David C. Flatto on
The Crown and the Courts: Separation of Powers in the Early Jewish Imagination

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**Biographies**

**Moderator:**


**Speaker:**

**David C. Flatto** received a B.A. and Ordination from Yeshiva University, a J.D. from Columbia Law School, and a Ph.D. with distinction from the Department of Near Eastern Languages and Civilizations at Harvard University. He is a professor of law and Jewish philosophy at Hebrew University. He was previously a professor of law and religion at Penn State University, and a visiting professor and lecturer at Penn Law School, NYU Law School and Yeshiva University. He has also served as a fellow at NYU Law, Tikvah Center, and a visiting researcher at Yale Law School. Experienced as an educator and lecturer, he was honored in 2003 with a Teacher Recognition Award from the U.S. Department of Education.


**Commentators:**

**Dr. Elana Stein Hain** is Scholar in Residence and Director of Faculty at the Shalom Hartman Institute of North America, where she serves as lead faculty, directs the
activities of the Kogod Research Center for Contemporary Jewish Thought and consults on the content of lay and professional leadership programs.

A widely well-regarded teacher and scholar, Elana is passionate about bringing rabbinic thought into conversation with contemporary life. To this end, she created *Talmud from the Balcony*, an occasional learning seminar exposing the big ideas, questions, and issues motivating rabbinic discussions; she leads the *Created Equal Research Seminar* which considers the relationships between gender consciousness and Jewish thought; and she co-hosts *For Heaven’s Sake*, a bi-weekly podcast with Donniel Hartman and Yossi Klein Halevi, exploring contemporary issues related to Israel and the Jewish world.

Elana earned her doctorate in Religion from Columbia University where she wrote her dissertation on the topic of legal loopholes as a prism for understanding rabbinic views on law and ethics. She is an alumna of the Yeshiva University Graduate Program in Advanced Talmudic Studies (GPATS) as well as the Consortium in Jewish Studies and Legal Theory Graduate Fellowship at Cardozo School of Law. She also served for eight years as a clergy member on the Upper West Side of Manhattan, at both Lincoln Square Synagogue and the Jewish Center, has taught at the Wagner School at NYU, and sits on the board of Sefaria: A Living Library of Jewish Texts.

**Michael A. Helfand** is the Vice Dean for Faculty and Research, and Professor of Law at Pepperdine Caruso School of Law. Professor Michael Helfand is an expert on religious law and religious liberty. A frequent author and lecturer, his work considers how U.S. law treats religious law, custom and practice, focusing on the intersection of private law and religion in contexts such as religious arbitration, religious contracts and religious torts. His academic articles have appeared in numerous law journals, including the Yale Law Journal, New York University Law Review, Duke Law Journal, Minnesota Law Review, Boston University Law Review, Southern California Law Review, and University of Pennsylvania Journal of Constitutional Law. In addition, Professor Helfand often provides commentary on clashes between law and religion, writing for various public audience publications, including The Wall Street Journal, the Los Angeles Times, USA Today, the National Law Journal and the Forward.

Professor Helfand joined the Pepperdine Caruso Law faculty in 2010 where he has taught Contracts, Arbitration Law, Jewish Law and seminars in Law and Religion as well as Multiculturalism and the Law. Professor Helfand also serves as the Interim Director of the Nootbaar Institute for Law, Religion and Ethics as well as a member of the faculty of the Straus Institute for Dispute Resolution. In addition, he serves as both an arbitrator and consultant for the Beth Din of America.
THE FOLKTALES OF JUSTICE: TALES OF JURISDICTION*

PROFESSOR ROBERT M. COVER**

I. INTRODUCTION

The word "law" resonates richly in the language and mythology of western civilization. H.L.A. Hart began his great work, The Concept of Law, with an inquiry into the persistence of the question "what is law?" in our jurisprudence.¹ He argued that it is strange that such an apparently elementary question has persisted in jurisprudence while no analogous question such as "What is chemistry?" has occupied other areas of human inquiry.² Hart’s answer to his own question is, in some sense, the book, itself. He stresses and illuminates the analytic perplexities that constitute the deep structure of our concept of law. But there is an historical and political answer to Hart’s question which may be more to the point. The literature on the question “what is law?” is voluminous and continues to grow not because there are analytic difficulties in our conceptual apparatus—our categories—in this field. There are, indeed, such difficulties, but they are no greater than analogous problems in the categories of the sciences. In the sciences, however, the illumination of a deep structural ambiguity hitherto uncaptured by the “chemistry” paradigm does not lead to another round in a perpetual argument over "what is chemistry" but to the creation of new fields like “biochemistry” or “molecular biology.” The new fields take as their standard cases the problematic case for “chemistry.” The label itself is not the object of controversy.

A label may be the object of controversy, however, if the question is not “what is chemistry?”, but rather, “what is science?”³ For the word “science” is a heavily loaded one, freighted with normative significance. If one is doing “science”—which may or may not be chemistry—then the legitimacy of the enterprise is not in question, only the appropriate administrative label. Such labels are matters of convenience. But if one is not doing science at all, then the charge is that the enterprise itself

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* This paper was the basis for the 1984 John E. Sullivan Lecture given on November 15, 1984 at Capital University Law School.
** Chancellor Kent Professor of Law and Legal History, Yale Law School.
2. Id.
3. The philosophy of science in recent decades is frequently a debate about what is science. Thomas S. Kuhn’s The Structure of Scientific Revolutions (1962) has been enormously influential in defeating simplistic earlier models of “scientific method” as systems of observation, hypothesis, confirmation/disconfirmation. Michael Polanyi’s brilliant work Personal Knowledge (1958) represents a still earlier and in some ways richer critique of what was then conventional philosophy of science.
is outside the scope of legitimate inquiry for a certain sort of truth. 4

The word "law", itself, is always a primary object of contention. People argue and fight over "what is law" because the very term is a valuable resource in the enterprises that lead people to think and talk about law in the first place. "Law" evokes the law given on Sinai, Solon's legislative enterprise, Kant's categorical imperative. On a political level, it connotes legitimacy in the exercise of coercion and in the organization of authority and privilege. 5 On a philosophical plane it connotes universality and objectivity. Legal positivism may be seen, in one sense, as a massive effort that has gone on in a self-conscious way for over two centuries to strip the word "law" of these resonances. 4 But the sacred narratives of our world doom the positivist enterprise to failure, or, at best, to only imperfect success. 7

Historicist and analytic debunking of "law" have, indeed, rendered the term problematic. There is now a counter-resonance. For law has

4. Thus, the battle over the label science is fought out not only on the front of philosophy: what is science? what is scientific method? but also through various heavily loaded questions for particular fields: e.g., is Psychoanalysis a science? is its method scientific? See, e.g., N.Y. Times, January 15, 1985, at C1. See also M. EDELSON, HYPOTHESIS AND EVIDENCE IN PSYCHOANALYSIS (1984).

Similarly, great heat and everlasting smoke may be generated over the question of whether "social science" is "science". More narrowly, still, consider the debates over the "scientific" character of IQ testing. And, also, the long debate over the issue of whether ESP studies can be called "scientific."

5. It is a resource in legitimation, in aspirations to ideas of justice and in ambition for social control. See, e.g., E. P. THOMPSON, WHIGS AND HUNTERS 258-269, especially 260-64 (1975). "Most men have a strong sense of justice, at least with regard to their own interest. If law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just." Id. at 263 (emphasis in original).


7. The fact that "law" is located in our myths and stories as a powerful attribute of legitimate authority creates a potential ironic twist in the political consequences of positivist theory. The positivist assures us that evil "law" is "law" nonetheless, that the character of something as "law" cannot depend upon its moral qualities. Yet, the mythologies that we share do give that which is law legitimating force not by virtue of a sound analytic argument but by virtue of brute facts of culture, language and history. The result of the two vectors of positivism and cultural legitimation may be the unwanted greater legitimation of evil law. Positivism breaks down psychological barriers to outright conscription of the word "law" to nefarious purposes which natural law thinking might create. There remains, however, especially among the masses—sufficient cultural force to the symbolism of law that the evil law is given a substantial degree of legitimacy it would not otherwise have. Whether such a situation is "stable" is doubtful.
also come to suggest the mask of privilege. Nonetheless, the very meaning of law as an effective mask or ideology would be lost were the word to lose its primary mythic resonances. The struggle over what is "law" is then a struggle over which social patterns can plausibly be coated with a veneer which changes the very nature of that which it covers up. There is not automatic legitimation of an institution by calling it or what it produces "law", but the label is a move, the staking out of a position in the complex social game of legitimation. The jurisprudential inquiry into the question "what is law" is an engagement at one remove in the struggle over what is legitimate.

I have recently staked out a position about the nature of law that has obvious and consciously chosen political significance. My position is very close to a classical anarchist one—with anarchy understood to mean the absence of rulers, not the absence of law. Law, I argued, is a bridge in normative space connecting [our understanding of] the "world-that-is" (including the norms that 'govern' and the gap between those norms and the present behavior of all actors) with our projections of alternative "worlds-that-might-be" (including alternative norms that might 'govern' and alternative juxtapositions of imagined actions with those imagined systems of norms.

In this theory, law is neither to be wholly identified with the understanding of the present state of affairs nor with the imagined alternatives. It is the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there. Law connects "reality" to alterity constituting a new reality with a bridge built out of committed social behavior. Thus, visions of the future are more or less strongly determinative of the bridge which is "law" depending upon the commitment and social organization of the people who hold them.

The above is not a definition of law; it is a plea to understand the legitimating force of the term in a certain way. It is a plea to grant all collective behavior entailing systematic understandings of our commitments to future worlds equal claim to the word "law". The upshot of such a claim, of course, is to deny to the nation state any special status for the collective behavior of its officials or for their systematic understandings of some special set of "governing" norms.

The critical legal studies movement has certainly been a primary force in placing the ideological functions and the "legitimation" process at the heart of contemporary legal scholarship.
of such "official" behavior and "official" norms is not denied the dignity of "law." But it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs. The organized behavior of other groups and the commitments of actors within them have as sound a claim to the word "law" as does the behavior of state officials. The most important consequence of this radical relativization of law is that violence—a special problem in the analysis of any community's commitments to its future—must be viewed as problematic in much the same way whether it is being carried out by order of a federal district judge, a mafioso or a corporate vice-president.\(^\text{15}\)

I have argued not only that the nature of law is a bridge to the future, but also that each community builds its bridges with the materials of sacred narrative that take as their subject much more than what is commonly conceived as the "legal." The only way to segregate the legally relevant narrative from the general domain of sacred texts would be to trivialize the "legal" into a specialized subset of business or bureaucratic transactions.\(^\text{16}\)

The commitments that are the material of our bridges to the future are learned and expressed through sacred stories. Paradigmatic gestures are rehearsed in them. Thus, the claim to a "law" is a claim as well to an understanding of a literature and a tradition. It doesn't matter how large the literature or how old the tradition. Sinai might have been yesterday or four thousand years ago; the text might be two tablets or the infinity of Borges' library of Babel.\(^\text{17}\)

In my earlier work on this subject, I considered primarily the commitments and narratives of those communities who would make a law for themselves apart from that of the State. I believed and still believe that that emphasis is a necessary corrective to the imbalanced character of almost all contemporary legal theory. Nonetheless, I did consider briefly the commitments that are implicit in the assumption of jurisdiction by official judges of the state.\(^\text{18}\) In that section of my earlier work I criticized most jurisdictional reasoning as largely apologetic, state-

15. Please note well, here, that I am not saying that all violence is equally justified or unjustified. I am claiming that it is problematic in the same say. By that I mean that the form of analysis that we enter into to determine whether or not the violence is justified is the same. That same method will, of course, if it is any good at all, not yield the same answer with respect to dissimilar cases.

16. Cover, supra note 11, at 19-25. See also the important work of James White arguing for the significance of such narrative materials in the "culture of argument." J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); White, Law as Language: Reading Law and Reading Literature, 60 TEX. L. REV. 415 (1982).


18. Cover, supra note 11, at 53-60.
serving enterprises. I did conclude, however, with the following, undeveloped thought:

It is possible to conceive of a natural law of jurisdiction. . . In elaborating such a law . . . a judge might appeal to narratives of judicial resistance. . . . He might thus defend his own authority to sit in judgment over those who exercise extralegal violence in the name of the state. In a truly violent, authoritarian situation, nothing is more revolutionary than the insistence of a judge that he exercises such a "jurisdiction"—but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic. . . .

Such a hermeneutic of jurisdiction [texts], however, is risky. It entails commitment to a struggle, the outcome of which—moral and physical—is always uncertain.19

In this article, I take up the task of elaborating on the idea that there are sacred narratives of jurisdiction that might constitute the texts to ground judicial commitments. In part II, I shall consider one category of such texts—the resistance to "Kings". In Part III, I shall consider another, more problematic category—bringing the Messiah. Part II treats of the minimal aspirations of our myths for autonomous "law." Part III treats of the place of law in more comprehensive Utopian reorderings of the world.

II. OF JUDGES AND KINGS

Leonard Koppett once wrote that the most important single fact about hitting a baseball and the one least mentioned explicitly is fear.20 There is in the archetype of an upright judge—as there is in the upright batter—an important element of having conquered a fear, a fear which is always present yet almost forgotten. To understand that fear and its significance we must tell the stories that remember the fear and rehearse the gestures we make in response to it.

There is in the Talmud, tractate Sanhedrin, a fascinating account. The law in the Talmud (Mishneh) seems clear: "The king does not judge and we do not judge him."21 This rule appears to state a not unexpected norm of sovereign immunity and a perhaps unexpected norm of sovereign judicial incapacity. The rule was enunciated almost two thousand years ago and it will, as we shall explore, perhaps ring some bells concerning English law in the seventeenth century.22 In any event, the Talmud, hav-

19. Id. at 58-60.
21. MISHNEH SANHEDRIN, II, 3.
22. See notes 29-37 infra and accompanying text.
ing stated the rule in question, asks about its origin. Let me quote the answer in full:

But why this prohibition? Because of an incident which happened with a slave (servant) of King Yannai, who killed a man. Simeon b. Shetah (head of Sanhedrin) said to the court of sages: Be bold and let us judge him. They sent for the king saying, your slave killed a man. The King sent the slave to them. They sent to the King saying you must appear with him. He appeared but sat down before the court. Then Simeon b. Shetah said, Stand on your feet, King Yannai, so witnesses may testify against thee. For you do not stand before us but before He who spoke and the World was created. The King replied, 'I will not act by your word but upon the words of the court as a whole. He then turned to the left and to the right, but all looked at the ground. Then Simeon said, Are you wrapped in thought? Let the Master of thoughts come and call you to account. Instantly, Gabriel came and smote them all and they died. Then it was enacted: The King may neither judge nor be judged, testify nor be testified against. 23

What, we might ask, are we to make of this fabulous tale of a not altogether unreasonable king, a courageous, perhaps foolhardly and somewhat inflexible judge, and the Angel Gabriel? It seems clear enough that the taleteller and the redactor of the text consider it both a cautionary tale and a celebration of courage. Simeon b. Shetah is the hero. He is spared, and his castigation of his cravenly colleagues leads directly to their demise at the hand of the angel. At the same time the incident is put forward to account for a rule of law which, itself, seems to owe more to the cowardice of Simeon's colleagues than to the courage of their leader. The rule which results from the incident is not, after all, that Courts judge Kings courageously and impartially, but that they do not judge them at all. Before we begin an analysis of this very common paradox of jurisdiction, we should explore, for a bit, the historic episode that may lie behind this fabulous story.

The tales of the Talmud may be founded in myth or history. They may owe their fabulous character to literary or religious imagination, to failure to appreciate and preserve scientific historicity, or to the need—in some periods—to disguise a story with revolutionary implications. In the case of the story of King Yannai and Simeon b. Shetah we have another ancient source which tells a similar though by no means identical tale. In his work, Jewish Antiquities, the hellenized Jewish historian, Josephus, related a story which, if true, took place in 47 B.C.E. almost forty years after the death of King Yannai.

23. BABYLONIAN TALMUD [hereinafter cited as B.], Sanhedrin, 19a-19b.
Antipater the Idumite had been appointed the governor or procurator of Judea by Caesar. He executed his office while Hyrcanus II, the hereditary, legitimate, ruler of the Jews, descendant of the Hasmonean family of high priests, served as high priest and titular King of the Jewish nation. Both Hyrcanus and Antipater strongly supported Caesar and the Romans in their Egyptian campaign. In return, Caesar supported Hyrcanus in his conflict with Aristobulus II over Hasmonean succession. Antipater, at least for a while, formed an alliance with Hyrcanus. Antipater's second son, Herod, still very young, was made governor of the Galilee. There, he succeeded in boldly putting down a group of bandits or rebels, killing the leader and a number of others. According to Josephus, this and other acts formed the basis of a series of complaints from leading Jews that Antipater and his sons had become the de facto rulers of Judea and that Hyrcanus and the Jews were left with but a shadow.

The complainants fastened upon the fact that Herod's execution of the leader and some men of the band of brigands without judicial trial violated Israel's law. They asked that Herod be brought to account for this act. Hyrcanus, whether for political or personal reasons, summoned Herod to be tried for the act. [The servant of the king had killed a man]. Josephus suggests that Hyrcanus may have then received some sort of instructions or requests from Sextus, Roman governor of Syria, that Herod be acquitted. In any event, Josephus tells us that Herod arrived with a bodyguard of troops and stood before the Sanhedrin or Court with those troops, an act which had the desired effect:

he overawed them all, and no one of those who had denounced him before his arrival dared to accuse him thereafter; instead there was silence and doubt about what was to be done.

Josephus then goes on with a remarkable parallel to the Talmud's tale.

While they were in this state, someone named Samaias, an


25. Id. at 170. See also Loeb Edition, at 539 note e. There is a somewhat more abbreviated version of this event related in Josephus, I The Jewish War, 211 (reprinted by Penguin, G. Williamson, at 48-49). In The Jewish War, Josephus attributes Hycranus' motive in bringing Herod to trial entirely to jealousy. He sees the event as one involving a play by Hyrcanus to regain real power which was blocked by Sextus acting as ally and patron of Herod.

26. JOSEPHUS, supra note 22, at 171. See also JOSEPHUS, supra note 23, at 201 note ff. In The Jewish War the trial scene is not related but Josephus does say that Herod "presented himself in Jerusalem, accompanied by a strong escort—not so swollen a force as to suggest the intention of dethroning Hyrcanus, nor small enough to leave him helpless in face of jealousy." Id. at 211.
upright man and for that reason superior to fear, arose and said, 'Fellow councillors and King, I do not myself know of, nor do I suppose that you can name, anyone who when summoned before you for trial has ever presented such an appearance. . . But this fine fellow Herod, who is accused of murder . . . stands here clothed in purple, with the hair of his head carefully arranged and with his soldiers around him, in order to kill us if we condemn him as the law prescribes, and to save himself by outraging justice. But it is not Herod whom I should blame for this . . . but you and the King for giving him such great licence. Be assured, however, that God is great, and this man, whom you now wish to release for Hyrcanus' sake, will one day punish you and the King as well.' And he was not mistaken in either part of his prediction. For when Herod assumed royal power, he killed Hyrcanus and all the other members of the Sanhedrin with the exception of Samaias.27

Hyrcanus, by Josephus' account, saw that Samaias had moved the Court and postponed any decision so that Herod could escape. At that point, Herod resolved not to answer any future summons.28

While there are difficulties and possible internal contradictions in Josephus' account, it plainly described an historical moment of great danger in the jurisdiction of the Sanhedrin—a moment the moral enormity of which is captured in the Talmud's tale. That the historical referent for both tales was the same event has long been recognized even by traditional Medieval Jewish commentators on the Talmud for whom Josephus was hardly a canonical text.29

27. JOSEPHUS, supra note 22, at 172-76. The identity of Samaias is a matter of scholarly dispute. See Loeb Edition at 540-41 note a, for difficulties in piecing together the parallel accounts.

28. JOSEPHUS, supra note 22, at 177-79.

29. See HIDUSHEI HALAHOTH VE. AGGADOT MAHARSHA (Novellae of Laws and Legends of Samuel Eliezer ben Judah Ha-Levi Edels, 1555-1631) discussing B. SANHEDRIN 19a: "[T]he reason he (the King) did not send him (the servant) to them and emancipate him (thus removing his own legal responsibility to answer) may have been that the servant was dear to him and it was hard for him to put him to death. And when he first sent him before them he relied on the supposition that they would not judge him from fear of the King since he was the servant of the King as they say. And so it appears from Josephus that this murdering servant was Herod and the King wanted to save him." (My translation).

See L. FINKELSTEIN, II THE PHARISEES, 684 n.6 (1938) for a discussion of some nineteenth and twentieth century critical scholarship on the event in question. The discussion of the MAHARSHA on this question, which I have translated above, shows that the identification of the two stories long antedates the Wissenschaft des Judentums sources cited by Finkelstein.

The persistent question concerning the identity of "Samaias" in the account of Josephus is of interest. Shammai the Elder—who is one of the candidates for the role—is
Before we begin an analysis of this story, it is well to compare it to a striking counterpart in seventeenth century English legal history. The special, sacred history of the common law treats as one of its high moments the opinion supposedly enunciated by Chief Justice Coke in the matter reported by him and published posthumously under the style, *Prohibitions Del Roy*.30 King James, you will remember, had become angry at the writs of prohibition emanating from the common law courts and directed at the Court of High Commission. Some of these prohibitions had issued with respect to the power of High Commission to punish puritans for breaches of ecclesiastical discipline. The culmination of a string of acrimonious disputes over the use of the writ of prohibition by the common law courts to restrain High Commission came in *Fuller’s Case*.31 Nicholas Fuller was a barrister who had defended puritan dissenters in trouble over breaches of discipline. In one case before High Commission, Fuller had overreached a bit in his rhetoric, complaining

said, by the Talmud, to have differed with the majority of the Sages in that he held that one who procures the murder of a third person at the hand of an agent is nonetheless completely responsible as a murderer. See B. *Kiddushin*, 43a. While there is absolutely no basis in either the Talmud’s account or the account of Josephus for believing that the trial of Herod ever got to the point of a discussion of legal principles grounding Herod’s liability as commander for acts done at and under his command, it is nonetheless interesting that Shammai did advocate from a minority position the only rule of law which would have rendered Herod criminally liable. Moreover, Shammai’s proof text is II Samuel c.12, v. 9: “... you killed him with the sword of the Ammonites.” referring to David’s sending Uriah to the front against the Ammonites.

The identification of Herod and Yannai occurs elsewhere in Rabbinic literature. I’m not sure what to make of it, but in Megillath Ta’anith, ch. 11., we find:

“On the second of Shevat is a holiday and not for lamentations. And why is this different from, “that [the first day] for as to the first day, it is not written that there not be lamentations,” and here it is written. On the first day (of Shevath) Herod died and on this (second) day Yannai the King died. And it is a joy before the Holy One Blessed Be He when the wicked are removed from the world. They said: ‘when Yanai got sick he captured 70 Sages of the elders of Israel, put them in prison, and commanded the officers of the prison: If I die, kill the Elders. So that to the extent that Israel is joyful (at my death) may they lament their teachers.’ They said: ‘He (Yannai) had a good wife, Salome by name. When he died she removed the ring from his hand and sent it to the officer of the prison. She said to him, your master in (by) a dream has freed these sages. He freed them and they went home. Afterward she said, Yannai, the King is dead. And on that day that he died they make a holiday.’”

Josephus tells almost exactly the same story concerning the death of Herod. JOSEPHUS, The Jewish War, Book I, 660 et seq. In JOSEPHUS, it is Herod’s sister, Salome, who saves the Jewish leaders. (This is not the Salmone of The New Testament.)


