney General certifies that the case is of general public importance.

42 U.S.C. § 2000h-2 (2000).

caseload involving educational institutions.<sup>126</sup> Given the discretionary nature of DOJ's jurisdiction in this area and the costs of private party litigation, a determination by OCR to decline assertion of jurisdiction frequently constitutes a death sentence for potential civil rights claims.

For most of its history, OCR pursued a practice of non-enforcement of civil rights claims alleging anti-Semitic harassment. This practice was based upon a longstanding OCR determination—inconsistently communicated and applied—that no statute within OCR's jurisdiction prohibits discrimination against or harassment of Jewish students. Specifically, the traditional understanding at OCR was that Title VI protections do not extend to Jews. OCR's justification for this position was articulated during the Carter administration as follows: "any attempt to characterize discrimination against Jews as racial in nature would be contrary to the intent of Congress to exclude religious discrimination from Title VI protection as well as inconsistent with the weight of social science and anthropological scholarship regarding racial and nationality groupings."<sup>127</sup> While some officials deviated from this position from time to time, no formal policy asserting anti-Semitism jurisdiction was issued until 2004.

In 2004, OCR issued a series of policy statements announcing that it would assert, for the first time, jurisdiction to pursue claims alleging harassment of Jewish students.<sup>128</sup> These statements were issued as part of broader guidance concerning "complaints of race or national origin harassment commingled with aspects of religious discrimination against Arab Muslim, Sikh, and Jewish students."<sup>129</sup> They were issued, interestingly, in the course of determining an appropriate disposition for a case alleging harassment against a Sikh student.<sup>130</sup> At the same time, they were issued in the belief that a uniform policy should apply to members of all groups exhibiting both religious and ethnic or racial characteristics.

On September 13, 2004, OCR issued a public "Dear Colleague" letter informing recipient institutions of its new enforcement approach.<sup>131</sup> This guidance letter, issued to over 20,000 colleges, universities, public school districts, and state education departments,<sup>132</sup> announced OCR's decision to "exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics" and thus "aggressively investigate[] alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students."<sup>133</sup> With this guidance letter, OCR publicly announced for

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<sup>126</sup> OCR ANNUAL REPORT 2004, *supra* note 5, at 2–3. This extraordinary caseload is administered through twelve regional offices and OCR's Washington, D.C., headquarters. *Id.* at 3.

<sup>127</sup> HEW-OCR, *supra* note 3.

<sup>128</sup> See *supra* note 5 and accompanying text.

<sup>129</sup> 2004 OCR Dear Colleague Letter, *supra* note 5.

<sup>130</sup> Eli Lake, *Harassment of Jewish Students on Campus on the Rise Since 9/11*, U.S. AIDE ASSERTS, N.Y. SUN, Nov. 15, 2004, available at <http://www.nysun.com/article/4773>.

<sup>131</sup> 2004 OCR Dear Colleague Letter, *supra* note 5.

<sup>132</sup> Lake, *supra* note 130.

<sup>133</sup> 2004 OCR Dear Colleague Letter, *supra* note 5.

the first time that it would enforce Title VI to protect Jewish students (and, for that matter, Sikh students) against harassment. Nevertheless, questions still remained as to OCR's commitment to using Title VI even in cases in which the Jewish student asserted no racial or ethnic discrimination other than discrimination on the basis of the student's status as a Jew.

OCR resolved that question in a policy letter issued to the Institute for Jewish and Community Research (IJCR) in late 2004 and subsequently publicly distributed.<sup>134</sup> The IJCR asked whether, for purposes of extending civil rights protections, "'Jewish' may be interpreted as an ethnic [or] . . . racial category . . . even if the alleged victims are Caucasian and American born."<sup>135</sup> OCR answered in the affirmative, relying upon *Shaare Tefila Congregation v. Cobb*<sup>136</sup> and *Saint Francis College v. Al-Khazraji*.<sup>137</sup> In those cases, the U.S. Supreme Court held that anti-Jewish and anti-Arabic discrimination are barred by the Civil Rights Act of 1866 prohibition on racial discrimination in the formation of contracts and enjoyment of property.<sup>138</sup> The Court reasoned that the term "race" (ironically not contained in the original statute) was understood broadly in 1866 to encompass many ethnic and ancestral groups, including Jews and Arabs, who are not understood today to constitute distinct racial categories.<sup>139</sup> The IJCR letter stated that

the United States Supreme Court, has already answered in the affirmative and in analogous statutory contexts your question . . . The question here, of course, is not whether 'Jewish' is a racial or national-origin category *per se*, but whether anti-Jewish incidents may be covered within Title VI's broad protections against racial or ethnic discrimination. . . . OCR recognizes that anti-Semitic harassment may include adverse action taken against individuals based on a victim's ethnic background or ancestry, notwithstanding the prospect that such harassment may constitute religious discrimination as well. In short, OCR recognizes that Title VI covers harassment of students of Jewish heritage regardless of whether the students may be Caucasian and American born. OCR cannot turn its back on victims of anti-Semitism on the grounds that Jewish heritage may include both religious and ethnic characteristics.<sup>140</sup>

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<sup>134</sup> IJCR Letter, *supra* note 5, at 1.

<sup>135</sup> *Id.*

<sup>136</sup> 481 U.S. 615 (1987).

<sup>137</sup> 481 U.S. 604 (1987).

<sup>138</sup> See 42 U.S.C. § 1981 (2000).

<sup>139</sup> *Shaare Tefila Congregation*, 481 U.S. at 617; *Saint Francis College*, 481 U.S. at 610–11.

<sup>140</sup> IJCR Letter, *supra* note 5, at 1.



The new policy has been applied for the first time in the pending OCR investigation of the incidents at the University of California at Irvine.<sup>141</sup> In October 2004, the Zionist Organization of America's Center for Law and Justice ("ZOA") filed a complaint with OCR alleging that Jewish students at UC-Irvine had been subjected to anti-Semitic harassment in violation of Title VI.<sup>142</sup> ZOA detailed the Irvine incidents described above, as well as many other allegations by students stretching over a period of several years.<sup>143</sup>

UC Irvine publicly responded to the ZOA's complaint with a frontal assault on the 2004 OCR Policy, insisting boldly that "Title VI does not apply to allegations of anti-Semitism."<sup>144</sup> UC Irvine reasoned that "religion is not a protected class for purposes of Title VI."<sup>145</sup> Moreover, UC Irvine argued that *Shaare Tefila* held only that "Jewish" constitutes a "race" only for purposes of § 1982.<sup>146</sup> The Court "specifically rested its holding on the fact that when the Civil Rights Act of 1866, of which § 1982 is a part, was enacted, 'Jews . . . were among the peoples then considered to be distinct races and hence within the protection of the statute.'"<sup>147</sup> By 1964, UC Irvine notes, "race theory had developed dramatically," and Jews were no longer considered a race.<sup>148</sup> Moreover, UC Irvine argues that Congress's inclusion of religion in Title VII of the 1964 Act "indicates that had Congress desired to also make religion a protected class under Title VI, it knew that it needed to do so specifically."<sup>149</sup> UC Irvine also denies that it has discriminated against any student.<sup>150</sup>

ZOA responded, *inter alia*, that Jews are a protected class under Title VI as both a religious minority and a national origin group. ZOA conceded that the term "'religion' is not expressly included in the language of Title VI" but nevertheless argued that "the legislative history of the statute suggests that Congress intended that religious discrimination be included."<sup>151</sup> In support of this counter-intuitive theory, ZOA cited a substantial number of sources that include religious discrimination in a recitation of discriminatory grounds prohibited by Title VI.<sup>152</sup> ZOA also argued that

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<sup>141</sup> Susan B. Tuchman, *Using Federal Law to Fight Israel Bashing and Anti-Semitism on Campus*, ST. LOUIS JEWISH LIGHT, May 12, 2006, <http://www.stljewishlight.com/commentaries/285120863955917.php>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> CAMPUS ANTI-SEMITISM, *supra* note 8, at 16 (statement of Ms. Geocaris).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 16–17.

<sup>147</sup> *Id.* at 17.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Transcript, of U.S. Comm'n on Civil Rights, *supra* note 91, apps. 70, 81 (Letter from Susan B. Tuchman to Kenneth L. Marcus, Staff Dir., U.S. Comm'n on Civil Rights (Mar. 20, 2006)).

<sup>152</sup> *Id.* apps. 81–82.

Jews are protected under the broad interpretation that some lower courts have given to the term “national origin.”<sup>153</sup>

The UC Irvine matter remains pending before OCR. In the author’s view, however, the legal arguments advanced by both parties are incorrect for reasons that will be explained below.

## 2. The U.S. Commission on Civil Rights

On April 3, 2006, the U.S. Commission on Civil Rights issued its Findings and Recommendations regarding Campus Anti-Semitism, which strongly reinforced the 2004 OCR policy.<sup>154</sup> In particular, the Commission found that these incidents, “[w]hen severe, persistent or pervasive . . . may constitute a hostile environment for students in violation of Title VI of the Civil Rights Act of 1964.”<sup>155</sup> The Commission, over the objections of its Chairman, called upon the Department of Education to “protect college students from anti-Semitic and other discriminatory harassment by vigorously enforcing Title VI against recipients that deny equal educational opportunities to all students.”<sup>156</sup>

In the course of deliberations, however, several fault lines became apparent. First, some commissioners questioned the jurisdictional basis for pursuing anti-Semitism claims under Title VI.<sup>157</sup> Second, the new OCR chief issued correspondence that some have interpreted as pulling back from the 2004 policy.<sup>158</sup> In light of this apparent confusion, the Commission called upon Congress to clarify to the Department of Education that Title VI does indeed protect Jewish students from anti-Semitic harassment.<sup>159</sup>

## II. ANTI-SEMITISM AND TITLE VI

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of “race, color, or national origin” in federally funded programs or activities, including most colleges and universities.<sup>160</sup> Title VI does not explicitly prohibit discrimination

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<sup>153</sup> *Id.* apps. 82–83.

