

AGREEING TO DISAGREE:
EXAMINING THE ROLE OF DISSENT IN
TALMUDIC AND U.S. CONSTITUTIONAL LAW

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INTRODUCTION

Today, dissent plays a crucial role in the United States legal system. Many Americans understand dissent to be a fundamental component of appellate law. The inclusion of minority opinions in a legal system, however, is neither necessary nor obviously beneficial. Most legal systems, including that of the U.S., require adherents to follow a strict set of rules and regulations interpreted by a select few deemed fit to understand the law. In order to enable a tradition that individuals can both comprehend and obey, most legal systems are necessarily rigid operations. In this context, clarity and uniformity in messaging are essential to upholding the rule of law, yet dissenting opinions inherently work against those goals. A dissent, by its very nature, offers an argument that specifically undermines a decision already rendered normative within a legal system. By contradicting the very decision individuals are supposed to follow, dissent could easily confuse legal matters and insert a level of ambiguity into systems that depend on certainty. Nonetheless, dissent is often lauded as beneficial and remains a celebrated practice of many modern secular and religious legal systems. This dynamic makes the history and function of dissent a rich and compelling point of study.

This essay examines the complex role of dissent in two specific legal systems: Jewish law in the context of the Babylonian Talmud and U.S. constitutional law in the context of the Supreme Court.¹ I aim to evaluate and compare the role of dissenting opinions in both of these systems via the descriptions of dissent written by the rabbis who contributed to the Talmud and Supreme Court justices from different time periods. In this endeavor, I will first introduce these systems and discuss how the rabbis and justices were established as interpretive authorities within them. Then, I will survey rabbinic and Supreme Court writings about the function of

¹ For a general overview on Talmudic and U.S. constitutional law, see the Appendix.

dissent and compare those functions with the actual practice of dissent. Finally, I will analyze the role that dissent plays, as both a strengthening and weakening force, in each of these legal traditions.

Judaism as a Legal System

At face value, Jewish law may seem like an entirely distinct entity from a secular, modern legal system, such as U.S. constitutional law. These two systems, however, resemble one another in a variety of ways as types of legal systems. Rabbi and legal scholar Elliot Dorff has argued that the two traditions share a variety of commonalities: each is guided by a key authoritative text; each deals with similar subject matters (though Jewish law, as a religious-legal system, also addresses many areas of religion that U.S. law does not), and each promotes the continued interpretation of its foundational text in order to adapt to new and changing circumstances. Dorff specifically highlights the similarities in rabbinic and judicial interpretation in both traditions. He explains how both systems have rooted continued interpretations in their original texts, while simultaneously expanding and altering the meaning of those texts.

On the U.S. side, the Constitution—save for the last sixteen amendments—remains the same as it was when the Bill of Rights was ratified in 1791, but its meaning has also been radically changed by the Supreme Court throughout the nation's history.² Yet Dorff also explains:

In an important sense, all of the later developments were inherent in the original Constitution because they all are derived from the governmental bodies that it created and the general principles that it established. The Constitution is understood and applied in many novel ways each year, or in more theological terms, many new, previously undiscovered meanings and applications are revealed over time. All of the new meanings,

² Elliot Dorff, "Judaism as a Religious Legal System," *Hastings Law Journal* 29, no. 6 (1978): 1339, https://repository.uchastings.edu/hastings_law_journal/vol29/iss6/4/.

however, are dependent upon the Constitution which originally set up the structure for those interpretations and applications.³

In other words, the Supreme Court justices are tasked with continually working to apply an older structure to modern circumstances and, in doing so, offer new interpretations that find their roots in the Constitution created by the nation's founding fathers.

Similarly, Jewish law is foremost derived from the text of the Hebrew Bible, but it has also become a product of extensive rabbinic scholarship. The rabbis have expanded and contracted Biblical verses in a process that, in many instances, plainly and drastically alters the clear meaning of the text. According to Dorff, the rabbinic tradition nonetheless holds that its new and developing interpretations are direct extensions of divine Sinaitic revelation:

Every interpretation and application of Jewish law that has ever been, is, or will be made already was revealed at Sinai. They were revealed at Sinai because every one of them comes directly or indirectly from the procedures and principles embodied in the Jewish constitution, the Torah.⁴

Accordingly, from an interpretive perspective, each system retains a similar dynamic relationship and tension between the adaptive process of interpretation and the static nature of the older texts that underlie these legal systems.

There are, of course, important distinctions between Jewish and U.S. law. Namely, Jewish law, also known as the "*halakhah*," has a religious element that inherently influences Judaism's legal tradition. As Jewish legal scholar Suzanne Stone has argued, Jewish law is structured by a fundamentally religious framework, which plays an important role in how followers of the tradition personally understand and relate to their law. These elements include the law's foundations in divine revelation, the fact that authoritative interpreters must also hold

³ Dorff, "Judaism as a Religious Legal System," 1339.

⁴ Dorff, "Judaism as a Religious Legal System," 1339-1340.

religious qualifications, and the significant element of divine accountability over human action, all of which have no direct parallel in secular law.⁵ In particular, the notion that people's actions can be punished by both fellow humans as well as the divine allows for a dynamic within Jewish law that remains highly distinctive from its secular counterparts.

Similarly, the actual operation of these systems looks quite different. U.S. law functions within a vast and complex court system with clear delineation between how matters proceed within it, culminating in the existence of a Supreme Court at the apex of the legal system. Legal interpretation and dissent in U.S. law are necessarily contained within this carefully curated system. Interpretation in the Talmud, however, is the product of rabbinic scholars and not the result of decisions issued within an organized system of courts.⁶

In sum, these traditions share many similarities in their general forms as legal systems, but there are also certainly facets of Talmudic Judaism as an ancient, religious-legal system that differentiate it from the more modern, secular U.S. legal system. When taken on the whole,

⁵ Suzanne Last Stone, "In Pursuit of the Counter-Text: The Turn of the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106, no. 4 (Feb. 1993): 821, JSTOR.

⁶ There was a period in which Jewish law operated within a more comparable court-based framework from roughly 200 B.C.E to 500 C.E. Texts written contemporaneously, including the Mishnah, have indicated that three primary courts existed during this time: a court consisting of three judges that dealt with less severe infractions called the Beth Din, a court consisting of 23 judges that handled cases with the potential for more severe punishments known as the lesser Sanhedrin, and a single highest court consisting of 71 judges called the Great Sanhedrin. In ancient Palestine, every area of population—small and large—had its own Beth Din and more populated areas also had a lesser Sanhedrin. The Great Sanhedrin operated in a single location: first, out of Jerusalem prior to the destruction of the Temple and then, at a variety of different locations following the dispersion of the Jewish people. The Great Sanhedrin served as a type of Supreme Court for Jewish law during its existence—it could hear appeals from matters that had been decided in the other two courts. As geographic and political circumstances changed, the time of the Great Sanhedrin ended, but Jewish courts continued to operate in a variety of settings from the Middle Ages to modern times. Rabbinic texts, however, do not account for other court systems that Jews in some diaspora communities may have used. Though the Great Sanhedrin offers, perhaps, the closest approximation in Jewish history to the Supreme Court, there are no existing records of both sides of the judicial body's opinions like the Court records. Instead, the text in Jewish law which most closely resembles the collection of opinions issued by the Supreme Court in U.S. law is the Talmud. See m. Sanhedrin 1; Samuel Hirshberg, "Jurisprudence Among the Ancient Jews," *Marquette Law Review* 11, no. 1 (Dec. 1926): 25-26, <http://scholarship.law.marquette.edu/mulr/vol11/iss1/3>; Dorff, "Judaism as a Religious Legal System," 1337-1336.

however, rabbinic Jewish law within the limited bounds of the Talmud sufficiently resembles U.S. constitutional law to enable fruitful comparison between the two traditions as types of legal systems.⁷

Terminology: Dissent, Polysemy, Pluralism, Characterization, and Praxis

This paper relies on a few terms that require clear and precise definitions. Several of these definitions will follow a framework previously laid out by Steven Fraade. The others will represent my own attempts at creating terminology that enables Talmudic and U.S. constitutional law to be placed in dialogue. In finding terms that allow these starkly different systems to operate within a single comparative framework, I've borrowed terminology traditionally associated with each system and, at times, expanded terms in order to allow them to most accurately describe facets of both traditions.

The contrasting writing styles used by each of these systems make it difficult to operate with a narrow understanding of the term "dissent." In this paper, "dissent" will be defined as any minority opinion offered alongside a majority opinion in a legal or religious-legal tradition. Under this definition, dissent is distinct from critiques offered by individuals outside of the tradition. Rather, minority opinions must be included as part of an institutionalized practice within the tradition in order to constitute dissent. Further, this paper will consider most concurring opinions as part of the broad umbrella of dissent in U.S. law. In determining which concurrence constitutes a form of dissent, Supreme Court Justice Antonin Scalia's definition of "genuine conferences," in reference to separate concurrences that express disagreement with an

⁷ In modern times, the Jewish legal corpus has expanded to include texts and codes beyond just the Talmud and Hebrew Bible. For the purposes of this paper, however, dissent in Jewish law will be examined solely through the narrow lens of the Talmud.

aspect of the majority opinion, will be used.⁸ The incorporation of many concurring opinions under this paper's definition of dissent allows for the consideration of dissenting opinions in U.S. law to more closely approximate those in Jewish law.

Given many of the stark differences between these two legal traditions, dissent will necessarily look and read quite differently in both systems. In the context of U.S. law, the Supreme Court clearly labels dissenting and concurring opinions, which are released, when applicable, alongside its majority decisions. As will be discussed in later chapters, dissent in Judaism is far more pervasive than in U.S. law because it plays a key role in the argumentative form that rabbinic writings often follow. While dissent may take different forms in Jewish and U.S. legal texts, there is a clear and repeated practice in both traditions of recording and publishing minority opinions alongside majority decisions.

I will rely largely upon Fraade's definitions of the terms "polysemy" and "pluralism" in this paper. "Polysemy" will refer to the idea that a canonical text can simultaneously contain or yield multiple legitimate meanings.⁹ "Pluralism," as deployed in this essay, by contrast, builds on Fraade's definition to refer specifically to the idea that a legal tradition promotes an "intellectual culture that encourage[s] ... groups or individuals to 'agree to disagree' and to 'teach the controversy' when [a matter] could not be resolved."¹⁰ Thus, for the purposes of this paper, the

⁸ As Scalia has written, "[t]o my mind, there is little difference between [dissents and concurrences], insofar as the desirability of a separate opinion is concerned. ... But though I include in my topic concurrences, I include only *genuine* concurrences, by which I mean separate writings that disagree with the groups upon which the court has rested its decisions, or that disagree with the court's omission of a ground which the concurring judge considers central." See Antonin Scalia, "Dissents," *OAH Magazine of History* 13, no. 1 (Fall 1998): 18, Oxford Academic.

⁹ Steven Fraade, "Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization," *AJS Review* 31, no. 1 (Apr. 2007): 3, JSTOR.

¹⁰ Fraade's complete definition refers to "pluralism" in a specifically Jewish context. He explains that "By pluralism,' I mean, in the present context, the claim that the rabbinic sages not only contained among themselves 'houses,' or master-disciple circles, that commonly disagreed with one another on matters of textual interpretation or legal practice ... but also promoted—even celebrated—an ideology and intellectual culture that encouraged such rabbinic groups or individuals to 'agree to disagree' and to 'teach

institutionalization of dissent *qua* the practice of merely allowing multiple opinions to co-exist in the context of the same legal teaching is distinct from “pluralism,” a term that in the present context refers specifically to the *active championing* of the development of competing viewpoints over the same legal matter.

This paper will also distinguish between “characterizations” of dissent and the “praxis” of dissent. This terminology adjusts and expands upon Fraade’s division between “thematization” and “praxis” in reference to dissent in the Talmud. Fraade defines the former as referring to passages in the Talmud in which the text depicts “rabbinic polysemy or legal pluralism” as “ideologically upheld” values within the tradition, and he defines the latter as the “textual practice” in early rabbinic texts that “consists of arrays of multiple interpretations or legal pronouncements.”¹¹ In this paper, I adapt these terms to operate within both the rabbinic and U.S. legal contexts. I will use the term “characterizations” to discuss the Talmudic passages and writings by Supreme Court justices that outwardly discuss the role of dissent as a practice in the tradition, whether in positive or negative terms. The term “praxis” will refer to passages in which dissent itself is textually demonstrated through the inclusion of multiple legal viewpoints on the same issue set alongside one another in the same text. In other words, characterizations of dissent refer to the act of describing and asserting a tradition of dissent, while praxis refers to the actual inclusion of dissenting opinions as part of a legal text. The primary focus of this paper will be on understanding the characterizations of dissent in both of these traditions.

the controversy’ when it could not be resolved.” My adapted definition expands this term to apply to both Talmudic and U.S. legal contexts. See Fraade, “Rabbinic Polysemy and Pluralism Revisited,” 4.

¹¹ Fraade, “Rabbinic Polysemy and Pluralism Revisited,” 4.

Overview

There are a variety of both secular and religious legal systems that occasionally include dissent within their traditions. In few of these systems, however, is the inclusion of dissenting opinions as entrenched in their legal discourse as in Jewish and U.S. constitutional law. Among religious-legal systems, Talmudic law relies quite heavily upon teachings that take the form of discussions and arguments between sages holding differing opinions. In fact, argumentation comprises the core of the Talmud: its various laws, rulings, and religious teachings almost entirely take the form of arguments that include both the majority and minority opinions.¹² Similarly, the U.S. Supreme Court stands out among secular legal systems in its longstanding emphasis on the inclusion of dissenting opinions in its decisions. Though in modern times, the U.S. Supreme Court is far from the only judicial body in the world to issue dissenting opinions, the practice of dissent has been most thoroughly studied in the United States. In the past, the highest courts in civil law countries tended to only issue a single opinion on behalf of all jurists regardless of how each jurist individually voted. While the majority of European constitutional courts now permit the publication of dissenting opinions, the practice is a relatively recent development.¹³ Accordingly, U.S. constitutional law offers one of the largest bodies of dissenting opinions and secondary scholarship about judicial dissent to draw from.

In this paper, I explore the complex relationship between the rabbis' and Supreme Court justices' claims to interpretive authority and their characterizations of the role of dissent. First, I detail the establishment of interpretive authority for the rabbis and justices within Jewish and U.S. law. I then map out the development of dissent in the rabbinic tradition and U.S.

¹² Louis Jacobs, *The Talmudic Argument: A study in Talmudic reasoning and methodology*, (Cambridge University Press, 1984): 1.

¹³ Katalin Kelemen, "Dissenting Opinions in Constitutional Courts," *German Law Journal* 14, no. 8 (2013): 1345-1347, SSRN.

constitutional law, and I survey texts in which the rabbis and justices offer key characterizations of the role of dissent in each system. Next, I test these characterizations against praxis by relying upon specific examples of dissent in each system. Finally, I analyze the ways in which the rabbis and justices perceive dissent as both a strengthening and weakening force in their respective legal systems and how dissent ultimately plays a role in legitimizing the authority of both groups.

In both systems, the rabbis' and justices' characterizations of dissent, at times, align with the praxis of dissent, though they are likely incomplete descriptions of the varied functions that dissent actually plays in these systems. While the rabbis and justices recognize that the inclusion of dissenting opinions, at times, can undermine their authority, on the whole, they understand dissent as helping to ameliorate key problems in each of their legal systems. As a result, the characterizations of dissent by the rabbis and justices demonstrate the ways in which dissent helps to buttress their claims to authority in their respective legal systems.

CHAPTER ONE: The Foundations of Interpretive Authority

These traditions each boast extensive bodies of interpretive work, which have, in some instances, entirely supplanted portions of the original texts they seek to interpret. In neither system, however, is ultimate interpretive authority directly and explicitly granted to either the rabbis or Supreme Court justices by their foundational texts. In fact, neither the Bible nor the Constitution clearly designates *any* group as interpreters of these texts or ultimate arbiters for how they should be applied in modern circumstances. Once these texts were written and came into common acceptance, both ancient Jews and citizens of the nascent United States needed to be able to apply their laws to instances not specifically detailed in the Bible or Constitution. As a

result, the lack of assigned interpretive authority in both systems created large, though distinctive, problems for each, which were precipitated by unique historical events.

In this chapter, I aim to map out the development of interpretive authority in both Judaism and U.S. constitutional law. I first outline a general history of the establishment of the rabbis as interpretive authorities of the Hebrew Bible and of the Supreme Court justices as interpreters of the Constitution. I conclude by evaluating the similarities and differences in each group's path towards and claim to interpretive authority.

Rabbinic Authority in Judaism

The historical transition towards rabbinic interpretive authority can be difficult to trace because of the sparsity of trustworthy archeological and literary evidence from this time period. The Hebrew Bible does, however, offer many significant clues into the history of interpretation within Judaism in antiquity. In biblical times, the Jewish people understood prophets as their intermediaries with the divine—prophetic messages were believed to be a key way in which God communicated his will. In fact, a continued prophetic tradition was promised by God in the Torah: “From among your own people, your God will raise up for you a prophet like [Moses]; that is whom you shall heed.”¹⁴ God both told of prophets that would come and instructed the Jewish people to follow their messages, even dictating how the people should recognize a true prophet:

And should you ask yourselves, ‘How can we know that oracle was not spoken by God?’ If the prophet speaks in the name of God and the oracle does not come true, that oracle was not spoken by God; the prophet has uttered it presumptuously: do not stand in dread of that person.¹⁵

¹⁴ Deuteronomy 18:15 (JPS, 2006).

