The Repeal of Tosefet Shevi'it: The Role of Discovered Traditions, Indirect Nullifications, and Asmakhtot in Annulling a Rabbinic Decree[1]

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The Talmud records how Rabbi Yehudah Ha-Nasi and his son Rabban Gamliel[2] made significant changes to nullify work restrictions in the periods immediately preceding and following the *shemittah* year (*shevi'it*). The motivations for these changes are not hard to understand. Even according to the base requirements of the Torah law, the idea of leaving one's land fallow for the year was very difficult, especially once compounded by a weak economic situation and heavy Roman demands for tax payments.

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1 This essay draws from chapters of my doctorate, Shlomo M. Brody, *Repealing Rabbinic Laws: Talmudic and Medieval Perspectives on the Authority to Nullify Halakhic Norms* (Bar Ilan University Law School, 2018). Many thanks to my advisor, Rabbi Prof. Yitzhak Brand, for his many suggestions, as well as my father, Prof. Baruch Brody, Baruch Alter ben HaRav Eliezer Zev *a"h*. My last extended conversation with my father before his death related to material covered in Section III of this study, and it is dedicated in his memory.

2 I follow Ra"sh Sirilio to y*Shevi'it* 1:1 (*d.h. lamah ne'emar*) and Rabbi Gedalia Nadel, *Be-Torato Shel R. Gedalia* (Maale Adumim, 5764), p. 63, in identifying Rabban Gamliel as the son of Rebbi, known in academic literature as Rabban Gamliel III. For sources and argumentation, see R. Shaul Lieberman, *Tosefta Ki-Feshutah: Shevi'it,* 482–483. Hereafter, references to *Tosefta Ki-Feshutah* are designated as TKF.

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The additional days or months to this prohibition, known as *tosefet shevi'it*, only added to the burden while increasing the probability that people would violate these laws to maintain economic sustenance.[3]

Nonetheless, these legal nullifications seemingly violate the rule established in the mishnah in *Eduyyot* (1:5). *Ein bet din yakhol le-vatel divrei bet din ḥavero ad she-yihiyeh gadol mimenu be-ḥokhmah u-be-minyan,* loosely translated as "A judicial court cannot nullify the edicts of a fellow court unless it is greater than the latter in wisdom and numbers" (hereafter known as the *ein bet din* rule). In the case of Rabban Gamliel, the Talmud asks how he was able to make this change to the pre-Sabbatical year period in light of the mishnah's rule. The Talmud gives multiple answers that have important implications for understanding the *ein bet din* rule and ways of circumventing it. In the first section, we document these answers and try to understand the different strategies that they represent. In the second section, we examine the texts regarding Rebbi's successful attempt to nullify the limitations in the post-Sabbatical-year period and ask why the Talmud did not question his authority to make this significant change in light of the *ein bet din* rule. We will suggest that Rebbi's actions entailed an indirect nullification through a series of legal proclamations without directly repealing a rule, and therefore was not seen to conflict with the *ein bet din* rule. We will further argue that our findings in the first two sections indicate that the *ein bet din* rule was understood to mandate direct repeals of earlier laws but not indirect nullifications. In the third section, we will use this insight to focus on one of the strategies taken by the Talmud to justify Rabban Gamliel's innovation and explore the rule of Biblical hermeneutics in justifying rabbinic innovation.

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3 The impact of economic pressures was already noted in *Tiferet Yisrael*: *Yakhin* to m*Shevi'it* 1:3 and are documented most systematically in Shmuel Safrai, *Bi-Yemei Ha-Bayit U-Bi-Yemei Ha-Mishnah,* Vol. 2 (Jerusalem, 5754), pp. 421–466. See also Daniel Sperber, *Roman Palestine: 200–400 The Land: Crisis and Change,* pp. 92–93.

Section I
How Did Rabban Gamliel III Nullify the Pre-Sabbatical-Year Prohibition?

1. The Repeal

In the beginning of *Tosefta Shevi'it*, we are told about the following rescindment.

> רבן גמליאל ובית דינו התקינו שיהא מותרין בעבודת הארץ עד ראש שנה
> Rabban Gamliel and his court ordained that the working of the land be permitted until the New Year [of the Seventh Year].[4]

Apparently, before this declaration, there was some form of prohibition of working the land even before the Sabbatical year began. What exactly was the existent rule beforehand and how did Rabban Gamliel nullify it? This is a matter of dispute discussed in both the Jerusalem and Babylonian Talmuds.[5] A few mishnayot in the beginning of tractate *Shevi'it* discuss the extent of the period before the Sabbatical year (colloquially known as *shnei perakim* of *tosefet shevi'it*) in which the different types of agricultural activity are prohibited.[6] The two Talmuds present various theories, with some differences, about the origins of this prohibition and which elements of the law were nullified by Rabban Gamliel.[7] Yet both

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4 t*Shevi'it* 1:1 (Lieberman edition).

5 *Mo'ed Katan* 3b, y*Shevi'it* 1:1, 33a (= Felix*, Masekhet Shevi'it*, Vol. 1, p. 22). See also y*Shevi'it* 1:7, 33b (=Felix*, Masekhet Shevi'it*, Vol. 1, pp. 66–68). The default version of y*Shevi'it* is*Talmud Yerushalmi im Masekhet Shevi'it*, ed. R. Yehuda Felix, 2 volumes (Jerusalem 5740).

6 See m*Shevi'it* 1:1, 1:4, 2:1, for example. Regarding theories of when this enactment was originally created, see Felix*, Masekhet Shevi'it*, Vol. 1, pp. 84–85, who himself believes it was enacted around the time of Shammai, based on his comment in t*Shevi'it* 3:10. See also Safrai, *Mishnat Eretz Yisrael: Shevi'it,* p. 6. (Hereafter, books from the *Mishnat Eretz Yisrael* series will be abbreviated as MEY). Most commentators assume that the law was enacted out of concern that farmers were tilling the land in preparation to illicitly work the land in *shevi'it* itself (as opposed to preparing it for the year following *shevi'it*). Felix suggests that this was a generic *shvut* to warn people of the prohibition during the *shevi'it* year itself. Regarding the agricultural basis for why preparing the land at the end of the sixth year might be beneficial, see Y. Felix, *Ha-Ḥakla'ut Be-Eretz Yisrael Be-Tekufat Ha-Mishnah Ve-Talmud* (Jerusalem, 1963), pp. 34–42.

7 Most significantly, it is clear within the Tosefta and Yerushalmi that Rabban Gamliel's pronouncement permitted working the land until Rosh Hashanah. Within Bavli, however, some explanations maintain that an earlier prohibition (originating before the decree of Hillel and Shammai) would remain in place for

include admissions (at least by some Sages) that at least part of the pre-Sabbatical-year period had initially included some form of rabbinic decree which was entirely rejected by Rabban Gamliel.[8] In both Talmuds, this bothered different *amoraim* since the nullification of the law by later figures seemingly violates the *ein bet din* principle. Indeed, Bavli records that one of the Sages was initially confounded by this problem.

> ואמר רבי שמעון בן פזי אמר רבי יהושע בן לוי משום בר קפרא: רבן גמליאל ובית דינו נמנו על שני פרקים הללו ובטלום.[9]
> אמר ליה רבי זירא לרבי אבהו, ואמרי לה ריש לקיש לרבי יוחנן: רבן גמליאל ובית דינו היכי מצו מבטלי תקנתא דבית שמאי ובית הלל? והא תנן: אין בית דין יכול לבטל דברי בית דין חבירו אלא אם כן גדול ממנו בחכמה ובמנין! **אשתומם כשעה חדה**...
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> And Rabbi Shimon ben Pazi said that Rabbi Yehoshua ben Levi said in the name of bar Kappara: Rabban Gamliel and his court voted about the prohibitions of these two periods (i.e., from Passover or *Shavuot* until Rosh Hashanah) and nullified them.
> Rabbi Zeira said to Rabbi Abbahu, and some say that it was Reish Lakish who said to Rabbi Yoḥanan: How could Rabban Gamliel and his court nullify an ordinance instituted by Beit Shammai and Beit Hillel? Did we not learn, "A court cannot nullify the ruling of another court unless it surpasses it in wisdom and in number?" **Rabbi Abbahu was dumbfounded for a moment**…[10]

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a limited period (e.g., 30 days) before Rosh Hashanah. See b*Mo'ed Katan* 3b and Felix*, Masekhet Shevi'it*, Vol. 1, p. 23.

8 A different problem raised by this prospect is why did the mishnah continue to state the law of *tosefet shevi'it* even after it had been nullified. This question is addressed in the Yerushalmi (1:1, 33a). For other examples, see Yaakov N. Epstein, *Mevo'ot Le-Sifrut Ha-Tanna'im* (Tel Aviv, 1957), pp. 227–229 and David Beit-Halaḥmi, *Ha-Ukimta Ba-Talmud* (Tel Aviv, 1987), pp. 81–84.

9 It should be noted that several Bavli manuscripts (including Munich 95) all use the term התירו (or similar variation) as opposed to בטלום. This language is also used in the Yerushalmi, and the Tosefta also used the verb of ה.ת.ר. There is no reason to assume that the term *heter* means something different than *batel*. The relationship between the word התירו and בטלו is discussed further in appendix #4 of my doctorate.

10 b*Mo'ed Katan* 3b. Translation adapted from the William Davidson Talmud on Sefaria.

2. Talmudic Explanations for Rabban Gamliel's Authority

In both Bavli and Yerushalmi, justifications for Rabban Gamliel's authority are ultimately given. Each answer represents its own type of resolution and will be presented thematically.

a) Stipulation: The Law Was Limited to Specific Conditions

One strategy interprets the original law as being limited in scope to specific conditions, namely the standing of the Temple.[11]

> אמר רב אשי: רבן גמליאל ובית דינו סברי לה כרבי ישמעאל דאמר הלכתא גמירי לה, וכי גמירי הלכתא - בזמן שבית המקדש קיים, דומיא דניסוך המים, אבל בזמן שאין בית המקדש קיים - לא.
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> Rav Ashi said: Rabban Gamliel and his court held in accordance with the opinion of Rabbi Yishmael, who said that they learned this prohibition as a *halakhah* (i.e., transmitted to Moses from Sinai). But they learned this *halakhah* only with regard to the time period when the Temple is standing, similar to the law of water libation (in the Temple). But when the Temple is not standing, [this law] does not apply.[12]

According to Rav Ashi, Rabban Gamliel believed, in accordance with the position of R. Yishmael,[13] that *tosefet shevi'it* before the Sabbatical year was derived as a *halakhah le-Moshe mi-Sinai* along with two other unrelated laws that were relevant to the Temple. Once the Temple was destroyed, *tosefet shevi'it* was automatically nullified, just as the other two laws were nullified. As such, Rabban Gamliel was in fact not nullifying anything, but rather merely pronouncing (or clarifying) that the ancient law of *tosefet*

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11 This is the last answer offered in the Bavli's presentation but is presented here first because it is the simplest approach to resolving the question and was also deemed normative by many later halakhic figures. See Rambam, MT *Shemittah ve-Yovel* 3:1 and the comments of Radbaz. This answer is not found in the Yerushalmi.

12 b*Mo'ed Katan* 4a. The position of R. Yishmael that attributes *tosefet shevi'it* as a *halakhah le-Moshe mi-Sinai* might run into a conflict with a different tradition in his name regarding *tosefet Shabbat* in b*Rosh Hashanah* 9a. See the commentaries there for attempted resolutions.

13 Menachem Katz, "Halakhah Le-Moshe Mi-Sinai' ke-even boḥen ideologit," *Uquimta* 6 (5780), pp. 1–21, argues that there is broader difference between the schools of R. Yishmael that will attribute unsourced norms to "*halakhah le-Moshe mi-Sinai*" whereas the school of R. Akiva will support them with an *asmakhta.*

shevi'it, which has the status of a *halakhah le-Moshe mi-Sinai*,[14] was always intended to apply only when the Temple stood.[15] Accordingly, the original legislation stipulated that the prohibition was only binding under certain circumstances.

This interpretation, which is connected to a parallel passage in b*Sukkah* 44a,[16] solves the problem of the authority of Rabban Gamliel's court's action by interpreting the law in light of its supposed legislative history. In general, legislative history is a well-known tool for judges to try to understand the purpose and meaning of a statute.[17] Yet this depiction of the law's historical evolution goes against the thrust of the tradition that *tosefet shevi'it* was enacted in the time of Beit Hillel and Beit Shammai (as Bavli calls it, "תקנתא דבית שמאי ובית הלל"), and that Rabban Gamliel and his court convened a quorum to nullify it. Or to put it another way, it offers a conflicting narrative to the assumed legislative history of this law and, to a certain extent, brings the authenticity of both into question.

Moreover, while many laws were deemed by the Sages as applying in the Temple era alone, it is not clear why the rule of *tosefet shevi'it* should be particularly tied to the standing of the Temple. The fact that it was allegedly announced at the same time as two other laws that are more naturally tied to the Temple service does not mean that the third law is also contingent on the Temple.[18] Rav Ashi's interpretive recreation of the law's

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14 In discussion of this passage in *Mo'ed Katan*, as well as other circumstances in which *halakhah le-Moshe mi-Sinai* or the forgotten/reestablished strategy are invoked, R. Gedalia Nadel asserts that these are cases in which we are dealing with old, recognized laws whose origins we do not know. While they could go back to the days of Sinai, they might not go back that far, and in any case, are treated as rabbinic laws. See Nadel, *Be-Torato shel R' Gedalia*, pp. 66–68. For earlier sources who assert that "*halakhah le-Moshe mi-Sinai*" refers to ancient traditions, see the commentary of R. Ovadiah Bartenura to m*Yadayim* 4:3 and *Tosafot Yom Tov* to m*Yevamot* 8:3.

15 See Meiri (*Bet Ha-Beḥirah, Mo'ed Katan* 3b *d.h. halakhah*) and *Shittah al Mo'ed Katan Le-Talmido R. Yeḥiel Me-Paris* 4a *d.h. dumya.* Accordingly, the law of *tosefet shevi'it* would be revived in a future Temple era.

