BY BIRTH OR BY CHOICE? THE INTERSECTION OF RACIAL AND RELIGIOUS DISCRIMINATION IN SCHOOL ADMISSIONS

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I. INTRODUCTION

By most measures, 12-year-old "M" was an observant Jewish boy.[1] Practicing in the Masorti tradition,[2] M prayed in Hebrew, attended synagogue, and participated in a Jewish Youth Group.[3] It was not surprising then, when M applied for admission to JFS (formerly the Jews' Free School). Founded in 1732, JFS is Europe's largest Jewish secondary school and receives funding from the British government.[4] As such, it is extremely popular among Jewish children and generally considered to be an outstanding comprehensive school.[5]

Nevertheless, M's application was denied.[6] Due to the popularity of the school, JFS gave preference to applicants who were recognized as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR).[7] The OCR recognizes a person as Jewish only if: 1) that person was descended in the matrilineal line from a woman whom the OCR would recognize as Jewish; or

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1 Sarah Lyall, *British Case Raises Issue of Identity for Jews*, N.Y. TIMES, Nov. 8, 2009, at A8.

2 "Masorti" Judaism is referred to as "Conservative" Judaism in America. *See Masorti: Jewish Tradition and Halachah*, MASORTI FOUND., http://www.masorti.org (last visited Oct. 9, 2010).

3 R (E) v. Governing Body of JFS, [2008] EWHC 1535/1536 (Admin), [34] (Eng.).

4 *JFS*, [2008] EWHC 1535/1536, at [119]; Sarah Lyall, *British High Court Says Jewish School's Ethnic-Based Admissions Policy Is Illegal*, N.Y. TIMES, Dec. 17, 2009, at A8 (explaining that JFS is "financed by the state"); *JFS History*, JFS, http://www.jfs.brent.sch.uk/node/65 (last visited Oct. 9, 2010).

5 JFS was rated "outstanding" on all thirty-nine measures by which the school was assessed by the British government in April 2009. *See* OFFICE FOR STANDARDS IN EDUCATION, CHILDREN'S SERVICES AND SKILLS (OFSTED), INSPECTION REPORT: JFS SCHOOL, REF. NO. 133724 (2009), *available at* http://www.jfs.brent.sch.uk/sites/default/files/pdfs/JFS%20Ofsted%20Report.pdf.

6 *JFS*, [2008] EWHC 1535/1536, at [60].

7 *Id.* [31].

2) the applicant's mother had undertaken a qualifying course of Orthodox conversion.[8]

JFS' Headteacher informed M's parents:

> [B]ecause . . . [JFS] has not received evidence of [M]'s Jewish status it would not be possible to consider [M] for a place unless and until all those applicants whose Jewish status has been confirmed have been offered places. It follows from this that, as the School is likely to remain heavily oversubscribed, [M]'s position on the offer list will almost certainly be very low and the likelihood of being able to offer a place is very small.[9]

M was dedicated to and engaged in the Masorti Jewish community, and his parents were practicing Jews.[10] M's father was a member of the Masorti New London Synagogue, and considered himself to be of Jewish ethnic origin, to be of the Jewish faith, and to be a practicing Jew.[11] M's mother was of Italian and Catholic origin, but she converted to Judaism under the auspices of a rabbi at an independent Progressive synagogue.[12] Many might consider M to be of Jewish heritage, but OCR did not.[13] According to OCR and JFS, M's mother's conversion was invalid. Consequently, OCR and JFS did not recognize M as Jewish.[14]

M and his family brought suit, alleging that JFS had discriminated on the basis of race.[15] In mid-December 2009, the Supreme Court of the United Kingdom ruled in M's favor.[16] "[O]ne thing is clear about the matrilineal test," wrote Lord Nicholas Phillips, president of the court, "it is a test of ethnic origin. By definition, discrimination that is based upon that test is discrimination on racial grounds."[17]

As this case, officially known as *R (E) v. Governing Body of JFS*,[18] illustrates, the line between religious categorization and racial discrimination is often blurred. When are seemingly permissible religious distinctions actually prohibited racial discrimination? In many cases, the answer may not be legally clear. In America, a country with a unique history of both religiosity and racism, jurisprudence sur-

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8 *Id.*
9 *Id.* [60] (alterations in original).
10 *Id.* [34].
11 *Id.*
12 *Id.*
13 *Id.* [34]–[35].
14 *Id.* [35].
15 *Id.* [74]–[75].
16 R (E) v. Governing Body of JFS, [2009] UKSC 15 (appeal taken from Eng.).
17 *Id.* [45].
18 [2009] UKSC 15 (appeal taken from Eng.); [2008] EWHC 1535/1536.

rounding racial and religious discrimination is well-developed.[19] Courts have recognized the fundamental importance of public education,[20] and disputes over race and religion in school admissions have become increasingly contentious.

Public schools are generally prohibited from using race or religion in admissions policies, with a limited exception for benign racial classifications.[21] Title VI of the Civil Rights Act of 1964 (CRA) prohibits discrimination on the basis of race, color, religion or national origin in public schools,[22] subjecting public schools to strict judicial scrutiny whenever they use racial classifications in admissions policies.[23] Benign racial discrimination in admissions policies, such as affirmative action programs, may be legally valid under certain circumstances.[24] Thus, while public schools may never make admissions

19 For a discussion of racial discrimination, see, for example, Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 1 (2009), noting the long, storied history of American race jurisprudence; Philip C. Aka, *Affirmative Action and the Black Experience in America*, 36 HUM. RTS. 8 (2009), detailing the legal history of race-based affirmative action in the United States; Derrick Darby, *Educational Inequality and the Science of Diversity in* Grutter*: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 756–57 (2009), describing racial discrimination in the educational context. For a discussion of religious discrimination, see, for example, Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1187, 1188 (2005), assessing various laws intended to address religious discrimination; John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 280 (2001), describing the history and politics surrounding various interpretations of the Establishment Clause; Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 673–74 (2002), contending that the Supreme Court has interpreted the Establishment Clause in such a way as to preserve political equality for and prevent discrimination against religious minorities.

20 *See, e.g.*, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 493 (1954) (noting that "education is . . . the most important function of state and local governments" and the "principal instrument in awakening [a] child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment").

21 *Cf.* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996) (suggesting that the use of benign religious classifications in public school admissions decisions may also be a constitutional exception to federal anti-discrimination statutes).

22 *See* Civil Rights Act of 1964 §§ 601, 606, 42 U.S.C. §§ 2000d, 2000d-4a(2) (2006).

23 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

24 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007) (explaining that the Supreme Court has recognized two compelling state interests that may justify the use of racial classifications in the school context: remedying the effects of past intentional discrimination and interest in diversity).

decisions on the basis of racial animus, they enjoy a limited right to engage in benign discrimination.[25]

Title IV of the CRA also allows for the invalidation of a public school admissions decision based on religion.[26] More than that, however, the Establishment Clause of the First Amendment prevents any public school from exercising religious preferences or creating religious restrictions.[27]

Private schools, however, are not subject to the same anti-discrimination laws. As part of the First Amendment's guarantee of free exercise of religion and freedom of association, religious institutions remain free to discriminate on the basis of religion in admissions.[28] Despite this exemption, courts have applied some anti-discrimination laws to private universities. In particular, courts have prohibited private schools from engaging in race-based discrimination in admissions decisions.[29]

This distinction between race and religion is complicated by the blurring of religious and racial lines, especially by "ethnoreligious" groups (i.e., groups identifying as both racial and religious groups).[30]

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25 *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 298 (1955) ("[R]acial discrimination in public education is unconstitutional. . . . All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."). *But see Parents Involved*, 551 U.S. at 720–22.

26 *See* 42 U.S.C. § 2000c-6(a)(2) (2006).

27 *See* U.S. CONST. amend. I.

28 *See* 42 U.S.C. § 2000d (2006) (prohibiting discrimination based on race, color or national origin at any program or activity receiving federal financial assistance, but not prohibiting discrimination on the basis of religion); *see also Admissions*, MARINERS CHRISTIAN SCH., http://www.marinerschristianschool.org/admissions/process.aspx (last visited Oct. 9, 2010) (explaining that Mariners Christian School may screen applicants on the basis of religious preference and that "[a]t least one parent of each student must be a professing Christian"); *Nondiscrimination Policy*, ALMA HEIGHTS CHRISTIAN SCHS., http://almaheights.org/hs/admissions/nondiscrimination-policy/ (last visited Sept. 28, 2010) (reserving the right to screen applicants on the basis of religious preference); Office of Gen. Counsel, *Non-Discrimination with Respect to Students*, CATHOLIC U. AM., http://counsel.cua.edu/fedlaw/Cr1964s.cfm (last visited Sept. 28, 2010) ("An admissions preference on the basis of religion at a private university is not considered a violation of any federal law."); *School of Medicine Admissions*, LOMA LINDA UNIV. SCH. OF MED., http://www.llu.edu/medicine/admissions.page (last visited Oct. 9, 2010) (giving admissions preference to members of the Seventh-Day Adventist Church).

29 *See* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (holding that a private school could not legally discriminate on the basis of race in admissions decisions); Bob Jones Univ. v. United States, 639 F.2d 147, 149 (4th Cir. 1980) (holding that the IRS may revoke a university's tax exemption because the university engages in racial discrimination).

30 *See, e.g.*, Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 170–71 (2005) (describing how peremptory challenges based on religion may in fact, allow for racial discrimination).

Should discrimination against or in favor of ethnoreligious groups be treated as racial or religious discrimination?

