THE LANDMARK CASE OF *SHAARE TEFILA V. COBB*[*]

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A review of ANNALISE E. GLAUZ-TODRANK, JUDGING JEWISH IDENTITY IN THE UNITED STATES (Lexington Books 2023)

On September 28, 2023, eight federal cabinet-level agencies formally clarified, for the first time, that Title VI of the Civil Rights of 1964[1] prohibits ethnic and ancestral discrimination against Jewish Americans and members of various other ethno-religious groups.[2] This move, and its underlying concept, dispelled any remaining doubt that Title VI—which prohibits discrimination on the basis of race, color, or national origin, but not religion—applies to ethnic groups that share a common religion. The White House announced that this move was taken to advance President Joseph Biden's National Strategy to Combat Anti-Semitism.[3] In fact, the action was the culmination of a twenty-year effort, begun during the George W. Bush

[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] 42 U.S.C. §§ 2000d - 2000d-7 (Title VI).

[2] *Biden administration to take new actions against antisemitism*, REUTERS, Sept. 28, 2023, https://www.reuters.com/article/usa-biden-antisemitism/biden-administration-to-take-new-actions-against-antisemitism-idUSKBN30Y1F3. The eight agencies are the Departments of Agriculture, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Labor, Treasury, and Transportation. The Departments of Justice and Education had already long since issued similar statements.

[3] White House Fact Sheet: Biden-Harris Administration Takes Landmark Step to Counter Antisemitism, Sept. 28, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/28/fact-sheet-biden-harris-administration-takes-landmark-step-to-counter-antisemitism/.

administration, to ensure that federal officials would extend uniform protections to such populations in a manner consistent with the U.S. Supreme Court's unanimous decision in the case of *Shaare Tefila v. Cobb*.[4] Full disclosure: I have been a principal player in these efforts. Indeed, the notion that Title VI protects ethno-religious groups from discrimination based on ethnic or ancestral characteristics has been variously described as the "Marcus Policy"[5] or "Marcus Doctrine"[6] (although I will describe it below as the 2004 Policy).

By coincidence, *Shaare Tefila v. Cobb* has just received its first book-length treatment in Annalise E. Glauz-Todrank's new volume on *Judging Jewish Identity in the United States*. Glauz-Todrank, a religion scholar, devoted fifteen extraordinary years of her life—beginning with her doctoral dissertation, continuing through a bout with cancer that left her temporarily blind, and continuing into her professorial career at Wake Forest—to telling the story of *Shaare Tefila*. Despite this laudable dedication, Glauz-Todrank modestly claims that the object of her tireless efforts is "*not* a landmark case," although she finds it interesting for how it "situates Jewishness at the interface of 'religion' and 'race' . . . "[7]

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[4] 481 U.S. 615 (1987).

[5] *See, e.g.*, Mark G. Goldfeder, *The Biden Administration National Strategy to Counter Antisemitism Reaffirms its Use of the IHRA Definition*, JEWISH J. (Oct. 4, 2023), https://jewishjournal.com/commentary/opinion/363459/the-biden-administration-national-strategy-to-counter-antisemitism-reaffirms-its-use-of-the-ihra-definition/ ("Last Thursday the Biden Administration announced that as part of implementing its National Strategy to Counter Antisemitism, eight more federal agencies have now officially adopted the Marcus Policy under Title VI of the Civil Rights Act."); Lesley Klaff, *Fighting Back Against Campus Anti-Semitism*, 3 J. FOR THE STUDY OF ANTISEMITISM 747, 758 (2011) ("Known as the 'Marcus Policy" or the '2004 Policy,' it announced that discrimination on the basis of ancestral or ethic characteristics is no less permissible against groups that also have religious attributes than against those that do not."). Numerous student government resolutions have referenced the "Marcus Policy." *See, e.g.*, Associated Students of San Diego State University, *A Resolution to Condemn Anti-Semitism*, https://as.sdsu.edu/govt/resources/legislation/?legis=139 ("Under the Marcus Policy initiated in 2004, Jewish students are now protected under Title VI, based on their ethnic or ancestral background").