<sup>154</sup> FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 1.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2.

<sup>157</sup> Jacobson, *supra* note 7.

<sup>158</sup> *See* Clyne, *supra* note 6.

<sup>159</sup> FINDINGS AND RECOMMENDATIONS, *supra* note 1, at 2.

<sup>160</sup> Specifically, the statute provides that “[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” covered by Title VI. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, 252 (codified as amended at 42 U.S.C. § 2000d (2000)). It authorizes federal agencies “to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability,” *id.* § 602, 42 U.S.C. § 2000d–1, and the DOJ, in an exercise of this authority, promulgated a regulation forbidding funding recipients

on the basis of religion, even though (i) prior versions of the legislation would have prohibited religious discrimination<sup>161</sup> and (ii) the 1964 Act elsewhere prohibits religious discrimination in other contexts.<sup>162</sup> To what extent, then, does Title VI prohibit discrimination against Jewish students in federally funded educational programs and activities? Is UC Irvine correct that this issue should turn on whether Jews were understood to constitute a “race” when Title VI was enacted in 1964? Is ZOA correct that the 1964 Act tacitly prohibits all religious discrimination in all educational programs and activities funded by the federal government? Or is the OCR correct in determining that Title VI prohibits anti-Semitic harassment as a form of racial (or national origin) discrimination, subject to a limited exception for anti-Semitic animus directed exclusively at the tenets of Jewish religious faith?

### A. Anti-Semitism as Racism

#### 1. The Supreme Court: *Saint Francis College* and *Shaare Tefila*

The Supreme Court unanimously decided *Saint Francis College v. Al-Khazraji*<sup>163</sup> and *Shaare Tefila Congregation v. Cobb*<sup>164</sup> on the same day, establishing simultaneously that 42 U.S.C. § 1981 protects both Arabs and Jews against racial discrimination in the making of contracts and enjoyment of property.<sup>165</sup> In *St. Francis College*,

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to “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.” 28 C.F.R. § 42.104(b)(2) (2006). OCR regulations provide that:

A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service . . . or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

. . . .

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

. . . .

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program . . . .

34 C.F.R. § 100.3(b) (2006).

<sup>161</sup> See *infra* note 258 and accompanying text.

<sup>162</sup> See *infra* note 271 and accompanying text.

<sup>163</sup> 481 U.S. 604 (1987).

<sup>164</sup> 481 U.S. 615 (1987).

<sup>165</sup> In so doing, the Court resolved a circuit split in which the courts of appeals had

an Iraqi-born Arab American professor sued the college that had denied him tenure, arguing that the college had discriminated against him on racial grounds in violation of § 1981.<sup>166</sup> The Supreme Court decided the case by examining the history of § 1981, going back to the 1866 Act to determine “what groups Congress intended to protect” in 1866.<sup>167</sup> In so doing, the Court considered both legislative debate and contemporaneous literature. As the Court found, “[t]he [legislative] debates are replete with references to” Jews, Scandinavians, Chinese, Mexicans, Gypsies, blacks, Mongolians, and Germans as members of separate races.<sup>168</sup> The Court noted that this was consistent with common mid-nineteenth century usage of the term “race,” as demonstrated by countless dictionaries and encyclopedias of that era.<sup>169</sup> The Court held, “[b]ased on the history of § 1981, . . . that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”<sup>170</sup> As the Court emphasized, “[s]uch discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.”<sup>171</sup> In an important footnote, the Court also stated that, under its prior cases, “discrimination . . . on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>172</sup>

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extended § 1981 protection to Arabs but not Jews. *Compare* Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 527 (4th Cir. 1986) (finding that “discrimination against Jews is not racial discrimination”), *rev’d*, 481 U.S. 615 (1987), *with* Al-Khazraji v. Saint Francis College, 784 F.2d 505, 517 (3d Cir. 1986) (finding that discrimination against Arabs violates the § 1981 prohibition against racial discrimination), *aff’d*, 481 U.S. 604 (1987).

<sup>166</sup> 481 U.S. at 606. Section 1981, deriving in pertinent part from the 1866 Act, provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (2000). Interestingly, § 1981 does not actually use the word “race.” In *Runyon v. McCrary*, however, the Court held that this section prohibits all “racial” discrimination in contracting. 427 U.S. 160, 168 (1976). This holding shifted the debate, fortuitously enough, from the even more emotionally loaded question as to whether Arabs, Jews, and other groups are sufficiently “non-white” to merit protection under § 1981.

<sup>167</sup> *Saint Francis College*, 481 U.S. at 612–13. Specifically, the Court examined the legislative history of the Civil Rights Act of 1866 and the Voting Rights Act of 1870 because § 1981 is based on both statutes. *Id.*

<sup>168</sup> *Id.* at 612.

<sup>169</sup> *Id.* at 610–11.

<sup>170</sup> *Id.* at 613.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 613 n.5 (citing *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *Hurd v. Hodge*, 334 U.S. 24, 32 (1948); *Oyama v. California*, 332 U.S. 633, 646 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

In *Shaare Tefila Congregation v. Cobb*, the Court applied its *St. Francis College* holding to Jews, ruling that the 1866 Act's prohibition on racial discrimination applies to Jews, since Jews are a "race" within the meaning of that statute.<sup>173</sup> In that case, a Jewish congregation sued vandals under § 1982 for racial discrimination, after the defendants spray-painted anti-Semitic messages on the walls of their synagogue.<sup>174</sup> Applying the *St. Francis College* analysis, the Court held that to make a claim under § 1982 one must allege that "defendants' animus was directed towards the kind of group that Congress intended to protect when it passed the statute."<sup>175</sup> The Court, however, announced its view that "[i]t is evident from the legislative history of the section . . . that Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute."<sup>176</sup> The Court concluded by adding that "Jews are not foreclosed from stating a cause of action against other members of what today is considered to be part of the Caucasian race."<sup>177</sup>

In both cases, the Court relied upon the intent of Congress in enacting the underlying statutes. Specifically, the Court asked the critical question: based on the history of the statute, what are the "identifiable classes of persons" that "Congress intended to protect from discrimination"?<sup>178</sup> It was in order to answer this question that the Court examined legislative history and contemporaneous literature. Since *Shaare Tefila* and *St. Francis College*, the Supreme Court has reiterated the rule in those cases elsewhere,<sup>179</sup> and Jewish plaintiffs have successfully established standing to pursue § 1981 claims.<sup>180</sup> In interpreting other statutes, courts must ask the same question: what are the classes of persons that Congress intended to protect?

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<sup>173</sup> 481 U.S. 615 (1987).

<sup>174</sup> *Id.* at 616. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2000).

<sup>175</sup> *Shaare Tefila Congregation*, 481 U.S. at 617.

<sup>176</sup> *Id.* at 617-18.

<sup>177</sup> *Id.* at 618.

<sup>178</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

<sup>179</sup> The Court, in determining that distinctions between Hawaiian natives and other Hawaiian people constituted a suspect "racial" classification for the purposes of the Fifteenth Amendment's voting rights protections, reiterated *St. Francis College*'s basic holding in *Rice v. Cayetano*: "In the interpretation of the Reconstruction era civil rights laws we have observed that 'racial discrimination' is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" 528 U.S. 495, 515 (2000) (omission in original) (quoting *Saint Francis College*, 481 U.S. at 613).

<sup>180</sup> See *Sinai v. New England Tel. & Tel. Co.*, 3 F.3d 471, 474 (1st Cir. 1993), *cert. denied*, 513 U.S. 1025 (1994); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1331 (D. Colo. 1997). At least one court has gone further, holding that *Shaare Tefila*, read together with *Saint Francis College*, "protects Jews as a race" not only under the Reconstruction Era civil rights statutes but also under the Thirteenth Amendment and under those contemporary civil rights statutes passed pursuant to the Thirteenth Amendment. *United States v. Nelson*, 277 F.3d 164, 177 (2d Cir. 2002), *cert. denied*, 537 U.S. 835 (2002).

## 2. Legislative History

Focused primarily on the plight of African Americans, Congress in 1964 cast little light on its intentions with respect to the scope of racial discrimination against non-African Americans, the reasons for Title VI's omission of religious discrimination, or the extent of national origin protection. One point is, however, quite clear: Congress intended to prohibit racial discrimination in federally funded programs to the same extent as the prohibition contained in the Thirteenth and Fourteenth Amendments.

### *a. Emphasis on discrimination Against African Americans*

The lengthy debates on the 1964 Act provide little legislative history on the issues of anti-Semitism or, more broadly, on ethnic and religious discrimination, especially with respect to Title VI.<sup>181</sup> The reason for this is simple and should be rather obvious to even casual students of this period of American history: Congress was principally concerned at this time with racial discrimination against African Americans.<sup>182</sup> While Congress prohibited some forms of national origin, religious, and sex discrimination, its primary concerns were elsewhere. This is confirmed by the House Judiciary Committee's report discharging H.R. 7152 as well as by the statements of various members of both the House and Senate during floor debate.

The House Judiciary Committee's report acknowledged discrimination against "some minority groups" but identified discrimination against African Americans as the principal motive for the bill.<sup>183</sup> Congressman Emanuel Celler, then-Chairman of the House Judiciary Committee and sponsor of the legislation, frequently reminded the House during floor debate that discrimination against African Americans was the prime motivator behind Title VI: "[Title VI] simply provides that, where Federal money is used to support any program or activity—money which is paid into the

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<sup>181</sup> *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

<sup>182</sup> Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 806 n.6 (1994).

<sup>183</sup> The "General Statement" contained in House Report 914, reporting the House's version of the 1964 Act to the full House, explained,

Most glaring . . . is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

H.R. REP. NO. 88-914, at 18 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2393.

