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SHOULD DIVREI TORAH TAKE SIDES IN POLITICAL DISPUTES?

Rabbi Aryeh Klapper, Dean

Teachers of Torah must continually choose between timeliness and timelessness. Both options are legitimate. When the political issues of the moment are genuinely important, Torah should have something to say about them rather than shrinking off to a neutral corner. Involvement in politics is a great mitzvah when genuinely motivated by the pursuit of the straight and the good, as G-d gives us to see the straight and the good.

Yet under ordinary circumstances Torah itself must not become partisan. Legal interpretation (really all interpretation) loses its authority when it becomes subordinated to an external agenda. Even the perception of partisanship tends to greatly diminish moral influence. (I say "tends" because there is a clear exception. The most passionate partisans may dismiss the words of anyone **not** clearly identified with their political sect. But such people are often open to influence only within a very narrow range. They will turn on prophets or scholars who presume to critique the partisan line of the moment.)

I faced this issue squarely when thinking about what to write this week. So many American political issues of the moment deserve Torah treatment that writing about something else seemed an abdication of responsibility – and yet it is possible to speak Torah about them in a way that deepens the issue rather than cheapening the Torah?

Torah Jews are subject to the same political passions as everyone else. As citizens, we – scholars and salts of the earth alike – naturally become progressive and reactionary, liberal and conservative, just like everyone else. So our timely Torah is likely to be under partisan influence, even if we try to be self-aware.

My admittedly inadequate solution for this week is as follows. Ten years ago, when John Roberts was nominated for Chief Justice, I wrote an op-ed about judicial character for Edah, which was picked up by the [Milwaukee Chronicle](#). It seems to me that it stands rereading in the context of the Kavanaugh nomination. My hope is that the explicit recognition that it was not written in response to this moment will help readers evaluate the Torah claims on

their own terms, and then make their own decisions about how those claims might play out in practice today.

(Note: The printed version was superbly edited by Dr. Alan Brill to make it more accessible, but I will take this opportunity to make available a version closer to my original.)

JUDAISM PROVIDES HELPFUL GUIDELINES FOR CHOOSING JUDGES

The prospect of an entirely reshaped U.S. Supreme Court makes it important that Americans have a serious conversation about our constitutional system. Jewish tradition can make a significant contribution to that conversation.

When Moses creates the first Jewish judiciary, God instructs him to appoint "men of strength, in awe of God, men of truth, haters of corruption" (Exodus 18:21). The first lesson Jewish tradition teaches is that judicial character is more significant than judicial politics.

Today's nominees will likely make their most critical decisions about issues that do not yet appear on the legal horizon. What matters most is not their specific positions but their temperament and understanding of the responsibility of the court. The purpose of a constitution is to place basic principles beyond the reach of the powerful. In a genuinely democratic society, power rests with the majority. Paradoxically, a primary purpose of democratic constitutions is fundamentally antidemocratic, to protect minorities against the tyranny of the majority. Another purpose is to prevent other sources of power, such as wealth, from usurping the powers of the majority. Justices must understand that it is the court's responsibility to enable the constitution to play these roles.

The second lesson Jewish tradition teaches consists of a model for the long-term success of a text-ordered society. In Judaism, texts restrain power through authority, and

texts gain authority because they have meanings that are discovered rather than produced by their interpreters.

When judicial rulings are perceived as reflecting judges' political opinions rather than painstaking scholarship, they lose their authority. Thus the public perception, justified or not, that *Gore v. Bush* was decided on the basis of party affiliation cost the Supreme Court tremendously.

The Talmud records similarly that the Great Sanhedrin's capacity to prevent disputes in Israel ended when its members were perceived as ruling on the basis of affiliation with the School of Hillel or the School of Shammai rather than on the basis of individual judgment.

The third lesson is that even though the Torah exhorts us to care for the poor, nevertheless it bans favoring them in legal disputes (Leviticus 19:15). This is because the rich will only concede power to the law if they see its interpreters as objective and impartial.

Over much of the latter 20th century, the federal judiciary tended to be more liberal than the electorate. Liberals accordingly sought to expand the discretion of the courts, especially with regard to constitutional interpretation. (In the early 20th century, liberal policy goals were often frustrated by the discretion of a court they saw as too conservative. Hence FDR's threat to "pack the court".)

Some of the important advances of the civil rights movement were made possible by these theories. The liberal gains, however, because they were enabled by creative but intellectually unconvincing readings of the Constitution, made the text less capable of resisting political agendas.

The fear inspired in liberals by the prospect of a conservative Supreme Court brings home the price that has been paid for those theories. If the text of the Constitution were seen as controlling, the political leanings of potential justices would have far less potential effect. At the same time, if the Constitution had passed through the fire of the civil rights movement unaffected, if the text were not seen as genuinely responsive to the humanity of African Americans, it would be morally obsolete. But how can a text respond to changing circumstances and contemporary moral insights without losing its authority?

Jewish tradition offers a straightforward if difficult prescription — stick to the traditional meaning of a text except when urgently necessary. The Talmud celebrates legal adaptation, but maintains its received lore with almost fanatic obsession with detail.

When teaching rabbinic students, I gradually bring them to the realization that authoritative interpreters have nearly absolute power over texts, and that real creativity is possible. At the same time, I teach them that this power must be used with extreme caution. If a text can mean anything, it means nothing.

Sometimes, as for example in the face of disaster, one must reread the text and find new wine in old barrels through legitimate legal interpretation.

After the destruction of the Second Temple, the rabbis of the Talmud found creative ways to compensate for the loss of the sacrificial order; and in medieval times, rabbis found creative ways to justify commercial transactions banned by the plain meaning of the Talmud. But this creativity took place against a static traditional background.

Crucially, the rabbis were continuously aware that their capacity to innovate stemmed from their predecessors' resistance to innovation and their own usual reliance on precedent.

They realized that judicial discretion is not an easily renewable resource, but rather a capital account built up by years of judicial restraint. When they used this resource, they spent it carefully and wisely.

In other words, the rabbis understood that the authority of law, and its capacity to protect the weaker members of society, depends on a combination of judicial humility and self-confidence.

The Talmud teaches that only humble people can learn Torah properly. Yet, it saw excessive rabbinic humility in a time of crisis as causing the destruction of the Second Temple. The complex task of a judge is to be exceedingly humble without being excessively so.

At the nomination hearings of any potential Supreme Court justice, the question we should be asking is not whether he or she agrees with our political positions.

Rather, Jewish tradition teaches that we should be asking whether that individual has the humility to bow before the text and its history of authoritative interpretation, and the self-confidence and ingenuity to stand against that history when necessary to preserve the authority of the text.