31. Nicholas Fuller’s Case, 12 COKE 41; See also Bowen, supra note 29, at 293-301.
of the process before the Court of High Commission as "popish, under jurisdiction not of Christ but of anti-Christ." This inspired advocacy led contemporaries to remark that Nicholas Fuller had "pleaded so boldly for the enlargement of his clients that he procured his own confinement."32

The question of whether the common law courts could issue writs of prohibition to deny to High Commission the power to punish a barrister for contempt was the context in which the greatest of the common law texts of jurisdiction was written. Fuller was finally committed to prison though not for contempt but for, inter alia, schism and heresy over which it was conceded that the ecclesiastical courts had jurisdiction. Nonetheless, the case had precipitated a showdown on the issue of who was to be the final arbiter of jurisdiction within the English legal system. Archbishop Bancroft argued that the final determination of the respective jurisdictions of courts could and should properly rest with the King, himself, since all judges derived authority from him.33 Coke, if we are to believe his own account of the affair, answered not only the Archbishop, but the King, himself, with the ringing words that:

true it was that God had endowed his Majesty with excellent science and great endowments of nature. But his Majesty was not learned in the Laws of his Realm of England; ... With which the King was greatly offended, and said that then he should be under the Law, which was treason to affirm (as he said). To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et Lege—that the King should not be under man, but under God and the Law.34

It is striking that in this case, as in the case of Simeon b. Shetah, there is an alternative to the canonical version of the event. Contemporary historians have largely rejected Coke's self-serving account,35 relying instead on other seventeenth century evidence including a letter from Sir Roger Boswell to Dr. Milborne which recites that:

his Majestie fell into that hight indignation as the like was never knowne in him, looking and speaking fiercely with a bended fist, offering to strike him etc., which the Lo. Cooke perceiving fell flatt on all fower; humbly beseeching his Majestie to take compassion on him and to pardon him if he thought zeale had gone beyond his dutie and allegiance.36

In both of our stories of judges and Kings we find an unambiguous canonical text in which the courageous judge challenges the King, af-

32. BOWEN, supra note 29, at 299.
33. Prohibitions del Roy, 12 COKE at 63; BOWEN, supra note 29, at 303-04.
34. Prohibitions del Roy, 12 COKE at 65.
35. BOWEN, supra note 29, at 305-06.
36. Id. See also Usher, supra note 29, at 673.
firms the value of an impersonal law or source of law over the King and places the authority of the Court to speak the law—its jurisdiction—upon that impersonal foundation. The didactic power of these stories inheres in part in the literary form—the compression of the messages into a concentrated text which, itself, depicts a highly focused and artificially circumscribed stage upon which the action unfolds. In short, the classic “unities” are observed. History is rarely so neat. The processes by which Courts acquire the concepts of independence of jurisdiction and relate it to the autonomy of the law are long and complex. Moreover, the acts by which judges resist political subordination of themselves, their courts, and their law almost always entail prudential as well as principled behavior. Samaias, in Josephus’ account, may have simply seen more clearly than did his colleagues, that Herod was a man to be unambiguously crushed or else catered to. If Josephus is to be credited, Samaias may have been principled in opposing Herod but he later became Herod’s political ally. Similarly, according to Usher and Holdsworth following him, Coke cowtowed to King James but lived to continue his struggle on technical grounds in Common Pleas. Moreover, he completed his texts which became the canon after his death.

These texts and countertexts provide an interesting context for asking what the respective places of myth and history are in the building of law. It is important to note that from an “inside” perspective it is Coke’s report not Boswell’s letter that is the “source of law”, the “privileged” text, the citation for the future. From the “inside” perspective of Jewish law it is the Talmud not Josephus that is the privileged text. History certainly should provide cold water to throw upon any overzealous inclination to read these canonical texts uncritically. But the complex and circuitous paths of history ought not be permitted to obscure the proper destination of our journey. It is the canonical myths that supply purpose for history. They are the stories we would write and would live if we could. If we could we would, as judges, be the Lord Coke of the Reports, the Simeon b. Shetah of tractate Sanhedrin. The legitimating objective of jurisdiction, these canonical texts proclaim, is prophetic not bureaucratic. As a judge, one must be other than the King not because of the need for specialists in dispute resolution, but because of the need to institutionalize the office of the Prophet who would say to the King, as Nathan said to David, “You are that Man”; As Simeon b. Shetah said to Yannai, “Stand! before He who spoke and the World

37. JOSEPHUS, supra note 22, at 176: “[Herod] held him in the greatest honour, both because of his uprightness and because when the city was later besieged by Herod and Sossius, he advised the people to admit Herod. . . .”

38. See Usher, supra note 29. See also HOLDSWORTH, 5 HISTORY OF ENGLISH LAW 430-31 (1903).

39. II SAMUEL, ch. 12, v. 7.
was created”; As, Coke said to James I, “. . . under no man, but under God and the Law.” For that ultimate purpose—speaking truth to power—there must be a jurisdiction of the judge which the King cannot share.

At the moment the judge so speaks—if he so speaks—he is naked. Much, perhaps in one sense, all, of the complexity of jurisdictional lore from ancient times to our own day arises from a contra—motif produced in the tales through the awefulness of that very realization when it comes to both Judge and King. If the judge does not call the King to account—if the King is not judged—then the judge will not stand there, as Nathan, as Simeon, as Edward Coke, stripped of institutional protection against the power that ordinarily stands behind the Court. Prudential deference, thus, is the great temptation, and the final sin of judging.

In both the historical context for Prohibitions del Roy and in the case of King Yannai/Herod, the gesture of courage is conjoined with pragmatic concession. It may be that had the craven colleagues of Simeon been more courageous, they would all have survived. It may also be that they all would have died and Simeon with them as their leader. It may be that Lord Coke would have produced a greater gesture if we were left in no doubt as to his standing tall before the King. It may be that, in fact, he kissed the royal feet, that gesture rescued both the author of his great texts and the texts themselves from destruction. We can never be sanguine about the capacity of courage to rescue itself. Still, the gesture of courage is the aspiration, perhaps fabricated by Coke, certainly rescued in the talmudic account by a deus ex machina—the Angel Gabriel, himself. Nonetheless, were the gesture and aspiration of resistance not the principal motif of these stories, we would have no reason to remember them or to make them our own. We would need no myth to prepare us to cave in before violence and defer to the powerful. We must get the relative roles of myth and history straight. Myth is the part of reality we create and choose to remember in order to reenact. It is intensely personal and committed. History is a counter-move bringing us back to reality, requiring that we test the aspiration objectively and prudentially. History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would become; only history can tell us how hard it will really be to become that.

III. BRINGING THE MESSIAH

I have spoken until now of the fearful act of speaking law to power and of the necessarily difficult tightrope act that judges must perform precisely in these most challenging of cases.

Imagine yourself a tribunal. Pretend you have an audience—a community of some sort that will recognize you as a tribunal. Now, go all
the way. What grandeur of transformation of the normative universe would you perform? Will you simply issue a general writ of peace? A warrant for justice notwithstanding facts and law? Will you order everyone to be good? Perhaps, perhaps you will judge the dead? Or even bring God as a defendant? The possibilities are endless and the question arises whether or why one should or should not try something outlandish, impossible, or just plain daring. (Now, I am not speaking of jokes. If you are to try God you must believe in God.) If law, however, is a bridge from reality to a new world there must be some contraints on its engineering. Judges must dare, but what happens when they lose that reality?

I want to explore a couple of outlandish attempts to do more with a court then perhaps we would think might plausibly be done. Among the folktales of justice are a few serious comedies as well as the tragedies we always rehearse. The first of these tales is a serious enough attempt to create a Court to bring the Messiah in 1538 in the Holy Land. The second is more recent history: the Bertrand Russell/Jean Paul Sartre Vietnam war crimes tribunal in Sweden and Copenhagen in 1967. Both of these events had much about them that cannot be captured in the idea of courts and jurisdiction. But they each had something as well which approaches an idea of jurisdiction based on "pure" legal meaning divorced from power and coercion in every way. As such they are worth studying.

A. The Renewal of Semikhah at Safed, 1538

Jewish law has traditionally distinguished between the authority exercised by ordinary judges and that exercised by truly ordained judges. Ordination, or semikhah, the laying on of hands, was a transference of authority that supposedly traced back through an uninterrupted chain to Moses, himself. Only a truly ordained judge could decide certain classes of cases, especially those involving fines or criminal penalties. Sometime, probably in the fifth century, the chain of ordination was broken. Indeed, Roman authorities had tried to prohibit semikhah much earlier, though according to the Jewish sources they never totally wiped it out. The end of the chain of semikhah, shrouded in mystery, did not bring a sudden or catastrophic change in the actual practices of Jewish courts. For one thing, most elements of criminal jurisdiction had been taken from these courts by the Roman authorities centuries before the end of semikhah. Moreover, to the extent that Non-Jewish authorities permitted a measure of criminal jurisdiction to the Jewish courts, Jewish law evolved doctrinal ways of permitting that power to be exercised.

40. ENCYCLOPEDIA JUDAICA, sub nom. Semikhah.
41. B. SANHEDRIN, 13b-14a.
by judges who did not have true semikhah. Categories of penalties imposed by virtue of the exigency of the hour were exempted from the semikhah requirement. In short, as one might suppose would happen, legal fictions and categories were created to accommodate the formal requirements of the system to reality.42

The formal characteristics of the system continued, however, to have some impact. Certain penalties, —those biblically mandated—were not carried out by unordained judges. Moreover, the cosmological significance of human jurisdiction was impaired. For example, according to the Talmud, many transgressions are punishable by “excision.”43 This penalty is signaled by the biblical phrase, “And he shall be cut off . . .” Rabbinic law had taught that this penalty meant that the person who transgressed would either die an untimely death or, alternatively, that he would not have a place with Israel in the world to come after the Messiah.44 But the penalty or excision could be avoided by the experience of the very this-worldly punishment of flogging for the violation in question.45 But precisely in this respect the fictions surrounding the exercise of rabbinic authority cut deeply. For the floggings imposed by the bible were among the true biblical penalties that unordained judges could not impose. On the other hand, they could impose flogging for rebellion against rabbinic authority. But were floggings imposed for rebellion efficacious in preventing the penalty of excision? Of such stuff are academic legal discussions made. And you can be sure that such academic discussions there were in the thousands. But even academic discussions may become pressing matters if conditions are ripe.

In 1492 the Jews were exiled from Spain, the home of the most important and brilliant of Jewish communities in the world. The disaster of that exile existed at several levels. Homelessness and economic losses were catastrophic. Cultural loss was equally great as the dominant scholars and artists of the Jewish world lost their communities and tried to start afresh as refugees and wanderers. If communities in Turkey and the East profited greatly from the dislocation, it was at a great cost to those who were themselves dislocated. Among the refugees were many who had undergone at lest nominal conversion to Christianity during the disastrous years attending the exile. Those pseudo-Christians or Marranoes frequently viewed themselves as having committed a grievous

42. For an interesting compilation of these fictions and subterfuges see E. QUINT & N. HECHT, I JEWISH JURISPRUDENCE, IT'S SOURCES AND MODERN APPLICATIONS, 139-213 (1980). The terms fictions and subterfuges” is mine and would not, I think be an acceptable characterization of “exigency jurisdiction” to Quint and Hecht themselves. For a much more aggressive posture on the application of exigency jurisdiction, see J. Ginzberg, Mishpatim Le’ Israel: A Study in Jewish Criminal Law (Hebrew) (1956).
43. See Mishneh Kritoth I, 1.
44. MAIMONIDES, Mishneh Torah, Laws of Repentance, ch. 8, ¶ 1.
45. B. Makkoth, 23a-b.
sin—one punishable by excision—in the acts attending their conversion. Their attempt to find solace, or more precisely penitence, was an important phenomenon, particularly among the most religiously active and pious of the refugees. A second phenomenon of importance was the wave of Messianic anticipation that attended the disasters in the wake of the Exile. 46

Both of the phenomena mentioned above raised the problem of the true status of Jewish courts and judges. The penitents needed, or so some of them thought, a tribunal that could impose upon them the true biblical lashings that would absolve them from the penalty of excision, especially now that there were signs of the coming of the Messiah. The coming of the Messiah, itself, was related to the renewal of Semikhah. For, in Isaiah, Chapter 1, we have a Messianic proof text: “I will return your Judges as of Old, your counselors as at the beginning; And (then) you shall be called the faithful city. . . .” 47 All rabbinic authorities agreed that the return of the judges referred to true judges: namely those ordained in the tradition that went back to Moses. The text from Isaiah thus provided an occasion for the use of law to express powerfully needs and aspirations that are not themselves necessarily legal. 48

The precise legal question that was raised was whether it was possible to reconstitute semikhah—true ordination—once it had been lost, as all agreed it had been, long before the sixteenth century. For the position that such a bold act of jurisdiction creation was possible there was the word of the greatest of medieval Jewish authorities, Maimonides, himself. There were two texts in the Maimonidean corpus in which the issue was addressed as a legal question. In Maimonides’ Commentary on the Mishnah, written while Maimonides was a young man and completed in 1168, the Great Eagle wrote that if all the sages of the Land of Israel should agree to reinstitute semikhah and should all agree on one of their number to be the head of the academy, then that person would be truly ordained and would have the power to pass on the ordination to others. 49

46. In particular, there was a major Messianic anticipation surrounding the life and martyrdom of Solomon Molcho (1500-1532). Molcho, himself, was a reconverted Marrano. He had predicted that a Messianic event would occur in 1540, and many of his followers believed he had been miraculously saved from the stake in 1532. For the Messianic background to the Safed events, see, e.g., R. Werblowsky, Joseph Karo, Lawyer and Mystic, 97-99 (1976); Y. Maimon Hidush Ha Sanhedrin Be Medinnatenu Ha Mehudeesheth (1967). See also Encyclopedia Judaica, sub nom. Molcho, Solomon.
48. For examples of law as a medium of expression, see Cover, supra note 11, at 8.
49. Maimonides, Mishneh Commentary, Sanhedrin, I, 3: “And I reason that if there be agreement from all the students and sages to appoint a man of the Academy—that is that they make him Head—on condition that this be in Israel—then behold that would make that person ordained and he could ordain whomever he wished.”
In his great code, the Mishneh Torah, written in 1180, Maimonides takes a somewhat more equivocal position:

It seems to me that if all the sages in the land of Israel agree to appoint judges and to ordain them then they would thereby be ordained and could judge matters of fines and could ordain others. . . . And the matter requires reflection.  

These texts suggested a blueprint for the reinstatement of ordination, even if it was not clear what the reflection on the matter would yield. Maimonides, himself, reasoned that there had to be a formal, legal process for reinstatement of semikhah, in part because he was not prepared to take an apocalyptic perspective on Messianism. Indeed, Maimonides held that the Messiah himself could do nothing against the law. He would have no power to change or transform the law, but only to oversee its more perfect implementation. Thus, it was necessary that the verse “I will renew your judges . . .” be amenable to realization without postulating any extra-legal act by the Messiah or by God.

Maimonides' texts and the texts surrounding the renewal of Semikhah in Safed leave little doubt that for this legal civilization “true jurisdiction” was a sacred aspiration, a part of Messianic fulfillment. The justice that was rendered as part of their daily lives—and these Rabbis were all judges in their communities—was an inadequate and pallid reflection of the justice that could be rendered by true courts. The active approach to Messianism taken by many in the generation after 1492 included the view that those acts which were necessary preconditions to the Messiah which could be done by human beings should be done by them to hurry the Messiah on his way. Among those acts was the renewal of Semikhah—the return of the Judges.

By the 1530's there was a geographic center to the Messianic yearnings, to the Kabbalistic approaches to manipulation of the cosmos and to the legal scholarship that in Judaism had never been divorced from the esoteric approaches to religion. That center was Safed, a small city in the Galilee. There probably had been speculation and preparation for a renewal of Semikhah in Safed for a year or two prior to 1538. Jacob

50. MAIMONID, MISHNEH TORAH, LAWS OF SANHEDRIN, ch. 4, ¶ 11.
51. MAIMONIDES, supra note 49. Maimonides' reasoning in this respect led later commentators to engage in elaborate textual exegesis to determine whether there were proof texts for a scenario in which Maimonides' requirement for a return of judges without abrogating the law could be satisfied without also postulating some concrete legal act for reinstating semikhah. See, e.g., the commentary of Yom Tov Heller on Mishneh Sanhedrin I, 3 (Tosephoth Yom Tov) suggesting that Elijah the Prophet who undoubtedly has Semikhah will precede the Messiah and will ordain the judges.

52. On the connection between Messianism and the renewal of Semikhah see R. WERBLOWSKI, supra note 44, at 122-25.
53. On Berab's role in creating the academy and its spirit, see Dimitrovsky, Rabbi

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Berab, the dominant scholar in the town, seems to have attempted to create an academy of colleagues that enacted his vision of what the Great Sanhedrin had been and would be. Berab was able to mold a community out of such great and often conflicting figures as Joseph Karo and Moses b. Isaac Trani (The MaBIT). While we do not know a lot about the communal processes that led up to the fateful renewal of Semikhah, we can guess that there must have been an intense interpersonal atmosphere of moral energy and collegial pride to produce such an act. For, the act was an act of supreme juridical chutzpah (nerve). Rabbi Jacob Berab, the head of the Academy in Safed, the acknowledged leader if not the acknowledged master among them, was made the head of the academy as outlined by Maimonides and was given Semikhah. The sages of Safed were unanimous in their appointment of Berab and in their intent to renew Semikhah. They proclaimed their act through a message sent to the sages of Jerusalem through one of their number. In the message sent to Jerusalem they also purported to confer upon the leader of the sages of Jerusalem, Rabbi Levi Ibn Habib, ordination by virtue of the new authority of Berab.

The missive to Jerusalem was, of course, necessary from two perspectives. First, Maimonides had written of the necessity for the consent of all the sages in Israel. Outside of Safed, which was by the 1530's the dominant community in Israel, Jerusalem was the only town in the holy land which had a community of scholars worth noting. At the very least, the consent of Ibn Habib and of his colleagues appeared necessary to follow the outline that Maimonides had left. Quite apart from the legal validity of the acts in question without the assent of the Jerusalem sages, was the political force of the failure to secure their approval. It was hardly likely that the rest of Judaism would take the Safed experiment seriously without such assent.

In fact, Ibn Habib considered the missive from Safed and quickly concluded that it had no basis in law according to the normal canons.
of standard legal reasoning. A war of pamphlets ensued between Berab and Ibn Habib with some assistance from others on both sides. Eventually, a request for a formal opinion was also sent to Rabbi David Ibn Abi Zimra (RaDBaZ), one of the great authorities of the time, then residing in Egypt. He sided with the sages of Jerusalem and, by his own account, sent them a responsum denying the power to renew semikhah.58

We can hardly ignore the fact that for the Rabbis of Safed this was not a case of standard legal reasoning. Indeed, the most eloquent testimony to this fact is a "dog that didn't bark." Rabbi Joseph Karo was, as I have said, among the academy that conferred semikhah on Berab. Moreover, he, himself, was one of four disciples of Berab who received semikhah from him when he had to leave the country a year later. Finally, we know that Karo used the authority of Semikhah he had received to ordain still a third "generation" of sages, his disciple Moses Alshekh.59 None of this would be surprising in itself. However, in all of Karo's large legal corpus there is very little that indicates his opinion on the validity of this audacious act. Indeed, Karo wrote a commentary to the Mishneh Torah of Maimonides in which there is a gloss to practically every legal provision in the sections covered by the commentary. The provision in which Maimonides makes his creative and by no means uncontroversial suggestion draws no substantive comment or expression of approval from Karo. It is almost as if Karo managed to keep his legalistic oeuvre mentally separated from this act, the reasons for which were not standard legal reasoning but the necessity to hasten the Messiah.60

There is in the Act of Safed, a daring commitment and a risk of madness. The daring commitment is in this: One of law's usual functions is to hold off the Messiah. Messianism implies upheaval and fairly total transformation. Law ordinarily requires a cautious discernment among commitments: some of these we are prepared to undertake now

58. See gloss of the RaDBaZ, in Maimonides, supra note 47 C.4, ¶ 11 (printed ad loc. in standard editions).
60. R. Werblowski, supra note 44, at 124. There are several references, sometimes oblique, to the Semikhah incident in the strange work, Maggid Mesharim, a sort of mystical diary attributed to Karo in which the Mishneh personified speaks to and through Karo. The authenticity of the attribution was long in doubt though Werblowski has established the work as Karo's to the satisfaction of those competent to judge (of whom I am not one). Id. ch. 2-3. One must note that the Kesef Mishneh was the last of Karo's major works to be completed and he must have looked back at the Semikhah incident from a perspective of it having failed. On the other hand, the MaBiT in his commentary on the Mishneh Torah does explicitly relate the incident. Kiryath Sefer ad loc.
with total subordination of other values; some of these we are prepared to undertake only after specified preconditions shall be met; and some we are not prepared to undertake now but subject to certain prior claims; some we are prepared to undertake only after specified preconditions shall be met; and some we are not prepared to commit ourselves to concretely though we may yet acclaim their value. The readiness to move into a pre-Messianic mode of judicature is a readiness to dramatically increase the range of current legal commitment. It is to evince not only dramatic dissatisfaction with the world as it is, but a looming responsibility for drastic change. Now the natural understanding for a Court confronting a gap between what is affirmed as right and the world as perceived, is that the world will be changed. Courts exercise power to that end. But we know from the study of failed Messiahs that the failure of inflated expectations may entail complex compensations in the perception and understanding of a reality that cannot be brought to coincide with the demand made upon it. The risk, in short, is that the gulf between the redeemed world and the unredeemed will be bridged not by our committed practical behavior, but by our "inner life"—our spiritual and psychological realities. The Safed which was to have been the home of the Great Court or Sanhedrin became the home of Lurianic Kabbalah, increasingly spiritual and esoteric; psychologically demanding; and powerfully expressive of the chasm between the unredeemed fractured world of mortal human kind and the hope and vision that could no longer be grasped through law. Such powerful, expressive movements of the inner life may have revolutionary potential, realized in this case in the Sabbatian Movement in the 1660's. But such movements, though they bring a Messiah, do not do so through law. Sabbatai Sevi was hardly the Messiah Maimonides, Berab, or Karo had projected for the world.

b. Nuremberg and The Creation of A Modern Myth

As the allied victors in World War II set out to punish many of the leaders and other perpetrators of atrocities among the vanquished axis powers, a curious debate took shape about the character that should be given to the punishment proceedings. Almost nobody seriously maintained that the principal perpetrators of the axis war policies should go unpunished. But there was vigorous debate about whether the forms


62. See M. BELGION, VICTORS' JUSTICE (1949) for one view that no punishment was warranted for the "political" crimes.
of law and justice should be used. Charles Wyzanski asked of the trials:

For those who were not chargeable with ordinary crimes but only with political crimes such as planning an aggressive war, would it not have better to proceed by an executive determination—that is, a prescription directed at certain named individuals? 

To be sure, [such an executive determination] is also an exhibition of power and not of restraint. But its very merit is its naked and unassumed character. It confesses itself to be not legal justice but political.

Wyzanski's public challenge to the War Crimes Tribunal took place in April, 1946. We now know that a similar debate about whether to proceed in a juridical or purely political mode took place at the planning stages both within the American Administration and among the allies.