Treasury by Negro and white citizens alike—the program must be used for the benefit of both races, without discrimination.”<sup>184</sup>

Celler’s congressional colleagues in both chambers shared this abiding concern. Congressman Roland Libonati, for example, stated that “[t]his section VI of the bill is the enforcement section to eliminate all the prejudices practiced against the Negro in the labor market, in the schools, on questions of relief and other questions.”<sup>185</sup> Similarly, Senator John Pastore asked, rhetorically, “What will [Title VI] accomplish? It will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind.”<sup>186</sup>

This is not to suggest, of course, that Congress wholly disregarded other minority groups or neglected to find facts of other forms of discrimination to support its legislation. It is, rather, only to emphasize that the relatively slim legislative record on some critical questions arises from the appropriate legislative focus that was placed on discrimination against black citizens.

*b. Incorporation of a constitutional standard*

Notwithstanding this single-minded focus, the intent of Congress with respect to the scope of Title VI’s prohibition of racial discrimination is clear in one respect. Members of both the House and Senate intended to apply the Fourteenth Amendment’s standards of racial discrimination to federal programs and activities that receive federal funds. As Justice Powell would later put it, writing for the plurality in *Regents of the University of California v. Bakke*, Title VI evidenced “incorporation of a constitutional standard.”<sup>187</sup>

During floor debate, Senator Humphrey declared that the purpose of Title VI was “to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.”<sup>188</sup> In other words, “the bill bestows no new rights” and only seeks “to protect the rights already guaranteed in the Constitution of the United States, but which have been abridged in certain areas of the country.”<sup>189</sup> Senator Ribicoff agreed that Title VI embraced the constitutional standard: “Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction.”<sup>190</sup>

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<sup>184</sup> 110 CONG. REC. 1518 (1964).

<sup>185</sup> *Id.* at 2469.

<sup>186</sup> *Id.* at 7055.

<sup>187</sup> 438 U.S. 265, 286 (1978).

<sup>188</sup> 110 CONG. REC. at 6544. Senator Humphrey stated this point repeatedly. *See, e.g., id.* at 13,442 (“Section 601 is a policy statement on constitutional law . . .”).

<sup>189</sup> *Id.* at 5252 (statement of Sen. Humphrey).

<sup>190</sup> *Id.* at 13,333. Senator Ribicoff also put it this way:

Senators Claiborne Pell,<sup>191</sup> John Pastore,<sup>192</sup> Gordon Allott,<sup>193</sup> and Joseph Clark<sup>194</sup> made the same point during Senate debate. In the House, the point was also made by Congressman Celler, House Judiciary Committee Chairman and floor manager for the legislation.<sup>195</sup>

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If we are to eliminate discrimination, if we are to agree that discrimination is unlawful, and discrimination is also unconstitutional, then there is no justification for the Federal Government continuing to pay Federal funds to any organ of government . . . that continues to discriminate.

Title VI implements these basic principles. It provides a fair and reasonable procedure for making sure that the Constitution is observed and for making sure that discrimination in the use of Federal funds is ended.

*Id.*

<sup>191</sup> Senator Claiborne Pell asked rhetorically: "Is it not true that the philosophy of title VI is already in the law? The authority is permissive. Title VI would merely extend it, but would not bring in a new concept." *Id.* at 7064.

<sup>192</sup> Senator John Pastore traced the provision to the Thirteenth Amendment:

[I]t is next to disgraceful for us to be appropriating money to promote, preserve, and maintain a system that the Supreme Court of the United States has said is absolutely unconstitutional.

. . . .

We are assuming the position that we should have assumed when the 13th amendment to the Constitution, which freed the slaves, was ratified.

*Id.* at 7057.

<sup>193</sup> Senator Gordon Allott argued, "where Federal funds go to support racially segregated schools and other public institutions or activities, the result is that funds of the United States are used to support and maintain a violation of the Constitution of the United States." *Id.* at 12,677.

<sup>194</sup> Senator Joseph Clark, like Senators Humphrey and Ribicoff, emphasized that the bill would create no new rights distinct from those set forth in the Reconstruction Era amendments:

So I think the Record should show that there is very little basis in logic or in law for the statement that the bill does not give rights to millions of Americans which they do not now possess as a practical matter, but which the Constitution quite clearly sets forth, in the 14th and 15th amendments and the commerce clause and which they have a right to expect their Federal Government to give to them.

*Id.* at 5243.

<sup>195</sup> Congressman Celler explained:

The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds.

*Id.* at 1519.



*c. The Fourteenth Amendment*<sup>196</sup>

As mentioned above, the Supreme Court has already indicated in *dicta*, without discussion or analysis, that “discrimination . . . on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>197</sup> The Court’s observation is correct, but confirmation requires consideration of both the Amendment and the 1866 Act.

The text, structure, and history of the Fourteenth Amendment provide little direct evidence to demonstrate the scope of its anti-discrimination provisions. As compared to other Reconstruction Era civil rights legislation, floor debate on section one of the Fourteenth Amendment includes few statements from which one might discern legislative intent.<sup>198</sup> Nevertheless, the record is clear on one point: “the broad language of Section One [of the Fourteenth Amendment] was . . . widely understood [by its framers] to encompass—that is, to be at least as broad as—the commands of the [1866 Act].”<sup>199</sup> The co-extensiveness of Amendment and Act were made most plain by one of its opponents, Representative Andrew Jackson Rogers, who remarked that, “[t]his section . . . is no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill.”<sup>200</sup> In other words, just as the 1866 Act incorporates the full scope of the Fourteenth Amendment’s prohibition on racial discrimination, the Fourteenth Amendment in turn prohibits racial discrimination at least to the full extent covered under the 1866 Act.

This is not entirely self-evident, as the language of the 1866 Act is very different from that of the Fourteenth Amendment.<sup>201</sup> Nevertheless, the 1866 Act has been

<sup>196</sup> The Fourteenth Amendment, ratified July 9, 1868, provides in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment also provides Congress with the “power to enforce, by appropriate legislation, the provisions of this article.” *Id.* § 5.

<sup>197</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 n.5 (1987) (citations omitted).

<sup>198</sup> Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 47 (1955); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1330 (1952).

<sup>199</sup> Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1244 (1992).

<sup>200</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866).

<sup>201</sup> In pertinent part, the 1866 Act provides as follows:

[C]itizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly

regarded as “[t]he most concrete expression of the Framers’s [sic] understanding of the Fourteenth Amendment,”<sup>202</sup> deliberately fashioned to constitutionalize the 1866 Act (i) to provide constitutional support for the 1866 Act, (ii) to protect the 1866 Act against the prospect of subsequent repeal, and (iii) to provide for more effective enforcement of the 1866 Act.<sup>203</sup> In light of this history, it is clear that the framers of the Fourteenth Amendment intended its scope to be at least as great as that of the 1866 Act—since the Amendment’s purposes could not be achieved if its scope was any narrower—and the only room for question has been whether the scope of the Fourteenth Amendment’s anti-discrimination protection is equal to or broader than that of the 1866 Act.<sup>204</sup>

One of the principal motivating factors leading to the framing of the Fourteenth Amendment was a congressional desire “to provide an incontrovertible constitutional foundation” for the 1866 Act.<sup>205</sup> The 39th Congress had passed the 1866 Act largely under the authority of the Thirteenth Amendment.<sup>206</sup> Many members believed that the Thirteenth Amendment provided adequate constitutional support for the Act.<sup>207</sup> Senator Lyman Trumbull, for example, argued that “[d]epriv[ing] any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the [newly enacted Thirteenth Amendment to the] Constitution is prohibited.”<sup>208</sup> Representative M. Russell Thayer

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convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of Apr. 9, 1866, ch. 31, §1, 14 Stat. 27, 27 (1866).

<sup>202</sup> Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485, 505 (2004).

<sup>203</sup> See generally Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986) (arguing that the legislative history shows an understanding that civil rights were a national issue and need to be enforced by the national government).

<sup>204</sup> For example, Alexander Bickel argued that Section One is broader because it deals not only with racial discrimination but also with other forms of discrimination. Bickel, *supra* note 198, at 60.

<sup>205</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 362 (2005).

<sup>206</sup> The Thirteenth Amendment, ratified December 6, 1865, provides in pertinent part: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1. The Amendment also provides Congress with “the power to enforce this article by appropriate legislation.” *Id.* § 2.

<sup>207</sup> Zietlow, *supra* note 202, at 501.

<sup>208</sup> CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

elaborated that “[t]he [Thirteenth] amendment to the Constitution gave liberty to all; and in giving liberty it gave also a complete exemption from the tyrannical . . . laws which belong to the condition of slavery, and which it is the object of this bill forever to remove.”<sup>209</sup>

Other members maintained that Congress’s power to enforce civil rights laws was inherent in the Constitution, irrespective of the Thirteenth Amendment. Representative William Lawrence, for example, argued that

Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property, and the means essential to that end, by penal enactments to enforce the observance of the provisions of the Constitution, article four, section two, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State.<sup>210</sup>

Many members of Congress disagreed, as did President Andrew Johnson, particularly in light of the Supreme Court’s ruling in *Dred Scott*.<sup>211</sup> Congressman John Armor Bingham, later the principal draftsman of Section One of the Fourteenth Amendment, doubted the 1866 Act’s constitutionality, arguing that

[t]he Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised.<sup>212</sup>

Congress was required to override President Johnson’s veto by a two-thirds majority, the first time that it had done so in American history. Despite the strength of this support for the Act, doubts remained about its constitutionality, even among some congressmen who were strongly supportive of its aims. In short, Republican congressmen were concerned that the courts would interpret the amendment to merely abolish slavery, rather than to establish a broader array of rights to ensure that the newly liberated slaves would not be hampered by the badges of slavery.<sup>213</sup>

Congressman Bingham was among those who strongly supported the goals of the 1866 Act, but constitutional concerns led him to vote against it.<sup>214</sup> Intent upon securing the Act’s constitutional foundations, Bingham became a principal supporter of

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<sup>209</sup> *Id.* at 1152.

<sup>210</sup> *Id.* at 1835.

<sup>211</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>212</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

<sup>213</sup> Kaczorowski, *supra* note 203, at 910.