¹⁵ Deuteronomy 18:21-22 (JPS, 2006).

In the context of these explicit guidelines for how the Jewish people should interact with prophets, the Hebrew Bible subsequently depicts a long tradition in which prophets were viewed as the primary conveyors of the divine word.

However, amid this lengthy backdrop of prophecy, an important shift began to take place in the Second Temple period. While there is no scholarly consensus as to precisely when Jewish biblical law was first codified and followed, there is evidence that points to some type of transition towards a written legal tradition in the first and second centuries BCE.¹⁶

Unsurprisingly, in this transition, Jewish law faced problems generated by Judaism's long history of prophecy. From a legal perspective, a continued prophetic tradition makes legal cohesion difficult because at any point in time, God—or a person claiming divine inspiration—could entirely upend the existing system by suddenly announcing new or drastically altered laws. In other words, a legal system that relies upon prophecy to understand the will of the divine is nearly impossible to sustain.¹⁷ Accordingly, with the emergence of written biblical law over prophecy, the Jewish people needed to determine how to navigate their interactions and interpretations of the law.

This struggle emerged in full force towards the end of the Second Temple period. Before 70 CE, Judaism relied heavily upon sacrificial worship, which was led by priests and centered at the Temple. For much of this time, the priesthood was largely responsible for leading worship

¹⁶ The Book of Ezra, which centers on the leader who guided the Jewish people back to Judea from Babylonian exile in roughly the 4th century BCE, does contain some verses that may indicate a legal tradition dating back before the first and second centuries BCE. In particular, Ezra is presented as a scribe and a figure who brings law to the people, though it is unclear precisely what law he brings or how historically accurate the account may be. See Ezra 7:10-12 (JPS 2006). Additionally, Greco-Roman influences were likely a significant factor in the transition towards a written scribal tradition, as some historical evidence demonstrates that ancient Jews adopted and incorporated a variety of Hellenistic practices. For a discussion of Hellenistic influences on ancient Jews. See George Holley Gilbert, "The Hellenization of the Jews between 334 B.C. and 70 A.D.," *The American Journal of Theology* 13, no. 4 (Oct. 1909): 520-540, JSTOR.

¹⁷ Dorff, "Judaism as a Religious Legal System," 1334-1336.

while also serving as the custodians of Jewish written law.¹⁸ This time period, however, also saw an emergence of disagreement in the Jewish community over how the written law should be interpreted. During this time, groups of Jews began to disagree over how certain practices should be conducted—ranging from the calendrical system used to eschatological beliefs. As a result of these differences, extensive sectarianism emerged among Jews during this period. The primary sects that existed during this time were the Pharisees, Sadducees, and Essenes, though there were certainly others. These sects held different interpretations of Jewish law, specifically with regard to Temple practices as organized by the Priesthood.¹⁹

The destruction of the Second Temple, particularly in this context of division among the Jewish people, resulted in dramatic shifts in Judaism. The Temple's destruction triggered a fundamental shift in Jewish religious and interpretive practices. The loss of the Temple ended the sacrificial cult, essentially forcing the tradition to adopt different forms of worship, while also rendering moot existing disputes over Jewish laws about the Temple.²⁰ Scribal worship offered a sound replacement for the Temple cult, allowing the destruction of the Temple to provide a unique opportunity for a drastic transition towards an interpretive tradition to take place. In short, the transition towards rabbinic Judaism was the result of several factors that coalesced following the destruction of the Second Temple. Historical circumstances—namely, the emergence of sectarianism in the community and the subsequent destruction of the Second Temple—brought

¹⁸ Lester L. Grabbe, *An Introduction to Second Temple Judaism: History and Religion of the Jews in the Time of Nehemiah, the Maccabees, Hillel, and Jesus* (London: Bloomsbury, 2010), 41, ProQuest Ebook Central.

¹⁹ Shaye J.D. Cohen, *From the Maccabees to the Mishnah*, (Philadelphia: Westminster Press, 1987), 124-134, Internet Archive Books.

²⁰ Grabbe, *An Introduction to Second Temple Judaism*, 26-27; Shaye J.D. Cohen, "The Significance of Yavneh: Pharisees, Rabbis, and the End of Jewish Sectarianism," *Hebrew Union College Annual* 55 (1984): 33-45, JSTOR.

existing trends towards legalism in the Jewish community to the fore and enabled the evolution of Judaism into a legal tradition led by the figures who came to be known as rabbis.

There were two key transformations, in particular, that took place as part of this transition: 1) the sectarian divisions that marked Judaism before 70 CE dissipated, and 2) the rabbis' development of Jewish oral Torah—the Mishnah—and codification of it in the early 3rd century CE. Evidentiary limitations, however, make it difficult to precisely reconstruct how these developments occurred.²¹ In modern times, most scholars recognize a close, if not direct, connection between the Pharisees and rabbis. While the Tannaim (the rabbis who worked on compiling the Mishnah) never directly call themselves “Pharisees,” the later Amoraic texts indicate more of a self-identification with the sect, and rabbinic texts are more critical of the non-Pharisaic sects. The evidence suggests that, at a minimum, the Pharisees were important forerunners to the Rabbis.²² Some scholars believe this connection indicates that the beliefs held by the Pharisees eventually won out over the other sects after the Temple's destruction, while others understand Judaism to have undergone a dramatic transition that brought the varying sects together under rabbinic Judaism.²³ Regardless of rabbinic connections to the different sects, there is widespread consensus that the rabbis started to develop the processes that eventually led to the Mishnah and Talmud in the years following 70 CE. After the Temple's destruction, some scholars assert that a group of rabbis joined together near the coastal city of Yavne where they began to develop the rabbinic Jewish tradition that emphasized Torah study rather than Temple worship as the primary form of religious activity in Judaism.²⁴ The work of the sages of Yavne

²¹ Cohen, “The Significance of Yavneh,” 2-3.

²² Cohen, “The Significance of Yavneh,” 10-14.

²³ Cohen, “The Significance of Yavneh,” 25.

²⁴ Grabbe, *An Introduction to Second Temple Judaism*, 27.

eventually resulted in the cessation of sectarian divisions and the creation of a new form of scribal Judaism with an emphasis on *halakhic* pluralism.²⁵

The shift towards a scribal tradition necessitated some level of textual justification, and, in staking their claim as the sole interpreters of scripture, the rabbis substantiated their newfound authority in various ways. An important step was establishing a divine connection to the transition from a prophetic tradition to a scribal one. In the Talmud, the rabbis assert the end of prophecy with the fall of the Second Temple, claiming that “From the day that the Temple was destroyed prophecy was taken from the prophets and given to the Sages.”²⁶ They directly root their authority in the Hebrew Bible itself through an innovative interpretation of Deuteronomy 17:8-12. The biblical passage itself states:

If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between plague and plague, matters of controversy within thy gates: then shalt thou arise, and go up to the place which the Lord thy God shall choose; and thou shalt come to the priests the Levites, and to the judge²⁷ that shall be in those days, and inquire; and they shall tell thee the sentence of judgment: and thou shalt do according to the sentence, which they of that place which the Lord shall choose shall tell thee; and thou shalt observe to do according to all that they inform thee: according to the sentence of the Tora which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do: thou shalt not deviate from the sentence which they shall tell thee, to the right hand, or to the left. And the man that will act presumptuously, and will not hearken to the priest that stands to minister there before the Lord thy God, or to the judge, that man shall die: and thou shalt put away the evil from Yisra’el.²⁸

Though the passage never mentions “rabbis” or explicitly rabbi-like figures, the Tannaim focus heavily on the language regarding “the judge” (*hashofet*) that God assigns strong legal authority in the passage. The rabbis take advantage of the ambiguity of the term, and read themselves into the passage (and thus into the Hebrew Bible) as filling the role of the judge whose decisions

²⁵ Cohen, “The Significance of Yavneh,” 21-24.

²⁶ b. Bava Batra 12a (Koren - Steinsaltz).

²⁷ The Hebrew word used is “שֹׁפֵט” (*hashofet*).

²⁸ Deuteronomy 17:8-12 (Koren Jerusalem Bible).

must be followed according to the word of God.²⁹ This reading enables the rabbis to source their authority to God's will as dictated by Judaism's foundational text.

In another tractate, *Avot*, the rabbis continue to root their authority to the time of revelation. In the famous first line of the tractate, they depict themselves as part of an unbroken chain of transmission of legal authority that dates back to revelation at Sinai: "Moses received the Torah at Sinai and transmitted it to Joshua, Joshua to the elder, and the elders to the prophets to the Men of the Great Assembly."³⁰ They subsequently detail the transmission of authority from the Great Assembly through a series of famed rabbinic sages.³¹ This history further enables them to justify their claim as sole authoritative interpreters of the law.³²

The transition from prophetic to rabbinic authority is emphasized heavily in other portions of the Talmud as well. The rabbis make it clear that God's will, following the Temple's destruction, can exclusively be gleaned via *halakhic* study. In fact, the rabbis reject any form of divine intervention in matters of *halakhic* interpretation. The famed story in b. Bava Metzia 59a-b, often referred to as the story of the oven of Akhnai, clearly demonstrates this phenomenon. The story centers around whether a specific type of oven that has been brought before the Sanhedrin (the highest Jewish court for periods of antiquity) meets ritual purity standards. Rabbi Eliezer ben Hurcanus argues in favor of the oven's purity, while all of his colleagues argue against him. In an effort to convince the other rabbis, Rabbi Eliezer calls upon God to enact a series of miraculous occurrences if the *halakhah* accords with his opinion. Each time, the events take place as Rabbi Eliezer requests—culminating in the calls of a heavenly voice agreeing with

²⁹ Christine Hayes, "Law in Classical Rabbinic Judaism," *The Cambridge Companion to Judaism and Law*, ed. Christine Hayes (Cambridge University Press, 2017), 82-83, <https://doi.org/10.1017/9781139565974.004>.

³⁰ m. Pirkei Avot 1:1 (Kulp).

³¹ m. Pirkei Avot 1 (Kulp).

³² Hayes, "Law in Classical Rabbinic Judaism," 83-85.

Rabbi Eliezer. Rather than adjust their views in alignment with God’s demonstrated preference, the other group chooses to ostracize Rabbi Eliezer from the community. One of the opposing rabbis, Rabbi Yehoshua, says that the *halakhah* “is not in heaven,” and the rabbis reach a consensus that because “the Torah had already given at Mount Sinai, we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, After the majority must one include.”³³ Rather than express anger, the passage says that in response to the opposing rabbi’s declaration, “The Holy One, Blessed be He, smiled and said: My children have triumphed over Me; My children have triumphed over me.”³⁴ In other words, the rabbis reject intervention from the divine because the *halakhah* is to be decided based solely on human interpretation and decisions to be made in accordance with majority rule, and they portray the divine as relatively accepting of this choice. This embrace of communitarian rule over divine intervention is emblematic of the important shifts the rabbis made in developing a truly text-based tradition.

Judicial Review in U.S. Law

The U.S. Constitution similarly fails to explicitly assign the authority to review whether actions and laws enacted by the legislative and executive branches fall within the bounds of the Constitution. Article III of the Constitution establishes and outlines the role of the Supreme Court in the structure of the government. Section 1 vests the “judicial Power of the United States” in the Supreme Court and inferior Courts and details the role of Judges. Section 2 further specifies the role of the Supreme Court:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and

³³ b. Bava Metzia 59a-b (Soncino).

³⁴ b. Bava Metzia 59b: 5 (Soncino).

Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.³⁵

Nowhere in the Constitution is any group, including the Supreme Court, assigned with interpretive authority over how the text should be followed and applied in different circumstances.

The Supreme Court’s path toward interpretive authority was similarly precipitated by historical circumstances. As the U.S. government began to operate in the manner structured by the Constitution, direct conflict between the clear text of the Constitution and the actions taken by government branches inevitably arose. In 1796, the Supreme Court took up its first significant case of this nature in *Hylton v. United States*, 3 U.S. 171. The case centered around an annual tax on privately owned carriages issued by Congress in 1794. Daniel Hylton, the plaintiff in the case and an owner of many carriages, viewed the tax as a direct tax, which would violate the constitutional requirement that direct taxes be apportioned among the states in proportion to their populations. In taking up the case, the Court placed itself in a position to decide whether the actions taken by Congress aligned with the Constitution. The Court ultimately decided that the tax was not a direct tax and thus was constitutional, but the case clearly demonstrated a matter in

³⁵ U.S. Const. art. III, sec. 1. Web.

which there was potential for legislative action to clash with the foundational document that establishes and guides the U.S. government itself.³⁶

Less than a decade later, the Court directly staked its claim to interpretive authority in the landmark case of *Marbury v. Madison*, 5 U.S. 137 (1803). Once again, the justices were put in a position to determine whether actions taken by a different branch of the government aligned with the Constitution. In *Marbury*, the legal issue revolves around the appointment of the plaintiff, William Marbury, as Justice of the Peace for the District of Columbia. His appointment was made by President John Adams in the final days of his term. The appointment was rapidly approved by the Senate, but his commission—which officially validated his appointment—was not delivered before the end of Adams’ term. The new Secretary of State, James Madison, refused to deliver the commission, inhibiting Marbury from taking office. Marbury was able to bring the case to the Supreme Court because a provision in the Judiciary Act of 1789 allowed him to do so. The Court ultimately held that it was illegal for Madison to refuse to deliver the commission to Marbury. It also found, however, that the relevant provision of the Judiciary Act of 1789 conflicted with Article III, Section 2 of the Constitution and was thus null and void.³⁷ By invalidating an act of Congress, the Justices established the principle of judicial review—the Court’s power to review the actions of the other two branches to determine whether they are constitutional. Interpretive authority over the Constitution is implicitly granted to the Court via this principle: in determining whether the actions of other branches align with the Constitution, the Court must have the authority to actually determine the meaning of the Constitution itself.

³⁶ *Hylton v. United States*, 3 U.S. 171 (1796).

³⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

The Court's claim to this authority is hindered by the fact that the Constitution never explicitly assigned the Court the ability to determine constitutionality. Accordingly, in addition to deciding the outcome of the legal issue in *Marbury*, the Court also makes a detailed argument for its own constitutional authority to exercise judicial review. Chief Justice John Marshall, writing for the Court in *Marbury*, makes a careful and deliberate case for judicial review based on the text of the Constitution. He roots his argument for this power largely in the very existence and construction of the Constitution itself, ultimately explaining that: "the particular phraseology of the Constitution ... confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts ... are bound by that instrument."³⁸ Marshall supports this idea by arguing that the nature of the Constitution, as the nation's paramount law, inherently requires that it supersedes and thus voids any laws which contradict it, and that "it is emphatically the province and duty of the Judicial Department to say what the law is."³⁹ Extensive legal scholarship has been written about the principle of judicial review in the centuries following *Marbury*, but it is now an almost unanimously accepted judicial power.

A Comparison of Both Systems

The Rabbis and Supreme Court Justices followed a relatively similar trajectory in asserting their authority as interpreters of their foundational texts. Both processes began when interpretive authority was not clearly and explicitly assigned to any group within either of the systems, creating significant gaps in legal authority. In each tradition, certain historical events then established a need and opportunity for the interpretation of foundational texts, which the

³⁸ *Marbury*, 5 U.S. at 180.

³⁹ *Marbury*, 5 U.S. at 137.

rabbis and Supreme Court justices were uniquely poised to address. Both groups took the opportunity to establish themselves as the ultimate authority in matters of interpretation, and each did so by linking their authority to language within the foundational texts themselves. In doing so, the rabbis and justices successfully established their interpretive authority through the very texts that failed to assign any in the first place. In the years following the establishment of their claims to *halakhic* and constitutional authority, both groups' have also become the accepted interpretive authorities within their respective communities.

The precise manner in which the rabbis and justices chose to establish their authority is also important. Namely, both groups assert their authority via the construction of complex arguments rooted in their foundational texts: they reinterpret the Hebrew Bible and Constitution by reading into ambiguous language, omissions, or the structure of the text itself in order to assert an authority that is not explicitly assigned by the text. In tying their arguments to their authoritative texts, there is an implicit acknowledgment of the need to justify both groups' jurisdiction over the law through the law itself.

There are, however, also differences in how these groups approached the issue of interpretive authority. Chiefly, the textual justification for rabbinic authority is far less explicit in the Hebrew Bible than the authority of the Supreme Court justices in the Constitution. Though neither group is attributed direct interpretive authority, the Constitution does, at least, provide for the creation of a Supreme Court and assigns it levels of judicial authority. The Hebrew Bible, however, never even directly mentions a position comparable to the one the Rabbis eventually claimed. This difference helps explain why the establishment of the interpretive authority of the Supreme Court likely required less extensive written justification than that of the Rabbis. It is also a useful distinction when considering how dissent developed in each of these traditions.

CHAPTER TWO: The Development and Characterization of Dissent

The establishment of the interpretive authority of the rabbis in Jewish law and the Supreme Court justices in U.S. law was one of many important steps in the development of both legal systems. At the same time that these bodies worked to substantiate their authority, each group was also undergoing an important evolution in how it chose to present legal decisions. Shortly after the inception of each legal system, both the rabbis and Supreme Court justices developed a practice of issuing a form of dissenting opinions alongside their majority opinions. These dissents quickly became integral parts of both legal systems and feature prominently in many of their legal writings. Just as these groups followed relatively similar trajectories in establishing interpretive authority, they also took somewhat parallel paths in institutionalizing the practice of dissent in deciding legal matters. Once dissent was established as a regular and accepted practice in Jewish and U.S. law, however, dissenting opinions began to hold different levels of authority in these systems and thus dissent now serves separate, though related purposes in each.