16 See Moshe Benovitz, *Lulav Ve-Aravah Ve-Ha-Halil,* pp. 132–135.

17 Aharon Barak, *Purposive Interpretation in Law*, pp. 344–350.

18 This explanation works better in accordance with the position of *Tosafot* 4a *d.h. ela amar Rav Ashi*, who claims that all three of the laws were given together. As noted in *Hagahot ha-Bah*, however, Rashi (*Sukkah* 34a *d.h. asarah*) asserts that these three laws were taught in the *bet midrash* at the same time. If this is the case, the logic of why the default dormancy of one law would impact the status of another unrelated law is not clear. For questions on the attribution of a *halakhah le-Moshe mi-Sinai*, see Benovitz, *Lulav Ve-Aravah*, p. 114 fn. 5 and pp. 124–126.

history and its built-in stipulation is therefore somewhat surprising; indeed, it is not found in Yerushalmi. It is possible that in addition to his take on the disputed origin of these laws, Rav Ashi was also uncomfortable with the alternative answers given to the *ein bet din* problem, and therefore proposed his own solution which neutralized the innovation made by Rabban Gamliel.[19]

b) Stipulation: Revisionist Bias. A second solution, offered by R. Abbahu after being dumbfounded by the question, also follows the model of historical re-creation that posits that the original enactors included a stipulation. Yet unlike the model of Rav Ashi, which narrowly interpreted the intended scope of the original law, R. Abbahu made a broader claim that the legislators empowered a later court with the prerogative to nullify the decree should this be deemed necessary.

> אשתומם כשעה חדה .אמר ליה: אימור כך התנו ביניהן: כל הרוצה לבטל - יבוא ויבטל.
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> He [R. Abbahu] was dumbfounded for a moment. He said to them: Assert [that when they established their decree,] they stipulated among themselves: Anyone who wishes to nullify this decree may come and nullify it.[20]

As such, the initial decree included a provision that in effect neutralized the *ein bet din* principle by allowing for a later *bet din*, even of lesser stature, to nullify the law. In practice, the condition introduces what legal scholar Guido Calabresi has called a "revisionist bias" to the law.[21] That is to say, it creates a built-in condition that makes this particular law inherently more liable to being nullified. This overrides the *ein bet din* principle, which creates a strong "retention bias" that would preserve the

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19 See R. Gedalia Nadel, *Be-Torato shel R' Gedalia*, p. 73, who speculates that Rav Ashi believed this was an ancient decree (not a *de-oraitta* law) which was understood as a stringency that could only be kept under good political and economic conditions. The original enactors therefore stipulated that should things turn for the worse (as exemplified by the destruction of the Temple), the stringent practice would not apply. This interpretation would make his opinion more similar to that proposed by R. Abbahu, below.

20 In y*Shevi'it* 1:1, 33a, this concept is formulated as שאם בקשו לחרוש יחרישו. Note that whereas *Korban ha-Edah d.h. le-kakh nitnah* gives the authority to the court, Pnei Moshe *d.h. be-sha'ah* seems to give the authority to the people to decide. As Benovitz, *Lulav Ve-Aravah,* p. 134, notes, this was a problematic formulation which was clarified in the Bavli to assert that the authority rests with the court.

21 Calabresi, *Common Law*, pp. 123–124.

law.[22] It is not difficult to speculate why such a provisional clause might be built into this law. As the Tosafists already note, given the hardships already posed by observing the Sabbatical year, there might have been some concern that the law would cause undue damage to the land or strain for its owners.[23]

Yet this stipulated legislative history in Bavli begs the question of how R. Abbahu[24] knew that this *takanah* had such a clause built into it. As we saw, when originally challenged by the problem of *ein bet din*, the Sage was silent for a moment, as indicated by the word אשתומם. This term is used elsewhere in the Talmud in circumstances when a Sage was initially stumped on the origin of a law.[25] Following his recovery, he asserted, "Assert (אימור) that they have stipulated amongst themselves that whoever might want to nullify that measure can come and nullify it." The hesitation, followed by the postulation of this condition, might give the impres-

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22 See Meiri 3b *d.h. ein bet din*, who assumes this as a regular rule. אין בית דין יכול לבטל דברי בית דין חברו אא"כ גדול ממנו בחכמה ובמנין או שהתנו הראשונים על כל...

23 *Tosafot* 3b *d.h. kol ha-rotzeh*.

24 Or R. Yoḥanan, according to a different tradition in Bavli and the passage in Yerushalmi.

25 The term, which is derived from Daniel 4:16, is used in b*Shabbat* 47a, b*Ḥullin* 21a, and b*Sukkah* 44b. Significantly, in each case, the Sage responds to the challenge with a significant revisal of his previous statement. Particularly interesting is the use of אשתומם in the related *sugya* in b*Sukkah* 44b, in which R. Abbahu, when dealing with conflicting traditions about whether the practice of *aravah* was a *halakhah le-Moshe mi-Sinai* or a *takanat nevi'im*, asserts that the law was given, forgotten, and then re-established by decree. In the parallel in y*Sukkah* 4:1 (54b), which discusses *tosefet shevi'it* and the ten saplings, the passage states, "R. Yosi the son of R. Bun said in the name of R. Levi: This decree was a halakhah they had in their hands [by tradition], but they forgot it. The second ones arose and conceived of the same things as the earlier [Sages]. This serves to teach you that any matter for which a [members of a] court sacrifice themselves will ultimately become established by them as it was told to Moshe on Sinai." For a similar use of this expression with regard to various laws, see b*Yoma* 80a, b*Shabbat* 104a, b*Megillah* 2b–3a, y*Pe'ah* 1:1 (15c), and y*Shabbat* 1:4 (3d)). For more on this forgotten/reestablished strategy, including our case, see C. Hayes, "Halakhah Le-Moshe Mi-Sinai in Rabbinic Sources: A Methodological Case Study," in *The Synoptic Problem in Rabbinic Literature*, ed. Shaye J.D. Cohen (Providence, 2000), pp. 102–108. This statement would seem to indicate the necessity of finding new interpretations or traditions to deal with the challenges presented in the *sugya*, as argued by R. Ḥayyim ibn Attar, below.

sion that an invented tradition or fiction was created to solve this problem.[26] The importance of understanding this strategy is compounded by the fact that a similar stipulation is asserted in other Talmudic passages where rabbinic authority was challenged.[27]

Such a response might have broad implications. As R. Shlomo Algazi wondered in the 17th century, why does the Talmud not simply give this answer to other circumstances in which later Sages have nullified a previous law?[28] To answer this question, some interpreters like R. David Sinzheim assert that it must be that the given Sage had a bona fide tradition about this given clause. Otherwise, one cannot assume such a "revisionist" clause was built into the decree.[29] Others, like R. Yitzhak Goyta (19th century), assert that in order to assume that such a clause was made, we must have good reason to believe that the propagators of the law believed that the law might cause severe financial loss (as the Tosafists claimed in this case), as opposed to other decrees.[30] In other words, some decrees

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[26] It may also lead to ridicule of the system. See, for example, Solomon Zucrow (1870–1932), a teacher at Hebrew Teacher's College in Boston, who writes, in his *Adjustment of Law to Life* (Boston, 1928), p. 39, that this one of the "far-fetched explanations to which the later rabbis of the Talmud resorted in their attempt to explain away the apparent violation" of the *ein bet din* principle. In the postscript to the book, he writes that the *ein bet din* rule is "counter to the facts of Jewish history" and is "quite illogical."

[27] This idea is also used in the end of y.*Shabbat* 1:4, 3d to explain the nullification of the decrees against gentile oil and the law regarding five *ḥatat* offerings that are left to die. The notion of a law that is created with such a clause may also be found in m*Ma'aser Sheni* 5:2 with regard to *kerem reva'i*. A similar idea might be found in the concept of *masero ha-katuv la-ḥakhamim*. See the comments of R. David Frankel, *Shirei Korban*, *Sukkah* 4:1 *d.h. she-kakh*, regarding the prohibition of *melakhah* during *ḥol ha-mo'ed* and further discussion in chapter nine of my doctorate.

[28] *Halikhot Eli* #168, *d.h. bitul,* p. 64.

[29] R. David Sinzheim (d. 1812, France), *Yad David*, Vol. 2, *Mo'ed Katan* 3b *d.h. kakh*. He is cited favorably in R. Menachem Munisch Heilpern, *Menaḥem Meishiv Nefesh*, Vol, 3, pp. 109–110. For R. Sizhheim's position on the *ein bet din* rule regarding the prohibition of shaving on *Ḥol Ha-Mo'ed*, see the article of Moshe Samet within Meir Benayahu, *Tiglahat Be-Ḥolo shel Mo'ed*, p. 64, as well as the various primary sources recorded in his name in Benayahu's collection.

[30] *Sedeh Yitzḥak*, Helek Rishon, *Mo'ed Katan* 3b *d.h. Tosafot*, based on *Tosafot* 3b *d.h. kol ha-rotzeh*. He goes on to claim that such a concern would not have been inherently present in the case of gentile oil, which is why this solution was not presented in that case.

present complications which the original enactors undoubtedly anticipated and therefore we can assume that such a stipulation was made.[31] Despite their differences, both of these interpretations of R. Abbahu's solution assert that the original enactors had reason to introduce a revisionist bias to this particular law.

Yet other figures assert that later Sages made a post-facto claim when there was no other explanation for the authority used to change the law. As R. Ḥayyim ben Attar (known by the name of his popular Biblical commentary, *Or Ha-Ḥayyim*) posits,[32]

> ומינה (=מהסוגיא במועד קטן, ש.ב.) דכל דאשכחן דאתא בי"ד וביטל גזירת בי"ד חבירו שלפניו ולא אשכחן פירוק', אמרי דהכי התנו ביניהם. ולהכי אשתומם ר"י כשעה חדא ואהדר לשנויי ולא אשכח שינייא, אז אמור הכי התנו וכו'.

In other words, R. Abbahu conceived this tradition in the absence of other explanations. For this reason, he hesitated in his answer, seemingly to look for other explanations, and then proceeded to assert this stipulation.[33]

R. Ben-Attar's interpretation goes significantly further than the first two explanations to assert that not only did R. Abbahu give a post-facto justification for a legal repeal that would otherwise be unauthorized because of the *ein bet din* principle, but that he knew fully well there was no tradition of such a stipulation being made in the original decree.[34] One

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31 Such an idea may also be found in Meiri's comments to *Megillah* 2a and *Avodah Zarah* 35b.

32 *Rishon Le-Tzion*, *Beitzah* 5a *d.h. gemara.* Rabbi Binyamin Zeev Wolf Boskowitz (d. 1818), in his *Shoshan Edut* commentary to *Masekhet Eduyyot* 1:5 (10b in the book's pagination), formulated matters slightly more moderately. He interprets the Talmud to assert that whenever a nullification took place, later Sages assume that there must have been an oral tradition that the initial decree was made with the proviso that a later (and lesser) *bet din* could nullify that decree. Both statements are cited approvingly by R. Moshe Tzvi Neriah, "Davar She-be-minyan Tzarikh Minyan Aher," in *Mazkeret* (Rabbi Herzog Festschrift), ed. Shlomo Zevin and Zerah Warhaftig (Jerusalem, 5722), pp. 327–328.

33 R. Ben-Attar significantly goes on to claim that when the Sages themselves explicitly stated the rationale of the decree, it does not require a greater *bet din* to nullify it because the original legislators are implicitly stating that should the law's rationale no longer be germane, any *bet din* could nullify it. These broader questions are discussed in chapters 10–12 of my doctorate.

34 All three of these interpretations understand R. Abbahu to be offering a post-facto justification for R. Gamliel's action. Yet a fourth, more liberal strand emerged to assert that R. Abbahu's statement was a broader programmatic assertion that *all* rabbinic decrees could be nullified (*ab initio*) if the social circumstances change or the original decree creates unanticipated hardships. R. Abbahu

might explain his reasoning as a hermeneutic method based on legislative history: sometimes subsequent legislation sheds light on the purpose and scope of the earlier legislation.[35] Since Rabban Gamliel's court nullified the law, we assume that the original legislators anticipated the potential pitfalls of the law and took measures to prevent it from doing harm. It *must be* that the original law had a built-in stipulation since otherwise he could not explain the subsequent legislative history. For R. Abbahu, this provided a satisfactory answer to justify Rabban Gamliel's authority in repealing this decree.

In fact, this strategy is already found in a Genizah fragment possibly composed by Sherira Gaon but elsewhere attributed to Rav Hai Gaon.[36] The *gaon* was asked how R. Yehudah ben Beteirah could nullify Ezra's decree regarding *tevillat ba'al keri*.[37] In response, he asserts that a condition must have been made, citing as precedent the stipulation made with *tosefet shevi'it*. Once again, the assumption is that later legislative history tells us something about the earlier stages of the enactment. The *gaon* then further

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teaches that the original legislators would have never wanted to make their decree in such a circumstance and tacitly understood that their decree could be nullified if later Sages deemed it necessary. This interpretation of R. Abbahu was made by Weiss, *Dor Dor Ve-Dorshav*, Vol. 2, p. 58 and Yitzhak Shmuel Reggio in his "*Ma'amar Ha-Tiglaḥat*," reprinted in Meir Benayahu, *Tiglaḥat*, pp. 295–296. A similar type of claim was made by R. Moshe Ashkenazi of Odessa, known as the author of *Sefer Leḥem Avirim*. In a major *agunah* case discussed within rabbinic circles in Turkey, he asserted that the entire rabbinic decree of "*mayim she'ein lahem sof*" was no longer relevant in an era of mass communication. Citing the statement of R. Abbahu, he asserted that every rabbinic decree had within it a condition that allowed for its nullification should it cause greater hardship. This position drew scorn from other rabbinic figures of the time, who asserted that one could only assert that such a condition was placed on a decree when *Ḥazal* themselves made that declaration (as in *Mo'ed Katan*). Ashkenazi's position, along with the responses, are found in R. Ḥayyim Palagi, *Shu"t Ḥayyim Ve-Shalom*, Vol. 2, EH *Siman* 1 and R. Shalom Gagin, *Shu"t Yismaḥ Lev*, EH *Siman* 5. For a thorough discussion, see Raphael Etzion, *Hilkhot Ḥakhamim She-Batal Ta'aman Be-Peskiat Ha-Dorot Ha-Aḥaronim,* unpublished PhD thesis (Bar Ilan University Law School, 2008), pp. 232–234 and p. 254. Indeed, it seems difficult to assert that there is any textual indication that the statement of R. Abbahu should be taken in a manner that was meant to be a broader *de jure* statement regarding the powers maintained for *all* decrees of *Ḥazal*.