[6] Dion J. Pierre, *"Unfinished Business": Biden Admin's New Actions Against Antisemitism Laudable But Not Enough, Expert Says*, THE ALGEMEINER (Sept. 29, 2023), https://www.algemeiner.com/2023/09/29/unfinished-business-biden-admins-new-actions-against-antisemitism-laudable-but-not-enough-expert-says/ ("The Department of Education became the first agency to declare that Title VI applies to Jewish Americans during the George W. Bush administration, when Marcus served as assistant secretary, in what has become known as the 'Marcus Doctrine.'").

[7] ANNALISE E. GLAUZ-TODRANK, JUDGING JEWISH IDENTITY IN THE UNITED STATES 8 (2023) (emphasis added).

Glauz-Todrank is half-right. *Shaare-Tefila* does indeed provide an important perspective on the relationship between Jewish identity, religion, and race in American law. And yet it is also a landmark case in American civil rights law, not only because of the Biden Administration's action, but also because it has supported a large-scale revision in the way that Jewish Americans and other religious groups are treated under Title VI of the Civil Rights Act of 1964.

While not as widely known as it deserves to be, *Shaare Tefila* should be considered—together with its companion case, *St. Francis College v. Al-Khazraji*—the seminal case on the legal status of ethno-religious groups such as Jews and Sikhs under racial discrimination laws in the United States. *Shaare Tefila* established for the first time that ethno-religious group members could avail themselves of civil rights protections that were established to protect against race discrimination. In other words, ancestral groups that also share a common religion would not be treated differently (i.e., with fewer protections) than those that do not. During the period when Glauz-Todrank was writing her book, *Shaare Tefila* provided crucial legal support for agency guidance regarding the protection of such groups. Glauz-Todrank does not address these developments, but they nevertheless can certainly be better understood in light of her contribution.

I. *SHAARE TEFILA V. COBB*

On November 1, 1982, eight vandals spray-painted the Jewish Conservative Shaare Tefila Congregation in Silver Spring, Maryland, with messages such as "Death to the Jude," "Death to the Jews," and "In, Take a Shower, Jew." Resisting the initial impulse simply to remove the graffiti—so as not to bring additional attention to their misfortune—congregants decided to involve the surrounding community in the process of cleaning their institution. Then they contemplated a more momentous task: the use of litigation, based on statutes that bar racial but not religious discrimination, to set a precedent that could protect Jewish Americans from subsequent civil rights violations.

The idea was initially controversial. Since the Holocaust, Jewish Americans have been understandably reluctant to give credence to the discredited Nazi notion of Jewish racial separateness. In addition, some in the broader Jewish community argued that legal action would bring undesired attention to anti-Jewish violence and possibly attract copy-cat crimes. There were also some who feared that litigation resulting in an adverse precedent would be a

setback for the entire community, leaving them worse off than the status quo. Nevertheless, members of the Shaare Tefila congregation who argued for a forceful legal response prevailed, and the matter was brought in federal court.

To obtain money damages, the congregants sued the vandals under 42 U.S.C. §§ 1981, 1982, and 1985, which derive from the Civil Rights Acts of 1866 and 1871. These statutes provide for monetary relief in response to the denial of certain rights based on race or color. The statutes do not, however, provide for relief in the case of *religiously* motivated hate crimes, so any complaint would need to be based on racial discrimination. The statutes had not previously been used by Jewish Americans to obtain remedies for racially motivated hate crimes, so this would be a case of first impression. However, the congregation's position was not that Jews are in fact a race. Rather, it was that the racist vandals mistakenly attributed racial distinctness to the Jewish people and that this was sufficient to constitute invidious racial discrimination. The goal was to establish that federal law bars crimes that target Jewish Americans and to deter violent actors with the additional threat of civil liability.

In the lower courts, the argument did not fare well. Judges in the district court and Fourth Circuit considered Jews to be "white" and therefore not members of a separate racial group. Neither "race" nor "religion" is a concept well-entrenched in Jewish tradition, but the concept of "race" has had peculiarly odious connotations since Hitler. In American law, Jews had often been understood to be members of a separate "Hebrew" race, especially for immigration purposes, for several decades leading up to World War II. This had led to serious adverse consequences, such as the restriction on Jewish immigration (based on the notion that Jews were "racially undesirable") under the Johnson-Reed Act.[8]

Whether Jews should be considered "white" is a question of intense political debate, not only because some Jewish people are Black, Asian, or Hispanic, but also because of how the popular understandings of both Jewishness and whiteness have evolved over the years.[9] Among white supremacists, Jews have generally been considered nonwhite.[10] Among progressive anti-racists in

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[8] *See generally* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022).

