The Arrogance of the Interpreter

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In his opinion in Dobbs v. Jackson Women's Health Organization, U.S. Supreme Court Justice Samuel Alito writes the following: "We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." As students of *halakhah,* we have some experience in the interpretation of legal texts. And that experience teaches us that Alito's statement demonstrates either shocking ignorance or stunning arrogance.

We don't think he's ignorant. So we'll go with arrogance.

Why? Because it's one thing to state the obvious, namely that the U.S. Constitution never explicitly mentions abortion. But in order to declare that the document contains no *implicit* right to abortion, you have to *interpret* its text to that end. To do that means you have to rely on a theory, a particular approach or method that defines the correct way to interpret the Constitution and to derive meaning as it were from between its lines. Since there are several available theories of constitutional interpretation, each of which could lead to different conclusions, you must *choose* the one you think is "correct." And since there is no objective or universally agreed-upon way to decide among the competing theories, your choice, along with the decision that flows from it, is inevitably controversial.

That's why Alito's claim that there's no implicit constitutional right to abortion is a display of arrogance. It's arrogant for an interpreter of the law to deny that he *is* interpreting, the reality that his decision – in fact, *any* judicial decision - is based upon a choice among various interpretive theories. As a judge, of course, he's obligated to reach a decision, and he can't do his job without choosing a theory. What he's not entitled to do is to act as though his decision is *the* correct one, that "the law" demands this decision and no other, that no thoughtful or knowledgeable student of the law might legitimately discover an implied right to abortion in the Constitution.
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Alito is by no means unique in this. Legal decisors – rabbis as well as judges – have a habit of speaking as though their conclusions express undeniable legal fact when, in truth, they reflect one side of a controversy that could have been resolved differently. This has been called "the monologic voice" of the law. The judge's opinion presents itself as a "compelled performance," speaking as though its decision was forced by the logic of the law and the duties of the judicial office, "which together eliminate all thought of an unfettered hand."[1] The opinion, that is to say, is not a choice among plausible alternatives. Rather, says the judge, "I am *compelled by the law* to rule as I have." So maybe Justice Alito gets a pass, because he is simply following standard judicial *minhag*.

The problem is that we all know that he is *not* compelled to reach this particular decision. There's always more than one theory of interpretation, more than one potentially "correct" way to distinguish the "correct" reading of the law. In this case, Alito claims that the Constitution does not implicitly guarantee a right to abortion because "because such a right has no basis in the Constitution's text or in our Nation's history." Since we're not constitutional law experts, we're not going to argue with him. But we can note that the precedents that his decision overturns[2] do locate an implied right to abortion in either the right to privacy or the guarantee of individual "liberty" in the Fourteenth Amendment to the Constitution. Alito doesn't agree with those readings, of course, but the authors of those precedents, along with the scholars upon whom they relied[3] would presumably disagree with *him*.

The difference between them lies in competing theories of constitutional interpretation. Alito's theory privileges the explicit language of the Constitution and "our Nation's history." The other side thinks the Constitution should be read as a living document whose meaning changes over time because it is shaped by experience. Which theory of interpretation is correct? Again, *we* certainly can't decide. But given that good constitutional scholars debate the issue, with some supporting one theory and some supporting the other, it's a safe bet that *neither* theory is "correct" in any objective fashion. And that's the thing about Alito – he never bothers to prove that *his* favored theory of constitutional interpretation is the one that leads to *the* correct reading of the law. He simply presumes it. Okay, but that doesn't mean that all those scholars who favor other theories of interpretation are wrong, that they are ignorant of the law or guilty of sloppy reasoning. And it sure as hell doesn't mean that he is necessarily smarter and wiser than they.

We're familiar with all of this from our study of Jewish law. The texts of *halakhah* are famously (notoriously?) open to different readings, and those readings accordingly lead to different conclusions and rulings (*p'sakim*).[4] As *progressive* halakhists, we openly seek to explore and achieve understandings of the *halakhah* that accord with the values that shape our liberal religious and moral outlook. In this we follow the example of our teacher, Rabbi Solomon B. Freehof, who describes the tendenz of Reform responsa as "liberally affirmative."[5] We would describe that tendency as an interpretive theory, one that intentionally searches for the best – meaning the most liberal and progressive – way to read the halakhic sources. We're not the only ones who "tendenz" in this direction. Such eminent Orthodox *poskim* as R. Benzion Meir Hai Ouziel[6] and R. Hayyim David Halevy[7] have spoken of the capacity of the *halakhah* to yield creative and positive responses to the needs of the hour *and* of the propriety of reading the sources in an intentional way to locate those answers. Of course, not everybody reads (or wishes to read) the *halakhah* in this manner. Orthodox rabbis who prefer a more restrictive approach – and who are just as aware as we are that the sources are open to differing interpretations – will claim that the "correct" interpretation is the one that follows the *m'sorah*, or established practice: "Once a halakhic practice was agreed upon, it could no longer be modified by reliance upon opinions that had previously been rejected."[8] And who establishes the *m'sorah*? Why the recognized Orthodox *poskim*, the tiny handful of *g'doley hador* who are endowed with a special perceptive ability to discern the right interpretations from the wrong ones.[9] Let's be clear: *all* of these approaches, ours as well as theirs, are theories of halakhic interpretation. There exists no