35 Barak, *Purposive Interpretation in Law*, pp. 348–349.

36 Shraga Abramson, *Inyanot Ba-Sifrut Ha-Geonim* (Jerusalem, 1974), p. 98.

37 For different strategies regarding the nullification of *tevillat ba'al keri*, see chapter eight of my doctorate.

adds a broader, more systematic statement, which we will cite from the version as later recorded in R. Zehariah Agmati's *Sefer Ha-Ner*.

> יש דברים **שעיקר תקנתן על תנאי** שאימתי שירצו בית דין יבטלוה, לפי' בזמן שאנו רואין תקנה שתיקנוה בית דין הגדול בחכמה ובמנין, ובא מי שוא קטן ממנו ובטלה, וקיבלו את דברי השני ועשו בו מעשים, **אנו אומ' שאלמלא שלא היה לו כוח לבטל, לא היה מבטל ואף לא היו מקבלין ממנו**.[38]

The argument of the *gaon* is clear: when we see that a lesser court nullified the decree and the masses accepted such a decision, we assume that a stipulation was made by the original legislators, since the later court would have never acted (or been accepted) had they not had such powers. In the more complete responsum re-created by Abramson, the *gaon* further cites the case of *tosefet shevi'it* as proof for this point, while contending that this matter was already discussed and resolved in a *kallah* gathering.[39] This basic explanation was later cited by *Tosafot* and others.[40] The formulation of the *gaon*, however, is particularly significant since he articulates a programmatic statement. If we find lesser courts nullifying earlier decrees and their actions are accepted by the masses, it must be that the original legislators gave them such powers.

Thus three different interpretations emerged within later rabbinic literature to explain the answer of R. Abbahu: 1) he possessed a specific tradition about this clause; 2) he did not possess a specific tradition, but there was a particularly good reason to think that such a clause would have been made in this case; or 3) such a clause is stipulated in all circumstances to post-facto explain how Sages had the power to nullify a decree when the *ein bet din* principle would seemingly preclude such a possibility. However plausible one might deem these interpretations of R. Abbahu's statement, all three highlight the struggle R. Abbahu had in explaining the actions of Rabban Gamliel.

c) Connection to Verses: Perhaps because of these difficulties, a third strategy was presented in both Talmuds to justify Rabban Gamliel's repeal. This explanation asserts that the original law was based on Biblical exegesis, which Rabban Gamliel rejected. Since the original decree was

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38 *Sefer Ha-Ner: Berakhot* 22a *d.h. ke-Rebbi Yehudah*, pp. 40–41.

39 Abramson, *Inyanot*, p. 98, line 8.

40 See *Tosafot*, *Bava Kamma*, 82b *d.h.* and Rosh, *Bava Kamma* 7:19, who cite this interpretation amongst three possibilities. See also Rashba, *Bava Kamma* 82b *d.h. ve-tiken*, *Ḥidushei Ha-Ra'ah, Berakhot* 22a *d.h. ke-de-Rav Ḥisda*, and Ritva, *Mo'ed Katan* 3b *d.h. ein bet din*.

built on Biblical interpretation, it could be subject to a reinterpretation by later courts. In the words of Yerushalmi,

> רבי אחא בשם רבי יונתן בשעה שאסרו למקרא סמכו ובשעה שהתירו למקרא סמכו.
>
> R. Aḥa said in the name of R. Yoḥanan, "When they issued the prohibition, they relied on support from Scripture. When they released the prohibition, they relied on support from Scripture."[41]

Bavli presents a similar explanation.

> ורבי יוחנן אמר: רבן גמליאל ובית דינו[**מ]דאורייתא בטיל להו**. מאי טעמא? גמר שבת משבת בראשית, מה להלן היא אסורה, לפניה ולאחריה - מותרין, אף כאן, היא אסורה, לפניה ולאחריה - מותרין.[42]
>
> And Rabbi Yoḥanan said that Rabban Gamliel and his court nullified based on a source written in the Torah. What is the reason? He derives [from the word] Shabbat [stated with regard to the Sabbatical Year in the verse: "But in the seventh year shall be a sabbath of solemn rest for the land" (Leviticus 25:4)] and the word Shabbat [which commemorates] the Shabbat of Creation. Just as there [on Shabbat itself] it is prohibited to perform labor, but before and after Shabbat it is permitted, so too here [in the case of the Sabbatical Year] itself it is prohibited [to perform labor during the Sabbatical Year] but before and after it is permitted.

Both Yerushalmi and Bavli suggest that Rabban Gamliel had the power to change the law because the original decree was based on Biblical verses. The later interpretation, by its nature, could undermine the original rabbinic statement and thus lead to a law's nullification. In Yerushalmi's formulation—"at the time when *they* prohibited… *they* permitted"—it is clear that both the original proclamation and its nullification were rabbinic pronouncements. The verses are being used as an *asmakhta* ("they relied on support from Scripture"). As Rashi notes, this also seems to be the meaning of Bavli as well.[43] The premise of this strategy is that the reliance of the original law on Biblical text makes it easier to nullify it. This strategy requires a more extended explanation to which we will return in Section III of our study.

Summary of Section I

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41 y.*Shevi'it* 1:1, 33a. See Felix*, Masekhet Shevi'it*, Vol. 1, pp. 24–25.

42 *Mo'ed Katan* 4a.

43 See Rashi *Mo'ed Katan* 4a *d.h. me-deoraitta*. See also the discussion in *Tosafot* 4a *d.h. ela*, Ritva 4a *d.h. R. Yohanan*, and *Shittah al Mo'ed Katan Le-Talmido R. Yeḥiel Me-Paris* 4a *d.h. deoraitta.*

The *amoraim* perceived Rabban Gamliel's action as a formidable legal declaration that violated the *ein bet din* principle. This seems to be the case because he sought to entirely repeal the decree that had been issued by Beit Hillel and Beit Shammai. Yet the Sages ultimately justified his court's innovation, albeit through different types of strategies to circumvent the *ein bet din* principle. Two major models emerged to resolve this problem. According to one model, a tradition was revealed which asserted that the original law had a stipulation built into it which undermined the authoritative status of the law. In one version, this went so far as to declare that Rabban Gamliel's court issued no nullification, as the original ancient law (*halakhah le-Moshe mi-Sinai*) originally asserted that it would not apply in an era without the Temple. According to another version of this strategy, Rabban Gamliel's court did issue a formal nullification which was nonetheless justified since the original legislators built in a revisionist stipulation which would allow for the law's easy nullification. According to the second model, Rabban Gamliel's court outright rejected the earlier law. Nonetheless, this was permissible, since the original law and its nullification were connected to Biblical verses.

Section II
How Did Rebbi Nullify the Post-7th-Year Prohibitions?

Rabban Gamliel III's pronouncement regarding *shnei perakim* before the Sabbatical year continued a trend initiated by his father R. Yehudah Ha-Nasi (known as Rebbi). Interestingly, while the innovations of Rebbi received much opposition, the *ein bet din* rule was not marshalled in Talmudic texts to challenge his authority. To understand why that might be the case, we must first appreciate the nature of his innovations and especially his nullification of the prohibitions extended to the post-*shevi'it* period.[44]

Rebbi made a series of declarations that were clearly intended to reduce the financial pressures created by agricultural laws. For starters, he

[44] This post-Sabbatical-year period is sometimes also colloquially known as "*tosefet shevi'it*." While the two decrees relating to before and after the *shevi'it* year are sometimes lumped together (as in m.*Shevi'it* 1:4 and *Mekhilta De-Rashbi* to *Shemot* 34:21), this might stem from post-facto *derashot* which were used to explain preexisting decrees, as discussed below. See Safrai, *MEY: Shevi'it*, 40–41 and Felix, *Masekhet Shevi'it*, Vol. 1, p. 50; and Yisrael Ta-Shma, *Minhag Ashkenaz Ha-Kadmon*, p. 111. In any case, it should be clear that we are dealing with separate decrees, which is why they would need separate nullifications, even as both had the same overarching goal of preventing the illegal working of the land during *shevi'it* itself.

made several controversial pronouncements that excluded significant population territories from the (costly) agricultural laws in an era of economic hardship.[45] These declarations engendered significant controversy, with some Sages refusing to participate in the quorum. Similarly, he allowed imports of produce from outside the land of Israel, thereby increasing supply and markets at the same time.[46] The most significant ruling was his pronouncement that the Sabbatical years were only in force from rabbinic law (*me-derabanan*) in the current era in which the laws of *yovel* were not applied.[47] This declaration, which also had direct implications for *shemitat kesafim* and *prozbul*, was premised on an interpretive statement that *shemittah* and *yovel* were directly tied to each other. This reasoning is sensible but is certainly not the only way to think about these laws; moreover, it was not the assumption of all *tannaim* in previous eras.[48] By the Sages' own admission, the reduced status of the *shemittah* year created a legal basis for additional dispensations,[49] while further creating a cultural atmosphere that tolerated even greater popular deviancy, especially given the economic hardships.[50] In fact, there is even a tradition that Rebbi tried to

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45 y*Demai* 2:1, discussed below. The significance of borders for legal purposes has regularly been a matter of deep halakhic significance with contentious debates. See m*Yadayim* 4:3, t*Oholot* 18:13–18 and the discussion in David Levine, "Rabbi Yehudah Ha-Nasi U-Teḥumei Arim Be-Eretz Yisrael," *Katedrah* 138 (December 2010), pp. 7–42. pp. 41–42. For broader discussions on the significance of legal borders in different realms, see Eyal Ben-Eliyahu, *Ben Gevulot* (Jerusalem, 2016).

46 y*Shevi'it* 6:4 and sources discussed below.

47 y*Shevi'it* 10:3, 39c. See the parallel versions in b*Gittin* 36a and b*Mo'ed Katan* 2b. The version in b*Gittin* significantly adds that the Sages explicitly decreed to continue to observe *shevi'it*, a claim not explicated in the parallel versions. See Felix, *Masekhet Shevi'it*, Vol. 2, pp. 311–312.

48 See, for example, *Sifra Behar* 2. See also the comments of Rashi *Gittin* 36a *d.h. bashevi'it* and *Tosafot* 36a *d.h. bazman* and the sources cited in *Otzar Mefarshei Ha-Talmud: Gittin II*, pp. 603–609. See also Safrai, *Be-yemei Ha-Bayit*, Vol. 2, pp. 456–457 and Yitzhak Gilat, "*Ha-Im Yovel Meshamet Kesafim?*" in *Yad Gilat*, pp. 116–126.

49 y*Demai* 2:1, 22d, the statement of R. Yoḥanan. See also y*Shevi'it* 9:9, 39a which depicts someone as being punctilious regarding the (Biblical laws) of *ḥallah* but lax on *shevi'it,* since it is a mere law of "Rabban Gamliel and his colleagues." See Felix, *Masekhet Shevi'it*, Vol. 2, p. 286.

50 y*Ta'anit* 3:1, 66b–c, in which Rebbi reflects sympathy for a schoolteacher who is suspect of violating *shemittah* restrictions, since he is dependent on this work for his livelihood. The tolerance for such behavior also impacts the status of *shevi'it* violators as witnesses in court. In m*Sanhedrin* 3:3, their status is suspect. In b*Sanhedrin* 26a, however, R. Yannai declares them legitimate witnesses since they acted under pressure to pay government taxes. The rest of the passage,

nullify all of the *shemittah* restrictions, but ultimately recanted because of the protests of the saintly R. Pinḥas b. Yair.[51]

In this regard, it is particularly significant to note Rebbi's dispensation to allow the consumption of vegetables that were picked immediately after the end of the *shevi'it* year. The story of his declaration is recorded without fanfare in the Tosefta.

רבי ובית דינו התירו ליקח ירק במוצאי שביעית מיד.[52]

Yet within the mishnah, his position is cited as a dissenting opinion. The first position asserts that a prohibition exists in the initial period of the eighth year until one can reasonably assume that vegetables currently picked had been planted following the Sabbatical year.

> מאימתי מותר אדם ליקח ירק במוצאי שביעית משיעשה כיוצא בו עשה הבכיר הותר האפיל.רבי התיר ליקח ירק במוצאי שביעית מיד.
>
> When in the year following the Sabbatical year is one permitted to buy a [given type] of vegetable? Once [the new crop of] that same vegetable has become ripe. Once the [portion of the crop which] ripens early [in the year] has become ripe, the [portion of the crop which] ripens later [in the year] is also permitted (i.e., may be purchased).[53] Rebbi permitted the purchase of vegetables immediately

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however, makes clear that not everyone, including Resh Lakish in the next generation, was pleased with this attitude. This is also clear in y*Shevi'it* 4:2, 35b. See Safrai, *MEY: Shevi'it*, pp. 117–120 and Felix, *Masekhet Shevi'it*, Vol. 1, pp. 227–236.