[9] *See generally* KENNETH L. MARCUS, JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA (2010).

[10] Kenneth L. Marcus, *Do Jews Count?: Review of 'Jews Don't Count' by David Baddiel*, COMMENTARY, Sept. 2021, https://www.commentary.org/articles/kenneth-marcus/jews-dont-count-david-baddiel/.

recent years, however, Jews have been considered the epitome of whiteness, even hyper-whiteness.[11] One could say that those with racial animosity have tended to perceive Jews to occupy whatever racial status they most disdain.

In Shaare Tefila's case, denying Jews a racial status had the consequence of dismissal of the congregation's claims on the ground that Jews lack the protection of the pertinent statues. The irony was that Jewish Americans had historically suffered, under U.S. law, because of their real or perceived racial separateness, but would now be denied the protection of laws intended to protect against racial discrimination. The synagogue lost in the district court. Judge Norman Park Ramsey professed to being "sympathetic" to the plaintiffs' "outreach" and feeling "sorrow" over the synagogue's desecration, but he nevertheless concluded that Jews do not constitute a "distinct or recognizable 'race' and are not 'commonly identified as such.'"[12]

On appeal to the Fourth Circuit, the synagogue did not fare much better. The appeals court affirmed the lower court's ruling in a decision by Judge Kenneth Hall. Viewing Jews as a religious group only, Hall reasoned that accepting the plaintiffs' claims "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants."[13] Judge Thomas Murnaghan, Jr., concurred, emphasizing that "the law"—by which he meant, presumably, the law's interpretation of Jewish identity—"is grounded on facts, not on misperceptions of fact."[14] After emphasizing his sympathy for the Jewish plaintiffs, and his disapproval of the defendants' "execrable" conduct, Murnaghan objected that "For persons of the ilk which the defendants . . . are revealed to be, to have the power to confer jurisdiction on the federal courts would, in all probability, lead to very regrettable consequences."[15] Since Jews are not a race, in other words, a racist's misperceptions should not be permitted to change the law's view of them.

In dissent, Judge J. Harvie Wilkinson skewered Murnaghan and Hall's opinions, arguing that "*[a]ll* 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."[16] Wilkinson noted that the Civil Rights Acts of 1866 and 1871, on which the plaintiffs' case was

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[11] *Id.*

[12] Shaare Tefila Congregation v. Cobb, 606 F. Supp. 1504, 1508 (D. Md. 1985).

[13] Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 527 (4th Cir. 1986).

[14] *Id.* at 528.

[15] *Id.* (Murnaghan, J., concurring).

[16] *Id.* (Wilkinson, J., dissenting).

based, were passed to "halt the spread of violence and hatred by those motivated by such perceptions."[17] Wilkinson argued that the defendants' "erroneous" but "all too sincere view" of Jewish racial identity should be sufficient to ground Shaare Tefila Congregation's claims under sections 1981, 1982, and 1985. "There is," he concluded, "simply no good reason why we should interpret this statute to protect against some forms of racial animus but not others."[18]

In seeking certiorari before the Supreme Court, the congregation had better fortune, in no small part because the case was considered with a companion case, *St. Francis College v. Al-Khazraji*,[19] which had been brought on behalf of an Iraqi American philosophy professor. In that case, Majid Ghaidan Al-Khazraji argued that St. Francis College had refused to grant him tenure because of its bias against persons of Arab and Muslim background. In his lawsuit, Al-Khazraji relied upon the Civil Rights Act of 1866 to argue for money damages based on racial injuries that he had suffered as an Arab American. Since Al-Khazraji had prevailed before the Third Circuit, the Supreme Court faced a circuit split.