Exhibiting both racial[31] and religious[32] characteristics, Jews are a paradigmatic ethnoreligious group.[33] While Jews were commonly considered a race in nineteenth century America,[34] Jews are no longer assumed to be part of a particular racial group.[35] Determining who is a Jew remains a fraught question within the Jewish community,[36] making it even more difficult for courts to analyze discrimination against individuals identifying as Jews. Despite the fact that Jews are not generally categorized as a distinct race, however, U.S. courts have allowed Jews to bring § 1981 and § 1982 civil rights actions, provisions that protect against racial discrimination.[37] If discrimination against Jewish groups can constitute racial discrimination, may religious schools make admissions decisions based on Jewish applicants' religious practice as an acceptable exercise of private schools' religious exemption from anti-discrimination laws? Or does this discrimination constitute impermissible racial discrimination as in *JFS*?

In this Comment, I investigate the ways in which Jews' ambiguous status pose unique problems for courts charged with evaluating private schools' compliance with anti-discrimination laws. In Part II, I provide an overview of laws prohibiting racial discrimination in

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31 *See, e.g.*, Nicholas Wade, *Jews in Europe and Mideast Share Genes, Studies Show*, N.Y. TIMES, June 10, 2010, at A14.

32 *See, e.g.*, CENT. CONFERENCE OF AM. RABBIS, THE GUIDING PRINCIPLES OF REFORM JUDAISM: "THE COLUMBUS PLATFORM" (1937), *available at* http://ccarnet.org/Articles/index.cfm?id=40&pge_id=1606 ("[W]e maintain that it is by its religion and for its religion that the Jewish People has lived. The non-Jew who accepts our faith is welcomed as a full member of the Jewish community."); *Principles*, AM. COUNCIL FOR JUDAISM, http://www.acjna.org/acjna/about_principles.aspx ("We view Judaism as a universal religious faith, rather than an ethnic or nationalist identity.").

33 *See generally* J. Alan Winter, *The Transformation of Community Integration among American Jewry: Religion or Ethnoreligon? A National Replication*, 33 REV. OF RELIGIOUS RES. 349, 349 (1992) (concluding that American Jews identify as an ethnoreligious group).

34 *See, e.g.*, Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) (noting that "[i]t is evident . . . that Jews . . . were among the peoples . . . considered to be distinct races" during the passage of the Civil Rights Act of 1866).

35 *Id.* at 617 ("Jews today [in 1987] are not thought to be members of a separate race . . . .").

36 *See generally* Michael Selzer, *Who are the Jews? A Guide for the Perplexed Gentile—And Jew*, 29 PHYLON 231 (1968) (examining who is a Jew); Solomon Zeitlin, *Who is a Jew? A Halachic-Historic Study*, 49 JEWISH Q. REV. 241 (1959) (detailing the history of how Jews determined who was Jewish); *Who is a Jew? The Great Debate*, JEWISH CHRON. ONLINE (Sept. 30, 2009), http://www.thejc.com/judaism/judaism-features/20463/who-a-jew-the-great-debate (providing a roundtable discussion between prominent Jews as to who is a Jew).

37 *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 612–13 (1987) (holding that § 1981 protects members of groups that would have been considered races when the 1866 Civil Rights Act was passed); *Shaare Tefila Congregation*, 481 U.S. at 617–18 (holding that Jews may be considered a race for purposes of 42 U.S.C. §§ 1981 and 1982).

school admissions. This includes a discussion of when race may be taken into account in public school admissions, i.e., affirmative action programs, and the applicability of race-based anti-discrimination laws to private schools. Part III discusses the use of religion in admissions decisions. In addition, I assess constitutional problems associated with providing government aid to religious private schools and in restricting religious schools' exercise of religious beliefs.

Part IV focuses on racial/religious discrimination against Jews and how courts have analyzed anti-Semitism. Despite conflicting opinions as to whether Judaism constitutes a race or a religion both in and out of the Jewish community, courts treat anti-Semitism as racial discrimination. In Part V, I examine the implications of providing Jews with race-based protections. After evaluating the competing constitutional interests in dealing with anti-Semitism, I suggest a legal framework for analyzing discrimination against Jews.

American courts have traditionally been reluctant to examine the character of discrimination against Jews. By rejecting further inquiry, however, courts provide Jews with unparalleled protection against any form of discrimination. The American legal system differentiates between racial and religious discrimination; when dealing with groups that exhibit both religious and racial characteristics, therefore, courts should examine carefully a school's rationale behind its admissions choice. Although it can be difficult to distinguish religious discrimination from racial discrimination in cases of anti-Semitism, I argue that—where feasible—courts must determine when discrimination is based upon racial characteristics and when it is based exclusively on tenets of religious belief. This inquiry will ensure standardized treatment of victims of discrimination and safeguard religious schools' ability to express religious preferences in admissions decisions.

PART II. RACE-BASED SCHOOL ADMISSIONS DECISIONS

The validity of the use of race in educational admissions has changed significantly in the past century.[38] In both the public and

38 *Compare* Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) (holding that statutes providing for the separation of races in schools were constitutional) *with* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 368–69 (1978) (Brennan, J., concurring) (holding that race may be considered in admissions decisions) *and* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954) (holding the segregation of children in public schools on the basis of race to be unconstitutional).

private school context, racial classifications in admissions policies are now subject to exacting judicial review.

Recognizing the importance of education in breaking racial barriers, courts have both provided for the desegregation of public schools[39] and approved affirmative action programs in public institutions.[40] The Supreme Court's understanding of the use of race in private school admissions has also evolved.[41] Though the state action doctrine limits the applicability of constitutional provisions to private actors,[42] courts have held that private schools may not engage in hostile race-based admissions decisions.

A. Public Schools

Discrimination on the basis of race in public school admissions is generally prohibited. Title VI of the CRA prohibits discrimination on the basis of "race, color, or national origin" in federally assisted programs or activities, including public schools.[43] Title IV of the same Act permits the Attorney General to initiate a civil action against any school board or public college that denies admission "by reason of race, color, religion, sex, or national origin."[44]

Yet courts did not recognize racial discrimination in schools as unconstitutional until the twentieth century. The Supreme Court officially ended *de jure* segregation in public schools in *Brown v. Board of Education* (Brown I) in 1954.[45] Chief Justice Earl Warren wrote that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . . [W]here the state has undertaken to provide [education], it is a right which

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39 *See Brown I*, 347 U.S. at 495.

40 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding constitutionality of the University of Michigan Law School's affirmative action program); *Bakke*, 438 U.S. at 379 (affirming the constitutionality of affirmative action programs).

41 *Compare* Guillory v. Adm'rs of Tulane Univ., 212 F. Supp. 674, 687 (E.D. La. 1962) (determining that a private university could discriminate on the basis of race in admissions decisions because the university was not a state actor for purposes of the Fourteenth Amendment) *with* Runyon v. McCrary, 427 U.S. 160, 172–73 (1976) (finding that federal anti-discrimination laws prohibit private schools from making race-based admissions decisions).

42 *See, e.g.*, Maimon Schwarzschild, *On This Side of the Law and on That Side of the Law*, 46 SAN DIEGO L. REV. 755, 756 (2009) ("The state action doctrine . . . holds that the institutions of American government are bound by these constitutional provisions . . . but that private persons and companies generally are not.").

43 Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006); *see also* Office of Gen. Counsel, *supra* note 28.

44 42 U.S.C. § 2000c-6(a) (2006).

45 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).

must be made available to all on equal terms."[46] Since then, schools have grappled with the legal mandate to end government-sponsored segregation.[47]

To achieve racial equality in law, the Supreme Court employs the highest standard of judicial review—strict scrutiny—when governmental actors subject individuals to unequal treatment based on race.[48] Governments must justify racial classifications by showing a compelling state interest and demonstrating that the racial classification has been narrowly tailored to meet that compelling interest.[49] The Court has held only two compelling interests to satisfy this standard: remedying past discrimination and achieving diversity in higher education.[50] Thus, racial classifications rarely survive judicial scrutiny.

Courts have occasionally permitted state actors to engage in race-based decision-making in affirmative action programs. Because these programs may serve one of the aforementioned compelling interests, courts have determined that some race-conscious admissions programs are constitutional. Even so, educational affirmative action programs must comply with certain criteria to pass constitutional muster.[51] These standards differ depending on whether the program deals with pre-college or postsecondary education.

1. Affirmative Action in Higher Education

Struggling to develop admissions programs that effectively ensured racial diversity, public universities began to adopt affirmative action programs in the 1970s.[52] The Court, however, limited these efforts at integration, restricting and refining the use of race in admissions decisions in higher education in three foundational decisions:

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46 *Id.* at 493.

47 Charles E. Dickinson, Note, *Accepting Justice Kennedy's Challenge: Reviving Race-Conscious School Assignments in the Wake of* Parents Involved, 93 MINN. L. REV. 1410, 1414 (2009) (describing school districts' struggle to overcome segregation).

48 *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to strict scrutiny); United States v. Carolene Prods. Co., 304 U.S. 144, 152–153 n.4 (1938) (suggesting that "discrete and insular minorities" should receive heightened judicial scrutiny).

49 *See* Grutter v. Bollinger, 539 U.S. 306, 333–34 (2003) (explaining that racial classifications are subject to strict scrutiny and thus are constitutional only if they are narrowly tailored to further compelling governmental interests).

50 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007).

51 See *infra* Section II.A.1–2.

52 Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 619 (1988) (discussing universities' use of race-based admissions decisions in the 1970s).