metatheory that can determine to the satisfaction of all just which interpretive theory is the correct one. You have to *choose* between them.

We make that choice, presumably, on the basis of our general religious, social, and cultural outlook. As progressives, we read the *halakhah* in a way that coheres with our liberal/progressive values because we believe that those values constitute the best available definition of the Torah's call to righteousness. Orthodox halakhists work from a different set of values and, for that reason, will arrive at other readings of the sources and steer clear of ours. To be sure, they will often deny that "values" play a role in halakhic interpretation, a process they will describe as an exercise in scholarly objectivity.[10] We don't buy it. You can't decide upon an approach to halakhic interpretation without reference to values, *hashkafah*, or *weltanschauung*, your sense of what Torah and Judaism are and what they ask of us. Just like you can't choose an theory for interpreting the Constitution in the absence of a notion of social value, of what freedom and liberty are all about, and about the role of the courts in protecting the rights of those who need that protection the most.

To pretend otherwise? Well, that's just plain arrogant.

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1. See Robert A. Ferguson, "The Judicial Opinion as a Literary Genre," *Yale Journal of Law and the Humanities* 2 (1990), pp. 201-219: "'the monologic voice' of the judicial opinion "works to appropriate all other voices into its own monologue… to subsume difference in an act of explanation and a moment of decision" (p. 205); "alternative views are raised but entirely within the controlling voice of the judicial speaker and with the foreknowledge that these alternatives will submit to that speaker's own authorial intentions" (p. 205).;"The presumed removal of personal predilections allows all parties to accept a compelled decision, one that every fair judge would reach despite differences in style and approach" (pp. 207-208).

2. *Roe v. Wade*, 410 U. S. 113, and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833.

3. Chief among them Justice Louis D. Brandeis, who wrote about the right to privacy in a seminal law review article as well as in a dissenting opinion (*Olmstead v. United States*, 277 U.S. 438 [1928], at 473-478) where he argues for a constitutional right to privacy.

4. Nobody expresses this point better than Nachmanides: "Every student of our Talmud knows that there are no absolutely decisive proofs that resolve the disputes among its interpreters… for in this science (*ḥokhmah*) there exists no demonstrative evidence (*mofet barur*) like that which functions in mathematics or astronomy"; Introduction to *Sefer Milḥamot Hashem*.

5. Solomon B. Freehof, *Reform Responsa* (Cincinnati: Hebrew Union College Press, 1960), p. 23. For a more recent, systematic account of the principles of liberal *halakhah*, see R. Moshe Zemer, *Evolving Halakhah* (Woodstock, VT: Jewish Lights Publishing, 1999).

6. "In every generation the conditions of life, changing values, and developments in science and technology bring forth new questions and problems that demand a solution. We cannot hide our eyes from these questions, saying 'everything new is forbidden by the Torah,' that is, anything that is not explicitly mentioned in the words of our predecessors must be defined as forbidden"; Introduction to *Resp. Mishp'tey Ouziel*, v. 1, pp. ix-x.

7. “It is only thanks to the flexibility of the *halakhah*, the many useful innovative interpretations (*ḥiddushim*) uncovered by the scholars of all generations, that the Jewish people have been able to ‘walk’ in the way of Torah and *mitzvot* for these 2000 years”; *Resp. Aseh L’kha Rav*, 7:54.
8. Walter S. Wurzburger, “Rav Joseph B. Soloveitchik as *Posek* of Post-Modern Orthodoxy,” *Tradition* 29:1 (1994), pp. 5-20 (quotation is at p. 6).

9. For a fascinating description of this mindset from the believer’s point of view see Emanuel Feldman, “Trends in the American Yeshivot – A Rejoinder,” *Tradition* 9:4 (1968), pp. 56-64, especially at pp. 60*ff*.

10. For a good example see J. David Bleich’s introduction to his *Contemporary Halakhic Problems*, vol. 1 (New York: Ktav/Yeshiva, 1977).