The defense of the Nuremberg Trials—a defense which Wyzanski, himself, came to accept in large part—was sounded at the outset in terms of the capacity of the event to project a new legal meaning into the future. Building a precedent which would be taken seriously was one of Robert Jackson's enunciated objectives. And his retrospective judgment on the event included that objective as one of its principal achievements. The fact of having shed blood in the juridical mode made the precedent one of special character. Wyzanski, by the end of 1946 acknowledged:

But the outstanding accomplishment of the trial, which could never have been achieved by any more summary executive action, is that it has crystallized the concept that there already

65. See R. SMITH, REACHING JUDGEMENT AT NUREMBERG (1977) for debate among allies and something of the debate within the American administration. The internal debate is more comprehensively canvassed in B. SMITH, THE ROAD TO NUREMBERG, supra note 60, give a summary of this material.
66. For the significance of the "aggressive war precedent" to Jackson before Nuremberg, see, e.g., Minutes of Conference Session of July 25, 1945 in U.S. DEPT. OF STATE, REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, 376, 383-84. (1945), Doc. 1.
67. Report to the President by Mr. Justice Jackson, October 7, 1946 in Id. at 437: "We have also incorporated its principles into a judicial precedent. 'The power of the precedent,' Mr. Justice Cardozo said, 'is the power of the beaten path,' One of the Chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction."
is inherent in the international community a machinery both of the expression of international criminal law and for its enforcement.\(^{68}\)

It is important to note that while the unlawful and evil character of the Nazi War seemed self-evident to most, the “aggressive war” crime was also applied across the world in the trial, conviction and execution of Japanese defendants. In retrospect, the Tokyo tribunal judgments seem to have applied criminal sanctions to a range of conduct which was not discontinuous with “normal statecraft” in the way that Nazi policy had been.\(^{69}\) Finally, in a series of trials by Military Commission, American tribunals undertook to punish Japanese General Officers for atrocities committed under their command on a theory of command responsibility which was breathtakingly broad and, as applied, seemed to some almost impossibly demanding.\(^{70}\)

The War Crimes tribunals of 1946 and the Military Commissions that interpreted command responsibility in 1945 employed the forms of jurisdiction in the interests of power. They were, in our typology, instances of Kings using judges. That, indeed, was the essence of the critic’s case. But these were also instances of judges using Kings. It is true that the particular proceedings at Nuremberg and Tokyo were limited to trials of axis defendants. But, the precedent that Jackson believed he was creating and that Wyzanski came to accept as a justification for the Trial was one which could not be so circumscribed.

As a matter of doctrine, the judgments at Nuremberg and Tokyo and the Yamashita enunciation of command responsibility did become part of the law of war of the United States of America.\(^{71}\) However, the controversy about the trials in 1946 had not been so much a controversy over doctrine as one over jurisdiction and its exercise. The issue was not so much whether to make “law” as it was whether to make a Court. In making the Court in 1946 the interests of judges and of Kings converged. What would happen when they came to diverge?

The Vietnam War, twenty years after Nuremberg, created a protracted and complex case study of the life of legal ideas when they come to diverge from the exercise of power through state institutions. Millions of Americans took the Nuremberg principles as their guide for conduct in opposing the Vietnam conflict and in legitimating their large scale opposition to a national war. Those principles were particularly well-

\(^{68}\) C. Wyzanski, Jr., Nuremberg in Retrospect in The New Meaning of Justice, 137, 144 (1966).


suited for legitimating opposition without recourse to alternative loyalties (the old treason rubric) and without requiring any ideology of internationalism (such as WW I pacifist socialism). Moreover, once certain factual premises were accepted, the Nuremberg principles provided the basis for an obligation to oppose such a war.

There were a variety of texts for this application of principle. Richard Falk and Telford Taylor wrote major works legitimating the comparison of Nuremburg to Vietnam. Taylor's small book was particularly important because of the weight of his own person—a chief prosecutor at the second round trials at Nuremburg itself.

With a few lonely exceptions that I shall not go into detail about here the official courts of the United States, when confronted with a variety of challenges to the Vietnam War in terms of the Nuremberg principles, refused to challenge power with law. The courts played a deference game, averting their eyes from the wielders of violence like the sage colleagues of Simeon b. Shetah. Can we expect more from the protected holders of life tenure? Is one of the preconditions for being given such a job the expectation that one will not take advantage of it to seriously discomfort the wielders of power?

The gesture of speaking truth to power was not often made within the official court system; but, it was inevitable that someone would think of institutionalizing the extraordinary popular feeling that Nuremburg was in fact applicable through creating a "court" just as the victorious powers had done in 1946.

In 1967 events took place first in Stockholm, then in Copenhagen which purported to be an "International War Crimes Tribunal." The tribunal was under the "Honorary Presidency" of Bertrand Russell and the "Executive Presidency" of Jean Paul Sartre. There were no individual defendants. The tribunal purported to adjudicate certain questions about the United States—Has the government of the United States committed acts of aggression against Vietnam under the terms of inter-

73. For an account of the exceptions and of the rule see BANNAN & BANNAN, LAW, MORALITY AND VIETNAM (1974); A. D'AMATO & R. O'NEIL, THE JUDICIARY AND VIETNAM (1972). Taylor, it should be noted, did feel the Nuremberg principles were directly relevant to Vietnam and argued eloquently that we should learn that lesson, but he did not think the domestic tribunals of the United States could or should stop the war. See T. TAYLOR, supra note 68, at 120-21. The author of this article has taken the position since 1968 that whether or not they could have stopped the war, judges should have removed themselves completely from the apparatus of complicity. See Cover, Book Review 68 COLUMB. L. REV. (1968).
74. See Cover, supra note 73; the final and most grotesque instance of this averting of the eyes took place in the Howard Levy Case. Parker v. Levy, 417 U.S. 733 (1974).
76. Id. at 17.
national law?—about the conduct of the war; and about the complicity of other governments. There can be little doubt that the tribunal passed a judgment that was in a sense a foregone conclusion. There can also be no doubt that the tribunal was understood to be a tribunal manqué by the very organizers themselves. They disclaimed any intent to bring to justice or punish the perpetrators of the acts they condemned. Yet, the event took the form of a trial and that form was not accidental. It did have force to others as well. The French government denied to some participants the visas necessary to let them convene on French territory for the trial, thus requiring it to be moved to Stockholm. DeGaulle wrote to Sartre that:

Neither is it [the right to hold the tribunal in France] a question of the right of assembly nor of free expression, but of duty, the more so for France, which has taken a widely known decision in this matter [of opposition to the war] and which must be on guard lest a state with which it is linked and which, despite all differences of opinion, remains its traditional friend, would on French territory become that subject of proceedings exceeding the limit of international law and custom. Now such would seem to be the case with regard to the activity envisaged by Lord Russell and his friends, since they intend to give a juridical form to their investigations and the semblance of a verdict to their conclusions. I have no need to tell you that justice of any sort, in principle as in execution, emanates from the State.

DeGaulle thus recognized a kind of force to the tribunal as such in denying it a French location. Needless to say, Sartre did not accept the characterization of the exclusive role of the State in justice which DeGaulle asserted. But in his answer to DeGualle he went somewhat further than nonacceptance. He also answered the question of the mandate by which the tribunal created its own jurisdiction over the matter. In this Sartre recognized and quite correctly delineated a relation between the tribunal and the nonaction of the official world of law.

There was Nuremburg, of course, but after having enforced the laws of the conqueror on the conquered—just laws, for once—the court was quickly disbanded by its creators for fear that one day they might find themselves brought before it. . . .

77. "At no time did we maintain that the Tribunal consisted of men who were agnostic about the war in Vietnam. On the contrary, we proclaimed our conviction that terrible crimes were occuring. . . ." Id. at 7. (Forward by Ralph Schoenman).

78. Opening statement of Jean Paul Sartre: "We are powerless: it is the guarantee of our independence. . . . What is certain, in any case, is that our powerlessness . . . makes it impossible for us to pass a sentence." quoted in id. at 43.

79. Letter from DeGaulle to Sartre, April 19, 1967 cited in id.
Why did we appoint ourselves? For the precise reason that no one else did. Governments or peoples could have done it. But governments want to retain the ability to commit war crimes without running the risk of being judged; they are therefore not about to set up an international body responsible for judging them. As for the people, save in time of revolution they do not appoint tribunals; therefore they could not appoint us.  

Sartre expressed some hope that the tribunal either continue or be a precedent for similar bodies to take cognizance of other war crimes around the world. But the important thing to note here is that the act of utopian jurisdiction-making was, in simple terms, an anarchist variant of a state institutional response. For Sartre it is perhaps second best. But any response, whether by the courts of states, revolutionairy tribunals, or the Russell tribunal would share the legal meaning created still earlier by the primal act of Nuremburg. It is an irony of the history of this age that Nuremburg—an act often characterized as a fig leaf for naked power, bore as offspring the attempt to empower the fig leaf standing alone. The "lynching party" of Robert Jackson, to use Hugo Black's phrase becomes Lord Russell's affront to the dignity of the United States which France would not abide—an affront that had the juridical defects not of a lynching, but of a tea party.

IV. CONCLUSION

The Russell/Sartre tribunal, like the Sanhedrin that R. Jacob Berab tried to set up, was a philosopher's realization of an ideal type. But both "Courts" refrained from acts that might have tested definitively their capacity to transform their worlds. Had the Russell/Sartre tribunal purported to license or solicit political assassination against particular defendants it would certainly soon have confronted a test in blood concerning the legitimacy of the "trial" and conviction of the defendants. For reasons of principle as well as prudence the "Court" took only actions which could—in a liberal democracy—be characterized by others not as a "Court" but as dramatization, or instruction. Berab and the elders he ordained in Safed never acknowledged any defect in their ordination. But, they, too, so far as we know, refrained from taking specific action that would test either world Jewry's view of the legitimacy of their status or the Turkish overlord's authority. They used their "ordination" but probably only for purposes for which the defective, routine ordination of ordinary Rabbis would have sufficed.

The caution which the Utopian jurist exercises in this regard is parallel to the caution that the state's judge exercises before the King.

80. Id. at 33.
Both thereby maintain the connection between law and reality. Both risk losing law to the overpowering force of what is and what is dominant. Integrity in both kinds of judges is the act of maintaining the vision that it is only that which redeems which is law.
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A REAPPRAISAL AND THEIR LEGACY

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THE FIRST CONSTITUTION:
RETHINKING THE ORIGINS OF RULE OF LAW AND
SEPARATION OF POWERS IN LIGHT OF
DEUTERONOMY

Bernard M. Levinson*

This Article demonstrates the overlooked contribution of the ancient Near East to the development of constitutional law. The legal corpus of Deuteronomy provides a utopian model for the organization of the state, one that enshrines separation of powers and their systematic subordination to a public legal text—the “Torah”—that delineates their jurisdiction while also ensuring their autonomy. This legislation establishes an independent judiciary while bringing even the monarch under the full authority of the law. Deuteronomy’s implicit model for a political constitution is unprecedented in legal history. Two of its cornerstones are fundamental to the modern idea of constitutional government: (1) the clear division of political powers into separate spheres of authority; and (2) the subordination of each branch to the authority of the law. This legislation was so utopian in its own time that it seems never to have been implemented; instead, idealism rapidly yielded to political pragmatism. Nonetheless, Deuteronomy’s draft constitution provides an important corrective to standard accounts of constitutional legal history.

INTRODUCTION

The purpose of this Article is to open a new avenue for inquiry into the role of The Bible in the history of the Western legal tradition. Recent trends in American public life demonstrate the enduring importance of The Bible as a source of persuasive authority. However, the debate over the role of religion and The Bible in public discourse is

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often framed as a “culture war” between the so-called “religious right” and the secular left. The implication of this characterization is that The Bible can only be read in one particular way, namely from a literalistic, evangelical perspective. Therefore, the contribution of The Bible to law and public debate is often limited to selected texts chosen to support one particular and predictably narrow political ideology. This Article


2 Not all evangelicals are biblical literalists, and not all biblical literalists are evangelicals. However, the public perception of the “religious right” often leads large numbers of individuals to equate the biblical interpretive strategy of literalism with the broad theological movement of evangelicalism. The evangelical movement has a complicated history in the United States, and generalizations about the evangelical community, like most stereotypes, are sometimes misleading. See MARK NOLL, AMERICAN EVANGELICAL CHRISTIANITY: AN INTRODUCTION (Blackwell Publishers 2000) (surveying the history of evangelicalism in the United States).

3 All citations to The Bible in this Article employ the following convention:

<table>
<thead>
<tr>
<th>Citation Format</th>
<th>Refers to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Genesis 1</td>
<td>Genesis, chapter 1</td>
</tr>
<tr>
<td>Genesis 1:4</td>
<td>Genesis, chapter 1, verse 4</td>
</tr>
<tr>
<td>Genesis 1-3</td>
<td>Genesis, chapters 1 through 3</td>
</tr>
<tr>
<td>Genesis 1:1-5:6</td>
<td>Genesis, chapter 1, verse 1 through chapter 5, verse 6 (inclusive)</td>
</tr>
<tr>
<td>Genesis 1:1-5; 2:4-6</td>
<td>Genesis, chapter 1, verses 1 through 5; and then chapter 2, verses 4 through 6</td>
</tr>
<tr>
<td>Genesis 1:1a (or b)</td>
<td>Genesis, chapter 1, verse 1—specifically, the first half (a) or second half (b) of the verse</td>
</tr>
</tbody>
</table>

Bible citations that occur in footnotes have been set off as parentheticals to improve the clarity of the surrounding text.

4 For example, advocates of so-called “creation science” usually rely on a single account of the origin of all things in Genesis 1. They ignore alternative accounts elsewhere in The Bible that offer very different conceptions of the origin of the physical universe and the emergence of life. These contrasting accounts include one immediately adjacent to the first chapter of Genesis, in which the creation of man precedes the creation of both plants and animals, and where woman is created last, separately from man (Genesis 2:4b-25). This account, which is normally viewed as significantly older than Genesis 1, would be especially hard to reconcile with any normal scientific approach. Yet a third account suggests that God had to defeat some type of mythological sea-creature, Rahab, prior to creating the world (Psalm 89:5-13). In other words, “creation science,” while purporting to be based upon The Bible, is both arbitrary and highly selective in its use of its alleged sources. It fails to take account of the multiple perspectives and intellectual complexity of the biblical text. Similarly, opponents of gay rights often refer to particular prohibitions on male homosexual activity found in Leviticus 18:22 and 20:13 as authoritative for contemporary social policy. Overlooked in the process are the challenges, both historical and hermeneutical, in seeking to apply those ancient laws to modern same-sex relationships. Little attention is paid to the question of how to define what specific activities are prohibited, why they are prohibited, to whom the given prohibitions are directed, or what other prohibitions exist. In actuality, there is every reason to believe that the prohibitions were addressed exclusively to Israelites, were intended only to be implemented in the land of Israel, and did not address oral sex, masturbation, or intracrural intercourse, let alone same-sex activity. Finally, it is not clear why these particular prohibitions are “cherry-picked” and deemed to offer a model for social regulation, while other aspects of the same legislation—which on contextual grounds are equally prescriptive—are conveniently disregarded. At issue, for example, are the biblical dietary laws that prohibit consumption of pork or shellfish (Leviticus 11; Deuteronomy 14:3-20), intercourse during the menses (Leviticus 18:19), the wearing of pants by
the study of the development of certain key legal concepts that are essential to the development of modern constitutional government.

Since the American Revolution, various religious and political figures have claimed a role for The Bible in establishing the American experiment in republican rule. Those claims have often come at the expense of recognizing other influences, such as Enlightenment philosophy. In recent years, the claims of biblical dependence for Anglo-American law have been reborn in the debate over the display of the Ten Commandments in public places. The arguments for the historical importance of the Ten Commandments have often thinly

women (Deuteronomy 22:5), or the harvesting of grain from a field to its edges, lest the alien and the poor be denied the opportunity to support themselves with dignity (Leviticus 19:9-10). For a discussion of the original meaning of the prohibition against male homosexual intercourse, see Saul M. Olyan, And with a Male You Shall not Lie the Lying Down of a Woman: On the Meaning and Significance of Leviticus 18:22 and 20:13, 5 J. HIST. SEXUALITY 179 (1994). For a discussion of these requirements as oriented specifically to Israelites in the land of Israel, see Jacob Milgrom, Leviticus 17-22, at 1565-70, 1749, 1785-90 (Anchor Bible 3A; New York: Doubleday, 2000), 1565–70, 1749, 1785-90). This is not to suggest that intelligent arguments cannot be made for conservative interpretations of The Bible. But the public use of The Bible in political debate rarely engages the text in all its complexity. See, e.g., Michael J. Perry, Christians, The Bible, and Same-Sex Unions: An Argument for Political Self-Restraint, 36 WAKE FOREST L. REV. 449 (2001) (recognizing the multiplicity of religious views on same-sex relationships).


6 See ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (W.W. Norton & Co. 1996). Kramnick and Moore write in a polemical style against what they describe as the party of “religious correctness,” or those advocating a so-called “Christian America.” The authors describe the religiously-correct view of history as one that ignores the complexities of the founding era, while advocating a narrow interpretation of religious influences on the key American historical figures of the late eighteenth century. Religious correctness, in the opinion of Kramnick and Moore, fails to give sufficient weight to the interaction between diverse religious and secular philosophies, including Enlightenment rationalism, as a source of American constitutional thought. While the authors have abandoned many scholarly conventions, such as footnotes, in rebutting what they see as a destructive popular movement, their description of the popular treatment of history by one form of religious extremism is enlightening.

7 The Supreme Court addressed the display of the Ten Commandments in public places in two recent, controversial decisions. Van Orden v. Perry, 125 S. Ct. 2854 (2005); McCreary County v. American Civil Liberties Union of Kentucky, 125 S. Ct. 2722 (2005). In his dissent in McCreary County, Justice Scalia acknowledged a common understanding of the Ten Commandments: “The frequency of [Ten Commandments] displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.” McCreary, 125 S. Ct. at 2760 (Scalia, J., dissenting). Contrast the much more historically-controlled analysis by Jean-Louis Ska, showing that the relative lack of social stratification within the Decalogue distinguishes it from other legal works of the period, and provides a groundwork for a democratic mentality. Jean Louis Ska, Biblical Law and the Origins of Democracy, in THE TEN COMMANDMENTS: THE RECIPROCITY OF FAITHFULNESS 146-58 (William P. Brown ed., Westminster John Knox 2004).
veiled the religious motivations of the display advocates.\(^8\) The back and forth over the display of the Decalogue has generated significant debate over the role of religion in contemporary society, but it produced very little intelligent dialogue about the legal texts in *The Bible* itself. The time has come for the introduction of biblical scholarship into the public debate.

Recorded legal history begins in the ancient Near East.\(^9\) Over four millennia ago, the great civilizations of Mesopotamia established the first systematic legal codes.\(^10\) Over the past century and a half, extensive written remains have been uncovered that are of particular interest to legal historians. This material, much of which is now available in translation, includes criminal codes, property law, international treaties,\(^11\) commercial regulations,\(^12\) family law,\(^13\) and torts.\(^14\) The Old Testament participated in the vibrant interchange of literature and culture that characterized the ancient world. Therefore, in order to fully appreciate the legal texts of *The Bible*, the historian must examine this material in light of ancient Near Eastern assumptions about the political community and the proper ordering of society.

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\(^12\) Martha T. Roth, The Scholastic Exercise: Laws about Rented Oxen (Sumerian Texts), 32 J. CUNEIFORM STUD. 127 (1980).


Advancements in biblical scholarship over the past three centuries have produced significant insights into the historical communities that produced The Bible. The historical-critical method of biblical scholarship attempts to recover the meaning and significance of The Bible in its own original historical context. The goal of this type of inquiry is to use historical methodology to free The Bible from the ideological, political, and religious overlay of the past two thousand years and to view it in terms of the assumptions and world-views of its authors. The historical-critical method does not make any claims about the modern religious authority of The Bible or the role The Bible should play in public life. Instead, a scholarly examination of the social and intellectual history of the text provides a window into the development of the social, religious, and political ideas of the people who lived behind the text.

The literary materials of The Bible and the ancient Near East are rarely directly examined for their role in the development of Western politics and judicial thought. The isolation of the academic disciplines from one another often impairs the constructive examination of ancient texts for their contribution to modern thought. The challenge for non-specialists of approaching the literary development of The Bible over time, through the mastery of ancient texts in their original languages, makes it difficult for political philosophers or legal historians to recognize The Bible as a primary source for the development of constitutional history. Conversely, precisely because of the rigors of academic specialization, biblical scholars have often been reluctant to address such broader theoretical and cultural issues.

This Article argues that a historical-critical reading of Deuteronomy presents a utopian model of community governance that anticipates the modern conception of a “constitution” in two interesting respects: the separation of powers among distinct branches of government; and the rule of law over all political actors—including the monarch. Deuteronomy’s draft constitution, moreover, grounds both of

15 While very little literature directly addresses the influence of the ancient Near East on modern constitutional thought, many scholars have applied analytical insights from the field of religious studies to the interpretation of the American Constitution. E.g., JAROSLAV PELIKAN, INTERPRETING THE BIBLE & THE CONSTITUTION (Yale University Press 2004) (a historian of religion applies the model of doctrinal development in religious tradition to the interpretation of the Constitution over time); Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,” 58 S. CAL. L. REV. 551 (1985) (a legal scholar applies principles of biblical hermeneutics to the interpretation of the American Constitution). The importance of that sort of interdisciplinary dialogue cannot be overstated. However, this Article seeks to demonstrate a need for the dialogue between legal and religious studies on another point. Scholars such as Pelikan and Perry have made a significant contribution by demonstrating the value of applying the analytical methodologies of the study of scripture to the Constitution. This Article seeks to address the correspondence between the content of The Bible as a piece of ancient Near Eastern legal literature and modern constitutional government. The goal of such an inquiry is to foster historical inquiry into an often ignored source of political thought.
these principles upon the notion of an independent judiciary. In Part I, I demonstrate the importance of Deuteronomy as a foundational political document to ancient Jewish communities and suggest the need for a more thorough examination of Deuteronomy in that light. In Part II, I compare the ancient Israelite legal tradition to other legal precedents in the ancient Near East. I argue that the Israelite conception of law diverges from other ancient legal systems through the use of an “origin myth” for the creation of the judicial system, which transforms the role of law in the political community. Unlike ancient Near Eastern analogs, the judiciary is constituted according to specific qualifications for appointment to office; the end being the enforcement of the law, not the will of a particular monarch. In Parts III through VII, I explore the implications of this transformation through the fundamental reordering of social and political institutions. Finally, in Part VIII, I argue that the legal corpus of Deuteronomy presents a draft constitution, unique in its time. This constitution differs dramatically from the royal ideologies of the ancient Near East and later Greek conceptions of monarchical power. By restructuring the social, religious, and political institutions of ancient Israel, the legal corpus provides an implicit model for the separation of powers and the rule of law. A critical reading of Deuteronomy therefore brings to light the first known precedents for two fundamental concepts of modern, secular, constitutional government.

I. **Deuteronomy as a Foundational Political Document**

In the late seventh century BCE, the authors of the legal corpus of the book of Deuteronomy (chapters 12-26)\(^{16}\) provided a comprehensive plan for the transformation of the religious, judicial, and institutional structure of Judah.\(^{17}\) This legal corpus dates to the period when the

\(^{16}\) *Deuteronomy* is cast as a valedictory address by Moses, addressing the Israelites forty years after their escape from slavery in Egypt, as he is about to die, and just as they are about to enter the promised land of Canaan. It consists of a series of speeches in which Moses reminisces about their collective past and enjoins them to obey the covenantal law (Torah) which was given to the nation at Mount Sinai. In literary terms, the core of *Deuteronomy* is found in the legal corpus of chapters 12-26, which contains a blend of religious, political, civil, and criminal law. That legislation is embedded in a literary frame, in which chapters 1-11 recall the events of the exodus, including the revelation at Sinai and the proclamation of the Ten Commandments. Following the legal corpus, *Deuteronomy* continues with ceremonies to ratify the covenant and to enforce obedience to it (26:16-28:68); the commissioning of Joshua as the successor of Moses with emphasis upon the legislation of *Deuteronomy* as a covenant equal in importance to that of the Ten Commandments (29:1-32:52); and finally, a poetic blessing of the twelve tribes of Israel as a form of last will and testament by Moses, along with a prose account of the death of Moses (33:1-34:12). Bernard M. Levinson, *Deuteronomy*, in *The Jewish Study Bible* 356-450 (Adele Berlin & Marc Zvi Brettler eds., Oxford University Press 2003).