Regents of University of California v. Bakke, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

a. Regents of University of California v. Bakke

In 1973 and 1974, Alan Bakke, a white male, was twice denied admission to the Medical School of the University of California at Davis.[53] To increase the number of minority students, Davis had instituted a special admissions program that set aside sixteen out of one hundred spots in every class for minority students.[54] As a white male, however, Bakke was not considered for the special admissions program.[55] Bakke sued, claiming that Davis's program violated the Equal Protection Clause of the Fourteenth Amendment.[56] The Court held that "attainment of a diverse student body" was a "constitutionally permissible goal for an institution of higher education."[57] Yet Davis' quota system had gone too far: assigning a fixed number of places to minority students did not further the legitimate goal of diversity.[58] In effect, the Court struck down the Davis program because it was not narrowly tailored to meet the goal of greater student body diversity. The six separate opinions in the case, however, meant that there was no majority holding regarding whether strict scrutiny or a lesser standard of judicial review would apply to future admissions programs.[59] As a result, schools and lower courts were left with no clear framework for analyzing the constitutionality of affirmative action programs.[60]

b. Grutter v. Bollinger

In 2003, the Court again addressed race-based admissions decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*.[61] *Grutter* assessed the constitutionality of the University of Michigan Law School's admis-

53 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 276–77 (1978).
54 *Id.* at 272–75.
55 *Id.* at 276.
56 *Id.* at 277.
57 *Id.* at 311–12
58 *Id.* at 315–16, 320.
59 *Id.*
60 Ellison S. Ward, Note, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 623–24 (2009) (describing confusion regarding the constitutionality of affirmative action programs in the wake of *Bakke*).
61 Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

sions policy.[62] The Law School evaluated each student based on a variety of factors including grades, LSAT scores, and an essay, as well as "soft variables" including recommendations, the quality of the applicant's undergraduate institution, and racial and ethnic status.[63] When the Law School denied admission to Grutter, a white Michigan resident, she claimed that the school had discriminated against her on the basis of race.[64]

Upholding the admissions policy, the court held explicitly that diversity was a compelling state interest.[65] More than that, the Court explained that the Law School's race-conscious admission program was narrowly tailored because it did not use a quota system, but rather considered race or ethnicity only as a "'plus' in a particular applicant's file," part of a "highly individualized, holistic review" of each applicant.[66]

c. Gratz v. Bollinger

The Court applied that same analysis to the University of Michigan's undergraduate admissions program in *Gratz*.[67] Michigan's college admissions program used a points-based system. An applicant received points based on high school grades, standardized test scores, geography and alumni relationships.[68] In addition, the applicant automatically received an additional twenty points (of the 100 points needed to guarantee admission) if he or she was part of an underrepresented racial or ethnic minority group.[69] Two white Michigan residents who were denied admission despite being within the qualified points range sued the University claiming racial discrimination.[70] While the Court reaffirmed that student body diversity was a compelling state interest, it held that the University's points system was not narrowly tailored enough.[71] The University policy did not provide the "individualized consideration" of each applicant upheld in *Bakke* and *Grutter*.[72] Instead, the automatic allotment of twenty points to minori-

62 *Grutter*, 539 U.S. at 311.
63 *Id.* at 315–16.
64 *Id.* at 316–17.
65 *Id.* at 325.
66 *Id.* at 334, 337.
67 Gratz v. Bollinger, 539 U.S. 244, 270 (2003).
68 *Id.* at 255.
69 *Id.*
70 *Id.* at 251.
71 *Id.* at 275.
72 *Id.* at 271.

ty applicants made "'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."[73]

Bakke, *Grutter*, and *Gratz* solidified diversity as a compelling interest for institutions of higher education. The Court, however, continues to refine its understanding of what kind of admissions program is narrowly tailored enough to achieve this compelling interest. While an individualized assessment of each applicant that takes race into account may be acceptable, an inflexible point-based system that awards applicants points because of race remains unconstitutional.

2. *Affirmative Action in Elementary and Secondary Schools:* Parents Involved in Community Schools v. Seattle School District No. 1

Bakke, *Grutter*, and *Gratz* left open the question whether elementary and secondary school admissions policies may take race into account.[74] In *Parents Involved in Community Schools v. Seattle School District No. 1*,[75] however, the Supreme Court addressed this issue directly.

Parents Involved challenged two school districts' voluntary, race-conscious student assignment policies. The Seattle, WA school district classified children as white or nonwhite when allocating slots in oversubscribed high schools.[76] The Jefferson County, KY school district classified children as black or "other" in order to make elementary school assignments and to rule on transfer requests.[77] Both school districts used race only to ensure that a school's racial balance mirrored that of the school district as a whole.[78] Parents of students denied admission to certain schools brought suit, claiming that the school districts' race-conscious school assignments violated the Fourteenth Amendment.[79]

Writing for the majority, Chief Justice John Roberts, Jr. struck down the school district assignment programs,[80] limiting *Grutter*'s acceptance of student body diversity as a compelling interest to higher education.[81] While Justice Kennedy agreed with Roberts' reading of

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73 *Id.* at 272 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

74 Ward, *supra* note 60, at 628 (suggesting that *Gratz* and *Grutter* created uncertainty regarding how to determine the constitutionality of race-conscious admissions programs in elementary and secondary schools).

75 551 U.S. 701 (2007).

76 *Id.* at 709–10.

77 *Id.*

78 *Id.*

79 *Id.* at 710–11.

80 *Id.* at 701.

81 *Id.* at 722–26. At least one author has suggested that five of the justices actually agreed that diversity in primary and secondary education is a compelling state interest. *See* Ni-

Grutter, he noted in his concurring opinion that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[82] In his dissent, Justice Breyer, joined by Justices Ginsberg, Souter, and Stevens, argued that diversity should be a compelling interest in primary and secondary public education.[83] Thus, a majority of the Court seemed to support the idea that student body diversity is a compelling state interest in pre-college education. The plurality held that *Grutter*'s analysis of diversity as a compelling interest did not apply to K-12 schools but it did not decide that diversity could never be a compelling interest sufficient to justify race-based classification.

The majority agreed, however, that the Seattle and Jefferson County programs were not narrowly tailored enough to achieve their stated ends.[84] The minimal impact of the districts' racial classifications on school enrollment suggested that racial classifications may not have been necessary.[85] Roberts explained that narrow tailoring "requires 'serious, good faith consideration of workable race-neutral alternatives'"[86] and that schools must employ a broader notion of diversity than white/nonwhite or black/"other" terms.[87] Neither the Seattle school district nor the Jefferson County school district had considered alternatives or embraced a broader view of diversity.[88]

While *Gratz* and *Grutter* provided some guidance as to when race-based admissions programs may be permissible in higher education, *Parents Involved* only addressed an impermissible use of race-conscious admissions in elementary and secondary schools. It remains to be seen whether any race-based classifications will survive strict scrutiny in elementary and secondary school admissions.

B. Race-Based Admissions Decisions in Private Schools

Private schools' admissions policies are not subject to the same constitutional constraints as public schools. Because racial discrimination is uniquely contrary to constitutional mandates, Congress and

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cole Love, Note, Parents Involved in Community Schools v. Seattle School District No. 1*: The Application of Strict Scrutiny to Race-Conscious Student Assignment Policies in K-12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 131 n.142 (2009).

82 *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring).

83 *Id.* at 842 (Breyer, J., dissenting).

84 *Id.* at 733 (majority opinion).

85 *Id.* at 734.

86 *Id.* at 735 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

87 *Id.* at 723.

88 *Id.* at 735.

the courts have found other avenues to attack racially-discriminatory admissions policies in private schools. Using civil rights laws[89] and tax statutes, courts have allowed private rights of action against race-based admissions decisions at private schools.

1. 42 U.S.C. § 1981(a)-(c): Equal Rights Under the Law

42 U.S.C. § 1981 guarantees all Americans "full and equal benefit of all laws and proceedings."[90] Originally enacted as § 1 of the Civil Rights Act of 1866, § 1981 prohibits racial discrimination in the making and enforcement of private contracts.[91]

While on its face, § 1981 might not seem to apply to education, in *Runyon v. McCrary*, the Supreme Court held that two black children who were denied admission to two private elementary schools on account of school policies against racial integration[92] had a cause of action under § 1981. The students had sought to enter into contractual relationships with the schools for educational services, and they had been prevented from doing so on account of their race.[93]

Rejecting the school's argument that § 1981 "d[id] not reach private acts of racial discrimination," the Court stressed that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."[94] Moreover, the court held that the schools did not fall into the "private club or other (private) establishment" exemption in Title II of the CRA.[95] This exemption only applies to truly private clubs. The Court explained that if a private organization comes within the ambit of state action, Title II is no longer available.[96] However, the Court determined that the exemption "d[id] not . . . reach private schools" because these schools were "private only in the sense that they [were] managed by private persons and they [were] not direct recipients of public funds. Their actual and potential constituency, however, [was]

89 *See e.g.* Civil Rights Act of 1866, § 1, 42 U.S.C. § 1981(a)–(c) (2006).

90 42 U.S.C. § 1981(a).

91 *See* 42 U.S.C. § 1981(b); *see also* Runyon v. McCrary, 427 U.S. 160, 168–69 n.8 (1976) (discussing that § 1981 is "derived solely" from § 16 of the Act of May 31, 1870, 16 Stat. 144).

92 *Runyon*, 427 U.S. at 163–65.

93 *Id.* at 164, 172.

94 *Id.* at 173, 178.

95 *Id.* at 172–73 n.10. Because the private school at issue advertised in the "Yellow Pages" and used mass mailings to attract students, the court found that the school's actual and potential constituency is "more public than private" and therefore ineligible for the "private club" exemption of Title II of the CRA. *Id.*

96 *Id.* at 173 n.10; *see also* 42 U.S.C. § 2000a(e).

more public than private."[97] Consequently, § 1981 could be applied; private schools could not deny admission to prospective students based on race.