In this chapter, I aim to provide a general overview of the role of dissent in Jewish and U.S. law. In that endeavor, I begin by outlining the origins of dissent in each system. I then describe the ways in which each system includes and formats dissent. Lastly, I offer a comparative analysis of the function of dissent in each system as explained by those systems' authoritative texts and interpreters. In this limited analysis, I exclusively rely upon explicit characterization of dissent in these traditions in order to better understand why the individuals who made the editorial decisions to include dissent have done so.

The Development of Dissent

The practice of issuing dissenting opinions was developed by the rabbis and Supreme Court justices at the same time that both groups worked to establish their interpretive authority over their foundational texts. Accordingly, the evolution of dissent and the establishment of interpretive authority are deeply intertwined phenomena in each of these systems. This analysis of the institutionalization of dissent in Jewish and U.S. law thus follows Chapter One's discussion of interpretive authority because these concurrent developments in both systems must be considered in light of one another.

As I discussed in Chapter One within the context of rabbinic interpretive authority, the dearth of clear historical evidence from the Second Temple and early rabbinic periods makes it difficult to precisely construct the development of dissent in Judaism. In the first few centuries CE in the Mediterranean region, there were many converging historical factors that may have both directly and indirectly influenced the rabbis and other ancient Jews. For instance, in recent decades, there has been growing scholarly interest in identifying Greco-Roman influences on rabbinic writings in general and particularly on the argumentative structure of Jewish law.⁴⁰ The study of such influences, though undoubtedly important in understanding the development of dissent in Judaism, extends beyond what can be adequately developed in this paper. Accordingly, the institutionalization of dissent in Judaism will be discussed from a relatively narrow historical perspective—one that focuses solely on the active decisions of the Rabbis—in order to allow for it to be considered alongside the development of dissent in U.S. law.

⁴⁰ For a discussion of the parallels between Greco-Roman law and culture and their Rabbinic counterparts, see Catherine Hezser, "Roman Law and Rabbinic Legal Composition," *The Cambridge Companion to the Talmud and Rabbinic Literature*, ed. Charlotte Elisheva Fonrobert and Martin S. Jaffe, (Cambridge University Press, 2007), 144-164, <https://doi.org/10.1017/CCOL0521843901.008>; and Hayim Lapin, *Rabbis as Romans: The Rabbinic Movement in Palestine, 100-400 CE* (Oxford University Press, 2012), Oxford Scholarship Online.

The rise of dissent in Jewish legal writings is intertwined with the emergence of rabbinic Judaism itself. There is ample literature on the nuances of rabbinic pluralism, which necessarily differentiate by location and time period. This paper will focus exclusively on the texts that comprise the Babylonian Talmud, but will consider general arguments regarding the development of dissent over several periods of sages, including the Mishnaic-period Tannaim; the subsequent Amoraim; and the eventual post-Amoraic anonymous editors of the Talmud, the Stammaim.⁴¹ A major consideration in tracing the history of Jewish dissent is the question of when pluralism became normative within the rabbinic legal tradition. This section will outline two of the better-known and more polarizing views about the origins of dissent in the Talmud, along with a view that bridges some of the gaps between them.

The first view recognizes the very early rabbis as a core unifying force in the tradition. This perspective holds that the early rabbis, the Tannaim, helped bring the competing Jewish sects together in the beginning of the first century amid an atmosphere of sectarianism within the Jewish community and communal despair following the destruction of the Second Temple. In this view, the embrace of legal pluralism in Judaism began shortly after 70 CE when disputes over Temple-based worship essentially became moot. The rabbis emerged as leaders that embraced a pluralistic approach to Judaism within this void of clear authority. As proponent of this view Shaye J. D. Cohen explains, “The net effect of these developments was the end of sectarianism and the creation of a society marked by legal disputes between individual teachers who nevertheless respected each other’s right to disagree.”⁴² Cohen acknowledges that “some of these disputes, both tannaitic and amoraic, are the artificial creations of editors and redactors,”

⁴¹ David Halivni popularized this term for the redactors of the Talmud whom he dates to the period from 550-700 CE. See David Weiss Halivni, *The Formation of the Babylonian Talmud* (Oxford University Press, 2013): chap. 1, Oxford Scholarship Online.

⁴² Cohen, “The Significance of Yavneh,” 45.

but he maintains that “most are real, the highly stylized summaries of real discussions and real arguments.”⁴³ In other words, this perspective holds that the period of time after the Temple’s destruction was marked by a rapid embrace of legal pluralism.

More recent scholarship, however, has pushed back against the narrative of a Tannaitic-led adoption of dissent. Instead, these scholars see legal pluralism as a later development: either by the Amoraim who commented on tannaitic work or the post-amoraic redactors of the Talmud as a whole, the Stammaim. Daniel Boyarin, a leading voice arguing for this historical account, sees the emergence of a pluralistic legal tradition in Judaism dating only to the fifth and sixth centuries when the Stammaim began editing the Talmud. He explains that “What has often presented as an ahistorical definitive attribute, the pluralism of rabbinic Judaism (perhaps its most striking feature), is the product of this specific moment in history and not a transcendental essence of rabbinic Judaism.”⁴⁴ Boyarin reads the Tannaim as a highly exclusivist group rather than one that welcomed extensive internal division. He asserts that a turn towards pluralism only emerged because the Stammaim were working with different goals than their earlier counterparts; namely, these later redactors operated within a historical context in which it became desirable to permit legal pluralism in order to help secure rabbinic control over the Jewish population.⁴⁵ Boyarin argues that “The Talmudic redactors were so successful in hiding themselves that they were able to retroject those patterns and make it seem as if they were a product of a ‘real’ Yavneh of the first century.”⁴⁶ In this view then, dissent did not become

⁴³ Cohen, “The Significance of Yavneh,” 47.

⁴⁴ Daniel Boyarin, *Border Lines* (Philadelphia: University of Pennsylvania Press, 2004), 155, ProQuest Ebook Central.

⁴⁵ Boyarin, *Border Lines*, 159.

⁴⁶ Boyarin, *Border Lines*, 152.

normative until at least the fifth century when the Stammaim edited the Talmud into a work that embraced legal pluralism.

There is, of course, considerable scholarship that details views somewhere in between these two disparate camps as well. Steven Fraade offers a helpful analysis of rabbinic polysemy and pluralism, painting a more nuanced picture that pushes back against both views, and, in particular, presents evidence to contradict Boyarin's assertion of an exclusively Stammaitic adoption of dissent.⁴⁷ As he explains, "The danger with drawing an overly linear schematization of tradition transformation is that it tends to exaggerate and dichotomize the differences between 'early' and 'late.'"⁴⁸ He further expounds that "[t]he continual transformation, in content and in form, of received traditions ... is more likely to have been the result of multiple, intersecting propellants of both *internal potentiality* and *external contingency*," and therefore "rendering their isolation for purposes of determining which was primary and cause to be ... not only difficult but also most often impossible by the nature of our sources."⁴⁹ Fraade's words are helpful to bear in mind: any depiction of a clear and direct path towards legal pluralism in the rabbinic tradition necessarily sacrifices nuance and accuracy because the historical reality was complex and difficult to construct.⁵⁰ Within this rather hazy context, regardless of what view one adopts, there is at least consensus that legal pluralism eventually became standard within Judaism by the seventh century at the latest, and these pluralistic tendencies can be found throughout the text of the Babylonian Talmud itself since it reached its final form.

⁴⁷ Fraade, "Rabbinic Polysemy and Pluralism Revisited," 1-40.

⁴⁸ Fraade, "Rabbinic Polysemy and Pluralism Revisited," 39.

⁴⁹ Fraade, "Rabbinic Polysemy and Pluralism Revisited," 40.

⁵⁰ For further discussion of these ideas, also see Richard Hidary, *Dispute for the Sake of Heaven* (Providence: Brown Judaic Studies, 2010).

On account of the relatively recent and well-documented history of U.S. law, it is far easier to trace precisely how the Supreme Court came to institutionalize the practice of dissent than it is in Jewish law. At the Supreme Court's inception, it followed the English practice of the King's Bench and issued opinions seriatim, meaning each justice announced his opinion independently.⁵¹ There were cases in which some opinions were issued "by the Court," but the justices always filed seriatim opinions in more important matters.⁵² Justice John Marshall's appointment as Chief Justice in 1801, however, brought radical shifts to the Court's practices. As detailed in Chapter One, Marshall's tenure on the Court was enormously influential in strengthening the Court and establishing its role as a significant American institution. His achievement was due, in no small part, to his push to expand the Court's authority by claiming the power of judicial review. Yet Marshall's desire to strengthen the authority of the Supreme Court also extended into matters of how the Court issued opinions: Marshall wanted the Court's opinions to be issued from, and thus bear the authority of, the Court as a whole rather than the individual jurists who comprise it.⁵³ Dissent, to Marshall, was a force that weakened the Court.⁵⁴ As a result of Marshall's dislike of dissent, he consciously directed the Court to stop the practice of seriatim opinions in favor of a single, authoritative "opinion of the Court."⁵⁵ Marshall would, at times, even alter his own opinions in order to earn the approval of his fellow justices, so that the Court could issue decisions with a single voice.⁵⁶

⁵¹ Meredith Kolsky Lewis, "Justice William Johnson and the History of the Supreme Court Dissent," *Georgetown Law Journal* 83 (1995): 2072-2073, https://digitalcommons.law.buffalo.edu/journal_articles/400.

⁵² Karl M. ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," *Cornell Law Review* 44, no. 2 (Winter 1959): 192, <https://scholarship.law.cornell.edu/clr/vol44/iss2/2>.

⁵³ ZoBell, "Division of Opinion in the Supreme Court," 193.

⁵⁴ M. Todd Henderson, "From Seriatim to Consensus and Back Again: A Theory of Dissent," *The Supreme Court Review* 2007, no 1. (2007): 283, JSTOR.

⁵⁵ ZoBell, "Division of Opinion in the Supreme Court," 193.

⁵⁶ Melvin I. Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue*, (New York: Pantheon Books, 2015), 46.

At first, the practice of unanimity was largely adhered to by the justices. In the first four years of Marshall's tenure, he alone issued 24 out of the Court's 26 opinions.⁵⁷ This apparent consensus, however, did not last for long. In 1804, the Court saw the beginnings of a breach in unanimity in Justice Samuel Chase's one-line concurring opinion in *Head & Armory v. Providence Insurance Company*, 6 U.S. 127.⁵⁸ Justice Bushrod Washington subsequently issued the first dissent under the Marshall Court in 1805.⁵⁹ The justices also sometimes reverted to practices of seriatim opinions when Marshall was not present.⁶⁰ These breaks with Marshall's practice helped trigger a permanent shift away from forced consensus and towards the modern practice of dissents. Shortly after the actions of Chase and Washington, Justice William Johnson began regularly issuing dissents and is widely credited as the "first great dissenter" on the Supreme Court.⁶¹

These initial dissenters under the Marshall Court, however, self-admittedly dissented with reluctance. Johnson began his first dissent, stating "I have the misfortune to dissent from the majority of my brethren."⁶² Though few of Johnson's dissents became historically important, his willingness to diverge from the majority helped normalize the practice of dissent for justices to come. In fact, following Marshall's death in 1835, the Court never again spoke with the same level of unanimity as it did under his tenure.⁶³ In spite of this shift, many of the great opinions of Marshall's tenure—cases that established and reinforced the Court's interpretive and legal authority such as *Marbury*; *McCulloch v. Maryland*, 17 U.S. 316 (1819); and *Gibbons v. Ogden*,

⁵⁷ Marshall was not present for the two cases in which he did not issue the Court's opinion. See ZoBell, "Division of Opinion in the Supreme Court," 194.

⁵⁸ Lewis, "Justice William Johnson and the History of the Supreme Court Dissent," 2074.

⁵⁹ Urofsky, *Dissent and the Supreme Court*, 47.

⁶⁰ Lewis, "Justice William Johnson and the History of the Supreme Court Dissent," 2075.

⁶¹ Lewis, "Justice William Johnson and the History of the Supreme Court Dissent," 2077.

⁶² Urofsky, *Dissent and the Supreme Court*, 47.

⁶³ Urofsky, *Dissent and the Supreme Court*, 54.

22 U.S. 1 (1824)—were issued unanimously by the Court, perhaps lending credence to Marshall’s beliefs about consensus at the time.⁶⁴

In short, Marshall sought to legitimize the Court both through the expansion of its powers and its consolidation into a group that speaks with a single voice. While the unanimity Marshall wanted did not last, he did successfully enable the Court to expand its authority and legitimacy. This authority has remained even during eras of extensive disagreement among Supreme Court justices that have resulted in frequent dissents.

When viewing how dissent developed in both systems, an important similarity emerges: the establishment of interpretive authority and the practice of dissent are interrelated, yet distinct, phenomena in each system. To be more specific, though the practice of dissent developed at the same time that the rabbis and justices were working to substantiate their interpretive authority, there is a marked difference and distance between these two evolutions. Namely, neither system allows for dissent in the works in which they establish their own authority. Dissent, rather, is a practice that can only be conducted within the bounds of that agreed-upon authority, not one that can be used to potentially undermine the authority itself.

The Form of Dissent

In a comparative context, dissents within Jewish and U.S. law appear quite different because of the wildly different forms in which decisions are presented. Areas of disagreement, and specifically dissents, are easy to recognize in U.S. constitutional law. The Supreme Court justices have the regular practice of clearly labeling dissenting opinions alongside any majority and concurring opinions. Dissents and concurrences are included in the Supreme Court’s opinion immediately following the Court’s binding, majority decision. Each dissenting and concurring

⁶⁴ Urofsky, *Dissent and the Supreme Court*, 5.

opinion clearly explains where the justice(s) disagree with the majority and why they do so. The finer points of dispute are thus relatively easy to discern in most Supreme Court cases by simply reading the opinions of the Court. The Talmud, on the other hand, incorporates dissent through writing in the argumentative form. Majority opinions are depicted in close dialogue with minority voices, and rabbinic literature sometimes fails to indicate which opinion is normative and distinctly avoids declaring any opinion wholly inauthentic in the tradition.⁶⁵ The ambiguous nature in which majority and minority opinions are sometimes presented enables the promotion of polysemy—the idea that multiple, legitimate meanings can be derived from a single authoritative text.⁶⁶ This notion of polysemy finds no direct parallel in U.S. constitutional law: in U.S. law, dissents offer counterarguments to the logic laid out by the majority, but they do not hold any legal authority in and of themselves. Specifically, dissenting opinions issued from the Supreme Court do not create a binding legal precedent for future cases as majority opinions do.

The types of texts being evaluated in this paper are also quite different. The tradition of dissent is ongoing in the U.S. legal system; thus, the practice of dissent has changed in its nature and tone since it first became commonplace, and the body from which dissents can be drawn continues to grow each year. In U.S. law, there is a degree of deference to past decisions under the doctrine of *stare decisis* in which new decisions are made following the work of past cases.⁶⁷

⁶⁵ Hidary, *Dispute for the Sake of Heaven*, 1.

⁶⁶ Fraade, “Rabbinic Polysemy and Pluralism Revisited,” 3.

⁶⁷ *Stare decisis* is the legal doctrine that obligates courts to adhere to precedent (following the decisions of historical cases) in rendering their own decisions in a case that deals with related issues. The extent to which courts abide by precedent is a complicated issue that extends beyond the bounds of this essay. For discussions of *stare decisis* and precedent in U.S. courts, see U.S. Library of Congress, Congressional Research Service, *The Supreme Court’s Overruling of Constitutional Precedent*, by Brandon J. Murrill, R45319 (updated 2018), <https://sgp.fas.org/crs/misc/R45319.pdf>; Amy Coney Barrett, “Statutory Stare Decisis in the Courts of Appeals,” *George Washington Law Review* 73 (2004-2005): 317-352, https://scholarship.law.nd.edu/law_faculty_scholarship/767/; John M. Walker, “The Role of Precedent in The United States: How Do Precedents Lose Their Binding Effect?” *Stanford Law School*, China Guiding Cases Project, <https://cgc.law.stanford.edu/commentaries/15-john-walker/>.

Yet, ultimately, each new majority opinion that is issued by the Supreme Court immediately becomes authoritative, and there are times when new opinions will entirely overturn past decisions of the Court. While Jewish law also possesses a lengthy history of dissent and development since the finalization of the Talmud, the rabbinic corpus is far too extensive to be given full or just analysis in a paper of this nature. Accordingly, dissent is being addressed in the narrow context of the completed Babylonian Talmud—a core text in the rabbinic tradition, but also one that has been closed for well over a millennium. Dissent is therefore part of a work that was curated by the redactors of the Talmud: these redactors had the benefit of selecting when to include dissent or to leave it out. Further, unlike in the modern Supreme Court, the rulings of the rabbis depicted in the Talmud are considered more authoritative than those of later thinkers. In fact, even the views of the earlier rabbis, the Tannaim, are viewed as more authoritative than the later Amoraim (though later rabbis have undoubtedly reinterpreted Talmudic passages in ways that have fundamentally shifted the meaning of the text). These differences mean dissent will necessarily serve different purposes because it is being included in fundamentally different types of works.