\(^{17}\) S. Dean McBride, *Polity of the Covenant Peoples: The Book of Deuteronomy*, in 41
state’s autonomy, if not its existence altogether, was jeopardized by neo-Assyrian hegemony and repeated incursions down the Mediterranean littoral.  

Although its language is legal and its metaphors are religious, Deuteronomy articulates a complex vision of political philosophy, as was already clear in antiquity. The historian Josephus thus speaks of how Moses presented Israel “with these laws and this constitution recorded in a book.” He begins by describing Deuteronomy as “the code of those laws of ours which touch our political constitution,” and concludes by summarizing it as “the constitution that Moses left.”

The two references elegantly frame his review of Deuteronomy and function like an initial superscription and final colophon that formally

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18 The English name of the book—Deuteronomy—means “second law.” That title reflects the perspective that Deuteronomy is a Mosaic rehearsal of law that was previously given in Exodus 19-23. Despite this perspective and the text’s own self-presentation, Deuteronomy is likely not Mosaic in origin (if it were, the book would date to roughly 1240 BCE). More probably, it was written sometime during the seventh century BCE by educated scribes associated with Jerusalem’s royal court. It has long been recognized that there are very striking similarities between the distinctive religious and legal requirements of Deuteronomy and the account of the major religious reform carried out by King Josiah in 622 BCE. That reform had been inspired by the discovery in the Temple of a “scroll of the Torah” (2 Kings 22:8). Josiah’s reform restricted all sacrificial worship of God to Jerusalem and removed foreign elements from the system of worship (technically, the “cultus”); it culminated in the celebration of the first nationally-centralized Passover at the Temple in Jerusalem (2 Kings 22-23). Because these royal initiatives correspond closely to Deuteronomy’s distinctive requirements, scholars have long identified this “scroll of the Torah” as Deuteronomy and assigned the book a seventh-century date.

The historical background of Josiah’s reforms was the increasing threat of foreign imperial domination. The northern kingdom of Israel had fallen under the neo-Assyrian invasion a scant century before (722 BCE; 2 Kings 17). Continuing Assyrian incursions down the coastal littoral had all but reduced Judah to a rump state (2 Kings 18:13). In a desperate bid to preserve the nation’s autonomy, Hezekiah had already made a pact with Assyria (2 Kings 18:13-18). Subsequently, Judah’s political and religious independence seemed to hover uncertainly between the threats presented by Assyria and resurgent Babylon (2 Kings 20:12-15). The resulting military allegiances led to religious syncretism, as foreign forms of worship were imported into the Temple (2 Kings 16:10-20; 21:1-6). In this context, Josiah’s religious reforms represented an important bid for Judean cultural, political, and religious autonomy.

19 Flavius Josephus, the ancient historian who was a commanding officer of the Galilean Jewish forces in the war against Rome (66-70 CE), was born roughly 37/38 CE and died sometime after 100 CE. After being taken prisoner by the Roman forces, he was eventually freed and then served the Roman forces as both translator and mediator. The Jewish Antiquities appeared roughly 93-94 CE. Modeled after Roman historical works, it presents the history of the Jewish people in twenty books, from the patriarchal period right up to the Jewish rebellion against Rome. The intent of the work was to portray for the cultivated Greco-Roman reader the historical antiquity and cultural legacy of the Jewish people. See Judah Goldin, Josephus, Flavius, in 2 THE INTERPRETER’S DICTIONARY OF THE BIBLE 987 (Abingdon 1962).


21 Id. at 571, 621 (Book IV, §§ 198, 302).
classify the legal corpus as a “constitution.” This seeming breakthrough in recognizing Deuteronomy’s political implications must be sharply qualified, however, because the translator of the standard English edition of Josephus, H. St. John Thackeray, sends the wrong message with a significant anachronism. The Greek word πολιτεία [politeia] is not precisely equivalent to the modern concept of a political “constitution” but simply indicates “form of government.”22 The term may encompass such diverse forms of government as monarchy, tyranny, oligarchy, and democracy.23 It serves most famously as the Greek title of Plato’s Republic, where a constitution is not in question. Despite the translation error, which may represent a modernizing apologetic, these quotations confirm the extent to which, already in antiquity, the legislation of Deuteronomy was read as a political treatise. During the first centuries of this era, other Jewish communities, both in Palestine and Babylon, took the same approach as Josephus and regarded Deuteronomy as providing a model government.24

Modern scholarship seems to have lost sight of what the readers of antiquity recognized. A form of cultural amnesia causes the legal literature of the ancient Near East, both Mesopotamian and Israelite, to remain almost completely beyond the academic pale, overlooked by disciplines like legal history, political science, and constitutional theory.25 These disciplines turn almost exclusively to classical Greece and Rome to reconstruct the history of constitutional thought. Even disciplines specializing in the study of antiquity, like Classics, perpetuate a “pristine” vision of Greco-Roman political thought that leaves it remarkably untainted by the cultural legacy of the ancient Near East.26 These difficulties are far from one-sided.27 Scholars in the

22 More accurately, therefore, Josephus refers to how Moses presented Israel with διάταξιν της πολιτείας ἀναγεγραμμένην [this written disposition of the form of government]. Id. at 569 (Book IV, § 194).

23 See Herodotus, The Persian Wars, II, Books 3-4, at 105-15 (A.D. Godley trans., Loeb Classical Library 118, Harvard University Press 1921) (Book III, §§ 80-87). Herodotus (who lived ca. 484-424 BCE) preserves a famous, early exposition of the relative merits of these various forms of political organization. The context is a conversation that he attributes to the Persian conspirators who overthrew Cambyses and who then installed Darius as successor. The generic term used there to subsume monarchy, tyranny, oligarchy, and democracy as “forms of government” is politeia.

24 Deuteronomy was from ancient times viewed as a constitutional model by Jews. The rabbinic patriarchate in Israel during the second century CE and the exilarchate in Babylon were organized in the spirit of Deuteronomy. Daniel J. Elazar, Covenant & Polity in Biblical Israel 196 (Transaction 1995).

25 The work of Eric Voegelin is no exception to this generalization. It imposes a notion of Greek philosophical reason upon the material, failing to come to terms with the way in which the Near Eastern and Israelite narrative and law represent thought, even if not formulated in propositional terms. 1 Eric Voegelin, Order and History: Israel and Revelation, (Louisiana State University Press 1956).

26 Only recently has the situation begun to change. Important attempts to correct this oversight include Walter Burkert, The Orientalizing Revolution: Near Eastern
fields of Assyriology and academic biblical studies have also tended to erect disciplinary walls around their areas of research in ways that make it very difficult for them to venture forth and explore the historical and cultural diffusion of Near Eastern law. The result of this interdisciplinary aporia, so carefully maintained by all sides, is the loss of a crucial chapter of intellectual history. That loss, in turn, has further consequences: it perpetuates a false dichotomy between the cultures of the eastern and western Mediterranean, between religious law and political thought, between Jerusalem and Athens, between antiquity and modernity. Consequently, the attempt to recover that lost chapter affords a different perspective not only upon the past but also upon the present.


27 Ironically, even a volume explicitly providing a valuable comparative perspective on the ancient Mediterranean proves this point. See Law, Politics, and Society in the Ancient Mediterranean World (Baruch Halpern & Deborah W. Hobson eds., Sheffield Academic Press 1993). While bringing together separate studies on law in ancient Mesopotamia, Israel, Greece, Rome, and in rabbinic interpretation, the larger intellectual statement intended by the collection remains unclear. The question of legal, historical, or cultural influence is not considered, one way or another; nor are comparisons or contrasts explored.

28 There are, of course, exceptions. Several scholars have proposed the significance of biblical and Near Eastern law for contemporary legal and political thought. For example, two ground-breaking studies by Assyriologist Jacob Finkelstein articulate the conceptual categories and legal concepts underlying biblical and cuneiform law and trace their legacy into the modern world: Jacob J. Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty, 46 Temple L.Q. 169 (1973); and Jacob J. Finkelstein, The Ox That Gored (Transactions Am. Phil. Soc’y 71:2; American Philosophical Society 1981). See also Eckart Otto, Das Deuteronomium: Politische Theologie und Rechtsreform in Juda und Assyrien (Walter de Gruyter 1999); and Jean-Marie Carrière, Théorie du Politique dans Le Deutéronome (Peter Lang 2001). The last sentence of Otto’s book makes a powerful claim (although one not directly developed within the book itself): “Die Wiege der modernen Demokratie steht nicht nur in Athen, sondern auch in Jerusalem” ["The cradle of modern democracy stands not only in Athens, but also in Jerusalem"]. Otto, supra, at 378 (my translation).

29 There have been several attempts to recover the tradition of Jewish political thought. However, those attempts usually focus specifically on “Jewish”—that is, post-biblical—political thought. As a result, the specific legal and intellectual contribution of the ancient Near East and of ancient Israel (the Hebrew Bible/Old Testament) is primarily addressed from the perspective and religious claims of later Jewish tradition rather than on its own terms. See Daniel J. Elazar & Stuart A. Cohen, The Jewish Polity: Jewish Political Organization from Biblical Times to the Present (Indiana University Press 1985); Stuart A. Cohen, The Three Crowns: Structures of Communal Politics in Early Rabbinic Jewry (Cambridge University Press 1990) (an astute analysis of the strategies used by the rabbinic community to legitimate their own claim to political authority); 1 The Jewish Political Tradition: Authority (Michael Walzer et al. eds., Princeton University Press 2000) (a valuable anthology of sources with commentary).
II. THE “ORIGIN MYTH” OF THE JUDICIAL SYSTEM

Many of the myths of origin found in the Hebrew Bible parallel and presuppose those attested in the cuneiform literature of the ancient Near East: accounts of cosmogony, of a theomachy between a Storm God and Sea, of a primordial flood, of the origins of humanity, and of the mythic significance of the Temple. The genre of law provides an additional context where Israelite authors drew upon the literature of the Near East. At many points, biblical law closely corresponds to the great cuneiform legal collections in formulation, technical terminology, topos, and range of sanctions. Moreover, both the cuneiform and the biblical legal collections include provisions of substantive law as well as procedural law. The importance of procedural law is signaled by the symbolic location assigned it by the draftsman responsible for the Laws of Hammurabi, a legal collection whose literary-religious frame composition attributes it to Hammurabi, King of Babylon (ca. 1792-1750 BCE), as first-person speaker and royal author.30 In that frame, the monarch repeatedly asserts his devotion to the cosmic ideals of kittum u mišarum [truth and justice]. In order to drive that royal boast home, the editor of the legal corpus deliberately placed laws devoted to due process (requiring integrity in the testimony of witnesses in court and accountability of judges) at the very beginning of the monument.31 The arrangement of the laws thus underscores Hammurabi’s pious commitment to justice by establishing judicial probity as “the first priority” of the legal collection, as its cardinal principle of organization.32 As the monarch shapes his legacy for posterity and for the gods by presenting himself as the preeminent šar mišarim [king of justice], the very structure of the legal corpus sanctions that royal bid for immortality.33

30 The more familiar term, “Hammurabi’s Code,” is a misnomer, since it is unlikely that this ancient text ever had statutory force or was even written with that intention. Moreover, as has been long noted, the text does not constitute a comprehensive “code” of laws. See Laws of Hammurabi, in MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 4-7, 71-142 (2d ed., Scholars Press 1997).
31 Laws of Hammurabi, supra note 30, §§ 1-5, at 81-82.
32 Herbert Petschow, Zur Systematik und Gesetzestechnik im Codex Hammurabi, 57 ZEITSCHRIFT FÜR ASSYRIOLINGIE 146, 148-9 (1965) (arguing that the first five laws make an implicit statement of value, and demonstrating their link to the literary frame). From another point of view, however, the systematics of the legal corpus entrench class privilege and rigid social stratification. They thus completely undercut the affective rhetoric of the frame, which repeatedly asserts royal solicitude for the socially marginalized (the widow, the orphan, and the poor). Eckart Otto, Soziale Restitution und Vertragsrecht: Mišaru(m), (an)durāru(m), kirenzi, parā tarmumar, š’ mitta und d’ ror in Mesopotamien, Syrien, in der Hebräischen Bibel und die Frage des Rechtstransfers im Alten Orient, 92 REVUE D’ASSYRIOLINGIE 125, 140 n.64 (1998).
33 This repeated self-description of Hammurabi as “king of justice” is found in the Epilogue. Laws of Hammurabi, supra note 30, at 134-36 (xlvi 7; xlvii 7; xlviii 96; xlix 13), and the comment at 142 n.49.
Israelite authors were well tutored in the topical and formal conventions of cuneiform law. They drew upon the Mesopotamian concept of a royal propounder of law but also radically transformed it in light of their own cultural and religious priorities. They transformed precedent by making the royal legislator of biblical law the nation’s divine monarch, Yahweh.\textsuperscript{34} In that way, the ancient Babylonian generic convention of the royal voicing of law ironically provides an important legal and intellectual source for the distinctively Israelite concept of divine revelation.\textsuperscript{35} So close is the connection between the two systems of law that even techniques of legal ordering seem to have been carried over, although implemented in different ways to reflect different cultural values.\textsuperscript{36} In Israelite law, just as in cuneiform law, formal matters like textual sequence can thus amount to meta-legal reflections on the priorities of the legal system.\textsuperscript{37} Biblical law also manifests an


\textsuperscript{36} For example, in both contexts, the initial law in a legal composition also played a larger theme-setting role. That technique, which Petschow (\textit{supra} note 32, at 148-49) was able to recover in his important study of cuneiform legal systematics, was also recovered for biblical law by medieval rabbinic exegesis, which devoted considerable effort to questions of legal ordering. Nachmanides (1194-1270 CE) astutely identified a difficulty in the arrangement of the Covenant Code (\textit{Exodus} 21-23): laws concerned with manumission of slaves (\textit{Exodus} 21:2-11), are placed at its very beginning, where they even precede a series of apodictic laws that govern capital cases (\textit{Exodus} 21:12-17). The priority thereby granted to slave or property law over capital law he accurately recognized as anomalous; in fact, such an arrangement is also inconsistent with the norms of cuneiform law (which he could not have known, of course). In response, he argued that the placement of the manumission laws reflects the first verse of the Decalogue, both in topos (manumission) and in language. Thus, God’s self-introduction in the Decalogue—“I, Yahweh your God, led you out \textit{[הָעַץ]} of Egypt, out of the house of bondage \textit{[יִבְדָּכ]} of Israel, lit., slaves” (\textit{Exodus} 20:2)—is echoed in reverse order (following common scribal practice in the Near East, \textit{i.e.}, \textit{AB :: BA′}) in the first law of the Covenant Code, which requires manumission of male slaves after six years: “If you purchase a Hebrew slave \textit{[עבד]} six years shall he work but in the seventh year he must go out \textit{[יִבְדָּכ]} free’ (\textit{Exodus} 21:2). The priority granted the manumission of the individual slave thus follows from the collective manumission of Israel from slavery in Egypt. In effect, the priority of manumission law affirms that the priority of the lawgiver (and thus of the legal system in this case) is freedom. Although Nachmanides could not use the language of “redactor,” he nonetheless recognized that the systematics of the laws themselves make a statement of value and are themselves a source of meaning. \textit{See Ramban (Nachmanides), Commentary on the Torah: Exodus} 340 (Charles B. Chavel ed. & trans., Shilo 1973).

Nachmanides was preceded in his analysis by \textit{Midrash Exodus Rabbah} 30:15, which may have served as his source. \textit{See Midrash Rabbah Exodus} 363 (S. M. Lehman trans., Soncino 1983).

\textsuperscript{37} For a \textit{tour de force} defense of this position, \textit{see Finkelstein, supra} note 28. This brilliant analysis by an Assyriologist with a strong interest in the reception of cuneiform legal motifs by later Roman, European and American law provides a powerful reading of the systematics of the Covenant Code (\textit{Exodus} 21-23) as a transformation of the values and ordering systems evident in the \textit{Laws of Hammurabi} and the \textit{Laws of Eshnunna}. There are difficulties, however, in his dating of biblical material to the second millennium. Moreover, in arguing that seeming textual
explicit concern to ensure the integrity of the judicial system that is
evident in cuneiform law. For example, the principle of talion ("an eye
for an eye") represents the standard punishment for physical injury to an
individual in biblical law.\(^\text{38}\) Later legists broadened that principle’s
application so that it might also protect due process. They stipulated
that false accusation in court should also be punished “measure for
measure”: the perjurer is held liable for whatever punishment his
accusation would have inflicted upon the accused.\(^\text{39}\) The legal rationale
involved elevates talionic justice to a coherent sanction not only against
physical injury but also against injury to the body of the legal system
itself.\(^\text{40}\)

This doubly-shared interest of ancient Israel’s scribes in origin
myths and in the prestigious genre of law almost certainly reflects the
curriculum of the Mesopotamian scribal school, or \textit{e.dub.ba}.\(^\text{41}\) The
detailed points of contact suggest that Israelite scribes had direct or
indirect access to certain key components of the cuneiform
curriculum.\(^\text{42}\) Just at this point of greatest reliance upon Mesopotamian
precedent, however, Israelite authors exhibit their independence by
departing from any known precedent in Near Eastern literature: they
repeatedly concern themselves with providing an “origin myth” for the
institutions that administer the law. To sharpen the contrast, the
prologue to the \textit{Laws of Hammurabi} affirms that both the monarch’s
appointment to office and the right of his city-state, Babylon, to
hegemony over Mesopotamia were jointly destined at the beginning of
time by the fate-decree of En-Lil.\(^\text{43}\) Both monarchy and hegemony are
thus assigned primordial status and cosmic origin. The scribes
responsible for the \textit{Laws of Hammurabi} are equally concerned to
account for the origins of the laws themselves. The scribes locate the

\(^{38}\text{Exodus 21:24; cf. Leviticus 24:15-22.}\)

\(^{39}\text{Deuteronomy 19:15-21.}\)

\(^{40}\text{False accusation in court, whether involving capital crime or property law, is similarly
punished by talion in the \textit{Laws of Hammurabi}, supra note 30, at 81-82 (§§ 1, 3, 4). The perjurer
himself receives the sentence for the crime that he accuses the defendant of having committed.}\)

\(^{41}\text{See Raymond Westbrook, \textit{Studies in Biblical and Cuneiform Law} 2-6 (J. Gabalda
(University of Chicago Press 1992); Bernard M. Levinson \& Molly M. Zahn, \textit{Revelation
Regained: The Hermeneutics of \textit{כי} and \textit{אם} in the Temple Scroll}, 9 DEAD SEA DISCOVERIES: J.
CURRENT RES. ON SCROLLS \& RELATED LITERATURE 295 (2002).}\)

\(^{42}\text{Hans Ulrich Steymans, \textit{Deuteronomium 28 und die Adé zur
Thronfol geregelung Asarhaddons 143-94} (Universitätsverlag \& Vandenhoeck \&
Ruprecht 1995) (showing that the neo-Assyrian treaty form is presupposed as literary model by
\textit{Deuteronomy} 28, perhaps via Aramaic translations).}\)

\(^{43}\text{En-Lil, meaning, “Lord Storm,” was the Mesopotamian storm god, and was considered the
most active and powerful deity in the pantheon.}\)
laws not in cosmic history but in human history as the *ipsissima verba* of Hammurabi himself. Speaking in the first person in the literary frame of the legal corpus, he repeatedly insists that the laws are, *awāṭyā ša ina nariya ašṭuru* [my cases, which I have inscribed on my stela] and *awāṭyā šāqurātim* [my precious cases]. Nonetheless, despite this concerted effort to attach a myth of origins to both the monarch’s authority and to the laws themselves, there is a striking omission. The key institutions of justice—the office of judge and the organization of the judicial system—are simply presupposed as self-evident. Their origin is nowhere addressed.

Precisely that omission is directly thematized by the Hebrew Bible, which, in fact, preserves two sophisticated narratives about the origins of ancient Israel’s judicial system. In the context of the exodus from Egypt, shortly after the wondrous event at the Sea of Reeds, the archetypal leader Moses is represented not only as Israel’s nationalist leader but also as its chief justice: “Moses sat as judge for the people, as the people stood about Moses from dawn to dusk.” While visiting the Israelite camp in the desert, Jethro, the Midianite father-in-law of Moses, grew puzzled as he observed this process. As Jethro watched Moses and “saw how much he had to do for the people,” he asked him to explain why he was required to spend the entire day sitting, surrounded by a milling crowd. Upon hearing the reply—“It is because the people come to me . . . . When they have a dispute, they come before me, and I decide between one person and another . . . .”—Jethro responded sharply:

> What you are doing is not right. You will surely wear yourself out; and these people as well. For the task is too heavy for you; you cannot do it alone. Now listen to me: I will give you counsel . . . . [S]eek out from among all the people capable men who are god-fearing, trustworthy men who refuse bribes. Set these over them as officers of thousands, officers of hundreds, officers of fifties, and

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44 These repeated affirmations derive from the epilogue of the legal corpus. *Laws of Hammurabi*, supra note 30, at 136, 134 (xl 19-21, xlviii 12-13).

45 Here excluded from consideration is the Chronicler’s programmatic narrative of Jehoshaphat’s judicial reform, with its account of the creation of a system of judicial officials (2 Chronicles 19). That account cannot be used as a reliable historical source. It is a deliberate compilation based upon other texts that only provides reliable information about the Chronicler’s vision for a reconstruction in the Persian Age. Establishing the text’s non-historicity are: Alexander Roje, *The Organization of the Judiciary in Deuteronomy, in 1 THE WORLD OF THE ARAMAEANS: FESTSCHRIFT P. E. DION 92* (P.M. Michèle Daviau, John W. Wevers & Michael Weigl eds., Sheffield Academic Press 2001); Robert R. Wilson, *Israel’s Judicial System in the Preexilic Period, 74 JEWISH Q. REV. 229, 246-48* (1983); UDO RÜTERSÖRWDEN, VON DER POLITISCHEN GEMEINSCHAFT ZUR GEMEINDE: STUDIEN ZU DT 16,18-22 15-19 (Athenäum 1987); Gary N. Knoppers, *Jehoshaphat’s Judiciary and “the Scroll of YHWH’S Torah,” 113 JOURNAL OF BIBLICAL LITERATURE 59* (1994).

46 *Exodus* 18:13. All Bible translations are my own.

47 *Exodus* 18:14-16.
Let them sit as judges for the people at all times. Have them bring every major case to you, but let them decide every minor case themselves. Make it easier for yourself by letting them share the burden with you.48

Taking Jethro’s advice to heart, Moses immediately implemented that protocol for delegating judicial authority so as to dispense justice more efficiently.49

This foundation account associates the establishment of Israel’s judiciary with the redemptive events of the exodus. That there should be any attempt at all to reflect on the origins of the system for administering justice represents a distinctively Israelite concern. Yet precisely in its distinctiveness, the account raises several complications. First, the narrative directly concedes that Israel’s judicial organization is foreign in conception and inspiration, since it derives from the counsel of Midianite Jethro rather than from Moses himself. Second, the narrative concedes that the system for administering justice precedes and is thus completely independent of the revelation of law at Sinai, which is the basis for God’s covenant with Israel. The narrative thus affirms that Israel’s judicial administration derives neither from Israel nor from revelation! The frank admission betrays the historical truth of ex Oriente lex: Israel was indeed indebted to the ancient Near East for the origins of its legal tradition. But it is highly problematic to imagine that such a concession could be aligned with the more fundamental Israelite claim for the origin of her laws in divine revelation at Mount Sinai, the account of which immediately follows in the narrative.50 After all, conceding the foreign origins of the judicial administration implies that the Sinaitic revelation, central to which is law, is somehow incomplete: reliant upon something prior, external, and extrinsic for its implementation. In effect, the inclusion of the origin myth of the judicial administration threatens to preempt the status of divine revelation as the culturally more important origin myth for Israel’s Torah. The distinctively Israelite conception is here reduced, both chronologically and ontologically, to ancillary status alongside the prior, foreign institution on which it must depend for its implementation.