<sup>214</sup> William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 185 (2002).

what became the Fourteenth Amendment. As Professor William J. Rich has observed, Bingham's "central role in promulgating the Fourteenth Amendment reflected his drive to eliminate all doubts regarding congressional power."<sup>215</sup> Bingham argued that the Amendment would authorize Congress to enforce "'the rights which were guaranteed . . . from the beginning, but which guarantee has been unhappily disregarded by more than one state of this Union . . . simply because of want of power in Congress to enforce that guarantee.'"<sup>216</sup>

Many supporters of the 1866 Act who believed that it was constitutional nevertheless supported enactment of the Fourteenth Amendment to allay any remaining doubts.<sup>217</sup> Representative Thomas D. Eliot expressed this perspective:

I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.<sup>218</sup>

Other congressmen agreed with Representative Eliot, joining in his call to provide greater constitutional fortitude for the 1866 Act.<sup>219</sup> In short, a consistent refrain among members of the 39th Congress was that a constitutional amendment was necessary to strengthen the support for the 1866 Act, either because the Act was not sufficiently supported by the existing Constitution or because others might later erroneously claim that it was unconstitutional.

A second and similar motivation was to ensure that the 1866 Act would not be repealed when Southern Democrats returned to Congress.<sup>220</sup> As Representative James A. Garfield explained:

The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when [the Democratic] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the

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<sup>215</sup> *Id.*

<sup>216</sup> Zietlow, *supra* note 202, at 503 (omissions in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866)).

<sup>217</sup> Kaczorowski, *supra* note 203, at 910.

<sup>218</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

<sup>219</sup> *See, e.g., id.* at 1088 (statement of Rep. Frederick E. Woodbridge) (arguing that most of the civil rights work "may be done by legislation. . . . But the experience of this Congress in that regard has been most unfortunate"); *id.* at 2465 (statement of Rep. Martin R. Thayer) ("[I]n the estimation of this House [the 1866 Act] cannot be sustained as constitutional.").

<sup>220</sup> Kaczorowski, *supra* note 203, at 910.

serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it.<sup>221</sup>

Similarly, some members may have been concerned that some courts were refusing to enforce the 1866 Act on constitutional grounds.<sup>222</sup> In fact, as Professor Eugene Gressman pointed out, some courts challenged the constitutionality of the 1866 Act,<sup>223</sup> although others affirmed it.<sup>224</sup> For this reason, the Amendment was thought to provide a necessary bulwark against judicial activism.

It is clear, then, that Congress's enactment of section One of the Fourteenth Amendment was intended, in significant measure, to provide a firmer constitutional protection for the rights defined in the 1866 Act. Since the Amendment was intended to support the Act, it stands to reason that the scope of its protections could not be narrower than the scope of the statutory provisions that rest upon it. The constitutional basis for the 1866 Act—whether it be the Thirteenth Amendment or the Fourteenth Amendment—must therefore provide protections against racial discrimination that are at least as broad as those contained in the 1866 Act, and those broad protections (including protections against anti-Semitism) are therefore incorporated into the 1964 Act as well.

### 3. Analysis: Anti-Semitism as Racial Discrimination

The most significant legal challenge facing efforts to combat campus anti-Semitism has been the argument that discrimination on the basis of "race," as it is defined within the meaning of the Civil Rights Act of 1964, does not apply to discrimination against Jews. This argument has an emotional edge to it, of course, because racialist conceptions of Jewishness have a particularly odious pedigree. After *St. Francis College* and *Shaare Tefila*, the argument has been articulated as follows: anti-Jewish discrimination may be considered racial discrimination under the 1964 Act only if Jews were considered to constitute a race in 1964, just as anti-Jewish discrimination is considered racial discrimination under the 1866 and 1870 Acts<sup>225</sup> only because Jews were considered a race during 1866–70. The body of evidence demonstrating that Jews were no longer considered to constitute a separate racial group in 1964 is as formidable as the body of evidence demonstrating that they were so considered in 1866.<sup>226</sup>

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<sup>221</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

<sup>222</sup> Gressman, *supra* note 198, at 1328.

<sup>223</sup> *Id.* at 1328 & n.19(citing *People v. Brady*, 40 Cal. 198 (1870); *Bowlin v. Commonwealth*, 65 Ky. (1 Bush) 5 (1867)).

<sup>224</sup> *Id.* at 1328 n.18 (citing *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151); *People v. Washington*, 36 Cal. 658 (1869); *Smith v. Moody*, 26 Ind. 299 (1866); *In re Turner*, 24 F. Cas. 339 (C.C.D. Md. 1867) (No. 14,247); *Hart v. Hoss & Elder*, 26 La. Ann. 90 (1874)).

<sup>225</sup> See *supra* note 199 for text of the Act.

<sup>226</sup> See, e.g., 13 COLLIER'S ENCYCLOPEDIA 569 (1964) ("A common error and persistent

This is the main reason that the Office for Civil Rights rejected anti-Semitism claims until 2004.<sup>227</sup> This approach is, however, based upon an erroneous interpretation of both the 1964 Act and the *St. Francis College* and *Shaare Tefila* cases.

Given the intent of the framers of the 1964 Act, the scope of racial discrimination prohibited in 1964 is based upon the scope of the Reconstruction Era civil rights legislation. The scope of racial discrimination prohibited under the 1866 and 1964 Act is identical because both statutes bar racial discrimination to the same extent authorized under the Thirteenth and Fourteenth Amendments. The Supreme Court repeatedly and correctly recognized that the scope of racial discrimination barred under Title VI is coextensive with that which is prohibited under the Equal Protection Clause and the Fifth Amendment.<sup>228</sup> This holding is based upon the documented intent of legislators to ensure that federal funds are not used in a manner that violates constitutional requirements.<sup>229</sup>

Under the alternative approach, basic civil rights statutory terms such as “race,” “religion,” and even “sex” should be defined differently for each anti-discrimination statute in which they appear. In order to determine the scope of protection provided, it would be necessary to analyze the manner in which the terms were used as of the date of the bill’s passage. This is in part a project for the history of anthropology and related social sciences. Under the *St. Francis College* analysis, however, it is not merely a matter of social scientific history. Because the *St. Francis* Court has taught us that “race” is no mere anthropological concept—but may in fact be a socio-political construct—the task of statutory interpretation under this approach requires a socio-political analysis of the construction of race in each historical period in which

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modern myth is the designation of the Jews as a ‘race.’”); 16 THE ENCYCLOPEDIA AMERICANA 119–20 (1964) (“Jews have always been racially mixed, having absorbed individuals and groups of many races throughout their long history. . . . Anthropologists disagree about the racial continuity of the modern Jews with their Palestinian ancestors.”).

<sup>227</sup> See *supra* note 5.

<sup>228</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”); see also *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (noting that § 601 of the regulations implementing Title VI “proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment” (alteration in original) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978))); *United States v. Fordice*, 505 U.S. 717, 732, n.7 (1992) (“Our cases make clear, and the parties do not disagree, that the reach of Title VI’s protection extends no further than the Fourteenth Amendment.” (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., concurring) (“In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”))); *Bakke* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (declaring that Title VI, “merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds.”).

<sup>229</sup> See *supra* note 188 and accompanying text.

Congress has legislated on the subject. Moreover, it could be argued that socio-political trends are sufficiently mutable that racial conceptions may evolve even within historical periods as brief as the Reconstruction and Civil Rights Era. Indeed, it has been argued, albeit unsuccessfully, that the concept of race changed so rapidly between the 1866 Act and the Civil Rights Act of 1871 as to exclude Jews from the protection of anti-racial discrimination legislation only five years after the 1866 Act was passed.<sup>230</sup> This approach would render the scope of civil rights protections as mercurial as the socio-political trends underlying our various conceptions of group identities. This approach would also, ironically, provide a far lower degree of protection than would the Court's originalist approach because the scope of racial anti-discrimination law would contract, as the scope of that term has historically become more narrow. This over-stringency runs counter to the doctrine that anti-discrimination laws should be construed broadly to effectuate their remedial purpose.

In sum, the legislative history of the pertinent statutes and amendments demonstrates that Title VI must provide the same broad protection against anti-Semitic harassment in federally funded programs and activities that the 1866 Act established in the context of contracts and property.

### *B. Anti-Semitism as National Origin Discrimination*

As an intuitive matter, many policy-makers would prefer to bar anti-Semitism as a form of national origin discrimination because that category appears, at first blush, to approach most closely the common understanding of Jews as an ethnic group. In fact, the legal basis for barring anti-Semitism as a form of national origin discrimination is much shakier than the ground for barring it as a form of racial discrimination.

Although this area of the law is unsettled, at least one district court has held (in an unpublished memorandum opinion) that Jews do not constitute a national origin group under Title VII,<sup>231</sup> but a couple of others have held that they do.<sup>232</sup> This reflects the current tension that exists, more generally, with respect to the scope of "national origin" protection. Some lower courts have extended "national origin" broadly to include, e.g., gypsies,<sup>233</sup> Serbs,<sup>234</sup> Cajuns,<sup>235</sup> and Ukrainians<sup>236</sup> at times when these groups have not held independent nations. Such courts have relied upon various ancestral or ethnic

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<sup>230</sup> Section 2 of the Civil Rights Act of 1871 is the parent of § 1985. *See United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002).

<sup>231</sup> *Lapine v. Edward Marshall Boehm, Inc.*, No. 89-C-8420, 1990 U.S. Dist. LEXIS 3459 (N.D. Ill. Mar. 28, 1990). This unpublished opinion provides only a brief, perfunctory discussion of the issue and cannot be considered persuasive.

<sup>232</sup> *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976).

<sup>233</sup> *Janko v. Ill. State Toll Highway Auth.*, 704 F. Supp. 1531, 1532 (N.D. Ill. 1989).

<sup>234</sup> *Pejic v. Hughes Helicopter, Inc.*, 840 F.2d 667 (9th Cir. 1988).

<sup>235</sup> *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215 (W.D. La. 1980).