In addition to differences in format, there is another fundamental distinction between these two traditions with respect to the inclusion and development of dissenting opinions: the individuals who choose to include dissent. In U.S. law, it is the same Supreme Court justices that issue the dissents who also decide to include them in a legal decision, whereas in Judaism, it is the compilers and redactors of the Talmud that choose to include dissent rather than the rabbis who are actually presented as representing both sides of the argument. This division holds true regardless of whether the Tannaim accepted or rejected legal pluralism and polysemy. Ultimately, the Stammaim made the final decisions regarding precisely when to include minority

opinions alongside majority ones in the final form of the Babylonian Talmud. In considering the purpose of dissent and its function in these legal systems, it is valuable to keep in mind who the decision-making bodies are and what considerations they must account for when doing so. The context behind those editorial choices in these texts helps elucidate some of the different functions that dissenting opinions play in each system.

Dissent in Talmudic Law

Talmudic texts demonstrate a clear awareness of their own reliance upon dissent. Regardless of whether this approach was taken by the Tannaim, was largely the result of later inclusions by the Stammim, or was a longer developing trend, the final form of the Talmud is undoubtedly one that both includes and self-consciously considers its incorporation of dissenting opinions. In the Talmud, there are two important and interrelated tendencies as defined in the introduction of this paper: pluralism and polysemy.⁶⁸ This section will consider both of these ideas, in turn, by analyzing rabbinic characterizations of dissent in four famous Talmudic passages: m. Eduyot 1:4-6, b. Bava Metzia 84a, b. Eruvin 13b, and b. Chagigah 3b. Through these passages, several important characterizations of dissent emerge: 1) dissent as a model for argumentative flexibility 2) dissent that refines the majority's opinion, 3) dissent as a guide for future decisions, and 4) dissent as a valid reflection of the divine will.

We begin with the oldest of the three: tractate Eduyot, which belongs to the fourth order of the Talmud, and dates to the period of the Tannaim (roughly from 70 to 220 CE). m. Eduyot 1:4-6 presents a strong starting point for the consideration of dissent in the Talmud because it specifically addresses the question of why the text records conflicting views in legal disputes. The text begins by anonymously proposing this very question in the context of two famed

⁶⁸ See "Terminology" section of this paper and Fraade, "Rabbinic Polysemy and Pluralism Revisited," 3.

rabbinic sages, Hillel and Shammai: “And why do they record the opinions of Shammai and Hillel for naught?”⁶⁹ Hillel and Shammai are frequently depicted in disagreement in the Talmud. In disputes between these two sages, Hillel is traditionally held to be correct over Shammai, yet the opinions of both men (and the students who follow their interpretive approaches) are consistently recorded in the Talmud. The Mishnah responds to this question by explaining first that the purpose of including minority opinions is “To teach the following generations that a man should not [always] persist in his opinion, for behold, the fathers of the world did not persist in their opinion.”⁷⁰ In this view, the disputes between Hillel and Shammai serve as a model of a type of “halakhic flexibility” in their willingness to adapt their legal arguments to those of one another.⁷¹ In this passage, dissent is represented as a way to show individuals that it is not only permissible but actually beneficial to engage in debate and allow argumentation to alter their own views. Simply put, dissent demonstrates plasticity in arguments.

The passage then prods the matter further, this time singling out the preservation of the opinions of one person that goes against the majority:

“And why do they record the opinion of a single person among the many, when the *halakhah* must be according to the opinion of the many? So that if a court prefers the opinion of the single person it may depend on him. For no court may set aside the decision of another court unless it is greater than it in wisdom and in number. If it was greater than it in wisdom but not in number, in number but not in wisdom, may it not set aside its decision, unless it is greater than it in wisdom and in number.”⁷²

This understanding asserts a highly practical function for dissent: a later court could eventually use the minority opinion in order to rule against the majority. The text continues, however, with the assertion of the completely opposite viewpoint: “Rabbi Judah said: ‘If so, why do they record

⁶⁹ m. Eduyot 1:4 (Sefaria Community).

⁷⁰ m. Eduyot 1:4 (Sefaria Community).

⁷¹ Fraade, “Rabbinic Polysemy and Pluralism Revisited,” 19.

⁷² m. Eduyot 1:5 (Sefaria Community).

the opinion of a single person among the many to set it aside? So that if a man shall say, ‘Thus have I received the tradition’, it may be said to him, ‘According to the [refuted] opinion of that individual did you hear it.’”⁷³ Here, in reverse fashion, the single, minority opinion is said to be preserved precisely to ensure that the opinion is not relied upon at a later date. Taken together, in b. Eruvin 1:4-5, the Mishnah has presented fundamentally opposing views about why minority opinions are included. As Moshe Halbertal explains “The debate ... is whether the Mishnah is a flexible code which preserves minority opinion for a future recall against its own rule, or whether it is a closed code which preserves the minority opinion to freeze the rejection forever.”⁷⁴ Notably, the presentation of the opinions may let the reader know the opinion of the Mishnah itself: the anonymous Mishnaic voice is used for the former opinion promoting flexibility, while the voice of R. Judah is used to present the latter, closed opinion. Thus, the fact the Mishnah asserts the flexible view without attribution may indicate that a majority agree with that viewpoint.⁷⁵

Jeffrey Roth highlights a related yet distinct function of dissent: its use in refining majority opinions, or in his words, “issue sharpening.”⁷⁶ In this idea, dissent serves the purpose of improving the position taken by the majority by demonstrating flaws with the majority’s reasoning. Roth highlights a Talmudic story that discusses this function of dissent: b. Bava Metzia 84a. In the story, Rabbi Yohanan grieves the death of a fellow Rabbi and study partner,

⁷³ m. Eduyot, 1:6, (Sefaria Community).

⁷⁴ Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* (Cambridge: Harvard University Press, 1997), 50-52, ProQuest Ebook Central.

⁷⁵ Halbertal, *People of the Book*, 50-52; Hayes, “Law in Classical Rabbinic Judaism,” 103.

⁷⁶ Jeffrey I. Roth, “The Justification for Controversy under Jewish Law,” *California Law Review* 76, no. 2 (Mar. 1998), 377, JSTOR.

Rabbi Simeon ben Lakish. In response, Rabbi Elazar ben Pedat is sent to fill the void of Rabbi Simeon ben Lakish.⁷⁷ The Talmud explains:

So he went and sat before him; and on every dictum uttered by R. Johanan he observed: 'There is a Baraitha which Supports you.' 'Are you as the son of Lakisha?' [R. Johanan] complained: 'when I stated a law, the son of Lakisha used to raise twenty-four objections, to which I gave twenty-four answers, which consequently led to a fuller comprehension of the law; whilst you say, "A Baraitha has been taught which supports you:" do I not know myself that my dicta are right?'⁷⁸

According to the story, R. Johanan actively did not want a fellow rabbi to merely offer support for his claims because, in making those claims, he already understands his own viewpoints. Instead, his attitude toward debate and dissent as leading “to fuller comprehension of the law” demonstrates an acknowledgment in the Talmud of the ways in which dissent can help refine and improve majority opinions.⁷⁹

Eruvin, a tractate in the second division of the Talmud, further contributes to the discussion of conflicting opinions in Judaism and includes important ideas about the pluralistic legal tradition in Judaism. b. Eruvin 13b: 10 considers the notion of competing opinions with respect to both divine will and actual human practice:

Rabbi Abba said that Shmuel said: For three years Beit Shammai and Beit Hillel disagreed. These said: The *halakhah* is in accordance with our opinion, and these said: The *halakhah* is in accordance with our opinion. Ultimately, a Divine Voice emerged and proclaimed: Both these and those are the words of the living God. However, the *halakhah* is in accordance with the opinion of Beit Hillel.

This passage in Eruvin presents rabbinic dispute as bringing fuller expression to the divine word. In detailing the idea that “these and these” are correct—that wholly opposing ideas can *both* be legitimate understandings of the divine word—the passage asserts that the word of God itself

⁷⁷ Roth, “The Justification for Controversy under Jewish Law,” 377-378; b. Bava Metzia 84a (Soncino).

⁷⁸ b. Bava Metzia 84a (Soncino).

⁷⁹ Roth, “The Justification for Controversy Under Jewish Law,” 377-378.

holds multiple meanings (and thus is polysemic) or at a minimum, does not hold only one legitimate meaning.⁸⁰ The text then explains why only one opinion is held as authoritative if both hold some degree of divine backing:

The Gemara asks: Since both these and those are the words of the living God, why were Beit Hillel privileged to have the *halakhah* established in accordance with their opinion? The reason is that they were agreeable and forbearing, showing restraint when affronted, and when they taught the *halakhah* they would teach both their own statements and the statements of Beit Shammai. Moreover, when they formulated their teachings and cited a dispute, they prioritized the statements of Beit Shammai to their own statements, in deference to Beit Shammai.”⁸¹

We learn that the basis for choosing the school of Hillel is not the quality of the school’s logical constructions but rather the school’s approach to argumentation itself. Specifically, the school of Hillel is held as authoritative because it teaches and prioritizes the opposing viewpoint above its own. This passage, like the story of the Oven of Akhnai and b. Eduyot 1, emphasizes the value of promoting minority opinions alongside majority ones, and it also espouses a clear view of legal polysemy in Jewish law.

Further characterizations of Talmudic pluralism and polysemy can be found in tractate Chagigah belonging to the order dealing with festivals, Moed. The text, elaborating on the terminology used in an earlier statement, offers instructions that clearly demonstrate the Talmudic embrace of multiple opinions and textually-derived meanings:

‘The masters of assemblies’: these are the disciples of the wise, who sit in manifold assemblies and occupy themselves with the Torah, some pronouncing unclean and others pronouncing clean, some prohibiting and others permitting, some disqualifying and others declaring fit.

Should a man say: How in these circumstances shall I learn Torah? Therefore the text says: ‘All of them are given from one Shepard’. One God gave them; one leader uttered them from the mouth of the Lord of all creation, blessed be He; for it is written: ‘And God spoke all these words’. Also do thou make thine ear like the hopper and get thee a perceptive heart to understand the word of those who pronounce unclean and the words

⁸⁰ Hayes, “Law in Classical Rabbinic Judaism,” 100-102

⁸¹ b. Eruvin 13b: 11 (Koren - Steinsaltz).

of those who pronounce clean, the words of those who prohibit and the words of those who permit, the words of those who disqualify and the words of those who declare fit.”⁸²

This passage explains that an earlier textual reference to “the masters of assemblies” refers to the sages who study Torah and engage in argumentation with one another, reaching different conclusions about the text. If an imagined person were to ask how one could learn Torah given these many competing interpretations, the text answers that all of these interpretations derive from God. The text asserts the importance of listening and attempting to understand each of these many competing interpretations with “a perceptive heart.” In both embracing many different interpretations in the tradition, while also explaining that each of these interpretations reflects the word of the divine, b. Chagigah 3b is yet another example of specific Talmudic characterizations of Jewish law as both pluralistic and polysemic.

Though these four select passages are far from a comprehensive analysis of Talmudic notions of legal dispute, taken together, they begin to demonstrate key tendencies in the Babylonian Talmud: the promotion of minority viewpoints and the belief that multiple valid perspectives can emerge on a single legal issue.⁸³ Beyond illustrating a general preference for dissent, these trends provide valuable insight into the actual role of dissent in the Babylonian Talmud. On a very practical level, they exemplify the self-perceived functions of dissent within the Talmud as demonstrating legal flexibility and adaptability, as well as serving as a type of precedent for future courts. And, most importantly, minority perspectives, when viewed against the backdrop of legal pluralism and polysemy as expressed in b. Eruvin 13b and b. Chagigah 3b, can also be understood as the expression of legitimate interpretations of the divine word. Though

⁸² b. Chagigah 3b (Soncino).

⁸³ This tendency should not be expanded beyond the Babylonian Talmud and applied to all of rabbinic Judaism in late antiquity. See Hidary, *Dispute for the Sake of Heaven*, 18-20 for a discussion of Tannaitic views on this matter.

the majority view may be the one used to guide literal human action, minority views are not seen merely as meaningless exercises in argumentation. Instead, these passages suggest that minority views hold some level of divine authority. This notion could help explain why minority voices are so widely represented and outwardly promoted in the text.

Dissent in U.S. Law

In U.S. Constitutional law, many of the system's most important dissenters—Supreme Court justices who have sat on the bench over the course of the past two centuries—have written theoretical works about the notion of dissent. Just as the anonymous redactors of the Talmud provided insight into their choices to include dissent in the passages from the previous section, so too have many of these justices offered clear explanations of when and why they choose to dissent. This section will consider a selection of these writings in order to develop a better understanding of the role of dissenting opinions in U.S. Constitutional law as characterized by the very justices who write them. In this endeavor, the work of Justice Ruth Bader Ginsberg, Justice Antonin Scalia, Chief Justice Charles Evan Hughes, Justice William O. Douglas, and Justice William Brennan will be considered. As a collective, these justices each point out a variety of important functions that dissents may have. Though their exact language varies, this paper will focus on the five most common characterizations of dissents that these justices detail: 1) dissents that aim to implement change in the future, 2) dissents that aim to implement change in the present, 3) dissents that provide practical guidance to the legal community, 4) dissents that reflect a justice's strongly held conviction, and 5) dissents that aim to hold the majority accountable and generally further the nation's constitutional dialogue. These categories are not mutually exclusive; as some of these justices specifically note, many opinions may have converging aims and thus many dissents fall into more than one category. Similarly, these

categories, though relatively comprehensive, are not all-encompassing—there are certainly other potential functions of dissent. In an attempt to better understand the broad functions of dissent in U.S. Constitutional law, however, this section will exclusively consider each of these five categories, in turn.

One of the most commonly expressed purposes of dissent by these justices was that of the future-oriented opinion: a dissent issued in the hopes that a later court will eventually see the error of the present majority’s decision and overturn it. This aim is perhaps most succinctly encompassed by Chief Justice Hughes’s famed statement: “A dissent in a Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judges believes the court to have been betrayed.”⁸⁴ The justices see this as a highly significant function of dissent that can be almost prophetic in its nature while improving the general respect for the Court if its predictions do eventually come to fruition. As Justice Brennan, quoting Alan Barth, explains, there are times when justices can serve as “prophets of honor.”⁸⁵ “These are the dissents,” Brennan says, “that often reveal the perceived congruence between the Constitution and the ‘evolving standards of decency that mark the progress of a maturing society,’⁸⁶ and that seek to sow the seeds for future harvest. ... These are the dissents that, at their best, straddle the worlds of literature and law.”⁸⁷ Justice Scalia, too, recognized the benefits of having such future-looking dissents. “When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake,” he writes,

⁸⁴ Charles Evan Hughes, *The Supreme Court of the United States* (New York: Columbia University Press, 1928), 68, quoted in Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court* (New York: Knopf, 1974), 3, Internet Archive Books.

⁸⁵ Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court*, quoted in William J. Brennan Jr., “In Defense of Dissents,” *Hastings Law Journal* 39, no. 3 (1986): 430-431, https://repository.uchastings.edu/hastings_law_journal/vol37/iss3/1.

⁸⁶ *Trop v. Dulles*, 356 U.S. at 101 (1958).

⁸⁷ Brennan, “In Defense of Dissents,” 431.

“it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the justices saw the danger clearly and gave voice ... to their concern.”⁸⁸ Some of the Court’s most famed dissents fall, at least in part, under this category, from Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896) to Justice Benjamin Curtis’s dissent in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). These forward-looking dissents, thus, are perceived by at least some of the Justices as aiding the overall cohesion of a Court that, along with American society, has changed drastically over a relatively short period of time.

A related but distinct function of some dissents is to enact immediate change via legislative action. In writing about the function of dissent, Justice Ginsburg has highlighted her own personal use of dissent for this reason in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007). Finding the majority’s interpretation of Title VII of the Civil Rights Act of 1964 inadequate to actually protect against sex-based employment discrimination, she urges Congress to amend the law itself, writing “the ball is in Congress’s court. ... the Legislature may act to correct the Court’s parsimonious reading of Title VII.”⁸⁹ Ginsburg explains that this “genre of dissent aims to attract immediate attention and, thereby, to propel legislative change.”⁹⁰ In the case of *Ledbetter*, her aim was ultimately successful, with Congress passing the Lilly Ledbetter Fair Pay Act just two years later.⁹¹ As in Ginsburg’s example, dissents written with this purpose have a very clear and direct aim.

⁸⁸ Scalia, “Dissents,” 19.

⁸⁹ *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007)

⁹⁰ Ruth Bader Ginsburg, “The Role of Dissenting Opinions,” *Minnesota Law Review* 95 (2019): 6, <https://scholarship.law.umn.edu/mlr/428>.

⁹¹ Office of the Federal Register, National Archives and Records Administration, “123 Stat. 5 - Lilly Ledbetter Fair Pay Act of 2009,” Government, U.S. Government Publishing Office, December 23, 2009, <https://www.govinfo.gov/app/details/STATUTE-123/STATUTE-123-Pg5>.