51 See y*Ta'anit* 3:1, 66c (and parallel in yDemai 1:3, 22a). See also b*Ḥullin* 7b. See Moshe Benovitz, "*Be-Sha'at Ḥerum Shanu*," pp. 21–22. For analysis of Rebbi's relationship with R. Pinḥas, see Ofrah Meir, *Rebbi Yehudah Ha-Nasi* (Tel Aviv, 1999), pp. 145–154. Note that R. Pinḥas ben Yair did not oppose all of Rebbi's actions, such as those relating to the status of Ashkelon. Felix*, Masekhet Shevi'it*, Vol. 2, pp. 442–443 discusses the possibility that this was not an attempt to permanently nullify the law, but rather a) a temporary measure because of drought, or b) an attempt to permit *sefihin* (aftergrowth). This approach is rejected by Benovitz, "*Be-Sha'at Ḥerum Shanu*," p. 21 fn. 45. Either way, there is a clear general lenient trend in his approach, as well documented in Safrai, *Be-yamei Ha-Bayit*, Vol. 2, pp. 453–457.

52 t*Shevi'it* 4:17 (Lieberman edition).

53 It should be noted that even within the *tanna kamma*, there is an attempt here to create a formal rule that allows for certain leniencies since any crops that are already ripe at this stage (but would normally would only be ripe later) might have been presumed to have grown during *shevi'it*. See also t*Shevi'it* 4:14 and the discussion in Safrai, *MEY: Shevi'it* p. 207 and Felix*, Masekhet Shevi'it*, p. 438.

in the year following the Sabbatical.[54]

From several places in the Talmud, we know that this declaration of Rebbi received reproach from his colleagues, along with the other dispensations which he declared. For example,

> ר' התיר בית שאן ר' התיר קוסרין ר' התיר בית גוברין ר' התיר כפר צמח **ר' התיר ליקח ירק במוצאי שביעי' והיו הכל מליזין עליו.** אמ' להן בואו ונדיין כתיב וכתת נחש הנחוש' וכי לא עמד צדיק ממשה ועד חזקיהו להעבירו אלא אותה עטרה הניח לו הקדוש ברוך הוא להתעטר בה ואנן העטרה הזאת הניח הקדוש ברוך הוא לנו להתעטר בה. רבי יהושע בן לוי הוה מפקד לטלייא לא תיזבון לי ירק אלא מן גינתא דסיסרא.
>
> Rebbi permitted [i.e., exempted] Beit She'an. Rebbi permitted Caesarea. Rebbi permitted Beit Guvrin. Rebbi permitted Kfar Tzemah. **Rebbi permitted [people] to purchase vegetables immediately following the Shevi'it year, and everyone spoke derogatorily about him** (*malizin alav*).[55] Rebbi said to them: Come and let us judge [the merits of my action]: It is written, 'And he [King Ḥizkiyahu] crumbled the copper' (II Kings 18:4). Was there no righteous person who arose from Moshe until Ḥizkiyahu to remove [the copper serpent from the world]? Rather, that crown God decided for Ḥizkiyahu to

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54 m*Shevi'it* 6:4. As Safrai notes (*MEY: Shevi'it*, p. 208), the citation of a position of Rebbi within the mishnah likely indicated the editorial role of one of his students. On the broader phenomenon, see Epstein, *Mavo Le-Nusaḥ Ha-Mishnah*, pp. 946–950.

55 Emphasis added. R. Yisachar Tamar, *Alei Tamar*: *Yerushalmi Seder Zeraim,* Vol 1, p. 412, correctly argues, based on parallels to b*Ḥullin* 6b, that the Sages spoke derogatorily about all of Rebbi's declarations, not just the last one related to the period after *shevi'it*. R. Tamar believes that the criticism stemmed from Rebbi's hubris of disagreeing with his predecessors. Rabbis Yehudah Levi and Aryeh Carmel, *Talmud Yerushalmi im perush Kav Ve-Naki*, p. 39, argued that the term used in the Talmud (*malizin*) is connected to the problem of being *motzi laz* (casting aspersions) on previous generations. They contend that Rebbi's actions would surely incite the masses against those Sages whom they will now perceive as having been overly stringent on them. In contrast, Rebbi would be asserting in his response that it is justified for later figures to sometimes disagree with their predecessors. This is precisely the conclusion made by R. Menaḥem Meiri (*Seder Ha-Kabbalah,* p. 103) from this passage. וכמ"ש דרך כלל מקום הניחו לנו כו' (חולין ז.) כלומר שאין השלימות נמצא בנבראים, ואפי' במובחרים שבהם, עד שלא יהיו אחרונים רשאין לחלוק עמהם בקצת דברים.

Indeed, the premise of the larger *ein bet din* principle is that there are times when later scholars may be greater than their predecessors. See the commentaries of *Tosafot Yom Tov* and *Ahavah Be-Ta'anugim* to m*Eduyyot* 1:5 and the discussion in appendix #2 of my doctorate.

> be crowned with. R. Yehoshua ben Levi would command the boys, 'Do not buy vegetables for me [in Beit She'an] except from the garden of Sisera.'[56]

This is, in fact, one of several stories which indicate that the Sages did not accept his lenient rulings regarding *shemittah*, as seen below.[57] The dramatic story shows how Rebbi did not back down from his dispensation in spite of the scorn he received from his colleagues for his lenient ruling and their refusal to accept his position.

Why Did Rebbi's Actions Not Raise the Problem of the *Ein Bet Din* Rule?

What remains important for our purposes is that in the various discussions about Rebbi's *shevi'it* dispensations, he is never challenged as violating the *ein bet din* principle. This is particularly interesting because he was challenged on these grounds regarding his repeal of a prohibition of gentile oil (*Avodah Zarah* 36a), just as we have seen that his son's related nullification of the period of *tosefet shevi'it* before the Sabbatical year was also challenged.[58] One explanation might be that invoking the *ein bet din* principle was not necessary because of the rapid opposition to the merits of Rebbi's decree, let alone his authority to act.[59] One might additionally add that given the idiosyncrasies of the editing of the Talmuds, one cannot derive anything from such an omission.[60]

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56 y*Demai* 2:1, 22c. See Levine, "Rabbi Yehuda Ha-Nasi," p. 37. Levine also analyzes the larger story, as well as differences with the parallel in b*Ḥullin* 6b–7a. For additional analysis, see Ben-Eliyahu, *Ben Gevulot,* pp. 250–253; Felix*, Masekhet Shevi'it,* Vol. 2, pp. 424–431; and Oppenheimer, *Rebbi Yehudah Ha-Nasi*, pp. 67–73. Previously in the passage in the Yerushalmi, we also learn that R. Zeira opposed Rebbi's declaration. For other examples of R. Zeira's opposition to Rebbi's legal declarations (including his attempt to serve as the *makhria* who resolves disputes), see y*Yevamot* 4:11, 6a.

57 For examples, see the forthcoming passages. Many of these sources showing opposition to Rebbi are discussed in Alon, *The Jews in Their Land*, pp. 722–725, and Albert Baumgarten, "Rabbi Judah I and His Opponents," *Journal for the Study of Judaism in the Persian, Hellenistic and Roman Period* 12:2 (1981), pp. 135–172.

58 On this repeal, see chapters 6–7 of my doctorate.

59 Alternatively, one might state that this was perceived as a personal declaration, and not that of his *bet din*. Yet in t*Shevi'it* 4:17, these actions are attributed to Rebbi and his court.

60 As I show in my chapters 7–8 of my doctorate, there is evidence within the Talmud that two other decrees were nullified (gentile bread and *tevillat ba'al keri*), even as the *ein bet din* principle was not invoked. In those cases, however, there are disputes within the text whether such a nullification took place.

Even with those caveats, it pays to explore whether there is a more fundamental explanation for why the *ein bet din* principle might not have been invoked. Rebbi's pronouncement to permit post-*shevi'it* vegetables was the result of a series of his declarations, as seen in the presentation in both Tosefta[61] and Yerushalmi.[62] The latter tells the following history regarding Rebbi's declaration:

> בראשונה היה הירק אסור בספרי ארץ ישראל התקינו שיהא הירק מותר בספרי ארץ ישראל. אף על פי כן היה אסור להביא ירק מחוץ לארץ לארץ התקינו שיהא מותר להביא ירק מחוץ לארץ לארץ. **אף על פי כן היה אסור ליקח ירק במוצאי שביעית מיד** ,רבי התיר ליקח ירק במוצאי שביעית מיד בר מן קפלוטא. מה עבדון ליה ציפראיי אלבשוניה סקא וקיטמא ואייתוניה קומי רבי אמרין ליה מה חטא דין מן כל ירקא ושרא לי לון.
>
> At first (בראשונה),[63] vegetables were forbidden [for import] to the border settlements of the land of Israel. [The rabbis] instituted (התקינו) that [foreign-grown] vegetables should be permitted to the border settlements of Israel. Nevertheless, it was prohibited to bring vegetables from outside the land into [the central areas] of the land. They instituted that it should be permissible to bring vegetables from outside the land into [all parts of] the land. **Nevertheless, it was prohibited to buy vegetables immediately following *shevi'it*. Rebbi permitted buying vegetables immediately following *shevi'it*,** with the exception of the leek. What did the residents of Tzippori do?[64] They took it [a leek] and dressed it in sackcloth and ashes and brought it before Rebbi. They said to him, 'In what has this leek sinned more than all other vegetables?' Rebbi permitted the leek to them.[65]

Based on this depiction, Rebbi's permissive stance regarding post-*Shevi'it* produce stemmed from the previous declaration (also made by

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61 t*Shevi'it* 4:16–19.

62 Safrai, *Be-yamei Ha-Bayit*, Vol. 2, pp. 451–455 and Haim Licht, *Masoret ve-Ḥidush,* pp. 95–110. Both Safrai and Licht follow in the footsteps of the brief remarks of Lieberman, TKF, Vol. 2., p. 542.

63 The use of this term, which will also arise in section three, is discussed at length in appendices #6 and #7 of my doctorate. For now, note that it clearly connotes significant halakhic change, even as the *ein bet din* principle is not invoked.

64 Regarding the actions of the residents of Sephoris, see Stuart Miller, *Sages and Commoners*, pp. 42–44.

65 y*Shevi'it* 6:4, 37a (Felix*, Masekhet Shevi'it*, Vol. 2, pp. 91–92). See also the parallel in t*Shevi'it* 4:16. The passage continues with stories of rabbinic opposition to his actions.

him, as made clear further in the passage)[66] that one may import vegetables outside of Israel, first into border towns and later throughout the country. Initially, this prohibition had been made to prevent landowners within Israel from selling *shevi'it* produce under the guise of being imported produce.[67] Yet this decree was no longer deemed implementable, either because many border city residents owned land outside of the territory of Israel, or because their communities were naturally awash with such produce anyway.[68] Alternatively, or additionally, the decree may have become unfeasible given the need for increased supply of food[69] and broader economic struggles in later eras.[70] Once this prohibition was removed, and further applied to the rest of Israel, there was no reason to prohibit consumption of vegetables right after *shevi'it* since one could readily assume that the produce purchased in the market was imported.[71] As such, it no longer made sense to impose a law that prohibited the purchase of vegetables immediately after *shevi'it*. This declaration, of course,

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66 See as well y*Pe'ah* 1:5 (18d) and y*Shekalim* 1:2 (46a), amongst other places which attribute these decrees to Rebbi. t*Shevi'it* 4:16 attributes them to "*raboteinu*."

67 See Pnei Moshe *d.h. ba-rishonah* and Mahar"a Fulda *d.h. af al pi*. This interpretation is also adopted by contemporary scholars. See Felix*, Masekhet Shevi'it*, Vol. 2, p. 437 and Lieberman, *TKF*, Vol. 2, p. 541 Yet some commentators (*Ra"sh Sirilio d.h. assur* and *Ḥazon Ish, Shevi'it* 20:3) elected to interpret the Yerushalmi in light of the Bavli, which claims that the alleged initial prohibition decree was based on whether we are concerned with the implantation of impure dirt from outside of Israeli into Israeli soil. Bavli gives no direct indication of any form of historical development. This was simply a matter of disagreement, which had ramifications regarding the intercalation of the calendar. See b*Nedarim* 53b and b*Sanhedrin* 12a.

68 Mahar"a Fulda *d.h. she-yehe mutar*. See Lieberman, TKF, Vol. 2, p. 542, for various explanations.

69 This explanation is offered by Rabbi Chaim Kanievsky in his edition of the Talmud Yerushalmi, *Pe'ah* 5:1, p. 76.

70 See Rash Sirilio *d.h. assur* and Felix*, Masekhet Shevi'it,* Vol. 2, p. 437. Unfeasible laws can become nullified under the important principle found in y*Shabbat* 1:4 (and elsewhere), as discussed in chapters 6–8 of my doctorate.

71 See Mahara Fulda *d.h. be-motzei shevi'it*. A similar explanation is found in the commentary of Rabbenu Asher to m*Shevi'it* 6:4. According to a parallel version (y*Pe'ah* 7:3), a tale of nearly-miraculous speedy vegetable growth led to his declaration. According to this version of the legal development, Rebbi permitted the immediate consumption of the food because produce in Eretz Yisrael could be plausibly blessed to grow incredibly quickly. Yet as Ḥazon Ish (*Shevi'it* 20:3) notes, it is hard to think that Rebbi based his lenient ruling on an extraordinary miraculous occurrence. On the use of miracle stories in these narratives, see Albert Baumgarten, "Rabbi Judah I and His Opponents," pp. 166–167.

removed the strongest social sanction against those who had, in fact, violated the *shevi'it* restrictions[72] since, in effect, it allowed consumers to purchase vegetables from the marketplace without concern. It might be that it was precisely for this reason that Rebbi's colleagues believed he had gone too far. Yet as Rebbi made clear,[73] he had no interest in issuing moral judgments (and certainly social sanctions) against those who felt compelled to violate these laws which, after all, was no longer a Biblical command—at least according to Rebbi, who had made that declaration.[74]

Accordingly, Rebbi Yehudah Ha-Nasi's dispensation regarding post-*Shevi'it* produce never entailed the outright and direct repeal of a decree made by earlier figures.[75] Instead, a series of incremental legal developments made in light of the economic and agricultural situation—including those made by proclamation (*hora'ah)* by him—allowed for the evolution of a law in a manner which made the initial prohibition no longer relevant. Once one could reasonably assume that produce found in Israel after *shevi'it* came from abroad, a legal rationale emerged to lighten the burden on the people. Rebbi found a way to change the law without directly repealing any given decree,[76] even as the result was the same.