2. Tax Statutes

Six years later, the Supreme Court reaffirmed the importance of eliminating racial discrimination in private education. In *Bob Jones University v. United States*, the Internal Revenue Service (IRS) revoked tax exempt status for Bob Jones University because of its racially discriminatory policies.[98] Claiming that this revocation violated the University's rights under the Religion Clauses of the First Amendment, Bob Jones explained that its ban on interracial dating and admission for interracially married students was religiously-motivated and based on "a genuine belief that the Bible forbids interracial dating and marriage."[99] In upholding the IRS policy, the Court explained that the government has a "fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That . . . interest substantially outweighs whatever burden denial of tax benefits places on [Bob Jones'] exercise of [its] religious beliefs."[100]

As *Runyon* and *Bob Jones* illustrate, the Supreme Court has eliminated purely race-based admissions decisions in both public and private education. The question remains, however: does government have a "fundamental, overriding interest" in eradicating other forms of discrimination in education?

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97 *Runyon*, 427 U.S. at 172–73, n.10 (quoting McCrary v. Runyon, 515 F.2d 1082, 1089 (4th Cir. 1975)).

98 *See* Bob Jones Univ. v. United States, 639 F.2d 147, 148–49 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983). Believing that the Bible forbids interracial dating and marriage, Bob Jones refused to admit black students until 1971. Following *Runyon*, Bob Jones revised its policy. From May 1975 until this case in 1983, Bob Jones permitted unmarried blacks to enroll, but applicants who engaged in an interracial marriage or were known to advocate interracial marriage or dating were categorically denied admission. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983). After *Bob Jones University v. United States* was decided by the United States Supreme Court, Bob Jones changed its admissions policy to admit members of all races. However, interracial dating continued to be forbidden until 2000. *See Bob Jones University Ends Ban on Interracial Dating*, CNN (Mar. 4, 2000), http://archives.cnn.com/2000/US/03/04/bob.jones.

99 *Bob Jones*, 461 U.S. at 602 n.28.

100 *Id.* at 604.

III. DISCRIMINATION ON THE BASIS OF RELIGION

Admissions decisions based on religion have been treated differently than admissions decisions based on race. Section 1981 and 1982 actions are only available for claims of discrimination based on a plaintiff's race.[101] Thus, race-based discrimination is disfavored in both the private and public school context. Public schools are prohibited by the religion clauses from discrimination based on religion. Private schools' religious practice, however, remains constitutionally protected.[102] Under the First Amendment's guarantees of free exercise and freedom of association, religious organizations retain the right to act on the basis of religious distinctions.[103] As a result, the use of religion in private school admissions decisions is not parallel to an analysis of racially discriminatory admissions or to religious distinctions in public schools.

The use of religious preferences in private school admissions illustrates the different ways that race and religion are treated in constitutional law, especially distinctions between racial and religious categorizations and public and private actors. How can the government (and, by extension, public schools) refrain from advancing or inhibiting religion while, at the same time, allowing private individuals (and, by extension, private schools) to engage in discriminatory classifications? While the use of racial classifications in admissions decisions is generally impermissible in both public and private schools, the legality of religion-based admissions policies is not as clear cut. A school's ability to give preference to members of certain faiths in its admissions policy depends upon the school's source of funding and the religious nature of the institution. While private religious schools may be able to exert religious preference in their admissions policies,

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101 *See* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (Thomas, J., dissenting) ("[Section] 1982, like § 1981, prohibits only discrimination based on race."); Selden Apartments v. HUD, 785 F.2d 152, 159 (6th Cir. 1986) (noting that prima facie elements of a § 1981 claim include plaintiff being a member of a racial minority); White v. Wash. Pub. Power Supply Sys., 692 F.2d 1286, 1290 (9th Cir. 1982) ("It is well settled that section 1981 only redresses discrimination based on plaintiff's race."); *see also Runyon*, 427 U.S. at 167 (noting that 42 U.S.C. § 1981 is "in no way addressed" to a private school's ability to "limit its student body to . . . adherents of a particular religious faith").

102 *See* Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 237 n.314 (2004) (noting that, in contrast to race discrimination, private religious practice is constitutionally protected).

103 U.S. CONST. amend. I, § 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

public schools may not.[104] Thus, the constitutionally required protection of religious beliefs in the private school context may constitute an impermissible establishment of religion in the public school context.

A. Restrictions on the Use of Religion in Educational Decisions: Equal Protection and the Establishment Clause

The CRA provides redress for religious discrimination in public education. In particular, 42 U.S.C. § 2000c-6 allows the Attorney General to bring a civil action when an individual alleges that she has been denied admission to a public school on the basis of race, color, religion, sex, or national origin and when that action will "materially further the orderly achievement of desegregation in public education."[105]

In addition—though not specifically related to the admissions context—courts have enforced some level of equal protection for religious groups in schools. Public schools may not discriminate against religious expression by their students.[106] Moreover, the Equal

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104 *See* Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006) (omitting to prohibit discrimination on the basis of religion); *see also* Office of Gen. Counsel, *Summary of Federal Laws, Non-Discrimination with Respect to Students*, CATHOLIC UNIV. AM., http://counsel.cua.edu/fedlaw/Cr1964s.cfm (last visited Oct. 9, 2010) ("An admissions preference on the basis of religion at a private university is not considered a violation of any federal law.").

105 42 U.S.C. § 2000c-6(a) (2006). "Desegregation" in this context refers to "the assignment of students to public schools and within such schools without regard to their . . . religion" as opposed to "the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c(b). *But see* Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J.L. & EDUC. 505, 507 n.18 (2008) (claiming that this provision provides "little or no benefit, since desegregation is seldom the issue in religious discrimination cases").

106 *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them"). *See generally* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school's exclusion of a Christian children's club from meeting on school property because of religion was unconstitutional viewpoint discrimination); Rosenberg v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding unconstitutional a university's denial of funding to a Christian student group while providing funding to other student groups); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university that allowed political student-run groups to use campus facilities had to provide the same access to a Christian student group); Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004) (affirming injunction against defendant school district that had engaged in unconstitutional viewpoint discrimination when it prevented an evangelical organization from distributing flyers at a school event); Hedges v. Wauconda Cmty. Unit Sch. Dist., 9 F.3d 1295 (7th Cir. 1993) (finding that school policy forbidding the distribution of all material with religious

Access Act requires public schools to maintain a "limited open forum" to provide religious student clubs with equal access to meeting spaces and school publications.[107]

B. Defenses to the Use of Religious Preference in Educational Decisions: Free Exercise and Freedom of Association

Unlike public schools, private schools frequently employ religious preferences. The CRA does not mention private universities but § 2000c-6 tacitly allows for religious preference in admissions at private religious universities.[108] Thus, an applicant who is rejected from a private university because of his or her religious affiliation would not have standing to sue under the CRA. The free exercise of religion and the freedom to associate protected by the First Amendment allow a private educational institution to ask an applicant to identify her religion and to grant an admissions preference based on that identification.[109]

The Free Exercise Clause protects the autonomy of religious groups from governmental interference.[110] As the Supreme Court explained in *Wisconsin v. Yoder*, "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond

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content violated the First Amendment); Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98 (D. Mass. 2003) (granting high school bible club's motion for a preliminary injunction prohibiting school from imposing in-school suspensions on bible club members and preventing club members from distributing religious literature to other students); Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189 (D. Colo. 1989) (holding that a school ban on material that proselytizes a particular religious or political belief was unconstitutional discrimination).

107 The Equal Access Act, 20 U.S.C. §§ 4071–4074 (2000) (making it unlawful "for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious . . . content of the speech at such meetings"); *see also* Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990) (upholding the constitutionality of the Equal Access Act.)

108 *See, e.g.*, Office of Gen. Counsel, *supra* note 28.

109 *See* 42 U.S.C. § 2000d (omitting religion as a protected class in anti-discrimination law). Because § 2000d does not include "religion" as basis for protection against discrimination, educational institutions have interpreted § 2000d to authorize the exercise of religious preference in admissions decisions. *See, e.g.*, Office of Gen. Counsel, *supra* note 28.

110 *See* Andrew A. Cheng, *The Inherent Hostility of Secular Public Education toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 763 n.269 (1997) (noting the importance of the Free Exercise Clause in preserving church autonomy).

the power of the State to control."[111] A law may violate the Free Exercise Clause if it "unduly burdens the free exercise of religion."[112]

Though the courts walk a "tight rope" in balancing the Free Exercise Clause and the Establishment Clause, a ban on the use of religious preferences in admissions decisions would likely unduly burden that institution's exercise of religion.[113] A religious school's decision to maintain a distinctive religious creed is at the core of that institution's religious exercise. "Any governmental regulation of a private religious school's curriculum that infringes on . . . school's expression [including admissions standards] is presumptively unconstitutional."[114] Consequently, religious schools retain the right to prefer members of certain religious groups above other applicants.

The right to freedom of association reinforces the Free Exercise clause.[115] An individual's freedom to worship requires the promise of a commensurate freedom to engage in group worship.[116] Government actions that interfere with the internal organization or affairs of a religious group unconstitutionally infringe upon members' freedom to associate.[117] Indeed, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[118]

Moreover, government funding of a school that exercises religious preferences in admissions does not automatically violate the Establishment Clause. In assessing the regulation of funding for private religious schools, courts employ two tests. First, statutes governing the funding of religious schools may be struck down under the *Agostini* test—a modification of the Establishment Clause test developed in *Lemon v. Kurtzman*.[119] Under this test, courts examine: 1) the ex-

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111 Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

112 *Id.*

113 Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).

114 Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 714 (1996).

115 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (describing the relationship between the freedom of association and the Free Exercise Clause).