A third and rather broad class of dissent involves opinions that provide some level of practical guidance to the legal community. In this category, I include dissents that speak more specifically to litigants, lower courts, and other members of the legal profession about the nuances of a specific issue, as well as those that serve a signaling function about where the Court stands on certain issues. For instance, as Justice Brennan details, a dissenting justice may hope to guide litigants towards a more fruitful legal path or distinguish the current case from other situations in which another potential litigant may find the Court to be more amicable.⁹² Justice Scalia has also written about dissents that fall within this category, discussing those that “inform the public in general, and the Bar in particular, about the state of the Court’s collective mind.”⁹³ He specifically points to instances in which certain cases decided by a 5-4 vote of the Court may indicate a limitation on the scope of a decision. According to Scalia, the opinions of the Court in *Lee v. Weisman*, 505 U.S. 577 (1991)—a case that addresses the extent to which certain religious practices can be exercised by public schools—are emblematic of this category of dissent. Of *Weisman*, Scalia explains:

“Had the judgment been rendered by an institutional opinion for the Court, that rule of law would have the appearance of being as clear, as unquestionable, and as stable as the [previously-decided] rule that denominational prayers cannot be made a mandatory part of the school day. In fact, however, the opinion was 5-4. It is clear to all that the decision was at the very margin of the Establishment Clause prohibition; that it would not be extended much further and may even someday be overruled.”⁹⁴

Thus, both the content of and judicial force behind dissents can influence the function that they serve.

⁹² Brennan, “In Defense of Dissents,” 430.

⁹³ Scalia, “Dissents,” 20.

⁹⁴ Scalia, “Dissents,” 20.

Another genre of dissent, as detailed in the work of Supreme Court justices, is dissent that seeks to emphasize an important philosophical or ideological viewpoint held by one or more of the justices. Brennan writes eloquently about this category: “This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis,” he says, “Rather, this type of dissent constitutes a statement by the judge as an individual: ‘Here I draw the line.’”⁹⁵ In this category, Brennan places his own dissents which detail his belief that capital punishment violates the Eighth Amendments' prohibition against “cruel and unusual punishment.” Similarly, he sees Justice Hugo Black and Justice Douglas’s views about the importance of the First Amendment as similar examples of this form of dissent.⁹⁶ Unlike some of the other functions of dissent, the purpose of this category of opinion holds a less practical aim for the legal community itself. Rather than hoping for some level of present or future change, it places a justice’s personal convictions at the forefront of the dissent, detailing that justice’s beliefs for the historical record

Finally, and most commonly, some dissents function simply to hold the majority accountable and to further the nation’s constitutional dialogue. These opinions aim largely to refute the majority opinion for perceived shortcomings, and a great many dissents undoubtedly fall into this category, either alone or alongside some of the other four functions. This category is left intentionally broad in order to account for the many different types of dissent that do not serve any other identifiable purpose beyond attacking the majority’s opinion. The justices surveyed in this section repeatedly underscore the importance of this sort of dissent as crucial to developing the law. As Ginsburg explains, “My experience teaches that there is nothing better

⁹⁵ Brennan, “In Defense of Dissents,” 437.

⁹⁶ Brennan, “In Defense of Dissents,” 326.

than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation”⁹⁷ Similarly, Brennan details how “[dissent] safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decisions.”⁹⁸ Douglas, in fact, sees dissent in the judiciary as a necessary component of a democratic society: “Disagreement among judges is as true to the character of democracy as freedom of speech itself.”⁹⁹ Throughout their writings on the function of dissent, the justices surveyed emphasize the significant role that the inclusion of dissent has for America’s highest court, as both a means of improving legal decisions and the nation’s dialogue around the Constitution.

In relying upon characterizations of dissent written by the justices themselves, my approach in this passage ignores the ample political, personal, and strategic reasons for which justices may dissent, but which they may not—either consciously or subconsciously—choose to detail in their theoretical writings about dissent.¹⁰⁰ Similarly, it bears mention that dissents written with certain aims may, and often do, fall short of their lofty goals. As Scalia points out, “At the Supreme Court level ... a dissent rarely helps change the law. Even the most successful of our dissenters [Oliver Wendell] ... saw somewhat less than 10 percent of his dissenting views ultimately vindicated by later overrulings. Most dissenters are much less successful than that.”¹⁰¹ Many dissents, thus, may ultimately fulfill different purposes than intended by their authors, but

⁹⁷ Ginsburg, “The Role of Dissenting Opinions,” 3.

⁹⁸ Brennan, “In Defense of Dissents,” 430.

⁹⁹ William O. Douglas, “The Dissent: A Safeguard of Democracy,” *Journal of the American Judicature Society* 32, no. 4 (Dec. 1948): 105, Hein Online.

¹⁰⁰ For empirical analyses of judicial dissent that approach this topic from a very different viewpoint, see Richard A. Posner, William M. Landes, and Lee Epstein, “Why (and When) Judges Dissent: A Theoretical and Empirical Analysis,” *John M. Olin Program in Law and Economics Working Paper* no. 510 (2010), Chicago Unbound; Andrew F. Daughety and Jennifer F. Reinganum, “Speaking up: A Model of Judicial Dissent and Discretionary Review,” *Supreme Court Economic Review* 14 (2006), 1-41, JSTOR.

¹⁰¹ Scalia, “Dissents,” 20.

both the intended and actualized functions of dissents are important in understanding the role of these opinions in U.S. constitutional law.

While imperfect, these categories were selected in order to provide comprehensive yet clear coverage of the primary reasons for dissents as viewed by the dissenters in U.S. law. In that endeavor, a quote from Justice Brennan helps highlight the versatility of many Supreme Court dissenting opinions: “A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority’s reasoning can continue to be evaluated, and perhaps, in time, superseded.”¹⁰² His words highlight an important idea: most dissents likely operate at the cross-sections of these categories, simultaneously serving a variety of important and converging functions. In other words, dissent in the Supreme Court, as characterized by the justices, is a varied and complex component of the U.S. legal system that fulfills many crucial roles.

Comparing the Characterizations of Dissent

In juxtaposing characterizations of dissent in Jewish and U.S. law, a variety of distinctions emerge on account of the very different forms of texts I rely upon in these traditions. For instance, dissents in U.S. law that aim to compel immediate legislative action have no real parallel in the Talmud because Talmudic law is operating in a system without a comparable legislator. Casting aside these sorts of inherent distinctions in the function of dissent within both systems, an extremely important difference nonetheless emerges: in Jewish law, dissents are described as holding some level of divine authority or, at a minimum, divine authorization; while dissents in U.S. law hold no actual authority within the legal system, even if they may fulfill other important purposes. This idea is one of the key differences between the characterizations of

¹⁰² Brennan, “In Defense of dissents,” 435.

dissent in these systems. The justices allow for dissent as part of a tradition that merely allows for the publication of multiple opinions, but the rabbis allow for dissent in a tradition that both embraces pluralism and asserts the notion of legal polysemy. This distinction will be discussed in considerably greater detail in later chapters.

CHAPTER THREE: Case Studies in Dissent

The characterizations of dissent detailed in Chapter Two enable us to gain a better understanding of some of the general functions of dissent in Jewish and U.S. law and of the rabbis' and justices' perspectives on dissent within each of their legal systems. This section builds on Chapter Two's analysis by examining actual instances of dissent within the Talmud and Supreme Court decisions. I've selected specific cases that demonstrate some of the prominent and varied functions of dissent within each of these systems while also enabling me to test the characterizations of dissent against its praxis.

I begin on the Talmudic side, where I analyze three instances of disputes over marriage laws and practices between the Houses of Hillel and Shammai: m. Eduyot 1:12, b. Ketubot 16b-17a, and m. Yebamoth 13b. I then transition to U.S. law and examine the dissenting opinions from *Olmstead v. United States*, 277 U.S. 438 (1928), a case regarding wiretapped telephone conversations. I selected these cases because they cover a broad range of the functions of dissent in compact arguments, while also expressing the competing viewpoints at play relatively clearly and explicitly. Most importantly, these cases enable the consideration of some of the most significant and commonly exercised functions of dissent within each of these traditions, while also providing insight into the limitations of the characterizations from Chapter Two.

Disputes between the Houses of Hillel and Shammai on Marriage Laws

Chapter Two identified four specific functions of dissent as explicitly detailed within the Talmud: 1) dissent as a model for argumentative flexibility 2) dissent that refines the majority's opinion, 3) dissent as a guide for future decisions, and 4) dissent as a valid reflection of the divine will. This section aims to further that analysis within the Talmudic corpus through examining the praxis of dissent with respect to two of its most enduring rabbinic figures: Hillel and Shammai and their respective "houses" (groups of students who followed their interpretive approaches). These two sages are said to have lived in the beginning of the first century CE and served as the leaders of the Jewish high court, the Great Sanhedrin. They disagreed on some matters relating to Jewish law, and students of their conflicting viewpoints grew into two distinct schools of thought that spanned generations and developed legal opinions that challenged one another on a variety of matters.¹⁰³ The Talmud contains many references to the disputes between these two groups, which enable them to serve as key figures of Talmudic argumentation and dissent. This section will specifically analyze three instances of disagreement between these Houses over marriage laws: m. Eduyot 1:12, b. Ketubot 16b-17a, and b. Yebamoth 13b. Tractate Eduyot ("testimonies") is part of the order of the Talmud dealing with civil and criminal law in Jewish courts; while both tractates Ketubot (the plural of "ketubah" which is a Jewish marriage contract) and Yebamoth ("brother's widow") fall within the order of the Talmud that addresses family law.¹⁰⁴

Two functions of dissent are exemplified in disputes between the Houses of Hillel and Shammai over marriage practices in m. Eduyot 1:12: dissent as a model of legal flexibility and

¹⁰³ Hidary, *Dispute for the Sake of Heaven*, 163; Barry L. Schwartz, *Judaism's Great Debates: Timeless Controversies from Abraham to Herzl*, (Philadelphia: Jewish Publication Society, 2012), 47, Project MUSE.

¹⁰⁴ "Talmud," Sefaria, accessed April 26, 2022, <https://www.sefaria.org/texts/Talmud>.

dissent as a method of refining arguments. In this passage, the Houses of Hillel and Shammai initially express disagreement, but ultimately reach consensus:

These are subjects concerning which Beth¹⁰⁵ Hillel changed their mind and taught according to the opinion of Beth Shammai: A woman who came from overseas and said: “My husband died” may be married again; “My husband died [without children]” she must be married by her husband’s brother (the levir).¹⁰⁶ But Beth Hillel says: “We have heard so only in the case of one who came from the harvesting.” Beth Shammai said to them: “It is the same thing in the case of one who came from the harvesting or who came from the olive-picking or who came from overseas; they mentioned harvesting only because that is how it happened.” Then Beth Hillel changed their mind and taught according to Beth Shammai. Beth Shammai says: “She may be married again and take her ketubah payment.” But Beth Hillel says: “She may be married again but may not take her ketubah payment.” Beth Shammai said to them: “You have permitted the graver matter of a forbidden marriage, should you not permit the lighter matter of property?” Beth Hillel said to them: “We have found that brothers do not inherit on her statement.” Beth Shammai said to them: “Do we not infer it from her marriage document in which he writes to her ‘That if you be married to another you shall take what is written for you’?” Then Beth Hillel changed their mind and taught according to the opinion of Beth Shammai.¹⁰⁷

This Mishnah details a discussion between the two Houses over how to treat a woman who arrives from overseas and says that her husband has died. The House of Shammai asserts that the woman is to be believed, and thus she may be remarried pursuant to traditional Jewish marriage practices: if she has children, she may remarry anyone, whereas if she is childless she must marry her husband’s brother in accordance with the Jewish practice of Levirate marriage. Initially, the House of Hillel pushes back against this idea, distinguishing that the precedent for this law is not comparable to the case being considered: in the prior case, the woman’s husband died while harvesting closer to the area, therefore, the husband could easily return and prove the woman wrong if she was lying. In this case, the woman is coming from abroad, meaning she could lie about her husband’s death without concern that he may return. The House of Shammai,

¹⁰⁵ *Beth* is an English transliteration of the Hebrew word בית, meaning “house.”

¹⁰⁶ A “Levir” is the term for a brother who marries his widowed sister-in-law in accordance with the Jewish practice of Levirate marriage.

¹⁰⁷ m. Eduyot 1:12 (Kulp).

however, asserts that she should be believed regardless of where she returns from, and the House of Hillel ultimately changes its view in accordance with that of Shammai. Next, the two schools consider the question of ketubah payments, a part of a contractual marriage agreement between a Jewish groom and bride that sets out a predetermined payment for the wife in the event that her husband divorces her or dies. The House of Shammai asserts that she should also be allowed to receive her ketubah payment, while the House of Hillel argues she should not in case she is lying about his death. In response, the House of Shammai argues that the House of Hillel's stance is not consistent with the general practice in Jewish law which treats matters of marriage more seriously than those of property. Again, the House of Hillel then changes its mind.¹⁰⁸

In both instances, ultimately, the House of Hillel, upon hearing the arguments of the House of Shammai, shifts its viewpoints and teaches in accordance with the House of Shammai. This section directly demonstrates the notion of legal flexibility described in m. Eduyot 1:4—that dissent exists “To teach the following generations that a man should not [always] persist in his opinion, for behold, the fathers of the world did not persist in their opinion.”¹⁰⁹ m. Eduyot 1:12 serves as a clear and tangible model for later generations of the importance of approaching argumentation with an openness towards another's view and plasticity within one's own views. If one of the greatest Talmudic schools can shift its opinion after engaging in fruitful debate, so, too, should those who come after. Moreover, in offering an example of how dissent can shift the majority's view, this passage simultaneously demonstrates another important function of dissent as characterized in the Talmud: refining the majority's opinion. In this instance, the majority does not merely adjust its viewpoint, but adopts an entirely new one based on the logic of the

¹⁰⁸ Joshua Kulp, “English Explanation of Mishnah Eduyot 1:12,” Sefaria, accessed April 26, 2022, https://www.sefaria.org/English_Explanation_of_Mishnah_Eduyot.1.12.4?ven=Mishnah_Yomit_by_Dr._Joshua_Kulp&lang=bi.

¹⁰⁹ m. Eduyot 1:4 (Kulp).

minority, making this an exaggerated example of the ways in which dissent can improve the decision ultimately rendered as detailed by the statements of R. Johanan in b. Bava Metziah: 84a.

This passage, while a fitting example of some of the functions of dissent that are described by the Talmudic redactors, is somewhat anomalous within the Talmud. In most arguments between Hillel and Shammai (and their schools), only a single view is depicted as authoritative: that of Hillel. As detailed in Chapter Two in the discussion of b. Eruvin 13b, while the arguments of both schools are declared to be “the words of the living God,” ultimately, “the *halakhah* is in accordance with the opinion of [the House of] Hillel.”¹¹⁰ Time and again, the Talmud depicts this dynamic between the schools: the text details the opinions of Shammai, but ultimately declares the opinions of the House of Hillel to be normative in the tradition. In most of these debates, the House of Shammai does not acquiesce to the views of the House of Hillel, nor does the House of Hillel alter its arguments to account for the logic of Shammai. Rather, in a majority of the hundreds of Talmudic passages that discuss these two groups, one would be hard pressed to find dissent functioning as either a model of flexibility or a method of improving the majority opinion.

A passage from b. Ketubot 16b-17a demonstrates a typical Talmudic approach towards the debates between the Houses of Hillel and Shammai:

The Sages taught: How does one dance before the bride, i.e., what does one recite while dancing at her wedding? Beit Shammai say:

One recites praise of the bride as she is, emphasizing her good qualities. And Beit Hillel say: One recites: A fair and attractive bride. Beit Shammai said to Beit Hillel: In a case where the bride was lame or blind, does one say with regard to her: A fair and attractive bride? But the Torah states: “Keep you from a false matter” (Exodus 23:7). Beit Hillel said to Beit Shammai: According to your statement, with regard to one who acquired an inferior acquisition from the market, should another praise it and enhance its value in his eyes or condemn it and diminish its value in his eyes? You must say that he should praise

¹¹⁰ b. Eruvin 13b (Koren - Steinsaltz).

it and enhance its value in his eyes and refrain from causing him anguish. From here the Sages said: A person's disposition should always be empathetic with mankind, and treat everyone courteously. In this case too, once the groom has married his bride, one praises her as being fair and attractive.¹¹¹

In this passage, the two Houses debate whether or not it is permissible to praise an unattractive bride as “fair and attractive”—to tell a small lie in order to prevent offending anyone involved in the wedding. The House of Shammai expresses concerns over breaking the Torah's prohibition against lying, but the House of Hillel asserts that one should praise the bride. The two groups do not arrive at any agreement, nor does the passage portray the two Houses as having altered their thinking to account for the other's argument. Clearly, in this context, dissent is not demonstrating flexibility. Instead, dissent may be included merely to demonstrate two different viewpoints—one of which is treated as normative and one of which is not. More specifically, the Talmudic redactors may include dissent to allow for the fuller expression of the divine word as understood in *Eruvin* 13b.

m. Yebamoth 13b's discussion of marriage practices between the Houses of Hillel and Shammai offers further insight into the Talmudic notion of pluralism by describing how the two groups actually interact with one another:

If they perform the *Halizah*, Beth Shammai declare them ineligible to marry a priest, and Beth Hillel declare them to be eligible. If they were married to the Levirs,¹¹² Beth Shammai declare them eligible [to marry a priest], and Beth Hillel declare them ineligible. Though these forbade what the others permitted, and these regarded as ineligible what the others declared eligible, Beth Shammai, nevertheless, did not refrain from marrying women from [the families of] Beth Hillel, nor did Beth Hillel [refrain from marrying women] from [the families of] Beth Shammai.¹¹³

¹¹¹ b. Ketubot 16b-17a (Koren - Steinsaltz).