A similar explanation can be made regarding the changes he initiated over which cities were within the borders of Eretz Yisrael. As we saw, many Sages held different opinions, both before and after his declaration,

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72 Either those who had actively grown their crops during the *shemittah* year, as Safrai claims (*Be-yamei Ha-Bayit,* Vol. 2, p. 454) or those who did not accept the restrictions regarding *sefiḥin* (aftergrowths), as claimed by Felix (*Masekhet Shevi'it*, Vol. 2., p. 91 and pp. 437–439).

73 y*Ta'anit* 3:1, 66b–c. See the discussion in Safrai (*Be-yamei Ha-Bayit*, Vol. 2, p. 455.)

74 See Rash Sirilio to y*Shevi'it* 6:4 *d.h. rebbi hitir*, who argues that the ultimate basis for these leniencies was Rebbi's belief that *shevi'it* was no longer a Biblical law. That being the case, he was lenient to prevent major economic hardship, even to allow produce which could not regularly grow in such a short period of time.

75 The Bavli neutralizes this question by connecting this question to a general dispute regarding concerns over impure soil and never mentioning any historical development. Accordingly, we have a disagreement over a technical halakhic issue which Rebbi resolved in a different manner and which has subsequent consequences on the issue of post-*shevi'it* restrictions. Within the Yerushalmi, however, it is clear that there initially was such a prohibition of importing foreign produce which was released by Rebbi. This is seen in the multiple places in which the Yerushalmi will discuss legal implications before and after Rebbi's declaration. See, for example, the statement in y*Shevi'it* 6:4, 37a. The passage goes on to give other implications of Rebbi's decision. For other examples, see Lieberman, TKF*,* p. 541 fn. 76.

76 In this case, the term *hitir* means to permit an act, not to nullify a law.

arguing that there were clear traditions which affirmed various cities within the halakhic territory of the land of Israel. Rebbi's innovations may have stemmed from alternative traditions, a strong sense of legal prerogative and independence, or, most likely, something in-between.[77] Yet ultimately, he and his colleagues were making a legal declaration (*hora'ah*) regarding the application of a norm which had not originated in legislation.[78] The basic law that produce in the land of Israel was liable to tithings and other laws was known; the interpretation of those borders, however, was subject to dispute and different rulings. Rebbi and his court gave a different interpretation which changed the law. They were not repealing the

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77 What was the basis for Rebbi's declaration? According to Meiri (*Ḥullin* 6b *d.h. Bet Shean*), Rebbi based his declaration entirely on an earlier tradition regarding which territories were sanctified in the time of Ezra. As such, he was not making a novel declaration, and therefore could assert that the previous practice was a mistaken *hora'ah*. For a similar interpretation, see the commentary of *Pnei Moshe* to y*Demai* 2:1 *d.h. ve-hitir et kulah* and R. Yisrael Schepansky, *Ha-Takanot Ba-Yisrael*, Vol. 1, pp. 390–391. Bavli (*Ḥullin* 6b) indicates such an interpretation, based on the claim of Rebbi's opponents that he was relying on an inaccurate tradition in the name of R. Meir. Noah Aminah, "*Eizoh Hee Eretz Yisrael La-Da'at Rebbi Yehudah Ha-Nasi?*", *Or Ha-Mizraḥ* 32 (5744), pp. 44–47, more moderately sees this declaration as a *sha'at dehak* ruling based on a combination of earlier opinions. Schepansky notes that many contemporary scholars are more skeptical of this interpretation and saw Rebbi's action as decree that overturned earlier decisions. Yet a closer look shows a more nuanced approach in their writings as well. See, for example, Alon, *The Jews in Their Land*, p. 731, who writes, "In another of his enactments, Judah I dispensed Caesarea, Beth Guvrin, and Beth Shean from the payment of tithes. The motivation for this was undoubtedly the decrease in the number of Jewish farmers in those areas and the desire to enable those who remained to cling to their holdings." Yet Alon then adds, "The measure also had sound theoretical underpinnings and had been discussed earlier." Safrai, "*Mitzvat Shevi'it*," ties these declarations to Rebbi's broad halakhic approach which greatly weakened the status of the Sabbatical year, as Ra"sh Sirilio previously asserted. Felix, *Masekhet Shevi'it*, Vol. 2, pp. 424–431, ties Rebbi's declarations to a broader strand of thought in medieval commentaries who understood that the determination of borders for agricultural laws would take into consideration the economic needs of the power. See, for example, Rashi. *Ḥullin* 7a *d.h. harbeh kerakhim* and Rambam MT *Terumot* 1:5. Accordingly, Rebbi's declarations were consistent with a broader trend of keeping in mind the economic consequences regarding the determination of legal borders for agricultural laws.

78 In this respect, see the formulation Rambam gave in his Commentary to m*Ohalot* 18:9 for the ruling given to the area of Kini, which he deems was a matter of dispute that became resolved in the time of Rebbi.

decree of a previous court, and therefore did not violate the *ein bet din* rule. The *ein bet din* rule, it would appear, only applies for direct repeals.[79]

Summary of Section II

The comparison between the treatments of the two different periods of *tosefet shevi'it* highlights how far the Sages in the post-Temple period went to alleviate the economic pressures imposed by agricultural laws. It also shows us the difference between two different methods of nullifying a law in practice. In the case of Rebbi, the nullification of *tosefet shevi'it*, while controversial, occurred through a series of declarations that weakened the law to its ultimate nullification. In the case of Rabban Gamliel III, however, there was no such indirect development. As many mishnayot in the beginning of *Shevi'it* make clear, a decree was widely known against tilling the land before the Sabbatical year began. Rabban Gamliel III nullified that prohibition outright, seemingly in contradiction to the *ein bet din* principle.[80] Two important models emerged to resolve this tension. The first argued that there were built-in stipulations that the law applied only under certain circumstances or that it more broadly included a "revisionist bias" to undermine the *gadol mimenu* requirement. As such, the *ein bet din* principle did not apply to this law. The second approach argued that the legal

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79 As I argue in my doctorate, the Talmuds also perceived the nullifications (or attempted nullifications) of *prozbul,* gentile oil, and the days on which one can read *Megillat Esther* as direct repeals, which is why the *ein bet din* rule was invoked to challenge the authority of those nullifications. On many other occasions, however, laws were changed in more indirect manners and therefore did not violate this rule.

80 This is not to say that Rabban Gamliel operated in a legal vacuum. Clearly, he was aware of the precedents of his father's broad legal activity regarding *shemittah.* Moreover, the continued discussion within rabbinic literature of what activities might be permitted on the land (even during the *shemittah* year itself, let alone beforehand) clearly reflect shifts in what dispensations might be allowed to make the land usable in the period immediately following *shevi'it.* Unfortunately, the chronology of those developments is somewhat complex. For relevant sources, see m.*Shevi'it* 4:2, t.*Shevi'it* 3:10, y.*Shevi'it* 4:2 (35a–b), m.*Sanhedrin* 3:3, b.*Sanhedrin* 26a, and y.*Sanhedrin* 3:5 (21b). These sources include traditions regarding the dispensation of R. Yanai (challenged by other authorities) to permit plowing the land in *shevi'it* because of taxes *("annona militaris")* imposed by the rulers. For plausible chronologies of these developments, see Felix*, Masekhet Shevi'it,* Vol. 1, pp. 85–86, 226–229, and Vol. 2, pp. 339–353, and Safrai, *MEY: Shevi'it*, pp. 115–121. That being said, none of these developments seem to have affected the period before *shevi'it* until Rabban Gamliel made his declaration. As such, Rabban Gamliel's actions were an outright challenge to the decree that had been made in previous generations.

decree was built on a Biblical verse which could be interpreted differently. As we will now argue, the logic behind this strategy is that the utilization of alternative *derashot* to support a law's nullification prevent it from being deemed a direct repeal and therefore not a violation of the *ein bet din* rule.

Section III
How Does the Connection of *Tosefet Shevi'it* to Biblical Verses Make It Easier to Nullify?

The Yerushalmi, as we saw, clearly indicates R. Yoḥanan treated these *derashot* regarding *tosefet shevi'it* as *asmakhtot*. Yet when reading some Talmudic presentations of the original notion of *tosefet shevi'it*, one might have thought these were understood to be full-fledged *deoraitta* laws based on Biblical *derashot*. This is certainly the impression that one may get from the mishnah in *Shevi'it*, based on its citation of Exodus 34:21.

> …שנאמר (שמות לד) בחריש ובקציר תשבות אין צריך לומר חריש וקציר של שביעית אלא חריש של ערב שביעית שהוא נכנס בשביעית וקציר של שביעית שהוא יוצא למוצאי שביעית
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> … As it says (Exodus 34:12), "From the plowing and the reaping you shall rest"; [this verse] is not needed to discuss the plowing and reaping of the Sabbatical year, rather the plowing of the pre-Sabbatical year that enters the Sabbatical year, and the reaping of the post-Sabbatical year that leaves the Sabbatical year. [81]

As such, according to those who adopt the approach of R. Yoḥanan, it required them to clarify these *derashot* to have been mere *asmakhtot* and that the original law stemmed from a rabbinic pronouncement.[82]

For our purposes, the key question is how does the decree's connection to Biblical verses ("*la-mikra samkhu*") help obviate the *ein bet din* problem? One might have actually thought the opposite—the fact that the original law was "supported" by a Biblical verse should make it harder to nullify. Unfortunately, the Talmuds postulate this approach without further explicating how this addresses the problem of overcoming the *ein bet*

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81 m.*Shevi'it* 1:4. The *derashah* is referring back to the basic idea of *tosefet shevi'it*, as found in m.*Shevi'it* 1:1. Indeed, the Yerushalmi begins its discussion of the first mishnah with this *derashah*. See *Melekhet Shlomo* to *Shevi'it* 1:4, the comments of Vilna Gaon to y.*Shevi'it* 1.3, along with Felix, *Masekhet Shevi'it*, Vol. 1, pp. 48–50 and Safrai, *MEY: Shevi'it*, p. 40. The midrash is cited in the name of R. Akiva in b.*Mo'ed Katan* 3b–4a, b.*Rosh Hashanah* 9a, and b.*Makot* 8b. The mishnah (and Bavli) go on to give an alternate reading of the verses in the name of R. Yishmael.

82 On this general issue, see, most recently, Rabbi Shmuel Ariel, *Nata Betokheinu: Perakim Be-Yesodot Torah She-be-al Peh* (Otniel, 5778), Vol. 2, pp. 225–236.

din principle. Moreover, the strategy is also utilized in other prominent cases to justify legal repeals, including the alleged nullifications of laws relating to gentile oil[83] and *tevillat ba'al keri*.[84] On this basis, Rambam asserts that the *ein bet din* rule (and more specifically, the requirement of a greater court) does not apply to laws based on the rules of hermeneutics but does apply to rabbinic decrees, further highlighting the significance of this strategy.[85] Thus, the question becomes how the utilization of Biblical verses lowers the barriers to halakhic change.

Do *Asmakhtot* Create Legal Stability?

As is well known, rabbinic scholars have long disagreed over the relationship between traditional practice, law, and midrash. They have particularly questioned which came first: the law or the *derashah*? Did the *derashah* generate the law, or does it support the declared law or contemporary practice?[86] Without entering the fray over the larger debate, it seems clear that there are times when the Torah is being used to buttress a pre-existing practice or a new rabbinic decree. That is to say, the law came first, and the verse followed it. This can be classically seen in the passages in which we find the following statement.

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83 See *Avodah Zarah* 36a-b and the comments of Rabad, *Perush Ha-Rabad Le-Avodah Zarah*, ed. A. Sofer (Jerusalem, 5738), 36a *d.h. bishlama*, pp. 73–74.

84 See *Berakhot* 22a and the comments of Meiri, *Bet Ha-Behirah*, *Berakhot* 22a *d.h. tevillah*.

85 *Mishneh Torah, Mamrim* 2:1–2. See also Rabbi Abraham di-Biton, *Leḥem Mishneh, Mamrim* 2:2; Rabbi Abraham Hayim Schor, *Torat Ḥayyim, Avodah Zarah* 36a *d.h. kesavar*; Rabbi Yosef Shaul Natanson, *Shu"t Shoel U-Meshiv Kamma* 2:100; Maharatz Chajes, *Kol Kitvei,* Vol. 1, pp. 384–385. See also the position of Rav Hai Gaon, as cited in Rabbi Meir Abulafia, *Yad Ramah*, *Sanhedrin* 33a *d.h. ve-ibaye*, and the comments of Meiri at the end of his commentary to *Beitzah* 5a.

86 Many positions on these questions, from earlier centuries, are explored in Jay Harris, *How Do We Know This*? (New York, 1995). In recent years, the trend within academic scholarship favors the opinion that legal declarations came first and then were given support through Biblical exegesis. See Ephraim Urbach, *Me-Olamam shel Ḥakhahim*, pp. 50–66 and his *Ha-Halakhah*, pp. 79–88. See also Epstein, *Mevo'ot Le-Sifrut Ha-Tana'im,* p. 511, who asserted, "While Scriptural prooftexts are provided for halakhah, one does not derive or innovate legal traditions on the basis of Scripture." Vered Noam, "*Ben Sifrut Qurman La-Midrash Ha-Halakhah*," p. 94 fn. 99, affirms that this is the current trend in scholarship. For a primary opposing position who sees the exegesis as preceding the law, see David Weiss Halivni, *Midrash, Mishnah, and Gemara*, pp. 18-37, who also provides earlier literature on the topic.

מדרבנן, וקרא אסמכתא בעלמא הוא.[87]

Here the Talmud asserts that a law is of rabbinic origin and that the text was only an *asmakhta* invoked to provide "support."[88]

One of the Talmudic passages which is frequently cited[89] to support the notion that *derashot* came to support existing laws is a mishnah in *Sotah* in which R. Yehoshua praises R. Akiva for buttressing a law developed by an earlier Sage, R. Yoḥanan ben Zakkai, with a midrashic teaching.

