

Walker v. Texas Division, Sons of Confederate Veterans
Or: Standing Against Racism

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When I was growing up I always thought I would be lawyer. Life take's its own turns but there is a part of who we are that we always carry around with us, no matter where we are. I ask your indulgence, then, as I devote these and my Yom Kippur reflections through the prism of the law. As we have just completed another year on the Jewish calendar, the Supreme Court of the United States completed an historic year of important decisions. I picked three of those decisions, and will be devoting each of my three major remarks to one of those three decisions. Rabbis spend their summers thinking about which texts they will use for their sermons on the holidays. I hope that my rather unorthodox decision in choosing opinions of the Supreme Court will not overtax us too much.

This morning, I want to talk about *Walker, Chairman, Texas Department of Motor Vehicles Board, et al., v. Texas Division, Sons of Confederate Veterans*. But before we get into that, let's take a moment to understand why it was important. We have lived through a painful year in this country as we have seen racial tensions explode in a matter that has not been witnessed in a generation. We have seen order break down in major American cities as frustration bursts forth over issues of justice and prejudice, fairness and equity. We have seen a terrible outbreak of violence against African Americans worshipping in a house of God, perpetrated by a troubled individual coming from a culture of hate. We

have ourselves experienced traffic stop in the busiest metropolis of the world as protestors scream out: "Black Lives Matter!"

How is it that in the 239th year of this republic, a republic founded upon the ideals of liberty and equality, of freedom and tolerance, we still suffer from hatred, and we still accuse, and are accused, of unequal treatment, of preference, of prejudice, of racism?

We and the interfaith religious community of Ridgewood gathered one evening early this summer at the African Methodist Episcopal Zion Church on Broad street as we sang together as one, as we found hope through the sorrow of the tragedy in Charleston. When I ascended the pulpit that evening there, I said that while many of my colleagues were addressing their concerns to the epidemic of gun violence, the Charleston shooting opened a far older and deeper wound. Gun violence is a growing problem and we at Temple Israel have been at the forefront in joining each year the national interfaith effort at a single weekend where houses of worship across the faiths devote thoughts and prayers to the issue. I am happy to announce that this year, on December 12, Mayor Steven Fulop of Jersey City will be joining us at kiddush to talk about this critical concern. But at AME Zion I said that the wound that Charleston opened up has been festering through all the 239 years of our republic. We established a nation based on freedom, but where all would not be free. We fought a civil war where more Americans lost their lives than in any other conflict, and yet the union that was fought for, the civil space of equality, is still resented and hated.

For so many, that pain is symbolized by the Battle Flag of the Confederacy. That symbol that drove the shooter in Charleston came down at the South Carolina statehouse, only twenty-three days after the shooting and less than a week after the fourth of July. I remember thinking then, as I watched the flag coming down, that only now has the Civil War finally ended.

Walker v. Sons of Confederate Veterans is about that flag. In a stunning correspondence that others might attribute to providence, the Court issued its decision in *Walker* the very morning after the Charleston shooting. The case had been argued in Washington three months earlier and in no way were the learned opinions written the night before they were issued, but the correspondence yet draws our attention to the pressing importance of the case as it weighed on our nation's top justices.

The case was about the Texas Department of Motor Vehicles denying an application for a specialty license plate that would have included the Confederate battle flag. Texas allows specialty license plates as a source of revenue for the state, with the proviso that the DMV needs to approve the design. In this case, the DMV denied the application because "the Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed towards people or groups that is demeaning to those people or groups....Many members of the general public find the design offensive, and because such comments are reasonable." The Texas Division of the Sons of Confederate Veterans sued the DMV in federal court on the grounds that their freedom of speech guaranteed by the First Amendment had been denied. The

district court ruled in favor of the DMV, but the Sons of Confederate Veterans won their appeal. The Supreme Court reversed the appeal, upholding the DMV's decision and the decision of the district court.

The most important element in this case are the words I just quoted, that the Confederate flag is understood by many as representing hatred, that such a symbol is offensive to many, and that the State of Texas found such opinions reasonable. And yet that was the one element that was hardly mentioned in the Supreme Court decision. Justice Breyer's opinion of the Court focuses on the definition of what is called "government speech." The Court limited the protections of the First Amendment to "private speech" but allowed the government the right to choose and limit "government speech." "When the government speaks," Justice Breyer wrote in the court opinion, "it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." The dissenting opinion written by Justice Alito, somewhat longer and more colorful than the court opinion, does not dispute the concept of "government speech." The issue is whether a license plate design constitutes government speech or private speech. The rest of the court opinion and the dissent are devoted to a debate over the applicability of prior precedent, a case of a town rejecting a stone monument with religious content in a town park, which the court found applicable and the dissent did not. Of course, we in Ridgewood know nothing about religious displays in public parks! But that was a different sermon...