¹¹² *Supra* note 105.

¹¹³ m. Yebamoth 13b (Soncino).

This passage deals with the nuances of Levirate marriage: the practice in which a childless widow remarries the brother of her deceased husband. Jewish law holds that a man is obligated to remarry his brother's widow if the pair never had a child. The first child of the new marriage is then to be accounted to the deceased brother in order to preserve his name. If for some reason the brother refuses to marry the widower, Jewish law prescribes a practice known as *Halizah*, in which the woman removes her brother-in-law's shoe and spits on the ground in front of him in the presence of elders. After performing the *Halizah*, the woman becomes free to marry other men.¹¹⁴ In the above passage, the Houses of Hillel and Shammai debate a nuanced point regarding *Halizah*: the question is whether a woman who has been declared eligible to marry by performing that practice is also eligible to marry a priest—a bond that in rabbinic writings generally presumes a higher standard than marriage to a man who is not part of the priestly class. Initially, we learn that the House of Shammai regards women who have completed the ceremony as ineligible to marry a priest, while the House of Hillel sees them as eligible to do so. Next, the passage considers the eligibility of a woman who did marry her brother-in-law. In this consideration, the two schools flip, with the House of Shammai viewing her as now eligible to marry a priest and the House of Hillel asserting that she is ineligible. The anonymous Mishnaic voice then inserts itself, explaining that in spite of the differences in views on marital eligibility between these two Houses, in practice, the members of both groups did not refrain from marrying women within the other.

According to this passage, even though the Houses of Hillel and Shammai disagreed on fundamental matters of marriage and found no common solution to their disagreement, neither group allowed its views to greatly inhibit interactions between the two. Both groups permitted

¹¹⁴ Deuteronomy 25: 5-10 (JPS 2006).

inter-marriage, despite the fact that there would inevitably be instances when their views of marital eligibility would conflict. This passage offers a striking demonstration of the ways in which pluralism permeates interactions portrayed in the Talmud: regardless of their differences, both groups were accepting enough of the other to maintain high levels of contact even when that contact might require one to go against the teachings of his or her own group. The Talmudic understanding that multiple, competing views can simultaneously express the divine word enables this practice of casting aside core differences in opinion to join together as a broader community because unity can be achieved without inherently asserting that one group is going against the will of the divine.¹¹⁵

While dissent in the Talmud can, at times, model argumentative flexibility and improve the reasoning of the majority, this is not always, or even often, the case. As the excerpts from Ketubot and Yebamoth demonstrate, many debates in the Talmud offer no clear resolution, and dissent is often included without an explanation as to its function. Given the Talmud's repeated expression of divine approval of debate and m. Yebamoth 13b's portrayal of the unity between the Houses of Hillel and Shammai in spite of their differences, the lack of a clearly assigned purpose of dissent in many passages may best be explained by the embrace of pluralism and polysemy in Judaism. More specifically, the widespread inclusion of minority opinions in the text helps underscore the Talmudic emphasis on dissent as a way of bringing fuller expression to the words of the divine, making this function of dissent highly formative within the tradition.

In another vein, these instances may represent important limitations in the characterizations from Chapter Two. When compared against actual instances of dissent in the

¹¹⁵ There are, however, other instances recorded that indicate greater animosity between the two groups. See b. Sanhedrin 88b.

Talmud, there could also be functions for dissent that the Talmudic redactors never explicitly cite or purposes that were not surveyed in Chapter Two. Specifically, in addition to the fact that most disputes remain unresolved in the Talmud, throughout most of the text, the rabbis typically only declare a single practice normative within the tradition. For instance, as detailed in Chapter Two's discussion of *Eruvin* 13b, the *halakhah* is almost always said to follow the arguments of the House of Hillel in disputes between the Houses of Hillel and Shammai. Therefore, in spite of the widespread embrace of pluralism and characterizations of Jewish law as polysemic in the Talmud, the tradition ultimately arrives at a single, "correct" way of interpreting Jewish law. This contradiction between characterization and common praxis does not inherently render the rabbinic descriptions of dissent as false or misleading—just because the tradition does not permit individuals to follow all interpretations does not mean it fails to uphold them as meaningful and divinely inspired. Rather, the repeated emphasis on characterizing Talmudic law as pluralistic and polysemy may indicate that the rabbis' choices in describing dissent could additionally serve other functions within the tradition.

On the whole, the disputes surveyed in this chapter demonstrate that at least some of the characterizations of dissent provided in Chapter Two do manifest in a variety of contexts within the textual practice of the Talmud. However, they also begin to show that the Talmud's promotion of pluralism and polysemy may serve important but less direct purposes than precisely what the rabbis state.

Olmstead v. United States, 277 U.S. 438 (1928)

Chapter Two identified five distinct functions of dissent in U.S. constitutional law as characterized in the writings of Supreme Court justices: 1) dissents that aim to implement change in the future, 2) dissents that aim to implement change in the present, 3) dissents that provide

practical guidance to the legal community, 4) dissents that reflect a justice's strongly held conviction, and 5) dissents that aim to hold the majority accountable and generally further the nation's constitutional dialogue. As these functions vary greatly, it is difficult to encapsulate them all in a single case study. The dissents in *Olmstead v. United States*, however, offer a sound example of a historically significant legal matter in which dissent serves several functions simultaneously.

Olmstead is a highly formative case for issues of privacy law in the United States. The case centered around the question of whether the federal government's use of wiretapped telephone conversations as evidence against the petitioners violated their Fourth and Fifth Amendment rights. Specifically, the petitioners, led by Roy Olmstead, had been convicted for conspiring to violate the National Prohibition Act by importing, possessing, and selling liquor in Washington state. The conspiracy was discovered through the use of wiretaps on the phones at the residences of the petitioners, which had been used by federal officers without the consultation or approval of a judge. The petitioners argued that the wiretapping amounted to an unreasonable search or seizure under the Fourth Amendment and that the use of incriminating phone conversations obtained via a tapped wire inherently compels a defendant to witness against his or herself in violation of the Fifth Amendment.¹¹⁶ There were five different opinions issued in *Olmstead*: a majority written by Chief Justice William H. Taft and joined by Justices James C. McReynolds, Edward T. Sanford, George Sutherland, and Willis Van Devanter; a dissent by Justice Louis Brandeis; a dissent by Justice Harlan F. Stone; a dissent by Justice Pierce Butler; and a brief dissent by Justice Oliver W. Holmes Jr.

¹¹⁶ *Olmstead v. United States*, 277 U.S. 438 (1928), Justia.

The majority found in favor of the United States, asserting that the government did not violate the plaintiff's Fourth and Fifth Amendment rights. In the majority opinion, Justice Taft maintains that the Court could not find a violation of the Fifth Amendment in this case unless it was first determined that the petitioners' Fourth Amendment rights had been violated. Thus, he narrows the issue to the question of whether the wiretaps amounted to a Fourth Amendment violation.¹¹⁷ Taft proceeds to offer a relatively narrow understanding of Fourth Amendment protections, stating "The [Fourth] Amendment itself shows that the search is to be of material things – the person, the house, his papers, or his effects."¹¹⁸ With this understanding of the Fourth Amendment applying to the search or seizure of highly tangible evidence within a person's property, he explains that the advent of the telephone does not shift the meaning of the Amendment: "By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place," he says, "The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office."¹¹⁹ Under this logic, the majority ultimately decides that "the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment."¹²⁰ In sum, the majority finds that the Fourth Amendment is highly limited in its scope, and thus the government was acting constitutionally and without the need for a warrant in its secret wiretaps of Olmstead and his business partners' homes.

The dissents addressed various issues with the majority's reasoning. Brandeis argues that the government's actions did violate the petitioners' Fourth and Fifth Amendment rights,

¹¹⁷ *Olmstead*, 277 U.S. at 462.

¹¹⁸ *Olmstead*, 277 U.S. at 464.

¹¹⁹ *Olmstead*, 277 U.S. at 465.

¹²⁰ *Olmstead*, 277 U.S. at 466.

asserting that both amendments should be construed far more broadly than in the majority's view. Brandeis explains that the constitutional protection against unreasonable search and seizure should include telephone conversations, warning that technological developments necessitate a broader interpretation of the Fourth Amendment. He also asserts that the Constitution protects a right to privacy, which was violated in this case. Further, he states that constitutional questions aside, the government's wiretap still should not hold because it was obtained illegally in the first place.¹²¹ Justice Holmes largely concurs with the dissent of Brandeis, Holmes, however, also explains that "[w]hile I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendants."¹²² Rather, for Holmes, the evidence obtained by the government should not stand because it was "only obtainable by a criminal act."¹²³ In stark contrast, Justice Butler exclusively addresses the constitutional questions in the case, and—citing the Court's broader construction of the Fourth Amendment in its decision in *Boyd v. United States*, 116 U.S. 616—he states that "a fair application of that principle decides the constitutional question in favor of the petitioners."¹²⁴ Finally, Justice Stone, in a very brief dissent, concurs with the opinions of Holmes and Brandeis, while also concurring with the dissent of Butler in "so far as it deals with the merits."¹²⁵

The decision in *Olmstead*, however, did not stand indefinitely. The precedent set by the case was eventually overturned in 1967 by *Katz v. United States*, 389 U.S. 347, another case dealing with wiretapping.¹²⁶ This shift was due, in no small part, to the work of the dissenting justices in *Olmstead*. The remainder of this section will identify the primary functions of the

¹²¹ *Olmstead*, 277 U.S. at 471.

¹²² *Olmstead*, 277 U.S. at 469.

¹²³ *Olmstead*, 277 U.S. at 469.

¹²⁴ *Olmstead*, 277 U.S. at 488.

¹²⁵ *Olmstead*, 277 U.S. at 488.

¹²⁶ *Katz v. United States*, 389 U.S. 347 (1967), Justia.

dissents issued in this case through an analysis of Justice Brandeis's lengthy and now famous dissent. Brandeis's opinion serves as a clear demonstration of two of the characterizations of dissent from Chapter Two: the expression of a justice's strongly held belief and a future-oriented dissent. Further, in giving a clear and authoritative voice to important issues in the majority opinion, Brandeis's dissent also demonstrates how dissent can serve to further the nation's constitutional dialogue.

For much of his legal career, Brandeis advocated for a right to privacy. His published work on the subject can be traced back early into his legal career to 1890 with an article he co-authored in the *Harvard Law Review* entitled "The Right to Privacy." In their article, Brandeis and attorney Samuel Warren make a strong argument for the recognition of a right to privacy, considering the scope and nature of such a right.¹²⁷ Even early on, Brandeis's work on the matter attracted attention and a warm reception within the broader legal community.¹²⁸

There are clear echoes of this early work in his *Olmstead* dissent. Nearly four decades after this initial article, Brandeis continued to champion privacy rights throughout the opinion, asserting "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness ... They conferred, as against the Government, the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men."¹²⁹ He explains that government intrusions upon individuals' privacy "must be deemed a violation of the Fourth Amendment."¹³⁰ In making this argument, he sees a need to broadly construe the Fourth

¹²⁷ Louis Brandeis and Samuel D. Warren, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (Dec. 1890), https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.

¹²⁸ Dorothy J. Glancy, "The Invention of the Right to Privacy," *Arizona Law Review* 21, no. 1 (1979): 6, <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1318&context=facpubs>.

¹²⁹ *Olmstead*, 277 U.S. at 478.

¹³⁰ *Olmstead*, 277 U.S. at 478.

Amendment, particularly in light of the vast technological development in society since the nation's founding:

When the Fourth and Fifth Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were the only means known to man by which a Government could directly effect self-incrimination. ... But 'time works changes, brings into existence new conditions and purpose.' Subtler and more far reaching means of invading privacy have become available to the Government, by means far more effective than stretching upon the rack.¹³¹

He further recognizes the dangers in future technological evolution as well: "The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping," he said, while also predicting that "Ways may someday be developed by which the Government ... will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions."¹³² Ultimately, in asserting this broad right to privacy, Brandeis finds that the government's actions in wiretapping the petitioners' phones without a warrant and subsequently using that evidence in Court violate both the Fourth and Fifth amendments.¹³³

Brandeis's choice to directly address the constitutional questions that implicate privacy rights is notable in light of the fact that Brandeis also argues in his dissent that "[i]ndependently of the constitutional question, I am of the opinion that the judgment should be reversed."¹³⁴ More specifically, Brandeis asserts that the wiretap should not be admissible because it was contained illegally, which, alone, is sufficient cause to reverse the petitioners' conviction.¹³⁵ Justice Holmes, in fact, finds in favor of the petitioners on these grounds alone, choosing to skirt the question of constitutionality altogether. In light of Brandeis's long-standing work on legal

¹³¹ *Olmstead*, 277 U.S. at 473.

¹³² *Olmstead*, 277 U.S. at 474.

¹³³ *Olmstead*, 277 U.S. at 478-479.

¹³⁴ *Olmstead*, 277 U.S. at 479.

¹³⁵ *Olmstead*, 277 U.S. at 479-485.

privacy rights and choice to fervently explain and defend the right to privacy in this case, the emphasis on the right to privacy in his *Olmstead* dissent can be understood as an expression of a strongly held conviction.

Additionally, there are few clearer examples of how dissent can function in speaking “to the intelligence of a future day,” than Brandeis’s in this case.¹³⁶ Though Brandeis’s *Olmstead* dissent is never explicitly cited in *Katz*, his strong influence over the decision is clear throughout the opinion. Justice Potter Stewart, writing for the majority in *Katz*, uses language that at times almost directly mirrors that of Brandeis’s dissent. Just as Brandeis asserts—in opposition to the majority—that “[i]t is, of course, immaterial where the physical connection with the telephone wires leading into the defendant’s premises was made,”¹³⁷ so, too, does the *Katz* majority explain that “The fact that the electronic device employed to [wiretap the phone] ... did not happen to penetrate the wall of the [phone] booth can have no constitutional significance.”¹³⁸ Similarly, they see the petitioner as having “justifiably relied” upon a level of “privacy” while on the phone, mimicking Brandeis’s clear assertions of a right to privacy.¹³⁹ Though distinct from Brandeis’s *Olmstead* dissent, Stewart does additionally cite Brandeis’s article “The Right to Privacy” in *Katz*, further demonstrating Brandeis’s influence on the dissent.¹⁴⁰ The staying power of Brandeis’s dissent extends well beyond *Katz* as well, lasting even into the twenty-first century. In 2018, the majority in *Carpenter v. United States*, 585 U.S. ____ quoted his dissent, stating, “As Justice Brandeis explained in his famous dissent, the Court is obligated—as ‘[s]ubtler and

¹³⁶ Hughes, *The Supreme Court of the United States*, 68.

¹³⁷ *Olmstead*, 277 U.S. at 478.

¹³⁸ *Katz*, 389 U.S. at 353.

¹³⁹ *Katz*, 389 U.S. at 353.

¹⁴⁰ *Katz*, 389 U.S. at 350.

more far-reaching means of invading privacy have become available to the Government’—to ensure that the ‘progress of science’ does not erode Fourth Amendment Protections.”¹⁴¹

Though Brandeis’s influence over *Katz* is quite obvious and the majority in *Carpenter* did eventually explicitly cite his dissent, it is notable that the majority in *Katz* chose not to rely upon it directly. In fact, the only reference to the *Olmstead* dissents comes in Stewart’s remark about the narrowness of that decision: “Thus, **although a closely divided Court supposed in *Olmstead*** [emphasis added] that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.”¹⁴² The *Olmstead* dissents here are used merely to undermine the *Olmstead* majority by emphasizing that the decision was rendered without a strong mandate from the entire Court. Stewart’s decision to use the *Olmstead* dissents in this very narrow way demonstrates some general limitations on the power of dissenting opinions in the U.S. legal system. Notably, though *Katz* uses very similar logic to the arguments set out in Brandeis’s dissent, the majority ultimately relies on precedents set by cases after *Olmstead*. In fact they conclude that “the underpinnings of *Olmstead* ... have been so eroded by our subsequent decision that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”¹⁴³

In relying upon the decisions of the Court in later cases rather than the dissent in *Olmstead*, the majority here is implicitly recognizing the far greater authority granted to majority opinions over dissents in the U.S. legal system. The *Katz* opinion could not simply point to *Olmstead* as support for its decision but required a slow path towards adjustment made in

¹⁴¹ *Olmstead*, 277 U. S. at 473–474 quoted in *Carpenter v. United States*, 585 U. S. ____ (2018), Justia.

¹⁴² *Katz*, 389 U.S. at 353.

¹⁴³ *Katz*, 389 U.S. at 353.

majority decisions by the Court in the years following its *Olmstead* decision. In this context, Brandeis's dissent demonstrates that, though dissenting opinions can be important in outlining a different thought process to a future day, on the whole, they speak with no real authority when compared with majority decisions. These opinions can offer cohesion in demonstrating that certain lines of thought have been entertained by the Court for years, but their appeal to a future day must be accompanied first by other smaller shifts in Court decisions in order to actually overturn existing legal precedents.