At oral argument, the Justices were lively and engaged. Justice Sandra Day O'Connor observed that the legislative history of the 1866 Act suggested that Congress considered not only Jews and Arabs, but also "Gypsies and Chinese and Germans and so forth" to be covered as members of distinct races.[20] Justice Antonin Scalia suggested that the terms of the statute might be broad enough to cover even discrimination by Germans against Frenchmen.[21]

In a memorable exchange, Justice Thurgood Marshall questioned the widespread notion that race should be equated with skin color. He asked respondents' counsel how she would classify a person who is "part Scandinavian, part Indian, part South African, and part Japanese." Counsel responded that a jury could determine that such a person is "non-white." Marshall then asked how the person might be identified as non-White, and she said that it would be based on "immutable physical characteristics." Justice Marshall interrupted to say, "I would like . . . to have seen you identify my father. He was white with blond hair and blue eyes." Counsel responded, "In that case,

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[17] *Id.*
[18] *Id.* at 529.
[19] 481 U.S. 604 (1987).
[20] Glauz-Todrank, *supra* note 7, at 146.
[21] *Id.* at 142.

sir, I don't think he would have a cause of action for race discrimination." Marshall replied, "Oh, but he did. He was a Negro."[22]

Justice Scalia asked the congregation's lawyer whether it would be appropriate to read the statute and legislative history to say that Congress considers Jews to be a different race and therefore to be covered by it. Appellant's counsel responded that this would not be an error, but that she would urge the Court to make clear that Jews should not be considered today to constitute a distinct racial group. In other words, she argued that the Court should find in favor of the synagogue because the vandals mistakenly *believed* the Jewish people to form a separate race, not because that belief is true. Justice Scalia, however, questioned an interpretation that would cover only the "ill-educated discriminator."

Justice John Paul Stevens pointed out that anti-Semitism is "still prevalent in some areas" and questioned whether all of it could fairly be described as purely "religious" discrimination. He observed that the Jewish people have a "very special culture of their own." Respondents' counsel insisted that anti-Semitism is merely "[p]rejudice that is based on their religion." When Stevens asked whether it is based "entirely on their religion," counsel answered, "That is the characteristic that defines them. There is no racial characteristic that in fact defines people of the Jewish faith. It is a religion." Incredulous, Stevens asked, "Do you think that would be the proper characteristic in Germany when it was so virulent?" Counsel demurred but insisted that this was merely a "deviant perception of a couple of organizations . . . that had run rampant."[23]

Justice Scalia revealed the absurdity of respondents' position, asking, "It didn't extend to Jews who were atheists, nonbelievers? Do you really think that was the case?" When counsel expressed uncertainty, Scalia demanded, somewhat rhetorically "I mean, do you think that the prejudice that existed against Jews in this country was only against believing Jews, and so long as the Jew said, I really no longer believe in the religious tenets of Judaism, the prejudice no longer existed and that person would have been able to get into all sorts of country clubs and whatnot?" Scalia also questioned counsel's argument that religious rather than racial animus could be inferred from the fact that the vandals had chosen to attack a synagogue, which is a religious institution. Scalia noted that the vandals had used the words "White Power"

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[22] *Id.* at 148.

[23] *Id.* at 150.

and had also just spray painted a drug store, which, he observed, is not obviously religious." The courtroom broke into laughter.[24]

On May 18, 1987, the Supreme Court issued a unanimous decision in favor of the congregation. Justice Byron White wrote the Court's opinion, reversing the decision of the court of appeals. White rejected the argument that a case could be brought under Section 1982 only when defendants are motivated by accurate racial animus. Instead, he held that "Jews can state a Section 1982 claim of racial discrimination since they were among the peoples considered to be distinct races and hence within the protection of the statute at the time that it was passed."[25] Pointing to the St. Francis College companion case, Justice White wrote that the Court's "opinion in that case observed that definitions of race when § 1982 was passed were not the same as they are today . . ." and concluded that the section was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[26]

After the Supreme Court's decision came down, the case was remanded to the district court. Plaintiffs' counsel explained in public interviews that the point of the lawsuit had been to obtain judicial acknowledgement of the fact that anti-Semitism is "a civil rights issue."[27] The congregants requested and received an apology letter from the vandals. Satisfied with this apology, the synagogue waived its request for money damages, except for three hundred dollars that the defendants were asked to repay their insurance company. On December 21, 1988, the congregation released its claims in exchange for a consent injunction that the defendants would not harass any other Jews and that they would stay off the congregation's property.[28]

II. *SHAARE TEFILA*'S DOWNSTREAM EFFECTS

Sixteen years later, in 2004, a Sikh man went to the New York office of the U.S. Department of Education's Office for Civil Rights (OCR) and complained that his son, a New Jersey junior high school student, had been beaten up and called "Osama." He sought relief from OCR under Title VI of the

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[24] *Id.* at 151.
[25] *Shaare Tefila*, 481 U.S. at 617.
[26] *Id.*
[27] Glauz-Todrank, *supra* note 7, at 184-85
[28] *Id.* at 185.