<sup>236</sup> *Kovalevsky v. West Publ'g Co.*, 674 F.Supp. 1379 (D. Minn. 1987).

features to establish “nationality”: physical characteristics,<sup>237</sup> language,<sup>238</sup> distinct culture,<sup>239</sup> surnames,<sup>240</sup> documented history of the group’s existence,<sup>241</sup> physiognomically distinct characteristics,<sup>242</sup> and even predominant religion.<sup>243</sup> Some of these traits could form the basis of an argument that American Jews form a national origin group. Similarly, the U.S. Equal Employment Opportunity Commission has defined national origin discrimination to “includ[e], but not [be] limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”<sup>244</sup> Such a broad construction of “national origin” could be used to prohibit anti-Semitism.

On the other hand, the single Supreme Court case to analyze “national origin” within the meaning of the 1964 Act, *Espinoza v. Farah Manufacturing Co.*, interpreted the term very narrowly.<sup>245</sup> In *Espinoza*, the plaintiff alleged that the defendant clothing company’s policy of restricting its hiring to United States citizens constituted national origin discrimination in violation of Title VII.<sup>246</sup> The Court, noting the absence of significant legislative history on this issue, held that Title VII only protected U.S. citizens from discrimination.<sup>247</sup> When specifically addressing the national origin issue, Justice Marshall noted that national origin “on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>248</sup>

The legislative history of the 1964 Act provides little guidance. As Juan Perea has noted, since Congress’s principal concern in enacting the 1964 Act was with race, “national origin” was likely included as “boilerplate,” since it had previously been included in executive orders and prior legislation.<sup>249</sup> Congress provided similarly sparse illustration of the scope of Title VI’s prohibition on national origin discrimination. Chairman Celler provided one of the few pertinent explanations during an exchange on the House floor with Congressman Thomas Gerstle Abernethy.<sup>250</sup> At

<sup>237</sup> *United States v. Texas*, 342 F. Supp. 24, 25 (E.D. Tex. 1971).

<sup>238</sup> *Lau v. Nichols*, 414 U.S. 563 (1974); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

<sup>239</sup> *Texas*, 342 F. Supp. at 25–26.

<sup>240</sup> *Id.* at 26.

<sup>241</sup> *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 217 (W.D. La. 1980).

<sup>242</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987).

<sup>243</sup> *Texas*, 342 F. Supp. at 25.

<sup>244</sup> 29 C.F.R. § 1606.1 (2006).

<sup>245</sup> 414 U.S. 86 (1973).

<sup>246</sup> *Id.* at 87.

<sup>247</sup> *Id.* at 88–89.

<sup>248</sup> *Id.* at 88.

<sup>249</sup> Perea, *supra* note 182, at 807. While Professor Perea’s comments are directed specifically towards Title VII, they are no less true with respect to Title VI.

<sup>250</sup> 110 CONG. REC. 1528 (1964).



that time, Chairman Celler suggested that the inclusion of “national origin” into Title VI was intended to address discrimination against Puerto Ricans:

Mr. ABERNETHY. . . . Now what national origin—what group of that character have been discriminated against?

Mr. CELLER. There were discriminations mentioned concerning certain groups like Puerto Ricans.

Mr. ABERNETHY. They were not discriminated against then because of color?

Mr. CELLER. Well, they were discriminated against because of national origin.<sup>251</sup>

During Senate floor debate, Senator James Eastland complained that the bill left terms like “national origin” undefined and ambiguous:

There is no definition of “national origin.” Each Federal department or agency is given *carte blanche* to define these words as it may determine by “rule, regulation, or order.” Federal political appointees in the executive departments will invent their own definitions and make their own rules. They will devise their own penalties.<sup>252</sup>

In sum, the legislative history sheds little light on what Congress intended by its inclusion of “national origin” in Title VI.

If this Court should address this issue in the future, it will find a significant tension between its *Espinoza* precedent on the one hand and the direction that the lower courts and the EEOC have taken on the other. Given the broad scope of “race” discrimination under the 1964 Act, the resolution of the “national origin” issue should be immaterial to the anti-Semitism question. However, it should be observed that establishing protection under the “national origin” classification will be a more difficult hurdle than under the “race” classification, in light of the differing approaches of *Shaare Tefila* and *Espinoza*.

### *C. Anti-Semitism as Religious Discrimination*

Susan Tuchman has argued that Title VI prohibits religious discrimination, even though Congress omitted the term “religion” from the prohibited bases of discrimination listed in Title VI.<sup>253</sup> Interestingly, Ms. Tuchman’s argument is supported by a wide range of authorities that have listed “religion” among the forms of discrimination

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 5863.

<sup>253</sup> Tuchman, *supra* note 141.

that Title VI prohibits. These discussions, however, invariably occur in dicta, unsupported by any form of analysis, and appear in context to be simple error. The legislative history of Title VI demonstrates that Congress intentionally refrained from prohibiting religious discrimination in educational institutions in order to permit religious institutions to select their own faculties and students.

### 1. The Argument for Tacit Prohibition

Tuchman argues that the legislative history of Title VI demonstrates both congressional concern about religious discrimination and a congressional intent to eliminate religious discrimination.<sup>254</sup> In fact, she correctly notes that at least one Senator stated that Title VI would prohibit religious discrimination. Indeed, as she observes, numerous courts have similarly indicated that Title VI prohibits religious discrimination.<sup>255</sup> However, every one of these references appears in dicta, unaccompanied by any reasoning or analysis and appears to be a simple misstatement, just as Senator Ervin's statement appears to be a simple error. The term "religion" is simply included by rote in a boilerplate list of discriminatory bases that people assume, incorrectly, must have been barred by Title VI. As a basic rule of statutory construction, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>256</sup> In this case,

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<sup>254</sup> *Id.* Tuchman relies in part upon then-Senator Sam Ervin's statement that "the discrimination condemned by [Title VI] occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 338 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part) (quoting Senator Ervin).

<sup>255</sup> *See, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979) ("[V]ictims of discrimination on the basis of . . . religion . . . have had private Title VI remedies available . . . since 1965 . . ."); *Grove City College v. Bell*, 687 F.2d 684, 691 (3d Cir. 1982), *superseded by statute*, Civil Right Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, *as recognized in* *Radcliff v. Landau*, 883 F.2d 1481 (9th Cir. 1989) ("Title VI of the Civil Rights Act of 1964 . . . proscribes discrimination by reason of . . . religion . . ."); *Carmi v. Metro. St. Louis Sewer Dist.*, 620 F.2d 672, 679 n.11 (8th Cir. 1980) (McMillian, J., concurring) ("Title VI prohibits discrimination based on . . . religion . . ."), *cert. denied*, 449 U.S. 892 (1980); *Oti Kaga, Inc. v. S.D. Hous. Dev't Auth.*, 188 F. Supp. 2d 1148, 1167 (D. S.D. 2002) ("[Title VI] prohibits the exclusion of anyone in a federally-assisted program on account of . . . religion . . ."), *aff'd*, 342 F.3d 871 (8th Cir. 2003).

Similarly, President Clinton's Executive Order (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs) states that "discrimination on the basis of . . . religion . . . [is prohibited] under Title VI of the Civil Rights Act[] of 1964 . . ." Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 27, 2000).

<sup>256</sup> *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Congress did not merely omit “religion” from Title VI, while including it in Title IV, Title VII, and elsewhere. In fact, Congress deliberately stripped “religion” from the legislation. While Congress’s precise purpose in stripping this probation from the bill may be debated, it is clear that it did so deliberately.

## 2. Deletion of Religion

The primary congressional intent in stripping religious discrimination from Title VI appears to have been concern over the ability of denominational institutions to discriminate in favor of co-religionists in academic admissions, choir, and employment.

The original version of the statutory language that became Title VI, drafted by the Department of Justice,<sup>257</sup> explicitly prohibited religious discrimination.<sup>258</sup> However, the Committee on the Judiciary deleted the prohibition on religious discrimination from what became Title VI. The Committee report provides no explanation for the deletion of religion from what was to become Title VI. Here is what happened. After four months of hearings, Subcommittee No. 5 of the Judiciary Committee adopted a substitute amendment replacing entirely the substantive text as proposed by the DOJ.<sup>259</sup> Among other substantial changes, this substitute version did not include the term “religion” in Title VI. The full Committee on the Judiciary, in its reported version, accepted the subcommittee’s recommendation and reported the bill to the full House.<sup>260</sup>

There is little legislative history to explain this decision by Subcommittee No. 5. Even House Report 914, reporting H.R. 7152 to the full House, does not discuss the change, though the report does discuss other substantive changes the Subcommittee and

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<sup>257</sup> 110 CONG. REC. 2462 (1964).

<sup>258</sup> Section 601 originally provided as follows:

Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, *religion*, or national origin.

S. 1731, 88th Cong. § 601 (1963) (emphasis added); *see also* 109 CONG. REC. 11,252 (1964) (introducing H.R. 7152 by Congressman Celler, Chairman of the House Committee on the Judiciary).

<sup>259</sup> *See* H.R. REP. NO. 88-914, pt. 1, at 16–17 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2391–92.

<sup>260</sup> *See* 110 CONG. REC. 2462–65 (1964).

the full Committee made to the proposed text.<sup>261</sup> Discussion on the omission of the term “religion” from Title VI is also omitted from the views of Judiciary Committee members included alongside the full Judiciary Committee report.<sup>262</sup>

On January 31, 1964, H.R. 7152’s sponsor, Congressman Celler, explained during floor debate that he had been concerned about permitting denominational colleges to engage in certain forms of discrimination in favor of co-religionists:

There may be employees in a denominational college where it is required that people of certain faith do the particular kind of work that is required—and that is somewhat in the nature of discrimination if the authorities would only have those of a certain faith, consistent with the faith that dominates that college . . . . Therefore, they have to discriminate in favor of those of their religion.<sup>263</sup>

The following week, during floor debate, Congressman Celler amplified upon this explanation:

The clergy who testified accepted and stated they supported fully this bill with religion omitted.

By eliminating religion, we avoid a good many problems which I am sure the gentleman understands. The aid now goes to sectarian schools and universities. Local sectarian welfare groups, I am sure you will agree, do an excellent job. There is no religious discrimination, of course, among them.