116 *Id.* at 622.

117 *Id.*

118 *Id.* at 623.

119 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). Under the *Lemon* Test, to be found constitutional, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* (citation omitted) (internal quotation marks omitted). The Court modified the test in

tent to which a statute has a secular purpose; and 2) whether the statute has the primary effect of advancing religion.[120] Second, some courts still employ the "pervasively sectarian" test. Under this test, courts determine whether the school is "so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones."[121]

While statutes are occasionally struck down under the *Agostini* test,[122] schools are rarely found to be so sectarian as to compromise government funding.[123] Furthermore, in a series of cases against Columbia Union College (CUC), the Fourth Circuit held that an admission preference alone would not amount to a finding that a college was pervasively sectarian and thus ineligible for public funding.[124] Consequently, a private religious school's ability to employ religious preference in admissions decisions is not likely to threaten federal funding under the Establishment Clause.

IV. WHEN RACE AND RELIGION OVERLAP: ETHNORELIGIOUS GROUPS

As Parts II and III demonstrate, courts evaluate race-based and religion-based admissions preferences differently. How, then, are courts to assess admissions discrimination when race and religion are mixed in a single applicant or group of applicants? That is, how are

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Agostini v. Felton, subsuming the "excessive entanglement" prong into an examination of the statute's effect. 521 U.S. 203, 222–23 (1997).

120 *See* Mitchell v. Helms, 530 U.S. 793, 844–45 (2000) (plurality opinion) (O'Connor, J., concurring) (noting that to determine a statute's validity under the Establishment Clause, courts examine whether a statute: 1) has a secular purpose and 2) has a primary effect of advancing or inhibiting religion).

121 Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976). Note, however, that the viability of the pervasively sectarian test is debatable. *See Mitchell*, 530 U.S. at 826–29 (Thomas, J., plurality) (suggesting that the pervasively sectarian test should be abandoned); James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory "Pervasively Sectarian" Test*, 7 AVE MARIA L. REV. 59, 93–104 (2008) (describing circuit courts' confusion regarding the vitality of the pervasively sectarian test post-*Mitchell*).

122 *See Agostini*, 521 U.S. at 234.

123 *See, e.g.*, Columbia Union Coll. v. Clarke, 159 F.3d 151, 163 (4th Cir. 1998) ("[T]he Supreme Court has set the bar to finding an institution of higher learning pervasively sectarian quite high."); *see also Mitchell*, 530 U.S. at 826–29 (2000) (Thomas, J., plurality) (suggesting that the "pervasively sectarian" standard should be dismissed entirely.)

124 *Columbia Union Coll.*, 159 F.3d at 163 ("[T]he college must in fact possess a great many of the following characteristics: mandatory student worship services; an express preference in hiring and admissions for members of the affiliated church for the purpose of deepening the religious experience or furthering religious indoctrination; academic courses implemented with the primary goal of religious indoctrination; and church dominance over college affairs as illustrated by its control over the board of trustees and financial expenditures.").

courts to evaluate discrimination targeted at a member of an ethnoreligious group?[125]

Members of ethnoreligious groups exhibit both religious and ethnic concerns.[126] Many groups have been labeled as "ethnoreligious" including Tibetan Buddhists, Uighur Muslims in China, Turkish Muslims in Europe, Greek Orthodox, and Italian Catholics in the United States.[127] This Comment, however, focuses on Jews. Jews are a prime example of an ethnoreligious group: while Jews may embrace a distinct religious identity, Jews may also be grouped together in national or ethnic terms.[128] As sociologist J. Alan Winter wrote, "while primarily differentiated by their religious beliefs and practices, Jews are differentiated as well . . . by a sense of peoplehood."[129]

A. A Historical Understanding of Judaism: Race or Religion?

Determining whether Judaism is a religion or a race is no easy task. Some scholars maintain that Judaism fits into neither of those categories.[130] While some argue that Judaism denotes a religion with normative beliefs and practices, others claim that Jews who practice Judaism are members of the ethnic group, the Jews.[131] However, an individual of Jewish heritage who declares herself to be an atheist may still be considered a Jew by other Jews.[132]

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125 *See* Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 45 n.18 (2002) ("[E]thnoreligious groups are comprised of members bound together by loyalty to common ethnic origins, prominently including religious identity, but interwoven with language, physical (or 'racial') characteristics etc."); *see also* Hinkle, *supra* note 30, at 169–73 (explaining how religion and race are often confused in jury selection).

126 J. Alan Winter, *The Transformation of Community Integration among American Jewry: Religion or Ethnoreligion? A National Replication*, 33 REV. RELIGIOUS RES. 349, 350 (1992) (defining ethnoreligious groups).

127 Danchin, *supra* note 125, at 44 n.18 (2002) (listing different ethnoreligious groups.)

128 Winter, *supra* note 126, at 350 (1992) (describing different facets of Jewish identity).

129 *Id.* at 351.

130 For example, Rabbi Adin Steinsaltz writes that Judaism is neither a religion, a race or nation, or an ethnic group. Instead, he claims that Jews are "essentially and principally" a family. Stensaltz claims that someone who removes himself from the Jewish "family" and converts to another religion is still a Jew because of his genetic ties. Under this framework, Judaism becomes an immutable characteristic and points more towards the idea of Judaism as race. *See* ADIN STEINSALTZ, WE JEWS: WHO ARE WE AND WHAT SHOULD WE DO? 42–55 (Yehuda Hanegbi & Rebecca Toueg trans., 2005).

131 *See* Jacob Neusner, *Jew and Judaist, Ethnic and Religious: How They Mix in America*, *in* RELIGION AND THE CREATION OF RACE AND ETHNICITY 85, 85 (Craig R. Prentiss ed., 2003); *see also* ASHLEY MONTAGU, STATEMENT ON RACE 52–57 (3d ed. 1972) (arguing that Jews are not a race but rather a religious and cultural group).

132 STEINSALTZ, *supra* note 130, at 53–55 (writing "a person cannot leave or be ejected from the Jewish family"); Neusner, *supra* note 131, at 88.

Genetic characteristics are often traced to Jewish ancestry.[133] This suggests that Judaism is an immutable status similar to race. By converting to Judaism, however, a gentile—a person without ethnic or racial Jewish heritage—becomes a Jew.[134] This points towards a conception of Judaism as a changeable identity that can be adopted at will, a religion. Thus, Judaism straddles race and religion, depending on where the emphasis lies.

Notably, while Americans at one time embraced a notion of Judaism as race, that understanding gradually faded.[135] In the late nineteenth and early twentieth centuries, a conception of Judaism as a "race" allowed Jews to express an attachment to "Jewishness" as assimilation to American culture began to tear down cultural boundaries between minority groups.[136] As Americans became concerned with the rise of immigrant labor taking away industrial jobs from native-born whites at the beginning of the twentieth century, however, many Jews struggled with the tension between accepting the benefits of identifying more strongly with the "Caucasian family" and their desire to preserve a more distinct racial identity.[137]

World War II further extinguished the notion of Judaism as race. As part of their justification for the Holocaust, Nazis labeled Jews an inferior race.[138] Promoting eugenics and "race hygiene," Nazis "medicalized anti-Semitism to lend legitimacy to the genocide."[139] As one result of this Nazi conception of Judaism as a race, Jewish writers of the 1940s and 50s began to move away from a racial definition of Jews and towards an understanding of Judaism based on shared religion

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133 Jonathan Weems, *A Proposal for a Federal Genetic Privacy Act*, 24 J. LEGAL MED. 109, 116 (2003) (noting the genetic link between Tay-Sachs disease and Ashkenazi Jews); Wade, *supra* note 31 (reciting recent genetic studies finding Jews to be genetically related); *see also* Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 392 n.134 (2009) (describing genetic patterns common among Jews).

134 STEINSALTZ, *supra* note 130, at 53–55. Jewish denominations are partially differentiated based on their respective conversion processes. The legitimacy of M's mother's Progressive Jewish conversion in the eyes of the Orthodox JFS was the central issue in *JFS*. *See* R (E) v. Governing Body of JFS, [2009] UKSC 15, [17], [22] (appeal taken from Eng.).

135 *See generally* Eric L. Goldstein, *Contesting the Categories*: *Jews and Government Racial Classification in the United States*, 19 JEWISH HIST. 79 (2005) (discussing the history of American conceptions of Judaism as a "race").

136 *Id.* at 81.

137 *Id.* at 83–84.

138 *See Nazi Racism*, U. S. Holocaust Memorial Museum, http://www.ushmm.org/outreach/en/article.php?ModuleId=10007679 (last visited Oct. 9, 2010); *see also* Joseph Avanzato, *Section 1982 and Discrimination against Jews:* Shaare Tefila Congregation v. Cobb, 37 AM. U. L. REV. 225, 228 n.13 (1987) (substantiating the claim that Nazi persecution of Jews was racially motivated). *See generally* ADOLF HITLER, MEIN KAMPF (1924).

139 NAOMI BAUMSLAG, MURDEROUS MEDICINE: NAZI DOCTORS, HUMAN EXPERIMENTATION, AND TYPHUS 37 (2005).

and culture.[140] For some, the idea of a Jewish race condones Nazi propaganda.