Civil Rights Act of 1964. At the time, OCR's unwritten policy was to dismiss such cases on the grounds that Title VI, which bars discrimination on the basis of race, color, or national origin, but not religion, could not provide the protection being sought. This time, however, OCR's response would be different.

I had recently been appointed acting head of that agency, and I had asked my staff to be on the lookout for such cases. In the wake of September 11, 2001, I was aware of news reports indicating an uptick of discrimination against various Middle Eastern and North African minorities, as well as a surge in anti-Semitism incidents, both globally and also on U.S. college campuses. It was clear that some of these cases might be based on religious animus, but others were more likely related to ethnic or racial attitudes. In this case, there were many possible explanations for why a Sikh American youth might be subjected to such mistreatment, and some of them would clearly fall within the lawful jurisdiction of the agency. While Sikhism is a major religion, for example, members of the Sikh community also share various ethnic or ancestral characteristics, such as distinctive dress, music, culture, and geographic origins. I directed my staff to open an investigation and issued a series of memoranda explaining the basis for my decision.[29]

On September 13, 2004, I issued informal guidance clarifying that discrimination on the basis of Sikh or Jewish identity is no less unlawful than discrimination based on membership in a group that shares ethnic but not religious attributes:

> Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. . . . Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students.[30]

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[29] *See generally* MARCUS, JEWISH IDENTITY, *supra* note 9 (excerpted in Kenneth L. Marcus, *A Blind Eye to Campus Anti-Semitism?*, COMMENTARY (Sept. 2010).

[30] *See* Letter from Kenneth L. Marcus, Deputy Ass't Sec'y for Enforcement, Delegated the Auth. of Ass't Sec'y of Educ. for Civil Rights, U.S. Dep't of Educ., to Colleague, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/religious-rights2004.pdf.

In this common-sense formulation, I did not find it necessary to cite *Shaare Tefila*, although I drew some of the language (e.g., "ethnic characteristics") directly from it. I was also aware, as Justices Stevens and Scalia suggested, that Jewishness is more than a religion, while anti-Semitism is more than a religious animus. As one commentator would later write of the 2004 Policy, "The logic behind the clarification is simple: much of the hatred embodied in anti-Semitism (and the same is true for Islamophobia) has nothing to do with specific religious practices, and everything to do with ancestral bias."[31] I have explained in subsequent articles how *Shaare Tefila* provided the basis for the decision.[32]

At the time, I was aware that the 2004 Policy would likely be controversial, simply because it relates in part to the Jewish community, but I was surprised by the vehemence with which it was attacked. After the 2004 presidential election, I left OCR to assume a new appointment as Staff Director at the U.S. Commission on Civil Rights. There, my colleagues and I began to hear murmurs that my successors were not adhering to the 2004 Policy.[33] The policy faced numerous objections. Progressives argued that the civil rights laws should be used for disadvantaged minorities and that Jews had no need for it. Bureaucrats were often change-averse and suspicious that the policy would somehow be used to increase the role of religion in education. Some Jewish officials were reluctant to view Jews as victims. Even some conservatives objected, misunderstanding the legal basis for the policy.

The most serious objection was this: While the Supreme Court had held that Jews are protected by the Civil Rights Act of *1866* on the grounds that Congress at that time considered Jews to be a separate race, no congressmen in *1964* thought of Jews that way; at any rate, the legislative record contains no record of that. Thus, the reasoning supporting the decision in *Shaare Tefila* was inapplicable when later-passed civil rights laws were at issue. This objection is premised on the unworkable notion that terms like "race" and "national origin" have different meanings in each place that they appear in the

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[31] Mark Goldfeder, *Defining Antisemitism*, 52 SETON HALL L. REV. 119, 144 (2021), *available at* https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1808&context=shlr.

[32] *See, e.g.*, Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837 (2007), *available at* https://scholarship.law.wm.edu/wmborj/vol15/iss3/4.

[33] *See* Meghan Clyne, *Education Department Backs Away from Anti-Semitism Safeguards*, THE SUN (Mar. 29, 2006), https://www.nysun.com/article/national-education-department-backs-away-from-anti.