> בו ביום דרש רבי עקיבא (ויקרא י"א) וכל כלי חרש אשר יפול מהם אל תוכו כל אשר בתוכו יטמא אינו אומר טמא אלא יטמא לטמא אחרים לימד על ככר שני שמטמא את השלישי. אמר ר' יהושע מי יגלה עפר מעיניך רבן יוחנן בן זכאי שהיית אומר עתיד דור אחר לטהר ככר שלישי שאין לו מקרא מן התורה שהוא טמא, והלא עקיבא תלמידך מביא לו מקרא מן התורה שהוא טמא שנאמר כל אשר בתוכו יטמא.
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> On that day Rabbi Akiva expounded, "Any earthenware vessel into which any of them fall, whatever is within it shall become impure" (Leviticus 11:33). It does not say "impure" but "becomes impure" —thus it makes others impure. This teaches that a loaf of second-degree impurity can make impure a loaf to the third-degree. Rabbi Yehoshua said, "Who will remove the dirt from your eyes, Rabban Yoḥanan ben Zakkai? You used to say that in the future another generation will purify a third-degree loaf, because there is no verse

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87 See, for example, b*Sukkah* 28b, b*Yevamot* 24a, b*Ḥullin* 17b, and b*Niddah* 25a. See also b*Sukkah* 6a and b*Erwin* 4a, where it is used to buttress an old legal tradition (*hilkhata*).

88 On the many different meanings offered to the term "*asmakhta*," see R. Ḥanan Gafni, *Peshutah shel Mishnah* (Jerusalem, 2011), pp. 245–251, R. Yehoshua Inbal, *Torah She-be-al Peh: Samkhutah U-Derakheihah* (Jerusalem, 5775), pp. 304–309, and *Encyclopedia Talmudit*, Vol. 2, pp. 105–108 (*d.h. asmakhta*). It should be noted that even Halivni recognizes that the term *"asmakhta*" connotes in later Talmudic literature a rabbinic law. As he writes, in some cases, "The text is, as it were, merely ornamental, a rabbinic decoration with no Biblical force." See Halivni, *Peshat and Derash*, p. 157. In contrast, we will argue that the use of the prooftext in our cases was clearly not meant to just be "ornamental."

89 See, for example, anokh Albeck, *Mavo La-Mishnah*, pp. 47–48; Shmuel Safrai, *The Literature of the Sages*, Part 1, p. 159; Gafni, *Peshutah Shel Mishnah*, pp. 244–245, as well as the literature discussed in Yishai Rosen-Zvi, "'*Mi Yigaleh Afar Me-Einakha*': *Mishnat Sotah Perek* 5 *U-Midrasho shel R' Akiva*," *Tarbiẓ* 75:1–2 (5766), pp. 101–102.

> from the Torah that makes it impure. Now behold, Akiva your student brings a verse from the Torah that it is impure! As it says, 'All that is in it becomes impure."' [90]

R. Yehoshua congratulates R. Akiva for solidifying a law which lacked bona fide textual proofs.[91] According to Bavli (*Sotah* 30a), R. Yoḥanan ben Zakkai derived this law from a *kal va-ḥomer* which he believed was compelling but nonetheless had flaws, thereby making it subject to reversal. As such, R. Akiva gave the claim greater strength. The prooftext of the Torah, R. Yehoshua hoped, will solidify the law and prevent it from being rejected or overturned in later generations, as R. Yoḥanan ben Zakkai feared.[92] The mishnah plainly acknowledges the creativity used by R. Akiva in fortifying the halakhah though the support of Biblical exegesis.

In recent years, academic scholars like Menaḥem Kahana have painstakingly documented how R. Akiva's strategy was to confer authority to these new rabbinic teachings. This can be seen in the many *midrashim* in which a Biblical text is cited only to give support to a complete mishnah or other halakhic teaching, as introduced by the term *mikan amru* (מכאן אמרו).[93] This process, which has been aptly called "re-scripturizing," uses

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90 m.*Sotah* 5:2.

91 Rosen-Zvi, "*Mi Yigaleh Afar*," pp. 98–101.

92 As Jay Harris notes, the historical motivation for this fear is not easy to determine and it may not have been uniform among all Sages. However, as he goes on to write, specifically commenting on this mishnah, "What is important is that at some point in the tannaitic period, a concern was expressed that law passed on without explicit scriptural authority might fail to stand the test of time. The position attributed to Yoḥanan ben Zakkai here gives voice to that anxiety precisely. One cannot know how widespread such anxiety may have been in the rabbinic world of the second century, or that the teaching attributed to Akiva was motivated by it; nor, finally, can one conclude that *midrash halakhah* originated in response to such anxiety. The only thing one can know is that in the tannaitic period, some large or small segment of the rabbinic estate developed a deep-seated concern that unjustified law would not seem compelling to later generations. A suggestion can be made that midrashic activity, no matter its origins, serves inter alia to address such anxiety. (It is striking that such anxiety finds expression in the Mishnah, which, with important exceptions, is the vehicle of unjustified law par excellence.)" See Harris, "Midrash Halachah," in *The Cambridge History of Judaism, Vol. 4: The Late Roman-Rabbinic Period*, ed. Steven Katz (Cambridge, 2006), pp. 340–341.

93 Menaem Kahana, "*Hadrashot Ba-Mishnah Ve-Ha-halakhot Ba-Midrash*," *Tarbiẓ* 84:1–2 (5776), pp. 17–76. An earlier English summary of the major claims can be found in Yakir Paz, "Re-Scripturizing Traditions: Designating Dependence in Rabbinic Halakhic Midrashim and Homeric Scholarship," in *Homer and the*

exegesis to connect a self-standing legal tradition to a Biblical word, verse, or passage. By showing a close connection between the rabbinic law to the Bible, R. Akiva and his school gave authority to the rabbinic teaching which has been attached to the text. Significantly, R. Akiva's midrashic teachings are not just innovating new laws, strengthening independent rabbinic teachings, or arbitrating standing disagreements.[94] Rather, they are innovations which fundamentally *change* halakhic practice and nullify the previous norm.[95] Accordingly, R. Akiva utilized *derashot* as a mechanism to justify halakhic changes, which he was introducing.

A good example of this phenomenon in which an *asmakhta* supports a legal change found in a mishnah relates to the case of how the *bikkurim* ritual was performed. In *Sifre Devarim*, a work of *midrash halakhah* generally attributed to the school of R. Akiva, a change in the ritual is recorded alongside support from a Biblical verse, using similar linguistic expressions (*samkhu al ha-mikra*) to those in the case of *tosefet shevi'it*. The *derashah* is wrapped around a citation of the mishnah in tractate *Bikkurim* (3:7) which describes how the Sages changed the protocol of reciting the appropriate verses because illiterate people were too embarrassed to bring their sacrifice.

> ענית ואמרת, נאמר כאן עניה ונאמר להלן עניה מה עניה האמורה להלן בלשון הקדש אף עניה האמורה כאן בלשון הקדש. **מיכן אמרו בראשונה** כל מי שהוא

Bible in the Eyes of Ancient Interpreters, ed. Maren R. Niehoff (Leiden, 2012), pp. 269–298.

94 On the use of the expression *ad she-ba R. Akiva* ("until R. Akiva came and asserted") which appears in several of these texts, see Epstein, *Mevo'ot La-Sifrut Ha-Tana'im*, pp. 74–80.

95 On R. Akiva as a *darshan* and innovator, see the literature cited in Menaḥem Kahana, *Sifre Zute Devarim,* p. 373 fn. 31. One classic collection of his innovations, including those that go against *mishnah rishonah*, is Epstein, *Mevo'ot Le-Sifrut Ha-Tana'im*, pp. 71–84. A representative sentiment is expressed by Shmuel Safrai (*Literature of the Sages*, Part I, p. 200): "R' Akiva is one of the greatest innovators in the history of halakhah." He goes on to add (p. 204–205, emphasis added), "But R. Akiva's contribution consisted not only of reformations, expansions, and clarifications of existing mishnayot, but also of conscious innovations in explicit opposition to the accepted Halakhah. The Sages prior to R. Akiva, as was all his contemporaries, did not alter or rework the mishnayot which they had received from their teachers. They added to them and used them for creating new halakhot, for example, by comparing a new problem with an appropriate accepted halakhah… To be sure, R. Akiva himself also derived many new halakhot in this way. **What was new was that R. Akiva altered accepted traditions and thus made them what was subsequently called the 'First Mishnah**."'

יודע לקרות קורא ושאינו יודע לקרות מקרים אותו נמנעו מלהביא **התקינו** שיהו מקרים את היודע ואת מי שאינו יודע. **סמכו על המקרא** וענית אין עניה אלא מפי אחרים.

(*Devarim* 26:5) 'And you shall answer': 'answer' is written here, and elsewhere (ibid. 27:14): Just as there, in the holy tongue; here, too, in the holy tongue. 'And you shall answer and you shall say': **From here they said: In the beginning**, whoever could recite the formula (by himself) did so, whoever could not, recited after another—whereupon they stopped bringing *bikkurim* (to avoid embarrassment). **It was, therefore, ordained** to have one who knew how (to recite it) do so; and for those who did not know how to recite it, **they relied on the verse** 'and you shall answer'—'answering' is in response to another. [96]

This is clearly a case in which the *derashah* justifies or solidifies the legal change that was instigated for social reasons (in this case, embarrassment from illiteracy causing people to not bring the sacrifice).[97] The text testifies to the fact that that this was a rabbinic innovation (*hitkinu*) which departs from the earlier practice (*ha-rishonah)*,[98] and that the *asmakhta* (*samkhu al ha-mikra*) is being marshalled (*mikan amru*) to support the change already known from the mishnah.

In this case, we are dealing with a new exegesis regarding a law to which there was no recorded earlier, alternative interpretation or *derashah*. For our purposes, we will call this a "reinforcing *asmakhta*" in that it buttresses a legal declaration without challenging an earlier *derashah*.[99]

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96 *Sifre, Devarim* #301.

97 Safrai, *MEY: Bikkurim*, pp. 257–258.

98 For more examples of legal changes indicated by this word, as well as an explanation why these developments did not violate the *ein bet din* rule, see appendices 6–7 of my doctorate.

99 Other examples of a "reinforcing *asmakhta*:"1) See m*Nedarim* 9:6 and y*Nedarim* 1:1, 36c. (Note that that the *derashah* does not appear in b*Nedarim* 27a.) For discussion of parallel ideas and sources, see Lieberman, *TKF*, Vol. 6, pp. 468–470 (to t*Nedarim* 5:1) and Kahana, *Sifre Bamidbar*, Vol. 4, p. 1260 fn. 57. 2) m*Yoma* 2:1–2 states that the job assignments in the Temple were initially decided on a first-come, first-serve basis, but that after a violent incident, the Sages enacted a lottery system. The violence of this incident is greatly elaborated upon in parallel sources, such as t*Kippurim* 1:12. Less noted, however, is that in *Sifre Bamidbar* #116, the lottery system is established on the basis of a *derashah* with no reference to such an incident. Many classic commentators have noted that this is just an *asmakhta*, yet as Kahana notes, the later *derashah* is being employed to justify a change in practice (in this case, a "reinforcing *asmakhta*"). See Kahana, *Sifre Bamidbar*, Vol. 4, p. 879. 3) The type of land from which one collects damages.

"Revisionist *Asmakhtot*": Challenging Earlier Interpretation to Make Legal Changes

In different cases, however, an *asmakhta* is used when there were alternative Scriptural interpretations supporting the competing and earlier legal practices. For our purposes, we will call this a "revisionist *asmakhta*" since it challenges and revises the earlier meaning derived from Scripture. An example of this is the disagreement given in the mishnah regarding the minimum amount a *nazir* must consume to violate the prohibition. The original law (*mishnah rishonah*) was that a *revi'it* must be consumed, yet the law changed to follow the opinion of R. Akiva that a *kezayit* was necessary. In the parallel Yerushalmi, it becomes clear both opinions were based on competing *asmakhtot*, with R. Akiva using his own *derashah* to buttress his opinion. Thus, the *asmakhta* in this case comes to undermine the "*mishnah rishonah*" that was based on an alternative *derashah*.[100]

Another case in which alternative exegesis supports multiple legal changes relates to the complex development of the law that came to prohibit a woman betrothed (*arusah*) to a *kohen* from eating his *terumot* before they are married (*nesu'in*). The mishnah[101] asserts that the *mishnah rishonah* (i.e., original law) was that a betrothed woman was only entitled to eat from *terumot* if the 12-month deadline had passed and she had still not been formally married. A later *bet din* changed the rule to assert that she could not eat from the *terumot* under all circumstances until she was married under the wedding canopy.[102] From other sources, however, we learn that there was an even earlier position which asserted that the *arusah* could eat from *terumot* already from the beginning of the betrothal period, based

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See t*Ketubot* 12:2. As Lieberman notes (*TKF,* Vol. 7, p. 370), the parallel Yerushalmi (y*Gittin* 5:1, 46c) makes clear that this is a departure from the Biblical law, with (once again) R. Akiva basing the change on a Biblical verse. The matter, however, is more complicated within Bavli (*Gittin* 48b), which initially asks how this can be attributed to a rabbinic law and asserts that this is a case in which the norm derived from the logic of the Torah.

100 See m*Nazir* 6:1, y*Nazir* 6:1, 55a and the discussion in Kahana, *Sifre Bamidbar*, Vol. 2, p. 219 to *Sifre Bamidar* #24.

101 m*Ketubot* 5:2–3. See also the parallel in t*Ketubot* 5:1 (Lieberman edition). On the text, see Yeraḥmiel Brody, *Mishnah ve-Tosefta Ketubot*, pp. 146–149. See also Epstein, *Mavo Le-Nusaḥ Ha-Mishnah,* pp. 972—973, Lieberman, TKF, Vol. 6, pp. 256–259; Adiel Schremer, *Zakhar u-Nekevah*, pp. 326–333 and 341–345 (which includes important discussion regarding parallels to Roman law); Safrai, *MEY: Ketubot* (to m*Ketubbot* 5:2–3); and Kahana, *Sifre Bamidbar,* pp. 898—901 (to Sifre #117), who provides textual variations to texts as well as parallel sources.