Americans' rejection of the idea of Judaism as a race was explored publicly in *Shaare Tefila Congregation v. Cobb*[141] in 1987. *Shaare Tefila* addressed the question of whether painting anti-Semitic slogans, phrases, and symbols on a synagogue violated 42 U.S.C. § 1982.[142] The lawsuit highlighted Jews' reluctance to accept a racialized identity.[143] The National Jewish Community Relations Council asserted that "there ought not to be the suggestion that the Jewish community in any way gives sanction to the notion that Jews constitute a race."[144] The American Jewish Committee and Anti-Defamation League of B'nai B'rith eventually submitted amicus curiae briefs in favor of providing Jews with protection from "racial discrimination," but neither of these organizations "believed that the Jews actually constituted a 'race' . . . . Ultimately, they were willing to accept the terminology of 'race' because it was the only language available in American law that could bring Jews under the umbrella of civil rights protection."[145]

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140 Susan A. Glenn, *In the Blood? Consent, Descent, and the Ironies of Jewish Identity*, 8 JEWISH SOC. STUD. 145, 146 (2002). Glenn cites several literary examples of ways in which the idea of a Jewish racial identity declined in the wake of World War II. For example, in the Academy Award-winning film, *Gentleman's Agreement* (1947), a Jewish physicist character "challenges the idea that being a Jew is a matter of racial descent." *Id.* The character states, "'I have no religion, so I am not Jewish by religion. Further, I am a scientist, so I must rely on science which tells me I am not Jewish by race, since there's no such thing as a distinct Jewish race.'" *Id.* (internal quotation marks omitted). Similarly, Glenn explains that editors of the 1955 volume *Who's Who in World Jewry: A Biographical Dictionary of Outstanding Jews* determined that "the principle [of] 'Jewish birth' would not determine the selection process [for the volume]. Instead, the list [of individuals included] . . . would be based on the modern concept of 'self-identification as a Jew' as evidenced by 'participation in some phase of Jewish life.'" *Id.* at 147.

141 Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

142 *Id.* at 616 ("Section 1982 guarantees all citizens of the United States, 'the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.' The section also forbids both official and private racially discriminatory interference with property rights . . . ." (alteration in original) (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968))).

143 *See, e.g.*, Naomi W. Cohen, Shaare Tefila Congregation v. Cobb*: A New Departure in American Jewish Defense?* 3 JEWISH HIST. 95, 100–02 (1988) (explaining various national Jewish organizations' reluctance to agree to categorize Judaism as a race).

144 *Id.* at 100 (internal quotation marks omitted).

145 Goldstein, *supra* note 134, at 99.

B. A Legal Understanding of Judaism: Jews and Race

Even the identification of Jews is difficult. "Who is a Jew?" wrote Justice James Munby in *JFS*; "as will . . . become apparent, that is not a matter on which all . . . agree."[146]

In the United States, numerous cases suggested that Jews should be legally treated as a race.[147] A pair of Supreme Court cases in 1987 solidified the idea of Jews as a race as binding law.

First, in *Saint Francis College v. Al-Khazraji*, the Court held that a Caucasian Arab could sustain a claim of racial discrimination under 42 U.S.C. § 1981.[148] In *Saint Francis*, an Iraqi-born United States citizen was hired as a professor.[149] The professor alleged that he had been denied tenure because of his "Arabian" race and sued under § 1981.[150] The college argued that § 1981 did not encompass claims of discrimination by one Caucasian against another.[151] Noting that § 1981 had its source in the Civil Rights Act of 1866,[152] the Court concluded that at the time of its passage, Arabs were not considered to be the same race as Englishmen, Germans, and other Caucasians.[153] Thus, the Court wrote, "we have little trouble in concluding 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" regardless of "whether or not [they] would be classified as racial in terms of modern scientific theory."[154] Although *Saint Francis* did not explicitly mention whether § 1981 would apply to Jews, by interpreting § 1981 to protect all groups of people considered to be distinct racial groups at the

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146 R (E) v. Governing Body of JFS, [2008] EWHC 1535/1536 (Admin), [6] (Eng.).

147 *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) (describing treatment of the "Jewish race" in Germany); Banker v. Time Chem., Inc., 579 F. Supp 1183, 1186 (N.D. Ill. 1983) (arguing that Nazi anti-Semitism was motivated by racism); Ortiz v. Bank of Am., 547 F. Supp. 550, 567 & n.25 (E.D. Cal. 1982) (noting that Jews are the target of "racial prejudice"); Marlowe v. Fisher Body, No. 35206, 1972 WL 197, at *1 (E.D. Mich. Jan. 26, 1972) (arguing that prejudice against Jews has become racial); *see also* LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 267 (S.D.N.Y. 1991) ("Because Jewish culture, ancestry, and ethnic identity are intricately bounds up with Judaic religious beliefs, racial and religious discrimination against Jews cannot be . . . easily distinguished . . . .").

148 Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

149 *Id.* at 606.

150 *Id.* at 606, 609 ("Although § 1981 does not itself use the word 'race,' the court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts." (quoting Runyon v. McCrary, 427 U.S. 160, 168, 174–75 (1976))).

151 *Id.* at 609–10.

152 *Id.* 610–12.

153 *Id.* at 612.

154 *Id.* at 613.

passage of the Civil Rights Act of 1866, the case laid the groundwork for Jews to claim discrimination under § 1981.

The Court officially asserted § 1981's applicability to Jews in *Shaare Tefila Congregation v. Cobb*, finding that the term "race" within the meaning of the 1866 Act was not limited by contemporary usage of the term.[155] In *Shaare Tefila*, petitioners claimed that they had been deprived of the right to hold property in violation of § 1982 because the defendants' desecration of their synagogue was motivated by "racial prejudice."[156] Defendants claimed that because Jews were not members of a "racially distinct group," petitioners could not state a claim for racial discrimination under § 1982.[157] Thus the question before the Court boiled down to whether Jews could be considered a race for purposes of § 1982 protections: were Jews the "kind of group that Congress intended to protect" when it passed the Civil Rights Act of 1866.[158] Adopting *Saint Francis*' interpretation of congressional intent, the Court determined that Jews were among the peoples considered to be a distinct race within the protection of the 1866 Act.[159] As a result, the Jewish petitioners could maintain a § 1982 action.

Saint Francis and *Shaare Tefila* jointly established that Jews are legally considered to be a race for civil rights actions.[160] In the wake of the two decisions, protection of Jews as a "race" was extended to allow Jews to maintain § 1981 actions and cases under the Thirteenth Amendment.[161] In addition, Jews may be able to receive protection under Title VI against racial discrimination in federally assisted programs or activities.[162]

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155 Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987).

156 *Id.* at 616.

157 Brief for Respondent at 5, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (No. 85-2156).

158 *Id.* at 617.

159 *Id.* at 617–18.

160 *See* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1730 n.110 (2000) (noting that *Shaare Tefila* applied *Saint Francis*' reasoning).

161 *See* U.S. v. Nelson, 277 F.3d 164, 176–77 (2d Cir. 2002) ("Jews . . . are today generally not considered a distinct race. . . . [However], the Supreme Court's case law firmly and clearly rules that Jews count as a 'race' under certain civil rights statutes enacted pursuant to Congress's power under the Thirteenth Amendment. . . . [T]hese cases not only extend the protections of Reconstruction Era civil rights statutes, now codified at 42 U.S.C. §§ 1981 and 1982, to Jews understood as a 'race,' they also implicitly rule that the Thirteenth Amendment . . . protects Jews as a race.") (citations omitted).

162 *See* Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(d) (2000). Jews' ability to receive Title VI protections remains in flux. In 2004, the Office of Civil Rights (OCR) issued a formal "Dear Colleague" letter informing recipient institutions that it would exercise its Title VI jurisdiction to defend Jews. The OCR also issued a guidance letter explaining that "'Jewish' may be interpreted as an ethnic [or] . . . racial category." Kenneth L. Marcus, *supra* note 132, at 387–88; *see* Memorandum from Kenneth L. Marcus, Deputy Assis-

Since *Saint Francis* and *Shaare Tefila*, lower courts have been reluctant to differentiate between religious and racial discrimination against Jews. This has resulted in at least two rulings that extend the 1866 Act to purely religious discrimination against Jews.[163] In *LeBlanc-Sternberg v. Fletcher*, a Hasidic Rabbi sued those responsible for incorporation of the village of Airmont, New York, alleging that Airmont had been incorporated in order to prevent the development of Orthodox Jewish residential neighborhoods.[164] The rabbi claimed that the defendants had violated the Hasidim's right to use and enjoy property under § 1982.[165] Defendants, however, asserted that their motivation was purely religious, being "directed toward the plaintiffs' lifestyle as dictated by the tenets of plaintiffs' religion."[166] While the federal district judge acknowledged that the defendants' actions were based on the plaintiff's religion, he said that this "ma[de] . . . no difference . . . . Because Jewish culture, ancestry, and ethnic identity are intricately bound up with Judaic religious beliefs, racial and religious discrimination against Jews cannot be as easily distinguished as defendants would have it . . . . We need not inquire any further."[167] Rejecting an examination of the nature of the anti-Semitism, the judge held that the Jewish plaintiffs had stated claims for racial discrimination under §§ 1981 and 1982.[168]

A second judge also overlooked claimed distinctions between religious and racial discrimination in *Singer v. Denver School District No. 1*.[169] In that case, a Hispanic public school teacher who converted to Orthodox Judaism claimed that he had experienced discrimination

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tant Sec'y for Enforcement, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 13, 2004), *available at* http://www.ed.gov/about/offices/list/ocr/religious-rights2004.html; Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Office for Civil Rights, U.S. Dep't of Educ., to Sidney Groeneman, Senior Research Assoc., Inst. for Jewish & Cmty. Research 1–2 (Oct. 22, 2004), *available at* http://www.eusccr.com/letterforcampus.pdf. In 2006, however, Honorable Stephanie Monroe, Assistant Secretary of Education for Civil Rights, stated that the OCR will not investigate allegations of anti-Semitic harassment unless the allegations also include other forms of discrimination over which OCR has subject matter jurisdiction. *See* Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Dep't of Educ., to Kenneth L. Marcus, Staff Dir., U.S. Comm'n on Civil Rights 1 (Dec. 4, 2006), *available at* http://www.eusccr.com/lettermonroe.pdf.

