

1987

## Is Discrimination Against Jews "Race Discrimination?"

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### Repository Citation

Devins, Neal, "Is Discrimination Against Jews "Race Discrimination?"" (1987). *Faculty Publications*. 410.  
<http://scholarship.law.wm.edu/facpubs/410>

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## *Is Discrimination Against Jews "Race Discrimination?"*

by Neal Devins

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Shaare Tefila Congregation

v.

John Cobb

(Docket No. 85-2156)

Argued February 25, 1987

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What is racial discrimination? Is it discrimination against members of a racially distinct group, or is it discrimination against individuals believed to be members of such a group? In other words, should subjective intent or taxonomical classifications determine whether civil rights laws' protection against "all racially motivated deprivations" apply to Jews, Arabs and other ethnic Caucasians? This important question will be addressed by the Supreme Court in *Shaare Tefila Congregation v. Cobb*. (In a related case, *St. Francis College v. Al-Kharaji*, No. 85-2169, also analyzed in this issue of *Preview*, the Court will determine whether these laws protect Arabs.)

### ISSUES

Specifically, *Cobb* will determine whether the Civil Rights Act of 1866 recognizes that discrimination against Jews might constitute race discrimination. In making this determination, the Court will necessarily decide whether the post-Civil War guarantee that "all citizens shall have the same rights enjoyed by white citizens" is a universalistic demand that discrimination is not to be tolerated or whether this protection is limited to non-Caucasian interests. Because this issue lies at the heart of perceptions about race and discrimination, Arab, Jewish and black organizations have joined together in arguing that Jews are entitled to protection under this statute. While such agreement might make resolving this case easy from an emorights Act of 1866 was enacted to ensure that blacks' right to enjoy the laws' protection was equal to that of "white citizens." Many courts—including the Fourth Circuit Court of Appeals which rejected the Jewish plaintiffs' claim in this case (785 E. 2d 523 (1986))—have held that Congress did have taxonomical classifications in mind when it enacted this statute.

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### FACTS

On November 2, 1982, the Shaare Tefila Congregation of Silver Spring, Maryland was desecrated. The walls of the synogogue were spraypainted in large anti-Semitic slogans and symbols—including "Death to the Jude," "Dead Jude," swastikas and Ku Klux Klan symbols. Perpetrators of the attack admitted that they perceived Jews to be members of a distinct and inferior race. Claiming that their civil rights were violated, members of the Shaare Tefila Congregation filed a claim in federal court against the perpetrators—at least eight individuals including John Cobb and Michael Remer. (Remer was the only original defendant to be active in the court of appeals.)

The original claim was based on 42 U.S.C. section 1982—part of the 1866 Act—which ensures all citizens "the same right as is enjoyed by white citizens to own property." The congregation argued that defendants' racially-motivated desecration of their synogogue denied them the statutorily-protected right to hold property. The United States District Court for Maryland and the Fourth Circuit Court of Appeals rejected this contention. Ruling that "nothing in the statute, its legislative history, or subsequent case law" suggests that this statute "was intended to apply to situations in which a plaintiff is a member of a racially distinct group," these courts summarily dismissed—without need for a trial—plaintiffs' claim. (These courts also rejected plaintiffs' 42 U.S.C. section 1981 claim; holding that the right to the "full and equal benefit of all laws" is concerned only with state-sponsored deprivation of rights. This state action holding was not appealed to the Supreme Court.)

Judge Wilkinson of the Fourth Court dissented to this appellate court holding. For him, the majority's taxonomical distinction misunderstood the purposes of the Civil Rights Act—namely, "to halt the spread of violence and hatred by those motivated by such perceptions." Judge Wilkinson also sought to support his thinking through the commonsense argument that "all racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group."

### BACKGROUND AND SIGNIFICANCE

At its core, *Cobb* addresses a question of fundamental importance to the ongoing debate—spurred on by the

Reagan administration—regarding the definition of civil rights. If the congregation prevails, civil rights is an umbrella, protecting all against discrimination. If the defendants prevail, civil rights has a much narrower focus—the protection of taxonomic minorities from the dominant white culture. (The Reagan administration, which supports reverse discrimination claims of innocent whites injured by affirmative action plans, supports the view that civil rights laws extend to all citizens. However, the administration did not file an *amicus* brief in this litigation.)

*Cobb* also addresses an important statutory interpretation issue: What is the appropriate point of reference for determining statutory purpose? Unlike the current debate over the framers' understanding of constitutional provisions, the Congress which enacts a statute establishes its meaning. At the same time, just as the framers did not anticipate changes in social custom and practice, the 1866 Congress might not have anticipated changing perceptions of racial identity. In interpreting 42 U.S.C. section 1982, therefore, the Court must determine whether "the rights enjoyed by white citizens" is an inherently evolving concept.

Finally, as mentioned earlier, *Cobb* is socially significant because it has united Arabs, Jews and blacks before the Court.

#### ARGUMENTS

*For Shaare Tefila Congregation (Counsel of Record, Patricia A.*

*Brannan, 815 Connecticut Avenue, NW, Washington, DC 20006; telephone (202) 331-4500)*

1. The racial motivation and character of the defendants' conduct, not some taxonomic classification, define race under 42 U.S.C. section 1982. To hold otherwise defeats the purpose of the statute and is inconsistent with Supreme Court race discrimination jurisprudence.

*For Michael Remer (Counsel of Record, Robert Barnhouse, 1100 Charles Center South, Baltimore, MD 21201; telephone (301) 539-2530)*

1. The language and legislative history of section 1982, as interpreted by the Supreme Court, indicate that the statute covers discrimination on the basis of race—not discrimination based on erroneous perceptions of racial identity.
2. The congregation's interpretation of section 1982 would infinitely expand the scope of civil rights laws, making those laws unworkable.

#### AMICUS BRIEFS

*In Support of the Shaare Tefila Congregation*

The state of Maryland; the American-Arab Antidiscrimination Committee; and a coalition of groups including the Antidefamation League, the ACLU and the NAACP

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