Prominently located at the heart of Israel’s foundation narrative concerning the exodus from Egypt and the revelation at Sinai, this chapter must have presented an interpretive challenge, if not a cause of chagrin, to later readers within ancient Israel. One of the more important developments within biblical scholarship is the recognition

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48 Exodus 18:17-22 (emphasis added).
50 Exodus 19-24.
that such interpretive issues may be reflected in the biblical text itself.\textsuperscript{51} Indeed, such issues may also have contributed to the composition of new texts in ancient Israel as later authors responded to and sought to correct difficulties that they perceived in earlier texts. To do so, however, they often stylized their compositions as an “ancient original” rather than as an explicit “later correction.” As these later texts themselves came to be accepted by the community, they were incorporated into The Bible along with the works with which they were originally in dialogue. As a result, subsequent generations inevitably began to read both the earlier work and the later response to it together, ahistorically, as if both had always been part of the same continuous story.

Such issues help explain the fate of Exodus 18. The Pentateuch itself provides the best evidence that the difficulties identified here concerning the dignity and autonomy of the legal system were already identified in ancient Israel itself. The two sources of chagrin triggered by Moses’s reliance upon Jethro in Exodus 18 are each systematically addressed and deftly corrected by the narrative of Deuteronomy 1. Although presented as a straightforward retelling and recollection by Moses of the events of the journey from Egypt as the Israelites are about to enter the promised land forty years later, the chapter in fact derives from a much later historical period and revises the earlier account in two significant ways.\textsuperscript{52} First, the retold account significantly alters the original sequence of events. If Exodus placed Jethro’s inauguration of the judiciary\textsuperscript{53} prior to the revelation of law at Mount Sinai,\textsuperscript{54} Deuteronomy removes the difficulty. The narrative of Deuteronomy begins with the divine command to depart from the mount where revelation had taken place. Only thereafter is there the move to organize the judiciary:

These are the words that Moses spoke to all Israel beyond the Jordan . . . .

“Yahweh our God spoke to us at Horeb, saying, ‘You have stayed long enough at this mountain. Resume your journey . . . .’


\textsuperscript{53} Exodus 18.

\textsuperscript{54} Exodus 19-24.
“At that time, I said to you, ‘I am unable by myself to bear you. Yahweh your God has multiplied you, so that today you are as numerous as the stars of heaven. . . . How can I possibly, all by myself, bear the heavy burden of your legal disputes? Choose for each of your tribes individuals who are wise, discerning, and reputable . . . .’”  

In the retelling, the divine revelation of law at Horeb (Deuteronomy’s term for Sinai) now—more “logically” than in the Exodus version—precedes the creation of the judicial system. Deuteronomy’s authors have “re-chronologized” the narrative sequence of Exodus in order to ensure the dignity and prestige of revelation itself. The remembered past is therefore here a reordered and a corrected past since the real point of departure for memory is the present rather than the past. The revised version of Deuteronomy 1 grants divine revelation of law its proper chronological priority over the judicial apparatus; by extension, the revised version also affirms the ontological priority of revelation to administration. Perhaps most strikingly, this text’s authors have solved the theological and hermeneutical problem they confronted without even marking their revision as an explicit departure from the original.

It should already be evident that the authors of Deuteronomy 1 have also taken it upon themselves to correct the second major difficulty raised by Exodus 18, whereby both the initiative and the inspiration for the system of judges had come from Jethro, the Midianite father-in-law of Moses. Deuteronomy rejects that foreign derivation, as a second look at the chapter confirms:

At that time I said to you, “I am unable by myself to bear you. Yahweh your God has multiplied you, so that today you are as numerous as the stars of heaven. . . . But how can I bear the heavy burden of your disputes all by myself? Choose for each of your tribes individuals who are wise, discerning, and reputable to be your leaders.” You answered me, “The plan you have proposed is a good one.” So I took your tribal leaders, wise and experienced men, and appointed them heads over you: officers of thousands, officers of hundreds, officers of fifties, and officers of tens, and officials for your tribes. I further charged your magistrates as follows: “Hear out your fellow men: You must adjudicate justly between any man and a fellow Israelite or a stranger. You shall not be partial in judgment: hear out low and high alike. Fear no man, for judgment is God’s. And any case that is too difficult for you, you shall bring to me and I will hear it.”

Rather brazenly, Moses here avers that the initiative to delegate responsibility for justice was his alone; there is no mention of any

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56 Deuteronomy 1:9-17 (emphasis added).
external intervention whatsoever. As the italicized terms in the passage confirm, the composer of this narrative has redeployed the specific formula proposed by Midianite Jethro for the judicial administration, hierarchically organized like a chain of military command, but now attributes that same formula to Israelite Moses. There is no longer even the hint of a dialogue between Moses and any advisor, whether foreign father-in-law or Israelite confrere. Instead, Jethro has been completely “air-brushed” out of the retold, now-sanitized, narrative, as if to remove even the possibility of the Israelite system of justice having any foreign derivation. Jethro lives on only as a spectral, textual trace, assimilated into the character of Moses, who now gives an Israelite voice to the Midianite original plan.

Of course, one might counter that the two versions of the story are mutually independent, simply parallel accounts; that alternative would make the thesis proposed here, whereby the authors of Deuteronomy 1 revise Exodus 18, indefensible. The scholarly consensus, however, is that this chapter of Deuteronomy represents a stage in Israelite history when later writers were systematically reshaping earlier traditions.\(^57\) Evidence that the chapter integrates material from other biblical sources as well only lends added weight to the argument that the authors of Deuteronomy 1 were conscious of and responded to earlier Israelite texts.\(^58\) The details of scholarship aside, it is extraordinarily telling that Deuteronomy’s retold version happens to depart from the Exodus version precisely at each of the two points—non-Israelite origin and pre-Sinaitic status—where that version could cause most chagrin for later readers. That fact alone constitutes \textit{prima facie} evidence that Deuteronomy here responds to and strategically corrects the Exodus account. That variation does not seem simply free or arbitrary, as might properly be expected in the case of two independent traditions that bore no literary connection. The highly selective, point-for-point adjustment, both of the chronology and the aetiology of the judicial administration, can only be explained in terms of the authors of Deuteronomy 1 consciously seeking to revise and correct the narrative of Exodus 18.\(^59\)


\(^{58}\) A more complete presentation of the texts upon which the authors of Deuteronomy 1 draw as literary sources would require reference not only to Exodus 18 but also to Numbers 11. For example, the reason for Moses’s need for assistance—the onerous “burden” he must bear single-handedly (Deuteronomy 1:12)—echoes the similar rationale and terminology of Numbers 11:11, 14, 17. A.D.H. Mayes, \textit{Deuteronomy} 122 (Marshall, Morgan & Scott 1979) (part of New Century Bible series).

\(^{59}\) It is all but inconceivable that this argument could be reversed, making Exodus 18 the later text that revises and corrects Deuteronomy 1. The move from a problem-free to a problematic text is most unlikely, especially since the two specific issues identified here go beyond merely mechanical matters of manuscript transmission (where random errors may be expected). Instead,
An additional example confirms this model of revisionist authorship, since a subtle but telling change of language underscores Deuteronomy’s reworking of Exodus 18. In the original account, Jethro defined the attributes required for appointment to judicial office thus: “capable men who are god-fearing, trustworthy men who refuse bribes.”60 These prerequisites—pragmatism, piety, and moral probity—were gained in and through life experience, were accessible to all, and did not presuppose formal training. As Moses specifies the qualifications for judicial office in the structurally-similar list of Deuteronomy, he strikingly departs from Jethro’s pragmatic and democratic model. The new list places an unprecedented three-fold emphasis upon a different kind of acumen: “men who are wise, discerning, and knowledgeable.”61 The thrice-articulated, sole condition of office in the new context—“wisdom”—appears disconnected from any particular realm of practical life experience. It is rather a product of professional study and training, as the formal competence associated with entry into a guild or school. In Deuteronomy, the judicial system’s foundation narrative has clearly been restructured from a later vantage point, one that elevates the distinctly scribal virtue of “wisdom” into the essential qualification for judicial office. With that substitution, the scribal authors of Deuteronomy reveal both their revisionist hand in the composition of this narrative and their own professional training and commitments.62

While extensively revising the earlier narrative, Deuteronomy 1 presents itself as a straightforward restatement and recollection of the past. That indirect form of rewriting and rethinking history was almost certainly intentional, serving as a compositional strategy of the text’s

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60 Exodus 18:21.

61 Deuteronomy 1:13; Moshe Weinfeld, Deuteronomy and the Deuteronomic School 244-45 (Clarendon 1972). The translation of the final term of Deuteronomy 1:13 as an active participle (“knowing”) requires a slight emendation of the received Hebrew (Masoretic) text, which instead has the passive participle (“experienced”). The change makes the word consistent, however, with the first two terms of the list, and requires the change only of the vowels (normally regarded as a later stage of the textual tradition), while leaving the consonantal text intact. Id. at 244 n.2.

62 The single best study of the scribal background of Deuteronomy remains Weinfeld’s Deuteronomy and the Deuteronomic School. Id. His work opened a new perspective on the analysis of Deuteronomy as the work of literati familiar with a wide range of both Near Eastern and Israelite literature.
authors in seeking acceptance for their work. The authors’ selection of textual speaker is part of this compositional strategy because it places their revision of tradition quite literally in the mouth of Moses, the very spokesman of tradition. The attribution of a text to a prestigious speaker from the past, technically called “pseudepigraphy,” is a literary device well attested in antiquity. In this case, the critical analysis of tradition and the transformation of the status quo are effectively garbed in the voice of authoritative legal tradition.63 This insight also provides a clue that elsewhere, too, Deuteronomy’s retold past may be a corrected past, one structured in light of the authors’ priorities in the present.64 That revisionist voice reveals itself in narrative form in the case of Deuteronomy 1. It assumes legal form within the laws of Deuteronomy, in a section concerned with the judiciary and the broader public administration.65 The interpretive richness of these laws could easily escape the non-specialist reader. The issues that they raise emerge indirectly, as much from what they omit as from what they assert.

III. “THE LAWS REGULATING OFFICIALS” AND THE TRANSFORMATION OF SOCIETY

Deuteronomy is associated with a movement of major religious and social reform that took place in the southern kingdom of Judah at the time of neo-Assyrian hegemony in the Near East. As a strategic response to the neo-Assyrian incursions, Hezekiah all but abandoned the outlying countryside to the invaders. He contracted Judah into a rump state, protected by fortress cities at the borders, in defense of the royal capital, Jerusalem, at the center.66 In order to urbanize the


65 Deuteronomy 12-26.

66 See Baruch Halpern, Jerusalem and the Lineages in the Seventh Century BCE: Kinship and the Rise of Individual Moral Liability, in LAW AND IDEOLOGY IN MONARCHIC ISRAEL 11, 27, 74-75 (Baruch Halpern & Deborah W. Hobson eds., JSOT Press 1991) (a stimulating analysis of the archaeological and literary evidence and of Deuteronomy’s connection to the immense social
population, he began to dismantle Judah’s extensive rural cultus and the familiar clan structure that supported it. Josiah’s so-called “reform” of 622 BCE continued this process as he centralized the cultus and established the Jerusalem Temple as the exclusive site for legitimate worship of Yahweh.⁶⁷ Cult sites other than those in Jerusalem were demolished, while the Temple itself was purged of any elements not viewed as Yahwistic. Even previously legitimate Yahwistic shrines in the countryside were declared illegitimate, despite their legacy of having legendary patriarchal and prophetic figures associated with them. The legal corpus of Deuteronomy, which is intimately connected with this comprehensive transformation of Judean society and religion, thus had two primary goals: (1) to stipulate that sacrifice is legitimate only at the central sanctuary (implicitly, the Jerusalem Temple); and (2), conversely, to abolish the multiple local altars and sanctuaries throughout Judah as illegitimate.⁶⁸

The impact of this reform program extended beyond such explicitly cultic matters, however, to include other areas of public life like justice and the political structure of the state. In fact, while the first section of the legal corpus primarily addresses technical cultic matters (such as sacrifice, tithes, and the festival calendar, with additional material added by way of association),⁶⁹ its second section makes scant direct reference to the cultus.⁷⁰ Instead, it lays out a plan for the complete restructuring of the major judicial, political, and religious institutions of ancient Judah. The unit begins with the requirement to establish a system of judicial officials throughout the land:⁷¹

Judges and officials shall you appoint in each of your city-gates, which Yahweh your God is about to give you, according to your tribes. They must adjudicate for the nation, ruling justly. Do not pervert justice, do not show partiality, and do not take bribes, for bribes blind the eyes of the wise and pervert the plea of those who are in the right. Justice, only justice shall you pursue, so that you may live and retain possession of the land that Yahweh your God is about to give you.⁷²

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⁶⁷ 2 Kings 22-23.
⁶⁸ LEVINSON, supra note 63, at 23-52.
⁷¹ Moshe Weinfeld, Judge and Officer in Ancient Israel and in the Ancient Near East, 7 ISRAEL ORIENTAL STUDIES 65 (1977) (offering a reconstruction of the historical background of the professional appointees).
⁷² Deuteronomy 16:18-20. This law served as one of the sources for the historically-later account of origins of the judicial administration discussed above in Deuteronomy 1. There are clear literary ties between this legal unit and the earlier narrative concerning the Mosaic appointment of judges: the Mosaic charge in the second person, “You must adjudicate justly” (Deuteronomy 1:16), echoed here in the third person as, “They must adjudicate justly” (Deuteronomy 16:18). The following “mirror for magistrates,” which requires
Several cultic regulations follow,\(^{73}\) which are reused from the first section of the legal corpus. At this point of thematic transition from “cultus” to “justice,” the repetition provides a literary bridge between the two sections, while also locking them together in an \(AB :: A'B'\) pattern.\(^{74}\) The new unit then continues, providing a comprehensive blueprint for the institutional structure of the Judean polity:

- The local court system with its procedural rules\(^{75}\)
- The “High Court” at the Temple in Jerusalem\(^{76}\)
- The office of the monarch\(^{77}\)
- The priesthood\(^{78}\)
- The office of prophet\(^{79}\)

Biblical scholars have long labeled this unit,\(^{80}\) “Office-bearers of the theocracy,” or “Ämtergesetze.”\(^{81}\) Both descriptions fail to do justice either to the unit’s complexities or to the aims and ambition of its authors. Analysis of its formal structure also militates against reducing it to an administrative flow-chart. The sequence of officials that it names—judge, king, priest, prophet—reflects neither an ascending nor a descending scale of political, religious, or social status.\(^{82}\) The logic of that sequence instead reflects the priorities of the authors of the legal corpus itself as they systematically draw the consequences of cultic centralization for other spheres of public life, including judicial procedure and public administration. In doing so, the authors

commitment to due process (impartiality, spurning bribes), similarly echoes the frame narrative. Cf. Deuteronomy 1:17, 16:19. See Brettl, supra note 52, at 65-70.

\(^{73}\) Deuteronomy 16:21-17:1.
\(^{74}\) Levinson, supra note 63, at 135-37.
\(^{75}\) Deuteronomy 17:2-7.
\(^{76}\) Deuteronomy 17:8-13. Because the literary setting of Deuteronomy is the ancient past, its authors never refer directly to Jerusalem, in order to avoid any anachronism that would betray the literary fiction. Instead, they use a circumlocution to refer to the Jerusalem Temple: “the place that Yahweh shall choose” (see, for example, Deuteronomy 17:8, 10). See further Levinson, supra note 63, at 4, 23.
\(^{77}\) Deuteronomy 17:14-20.
\(^{78}\) Deuteronomy 18:1-8.
\(^{79}\) Deuteronomy 18:9-22.
\(^{80}\) Deuteronomy 16:18-18:22.
\(^{82}\) If the concern were simply administrative, the paragraphs would be organized consistent with office-holder’s rank within the organizational hierarchy, whether “top-down” or “bottom-up.” Indeed, the principle of organizing legal paragraphs in a sequence that reflects social rank, from higher to lower, has long been recognized within Israelite and cuneiform legal collections. In the Israelite context, note the sequence of the goring ox laws in the Covenant Code: death of male or female adult (Exodus 21:28-30), death of male or female minor (Exodus 21:31), death of male or female slave (Exodus 21:32). Showing the operation of this ordering principle in cuneiform law, see Petschow, supra note 32, at 146-72. For its operation in biblical law, see Stephen A. Kaufman, The Structure of the Deuteronomic Law, 1/2 Maarav: J. for Stud. of Northwest Semitic Languages & Literatures 105, 116-17, 132-33, 135, 141 (1978-1979).
IV. THE TWO-FOLD TRANSFORMATION OF LOCAL JUSTICE

The program of drawing the consequences of cultic centralization for other spheres of public life begins with the structure of justice in the local sphere. Here Deuteronomy introduces two innovations, corresponding to the two distinct contexts for local justice that existed prior to centralization. The first was the system of the “elders,” who were deeply rooted in the clan network of the Judean countryside and thus operated independently of any centralized state authority. They held court at the “village gate,” which provided the conventional site for a public hearing. It was precisely that autonomy of the elders and the clan network—as the bearers of the traditional way of life and with a vested interest in its preservation—that centralization sought to dismantle in order to restructure Judean society. The authors of Deuteronomy therefore replaced the older system with a new and professionalized judiciary in order to bring local clan justice under centralized authority. Strikingly, the new judges are installed precisely in the seat of honor reserved by tradition for the elders, who are here summarily evicted from office, replaced—like Jethro in Deuteronomy 1—without even being mentioned: “Judges and judicial officers shall you appoint for yourself in each of your village gates.”


85 Halpern, supra note 66, at 11-107 (arguing that the implementation of Hezekiah’s policy of urbanization required disruption of the clan networks). Halpern’s valuable analysis engages the archaeological evidence. The stress here, however, lies with the explanation of certain features of the legal corpus in light of that policy.

86 Deuteronomy 16:18 (emphasis added). Textual silence as a form of rewriting legal history is also evident in rabbinic literature, where a competing power claim may in effect be “written out of the record” by way of polemical delegitimation. The well-known first chapter of “The Sayings of the Fathers” (Pirke Aboth) provides a striking example. Aboth presents itself as a straightforward account of tradition: “Moses received the Law [lit., Torah] from Sinai and transmitted it to Joshua, and Joshua to the elders, and the elders to the Prophets; and the Prophets transmitted it to the men of the Great Synagogue” (Aboth 1:1). This chain of tradition legitimates the rabbinical movement as heirs to a legal authority that goes directly back to revelation itself. That account of tradition, however, constitutes a striking departure from tradition. It is
now professionalized judiciary assumed responsibility for all routine legal cases.87

A second context for local justice prior to centralization also required transformation. Certain legal cases required cultic resolution, either by means of a judicial ordeal officiated over by a priest88 or a judicial oath of innocence sworn at a sanctuary or temple and thus symbolically in the presence of the divinity.89 The recourse to the
tendentious in its representation—or non-representation—of the various groups who conventionally have an association with the law. It conveniently omits the priests and the Levites, for example. That omission is inconsistent with scripture. Concerning Levi, as ancestor of the Levites, none other than Moses himself affirms (as literary speaker of the Blessing of Moses): “They teach Jacob your ordinances, and Israel your Law [lit., Torah]” (Deuteronomy 33:10). Aboth’s rewriting of legal history thus takes place by means of silence, as the rabbis seek to validate their claim to power at the expense of rival claims that are actually far more legitimate from the vantage point of tradition. This analysis of Aboth 1:1 follows Moshe David Herr, The Continuity of the Chain of Tradition of the Torah, 44 ZION 43, 46-47 (1979) (Hebrew). The translation provided supra for Aboth 1:1 slightly revises HERBERT DANBY, THE MISHNAH 446 (Oxford University Press/Geoffrey Cumberledge 1933).

87 It is important to indicate that this replacement may not have been absolute. The elders are depicted as active in another section of the legal corpus, which primarily addresses sex and family law. Scholars have divided on how to understand the elders’ retention there: either it amounts to the contraction of their area of responsibility to such cases alone, so that the new system exists alongside the old; or it reflects the compositional history of the legal corpus, with that section representing an older stratum of law that has not been brought into conformity with the core legislation that reflects centralization. Scholars who maintain the coexistence of the two systems include: Weinfield, supra note 83, at 578-80; WEINFELD, supra note 61, at 234; Jacob Milgrom, The Ideological and Historical Importance of the Office of Judge in Deuteronomy, in ISAC [sic] LEO SEELIGMANN VOLUME: ESSAYS ON THE BIBLE AND THE ANCIENT WORLD 3.129, 3.138 (Alexander Rofé & Yair Zakowitch eds., E. Rubinstein 1983). More compelling, in my view, is the analysis of the laws where the elders are active as an earlier and pre-Deuteronomic stratum of the legal corpus. Rofé, supra note 45, at 200-201; MAYES, supra note 58, at 304. For the challenge that this stratum is indeed Deuteronomic, see Otto, supra note 84, at 375-76; Eckart Otto, Soziale Verantwortung und Reinheit des Landes: Zur Redaktion der kasuistischen Rechtssätze in Deuteronomium 19-25, in PROPHETIE UND GESCHICHTLICHE WIRKLICHKEIT IM ALTEN ISRAEL: FESTSCHRIFT FÜR SIEGFRIED HERMANN 290 (Rüdiger Liwak & Siegfried Wagner eds., W. Kohlhammer 1991). Unfortunately, this entire question concerning the respective spheres of authority of the elders and the official judicial system is not addressed by HANOCH REVIV, THE ELDERS IN ANCIENT ISRAEL: A STUDY OF A BIBLICAL INSTITUTION 61-70 (Magnes 1989). By discussing neither the installation of the judicial officials (Deuteronomy 16:18-20) nor the law of the king (Deuteronomy 17:14-20), he avoids challenges to his claim that Deuteronomy retains the institution of the elders essentially intact in its pre-settlement form. LEVINSON, supra note 63, at 124-26. By failing to address the crucial issue of legal history, he advances an argument whereby the literary stylization of Deuteronomy as a Mosaic address to Israel prior to the entry into the promised land is confused with its actual historical setting. The logical error involved is analogous to reading SHAKESPEARE’S THE TRAGEDY OF JULIUS CAESAR [1599] as if it were composed in ancient Rome, contemporary with Caesar’s assassination (44 BCE).