For these reasons, the subcommittee and, I am sure, the full committee or the majority thereof deemed it wise and proper and expedient—and I emphasize the word “expedient”—to omit the word “religion.”<sup>264</sup>

This explanation is a plausible one and fully explains the congressional decision to strip “religion” from the bill. It may have been difficult, however, for some members to explain why they had stripped such a core provision from the legislation and whether they were placing the interests of parochial institutions above the civil rights of certain religious minorities.

A complete discussion of this legislative history must acknowledge that legislators also identified an additional justification for the omission, perhaps to assuage concerns

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<sup>261</sup> See, e.g., H.R. REP. NO. 88-914 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391.

<sup>262</sup> See, e.g., *id.* pt. 2, at 1–27, 1964 U.S.C.C.A.N. at 2487–513 (additional views on H.R. 7152 of Hon. William M. McCulloch et al.).

<sup>263</sup> 110 CONG. REC. 1528 (1964).

<sup>264</sup> *Id.* at 2462.

that their primary justification may have caused, although their secondary explanation is far less persuasive. Congressman Celler contended somewhat mysteriously—and manifestly counter to the evidence—that Congress had obtained little evidence of religious discrimination:

We had testimony concerning religion. We did not have very much testimony of discriminations on the grounds of religion. You will notice in one of the titles, religion is left out.

. . . .

We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against.<sup>265</sup>

Surprisingly, Congressman Peter Rodino, Jr., agreed with Celler's contention during floor debate:

[T]here is a specific reason why religion was left out of title VI. There was no evidence that there was a need to include religion on the question of discrimination.

Various members of the clergy of the different faiths appeared before the committee and testified that religious discrimination was not a question. We attempted to meet the problems as they arose. As a result, we did not include religion.<sup>266</sup>

Rodino and Celler supported this argument with testimony that Subcommittee No. 5 received from Father John Cronin, Associate Director of the Social Action Department of the National Catholic Welfare Conference, and Rabbi Irwin Blank, Chairman of the Commission on Social Action, Synagogue Council of America.

Father Cronin had testified that he did not believe that the term "religion" should be included in the Civil Rights Act of 1964:

There are remnants of religious discrimination in the United States, but compared to the instant problem before us, of the civil rights of the Negro community, these are very, very minor and peripheral and I would not have any feeling that this should be broadened . . . . [T]he amount of religious discrimination in say, employment, public accommodations is very, very slight. . . . It is almost a matter of private injustice or private wrong rather than anything that involves public law.<sup>267</sup>

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<sup>265</sup> *Id.* at 1528.

<sup>266</sup> *Id.*

<sup>267</sup> *Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction*

During floor debate, Congressman Peter Rodino read part of this particular statement into the record to support his argument that religious discrimination was not pervasive and that the term “religion” should be omitted from Title VI.<sup>268</sup>

I don't believe that need is very pressing at this time. There are remnants of religious discrimination in the United States, but compared to the instant problem before us, of the civil rights of the Negro community, these are very, very minor and peripheral and I would not have any feeling that this should be broadened; no.<sup>269</sup>

When Congressman George Meader asked Rabbi Blank for his opinion regarding the omission of “religion” from various parts of the legislation, Blank responded:

It would be my impression along with Father Cronin that those agencies in Jewish life which have taken on the responsibility of dealing with questions of anti-Semitism and discrimination have been reporting of late a very significant decline in this kind of religious discrimination. . . . I do not think of this as being a significant omission at this point.<sup>270</sup>

If this testimony was truly the basis for the deletion of “religion” (as opposed to a pretext concocted to ensure political support), it raises several questions. For instance, despite Father Cronin and Rabbi Blank's testimony, the Judiciary Committee retained the term “religion” in fifteen other places within its reported version of H.R. 7152.<sup>271</sup> Celler explained that this was because the Committee found “elements of discrimination based on religion [as applied in other titles], so it was deemed wise to include ‘religion’ in those other titles” in contrast to the need for it to appear in Title VI.<sup>272</sup> Discussion of these “elements,” however, does not appear within Subcommittee No. 5's published hearing record and was not explained during floor debate. Moreover, it is entirely implausible that the Judiciary Committee found that enforcement mechanisms were needed to ensure that religious discrimination did not perpetuate unlawful segregation (Title VI) but that it was not a problem in federally funded institutions generally.

Moreover, this alleged paucity of religious discrimination in programs that receive federal funding conflicts directly with evidence presented to the House of

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*of the United States: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 88th Cong. 2030 (1963) [hereinafter *Subcommittee No. 5 Hearings*].*

<sup>268</sup> 110 CONG. REC. 1529 (1964).

<sup>269</sup> *Subcommittee No. 5 Hearings, supra* note 267, at 2030.

<sup>270</sup> *Id.* at 2031.

<sup>271</sup> 110 CONG. REC. at 2462.

<sup>272</sup> *Id.*

Representatives Committee on Education and Labor during the same period.<sup>273</sup> Notably, testimony in that committee's General Subcommittee on Labor regarding the existence of discrimination against those of Jewish ancestry was being heard at approximately the same time Subcommittee No. 5 was finding that no religious discrimination existed.<sup>274</sup> During three months in 1963, the General Subcommittee on Labor heard testimony from Jewish leaders and various state officials that discrimination against those of the Jewish faith was rampant in the nation's employment and other practices—including, among those agencies and programs that receive federal funding.<sup>275</sup>

The Special Subcommittee on Labor was presented, for example, with a 1954 survey of the Anti-Defamation League, which reported discrimination against Jewish graduates in higher education job placement offices.<sup>276</sup> A representative from the American Jewish Congress broadly concluded that "there is of course a continuing pattern of discrimination, that is, particularly among Negroes but, without surprise, among Jews as well."<sup>277</sup> The Subcommittee also heard testimony that between 1953 and 1960, the President's Committee on Government Contracts reported that 23.4% of complaints received were based on "creed," which at least one expert attributed to the "Jewish religion."<sup>278</sup> A review of the records of Subcommittee No. 5's proceedings indicates that this evidence of discrimination based on Jewish ancestry was not presented during the course of the Subcommittee's fact-finding when it drafted the substitute version of Title VI.<sup>279</sup>

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<sup>273</sup> The General Subcommittee on Labor's hearings were conducted in consideration of H.R. 405, "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age." *To Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry, or Age: Hearing on H.R. 405 and Similar Bills Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 88th Cong. (1963) [hereinafter *Subcommittee on Labor Hearings*]. At least one scholar has argued that H.R. 405 was the "nominal ancestor" to what became Title VII of H.R. 7152. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433 (1966).

<sup>274</sup> The General Subcommittee on Labor (then considering H.R. 405) heard testimony regarding the existence of religious discrimination on May 7, 1963. See, e.g., *Subcommittee on Labor Hearings*, *supra* note 273, at 116–22. By contrast, Subcommittee No. 5 heard testimony from clergy regarding the virtual nonexistence of religious discrimination on July 24, 1963—less than three months later. See, e.g., *Subcommittee No. 5 Hearings*, *supra* note 267, at 2030–31. The apparently irreconcilable nature of the testimony considered by both subcommittees appears unexplained in the Congressional Records and other sources.

<sup>275</sup> See, e.g., *Subcommittee on Labor Hearings*, *supra* note 273, at 116–22.

<sup>276</sup> See *Proposed Federal Legislation to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry, Age or Sex: Hearings Before the Spec. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 87th Cong. 585 (1961).

<sup>277</sup> *Subcommittee on Labor Hearings*, *supra* note 273, at 122.

<sup>278</sup> *Id.* at 119.

<sup>279</sup> See generally *Subcommittee No. 5 Hearings*, *supra* note 267.

In short, Congress's apparent purpose in deleting "religion" was to permit religious institutions to discriminate in favor of co-religionists. This was an understandable concern, and it also underlies religious institution exceptions to various other civil rights laws. It may be, however, that this congressional (and constitutional) interest was controversial in 1964 as in fact it has remained controversial to this day, as the competing claims of religious liberty and civil rights protections continue to play out in a variety of contexts. Some members proffered the alternative rationale that a ban on religious discrimination was not needed in light of the decline in that problem in the years leading up to 1964.<sup>280</sup> This explanation, though, is questionable in light of both the number of times that religious discrimination is addressed elsewhere in the 1964 Act (where it would not pose a threat to parochial schools) and also the conflicting evidence then before Congress, showing at least some basis for the proposition that Congress was aware in 1964 of the continuing problem of religious discrimination in federally funded educational institutions.

### 3. Analysis: Viability of the Religious Discrimination Exception

The prohibition of anti-Semitic discrimination, subject to an exception for discrimination based solely upon the tenets of religious faith, comports with the legislative history of the 1964 Act. In light of the clear legislative intent to strip "religion" from Title VI, the contrary authorities may be dismissed as being simple errors. Senator Ervin's mistake is understandable in light of the bill's evolution, and the courts' errors are similarly understandable in light of the inclusion of religion in so many other antidiscrimination statutes.<sup>281</sup>

On the other hand, the sheer frequency with which the courts have listed religion among the prohibited bases of discrimination may suggest a deeper point. To begin with, it confirms Professor Perea's point that Congress was so focused on the plight of African Americans that its inclusion of non-racial categories, such as national origin or religion, was often a matter of "boilerplate," based on the established legislative habit of listing in civil rights legislation more or less the same "usual suspect" classifications, if the pun may be excused, although the classifications were described in different ways from time to time.<sup>282</sup> This legislative sloppiness, while initially disconcerting, becomes less significant when one realizes that the listing of prohibited discriminatory bases was not intended to create specific new rights to protection from, say, racial or national origin discrimination.<sup>283</sup> Rather, Congress's goal merely was to provide an enforcement mechanism to protect those rights that had been established a century before in the Reconstruction Era civil rights statutes and amendments without exceeding the scope of that legislation in a manner that could impair the religious liberties

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<sup>280</sup> See *supra* notes 265-69 and accompanying text.