163 *See* Singer v. Denver Sch. Dist. No. 1, 959 F. Supp. 1325 (D. Colo. 1997); LeBlanc-Sternberg v. Fletcher 781 F. Supp. 261 (S.D.N.Y. 1991).

164 *LeBlanc-Sternberg*, 781 F.Supp at 264.

165 *Id.* at 267.

166 *Id.*

167 *Id.* at 267–68.

168 *Id.*

169 Singer v. Denver Sch. Dist. No. 1, 959 F. Supp. 1325 (D. Colo. 1997).

on account of his race and his religion.[170] Because Singer was a convert without any Jewish ancestry or heritage, it would seem that any discrimination faced by Singer would not be racial anti-Semitism, but rather discrimination based on his Jewish religious practices—religious anti-Semitism.[171] Singer himself described the discrimination as religious, accusing his employer of "religious harassment."[172] Surprisingly, however, the court rejected the argument that Singer's claims were purely religious: "[s]ince Singer is claiming he was discriminated against as a Jew, a distinct racial group for the purposes of § 1981, Defendants are not entitled to judgment on the basis that he is claiming religious discrimination."[173] *Singer* suggests that even if Jews are subject to purely religious classification, they will still have access to racial protections.

LeBlanc-Sternberg and *Singer* demonstrate that courts will be reluctant to differentiate between religious and racial discrimination, at least in the case of discrimination against Jews. In a sense, this provides Jews with a greater level of protection than other non-racial, religious minority groups.[174] For example, if a Mormon—a member of a non-racial, religious minority group—was fired as a result of his Mormon religious observance, he could not claim he had been discriminated against as a result of his race in violation of § 1981. In contrast, a Jew who was fired solely as a result of his Jewish religious practice could allege racial discrimination under § 1981. Thus, while claims of religious discrimination are not actionable under §§ 1981 and 1982, Jews—because of their unique racial and religious status—may use these statutes to mount claims of religious discrimination by claiming that they were discriminated against on the basis of their status as Jews.

V. A PROPOSAL FOR GREATER JUDICIAL INQUIRY INTO ANTI-SEMITISM

Anti-Semitism presents courts with two conflicting interests: an interest in preserving the First Amendment's guarantee of religious

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170 *Id.* at 1326–28.

171 William Kaplowitz, *We Need Inquire Further: Normative Stereotypes, Hasidic Jews, and the Civil Rights Act of 1866*, 12 MICH. J. RACE & L. 537, 555 (2007) (analyzing the discrimination against Singer).

172 *Singer*, 959 F. Supp at 1328.

173 *Id.* at 1331.

174 *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 167 (1976) (explaining that § 1981 does not apply to religious discrimination); Noyes v. Kelly Servs., 488 F.3d. 1163, 1167 n.3 (9th Cir. 2007) ("It is well established, however, that § 1981 does not apply to claims of religious discrimination.").

schools' right to religious preference and an interest in preserving the Fourteenth Amendment's protections against impermissible racial discrimination. To better balance these conflicting interests, courts should be more willing to examine the nature of the discrimination. Discrimination related to immutable characteristics of ancestry should remain subject to traditional race-based protections while discrimination relating to religious beliefs and practice should receive only those protections available to religious discrimination.

Greater judicial inquiry into the nature of the anti-Semitism at issue would be valuable for two reasons. First, by distinguishing between racial and religious anti-Semitism, courts could ensure that all victims of religious discrimination are treated similarly and that all victims of racial discrimination are treated similarly. Otherwise, Jews are essentially afforded a unique legal status that undermines basic fairness. Second, by examining the nature of the discrimination against Jews, courts can preserve religious schools' constitutionally protected right to express religious preferences. While a closer examination of anti-Semitism might require increased expenditure of judicial resources, because of the small number of cases in this area and judicial flexibility in choosing how to protect victims of discrimination, the benefit to maintaining clear boundaries between religious and racial animus outweighs concerns regarding judicial economy.

A. Ensuring Similar Treatment

In the interests of consistency and fairness, courts should examine anti-Jewish discrimination to ensure that all victims of religious and racial discrimination are treated similarly. By allowing Jews to bring race-based claims and refusing to inquire into the nature of the discrimination (racial or religious) against Jews, courts effectively provide Jews with a unique level of protection from discrimination. Case law suggests that anyone identifying as Jewish—independent of their ancestry or manner of conversion—may invoke race-based protections against discrimination.[175] Because laws governing the use of race and the use of religion in admissions decisions differ,[176] this access to race-based protections effectively ensures that any discrimination against Jews in admissions decisions is race-based and impermissible.

By providing Jews with race-based protections, courts give Jews greater protection than other victims of religious discrimination.

175 *See, e.g.*, *Singer*, 959 F. Supp. at 1331.

176 *See infra* Parts II-III.

This kind of disparate treatment belies the fairness that forms the basis of the American legal system because courts have differentiated between religious and racial discrimination when dealing with other groups.[177] This kind of disparate treatment could also trigger increased anti-Semitism based on resentment of Jews' unique receipt of race-based protections.[178]

One could argue that courts have a greater interest in protecting Jews than some other minority groups because of America's legacy of anti-Semitism.[179] Perhaps Jews, like African-Americans, deserve increased judicial protections as a result of "the tragic and indelible fact that discrimination . . . has pervaded our Nation's history and continues to scar our society."[180]

The potential for backlash argues against an automatic provision of racial antidiscrimination protections for Jews, however. Allowing Jewish victims of religious discrimination to assert race-based discrimination claims could trigger "backlash against 'special rights' and 'special treatment'" afforded to Jewish victims of religious discrimination, leading to a fortification of anti-Semitic animus.[181] As one scholar noted in his evaluation of antidiscrimination laws in the workplace, "[h]ostility to antidiscrimination laws creates real hurdles to their enforcement."[182]

In the context of affirmative action programs, for example, efforts seen as providing racial minorities with "special rights" have triggered backlash from the racial majority. Over one-quarter of Americans (28%) believe that too much attention has been paid to problems

177 *See, e.g.*, Daud v. Gold'n Plump Poultry, Inc., No. 06-4013, 2007 WL 1621386, at *9 (D. Minn., May 11, 2007) (evaluating Somali Muslims' complaints of racial and religious discrimination and determining that they stated only allegations of religious discrimination).

178 *See generally* Jeffrey R. Dudas, *In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC'Y REV. 723 (2005) (asserting that the perception that certain minorities have received "special rights" treatment has triggered resentment and motivated opposition).

179 *See, e.g.*, Malcolm Gladwell, *Getting In*, NEW YORKER, Oct. 10, 2005 (describing strategies employed by American colleges in the early twentieth century to keep Jews out); *The Jewish Law Student and New York Jobs: Discriminatory Effects in Law Firm Hiring Practice*, 73 YALE L.J. 625, 635 (1964) (describing law firm interview techniques perceived to be intended to exclude Jews).

180 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, J., dissenting) (explaining that affirmative action programs may be necessary to remedy past discrimination).

181 Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2318 (2003).

182 Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 140 (2008).

facing African-Americans;[183] a sentiment which threatens to exacerbate tangible racial divisions in America. In fact, Professor Clark Freshman has suggested that the perception that certain minority groups are receiving "special treatment" may result in "explicit retrenchment" of race stereotypes.[184] On a macrolevel, this may result in "initiatives . . . to prohibit race-conscious programs in schools and universities, court decisions invalidating affirmative action, or legislation."[185] Backlash may also occur "on a microlevel when outsiders cannot break into organizations or through glass ceilings, or when fellow employees sabotage their work."[186]

Professor Freshman's analysis of majority backlash against the "special treatment" of racial minorities suggests that courts' unique treatment of Jews could result in increased cultural divisions. Ironically, providing Jews with unique legal treatment has the potential to increase anti-Semitism and impede the enforcement of civil rights law.

B. Preserving Religious Preference

Providing Jews with the blanket anti-discrimination protections given to minority racial groups also undermines private actors' right to religious preference. The Free Exercise Clause and the right to Freedom of Association ensure that a Catholic school may admit Catholic applicants ahead of others.[187] Preferring Catholic applicants over Jews, however, might not be protected. Instead, because case law defines Jews as a race, admitting Catholic applicants while denying equally qualified Jews would constitute impermissible racial discrimination. This is true even if a Catholic school's admissions policy is based on purely religious preference, e.g., the school holds mandatory activities on Friday evenings or Saturday mornings and believes that admitting Sabbath-observing Jews would inhibit these activities. If Jews are treated as a race, the Catholic school no longer has the constitutional right to reject Jewish applicants.

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183 *The Tea Party Movement: What They Think*, CBS NEWS (April 14, 2010), http://www.cbsnews.com/8301-503544_162-20002529-503544.html?tag=contentMain;contentBody.

184 Freshman, *supra* note 181, at 2318.

185 *Id.*

186 *Id.* at 2318–19.

187 *See* Office of Gen. Counsel, *supra* note 28 (characterizing a private religious educational institution's right to admit members of certain faiths above others as "part of the First Amendment free exercise right of the religious educational institution").