102 This position also appears in m*Yevamot* 9:4 and y*Yevamot* 9:6, 10b.

on *Vayikra* 22:11 (regarding an analogous case of legal responsibilities with slaves[103]) or *Bamidbar* 18:13 (allowing "all of your household" to consume *terumot*).[104]

The Yerushalmi explains the different positions by providing a depiction of a three-stage historical development with significant implications for the role of *derashot* in supporting rabbinic pronouncements.

> מתניתי' לא כמשנה הראשונה ולא כמשנה האחרונה אלא כמשנה האמצעית. דתני בראשונה היו אומרים ארוסה בת ישראל אוכלת בתרומה **דהוון דרשין** וכהן כי יקנה נפש קניין כספו דלא כן מה בין קונה אשה ובין קונה שפחה. **חזרו לומר** לאחר שנים עשר חדש לכשיתחייב במזונותיה. **בית דין של אחרון** אמרו לעולם אין האשה אוכלת בתרומה עד שתיכנס לחופה.[105]

Accordingly, the original law (*mishnah rishonah*) was that a betrothed woman could eat *terumot*. This ruling, as the text stresses, was based on a *derashah*, in this case from the verse in *Vayikra*. Later, in the interim stage, the Sages asserted (חזרו לומר) that only a betrothed woman whose wedding day had passed was entitled to eat from the *terumot.*[106] Ultimately, in the final ruling, the later court ruled that no betrothed woman could consume *terumot* until she made it under the wedding canopy. Accordingly, we had two rabbinic decrees: the first which significantly amended the Biblical law, and the second which nullified the first rabbinic decree.

How did this prohibitive position win the debate? The Yerushalmi continues to explain that R. Yehudah ben Beteira felt that the original permissive law was correct based on the Biblical verses. Moreover, he had a *kal va-ḥomer* argument to show why that should be the case, based on an

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103 b*Ketubot* 57b.

104 *Sifre Bamidbar* (*Koraḥ*) #117. There is good indication in various Talmudic passages that this was the practice in certain times or places. See Safrai, *MEY: Ketubot,* pp. 318–320. The midrash, moreover, explicitly rejects an interpretation which would only allow a fully married woman to consume this food. Yet it is precisely this stringent exegesis which is adopted in *Sifre Zuta Bamidbar* 18:13 and asserts, based on the same word in the verse, that a woman cannot eat from the *terumot* until she is married. Moreover, in the latter text, the prohibitive position is presented as an outright *derashah*, with no comments on any historical development and no assertion (as found in Bavli) that the strict ruling was a decree to prevent mishaps. Yerushalmi, cited below, also relies upon this strict interpretation of *Bamidbar* 18:13 but does present the historical development.

105 y*Ketubot* 5:4, 29d, emphasis added.

106 The position recorded as *mishnah rishonah* in m*Ketubot* 5:2 is here labeled the *mishnah ha-emtza'it*, "the intermediate teaching."

analogous discussion regarding the laws of slaves.[107] Nonetheless, he remorsefully concludes,

> ומה אעשה והן אמרו לעולם אין האשה אוכלת בתרומה עד שתיכנס לחופה וסמכו להם מקרא כמה שנאמר כל טהור בביתך יאכלנו.[108]
>
> What can I do? For they have declared, "A woman may not partake of *terumah* until she has actually entered the wedding canopy." And they relied on the verse, as it says…

"What can I do?," he bemoans, seemingly reflecting his frustration that his position has been defeated as the later court marshalled Biblical verses (וסמכו להם מקרא) for their position. From this presentation, the final ruling of the latter *bet din* is clearly a mere *asmakhta,* as noted by medieval commentators.[109]

What did this *asmakhta* accomplish? The original law was also clearly supported by a Biblical verse, either from *Vayikra* or *Bamidbar*. Yet the law was changed by the Sages, possibly out of concern from the misuse of the *terumot* to those not entitled to it. This was a clear rabbinic development. It seems there were two stages in this process, including an interim decree when the Sages were generally stringent yet allowed the woman to partake in the food, albeit only after the planned wedding date had passed. This interim stage had no support verse, highlighting the fact that the later developments were clearly of rabbinic origin. In the final stage, the later *bet din* was supported by a *derashah*, being a departure from both the original Biblical law as well as an interim rabbinic ruling. For

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107 In the continuation of the story, the strength of the logic of this *kal va-ḥomer* is questioned. In any case, the stress of the narrative is that even if the *kal va-ḥomer* had been strong, it still would not have overridden the rabbinic decision.

108 This critical line, which clearly indicates that they saw this interpretation as an *asmakhta*, does not appear in the parallel presentations of the dialogue in t*Ketubot* 5:1, Sifre #171, and b*Kiddushin* 10b. See Kahana, *Sifre Bamidbar*, pp. 900–901.

109 This position is already asserted by Rabbenu Tam (*Sefer Ha-Yashar: Ḥiddushim*, *Siman* 7 (p. 17 in Schlesinger edition) and Rabbenu Asher (*Tosafot Ha-Rosh*, *Kiddushin* 10b *d.h. arusah*), where he makes the interesting claim that many *derashot* in the Sifre are *asmakhtot*. (He makes a similar claim in Rosh, *Bava Kamma* 7:3. See also Ramban, *Derashah Le-Rosh Hashanah* in *Kitvei Ramban*, Vol. 1, ed. Chavel, p. 218, in which he makes the same claim about the Sifra and the Sifre.) See Lieberman, TKF, Vol. 6, p. 258, as well as p. 83 and p. 233. Kahana, *Sifre Bamidbar*, p. 901 fn. 16, notes that the *amoraim* regularly understood a *derashah* to be an *asmakhta*, even as the presentation within tannaitic literature makes no indication of it. As one example, he cites *Sifre Bamidbar* #116 which claims that *netilat yadayim* is of Biblical origins, even as many other sources indicate otherwise.

whatever reason,[110] these Sages were adamant to prohibit these women from eating *terumah*, and they used a "revisionist *asmakhta*" to undermine the earlier law that also had Biblical support.[111]

These cases in which *derashot* are used to support legal changes (as indicated by *barishonah* or *mishnah rishonah*) highlight the fact that "re-scripturizing" does not necessarily preserve a legal ruling, as R. Yehoshua hoped. This method may have initially developed as a way of grounding the authority of a legal tradition or innovation, as in the case of "reinforcing *asmakhtot*." While the *asmakhta* might grant the law its initial authority or help win an opening dispute, it can also make the norm fleeting. Just

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110 Schremer, *Zakhar U-Nekevah,* pp. 326–329, attributes the motivation for this change to shifting visions of the nature of marriage and whether the union begins at *erusin* (contractual agreement) or *nesuin* (personal relationship). Accordingly, *terumah* is an ancillary consequence to a larger shift. Safrai, *MEY: Ketubot,* Vol. 1, p. 320, however, reads certain texts to indicate that the shift relates to the perceived severity of *terumah*, and not necessarily larger questions regarding the status of *erusin*.

111 Other cases of a "revisionist *asmakhta*": 1) The question of when non-tithed produce (*tevel*) is subject to the laws of *bi'ur*. See m*Ma'aser Sheni* 5:8. The original stringent ruling had attached to it a well-attested procedure in which scholars provided practical guidance to landowners how to fulfill this law. The Tosefta and Yerushalmi provide extensive documentation of this process, indicating that this was a rooted historical practice. Yet R. Akiva successfully introduced a significant lenient change to exempt much produce. According to a parallel version (*Midrash Tena'im* [ed. Hoffman], pp. 175–176 to *Devarim* 26:13), the Sages in the generations which preceded R. Akiva had rejected this lenient ruling when it was introduced by R. Neḥunia ben Ha-Kana. In that parallel, the two different practices are in fact attributed to a *derashah* of a Biblical verse. Ultimately, as the mishnah asserts, R. Akiva's ruling won the day, in part with the support of the *derashah* of his teacher which was used to overturn the existing practice, which itself had Scriptural support. On this ruling of R. Akiva and the practice beforehand, see the detailed study of Safrai, *MEY: Ma'aser Sheni*, pp. 403–413.
2) In another case, R. Akiva expanded the number of relatives who are ineligible to testify to include several relatives of one's mother. See m*Sanhedrin* 3:4. As Menaḥem Kahana (*Sifre Zute Devarim,* pp. 369–374) has documented, this ruling of R. Akiva was built on *derashot* found in several halakhic midrashim. See, for example, *Sifre Devarim* (*Ki Tetze*) #260, b*Sanhedrin* 27b, *Sifre Zute Devarim* 24:16.
3) t*Pesaḥim* 1:7, emphasis added. While not explicit in this source, it seems that previous eras believe that "*tashbitu*" in the Torah meant that *ḥametz* must be eradicated entirely from the world, whereas R. Akiva believed that it simply had to be out of a Jew's possession. See Rashi *Pesaḥim* 21a *d.h. ve-lav*, Meiri *Pesaḥim* 21a *d.h. u-mokhrah*, R. David Pardo, *Ḥasdei David* to *Tosefta Pesaḥim* 1:6 (p. 242–243). As R. Pardo makes clear, R. Akiva's position goes beyond that established by Beit Hillel. See also Shamma Friedman, *Tosefta Atikta*, p. 138.

as one can easily establish one law through exegesis, so too can one change the law through alternative exegesis, as we saw in the cases of "revisionist *asmakhtot*."

A Taste of His Own Method: A Revisionist *Asmakhta* to Justify Nullifying *Tosefet Shevi'it*

This, in fact, seems to have happened to the law of *tosefet shevi'it*, and most tellingly, with a *derashah* of R. Akiva as the victim. The *derashot* to support *tosefet shevi'it*, especially as derived from the verse in Exodus 34:21, is deeply tied to the school of R. Akiva, as we saw previously in the mishnah in *Shevi'it* 1:4.[112] In another *midrash halakhah* tied to this school, R. Akiva's students disagree on some of the details, but share the basic assumption of this law.

> ר' יהודה אומר בחריש ובקציר תשבת חריש שקצירו אסור זה חריש שלערב שביעית וקציר שחרישו אסור זה קציר שלמוצאי שביעית. ור' שמעון אומר שבות מן החריש בשעת קציר ושבות מן הקציר בשעת חריש.[113]

Yet there is good reason to believe this practice pre-dated R. Akiva's era, as much earlier sages from Beit Hillel and Beit Shammai disagreed about the duration of the prohibited period, as we see in the first mishnah in tractate *Shevi'it*.[114] Indeed, Bavli refers to this law as "תקנתא דבית שמאי ובית הלל".[115] Accordingly, R. Akiva's *derashah* was introduced later to support a practice which had emerged during the Second Temple period and was assumed within much tannaitic discourse.[116] This was, in short, a "reinforcing *asmakhta*."

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112 The basic ideas of this *derashah* (according to some texts and manuscripts, with the term דתנן), is quoted in b*Rosh Hashanah* 9a (regarding the broader notion of *tosefet shabbat*), b*Makkot* 8a, and b*Mo'ed Katan* 3b–4a, and is directly attributed to R. Akiva.

113 See *Mekhilta de-Rebbi Shimon bar Yoḥai*, *Shemot* 34:21. In the context of discussing the notion of *tosefet Shabbat*, *Mekhilta R' Yishmael* to 35:3 also records a similar *derashah* to 34:21 that would assume the notion of *tosefet shevi'it*. This is surprising given that R. Yishmael does not affirm this *derashah* in m*Shevi'it* 1:4 and b*Mo'ed Katan* 4a. Classic commentators to this passage, however, note that this is indeed a *derashah* connected to R. Akiva and is possibly an interpolation from elsewhere.

114 m*Shevi'it* 1:1 and Felix, *Masekhet Shevi'it*, Vol. 1, pp. 84–87. See Safrai, *MEY:* Shevi'it, p. 6 and p. 29, who affirms that the notion of *tosefet shevi'it* was widely accepted in the tannaitic period.

115 b*Mo'ed Katan* 3b.

116 As noted previously, the *mishnah* records a different *derashah* of this verse in the name of R. Yishmael. Does this mean that he did not accept the entire notion

A few generations later, however, this law was no longer viable or had become counter-productive, leading Rabban Gamliel and his court to nullify it. How could they make such a change, given the antiquity of this practice and the *ein bet din* rule? One possibility was to utilize the "revisionist *asmakhta*" strategy that R. Akiva himself employed elsewhere to support halakhic changes. As R. Yonatan continues to explain in the Yerushalmi, Rabban Gamliel based the new law on Biblical exegesis, in this case an alternative interpretation of the same verse (Exodus 34:21) that had previously supported *tosefet shevi'it*.

> רבי אחא בשם רבי יונתן בשעה שאסרו למקר' סמכו ובשעה שהתירו למקרא סמכו. בשעה שאסרו למקרא סמכו בחריש ובקציר תשבות בחריש שקצירו אסור ואי זה זה זה חריש של ערב שביעית שהוא נכנס לשביעית ובקציר שחרישו אסור ואי זה זה זה קציר של שביעית שהוא יוצא למוצאי שביעית. ובשעה שהתירו למקרא סמכו ששת ימים תעבוד ועשית כל מלאכתך מה ערב שבת בראשית את מותר לעשות מלאכה עד שתשקע החמה אף ערב שבתות שנים את מותר לעשות מלאכה עד שתשקע החמה[117]

Through a new interpretation of this verse, the *derashah* of R. Akiva is nullified—and so is the legal norm that pre-dated R. Akiva! Or to put it another way, the "reinforcing *asmakhta*" of R. Akiva gets nullified by the "revisionist *asmakhta*" of Rabban Gamliel. This, in fact, was exactly the strategy regularly utilized by R. Akiva and others that we have seen in this chapter. Once attached to a Biblical verse, the law becomes tied to the fate of that interpretation. An alternative *derashah* provides sufficient authority to make innovative changes to the pre-existing law, even against retentionist notions like the *ein bet din* rule.