U.S. Code, depending on the changing understandings of those terms over the years during which various civil rights laws were passed. Additionally, it ignores the Supreme Court's repeated holding that "race" has the same meaning in the Civil Rights Act of 1964 as in the Fourteenth Amendment and the 19th-century civil rights laws.[34] The basis for this principle is that the Civil Rights Act was not designed to create new rights with respect to race, but rather to create a new system for enforcing rights that had been established a century before.

Nevertheless, despite the clear holding of *Shaare Tefila v. Cobb*, federal officials refused to accept that Jews were protected under a statute that prohibited racial and national origin but not religious discrimination. The Commission, however, supported my view. On April 3, 2006, the Commission sent a shot across OCR's bow, issuing a statement (which I had drafted) that included this affirmation of the 2004 Policy:

> Many college campuses throughout the United States continue to experience incidents of anti-Semitism . . . When severe, persistent, or pervasive, this behavior may constitute a hostile environment for students in violation of Title VI of the Civil Rights Act of 1964.[35]

In other words, the Civil Rights Commission confirmed the 2004 Policy that Title VI applies to some forms of anti-Semitism, even though the statute (like the one at issue in *Shaare Tefila*) does not mention religion. Since then, the 2004 Policy has been confirmed in court with respect to Title VI[36] and also Title VII.[37]

Over the next four years, we received increasing reports that OCR was nevertheless refusing to apply Title VI in anti-Semitism cases. In deposition testimony, OCR officials confirmed that this was the case.[38] Senior OCR leadership privately believed—and later disclosed when questioned under

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[34] *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265, 272 (1987). *See also* Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

[35] Findings and Recommendations of the United States Commission on Civil Rights Regarding Campus Anti-Semitism (Aug. 3, 2006), https://www.usccr.gov/files/pubs/docs/081506campusantibrief07.pdf.

[36] T.E. v. Pine Bush Cent. Sch. Dist., 58 F. Supp. 3d 332, 354-55 (S.D.N.Y. 2014). *See generally* Goldfeder, *Defining Antisemitism*, *supra* note 31, at 144-45.

[37] *See, e.g.*, Vill. of Freeport v. Barrella, 814 F.3d 594, 607 (2d Cir. 2016); Doran v. New York State Dep't of Health Off. of Medicaid Inspector Gen., No. 15CV7217PKCSN, 2017 WL 836027, at *12 (S.D.N.Y. Mar. 2, 2017). *But see* Bonadona v. La. Coll., No.18-cv-0224, 2018 WL 4353979, at *4 (W.D. La. July 13, 2018) (rejecting a Jewish Title VII race claim).

[38] MARCUS, JEWISH IDENTITY, *supra* note 9, at 83-95.

oath—that anti-Semitism cases were purely religious matters that should not be handled by their agency.[39] In response, when I left the federal government, I led a coalition of Jewish organizations seeking to convince the Education and Justice Departments that Jews and other ethno-religious groups are indeed covered by the terms of Title VI, just as the Supreme Court had held that they are covered by earlier civil rights legislation. Those two departments responded favorably to our advocacy.

In 2010, Assistant Attorney General Thomas Perez affirmed this interpretation on behalf of the Department of Justice. In response to a request from Assistant Secretary of Education Russlynn Ali, who had succeeded to my position at OCR, Perez quoted the operative paragraph of my September 2004 letter (set forth above) and wrote, "We agree with that analysis."[40] Perez explained the rationale, drawing language from *Shaare Tefila*:

> Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice. Title VI further prohibits discrimination against an individual where it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.[41]

OCR reiterated this position in 2010[42] and in subsequent communications.[43] Nevertheless, this extension of *Shaare Tefila* remained a creature only of informal agency guidance until 2019. Various efforts were made, without success, to codify the approach of my 2004 Dear Colleague Letter, but these efforts remained unsuccessful.

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[39] *Id.* at 86.

[40] Thomas E. Perez, Ass't Att'y Gen., Dep't of Justice, to Russlynn H. Ali, Ass't Sec'y of Educ., Office for Civil Rights, U.S. Dep't of Educ., Title VI and Coverage of Religiously Identifiable Groups (Sept. 8, 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf.

[41] *Id.*

[42] *See* Russlyn H. Ali, Ass't Sec'y of Educ., Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Oct. 26, 2010), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (not for reliance for certain purposes immaterial to the topic of this review).