<sup>281</sup> See *supra* note 271.

<sup>282</sup> Perea, *supra* note 182, at 806-07.

<sup>283</sup> See *supra* Part II.A.2.b-c.



of faith-based educational institutions.<sup>284</sup> This understanding confirms Congress's intent to apply the new enforcement mechanism to ban from federally funded educational institutions the various forms of discrimination prohibited under, for example, the 1866 Act, the Thirteenth Amendment, and the Fourteenth Amendment, including anti-Semitic harassment, subject to a limited, legislatively implied exception for discrimination that is based exclusively on religious faith.

This point is not intuitively obvious. The question under *Shaare Tefila* is: what identifiable classes did Congress intend to protect?<sup>285</sup> It certainly gives one pause to see that at least some members of Congress seriously considered and deliberately rejected statutory language that would have provided Title VI protection to religious minorities, explicitly including Jewish students. At the same time, Congress's decision not to provide this additional protection does not in any way vitiate their manifest intent to protect racial minorities from racial discrimination to the full extent established under the Reconstruction Era Amendments. To this extent, Congress's tacit determination to extend only racial discrimination protection to Jews and not religious discrimination protection results only in the situation that the Title VI anti-Semitism bar necessarily has an exception for discrimination that is strictly religious in animus.

Another implication of the courts' frequent confusion on this matter is that the exclusion of religion is counter-intuitive because it does not sit well with the structure of the statute as a whole. Indeed, it is difficult to fully reconcile the religious discrimination exception with congressional intent to prevent government funding of unconstitutional discrimination. In a sense, the religious discrimination exception remains one bit of unfinished business left over from the 1964 Act. To the extent that this "loophole" remains open, it cannot be maintained that Congress has fully achieved its purpose, as Senator Humphrey put it, "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation."<sup>286</sup> Ironically, this purpose could be achieved, with careful draftsmanship, in a manner that permits religious educational institutions to select faculty and students to the same extent that they are able under existing law. A legislative solution to close this loophole would appear appropriate but is beyond the scope of this Article.<sup>287</sup>

### III. ANTI-SEMITISM, HARASSMENT AND THE FREEDOM OF SPEECH

Under what circumstances does anti-Semitic harassment constitute a Title VI violation? Having established that anti-Semitic incidents may be covered under Title VI,

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<sup>284</sup> See *supra* Part II.A.2.b–c.

<sup>285</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) ("The question before us is whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect.").

<sup>286</sup> 110 CONG. REC. 6544 (1964).

<sup>287</sup> For a discussion of this legislation proposal, see Kenneth L. Marcus, *The Most Important Right We Think We Have but Don't: Freedom from Religious Discrimination in Education*, 7 NEV. L.J. 171 (2007).

it remains to describe the circumstances under which they are covered. In this context, two questions are typically raised. The first is whether the recent incidents have been sufficiently severe to merit federal intervention. The second is whether the First Amendment may protect some of the conduct which is alleged to violate Title VI.

#### A. *The Scope of Title VI Harassment*

The Supreme Court has held that “severe, pervasive, and objectively offensive” student-on-student harassment may be actionable when it has a “concrete, negative effect” on a student’s “ability to receive an education.”<sup>288</sup> This standard, developed in the context of sex discrimination in the public schools, applies equally to other forms of discrimination in federal programs and activities, including ethnic discrimination in post-secondary education.<sup>289</sup> While this standard may be difficult to apply on a case-by-case basis, the difficulties are not unique to anti-Semitism cases; all harassment cases, particularly in the student-on-student context, raise practical difficulties in application. Anti-Semitism is no exception. Nevertheless, it is clear that this standard is a stringent one—more stringent than is commonly recognized—and that a substantial pattern of hostile behavior must be shown to demonstrate a violation.<sup>290</sup>

This judicial standard, it must be observed, varies significantly from OCR’s current standard. Under OCR’s harassment standard, unchanged since *Davis*, the Education Department will find a violation if an institution

has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently *severe, pervasive or persistent* so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.<sup>291</sup>

The Court’s *Davis* standard (“severe, pervasive, and objectively offensive”) differs from OCR’s standard (“severe, pervasive or persistent”) particularly with respect to

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<sup>288</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653–54 (1999).

<sup>289</sup> Both courts and agencies have generally articulated the standards for the different categories of harassment in the same terms and have purported to apply them in the same manner. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986); 29 C.F.R. § 1604.11 n.1 (1997) (“The principles involved here continue to apply to race, color, religion or national origin.”). This is not to say, however, that the standards are always applied in the same manner, as others have observed that this is not always the case. Heather L. Kleinschmidt, Note, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J., 1119, 1124–30 (2005).

<sup>290</sup> *See Davis*, 526 U.S. at 859–60.

<sup>291</sup> Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994) (emphasis added) [hereinafter *Racial Incidents Guidance*].

the substitution of conjunctive for disjunctive. In other words, seven years after *Davis*, OCR has not revised its regulations to reflect the Supreme Court's determination that a hostile educational environment requires not merely severe *or* pervasive misconduct, but also conduct that is sufficiently severe, pervasive, *and* objectively offensive as to deny a student an equal educational opportunity.<sup>292</sup>

The most significant ramification of this distinction appears with respect to "single-instance" episodes of harassment, an important category in that it likely covers many of the recent, lower-profile anti-Semitic incidents on college campuses.

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<sup>292</sup> Under conventional analysis, one might conclude that OCR must correct this discrepancy in order to conform its enforcement activities with the Supreme Court's interpretation of Title VI. Administrative agency deviations from binding judicial precedent, when deliberate, are typically characterized as "administrative agency nonacquiescence." During the 1980s, this practice was frequently analyzed by legal commentators. See Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1340 n.4 (1991) (listing over thirty law review articles and notes addressing various forms of nonacquiescence from 1982 to 1991). Most courts and commentators have been critical of the practice. *Id.* The newer school of decision rules constitutional analysis may, however, provide a somewhat different perspective on the practice. See, e.g., Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (discussing the role of precedent in the content and process of constitutional doctrine which is implemented in the context of institutional needs); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–67 (2005) (describing the decision rules model). Under the decision rules model, one would distinguish between the two outputs of judicial implementation: operative propositions, which interpret the meaning of laws, and decision rules, which provide directives to lower courts regarding how the operative propositions should be applied. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (distinguishing operative propositions from decision rules). In *Davis*, one might identify the operative proposition as the Court's determination that Title IX of the Education Amendments Act of 1972 prohibits federally funded programs and activities from deliberately ignoring student-on-student sexual harassment. *Davis*, 526 U.S. at 643. The *Davis* decision rule—requiring that the harassment be severe, pervasive, and sufficiently objectively offensive, *id.* at 653–54—may be construed as a judicially manageable standard to implement the operative proposition in money damages cases. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1297–313, 1317 (2006). Such decision rules, however, may be based on the judiciary's own "institutional considerations" unrelated to the meaning of the legal provision. Berman, *supra*, at 95 (citing decision rules that "seem patently motivated by institutional considerations"). Assuming that executive agencies must defer to the judiciary's interpretations of the meaning of laws, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it is not clear that agencies must apply the same decision rules implemented by the judiciary, particularly when, as in *Davis*, those rules underenforce the underlying legal norms. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220–28 (1978) (discussing the legal status and direct consequences of "judicially underenforced constitutional norms"). Whether OCR should apply the same decision rules as the courts may depend on a host of factors, such as OCR's own institutional considerations as well as its assessment of the likelihood that its cases will end up in an Article III court. A complete discussion of this topic would, of course, exceed the scope of this Article.

Although this issue has been addressed most notably in the context of sexual harassment, the issue is identical in the context of racial and ethnic discrimination. OCR has stated—both before and after *Davis*—that “a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.”<sup>293</sup> This claim, however, was rejected by the *Davis* Court, which observed that,

[a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.<sup>294</sup>

Notwithstanding OCR’s doctrinal deviation, hostile environment must be understood (at least since *Davis*) to require multiple incidents in order to be “severe, pervasive, and objectively offensive.”<sup>295</sup>

Following *Davis*, campus anti-Semitism will rise to the level of a Title VI violation only on those rare occasions when the incidents on a particular campus are as severe as we have seen during the most notorious episodes, when the conduct pervades the life of the university, and when it is so *objectively* offensive as to diminish educational opportunities for at least one Jewish student. Even then, the university must be on notice of the problem and fail to take adequate steps to remedy it.<sup>296</sup> Although this is a highly stringent standard, it does have real teeth. OCR’s decision to assert jurisdiction in the UC Irvine case, for instance, necessarily implies (under OCR’s investigative rules) OCR’s preliminary determination that the facts alleged, if true, are sufficient to confer subject matter jurisdiction, *i.e.*, that ZOA had properly alleged hostile environment discrimination at Irvine.<sup>297</sup> A similar determination would surely have been made at San Francisco State, had OCR’s 2004 policy been in place in 2002, absent President Corrigan’s swift and exemplary response to the problem on his campus.<sup>298</sup> Whether a Title VI case could be made at Columbia University is a harder question, as the facts there are harder to establish, despite the attention garnered in the wake of *Columbia Unbecoming*.<sup>299</sup>

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<sup>293</sup> See, e.g., OFFICE OF CIVIL RIGHTS, DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 6 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>294</sup> *Davis*, 526 U.S. at 652–53; *Racial Incidents Guidance*, *supra* note 291, at 11,449.

<sup>295</sup> *Davis*, 526 U.S. at 653 (emphasis added).

<sup>296</sup> *Id.* at 643–44.

<sup>297</sup> See OFFICE OF CIVIL RIGHTS, DEP’T OF EDUC., OCR CASE RESOLUTION AND INVESTIGATIVE MANUAL § 104 (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html> (elaborating OCR’s subject matter jurisdiction).

<sup>298</sup> See *supra* notes 72–84 and accompanying text.

<sup>299</sup> See *supra* notes 85–94 and accompanying text.