89 Exodus 22:8, 9, 11 (22:7, 8, 10 in Hebrew); see also KAREL VAN DER TOORN, SIN AND
cultus was necessary in ambiguous or disputed legal cases where—in the absence of witnesses and evidence—there were insufficient grounds to issue a judicial finding based upon empirical criteria. In such cases, the litigants were remanded to the sanctuary to swear an oath before the deity who, by virtue of his access to suprarational knowledge, presided over the hearing and ruled as omniscient Judge.90

For that reason, regular access to the local sanctuary was essential to the everyday judicial life of the populace. This held true even in cases that ostensibly fell within the sphere of civil or criminal law, such as contested deposits or accusations of theft.91 The abolition of local altars threatened, therefore, to deny the community access to an essential context for resolving a wide range of judicial disputes, unless alternative means of resolution were provided.92 Consequently, just as the legal corpus earlier redirected all sacrificial activity from the local sphere to the central sphere,93 so does it here stipulate that all disputed or ambiguous cases must similarly be remanded to the Temple as the only site that provided legitimate access to divine resolution.94

The two legal paragraphs95 introducing this double transformation of local justice interlock.96 By stipulating that a preponderance of witnesses97 is the necessary condition for conviction in the local sphere,98 the first paragraph in effect restricts the jurisdiction of the local courts to cases that can be empirically resolved. Within the limits of that operational restriction, however, local judicial authority is maximized, since the local judiciary is empowered to try capital cases on condition that witnesses are available. The second paragraph, concerned with judicial procedure at the Temple, is equally dialectical in its legal logic, since it is concerned neither with ritual trespass nor

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90 Levinson, supra note 63, at 110-27.
91 In such cases, the convention of the judicial oath is attested in both biblical and cuneiform law. The technical formula in biblical law is יְהוָה שָבַעת, “an oath by Yahweh” (Exodus 22:11 [22:10 in Hebrew]). That represents the exact interdialectical equivalent of the Akkadian nīl ilim, “(oath by) the life of the god.” Similarly, the biblical formula that stipulates the cultic location of the judicial oath is: אֵל שְׁבַעְתָּה, “before God” (Exodus 21:6; 22:8 [22:7 in Hebrew]). That formula corresponds precisely to the Akkadian: ina mahar ilim. For examples of judicial oaths in the context of cuneiform law, see Laws of Hammurabi, supra note 30, §§ 9, 23, 107, 120, 126, 266, at 82-83, 85, 101, 104, 105, 130.
92 Centralization thus created a “judicial vacuum in the provincial cities.” Weinfeld, supra note 61, at 234-35.
93 Deuteronomy 12.
94 Deuteronomy 17:8-10.
95 Deuteronomy 17:2-7, 17:8-13.
96 Levinson, supra note 63, at 127-33.
97 Deuteronomy 17:6.
98 Deuteronomy 17:2.
with questions of cultic purity or impurity. Indeed, such cases are not even mentioned here.\textsuperscript{99} Instead, the paragraph demarcates the jurisdiction of the court at the Jerusalem Temple, paradoxically, by employing secular cases of criminal or civil law. If any such case “extends beyond your ken”\textsuperscript{100}—that is, should neither witnesses nor evidence be available—then the ambiguous case must be remanded to the central Temple, since it requires divine adjudication.

V. THE TRANSFORMATION OF THE CENTRAL SANCTUARY

In the process of establishing the central sanctuary as the High Court, \textit{Deuteronomy} also radically revises the traditional form of cultic justice. The changes involve the locus of cultic justice, access to which now requires pilgrimage to the central Temple.\textsuperscript{101} The changes also affect, more subtly, the form of justice:

(8) If a legal case exceeds your ken, making it difficult to distinguish between one kind of homicide and another, one kind of bodily injury or another, one kind of civil law and another, or one category of bodily injury and another—any kind of legal dispute within your city-gates—then you shall proceed up to the place that Yahweh your God shall choose, (9) and come and inquire before the levitical priests and the judge who is in office at that time. When they proclaim to you the verdict of the case, (10) you must implement the verdict that they proclaim to you from that place which Yahweh shall choose. Be sure to do all that they instruct you. (11) You must fully implement the instruction that they teach you and the verdict that they proclaim to you. You may deviate neither right nor left from the verdict that they announce to you. (12) Should a man act presumptuously so as to disobey the priest appointed there to serve Yahweh your God, or the judge, that man shall die. Thus shall you purge evil from Israel! (13) And all the people will take heed and be afraid and not act presumptuously again.\textsuperscript{102}

The procedures for obtaining a verdict at the central sanctuary detailed here make no reference to the conventional priestly manipulation of the lots in order to issue a judicial ruling. Nor is there reference to the judicial use of the Urim and Thummim, the oracular devices carried by the High Priest and stored within the “breastplate of justice,” which hung from his vestment.\textsuperscript{103} Elsewhere their use serves as the hallmark of the priestly tribe of Levi, charged with responsibility

\textsuperscript{100} Deuteronomy 17:8.
\textsuperscript{101} Deuteronomy 17:9-10.
\textsuperscript{102} Deuteronomy 17:8-13.
\textsuperscript{103} Exodus 28:30; Leviticus 8:8.
for judicial oracles. Nor is there any hint of a judicial ordeal officiated over by a priest or of a judicial oath before the divinity. Instead of employing specific language appropriate to the setting of an oracular ruling at the Temple, as the context demands, the unit substitutes Deuteronomic cliché. No longer is a traditional priestly “ruling” (torah) at issue, one concerned with specific, ad hoc questions of cultic purity or impurity. The reference to the oracular responsum—יורוך אשר התורה פי על “according to the instruction [i.e., the torah] that they shall teach you”—remains cultic only in vestigial terms, so strongly is it colored by the language and thought of Deuteronomy. The oracle from the Temple bespeaks the distinctive priorities of the authors of the legal corpus, and repeatedly emerges as scribal “word” (dabar). Zion’s sanctuary has here been completely transformed by Sinaitic law.

VI. The Transformation of the Monarchy

The reconfiguration of the judicial system under centralization has implications for the executive branch. By assigning supreme judicial authority to the Temple, Deuteronomy’s authors deny the monarch his most prestigious, and thus most jealously guarded, bailiwick. After all, ensuring justice was one of the defining attributes of kingship throughout the ancient Near East. It was the responsibility of the king to prevent the oppression of those who lacked power—the widow and the orphan—by guaranteeing them access to the protections of the law. Fulfilling that royal duty was a benchmark of office, as attested across a wide range of Near Eastern literature, linguistically,
geographically, and chronologically. At Ugarit, this motif is represented by Dan El in the Aqhat epic and by prince Yaşib’s reproof of Kirta, his father, for failing to behave like a king by neglecting the royal duty to hear the cases of widows and orphans. That Kirta was mortally ill at the time was not countenanced as a valid excuse. That the monarch had prime responsibility for justice was also taken for granted in ancient Babylon, as is evident in Hammurabi’s elegant claim that Marduk commissioned him dannum enšam ana la ḫabālim, kīma Šamaš ana salmāt qaqqadim wasēmma mātim nuwwurim [so that the strong might not oppress the weak, to shine forth as the sun to the black-haired ones, and light up the land]. The monarch was viewed as having particular legal acumen. Thus Hammurabi is endowed by Šamaš, the sun god, with special ability to perceive the principles of “justice and righteousness” [kittum u mittarum] that inform his laws.

This royal topos of divinely-inspired judicial insight was carried over into Israelite literature and applied to the Israelite monarch. On behalf of the Davidic monarch, the psalmist thus petitions: “O God, grant the king your judgments; the king’s son, your righteousness!” David and Solomon directly and by delegation heard complex legal cases and entertained judicial appeals. Royal prerogative even entitled the monarch to pardon a capital offense that would otherwise legally require execution by the blood avenger.

As supreme judge, the monarch could operate freely as regards type of case, area of responsibility, or stage of proceeding. In other words, as judge, the king was not restricted to being either a final court of appeal, as in the case of the woman from Tekoa, or a protector of the poor, as in the case of the ewe lamb. Most important, the king would frequently preside over ambiguous legal cases involving only claim and counter-claim, with neither party able to summon witnesses or provide evidence in support of their account. One such case still survives as a legendary example of judicial brilliance: Solomon’s adjudication of the two prostitutes who contested maternity over their

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112 *Laws of Hammurabi*, supra note 30, i.27-44, at 76 (my translation).
113 Greenberg, supra note 34, at 27-28.
114 *Psalm* 72:1.
one surviving baby. \footnote{Kings 3:16-28.} That exercise of royal wisdom was therefore deliberately included in the collection of legends whose function was to legitimate and glorify Solomon as rightful heir to the Davidic throne as he consolidated his rule over the United Monarchy. \footnote{Gary N. Knoppers, 1 Two Nations Under God: The Deuteronomistic History of Solomon and the Dual Monarchies 83-87 (Scholars Press 1993-94) (showing how Solomon is redactionally aggrandized in conventional Near Eastern terms as possessing superior skills of royal administration as well as encyclopedic wisdom); Weinfeld, \textit{supra} note 61, at 254-57 (carefully analyzing the transformation of the concept of wisdom within the passage, from pragmatic shrewdness to judicial insight).}

It can hardly be an accident, therefore, when Deuteronomy pointedly requires that precisely such cases (lacking both witnesses and evidence) must be remanded to the Temple. \footnote{Deuteronomy 17:8-13.} With the Temple complex located adjacent to the royal palace, the slap in the face to the monarch could not be more stinging, as Deuteronomy takes justice completely out of the king’s hands. The legal corpus is remarkably consistent on this point. Throughout the previous laws regulating the administration of justice in the local and central spheres, \footnote{Deuteronomy 16:18-20; 17:2-7; 17:8-13.} there is a stunning silence about the judicial function of the king. That same silence is now maintained in the law establishing the monarchy. Just as the earlier laws, although concerned with the judicial administration, pointedly ignore the king’s traditional role, so Deuteronomy’s “Law of the King” just as pointedly omits his responsibility for justice. So consistent is the suppression of the monarch’s judicial role that it points to the authors’ rejection of that norm:

\begin{quote}
(14) When you enter the land which Yahweh your God is about to give you and have taken possession of it and have settled in it and you say, “I will appoint a king over me like all the nations that are round about me,” (15) you may indeed appoint a king over you whom Yahweh your God will choose. From among your brothers shall you appoint someone as king over you; a foreigner who is not one of your brothers may you not place over you. (16) However, he must not acquire many horses for himself nor may he cause the people to return to Egypt in order to acquire more horses, since Yahweh has said to you, “You must never again return that way!” (17) Nor may he acquire many wives for himself, for his heart would turn away; nor may he enrich himself with silver and gold. (18) When he comes to sit on the throne of his kingdom, he shall have a copy of this Torah written for him upon a scroll in the presence of the levitical priests. (19) It shall remain with him and he shall read in it all the days of his life, so that he may learn to fear Yahweh his God by diligently performing all the words of this Torah and all the statutes (20), so as not to exalt his heart over his brothers nor to
deviate left or right from the commandment, so that he, together with
his descendants, may long reign over his kingdom in Israel.\textsuperscript{122}

After the introductory insistence that the king not be a foreigner,\textsuperscript{123} five prohibitions specify what the king should \textit{not} do.\textsuperscript{124} The conception of the king in this unit serves far more to hamstring him than to permit the exercise of any meaningful authority whatsoever. In addition to his normal judicial role, other duties conventionally regarded as essential to the exercise of royal power are similarly either passed over in complete silence or severely truncated.\textsuperscript{125} In the end, there remains for the king but a single positive duty: to “read each day of his life”—while sitting demurely on his throne—from the very Torah scroll that daily circumscribes his powers.\textsuperscript{126} \textit{Deuteronomy} has reduced the king to mere titular head of state, more restricted than potent, more otiose than exercising real military, judicial, executive, and cultic function. The sole potent authority is the Deuteronomic Torah, the very lawbook in whose original reception, formulation, transcription, and implementation \textit{Deuteronomy}’s king plays absolutely no role.\textsuperscript{127}

In being thus constituted by the Torah, the monarchy becomes regulated by and answerable to the law.\textsuperscript{128} If the notion of the

\begin{footnotesize}
\begin{enumerate}
\item[122] Deuteronomy 17:14-20.
\item[123] Deuteronomy 17:14-15.
\item[124] Deuteronomy 17:16-17.
\item[125] Critical components of royal prestige that are obscured or contracted in this law include the monarch’s playing a significant role in the state cultus, serving as defender of the Temple, initiating and conducting military campaigns, and the unrestricted right to a harem as a sign of both wealth and potency. Knappers, supra note 119, at 2.223-25; Gary N. Knoppers, The Deuteronomist and the Deuteronomistic Law of the King: A Reexamination of a Relationship, 108 Zeitschrift für die alttestamentliche Wissenschaft 329 (1996); Gary N. Knoppers, Rethinking the Relationship between Deuteronomy and the Deuteronomistic History, 63 Cath. Biblical Q. 393 (2001); Levinson, supra note 63, at 138-43 (on the eclipse of royal judicial authority).
\item[126] Deuteronomy 17:18-20.
\item[128] Post-biblical Jewish tradition fails to maintain this utopian constitutional vision. Rabbinic authors were confronted by biblical sources that were inconsistent about the status of the monarch. More important, they also had to deal with the gap between utopian vision and pragmatic political reality. On that basis, Jewish law in the Mishnah (ca. 200 CE) abandons the constraints imposed by Deuteronomy and no longer subordinates the monarch to law: “The king can neither judge nor be judged, he cannot act as a witness and others cannot bear witness against him” (Mishnah Sanhedrin 2:2). See further Michael Walzer, The Constitution of Monarchy, in 1 The Jewish Political Tradition, supra note 29, at 139 (noting the “failure to incorporate kingship within a constitutional structure” and suggesting reasons for it). For the above translation of the Mishnah Sanhedrin, see Herbert Danby, The Mishnah 384 (Oxford University Press 1933).
\end{enumerate}
\end{footnotesize}
accountability of the office-holder to the law applied simply to a disreputable judicial official (as in Laws of Hammurabi § 5), it would not warrant comment. In terms of legal and intellectual history, however, its extension to the monarchy is astonishing. In the classical Mesopotamian legal collections discussed earlier, it was the monarch who promulgated law. Deuteronomy reverses that precedent: here it is law that promulgates the monarch. The revisionist nature of this text also helps provide the rationale for the sequence of laws in this unit. The law concerned with justice at the Temple now both literally and figuratively preempts the law of the king.

VII. The Transformation of Priesthood and Prophecy

The final two laws in this unit fill out Deuteronomy’s reconceptualization of public offices by turning to the institutions of priesthood and prophecy. It was imperative to reconfigure the traditional priesthood. As a consequence of cultic centralization, the rural priests who had officiated at the local altars suddenly became disenfranchised, since they lost their source of prebend. This law seeks to redress that loss of economic support by guaranteeing the displaced priests a new right to officiate on equal status with the priesthood already ensconced at the central sanctuary. The corrective nature of the unit on priesthood is also clear in its literary structure. It opens with two concise, apodictically-formulated laws that enshrine the priestly right to sacrificial emolument. Only then does there follow the adjustment that, as a result of centralization, stipulates that the countryside priests should have access to income at the central Temple. This provision for redress appears as a formally distinct coda. In contrast to the apodictic form of the preceding legislation, it is formulated as a conditional case addressing a specific contingency. This legislation granting the displaced Levites equal access alongside the Temple’s entrenched priesthood was almost certainly more utopian than pragmatic. The welcoming of their brothers from the countryside as equals would entail the sharing of the lucrative status quo by the

129 See, e.g., Greenberg, supra note 34 at 27-28; and Lohfink, supra note 127, at 308.
130 Deuteronomy 17:8-13.
131 The law governing the Levitical priesthood (Deuteronomy 18:1-8); and the law governing the institution of prophecy (Deuteronomy 18:9-22).
132 Deuteronomy 18:1-5.
133 Deuteronomy 18:6-8.
134 As in the clausula finalis of the Roman law known as the lex Aquilla, there is also in biblical law the phenomenon of “new provisions being joined to an existing code as an appendix instead of being worked in properly.” DAVID DAUBE, STUDIES IN BIBLICAL LAW 77 (Clarendon 1947).
priests at the central sanctuary. The narrative of Josiah’s reforms suggests that the priests were far less willing to do this than was hoped for by this legislation’s authors.135

The unit on prophecy136 is most striking for its inclusion here in the first place. The prophet’s inclusion in this section on public officials amounts to an act of assimilation that routinizes the office of prophet as now simply one among all the other institutions of the state. This institutionalization of prophecy strikingly departs from convention, since Israelite tradition normally placed the Yahwistic prophet in sharp opposition to the state. In particular, prophets appointed to state office represented the Yahwistic prophet’s greatest adversaries. Such “civil servant” prophets were systematically delegitimated, castigated as the prophets of foreign deities, as in Elijah’s famous contest with the prophets of Ba’al on the slopes of Mount Carmel,137 where his adversaries were, more likely, simply prophets in the employ of Israel’s King Ahab. Elsewhere, too, prophets who aligned themselves with the state, as part of its bureaucracy, were accused of uttering oracles inspired by “a lying spirit.”138 The conventional dichotomy between prophet and state is thus here brought to an end.

An equally striking transformation of classical Israelite prophecy is latent in the seemingly innocuous affirmation that all future prophets shall be “like” Moses.139 The elevation of the speaker of the legal corpus to paradigm for all subsequent prophecy, in effect, subordinates prophecy to law, while transforming the prophet into a legist.140 This redefinition of prophecy rejects conventional forms of ecstatic prophecy in ancient Israel, which had hitherto been characterized either by spiritual possession or visionary experience. Conformity to the requirements of the Deuteronomic legal Torah—rather than the performance of ostensible miracles—becomes the new touchstone of authenticity as a prophet.141 As a consequence, deviation from that Torah becomes stigmatized as apostasy and therefore prohibited as a capital offense.142 This restriction of the prophetic voice is consistent with the sharp contraction of royal authority in the previous law.143

136 Deuteronomy 18:9-22.
137 1 Kings 18.
138 1 Kings 22:23.
139 Deuteronomy 18:18.
141 Deuteronomy 13:1-5.
142 Deuteronomy 18:19-20.
143 Note the interesting suggestion by Christa Schäfer-Lichtenberger that the contraction of royal authority corresponds to a reciprocal realignment of prophetic authority in Deuteronomy 18:9-22. Christa Schäfer-Lichtenberger, Josua und Salomo: Eine Studie zu Autorität und Legitimität des Nachfolgers im Alten Testament 103-106 (E. J. Brill
Classical Israelite prophecy is here co-opted by the specific religious, political, and social program of the legal corpus of *Deuteronomy*.

VIII. THE UNIT AS A DRAFT CONSTITUTION

*Deuteronomy*’s laws of public offices emerge as the blueprint for a transformed society, one in which the key judicial, administrative, and cultic branches of government each have their separate spheres of authority defined and allocated by a single, sovereign text, to which each is equally responsible. The key idea of this charter is that no one branch of public office is superior to the other; rather, each is equally subordinate to *Deuteronomy*’s Torah. It is the legal corpus of *Deuteronomy* that assigns each branch its function and specific sphere of influence; brings each branch of the administration into relation to one another as part of a broadly conceived whole; grants each judicial, executive, cultic, and prophetic institution its legitimacy; and assigns each institution a standard of performance and therefore a criterion of evaluation. Constituted by the law, they must also answer to it.

This legislative vision presents a sophisticated reflection on the nature and structure of political authority. The textual speaker mounts a critique of power that rejects any conventional notion of institutional authority as self-evident, no matter whether based upon royal dynastic claim, traditional social status, priestly bloodline, or even upon divine inspiration and prophetic vision. This legislation permits no institution to have a basis of power external to or independent of *Deuteronomy*’s Torah. Without exception, the major public institutions are reconceptualized as accountable to the law. Competing “myths” of power are comprehensively worked into and subsumed by a single, comprehensive, new foundation account that asserts the common origin, simultaneous creation, equal status, and conjoint accountability of all political institutions. No single institution, therefore, can claim to be “prior” to another in its antiquity, status, privilege, or closeness to divinity. The new vision rejects all conventions of rank and hierarchy. The monarch stands neither in initial nor final position in the sequence of offices, neither first nor last in rank, since the order is not governed by rank. The unit therefore does not represent an ancient administrative

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144 *Deuteronomy* 16:18-18:22.
145 Lohfink, supra note 127, at 305-23.
146 The text’s speaker, the “Moses” of *Deuteronomy*, is represented as creating the entire public administration of the state: outlining terms, conditions, and areas of responsibility; providing operational guidelines (including conditions of appointment, such as professional training, probity, citizenship, or lineage); defining areas of restricted or prohibited activity; and selectively including sanctions for abuse of office.
“flow chart” that statically describes the organization of the public sphere. Rather, the unit critically engages the conventions of status, kinship, and political power that prevailed in its time. Conventional norms of social status, like the clan elder’s judicial role in the village gate, are rejected, replaced by professional competence and conformity to Torah.

Although the text employs religious language and situates itself as part of a larger presentation of the history and law of ancient Israel, it actually articulates a complex vision of political philosophy and of judicial authority. By conceiving of each individual institution as equally accountable to Torah (rather than as self-justifying), Deuteronomy creates a legislative structure that ensures the full autonomy and proper independence of each institution. This vision, moreover, provides a historical precedent for the later idea of an independent judiciary. Only when the judiciary stands on equal ground with the monarchy—as it does in Deuteronomy—is it possible to protect the judiciary from the monarchy, or, to shift into more modern language, to ensure the autonomy of the judicial branch in relation to the executive branch. Continuing the translation into the modern context, the same vision would prevent Church or Temple from being reduced to simple organ of the state; yet it would, just as effectively, preclude domination by either Church or Temple of the judicial system, of the executive branch, or of the public sphere more broadly.

It remains unclear whether the political, social, and religious transformations called for by Deuteronomy’s authors were ever actually implemented. In its final form, the unit may well date to the exilic period, when the unit’s editors were held in Babylonian exile without any direct access either to political power or to their land.147 From all these perspectives, the orientation of the unit thus seems far closer to utopian political science, a revisioning of the possibilities of political, religious and social life, than to any immediate description of an existing status quo. Scholars who describe the unit simply as “Laws of Public Officials” fail to recognize that transformative vision. As it seeks to provide a blueprint for the transformation of society and to create a new polity, the unit is more accurately described as a draft

147 Julius Wellhausen recognized this issue long ago, although in reference to specific material that he regarded as later insertions into the legal corpus. He refers to “dieser unpraktische Idealismus” [“this impractical idealism”] and insists “die Anschauung eines wirklichen jüdischen Reiches scheint hier schon gänzlich zu fehlen” [“the concept of an actual Jewish state already appears to be completely absent here”]. JULIUS WELLHAUSEN, DIE COMPOSITION DES HEXATEUCHS UND DER HISTORISCHEN BÜCHER DES ALTEN TESTAMENTS 192 (4th ed., Walter de Gruyter 1963) (1885) (my translation); see also Lothar Perlitt, Der Staatsgedanke im Deuteronomium, in LANGUAGE, THEOLOGY, AND THE BIBLE: ESSAYS IN HONOUR OF JAMES BARR 182, 190 (Samuel E. Balentine & John Barton eds., Clarendon Press 1994) (marshaling Wellhausen’s analysis in an acerbic challenge to Lohfink’s model).
It promotes the idea of a public text as regulating the institutional structure of government and permits no single institution to emerge as superior either to the other branches of government or to the charter to which all are accountable. The unit reflects no conceivable historical reality, no actual state apparatus. The judicial organization and legislative structure that Deuteronomy seeks to put into place were visionary and without precedent. At each point, this section of Deuteronomy thus significantly departs from the institutional and social status quo of its time. Deuteronomy’s subordination of the monarch to a sovereign legal text that regulates his powers and to which he is accountable has no known counterpart in the ancient Near East. It is equally distinct from the classical Greek ideology of kingship. To be sure, Greek political theory of the fifth century BCE devoted considerable attention to exploring the lawful authority and relative merits of different forms of government. Moreover, there was a clear recognition among the Greek intelligentsia that respect for law commanded a higher loyalty than that owed by a citizen to any particular monarch or government (especially in cases of tyranny). Nonetheless, even that strong affirmation of

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148 The conceptual breakthrough was made by Norbert Lohfink in 1971. Lohfink, supra note 127. Lohfink’s groundbreaking article, written in the context of the intellectual ferment associated with Vatican II, promised a follow-up that would support the article’s primarily synchronic analysis of the final redaction of the text with a diachronic analysis of its literary history. That next step is eagerly awaited, and even more so since recent scholarship has turned away from Lohfink’s insight and dissolved the premise of a redactionally-coherent unit. No longer regarding Deuteronomy 16:18-18:22 as a draft constitution (outlining “Laws of Public Officials”), such approaches see the unit as expressing only the late theological concerns of the Deuteronomistic Historian. See Udo Rüterswörden, Der Verfassungsentwurf des Deuteronomiums in der neueren Diskussion: Ein Überblick, in ALTES TESTAMENT FORSCHUNG UND WIRKUNG: FESTSCHRIFT FÜR HENNING GRAF REVENTLOW 313 (Peter Mommer & Winfried Thiel eds., Peter Lang 1994).