Do *Asmakhtot* Produce Legal Stability? Authority, Continuity, and the Power to Change

We must now ask why laws rooted in textual exegesis are more pliable for change and nullification. As we previously saw, Rambam asserted that laws based on rules of exegesis may be changed by a lesser court, while an

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of *tosefet shevi'it*? Such an opinion is recorded in *Melekhet Shlomo* to m.*Shevi'it* 1:4 at the end of *d.h. R. Yishmael*. More likely, however, is that he believed this was an ancient tradition not linked to Torah verses. This, in fact, is the opinion that is attributed to him in b.*Mo'ed Katan* 4a, as discussed previously.

117 y.*Shevi'it* 1:1, 33a. See Felix, *Masekhet Shevi'it*, Vol. 1, pp. 24–25. This *derashah*, of course, has implications for our understanding of the historical development of the notion of *tosefet Shabbat*, which this text seems to deny or greatly minimize. See Gilat, *Perakim*, pp. 315–320 and Safrai, *MEY: Shabbat*, Vol. 1, pp. 31–36.

act of independent legislation (a *gezerah* or *takanah*) requires a greater court, as demanded by the *ein bet din* principle. An explanation for this position was developed by Rabbi Yehuda Heschel Levenberg (d.1938), a rosh yeshivah in New Haven, Connecticut, and Cleveland, Ohio.[118] Levenberg asserts that the difference between hermeneutics and legislation lies in the fact that the former does not create a new, independent legal norm.[119] The Torah's words existed beforehand, with their legal meaning subject to interpretation. As such, a given interpretation does not represent a judicial pronouncement ("*shem hora'ah*") that becomes a part of the Oral Law because nothing new was introduced. Instead, Levenberg asserts, it is a mere explanation or extraction of the intent of the Torah ("*gilui kavanat ha-Torah*"). While binding in its period, it remains subject to review by later scholars, who also retain interpretive authority. Decrees, however, become new entities within the corpus of Torah. They represent substantive additions to the Oral Law, and when challenged, represent nullifications of the law (*bitul ve-akirah*) which require the sanction of a greater court. [120] Alternative interpretations, in short, preserve continuity

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[118] For more on R. Levenberg, see Moshe D. Sherman, *Orthodox Judaism in America: A Biographical Dictionary and Sourcebook* (Westport, CT, 1996), pp. 131–133.

[119] See his *Imrei Ḥen*, *Hilkhot Mamrim,* p. 54, also found in Ḥanina Ben-Menaḥem, *Ha-Maḥloket Ba-Halakhah*, Vol. 2, pp. 635–6.

[120] A different approach to the distinction in Maimonides and the role of hermeneutics was taken by R. Avraham Yitzḥak Kook. In the course of his defense of the temporary sale of Israeli territory during the agricultural Sabbatical year (*heter mekhirat karka'ot*), R. Kook affirmed that the *ein bet din* principle did not apply to laws derived from *derashot*, as stated by Rambam. He then went further to state that even in cases of bona fide *gezerot*, a greater *bet din* is not required if the later *bet din* finds an *asmakhta* to prove that the given law was not Biblical. In this case, an *asmakhta* is not coming to buttress the legitimacy of a rabbinic decree by showing that the Torah hinted toward this rabbinic law. Rather, the *asmakhta* highlights the fact that the Torah itself did not forbid this action, and therefore one may argue that the Torah itself implicitly states that such an action should be permissible. While the Sages were allowed to nonetheless prohibit the action, the rules for nullification are relaxed should scholars in a later era deem it necessary to overturn that decree, since their opinion is buttressed by the *asmakhta* which indicated the Torah's permissive stance on the matter. To prove the legitimacy of this method, R. Kook cited the famous position of the Tosafists (*Yevamot* 68a *d.h. mitokh*) that the rabbis may dictate non-observance of Torah law, even by acts of commission (*kum ve-aseh*), if there exists a compelling reason and *asmakhta* for this decision. All the more so, R. Kook contends, the rabbis, when compelled, may undermine earlier rabbinic laws with the support of an *asmakhta.* See chapters 2–3 of the introduction to Kook, *Shabbat Ha-Aretz im Tosefet Shabbat*, Vol. 1, pp. 86—92 and the commentary of Hagi Ben-Artzi, *He-*

by affirming the authority of the text. Repeal of legislation, in contrast, terminates a law entirely and therefore requires a greater court to authorize such an act of discontinuity.

Rabbi Levenberg, I believe, is touching upon a larger question of why many legal systems prefer changes through new interpretation of texts rather than writing the law anew. In a wide-ranging essay, the legal scholar Joseph Raz asked the fundamental question, "Why interpret?"[121] That is to say, why do we seek to determine the law by interpreting an authoritative text, as opposed to simply stating what we think is politically appropriate or morally correct in the given circumstance, irrespective of other positions, texts, or precedents. Legal systems require intervention to improve the law, address changing conditions, and provide equity for the citizens impacted by the law. To achieve that goal, it would be much easier for judges, for example, to employ moral and legal reasoning like that done by the legislators who first enacted the law. Nonetheless, they feel bound to the constraints of the authoritative text of the legal code. Why?

Raz's answer is both simple and elegant: authority and continuity.[122] We interpret legal texts because we consider the original law to have undergone an authoritative process which makes it valid and binding. Furthermore, we affirm the text's ongoing authority since the sustained observance of this law creates continuity that provides stable guidance for a political society.[123]

Analogously, *mutatis mutandis*, one can say that the Torah certainly held primary stature as an authoritative legal text. As new laws needed to be created over time, many Sages felt it was critical to connect laws to Biblical

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Ḥadash Yitkadesh, pp. 157–159. R. Kook further defended his claim in *Shu"t Mishpat Kohen* # 68.

121 Raz, *Between Authority and Interpretation* (Oxford, 2009), pp. 223–240.

122 Ibid., pp. 235–237.

123 A similar phenomenon exists in many common-law systems. As legal philosophers have noted, courts tend to eschew overt challenges to precedent rulings, preferring methods that allow for legal change without stirring legal quarters. It softens the potential harm to institutional authority by not directly challenging the wisdom or stature of the earlier judges. It provides, therefore, an important method for legal change while, relatively speaking, preserving institutional stability by maintaining a sense of continuity with the original authoritative text. The same, moreover, could be said about many legal changes that are made in terms of constitutional interpretation. See, for example, David Strauss, "Common Law Constitutional Interpretation," *University of Chicago Law Review* 63 (1996), pp. 913–916 in particular. Similarly, by obviating the *ein bet din* principle, hermeneutics prevent many of the problems caused by direct legal repeals.

words or verses. Accordingly, the process of "re-scripturalizing" gave rabbinic law the imprimatur of exegetical authority while at the same time maintaining a sense of continuity with the ancient tradition. Laws developed in consonance with the authoritative text gave a feel of consistency with the tradition.[124] This was the support offered by an *asmakhta*, whether it was buttressing a new norm or altering an existing practice ("reinforcing *asmakhta*").

Yet once that process was introduced, an attempt to further adapt the law would also need to be rooted in the Biblical text. Accordingly, changes to previous rabbinic proclamations which were portrayed as alternative interpretations ("revisionist *asmakhot*") helped maintain a sense of authority and continuity. After all, the revised law made the same claim to the

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[124] The notion of an *asmakhta* being used to support the authority of legal rulings is discussed by a few medieval commentators. Many medieval commentators believed that *asmakhtot* were divorced from the simple meaning of the text; instead, the laws were based on tradition and the *asmakhtot* employed as mere memory tools for Oral Law teachings. See, for example, Yehudah Halevi, *Kuzari* 3:72–73 and Ibn Ezra's abridged commentary to *Shemot* 21:8. More significantly, the Maharil (R. Yaakov ben Moshe Halevi Moelin, *Sefer Maharil,* Likutim, #70) argued that an *asmakhta* was meant to prevent the masses from denigrating the significance of rabbinic laws. אמר: כל היכא דאיתמר מדרבנן הוא וקרא אסמכתא בעלמא, הכי פירושו ודאי תקנתא דרבנן הוא והם יצאו ובדקו ומצאו להם סמך מקרא, **וסמכו דבריהם עליו כדי להחזיקם שיהיו סבורים דהוא מדאורייתא ויחמירו בו, ולא אתו לזלזל ולהקל בדברי חכמים.** This position of the Maharil was severely criticized by the Maharal (R. Yehudah Loew ben Bezalel of Prague), who deemed it unfathomable that the Sages would trick the masses (*geneivat da'at*). See his *Gur Aryeh* to *Shemot* 19:15. (For his own theory and the broader debate, see Maharal's *Be'er Ha-Golah*, *Be'er Rishon*, Chapter 1 and the discussion in Gafni, *Peshutah shel Mishnah,* pp. 246–248 and Ariel, *Nata Betokheinu*, Vol. 2, pp. 239–250). Nonetheless, the larger point made by the Maharil is that an *asmakhta* creates continuity with the Biblical text which creates a sense of continuity, thereby preventing people from dismissing the rabbinic inventions. This claim, in fact, was also made by Rabbenu Asher (Rosh *Mo'ed Katan* 1:1) regarding the *derashot* to support work prohibitions on *Ḥol Ha-Mo'ed.* אבל מלאכה לא נאסרה כי אם בראשון ובשביעי אלא ודאי ק"ו ליתא **אלא אסמכתא בעלמא לחזק דברי חכמים** שאסרו מלאכת חוה"מ אבל התירו דבר האבד כדתנן. See also the statement of Ramban, *Hasagot Le-Sefer Ha-Mitzvot* (ed. Chavel), p. 8, and other statements of his cited by R. Ariel, *Nata Betokheinu*, p. 241 fn. 48. Moreover, it could be that in fact, scholars themselves (not just the masses) would treat rabbinic laws that were supported with an *asmakhta* more severely, as claimed by R' Yosef Teumim (*Pri Megadim*, Introduction to *Oraḥ Ḥayyim*, Section 1.) משמע אסמכתא חשובה שיש לה כעין רמז בקרא הוה כדין תורה ממש... הא כל היכא דאסמכוה אקרא באסמכתא חשובה דעתם להיות ממש כדין תורה, ולא מקילין בספיקו וגוזרין גזירה לגזירה באפשר וכדומה.

canonical text. In essence, the legal text, as understood by the Sages, maintains its authority and continues to remain in force. In practice, Scripture's legal implications have shifted in light of its new interpretation. A lower court cannot overturn the authoritative teaching of its greater predecessor. Yet alternative interpretations, as Rav Levenberg asserted, do not uproot an earlier teaching; they merely redefine it.

Alternative interpretations, by their nature, do not directly call for normative reform. Their overt aim seeks to understand the text, with legal ramifications a secondary consequence. The normative impact, however, remains enormous, and thereby allows for evolution within the law, without explicit challenges to the authority of earlier texts or figures.[125] That is precisely what happens in cases of direct repeals, which directly nullify or uproot the original law. The Sages believed that such actions require the *gadol mimenu* clause, whereas more subtle changes based on exegesis

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[125] As many have shown, in different ways, textual interpretation remains a central method for the law's evolution, whether we are dealing with a Biblical text, a tannaitic work, or a legal practice. See, for example, Moshe Halbertal, *Mahapekhot Parshaniot Be-hithavutan;* Shai Wosner, "*Atzma'ut u-Meḥuyavut Parshanit*," *Akdamot* 4 (Shevat 5758), pp. 9–28; and R. Michael Broyde, *Innovation in Jewish Law*. This is certainly true regarding many cases of *ukimtot* in which *amoraim* interpret earlier rabbinic statements in ways which can deeply affect halakhic norms. In this respect, it pays to note that statement of R. Shlomo Fisher, contemporary head of the Itry yeshivah, in his *Derashot Beit Yishai*, *Siman* 15, p. 114. ובזה תבין עניין דוחקים והאוקימתות שעושים האמוראים כשמקשים עליהם מדברי התנאים, שרבים תמהו על זה. דהואיל והאמוראים יודעים שהאמת עמהם ורק האיסור לחלוק הוא העומד בפניהם, לכן דוחקים בלשון התנאים להתאים את דבריהם עם האמת... וכך נוהג החזו"א בעצמו עם לשונות הראשונים. Fisher's comments follow the spirit of a statement he briefly cites that is attributed to the R. Ḥayyim Soloveitchik of Brisk by R. Elchanan Wasserman in *Kovetz Shiurim*, Vol. 1, *Siman* 633, p. 326 (commentary to *Bava Batra* 170b). The Talmud (*Bava Batra* 170b) records a statement in the name of Rav in which he explicitly chooses to disagree with the two positions of *tannaim* stated in the mishnah. The medieval commentators, like Rashbam and Ritva, discuss why he had such powers, with the former arguing that Rav was sometimes treated like a *tanna* and the latter asserting that Rav was transmitting a third tradition that he had from his tannaitic teachers. Rabbi Soloveitchik, on the other hand, simply claimed that *amoraim* had the authority to disagree with *tannaim*, and if they knowingly chose to disagree with a *tanna*, the law could indeed follow their position, as it does in this specific case. R. Wasserman added that proof for R. Soloveitchik's claim may be found in the fact that sometimes the *amoraim* will dismiss an alleged tannaitic statement by stating that it is אינו משנה. R. Wasserman than goes on to suggest that perhaps there is a distinction between tannaitic statements made in mishnayot, which would have authoritative stature since this text was accepted as canonical, as opposed to tannaitic statements quoted elsewhere, which did not garner such acceptance.

do not, even if they may have the same effect on the bottom-line normative law.

R. Yehoshua congratulated R. Akiva for his methodology because he believed that a law would be buttressed through scriptural support. That strategy works, we saw, until a different scholar emerges with a new exegesis to help change the law.

Our exploration of the nullification of the prohibitions of *tosefet shevi'it* have thus revealed much more than the history of a particular law. They have also highlighted different strategies taken by *amoraim* and later commentators to explain various developments in the history of halakhah. I hope to explore other fascinating examples in future studies. ☙