Here, in the *Walker* case, the Court held that since the specialty license design appears on the license plate, under the word "TEXAS" and a small map of the state, it is government speech, and the government has the right to control it. The dissenting opinion argued that through the specialty license program the state is simply leasing a small billboard for private speech expression. It has a right to regulate, but not to prejudice one viewpoint over another.

I have to confess to you that reading both opinions, the majority and the dissent, I found Justice Alito's much more convincing! And not just because I have been conditioned as a good Jew from New York to generally support all expansions and supports of First Amendment freedoms. Listen here to Justice Alito's words:

Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the names of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver. As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30am on a Monday morning, would you think: "This is the official policy of the State—better to golf than to work?" If you did your viewing at the start of the college

football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games---Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents?

Of course Justice Alito is right, and we would not think those things. But we might be upset if we saw the Battle Flag of the Confederacy.

Justice Alito actually cites the DMV board's decision, that much of the public found the symbol of the Confederate flag as offensive, and that the board found that sentiment reasonable, as *proof* that the speech should be protected. As he wrote: “What Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.”

The reason why Justice Breyer's Court opinion does nothing but cite the reasoning of the DMV board is precisely because the Court majority understood quite well that Justice Alito's analysis, and the decision of the US Court of the Appeals for the Fifth Circuit, were cogent. But the majority of the Court was not operating in the vacuum of legal analysis. While the timing of the decision—the morning after the Charleston shooting—was eery, it is no mere accident that this historic decision was handed down in Washington within a month of the Confederate Battle Flag being lowered for the last time at the South Carolina statehouse. The Court majority understood that it was time for the United States

of America to turn the page on its bloody history of racism and prejudice. If the State of Texas was ready to turn that page, then a group of lawyers in Washington should be able to figure out how to support it.

The means by which the Court found a way to support Texas in this case are important only in terms of the precedent that the decision makes. And while the precedent might be “dangerous” as Justice Alito claimed, those were dangers that the majority was willing to live with. Life is a series of choices between greater and lesser risks and dangers.

Imagine if New Jersey were to approve a license plate with a swastika on it. Imagine if we had to park everyday next to a car with such a plate. I would be haunted, not only by the fact that the owner of that vehicle wants me in a death camp, but also by the fact that the State, which should represent me and protect me, is instead protecting his hatred. We need to think of *Walker* in these terms.

I like to point out that if you are a neo-Nazi Holocaust denier, then the Promised Land is the United States of America, where your right to teach and publish is guaranteed. In Germany, by contrast, Holocaust denial is a federal crime. The only place for Holocaust deniers in the Fatherland is prison. What an irony that is, that only we, the victors of the war, will protect the rights of neo-Nazis. But we understand that ours is a land that protects freedoms, even when we don't like them. We understand that our soldiers fight to protect the freedoms that our laws guarantee. But we also want to build a society based not on war but peace, rooted not in ignorance but knowledge, and founded not on hatred of the other but love of all.

When I spoke in late June at the AME Zion Church on Broad Street, I said that there is a reason why the AME Zion church and our synagogue both stand outside the center of town. At a breakfast meeting about a month later one of my Christian colleagues asked me about that. He said he had been haunted by my words, by the realization that the Jews of Ridgewood shared with African Americans a history of marginalization and victimization. That conversation reminded me of a time many years earlier when I was in college and joined a small group of Jewish student leaders in a meeting with the Dean of the College, a Latina woman and scholar of Latin American literature named Janina Montero, where we attempted to make the case that the Jewish community should be treated as a minority among the other student communities that were consolidated under an umbrella of "people of color." The experience of a minority, the experience of being the victims of hatred and prejudice, we argued, was not restricted to matters of race. And besides, the very idea of race was first used by Europeans against the Jews a hundred years earlier. Dean Montero was fascinated by our argument. But the facts on the ground, that the Jews made up a full third of the student population, that we came from the better schools and socio-economic backgrounds, that we were, in a sense, "the new WASPS" at our small New England college with roots in the Methodist church, mitigated against our self-proclaimed victimhood.