Most dissents, in offering a viewpoint not expressed by the majority, help further important issues of debate on constitutional questions. Therefore, it is unsurprising that Brandeis's dissent also serves a tertiary purpose of furthering the nation's general constitutional dialogue. In a sense, nearly every dissent can serve this function to some extent. The Supreme Court, as the nation's Court of last resort, offers the single most important platform for discussion of constitutional questions, and questions addressed by it will inevitably have important implications across the country. As a result, the furtherance of constitutional dialogue is the most widespread of the five categories of dissent detailed by past justices, but it is also the least specific of the five. In the case of Brandeis's *Olmstead* dissent, his opinion has had lasting implications on America's constitutional dialogue, particularly given the fact that the Court has continued to reference roughly 90 years after it was first published.¹⁴⁴

Within the framework of the characterizations of dissent in U.S. law set out in the preceding chapter, Brandeis's opinion in *Olmstead* offers a clear instance of a dissent that expresses a justice's strong conviction, a future-oriented dissent, and dissent that has contributed to the nation's Constitutional dialogue into the present. At the same time, the majority decision

¹⁴⁴ *Carpenter*, 585 U. S. ____.

in *Katz* shows how the types of functions that dissenting opinions can serve are deeply restricted within U.S. law—dissents cannot speak with the same authority as majority opinions. It is only through the work of the majority that the law can be changed and reinterpreted. Thus, Brandeis’s *Olmstead* opinion both highlights the ways in which dissent plays the varied functions detailed by the justices surveyed in Chapter Two, while also exemplifying the firm boundaries within which dissent can operate in the U.S. legal system.

CONCLUSION

The previous chapters have sought to explain four key phenomena in Jewish and U.S. constitutional law: how the rabbis and Supreme Court justices established their interpretive authority; how dissent developed as a practice in these traditions; how these two bodies have chosen to characterize the functions of dissent; and the ways in which their descriptions of dissent do and do not conform to how it actually functions. In this chapter, I aim to bring these phenomena into closer dialogue with one another in order to better understand how the rabbis and justices view of dissent in relation to their own interpretive authority and the overall legitimacy of each legal system. First, I detail how the characterizations of dissent, as described in Chapter Two, demonstrate the areas in which the rabbis and justices view potential or actual existing weaknesses in their traditions and how they understand dissent to strengthen the authority of their legal systems by addressing those weaknesses. I then survey ways in which both groups understand dissent to actually weaken the authority of both legal systems.¹⁴⁵ Next, I

¹⁴⁵ As discussed earlier, in relying exclusively upon the rabbis’ and justices’ explicit discussions of dissent, the weakness of dissent detailed may not always, or even often, conform with how dissent actually presents. Rather, these groups’ descriptions of dissent enable us to gain a better understanding of the areas in which they perceive and portray dissent as both useful and problematic.

offer a comparative analysis of how each group views the benefits and drawbacks of dissent with an emphasis on how their descriptions indicate that dissent strengthens the overall legitimacy of each system.

Dissent as a Strengthening Force

Chapter Two highlights the functions of dissent in Jewish law as described in the final version of the Talmud, and in U.S. law as described in writings by Supreme Court justices about the role of dissent. On the Talmudic side, four distinct functions emerge: 1) dissent as a model for argumentative flexibility; 2) dissent that refines the majority's opinion; 3) dissent as a guide for future decisions; and 4) dissent as a valid reflection of the divine will. On the U.S. side, we have identified five functions: 1) dissents that aim to implement change in the future; 2) dissents that aim to implement change in the present; 3) dissents that provide practical guidance to the legal community; 4) dissents that reflect a justice's strongly held conviction; and 5) dissents that aim to hold the majority accountable and generally further the nation's constitutional dialogue. While there is some overlap between these functions (for instance, both groups say that later thinkers can eventually rely upon earlier dissents and that dissent can serve to improve majority opinions), for the most part, the rabbis and justices seem to emphasize different key functions of dissent in each tradition.

I argue in this section that, in detailing these functions of dissent within their respective systems, the rabbis and justice also help demonstrate some of the ways in which they perceive dissent as addressing shortcomings in each. In other words, their characterizations of dissent also implicitly detail the ways in which the rabbis believe that dissent serves to strengthen each legal system overall.

On the Talmudic side, the rabbis detail multiple, related ways in which dissent benefits their legal tradition. In one sense, they explain dissent as a model for later generations by demonstrating how to approach arguments with flexibility and an open mind. In another important sense, the rabbis describe both sides of an argument as simultaneously correct in bringing fuller expression to the word of the divine. They assert this both explicitly, by describing majority and minority opinion as “the word of the living God,” and also implicitly, by asserting that later scholars could rely directly upon dissents.¹⁴⁶ These characterizations, however, as detailed in Chapter Three, do not always conform with praxis. Not all dissents demonstrate this flexibility, and though the text may assert that all dissent gives greater expression to the divine will, in practice, certain viewpoints—such as nearly all views of the House of Hillel—are ultimately deemed normative. In this sense, though the rabbis may understand dissent as serving the functions they detail, the fact that it does not always do so may indicate that dissent serves other, related purposes as well. Based on the rabbinic characterizations of the positive aspects of dissent, we can deduce that dissent addresses two perceived potential or actual shortcomings in their system: the threat of uncivil argumentation, as well as the threat of entirely casting aside minority views and alienating the people who express them. In turn, the rabbis' descriptions of dissent express two, related interests: their desire to promote civil argumentation and their desire to create a single, normative practice for the tradition without entirely invalidating other interpretations.

These interests are almost certainly the product of historical circumstances: the rabbis likely saw dissent as ameliorating shortcomings that were created by certain ongoing contemporaneous events. For instance, throughout the period when the Mishnah and Gemara

¹⁴⁶ b. Eruvin 13b (Koren - Steinsaltz); m. Eduyot 1:5 (Kulp).

were being written and eventually redacted, the rabbis were establishing their authority over an ideologically divided Jewish community. The Second Temple period that preceded the establishment of rabbinic authority in Judaism was marked by sectarian divides, and these competing ideologies undoubtedly carried over into the first and second centuries following the Temple's destruction while the Mishnah was being compiled. In this early context, the inclusion of dissent in *halakhic* writings, as expressed by the rabbis, could have served to accommodate the many competing voices in the Jewish community.¹⁴⁷ In later centuries, Daniel Boyarin has argued that early Christianity and rabbinic Judaism developed alongside one another with both groups simultaneously exerting influence on the other. Thus, rabbinic responses to the trends in post-Nicene Christianity may have also influenced Talmudic characterizations of dissent.¹⁴⁸ Regardless of whether one takes the view of an early embrace of Jewish legal pluralism, like Shaye Cohen, a late construction, like Boyarin, or views legal pluralism as a lengthy and more complicated process of development, like Steven Fraade, there are points throughout each of these periods when the rabbis had reasons to promote a tradition that embraced a wider swath of opinion. Throughout all of these different contexts, the Talmudic notion that all groups' opinions could simultaneously be "the words of the living God" could have served the rabbinic interest in different ways.¹⁴⁹ Given the limited archaeological and literary evidence, we can, instead, look at the coalescence of these varying historical events and understand that some or all of them—in

¹⁴⁷ Cohen, "The Significance of Yavneh," 45-47.

¹⁴⁸ Daniel Boyarin, "Rethinking Jewish Christianity: An Argument for Dismantling a Dubious Category (to which is Appended a Correction of my *Border Line*)," *Jewish Quarterly Review* 99, no. 1 (Winter 2009): 35, JSTOR; Boyarin, *Border Lines*, 156-157.

¹⁴⁹ b. Eruvin 13b (Koren - Steinsaltz).

varying degrees—likely produced circumstances in which the rabbis found it beneficial to include dissent in order to promote civil and fruitful argumentation in the tradition.¹⁵⁰

Dissent also may have served to address weaknesses in the establishment of rabbinic interpretive authority over Jewish law. As detailed in Chapter One, the rabbis established interpretive authority amidst a void in leadership following the destruction of the Second Temple. In instituting their own authority, the rabbis transitioned worship in Judaism towards a scribal tradition that operated within the confines of divinely-created texts, rather than one in which prophets were relied upon to transmit the divine word. In order to support their claim to authority, the rabbis worked to directly connect themselves to a long line of leaders in a chain linking back to Moses.¹⁵¹ They further made clear movements towards discrediting any individual claiming greater divine inspiration than others in order to promote argumentation over the texts alone.¹⁵² This authority, however, is entirely a rabbinic invention: nowhere in the Hebrew Bible is any group similar to the “rabbis” even mentioned, let alone delegated leadership over the Jewish people and authority over deciding how to interpret Jewish law. Further, the switch to a scribal tradition also necessitated substantial interpretive efforts—the rabbis had to develop an understanding of what their divine texts meant and how they should be applied to new and changing circumstances. However, legal interpretation can be a fraught and varied practice that produces entirely different understandings of the very same text. Thus, the rabbis' claim to interpretive authority faced two core challenges: a lack of clear biblically—and

¹⁵⁰ I set aside the questions of whether dissent actually was practiced as described by the rabbis and, if so, whether they succeeded in achieving their goals.

¹⁵¹ m. Pirkei Avot 1 (Kulp).

¹⁵² b. Bava Metzia 59a-b (Soncino).

therefore divinely—authorized power and the challenges of dealing with many competing views of the same text.

Dissent, as detailed in the rabbinic characterization of the idea, helps to mitigate both of these problems. The story of the oven of Akhnai detailed in Chapter One demonstrates how dissent functions to address the issue of rabbinic authority. Through the story, the rabbis are able to underscore their sole interpretive authority by arguing that the divine has left the law with human interpreters to argue among themselves. It is only through collective discussion, through a process of disputation, that the rabbis can determine how to understand the words of God. Therefore, discussions that involve both majority and minority opinions are core to the very essence of rabbinic authority in and of itself: dissent helps form their claim to leadership because it is part of the process of understanding the divine word. The many rabbinic stories that describe dissent as part of a culture of legal pluralism also demonstrate how embracing disagreement can ameliorate issues of competing interpretations. By creating, or at least describing, a system that never fully invalidates minority opinions as long as dissenters operate within the rabbinic boundaries of disputation, the rabbis enabled the practice of robust interpretation without fully isolating those who fall outside the majority

The characterizations of dissent expressed by the Supreme Court justices betray concerns of a very different nature than their rabbinic counterparts. The justices detail functions of dissent that are largely related to addressing the fact that dissenting opinions, even once published by the Court, are granted no real legal authority. As detailed in Chapter Three, even when dissents aim to influence action in the future, their impact can only be enacted indirectly through a lengthy process of later Court decisions. In this context, dissent helps to address the inherently undemocratic nature of the Court, allows justices with minority opinions to enact greater

contemporaneous change, and enables the justices to give voice to their minority viewpoints for the historical record.

The justices' writings about how minority opinions can improve majority opinions and further the nation's constitutional dialogue betray a key issue in the authority of the Supreme Court: since *Marbury's* expansion of the Court's powers, America's highest court became an extremely powerful but inherently undemocratic and insular institution. The justices of the Supreme Court have the power to make hugely important determinations in U.S law and public policy—their decisions can and often do impact the lives of every single American. These justices, however, are not directly voted onto the bench by the general public, nor are they held accountable for their decisions through any reelection process. Similarly, there is no requirement that the justices share the ongoing, backroom discussions that take place between them over cases, meaning the internal decision-making processes within the Court could easily be hidden from the public. In a nation in which the other two branches of the government require a clear public mandate and some level of transparency, the fact that the Court lacks both could call the justices' powerful authority into question. With this structural backdrop, dissent benefits the Court in a variety of ways. Through dissenting opinions, justices can at least share a wider array of opinions than would be the case if the Court required unanimity. Further, the publication of dissenting opinions, as explained by the justices in Chapter Two, can often force the majority to refine their final opinion before publication. The public is also able to understand the main points of contention on different legal matters undertaken by the Court. This enables dialogue on constitutional issues to be more transparent for the general populace while also representing a wider variety of views that may better reflect public opinion. On the whole, by serving to improve majority opinions and further the nation's constitutional dialogue, dissent serves, in

part, to help democratize a body that is otherwise fairly undemocratic and would lack transparency.

The justices further described two functions of dissent in which minority opinions can actually enact more immediate change: opinions that aim to compel legislative action and opinions that aim to offer practical guidance to the legal community. These dissents demonstrate that in spite of the fact that dissenting opinions can help bring voice to different viewpoints, the mere publication of these opinions does not create any binding law in and of itself. In writing dissents that provide more immediate, practical guidance, justices can enable their opinions to have a greater effect on the legal and legislative communities in less direct ways, thereby addressing the fact that their dissents set no actual precedent.¹⁵³

Dissent also helps to mitigate another potential problem in the American legal system: namely, the cohesion of Court decisions across many years and many different justices. Given that both Court and public opinion can change rather dramatically over time, there have been a variety of instances in which more modern justices' decisions have overturned the rulings of their predecessors. In a system guided by the doctrine of *stare decisis*, in which past cases are supposed to serve as a precedent for future ones, threats to Court cohesion over time can undermine the operation of the Court itself. In these situations, dissents can serve as a tool for retaining cohesion across the winding path of Court decisions. Dissents that support the overturning of a precedent demonstrate that judicial thought has not changed quite so dramatically even when the law itself is changing because minority opinions show that similar

¹⁵³ See Antonin Scalia's dissent in *TVA v. Hill*, 437 U.S. 153 (1978) and Ruth Bader Ginsburg's dissent in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007).

thought processes have been shared in the Court across long stretches of time.¹⁵⁴ Thus, future-oriented dissents can help to solve key issues of Court cohesion.

Finally, some of the justices detail a function of dissent as helping to express a strongly held belief of one or more justices. This function addresses the fact that each individual member of the Court's opinions both impacts legal decisions while also serving to create that justice's individual legacy as a jurist. In making a point to repeatedly express a strong conviction, a justice can make it clear for the historical record precisely where they stand on a given issue and why they do so. This use of dissent also illustrates a core difference discussed in Chapter Two of this paper: unlike in Jewish law where later redactors ultimately decided on key issues of when and where to include dissent, in U.S. constitutional law, the justices are responsible for making their own decisions for when to add their voice to the constitutional dialogue. This creates a function for dissent in U.S. law without any real parallel in the Talmud because the rabbis reflected in the Talmud were not able to consider their legacies while the text was being redacted.

In both Jewish and U.S. law, the rabbis and justices describe the ways in which they see dissent improving their respective legal systems. By detailing dissent as a model to later Jews and as the expression of the divine will, the rabbis underscore dissent as promoting civil and flexible argument and as a tool that enables the legal tradition to follow a single interpretation without entirely rejecting other viewpoints. With this understanding, dissent also implicitly addresses some of the key problems that the rabbis faced in ensuring their own interpretive authority within Jewish law. The Supreme Court justices, in a different fashion, see dissent playing a wide variety of purposes within their tradition—functions that largely address the fact that the Supreme Court is inherently undemocratic and that dissenting opinions are granted no

¹⁵⁴ Scalia, "Dissents," 19.

institutional authority in U.S. law. Through dissent, the justices are able to better democratize the Court by giving voice to multiple viewpoints. Similarly, dissent allows individual justices to voice their own opinions for the historical record and to achieve greater systemic sway with their opinions through creating other avenues to enact present change.

Dissent as a Weakening Force

In considering the functions of dissent detailed by the Talmudic redactors and Supreme Court justices, it is also valuable to understand the ways in which they express concern about minority opinions. This analysis requires two distinct categories that fall under the broader umbrella term of “dissent”: individual dissents and the general practice of dissent within each tradition. In surveying the writings of rabbis and justices regarding this issue, both groups for the most part speak favorably of dissent as an institutional practice, but each has more nuanced opinions regarding how dissent should be used concretely.

The Talmud draws several important distinctions between positive and negative forms of dissent. In Pirkei Avot 5:17, the tractate that deals largely with ethical teachings, the text describes some disputes as beneficial and others as problematic:

Every dispute that is for the sake of Heaven, will in the end endure; But one that is not for the sake of Heaven, will not endure.

Which is the controversy that is for the sake of Heaven? Such was the controversy of Hillel and Shammai.

And which is the controversy that is not for the sake of Heaven? Such was the controversy of Korah and all his congregation.¹⁵⁵

The passage distinguishes between two types of disputes: those that are “for the sake of heaven” which will endure and those that are not for heaven and therefore will not endure. In drawing this distinction, the Talmud asserts that some dissents possess heavenly intentions and thus are good,

¹⁵⁵ m. Pirkei Avot 5:17 (Kulp).

while others do not and are therefore bad. The text illustrates these two types of disputes by providing specific examples of each: the arguments between Hillel and Shammai and the controversy of Korah. As described in Chapter Two, the disputes between Hillel and Shammai are upheld in other portions of the Talmud as a key model of argumentative flexibility in which both sages can voice their opinions but “did not persist in their opinion[s]” when met with stronger logic.¹⁵⁶ Further, the school following Hillel is lauded as authoritative precisely because of its interpretive and argumentative practices: prioritizing the oppositional views of the school of Shammai before its own.¹⁵⁷ In this context, we can understand Pirkei Avot as indicating that argumentative behaviors of this nature fall within the category of heavenly-oriented disputes.

In opposite fashion, the controversy of Korah, a reference to a figure from the Hebrew Bible, is described in the non-heavenly category of dissent. In Numbers 16, Korah leads an attempted rebellion against the leadership of Moses while the people of Israel are traveling through the desert towards the promised land. Korah leads a group that criticizes Moses’s leadership, telling Moses and Aaron ““You have gone too far! For all the community are holy, all of them, and [God] is in their midst. When then do you raise yourselves above [God’s] congregation?””¹⁵⁸ Ultimately, God ended the rebellion through a strong demonstration of his power by opening the ground so that it swallowed Korah and his followers.¹⁵⁹ Korah’s grievance with Moses centered on the very general fact that Moses was made leader over him—no specific issues with his style of leadership are specified in the text. Further, Korah expresses his disillusionment with Moses by raising up a group against him rather than engaging in discussion about his misgivings. God made it clear that He did not approve of such disagreement by

¹⁵⁶ m. Eduyot 1:4 (Kulp).