149 The degree of correspondence of post-biblical, Jewish law to early modern constitutional thought is briefly addressed in the first chapter of Cohen, supra note 29. His analysis stresses the separation of spheres of authority as the hallmark of a model constitution. My stress, in contrast, is that two principles must both be present: (1) separation of powers; and (2) a prescriptive, public text as the source of institutional legitimacy and accountability.

150 The Greek vision of kingship, as Iron Age authors envisioned the Bronze Age, corresponds in part to the royal ideology of the ancient Near East. In both the Greek and Near Eastern conceptions, the hereditary king is overlord of a set of vassals, plays a role in the cult by leading sacrifice and sponsoring the construction of temples and shrines, is leader in war, and arbitrates legal disputes. The king possesses some form of strong connection to the divine, either being himself worshipped as a god or considered to be the literal or metaphorical son of a god or goddess. The gods look favorably on the king and often bestow their authority upon his rule, symbolically in the form of a scepter. The gods also grant the king the ability to judge wisely and fairly. Finally, the well-being of the crops was thought to be dependent upon the king, with a good growing season attributed to royal justice and piety. West, supra note 26, at 14-19, 132-37.

151 In classical Greece, the principle that law commands a greater loyalty than that owed a monarch is clear in several different contexts. Writing ca. 440 BCE, Herodotus provides an account of the symbolic encounter on the Hellespont between the Persian king, Xerxes, and the exiled king of Sparta, Demaratus. Herodotus, The Persian Wars, III, Books 5-7, at 403-409.
respect for law over obligation to government differs from Deuteronomy’s radical argument that even the supreme political authority is himself accountable to the law, on an equal basis with other citizens. On that basis, Deuteronomy’s blueprint for a “Torah monarchy” arguably helps lay the foundations for the later political conception of a constitutional monarchy.

CONCLUSIONS

An important chapter in the history of constitutional thought begins with the legal corpus of Deuteronomy. The jurists responsible for writing its utopian laws put into place two cornerstones of Western legal tradition: the separation of powers and the rule of law. Moreover, these visionary thinkers sought to safeguard the rule of law by establishing an independent judiciary. The development of these revolutionary ideas in ancient Israel has, for too long, gone unnoticed by the legal community as well as by biblical scholarship. The political experiment represented by Deuteronomy was without precedent either in the Near East or in ancient Israel itself. It went far beyond what was strictly necessary as a consequence of cultic centralization. The new constitution completely restructured the Judean polity (including the court system, the monarchy, and even traditional religious institutions like the priesthood and prophecy). This blueprint granted each institution an independent sphere of authority, yet subordinated each to the rule of law.

In their own way, therefore, Deuteronomy’s authors were also Founders. They sought to overthrow the neo-Assyrian Great King, and

(A. D. Godley trans., Loeb Classical Library 119, Harvard University Press 1922) (Book VII, §§ 101-104). Having just reviewed his massive invasion force of, allegedly, five hundred thousand men, well-organized in army and navy units, Xerxes summons Demaratus to ask whether the Greeks would defend their homeland against such overwhelming odds. The Spartan counters that the decisive factor in the battle would not be mere numbers: for the greatly-outnumbered Greek forces, he asserts, “freedom under the law” commands a higher loyalty than what even Persia’s “great king” could expect from servile subjects. Id. at 408-09 (Book VII, § 104).

A similar conviction that law supersedes government animates the plot of Antigone, by Sophocles. Antigone, tried for treason in having buried her rebel brother despite King Creon’s prohibition, never questions the validity of his royal authority or of the prohibition itself. She simply asserts that she acted out of allegiance to a higher law. The duty to her brother, she argues, supersedes that owed the king: “[N]or did I think your proclamations strong enough to have power to overrule, mortal as they were, the unwritten and unfailing laws of the gods.” SOPHOCLES, ANTIGONE, at 44-45 (Hugh Lloyd-Jones ed. & trans., Loeb Classical Library 21, Harvard University Press 1994) (lines 453-55, emphasis added). I have here corrected that translation at one point. Whereas Lloyd-Jones rendered νόμους (Id. at 44, line 449) as “ordinances,” I have substituted “laws.” The latter is both more accurate and more appropriate to the judicial context of Antigone’s speech as a direct response to Creon’s immediately preceding charge, where the same term had been rendered correctly: “And yet you dared to transgress these laws [νόμους]?” (Id. at 42-43, line 449, emphasis added).
the yoke of aggressive imperial taxation, in order to establish an independent Judean polity. The draft constitution they wrote was part of a larger attempt to purchase freedom and cultural autonomy. In purely pragmatic terms, this utopian bid for freedom was a tragic failure. Historically, there was simply no opportunity for it ever to be implemented. More profoundly, however, the visionary document remains to be discovered. Deuteronomy is a monument to the human intellect. A long tradition of legal hermeneutics and political debate was central to its composition. Yet the text’s significance has been obscured by the pervasive “cultural illiteracy” regarding academic biblical scholarship. For that reason, the interdisciplinary dialogue proposed here could permit new ways of looking at both the past and the present, and lead to a more adequate understanding of intellectual and legal history. Such a dialogue would provide an overdue corrective to the ideological and polarizing use of The Bible in contemporary American political debate and jurisprudence: a use that does justice neither to The Bible nor to the history of law.

152 Perhaps there was a fleeting hope of success. The explicit threat—the neo-Assyrian empire—was defeated by the Babylonians at an epochal battle on the plains of Carchemish, on the upper Euphrates, in 612 BCE. But the ostensible ally quickly turned into a potent adversary. The Babylonian juggernaut invaded Syro-Palestine, laid siege to Jerusalem, breached its walls, destroyed the city, plundered the Temple, and exiled the majority of the population (the entire upper and middle classes) to Babylon (in stages: 597 and 587 BCE). They were held captive there until the Persian defeat of the Babylonians in 539 BCE, when they were released and permitted to return to their homeland in order to serve as a buffer state for the Persian Empire.
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The King and I: The Separation of Powers in Early Hebraic Political Theory

David C. Flatto*

The extensive recent political and legal discourse concerning the constitutional themes of separation of powers and judicial independence has sparked increasing interest in their respective historical backgrounds. Certain early modern political writings point to significant theories of governance emerging from the Hebraic tradition. By exploring neglected Hebraic texts from a modern critical perspective, we can uncover bold and novel conceptions of authority.

Salient biblical passages that call for the separation of the king from the judiciary resist the broader ancient and biblical tendency that invests all powers in the monarchy. Promoting the notion of an independent judiciary, the earliest biblical strategy subordinates the king to other political leaders. Later Judaic writings either extend this approach or attempt to reverse it.

Largely misunderstood early rabbinic writings further cultivate the concept of an independent judiciary, but display a fundamentally different attitude toward the monarchy. Rather than demoting the monarch, they establish the legitimate and independent political autonomy of the executive. Further, they link the notion of an independent judiciary in surprising ways with the doctrine of sovereign immunity. What emerges is a distinctive scheme wherein the king cannot judge, but in many respects the court cannot govern either. Although these texts no longer carry authoritative weight, they continue to have allure and significance for political and constitutional theory.

INTRODUCTION

In 1649 Claudius Salmasius, a prominent seventeenth-century humanist and defender of the English Crown, wrote an influential broadside charging the parliamentarians with regicide for executing Charles I.1 Enlisted by Oliver Cromwell to respond on behalf of the parliamentarians, John Milton wrote a scathing rebuttal.2 By all accounts, Milton bested his

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1. CLAUDIUS SALMASIUS, DEFENSIO REGIA PRO CAROLO PRIMO 34-35 (1649).
2. JOHN MILTON, A Defence of the People of England, in 4 THE COMPLETE PROSE WORKS OF
opponent in their confrontation. Yet, Salmasius appears to have prevailed on at least one point: mastering the meaning of a rabbinic text invoked in the course of their argument.3

Why were Milton and Salmasius debating how to understand a rabbinic statement? In a century that was to prove so formative for shaping modern political thought, two leading political minds noticed something that has long since been neglected: the richness of early Hebraic reflections on governance. Drawing on classical sources in formulating their enlightened political theories, these writers joined other prominent early modern European thinkers in studying seminal traditions preserved in Hebraic texts.4

This Article examines the early Hebraic roots of two central constitutional themes, separation of powers and an independent judiciary. Modern scholarship conventionally associates these concepts with the Founding Fathers, who in turn were inspired by Enlightenment philosophy and political theory.5 Studies with a broader historical perspective have identified the origins of these theories in Greek writings from the Classical and Hellenistic period and Roman works from the late Republic and the early Principate.6 Despite the importance of the Greco-Roman political tradition as a source of early democratic principles, its relevance for the notion of an independent judiciary is rather limited.7 Early modern European political discourse—such as that of Milton and Salmasius—points to an entirely different classical heritage, the Hebraic tradition, however, which does have deep roots connecting to these themes. This Article will accordingly evaluate various early Jewish sources which

7. In particular, the kernel of the separation of powers doctrine derives from classical political theory, especially the proposal of a mixed constitution advanced by Polybius and later Cicero. Nevertheless, for Polybius and Cicero, the branches that they sought to separate are (to use modern taxonomy) the executive and legislative. Under Polybius’s model, judicial responsibility belonged to the consuls and assemblies, and was not allocated separately to an independent body. Later after the rise of the Principate (shortly after Cicero’s life), the supreme legal power was of course the emperor. See David C. Flatto, The Historical Origins of Judicial Independence and Their Modern Resonances, 117 YALE L.J. POCKET PART 9 (2007), http://thepocketpart.org/2007/07/06/flatto.html.
advance diverse models of separation of powers and an independent judiciary.

While these texts no longer carry the authoritative weight they did in the seventeenth century, they continue to have allure and significance for political and constitutional theory. Beginning with the Bible and proceeding to works from the Second Temple and Rabbinic periods, various Jewish writings display novel, and at times bold, reflections on political and legal authority. In contrast with most of the ancient world, which vested supreme judicial authority in the king or emperor, certain voices in early Hebraic thought—especially those of the biblical book of Deuteronomy and the rabbinic Mishnah—assigned such powers to an independent judiciary.

The salient biblical passages that call for the separation of the king from the judiciary resist the broader biblical tendency that conforms with the regnant ancient conception that invests all powers in the monarch. Promoting the notion of an independent judiciary therefore presented a formidable challenge for its proponents, and they responded with differing strategies. The earliest approach recorded in Deuteronomy stripped the king of judicial power by subordinating him to the religious leadership of the priests and the judges. Subsequent (pre-rabbinic) Jewish writings from the Second Temple period reacted to Deuteronomy in divergent ways, some further demoting the king, and others restoring his stature and judicial authority.

Early rabbinic writings emerge with their own singular response to the deuteronomic tradition. Like Deuteronomy, the Mishnah cultivates the concept of an independent judiciary, but advances a fundamentally different approach to the monarchy. Rather than containing the monarch, the early administrative system of the Mishnah establishes the legitimate and independent political autonomy of the executive apart from judicial responsibilities. Further, the Mishnah links the notion of an independent judiciary with the doctrine of sovereign immunity and the broader issue of monarchic responsibilities. In contrast with early notions of the immunity doctrine which derive from the king’s ultimate position at the head of the legal system, rabbinic writings embrace sovereign immunity as a way of more fully separating the king from the judiciary.

In contemporary legal and political discourse the themes of separation of powers and an independent judiciary are among the most widely discussed and debated. In many senses they are emblematic of the

8. Spinoza provocatively, if disparagingly, characterized the entire Torah as a political document. See BENEDICT SPINOZA, THEOLOGICAL-POLITICAL TREATISE (Jonathan Israel and Michael Silverthorne eds., 2007).

American legal tradition, and continue to inform the contours of modern democracy. Nevertheless, each one has been the subject of fierce challenges in recent years as they touch on basic definitional questions of power and authority that are increasingly vital in a post 9/11 world. Approaching these themes from a wider historical perspective exposes their recurring systemic strengths and limitations, and also reveals the nature of their complex interrelationship. Encountering past models and approaches helps illuminate questions such as: how much independence is desirable? When do checks and balances protect and when do they inhibit? Does one of these doctrines rely on the cultivation of the other? And so forth.

This Article’s turn to the Hebraic tradition should also be seen as part of a broader movement in contemporary political and legal scholarship. Recent anthologies, translations, publications, conferences, books and articles have refocused attention on the Hebraic political tradition. One specific article contributed important insights into the nature of separation of powers in the Bible. With all their contributions, some of these scholarly endeavors tend to simplify the material analyzed and to insufficiently explore the material’s subtle legal and political dimensions. This Article aims to make a significant contribution to this growing field by mining the biblical and rabbinic material in a nuanced manner, teasing out the distinctive emphases in discrete Jewish writings while considering


the important diachronic development of legal doctrines, especially during the early rabbinic period.

A study of the Jewish polity has at least two advantages for modern thinkers. The first is an advantage that scholars such as Robert Cover found particularly appealing—Jewish writings reflect important insights into law and politics from the vantage point of the disempowered.\(^{13}\) The second is that precisely because Jewish legal and political writings were more theoretical than practical they had more freedom to imagine and explore theories that may have been largely untenable to implement within the realities of society in Late Antiquity.\(^{14}\) In this Article I explore certain aspects of Jewish legal and political theory that emerged from the intersection of both these factors, producing several basic doctrinal notions that prefigure principles of contemporary constitutional theory.

In returning to these passages in the present context my aim is not merely to recall forgotten sources that were influential in the early modern period, but to analyze them in a modern critical study. Early modern thinkers such as Milton, as well as many traditional commentators, perpetuated a narrow reading of these passages that concealed their depth and diversity. Specifically, they read these passages through the prism of the Babylonian Talmud’s exegesis of earlier rabbinic law that greatly restricted the notion of separation of powers. Yet the early rabbinic law—especially that which is recorded in the Mishnah—advances a distinctive approach to questions of politics and governance that expands on aspects of the biblical tradition in important and non-obvious ways. Even Salmasius, who more closely grasped the original meaning of these sources, employed them in polemical contexts that partially distorted their meaning.\(^{15}\) In Part I of this Article, I summarize the version of rabbinic law recorded in the Babylonian Talmud. I then demonstrate how this reading has dominated later discussions of rabbinic law. Part I argues that the Babylonian Talmudic tradition constitutes a dramatic revision of early rabbinic law which has obscured a meaningful encounter with the early Hebraic political tradition.

Instead of relying on the later revised Hebraic political tradition, this Article will expose its original political and jurisprudential theory through a diachronic and contextual analysis of selected early texts. In Part II, I describe aspects of the earliest layer of the Hebraic tradition by briefly

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14. As powerful as the Roman jurists during the Principate were, for example, they always operated under the shadow of a dominant emperor who necessarily constricted their juristic independence.

15. See also JOHN SEDLEN, De Synedriis in 1 OPERA OMNIA 761 (David Wilkins ed., 1725) (who has a more thorough analysis of the early Hebraic material).
outlining the biblical approach to the relationship between the king and the judiciary. In particular, I contrast much of the biblical literature relating to this issue with the distinctive and influential model advanced by the book of Deuteronomy.

Next, I demonstrate that the approach of early rabbinic law found in the foundational legal text, the Mishnah, adapts the deuteronomic model in significant ways. Part III presents close readings of various passages in the Mishnah in order to expose a fundamental constitutional theme in early rabbinic law. In this part, the Mishnaic approach to the relationship between the king and the judiciary is fully reconstructed. Part III then elaborates on the king’s broader status in the rabbinic system. This is an aspect of early rabbinic thought that has largely been misunderstood. Given the king’s central role in the Mishnah’s political system, his displacement from the judiciary is striking.

Part IV highlights the distinctiveness of the approach of the Mishnah by contrasting it with three alternative models from Second Temple literature that likewise expand on the deuteronomic text. Only after considering the disparate expansions of the biblical foundation can the singular approach of the Mishnah be fully appreciated. In the Conclusion, I return to the mishnaic scheme to evaluate the theories of governance envisioned by the early rabbis. I also explore some of the contemporary resonances of early Hebraic political theory in modern constitutional jurisprudence.

I. LATER INTERPRETATIONS OF AN EARLY POLITICAL CONCEPT

Rabbinic law developed out of traditions that were transmitted orally down until the second century CE. From that point forward many of these traditions were collected by rabbinic authorities in Palestine and compiled into several foundational works. The most famous collection of teachings was redacted in the early third century and is called the Mishnah. It is a kind of digest of early rabbinic law that presumably functioned as a legal anthology or code for judges, teachers, and the larger traditional population. Below we will recover aspects of the early Hebraic political tradition by returning to the original teachings of the Mishnah addressing the role of the monarchy and its relationship to other leading officials according to Rabbinic law.\textsuperscript{16}

\textsuperscript{16} The Mishnah was redacted in the early third century in Palestine. The Babylonian Talmud, which is an expanded commentary on the Mishnah, was redacted in the sixth and seventh centuries in Babylonia. The Babylonian Talmud was often considered by later rabbinic authorities to be the authoritative statement of all rabbinic traditions up until its time, notwithstanding its many bold and innovative teachings. For the dates and characterizations of these and other rabbinic works cited herein, see HERMAN L. STRACK & GUNTER STEM BERGER, INTRODUCTION TO THE TALMUD AND MIDRASH (Markus Bockmuehl trans., 1992); Suzanne Stone, The Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory, 106 HARV. L. REV. 813, 816 n.13 (1993).
Before embarking on this study, however, it is worth pausing briefly to explain why the early Hebraic political tradition of the Mishnah concerning the distribution of power between the king and the judiciary has been obscured. In large measure this is due to the fact that these mishnaic teachings have, along with much of early rabbinic law, passed through the filter of the later Babylonian Talmud. At the most basic level, the Talmud, redacted in the sixth and seventh centuries in Babylonia, presents a running commentary on the Mishnah. In reality, however, the Talmud’s relationship to the Mishnah is much more complex, as it is a forum for later rabbinic traditions that amplify, expand, revise and amend earlier rabbinic traditions of the Mishnah. In the present context, post-talmudic theorists and commentators, from the eighth century until contemporary times, have predominantly relied on the Babylonian Talmud’s distinctive exposition of the mishnaic teachings concerning the allocation of power. The talmudic interpretation of this tradition, however, fundamentally revises the Mishnah, turning its core teaching about the separation of powers on its head. In order to demonstrate this rather stunning reversal, we must return to the primary passage, and its secondary elaborations.

A. Babylonian Hermeneutics

Directly addressing the relationship between the king and the judiciary, the Mishnah declares “the king may not judge nor be judged.” While this statement sounds like a programmatic statement concerning jurisdiction and judicial responsibility, the Babylonian Talmud significantly qualifies its scope and impact. Citing the teaching of Rabbi Joseph, the Babylonian Talmud elaborates:

This refers only to the kings of Israel; kings of the house of David, however, both judge and are subject to judgment. For it is written, “O House of David, thus said the Lord: Render just verdicts, morning by morning”—and if they are not subject to judgment, how can they judge others? For . . . Resh Lakish expounded [thus]: “Examine yourself and only then examine others!”

According to the Babylonian Talmud, the Mishnah’s dictum records the exception rather than the rule. For the primary principle maintains that kings participate in, and are subject to the jurisdiction of, the judiciary. The Mishnah merely presents a secondary rule that treats non-Davidic kings differently. Here the Babylonian Talmud is invoking a distinction that returns to the post-Solomonic monarchic schism in biblical Israel.

17. *Mishnah Sanhedrin* 2:2. For a more thorough evaluation, see *infra* Part III, Section B.
19. *BABYLONIAN TALMUD Sanhedrin* 19a-b.
between the northern kingdom (non-Davidic kings) and the Judean kingdom (the Davidic dynasty).\textsuperscript{20} In later biblical legacy, non-Davidic rule is largely associated with political and spiritual corruption, and even national catastrophe.\textsuperscript{21} Accordingly, in various rabbinic traditions, Davidic kings are portrayed as ideal rulers, while non-Davidic kings are depicted as having an inferior status that is only reluctantly tolerated.\textsuperscript{22} In the present context, the Talmud asserts that non-Davidic kings operate with a different administrative scheme than Davidic kings, due to a decisive historical episode:

But why this prohibition [of non-Davidic kings judging or being judged]? Because of an incident which happened with a slave of King Yannai who killed a man. Simeon b. Shetah said to the court of sages: Be bold and let us judge him. They sent for the King saying your slave killed a man. The King sent the slave to them. They sent to the King saying you must appear with him. He appeared but sat down before the court. Then Simeon b. Shetah said, Stand on your feet, King Yannai, so witnesses may testify against thee. For you do not stand before us but before He who spoke and the world was created. The King replied, I will not act by your word but upon the words of the court as a whole. He then turned to the left and to the right, but all looked at the ground. Then Simeon b. Shetah said, Are you wrapped in thought? Let the Master of thoughts come and call you to account. Instantly, Gabriel came and smote them all and they died. Then it was enacted: The king may not judge nor be judged, testify nor be testified against.\textsuperscript{23}

According to the Babylonian Talmud, the Mishnah's rule constitutes an emergency enactment legislated after an ugly showdown between a non-Davidic, Hasmonean king and the court of sages led by Simeon b. Shetah. This latter institution is likely an allusion to the Sanhedrin, the supreme court of seventy-one judges that according to rabbinic tradition presided at the Temple Mount in Jerusalem overseeing the judicial-administrative system.\textsuperscript{24} To avoid future confrontations it was decided that insolent kings, such as Yannai and all other non-Davidic kings, may not be judged, and, therefore, should be distanced from the judiciary altogether.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{20} 1 Kings 11:29-39.
\item \textsuperscript{21} See Jon Douglas Levenson, Sinai and Zion: An Entry into the Jewish Bible (1987).
\item \textsuperscript{22} For a post-Talmudic formulation of this rabbinic tradition, see Nahmanides on Genesis 49:10 (Chaim Chavel ed., 1959) and Maimonides, Hilkhot Melakhim 1:7-11 (Shabse Frankel ed., 1999). See infra note 121.
\item \textsuperscript{23} BABYLONIAN TALMUD, Sanhedrin 19a-b.
\item \textsuperscript{24} On the historical and legendary references to the Sanhedrin or the court of sages, and for additional information about their relationship to Hasmonean (non-Davidic) kings, see David Goodblatt, The Monarchic Principle: Studies in Jewish Self-Government in Antiquity 77-130 (1994).
\item \textsuperscript{25} An additional gloss in the Babylonian Talmud Sanhedrin 19a-b explains that one who is not subject to the jurisdiction of the court cannot enjoy the privileges of judging: "[A]nd if they are not
Nevertheless, Davidic kings, whose pious orientation and cooperative nature are apparently more dependable, continue to follow the ideal scheme wherein a king can judge or be judged.