Similarly, a Jewish school could not discriminate against Jewish applicants. An admissions policy like the one at issue in *JFS* would be struck down as unconstitutional. Under American law, as in Britain, if a Jewish-American student were rejected by a Jewish school because of his mother's ancestry, he or she could state a § 1981 claim for racial discrimination.[188] A number of Jewish schools, however, continue to ask questions related to the ancestry of the applicant.[189] For example, the Ida Crown Jewish Academy in Chicago, Illinois, asks applicants whether their mother and maternal grandmother are "Jewish by birth."[190] If the applicant, applicant's mother, or applicant's maternal grandmother is "not Jewish by birth," applicants must "provide [a] certificate of Halachic conversion."[191] A Jewish school such as Ida Crown might try to distinguish itself from a Catholic school that has rejected Jewish applicants on account of their Jewishness by arguing that it is merely "policing its own," a case of Jews discriminating against other Jews. However, because racial discrimination between members of the same race is also actionable under § 1981, discrimination against one sect of Judaism by another would still be racial discrimination.[192]

A more difficult question is whether a Jewish school could permissibly reject an applicant on account of his religious practice. This could occur, for example, if an Orthodox school rejected a "Jewish by birth" applicant because he was not sufficiently observant. On the one hand, this kind of religious discrimination between Jews may constitute a constitutional exercise of a Jewish school's religious freedoms, analogous to a Catholic school's ability to preference a Catholic applicant over a Protestant applicant. On the other hand, however, if courts, following *LeBlanc-Sternberg* and *Singer*, refuse to analyze the nature of the school's admissions decision, a Jewish applicant who is rejected by a Jewish school because of his religious practice should

188 Presuming that the student could show that he had been rejected *because of* his Jewish ancestry.

189 *See, e.g.*, *Application for Admission*, MAIMONIDES SCHOOL, http://www.maimonides.org/pdf/admissions/Application_GrK-1.pdf ("If your child, either parent, or any grandparent has been converted, please indicate the name of the Rabbi and Beit Din who performed the conversion. Please enclose a copy of the certificate of conversion."); *Ramaz Lower School Application*, RAMAZ LOWER SCH., http://www.ramaz.org/public/LowerSchoolApplication.pdf (asking both applicant's mother and father to check a box entitled "Jewish by Birth" or "Jewish by Conversion").

190 *Application for Admission*, IDA CROWN JEWISH ACAD., http://www.icja.org/filebin/ICJAApplication0809.pdf.

191 *Id.*

192 Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008) ("There can . . . be 'racial' discrimination within the same race . . . .").

be able to state a § 1981 claim for racial discrimination. Thus, the constitutionality of a Jewish school's ability to prefer applicants on account of their level of religious observance—the extent to which *LeBlanc-Sternberg* and *Singer* may be applied to religious discrimination between Jews—remains an open question.

C. Justifying Greater Judicial Inquiry

Closer judicial examination of anti-Semitic discrimination would maintain clearer boundaries between claims of purely religious discrimination and those of racial discrimination. In the *Singer* case, for example, instead of dismissing the defendants' claims that their discrimination was religion-based, the court could have examined the record more closely. Defendants made discriminating remarks about Singer's religious clothing, dietary restrictions, and religious practice.[193] Yet their comments were not based on Singer's ancestry or any other unchangeable characteristic; Singer was ethnically Hispanic. Thus, Singer should not have been allowed to claim race-based discrimination. He should have brought a Title VII claim for religion-based discrimination in employment.

1. Response to Concerns of Judicial Economy

While there are valid concerns that a greater inquiry into whether anti-Semitism is religious or racial would tax judicial resources and cause congestion in the courts, this concern should not be exaggerated. Because only a small number of cases involve a need to distinguish between religious and racial discrimination, these fears are largely unfounded. The Anti-Defamation League (ADL) reported 1,211 anti-Semitic incidents in the United States for 2009.[194] In 2008, approximately 2% of federal civil cases went to trial.[195] Assuming *arguendo* that victims of all of these incidents brought civil discrimination suits—as opposed to criminal actions—then judges would be called upon to adjudicate about twenty-four cases where the line between religious and racial discrimination could be an issue. Moreover, it seems likely that some of those twenty-four cases would be determined on procedural questions. With less than twenty-four of the

193 Singer v. Denver Sch. Dist. No. 1, 959 F. Supp. 1325, 1327–28 (1997).

194 *ADL Audit: 1,211 Anti-Semitic Incidents across the Country in 2009*, ANTI-DEFAMATION LEAGUE (July 27, 2010), http://www.adl.org/PresRele/ASUS_12/5814_12.htm.

195 UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. D, tbl. C-4 (2009), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C04Mar09.pdf.

260,000 case filings that federal trial courts receive annually[196] possibly requiring some in-depth analysis of discrimination, concerns about judicial economy remain unwarranted.

2. Response to Concerns of Judicial Expertise

Opponents of a greater examination of anti-Semitism may also argue that judges are not well-equipped to engage in such analyses of discrimination.[197] There are at least two responses: first, judges are often called upon to explore areas where they have "little or no expertise."[198] Indeed, "[j]udges are hired to be thoughtful legal analysts and diligent factual analysts," and should not "shy away from analyzing subjects they do not know in advance" of trial.[199] Second, courts currently allow a greater number of overly protective judgments. In deeming all anti-Semitic discrimination "racial," courts mistakenly conclude that all anti-Semitism is in fact racial.[200]

There may be occasions when the inquiry into the nature of anti-Semitism does not yield a clear answer. This could occur, for example, where an individual faced both religious and racial discrimination on account of her Judaism. In those cases, it may be appropriate for a court to defer to race-based protections for fear of condoning racial animus. By drawing clear boundaries between religious and racial anti-Semitism, however, courts can preserve well-established differences in law between religious discrimination and racial discrimination and ensure more uniform application of antidiscrimination laws to all victims. In addition, deeper probing into discrimination would preserve religious organizations' First Amendment rights. A Catholic school's religious preference would be examined to determine whether the admissions decision was motivated by religious be-

196 *Id.* at app. D, tbl. C.

197 *See, e.g.*, Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 197–98 (2007) (explaining that some scholars object to the idea of courts engaging with substantive analysis); Hon. Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 737–38 (2006) (criticizing the Wisconsin Supreme Court for failing to "defer to the judgment of those elected to represent the people"). *But see* Christina Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1116 (2006) ("Other [scholars] suggest that a more substantive approach to interpretation is required so that judges can address the fundamental moral values that are embodied in the Constitution.").

198 Courtney T. Nguyen, Note, *Employment Discrimination and the Evidentiary Standard for Establishing Pretext:* Weinstock v. Columbia University, 35 U.C. DAVIS L. REV. 1305, 1342–43 (2002).

199 Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 566 (2009).

200 *See supra* Part V.A.

lief or racial characteristics. If the Catholic school's admissions policy gave preference to non-Jews because admitting Sabbath-observing Jews would inhibit mandatory Saturday activities, this would be discrimination based purely on Jewish religious practice. As a result, the admissions policy would be a valid constitutional expression of the school's religious belief. In contrast, if the Catholic school's discriminatory admissions policy were based on an explicit belief that admitting Jewish applicants would change the religious makeup of the student body, this kind of discrimination would be analyzed as impermissible race-based discrimination.

Similarly, if a Jewish school gave admissions preferences to applicants whose mothers were "Jewish by birth," this practice would be struck down as an illegal racial classification. If, however, the Jewish school evaluated applicants based on their level of observance—for example, their involvement in synagogue and their commemoration of Jewish holidays—that might be a permissible religious distinction.

As these examples illustrate, investigating the nature of anti-Semitism could be particularly important in religious school admissions where the constitutionality of an admissions decision might depend upon the nature of the discrimination. Although beyond the scope of this paper, other private institutions expressing religious preferences such as nursing homes[201] and private cemeteries[202] could be similarly affected by the courts' unique treatment of anti-Semitism.

VI. CONCLUSION

Courts and legislatures have long distinguished between racial and religious discrimination. While racial classifications are almost always disfavored, religious classifications may be permissible. In public education, both racial and religious discrimination are prohibited. In private education, racial discrimination remains prohibited but religious discrimination is permitted. Consequently, in the private school context, courts struggle with cases involving discrimination against groups embodying both racial and religious characteristics.

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201 The Federal Fair Housing Act prohibits discrimination in senior housing on the basis of race. Fair Housing Act § 804, 42 U.S.C. § 3604 (2006). However, the Act allows religious organizations to prefer applicants for housing on the basis of religion. 42 U.S.C. § 3607(a). For additional discussion, see generally Michael P. Seng, *The Fair Housing Act and Religious Freedom*, 11 TEX. J. C.L. & C.R. 1 (2005).

202 *See* Note, *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378, 393 (1961) (noting that religious discrimination in cemeteries is arguably protected by the First Amendment.)

The British *JFS* case exemplifies courts' difficulties when confronted with discrimination against ethnoreligious groups: if Judaism is a religion, a private religious school may validly prefer certain Jewish sects above others; if Jews are a race, however, admitting members of one sect of Judaism over others constitutes impermissible racial discrimination. Not wanting to inquire into the nature of discrimination against Jews, U.S. courts have rejected even the prospect of separating racial and religious discrimination. Instead, they provide Jews with race-based protections as a matter of course.

These unique protections for Jews do not seem to be intentionally preferential. Instead, courts are unsure how to deal with ethnoreligious groups. By providing Jewish litigants with heightened racial protections, however, courts may unintentionally encourage backlash against these minorities. Moreover, by providing Jews with unique legal status, courts may prevent private schools from exercising otherwise constitutionally protected religious preferences.

The tension between the government's interest in preventing discrimination and its interest in preserving religious freedom is ongoing. Although Jews pose a unique challenge to this balancing scheme, to the extent possible courts should attempt to delineate between religious and racial discrimination. By differentiating between discrimination on the basis of ancestry and discrimination on the basis of religious belief and practice, courts may better prevent invidious racial discrimination while at the same time preserving the freedom of religious preference.