¹⁵⁷ b. Eruvin 13b (Koren - Steinsaltz).

¹⁵⁸ Numbers 16:3 (JPS 2006).

¹⁵⁹ Numbers 16 (JPS 2006).

ensuring that the group quite literally did “not endure.”¹⁶⁰ Thus, this passage seems to indict dissents that challenge divinely-authorized authority and do not engage in civil argumentation.

An additional tractate that deals with matters of criminal law, tractate Sanhedrin from the order of Nezikin, also details a danger in dissent. Sanhedrin 88b explains that “From the time that the disciples of Shammai and Hillel grew in number, and they were disciples who did not attend to their masters to the requisite degree, dispute proliferated among the Jewish people and the Torah became like two Torahs.”¹⁶¹ This passage criticizes the later disciples of Hillel and Shammai, specifically at a point at which the two schools grew larger in number and paid less heed to the teachings of their respective founding sages. As a result, the two groups engaged in increased dispute without finding ways to reach a consensus, resulting in the Jewish community splintering—with the legal tradition becoming “like two Torahs.” In offering this criticism, the text asserts another important warning for a system that largely valorizes dissents: if parties in a dispute cannot find common ground at the end of their disagreements, it threatens to tear apart the unity of the entire system. Here, the Talmud warns that when disputes fall too far from the exemplary practices of figures like Hillel and Shammai, dissent can cause fractures in a community rather than unifying it. A legal community that cannot eventually reach consensus and agree to a single normative practice—to follow one Torah—will not exist for very long because factions will emerge and follow their own separate understandings of the law. In other words, dissent is beneficial as long as those with minority viewpoints can eventually set aside their differences and abide by the decision of the majority.

¹⁶⁰ Joshua Kulp, “English Explanation of Pirkei Avot 5:16,” Sefaria, Accessed April 26, 2022, https://www.sefaria.org/English_Explanation_of_Pirkei_Avot.5.17.1?ven=Mishnah_Yomit_by_Dr._Joshua_Kulp&lang=bi.

¹⁶¹ b. Sanhedrin 88b: 7 (Koren - Steinsaltz).

These passages offer rather extreme examples of the downfalls of dissent. The story of Korah is one in which the “dissenter” did not engage in any sort of discussion or debate over his grievances and chose instead to express his views by gathering a group against Moses. In other words, the example dispute deemed to be “not for the sake of heaven” by the text contains little-to-no actual disputation. Here, the Talmudic redactors seem concerned with behavior that inhibits thoughtful debate rather than with the idea that argumentation could seriously harm the system. However, the content of the dissent, beyond the way in which it was expressed, is also important. The issue over which Korah raises dissent is whether Moses should be in power. As previously discussed in Chapter One, the rabbis view themselves as part of a divinely-authorized lineage that connects their authority to that of Moses himself.¹⁶² Thus, the fact that they deem a threat to the authority of Moses as an inappropriate form of dissent may also demonstrate their concern over dissent which threatens groups viewed as established figures of authority, like the rabbis themselves. Similarly, the concerns expressed in Sanhedrin 88b, seem to indicate an anxiety over the ways in which having conflicting opinions can separate groups—at least, to the extent that they could break apart into entirely separate traditions. The rabbis clearly express concern over students of the law who do not follow the model path of figures like Hillel and Shammai in which parties in a disagreement embrace the practice of dispute but ultimately arrive at a singular normative decision. In sum, this passage demonstrates a rabbinic concern that extreme and divisive forms of dissent can be problematic, whether it be dissents that do not engage in genuine debate, dissents that threaten the divinely appointed authority, dissents that create factions in the community, or some combination of all of these reasons.

¹⁶² m. Pirkei Avot 1:1 (Kulp).

From a U.S. legal perspective, the justices surveyed unanimously support dissent as a broad practice in the Court, viewing it as an important component of their decision-making process.¹⁶³ These jurists, however, had mixed views on whether every single instance of dissent should be lauded. Some justices, for instance, express an understanding that unanimous decisions are more welcomed by the public than those “marred” by dissent, and thus argue that justices should exercise some level of caution in choosing to dissent. Justice Ginsburg highlights this opinion, writing:

No doubt, as Chief Justice Roberts suggested in his confirmation hearings, the U.S. Supreme Court may attract greater deference, and provide clearer guidance, when it speaks with one voice. And I agree that a Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary? Consider the extra weight carried by the Court’s unanimous opinion in *Brown v. Board of Education* [347 U.S. 483 (1954)]. In that case, all nine Justices signed one opinion making it clear that the Constitution does not tolerate legally enforced segregation in our Nation’s schools.¹⁶⁴

The idea expressed here by Justice Ginsburg, that unanimity is preferable to disunity because unanimous decisions may assert greater authority, is shared among many of her fellow jurists. Other justices, however, see unity as beneficial, only if it is the result of genuine and not forced consensus: “When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence,” Chief Justice Hughes writes, “But unanimity, which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time.”¹⁶⁵ To Hughes, the public’s confidence in the Court is intrinsically tied to “the character and

¹⁶³ Though many justices not surveyed in this chapter have similarly supported the practice of dissent, some historically have not. Justice Learned Hand once wrote that having dissent “is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.” See Urofsky, *Dissent and the Supreme Court*, 9.

¹⁶⁴ Ginsburg, “The Role of Dissenting Opinions,” 3.

¹⁶⁵ Urofsky, *Dissent and the Supreme Court*, 9-10.

independence of the judges,” which is why eroding that confidence through eliminating dissent would ultimately harm the public’s faith in the Court.¹⁶⁶ Interestingly, even in asserting his fervent belief in the importance of dissent, Hughes also submits that opinions issued unanimously generally increase confidence in the decision. The idea that unanimous opinions—particularly when the result of a genuine agreement on the Court—are stronger than split decisions is relatively well accepted among the justices surveyed in this chapter. With this understanding that consensus can strengthen while dissensus can weaken public support of an opinion, justices like Ginsburg and Roberts see dissent as an important tool that should be exercised with care. Dissents that are not, in the words of Ginsburg, “necessary,” are seen by these justices as a negative, degenerative force on the Court.

The worry of jurists like Ginsburg or Roberts is that dissent can be used too frequently and in instances when it would be preferable not to include it because a unanimous decision would carry greater weight. These justices understand unanimous decisions to indicate a stronger mandate from the Court than in cases in which there is dissent. This view underscores the fact that decisions in U.S. law can only possess a single authoritative ruling because Judaism is a tradition marked by legal monism. The existence of dissent—of an argument that seeks to identify flaws with the majority’s logic—thus serves to undermine the final determination reached. Particularly in instances in which the majority is issuing a decision that may contradict the common practice or firmly held beliefs of large swaths of people (as was the case in the pivotal case of *Brown v. Board of Education* that Ginsberg referenced in discussing the benefits of unanimity), these justices see dissent as a negative force that serves to weaken the majority

¹⁶⁶ Urofsky, *Dissent and the Supreme Court*, 9-10.

decision. In certain situations, it may be beneficial for the Court to deliver decisions with the strongest mandate possible: unanimity.

A Comparative Analysis of Dissent

The rabbis' and justices' views of dissent—in terms of both its benefits and drawbacks, as described by these groups—reflect some important similarities and differences between the function of dissent in these systems. In both traditions there is a clear tension at play with respect to how dissent is viewed: on the one hand, both the Talmudic redactors and Supreme Court justices understand dissent to play an important and valuable function in the tradition. On the other hand, each group also recognizes that *certain types* of dissent can be a negative force that works against the integrity of their respective systems.

In the Talmud, dissent, on the whole, is seen as a force that gives greater voice to the divine word. Any individual dissent is viewed as increasing the expression of the divine will within the Jewish community, not as weakening the majority decision. Dissent poses a weakness to the system only when it is not practiced “properly” or, more specifically, when it serves to undermine the authority of the rabbis. This includes instances when parties do not engage in debate, when the threat of violence is used, when groups choose not to arrive at any sort of consensus to determine a normative practice, or when groups explicitly threaten a divinely-authorized leader. In other words, the threat posed by dissent to Jewish law is described primarily in instances when dissent manifests in a form that does not promote civil, honest debate which is ultimately set aside in deference to the view of the majority and to rabbinic leadership.

In U.S. constitutional law, dissent enables the Court to gain a level of cohesion across history, while also allowing justices certain avenues towards enacting change in the present or

expressing their viewpoints for the historical record, even when they are not in the majority. Further, dissent can be used to advance the broader constitutional dialogue, allowing justices to point out perceived errors in the majority's reasoning or interpretive approach such as expressing what they believe to be the "true" meaning of the Constitution. At the same time, dissent, even when written entirely in line with standard Court practice, is generally viewed by the justices as a force that weakens the majority opinion. Accordingly, in U.S. law, some justices view individual dissents as negative forces in instances when they think the Court and nation would benefit from the strong mandate of a unified decision from the Supreme Court.

An important difference between these two systems lies in the fact that the Talmud does not describe dissent executed in a "proper" way as negative, while some U.S. justices do see certain dissents that fall in line with standard Court practice as nonetheless problematic because they can undermine the majority's decision. In a sense, this distinction is not entirely firm: Ginsburg's notion that some dissents are "necessary" while others are not does point to the idea that dissent is appropriate and beneficial as long as it is delivered with good reason, which parallels the rabbinic idea of "disputes for the sake of heaven." The core distinction between the view of dissent in these systems, however, is the fact that even dissents that are delivered with "necessary" reasons in U.S. law are still understood to weaken majority opinions to some degree. By contrast, in Jewish law, dissenting opinions that abide by the rabbinic standards for "heavenly" dissents are not described as inherently undermining the majority viewpoint.

In order to understand this distinction, two related separations between these systems emerge: first, Jewish law is polysemic while U.S. law is monosemic, and second, as a result of this difference, each system deploys the notion of divine or original will differently.

Talmudic law, as characterized by the rabbis, is pluralistic and polysemic: different groups are encouraged to present different opinions with the understanding that these competing expressions can all collectively advance the divine will. In this context, dissents are expressive of the divine word in and of themselves, but they are not normative because only a single practice can be followed which is determined by the will of the majority. In the Talmud, the rabbis uphold the notion that all parties who argue within certain bounds can further the will of the divine, thus it is actively discouraged in the tradition for any individual rabbi to claim to speak exclusively or with greater authority to the divine will.¹⁶⁷

In U.S. law, though dissenting opinions are certainly permitted, it is not a pluralistic tradition because dissent is not actively promoted and the system is strictly monosemic in that only a single decision can ever be viewed as the correct expression of the law at any time. Under this system, competing views about the original intent of the framers of the Constitution are often deployed in order to argue for one viewpoint over another. Dissenters often claim to more accurately reflect the meaning of the Constitution as intended by the nation's founding fathers who constructed it. As a monosemic system, however, understanding the "true" meaning of the Constitution is necessarily a zero-sum game: only one group can lay claim to a correct interpretation and that group is determined on a majoritarian basis. Accordingly, though each system places great importance on the will of its "founder(s)," the rabbis and justices deploy this idea in different ways because of their clashing embraces of polysemy and monosemy.

These systems do share a key similarity: an appreciation of dissent. Though the writings of the rabbis and justices each betray their beliefs that dissent can undermine their legal systems, both groups, on the whole, emphatically embrace the practice. Their characterizations of dissent

¹⁶⁷ b. Bava Metzia 59a-b (Soncino).

illustrate how the institutionalization of minority opinions does help legitimize the rabbis' and justices' authority. The rabbis, through promoting dissent, were able to push forward notions that benefit the scribal, debate-based tradition they established for Judaism. Similarly, the justices, in staking a vast claim to interpretive authority in U.S. law, created an inherently undemocratic institution, which dissent has helped democratize.

In spite of the pitfalls of allowing and institutionalizing competing viewpoints in two legal systems which each only follow a single decision on any given legal matter, both Talmudic and U.S. constitutional law, on the whole, greatly benefit from dissent. These benefits may help explain why dissent remains a steadfast and celebrated component of each of these traditions in modern times.

APPENDIX

Talmudic Law: A General Overview

The Talmud is one of the most important texts in modern Judaism, alongside the Hebrew Bible itself. The core of the text consists of two key components: the Mishnah and the Gemara. The Mishnah is a collection of Jewish oral law, which rabbinic Judaism holds was given from God to Moses at Mount Sinai at the same time as the written Torah and then was preserved orally for subsequent generations. This Oral law was eventually written down in the first few centuries CE by a group of rabbinic scholars called the Tannaim, who largely worked in Palestine until the text was given its final form by Judah ha-Nasi as the Mishnah in the early third century CE. The Mishnah is divided into six Orders, each dealing with laws surrounding certain types of topics, and the Orders are further subdivided into tractates and then chapters.

In the centuries following the Mishnah's final compilation, another group of scholars, known as the Amoraim, wrote lengthy commentaries on the Mishnah. The Amoraim worked primarily in Babylonia and Palestine, and these two centers of scholarship produced distinctive sets of commentaries on the Mishnah, called Gemara. Together, the Mishnah and Gemara make up the Talmud. Since scholars were writing commentaries in both Babylonia and Palestine, two versions of the Talmud exist: the Jerusalem Talmud (*Talmud Yerushalmi*) and the Babylonian Talmud (*Talmud Bavli*). The former was completed about 100 years earlier than its Babylonian counterpart and is much less comprehensive; as a result, it is considered the less authoritative of the two texts. The commentaries do, however, share a variety of teachings because there was an ongoing scholarly exchange between the two schools.¹⁶⁸ Today, the term "Talmud" is typically used in reference specifically to the Gemara from the Babylonian Talmud; thus, those two terms

¹⁶⁸ Jacobs, *The Talmudic Argument*, xiii.

are used interchangeably throughout this paper. Today, the Talmud and the written law from the Hebrew Bible comprise the core of Jewish law, known as *halakhah*.

The modern-day Talmud is the product of many centuries of religious scholarship. A single page from a modern edition of the Talmud demonstrates the complex rabbinic commentaries that have been written over the course of more than a millennium. At the very top of the page, the Tractate name, chapter number, and chapter name are listed. The most central box of text contains the Mishnaic passage followed by the Gemara (an analysis of the passage by the Amoraim). In most modern versions of the Talmud, to the immediate right of this center-most passage is the commentary by Rashi, an important Rabbinic scholar from the eleventh century, while to the immediate left are the commentaries by the Tosafot, a group of European medieval Talmudic scholars. Surrounding these three blocks are other commentaries, notes, and references. This paper exclusively considers the Talmud itself and not the later commentaries. Similarly, in modern times, complex traditions have developed around Talmudic hermeneutics, and many Jews also hold additional, more-modern legal codes and texts as authoritative, namely the *Mishneh Torah* and *Shulchan Arukh*. These later developments in Jewish law are similarly not considered in this paper.

U.S. Constitutional Law: A General Overview

At the heart of the U.S. legal system lies the Constitution of the United States: the charter of government that lays out the U.S. governmental structure; divides power between the legislative, executive, and judicial branches; and details certain key laws and rights of American citizens. The Constitution was written at the Philadelphia convention in 1787 and was then ratified by states in their own conventions during the following years—finally taking effect in

1789. The Constitution includes a system for its own amendment. First, amendments may be proposed by a two-thirds vote of both the House of Representatives and the Senate or by a constitutional convention, if requested by two-thirds of the states. Second, a proposed amendment must be ratified by three-fourths of the states either by a vote of the State legislatures or by state ratifying conventions.¹⁶⁹

While the Constitution serves as the supreme law of the land, the U.S. federal government and individual state and local governments can create laws and statutes governing people within their jurisdictions. All federal and local laws, however, are superseded by the Constitution and thus cannot breach any rights that it endows. The body ultimately responsible for ensuring that the Constitution is upheld is the Supreme Court. Article III of the Constitution establishes the Supreme Court as the highest court of the land, and centuries of legal precedent set by the Court has more clearly defined its role in upholding the nation's law. In order to ensure that the Constitution is followed, the Supreme Court has the power to exercise judicial review—the review of actions taken by the executive and legislative branches to ensure that they abide by the Constitution. The Court also has the power to review certain decisions made by states if the issues involve federal law or constitutional matters. Accordingly, the Supreme Court is the body that is most responsible for interpreting the meaning of the Constitution. While all levels of the U.S.'s vast legal structure greatly influence the lives of Americans, this paper will

¹⁶⁹ The amendment process was quickly put to use after the Constitution took effect because certain states only agreed to ratify the Constitution if it also included a bill of rights, similar to the ones contained in most state constitutions at the time. Accordingly, the first 10 amendments to the Constitution, known as the Bill of Rights, were quickly adopted and took effect in 1791. Throughout the nation's history, the Constitution has been amended 17 additional times for a total of 27 amendments, most recently in 1992. For further background on early U.S. Constitutional law, see Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State*, (Oxford University Press, 2003), Oxford Scholarship Online.

exclusively focus on dissenting opinions issued by the Supreme Court—the judicial body that exerts the highest authority over Constitutional interpretation.

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