[43] *See, e.g.*, U.S. Department of Education, Office for Civil Rights, Combating Discrimination Against Jewish Students (Jan. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/jewish-fact-sheet-201701.pdf.

On December 11, 2019, President Donald Trump elevated the issue to the level of a government-wide decree. In his Executive Order 13899 on Combating Anti-Semitism, President Trump reiterated the substance and rationale of the 2004 Policy:

> Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d et seq., prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving Federal financial assistance. While Title VI does not cover discrimination based on religion, individuals who face discrimination on the basis of race, color, or national origin do not lose protection under Title VI for also being a member of a group that shares common religious practices. Discrimination against Jews may give rise to a Title VI violation when the discrimination is based on an individual's race, color, or national origin.[44]

Surprisingly, this extension of the 2004 Policy was initially controversial, largely because of popular misunderstandings based on an early and misleading report by the *New York Times*. Reporters Peter Baker and Maggie Haberman wrote, "The order will effectively interpret Judaism as a race or nationality, not just a religion. . . ."[45] Other outlets amplified this misconstruction, publishing articles with titles like, "Trump signs executive order to define Judaism as a race, ethnicity."[46] Given suspicions about President Trump within the liberal Jewish community, some commentators fretted that the order could "create[] a pretext to accuse Jewish Americans of dual loyalties."[47] Over time, as commentators read the actual order, the initial confusion was largely dispelled.

Although many of his other orders have been rescinded, President Trump's Executive Order 13899 remains in place, as do the 2004, 2010, and 2017 guidance documents. At OCR, the order has been integrated into the

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[44] Donald J. Trump, E.O. 13899, *Combating Anti-Semitism* (Dec. 11, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900859/pdf/DCPD-201900859.pdf. This order is probably best known for its application of the International Holocaust Remembrance Alliance's Working Definition of Anti-Semitism.

[45] Peter Baker & Maggie Haberman, *Trump Targets Anti-Semitism and Israeli Boycotts on College Campuses*, N.Y. TIMES, Dec. 10, 2019, https://www.nytimes.com/2019/12/10/us/politics/trump-antisemitism-executive-order.html.

[46] *See, e.g.*, Ursula Perano, *Trump signs executive order to define Judaism as a race, ethnicity*, AXIOS, Dec. 11, 2019, https://www.axios.com/2019/12/11/trump-jewish-executive-order-kushner-anti-semitism.

[47] Caitlin Dickson, *Trump Executive Order on Anti-Semitism Stirs Confusion*, YAHOO NEWS, Dec. 11, 2019, https://www.yahoo.com/video/trump-executive-order-on-anti-semitism-stirs-confusion-001501249.html.

agency's active policy portal through guidance issued in January 2021.[48] Indeed, President Biden has, if anything, doubled down on the 2004 Policy. In May, the Biden National Anti-Semitism Strategy directed the Assistant Secretary of Education for Civil Rights to remind schools of "their legal obligation under Title VI . . . to address complaints of discrimination . . ."[49] That same document directed eight agencies to produce fact sheets explaining that "Title VI . . . prohibits discrimination based on shared ancestry or ethnic characteristics, including certain forms of antisemitic, Islamophobic, and related forms of discrimination and bias, in federally funded programs and activities."[50] This is precisely the dictate with which these agencies complied on September 28, 2023, an outcome made possible by the legal groundwork a courageous synagogue laid long ago.

III. Conclusion

The nearly twenty-year saga since the passage of the 2004 Policy, which owes much of its vitality to the *Shaare Tefila v. Cobb* case, demonstrates that this litigation has had a profound effect on the trajectory of the fight against anti-Semitism. This case—which can now be much better understood in light of Glauz-Todrank's volume—underlies the once-controversial notion, developed under the George W. Bush, Barack Obama, and Donald Trump administrations, and confirmed yet again under Joseph Biden's, that Jews and other ethno-racial groups must receive equal protection under statutes, like Title VI, that prohibit racial and national origin but not religious discrimination. It may be time to reappraise the importance of the *Shaare Tefila* case, and to recognize it as the landmark decision that it clearly was.

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[48] U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR's Enforcement of Title VI of the Civil Rights Act of 1964* (Jan. 19, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf.

[49] The White House, *The U.S. National Strategy to Counter Antisemitism* (May 2023), https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf.

[50] *Id.* at 44.