Yes, victimization was "in" in college. But the exercise in self understanding and articulation was more important than our headway in student body politics, and I know that that is something that Dean Montero understood as well, and

why she gave us so much of her time and attention. In fact, living the good life after a past of oppression is the quintessential perspective of the Torah when it tells us over and over again: treat the stranger with kindness and remember that you were once a stranger in the Land of Egypt.

As Rabbi Joseph Telushkin explains: "The Torah's rationale for this command is somewhat counterintuitive, since so many of us do not learn from our own suffering not to inflict suffering on others. The last people we would expect to abuse their children are those who themselves were abused as children, but, in fact, they are far more likely to do so than adults who were not abused." The Torah teaches us to actually learn something from past experience. That is why as Jews, as a people who have been so abused by the world, we carry a special responsibility to make the world a better place. That is why we, as Jews, can today understand the plight of the Syrian refugee crisis more than others because so many of our people were refugees with no place to go as they sought to escape the Nazi horror.

And this is why we, as Jews, have stood arm in arm with our African American brothers and sisters in fighting prejudice and working to make our nation a place of true freedom for all its inhabitants. We need to work together so that our nation becomes a place where we have banished all hatred and bigotry. A place where we have zero tolerance for racism, as uncomfortable as that regime might be for Justice Alito.

Now don't misunderstand me. In no way do I believe that the dissenting justices in the *Walker* case are prejudiced. In fact, what they argued against was

the prejudice of Texas in denying the Confederate battle flag design. My point, and the wisdom that I garnered from Justice Breyer's opinion for the court, is that through the turns of law we will find a way for goodness and justice to triumph. This was always the *original intent* of the founders.

Which brings me to one more text, this one from the Talmud. Whoever saves one life, the Talmud teaches, it is as if he or she has saved the entire world. That is because *all* lives matter. Each life matters. The Talmud bases this on the Genesis teaching that all of humanity descended from a single human being, *nivra adam yehidi*. Just as all of humanity was represented in the original Adam, so is it represented through each of us. As the Talmud continues, a single human being was created for the sake of peace, so that no one can say to anyone else: 'My father was greater than your father.' This ancient Jewish teaching has always been one of my favorites because it completely denies the concept of race. We are not different types of humans, some superior and some inferior. We are all the same, all stemming from a common ancestor. Rather than support the racism of a master race, we can use science to point to the Human Genome Project, the mapping out of human DNA, to realize the wisdom of the ancient Rabbis that we all come from a common human stock. That we are all brothers and sisters.

And at the same time, the Talmud knew how to celebrate difference. The same passage continues: all humanity descends from a single human being to proclaim the greatness of the Holy One. When a king of flesh and blood stamps several coins with the same die, they all resemble one another. But the Holy

One, the King of Kings, stamps all human beings with the die of the first human, and yet not one of them is identical with another.

All people are equal and each person is unique. Our purpose, as Gods' partners in creation, is to build a society that mirrors *God's original intent*, a society based on equality for all, where each individual life is valued as the potential for a whole world.

We watched this summer how the President of the United States went to Charleston, mourned those who lost their lives, and prayed out in song for God's amazing grace. I have never heard a president sing and pray like that, and doubt that I will again. It was a special moment when we all, as Americans were led out of time into a civic sanctuary. But I believe that while we have been lost, we will be found when we seek. That while we have been blind, we will see when we look upon each other with love.

This president has every year, just before Rosh Hashanah, scheduled a conference call with American rabbis. Every year hundreds of rabbis join the President's conference call as he gives us new year's greetings and some reflections, and then answers questions from the leaders of each of the four rabbinical associations on the call representing Conservative, Reform, Reconstructionist and Orthodox rabbis. While the President spent most of the time on the phone last Thursday morning discussing Iran, the topics were wide-ranging, and at one point, in reflecting on the civil rights agenda, the President stated how it was the leadership of the Jewish community joining with Martin Luther King and African American voices fifty years ago that made it

possible for the civil rights legislation to pass. He said how profoundly grateful he was, personally, for that principled alliance, and how important it is that we continue to march together towards a better future.

And that is *government speech*. No mere private opinion. We accept and celebrate difference as we embrace each and every member of our American civil family. The government can allow innocuous support for various concerns, but it can—and must—disallow symbols of hatred and exclusion, and ultimately, violence, from the space of government speech, a space where we must protect the dignity of all.

We read in the prayer books: *Hayom harat olam*. Today the world was born. Each Rosh Hashanah the world is reborn, and we are charged yet again with making that world the most beautiful world it can be. A place where all races and creeds will forge a bond of true harmony to banish all hatred and bigotry. Amen.