### *B. Anti-Semitic Harassment and the First Amendment*

Those who resist campus anti-Semitism enforcement initiatives often argue that campus anti-Semitism may amount to constitutionally protected free speech or expressions of academic freedom.<sup>300</sup> The invocation of First Amendment arguments in anti-Semitism cases, disproportionately to the invocation of such arguments in analogous sex, race, or disability cases, reflects, in part, the frequency with which anti-Semitism has recently been intertwined with political speech, although it may also reflect the use of double standards.

To the extent that campus anti-Semitism raises First Amendment<sup>301</sup> or academic freedom issues, they largely mirror those raised by racial, national origin, sexual and disability harassment law.<sup>302</sup> As Eugene Volokh has noted, “[r]eligious harassment law is structurally almost identical to racial and sexual harassment law: both punish speech when it’s ‘severe or pervasive’ enough to create a hostile, abusive, or offensive work environment based on religion, race, or sex, for the plaintiff and for a reasonable person.”<sup>303</sup> The same, surely, can be said of anti-Semitic harassment under Title VI: it raises precisely the same issues as anti-black, anti-Hispanic, anti-female, or anti-disability harassment under either Title VI or similar anti-discrimination laws, no more and no less. The counter-argument here is that the “harassment” at issue here, if any, is merely political, not racial or religious. In other words, the question is whether enforcement of Title VI in cases of alleged anti-Semitic harassment may chill legitimate speech. Here again, the answer is that First Amendment issues arise in anti-Semitism cases in precisely the same manner as in race, ethnicity, sex, or disability cases, although they may be raised disproportionately often for various reasons.

As a foundational matter, federal anti-harassment policies are subject to the same potential claim that they are unconstitutional under the First Amendment when applied to anti-Semitism as to racist, sexist, or anti-disability harassment.<sup>304</sup> In all of these cases, it is true that (i) the Supreme Court has not yet directly reached the issue;<sup>305</sup>

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<sup>300</sup> See, e.g., Ruth Contreras et al., *Position Paper on Anti-Semitism in Academia*, SCHOLARS FOR PEACE IN THE MIDDLE EAST, Mar. 20, 2003, <http://www.spme.net/cgi-bin/articles.cgi?ID=32> (“Anti-Semitism has become commonplace once more in mainstream academic settings in classrooms and extracurricular affairs with tacit approval from many university officials, who assert that such discourse is protected as academic freedom and need not be treated as hate speech.”). This statement was adopted by Scholars for Peace in the Middle East. *Id.*

<sup>301</sup> The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I.

<sup>302</sup> Eugene Volokh, *Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law*, 33 LOY. U. CHI. L.J. 57, 57 (2001).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67, 68–69 (2002) (specifically referencing the relationship between the First Amendment and sexual harassment).

(ii) the Supreme Court has shown no inclination to address the issue;<sup>306</sup> and (iii) finding anti-harassment law unconstitutional would overturn more than twenty years of legal development,<sup>307</sup> not just in education law, but also in employment, housing and other areas.

This foundational issue has, however, been the subject of considerable litigation<sup>308</sup> and scholarly interest.<sup>309</sup> Harassment law imposes content-based restrictions on various forms of speech,<sup>310</sup> and such restrictions are presumptively unconstitutional.<sup>311</sup> These laws might be defended on several grounds, including that they are narrowly

<sup>306</sup> Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 9–12.

<sup>307</sup> Kirshenbaum, *supra* note 305, at 70. It is also true, of course, that the opposite holding—i.e., that there are no First Amendment limits whatsoever on campus speech and harassment codes—would similarly sweep away quite a bit of case law. *See, e.g.*, *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) (applying First Amendment protections to a fraternity's "ugly woman contest" and holding a university cannot selectively limit speech); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 867–73 (N.D. Tex. 2004) (striking down portions of a campus speech code on First Amendment grounds); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (applying First Amendment doctrines of overbreadth, fighting words, and vagueness to a campus speech code); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 861–67 (E.D. Mich. 1989) (applying vagueness and overbreadth doctrine to a campus speech code); *see also* Lee Ann Rabe, Note, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205, 225–27 (2003). For a defense of campus speech rights, *see* Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 941–44 (1991).

<sup>308</sup> *See, e.g.*, *Vega v. Miller*, 273 F.3d 460, 464, 466–71 (2d Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002) (finding that a sexual harassment policy did not violate a professor's free speech rights); *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246–47 (10th Cir. 1999) (upholding a hostile environment award in the face of a First Amendment challenge), *overruled as recognized in* *Haberman v. Hartford Ins. Group*, 443 F.3d 1257 (10th Cir. 2006); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996) (holding a college sexual harassment policy unconstitutional as applied on First Amendment grounds), *cert. denied*, 520 U.S. 1140 (1997). *See generally* Kirshenbaum, *supra* note 305, at 68, 69 & n.8 (noting the increase in litigation over sexual harassment issues).

<sup>309</sup> *See, e.g.*, Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563 (2001); Fallon, *supra* note 306; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Sherry, *supra* note 307; Rabe, *supra* note 307.

<sup>310</sup> Browne, *supra* note 309, at 563–64; Gerard, *supra* note 309, at 1004; Kirshenbaum, *supra* note 305, at 67.

<sup>311</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). OCR policy is to interpret harassment law in a manner that averts potential violations with the First Amendment. *See* Letter from Gerald A. Reynolds, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights to Colleague (July 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>. The author had a hand in the preparation of this letter.

tailored means of achieving a compelling governmental interest; i.e., they survive strict scrutiny. Alternatively, to the extent that harassment laws are construed to reach no further than the “fighting words” doctrine under *Chaplinsky v. New Hampshire*<sup>312</sup> or to curb imminent incitement to violence under *Brandenburg v. Ohio*,<sup>313</sup> they may be defended under those precedents. In *Grove City College v. Bell*,<sup>314</sup> the Court rejected a private college’s claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment.<sup>315</sup> Indeed, the Court found that this argument “warrant[ed] only brief consideration” because “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.”<sup>316</sup> The Court concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the government’s funds.<sup>317</sup>

In application, anti-Semitic harassment has various features in common with other forms of harassment, including its ability to yield easy cases. Few would argue that the rock allegedly thrown at a Jewish student at UC Irvine was constitutionally protected even if it was, as it appears, used moments before as a paperweight for anti-Israeli political literature.<sup>318</sup> Similarly, the threats and intimidation alleged at several campuses are no more protected as a result of the anti-Zionist political discourse with which they are interspersed.<sup>319</sup> The hurling of cinder blocks through Hillel windows may be intended to express a political opinion, but it is nevertheless a form of conduct prohibited by content-neutral laws of general applicability. Even the scrawling of swastikas, protected under some circumstances, is not protected when used to deface university property.<sup>320</sup> Given the detailed allegations of physical intimidation and

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<sup>312</sup> 315 U.S. 568, 572 (1942).

<sup>313</sup> 395 U.S. 444, 448–49 (1969).

<sup>314</sup> 465 U.S. 555 (1984).

<sup>315</sup> *Id.* at 575–76.

<sup>316</sup> *Id.* at 575.

<sup>317</sup> *Id.* at 575–76.

<sup>318</sup> See *supra* notes 97–98 and accompanying text.

<sup>319</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 586, 572 (1942) (discussing fighting words in an analogous case that did not involve anti-Semitism). Conversely, it may be argued that the anti-Zionist political discourse is no less protected as a result of the threats and intimidation with which they are interspersed, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (finding threats interspersed with otherwise non-violent, permissible assembly were not punishable by the state), subject of course to the limits of *Brandenburg* and *Chaplinsky*.

<sup>320</sup> This use of swastikas has become something of a varsity sport in recent years. To mention a few instances, swastikas were “carved into a residence hall bulletin board” at the University of Colorado at Boulder (March 2005), “carved into the freshly poured concrete” at Atlantic Cape Community College in New Jersey (April 2005), drawn on “[p]osters advertising a Chicago Friends of Israel event” at the University of Chicago (May 2005), and etched in acid on a campus café table top and drawn in a dormitory at the University of

assault that occur in the incendiary environment that now exists on some campuses,<sup>321</sup> it is rather vacuous (if not untrue) to insist that the First Amendment protects the political speech with which these incidents are interspersed. Those who would defend the recent outbreak of campus anti-Semitism on those grounds are rather like the man who shouts "First Amendment!" in a burning building.

#### CONCLUSION

Judea Pearl may have been right and the United Nations wrong in at least one respect: it may truly be anti-Zionism that is racism after all.<sup>322</sup> Specifically, it is racism in the technical sense that it constitutes "racial discrimination" prohibited by Title VI of the Civil Rights Act of 1964, and it does so only when it is in fact a guise for anti-Semitic bigotry so severe, pervasive, and objectively offensive that it denies some students the rights that all should enjoy equally. It is an unfortunate irony in today's much-trumpeted "golden age" of Jewish college life<sup>323</sup> that the world's oldest continuous bigotry should erupt just when many had thought it extinguished at long last. Particularly ironic is its reappearance in precisely the places where it should be most unwelcome. Although federal anti-discrimination law is a rather blunt instrument for addressing such matters, it can be an effective one when properly utilized. The severest cases of anti-Semitic harassment rise to a level requiring prompt and decisive action, and Title VI provides an available means for their resolution.

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Oregon (October 2005). Press Release, Anti-Defamation League, Annual ADL Audit: Anti-Semitic Incidents Decline in 2005 but Levels Still of Concern in U.S. (Apr. 5, 2006), [http://www.adl.org/presrele/asus\\_12/audit\\_2005](http://www.adl.org/presrele/asus_12/audit_2005).

<sup>321</sup> See, e.g., *supra* Part I.A.4–7.

<sup>322</sup> Judea Pearl, *Anti-Zionism is Racism*, ZIONISM ON THE WEB, [http://www.zionismontheweb.org/Anti-Zionism\\_is\\_racism.htm](http://www.zionismontheweb.org/Anti-Zionism_is_racism.htm).

<sup>323</sup> Seidler-Feller, *surpa* note 19.