B. Modern Theorists and Early Modern Commentators

Michael Walzer further unpacks the political scheme implicit in this passage in the Babylonian Talmud. He delineates the following two-tiered model: (1) An ideal model for Davidic kings: here the king rules alongside and as a part of the high court, the Sanhedrin. While the king must act within institutional constraints and is subject to the jurisdiction of the court (i.e., without the privilege of sovereign immunity), he reciprocally gains the capacity to participate in the judicial apparatus. (2) An alternative model for non-Davidic kings: the only way the idyllic model functions is if the king subjects himself to the jurisdiction of the court and willingly participates with the judges. If, however, the king refuses to cooperate, then the ideal structure collapses. Here, the Babylonian Talmud portrays the failure of incorporating the kingship within a constitutional structure.

Further elaborating on the implications of the withdrawal of the (rabbinic) court from the political realm upon constitutional collapse, Walzer suggests that one can discern in the alternative model the seeds of a later pattern wherein religious actors reclaim political power only in the absence of a strong, defiant political figure. Yet, notwithstanding Walzer’s emphasis on the alternative model, the ideal model remains the ultimate political vision of the Babylonian Talmud. Thus, even as the Talmud relays the episode which generated the enactment of the alternative model, it reminds us that this is a reluctant solution.

In a penetrating article, Robert Cover underscored this point by demonstrating how essential the narrative frame of the Babylonian Talmud is in the above passage. For while the Mishnah records perhaps the only pragmatically viable proposal (the alternative model), the Babylonian Talmud makes clear that Simeon b. Shetah courageously pushed for a different kind of solution (the ideal model). In Cover’s words “the gesture of courage is conjoined with pragmatic concession” in the Babylonian Talmud, and “still the gesture of courage is the aspiration.” The Talmudic myth inspires us to transcend power, and specifically here, emboldens judges to “speak truth to power” and not elect for “prudential

subject to judgment, how can they judge others? For... Resh Lakish expounded [thus]: “Examine yourself and only then examine others!”

26. See THE JEWISH POLITICAL TRADITION VOLUME I: AUTHORITY, supra note 11, at 139-41.
27. Although even the Babylonian Talmud, relying on an earlier teaching of the Tosefta, states that the king may not join the high court of the Sanhedrin. BABYLONIAN TALMUD, Sanhedrin 18b.
deference . . . , the great temptation, and the final sin of judging.” In a fuller sense, then, the Babylonian Talmud conveys the aspirational value of the ideal model wherein the king judges and is judged. 29

Together, Walzer and Cover successfully articulate aspects of the Babylonian Talmudic tradition, but their respective analyses hardly shed light on the core Mishnaic teaching. 30 The upshot of the Mishnah is actually the opposite: a king may not judge nor be judged. Similarly, the Babylonian Talmud’s rendition of the mishnaic law also dominated the interpretation of theorists of the early modern period who mined early Hebraic sources for their political traditions, beginning with the great seventeenth century English thinker, John Selden. 31 In his immensely learned and voluminous study of Jewish courts, De Synedriis, Selden relies on the original Babylonian passage which he cites, translates into Latin, and then uses as the basis of his subsequent summary of rabbinic law. 32 Later Milton, influenced by Selden’s Hebraism, also relied upon the Babylonian Talmudic tradition. In his Defence of England, Milton, who dismisses the fantastic intervention of the angel Gabriel at the end of the passage, nevertheless follows the Babylonian Talmud in describing the mishnaic law as a secondary one which reflects “a gradual usurpation on the [king’s] account against the opposition of the [Sanhedrin].” Therefore, Milton (unlike Salmasius) concludes, in light of the Babylonian Talmud, that the primary law is that the king judges and is judged. 33 In fact, Milton was so impressed with the implications of this ideal model that he returned to it in a much more sweeping context in another work. In The Doctrine and Discipline of Divorce, Milton provides a remarkably positive portrait of Mosaic law, invoking this same Babylonian Talmudic inversion of mishnaic law. It is the law, rather than “the Son,” that incarnates deity:

... the law is his reveled [sic] will, his complete, his evident, and certain will; herein he appears to us as it were in human shape, enters into cov’nant with us, swears to keep it, binds himself like a just lawgiver to his own prescriptions, gives himself to be understood by men, judges and is judg’d, measures and is commensurate to right

29. Cover concludes that for the Babylonian Talmud ideally “there must be a jurisdiction of the judges which the King cannot share,” although a more accurate description of the Talmudic ideal is that the king and the judiciary should be mutually involved.
30. The two scholars do not fully address the Babylonian Talmud’s treatment because each primarily focuses on whether the king can be judged, but does not sufficiently grapple with the issue of whether the king can join the judiciary, and the interrelationship between the two questions. At the same time, they each make helpful observations relating to the Mishnah’s plain sense.
31. On the turn to Hebraism among early modern thinkers, see infra note 178.
32. SELDEN, DE SYNEDRIIS and OPERA OMNIA, supra note 15.
33. As additional support for Milton’s conclusion, he cites 1 Samuel 8:6 (the initial request for a king by the elders of Israel) where the king’s judicial responsibility is depicted as one of his core responsibilities. Unlike Milton, Salmasius recognized that the plain sense of the Mishnah differed from the Babylonian Talmud’s tradition. See infra note 38.
reason.34

One recent scholar summarizes this passage in Milton as follows: “The most resonant phrases describe God as if he is a just king, who judges his subjects and is judged in turn by them.”35 In other words, for Milton, the talmudic rereading of the Mishnah is not only politically coherent, it is theologically foundational.

The dramatic reconfiguration of the Hebraic political tradition by the Babylonian Talmud also informed all subsequent rabbinic commentaries. Most significantly, Maimonides enshrined the Babylonian Talmudic tradition:

Although the kings of the House of David may not be given seats on the Sanhedrin, they judge others and are judged in a suit against them. But the kings of Israel may neither judge nor be judged, because they do not submit to the discipline of the Torah. [To sit in judgment on them] might lead to untoward consequences.36

Maimonides’s formulation understandably prioritizes the ideal model of Davidic kings, and relegates the mishnaic alternative model to a secondary position. For the legacy of the Babylonian Talmud is a vision of integrated political responsibilities of the various branches of leadership. Similarly, later interpreters of the Mishnah continued to read this text through the lens of the Babylonian Talmud. Accordingly, medieval, early modern and modern commentators, including critical scholars, interpreted the Mishnah as presenting a secondary rule that applied only to non-Davidic kings.37

C. The Limitations of Babylonian Revisionism

Notwithstanding all of these secondary sources, however, the Babylonian Talmud’s commentary on the Mishnah, while certainly interesting in its own right, must be recognized as a later revision that subverted the model of separation of powers and sovereign immunity implicit in the Mishnah.38 For the interpretation of the Babylonian Talmud is historically problematic and textually implausible. The

34. MILTON, supra note 2, at 2:292 (emphasis added).
35. ROSENBLATT, supra note 3, at 18-19, 90-98.
36. Hilkhot Sanhedrin 2:5.
37. See, for example, the summary of traditional commentators in PINHAS KEHATI, MISHNAH MASEKHET SANHEDRIN 363 (1966). For modern critical commentators, see HANOCH ALBECK, SHISHAH SIDRE MISHNAH MASEKHET SANHEDRIN (Six Orders of the Mishnah Tractate Sanhedrin) 174 (1953); EPHRAIM E. URBACH, THE SAGES: THEIR CONCEPTS AND BELIEFS 441 (Israel Abrahams trans., 1979); JACOB N. EPSTEIN, MEVO’OT LE-SIFRUT HA-TANNA’IM (Introduction to Tannaitic Literature) 55, 417-19 (Magnes/ Dvir 1957).
38. Interestingly, as stated, Salmasius recognized this in Defensio Regia, supra note 1. However, his emphasis on sovereign immunity no doubt ignored the latter half of the mishnaic teaching regarding the king’s lack of judicial authority.
A historical flaw emerges from a comparison of the Talmud's record of the confrontation between Simeon b. Shetah and the king with other versions of this episode in Josephus and elsewhere in rabbinic literature.\textsuperscript{39} Textually, there are several difficulties with the Babylonian Talmudic tradition, beginning with the obvious strain involved in qualifying the Mishnah's principle, and insisting that it is describing the exception rather than the rule. Further, although the Mishnah primarily employs the generic designation "king," it draws support for several of its rulings specifically from the life of King David.\textsuperscript{40} Therefore, the Mishnah's "king" at least also refers to members of the Davidic dynasty. Finally, the Babylonian Talmud's reading undermines the stark and pervasive contrast between the king and high priest that the Mishnah envisions, an essential point that will be returned to in Part III below.

An alternative understanding of the pronouncement of the Mishnah is found in a midrashic passage, which has strong echoes in the Palestinian Talmud:\textsuperscript{41}

A law that our Sages relayed: The king may not judge nor be judged . . . . Our Rabbis have taught us: Why may not a king be judged? R. Jeremiah said: Because of King David it is written, "Let my judgment come forth from Thy presence." Hence no human being may judge the king, only God . . . .\textsuperscript{42}

Chronologically and geographically more proximate to the Mishnah than the later Babylonian Talmud, the rabbinic interpreters of the Midrash and Palestinian Talmud confirm that the plain meaning of the Mishnah is the correct one.\textsuperscript{43} According to this midrashic passage, the king is granted sovereign immunity because he is subject only to God's jurisdiction—a line that is quoted centuries later by the medieval English jurist Henry of Bracton in his De Legibus et Consuetudinibus Angliae.\textsuperscript{44} This explanation for the king's immunity does not necessarily reflect the

\textsuperscript{39} A full study of the various accounts requires separate treatment. See FLAVIUS JOSEPHUS, ANTIQUITIES 14.158-84 (Ralph Marcus trans., 1933); SIFRE ZUTA, Devarim 19:17 (Menahem Kahane ed., 2002); MIDRASH TANHUMA DEVARIM, Shoftim 30 (Buber ed., 1946). I thank Barry Wimpfheimer for bringing these sources to my attention.

\textsuperscript{40} See Mishnah Sanhedrin 2:2-4.

\textsuperscript{41} PALESTINIAN TALMUD Sanhedrin 2:3. Bernard Septimus brought this midrashic passage and the first source in note 43 to my attention. He also pointed out the drastic change in tone in the continuation of this midrashic passage. In terms of the Palestinian Talmud's position, another passage in Palestinian Talmud Sanhedrin 2:3 (with a parallel in Palestinian Talmud Horayot) appears to contradict it, and states that the king is judged by three judges (who can administer lashes to him as a punishment).

\textsuperscript{42} Deuteronomy Rabbah 5:8 citing Psalms 17:2.

\textsuperscript{43} See the commentary of Rabbeinu Yonatan mi-Lunel on Mishnah Sanhedrin 2:1-2. See also Meiri, Horayot 266 (Abraham Sofer ed., 1964) who proves that the continuation of the Mishnah records a Torah regulation—in prohibiting the king from testifying in court. This interpretation would be more palatable if the opening statement of the Mishnah is interpreted as recording a Torah regulation as well (and not a later rabbinic enactment).

\textsuperscript{44} HENRY OF BRACTON, DE LEGIBUS ET CONSUEUTDINIBUS ANGLIAE (1230).
king's superiority, but rather his distinctive role, which requires independence from the reach of the judiciary. The corollary to the king's sovereign immunity, therefore, is that he cannot judge.

We are left with the challenge of recovering an important early rabbinic tradition recorded in the Mishnah concerning the separation of powers. But the origins of the early rabbinic position actually derive in part from the Bible. In order to properly delineate the early Hebraic tradition, especially the distinctive approach of the Mishnah, we will return in Part II of this Article to the origins of the relationship between the king and the judiciary as presented in the Bible, including the noteworthy passages in Deuteronomy. We will then move, in Part III, to the early rabbinic writings of the Mishnah, which we will read on its own terms, independently of the later Babylonian Talmudic commentary. The Mishnah's approach expands on certain aspects of the model of Deuteronomy, but also differs in other important ways. Part III will also demonstrate the comprehensive and consistent approach of the Mishnah, which distinguishes it from other rabbinic and non-rabbinic sources. We will carefully reconstruct the Mishnah's position, and then attempt to tease out its basis in political and constitutional theory.

II. TWO BIBLICAL MODELS OF JUDICIAL AUTHORITY

In the world of the ancient Near East, the absolutist king was the ultimate legal authority. Beyond adjudicating and enforcing legal rules, ancient regimes empowered the king with full legislative powers.45 A vivid illustration of this orientation can be found in the Laws of Hammurabi, which are presented as a collection of laws issued by the pronouncements of Hammurabi, the eighteenth century B.C.E. Babylonian king.46 Implicit in the royal prerogative to pronounce legal rules is the king's ultimate power to resolve all legal disputes. Hamurabbi further adds that he was blessed with divine gifts and with the special ability of perceiving the principles of "justice and righteousness" that inform his laws. Frequently, of course, the ancient king would delegate judicial authority to subordinate judges and magistrates. Yet, ultimately he had the power to overrule any legal


verdicts, and when he did not, his tacit approval was understood.\(^47\)

Moshe Greenberg, in a celebrated article contrasting aspects of criminal law in the Bible and other ancient Near Eastern writings, concludes that the Bible differs from these other works regarding these very conceptions.\(^48\) In the Bible, God is "the fountainhead of the law" and the law is an embodiment of God's will. Accordingly, instead of the royal law-giver, the Bible presents the law as deriving from divine revelation at Sinai. Greenberg proceeds to demonstrate how certain features of biblical criminal law reflect this fundamentally different conception of the origin of the law, including the absence of ransom and the highly constricted possibility of waiver and pardon. Nevertheless, even Greenberg acknowledges that the responsibility for the adjudication and enforcement of the Bible's divine legal principles resides in the hands of human actors. Therefore, the precise role of the monarch in the biblical scheme, while clearly different from that of other ancient Near Eastern legal regimes, requires further examination.

A survey of the Bible generates a list of officials and personalities who possess a certain measure of legal authority: local townsmen, elders, priests, the high priest, (lay or professional) judges, and the king.\(^49\) However, the precise hierarchy among these legal actors is less clear. Biblical scholars assume that during ancient Israel's primitive stages, before a centralized state developed, legal matters were handled on a local level.\(^50\) In the patriarchal and tribal world of biblical Israel, an elaborate web of connections formed among individuals, families and tribes. Over time (during the biblical period described in the book of Judges) these connections developed into a hierarchical and organized legal and social structure based on the model of a kinship group.\(^51\) At a later stage, however, when Israel developed into a nation with a centralized

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\(^47\) Greenberg, supra note 45, at 28: "However, the actual authorship of the laws, the embodying of the cosmic ideal in statutes of the realm, is claimed by the king... While the ideal is cosmic and impersonal, and the gods manifest great concern for the establishment and enforcement of justice, the immediate sanction of the laws is by the authority of the king. Their formulation is his, and his too... is the final decision as to their applicability.


\(^49\) See ZE'EV W. FALK, HEBREW LAW IN BIBLICAL TIMES: AN INTRODUCTION 1-50 (2d ed., 2001).


administration, these legal structures were insufficient. The issue of control of the judiciary, and the possible role of the king in this process, became essential.

A. The Royal Judiciary

The most enduring description of the monarch's overall responsibilities, including his surprising removal from the judiciary, emerges from the political constitution recorded in Deuteronomy 17. Yet, seen against the backdrop of the rest of the Bible, Deuteronomy stands out as anomalous. In the larger biblical scheme, according to most scholars, the king was central to the judicial system, and possibly even the highest judicial authority in the land. Indeed, the initial request by the elders for a king in place of a tribal ruler, as recorded in 1 Samuel 8:6, emphasizes the judicial responsibilities of this new kind of leader: "Give us a king to govern/judge us." Moreover, specific biblical episodes suggest that the king was the final body to whom one could appeal in legal disputes, whether as the supreme judge, or as one who could exercise a special royal prerogative to annul or bypass any other legal ruling. A vivid illustration of such powers appears in 2 Samuel 14. Appealing directly to King David, a woman requests that the king intervene in a clan dispute that has erupted after an accidental homicide in her family. As the matter of accidental murder clearly constitutes an issue that is governed by biblical law, this text displays the unique monarchic privilege to resolve legal controversies. Another relevant passage is 2 Samuel 15, where Absalom contests his father's monarchic powers by attempting to allure the people to heed his judicial rulings, in lieu of those of the king:

Absalom used to rise early and stand beside the road into the gate; and when anyone brought a suit before the king for judgment, Absalom would call out and say, 'From what city are you?' When the person said, 'Your servant is of such and such a tribe in Israel', Absalom would say, 'See, your claims are good and right; but there is no one deputed by the king to hear you.' Absalom said moreover, 'If only I were judge in the land! Then all who had a suit or cause might come to me, and I would give them justice.' Whenever people came near to do obeisance to him, he would put out his hand and take hold of them, and kiss them. Thus Absalom did to every Israelite who came to the king for judgment; so Absalom stole the hearts of the people of Israel.

Evidently, he who controls the judicial process controls the monarchy.

52. See LYLE M. ESLINGER, KINGSHIP OF GOD IN CRISIS: A CLOSE READING OF 1 SAMUEL 1-12, 254-58, n.24 (1985).
53. See Numbers 35.
King Solomon likewise plays a central role in adjudicating legal disputes, and he is popularly remembered for his wisdom as an adjudicator.\textsuperscript{54}

Various other biblical passages can be adduced along similar lines,\textsuperscript{55} and given the reality of the surrounding cultures this fact is far from remarkable. One particular source worth recalling in this context describes the sometimes misunderstood judicial reforms of King Jehoshaphat, as described in 2 Chronicles 19:5-11.\textsuperscript{56} According to the Chronicler, Jehoshaphat appointed judges in all the municipal courts in Judah. Further, he selected Levites, priests and family heads for the Jerusalem court (the central court). At Jehoshaphat’s instruction, the Jerusalem judges were all placed under the supervision of his delegates: the high priest, who was the religious delegate, and the governor of Judah, who was the royal delegate. Finally, Jehoshaphat instructed the newly appointed judges concerning the nature and aim of their judicial responsibilities. According to the Chronicler’s account, it is the king who lays the cornerstones and constructs the edifice of the judiciary. Even the two court supervisors (or, possibly, the leading justices) are his appointees, and one of them apparently works directly under him as a royal officer. All of this suggests that according to Chronicles the king is the ultimate official who is responsible for the legal system, and possibly the highest legal authority.

B. An Independent Judiciary

Scholars have long noticed the strong parallels between Jehoshaphat’s reforms and the arrangements envisioned in the political constitution of Deuteronomy 17. Yet, even though the similarity in formulation is unmistakable, in one fundamental regard these two sources have divergent emphases. While 2 Chronicles 19 coheres with the widespread biblical conception that locates ultimate judicial power in the monarchy, Deuteronomy 17 advances a fundamentally different model built upon the separation of executive and judicial powers.\textsuperscript{57}

According to Deuteronomy 17, at the helm of the elaborate network of municipal courts required by Deuteronomy 16:18 are the central judicial authorities who reside in the Temple Mount in Jerusalem: the judges,
priests, and Levites, but not the king. As Bernard Levinson has described it, there is a “double anomaly” in Deuteronomy 17’s political constitution. That is, the verses discussing the administration of justice never suggest that the king participates in this role. In the next sequence of verses, which directly address the role of the monarch, the text likewise omits mention of any judicial responsibility on the part of the king. A pair of verses from these respective sections employs a deliberate rhetorical technique to accent this point further. A verse in the first section describes the final jurisdiction of the supreme judicial officials by stating, “do not stray from the word that they proclaim to you either to the right or to the left.” In contrast, when mandating that the king write a Torah scroll in the conclusion of the next section, the verse explains the purpose: “in order that he not turn aside from the commandment either to the right or to the left.” In sum, the central judiciary supplies the authoritative interpretation of the Torah’s law. In contrast, the king is relegated to a passive role of reading, not interpreting, the Torah, and he is enjoined from straying from the Torah’s law, as interpreted by the judiciary. While the judicial officials have mastery over the Torah’s law, the king is subservient to the Torah, and, accordingly, to the judicial authorities as well.

The distinctive approach of Deuteronomy 17 finds implicit support in certain other biblical passages, although it is clearly less pronounced in the Bible than the notion of a royal judiciary discussed in the previous section. One passage that demonstrates the king’s formal subservience to the law of the Torah is evinced in the episode involving King Ahav and the vineyard of Naboth. Reviewing this story from the angle of jurisdiction, a rather remarkable point that emerges is that the greedy king has no recourse for confiscating Naboth’s property without initiating (and then manipulating) a legal procedure. Not only does this seem to undermine the right of eminent domain, but it also belies the notion that the king is the ultimate legal power. According to the

58. See id. See also the elaborate commentary by R.D.Z. Hoffmann in Devarim Im Perusho Shel Ha-Rav David Zvi Hoffman 287-342 (Zvi Har-Shefer trans., 1961).
60. Id. at 17:14-20
61. Id. at 17:11.
62. Id. at 17:20.
63. 1 Kings 21.
64. The right is implied in 1 Samuel 8.
65. As Nahum Sarna has already noted, King Ahav has no power to simply impose his will by force upon his subjects. Instead, he is limited by the restraint of the law (citing Deuteronomy 14-20, and Ezekiel 45:8-9, Ezekiel 46:18). In contrast, Akkadian legal documents, and other documents from Ugarit and elsewhere have shown the extreme and arbitrary royal powers that ancient kings often had. See Nahum Sarna, Naboth’s Vineyard Revisited (1 Kings 21), in Tehillah Le-Moshe: Biblical and Judaic Studies in Honor of Moshe Greenberg 119-126 (Mordechai Cogan et al. eds., 1997); 1. Mendelsohn, Samuel’s Denunciation of Kingship in the Light of the Akkadian Documents from Ugarit,
Naboth story, the king is at least formally subservient to the rule of law.

To summarize the biblical material, then, what we find is that this diverse and chronologically diffuse material can be largely divided into two strands. One dominant strand depicts the king as the ultimate authority in the legal system. Whether as the decisive arbiter of the law or as the possessor of extra judicial powers that can override the law, the king has the final word on legal matters. The second strand recognizes an independent judicial authority that operates separately from the monarch. More, the rhetoric of the verses depicts the judicial body as superior to the monarch, as the king is subordinated to the rule of Torah, along with the judicial authority’s interpretation of Torah law. The second biblical strand is amplified and adapted in critical ways in early rabbinic writings, especially the Mishnah, as discussed in the next part of this paper. Part III discusses the relationship between the king and the judiciary, and the king’s overall status in the Jewish polity, as presented in the Mishnah.

III. EARLY RABBINIC POLITICAL THEORY

Before exploring the political thought in early rabbinic writings, some brief background about the nature of these texts is necessary:

A. Background to Mishnah and Tosefta Studies

As introduced above, the Mishnah is the leading statement of early rabbinic law until the early third century CE. A roughly contemporaneous collection of early rabbinic traditions that overlaps in significant ways with the Mishnah is called the Tosefta. Literally meaning “supplements” or “collections,” this work has a complex and much disputed relationship to the Mishnah. The wider scholarly consensus is that material in the

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66. Both of the strands of the Bible differ from the larger conception of the monarch in the ancient Near East, wherein the king is the giver of the law, the possessor of supreme judicial wisdom, and often the exclusive judicial authority.

Numerous scholars have attempted to characterize the nature of the king’s judicial authority according to the Bible. See Levinson, supra note 12, at 1880-81, which highlights the approach of Deuteronomy:

So consistent is the suppression of the monarch’s judicial role that it points to the authors’ rejection of that norm. . . . Deuteronomy has reduced the king to mere titular head of state, more restricted than potent, more otiose than exercising real military, judicial, executive and cultic function. The sole potent authority is the Deuteronomic Torah . . . . In being thus constituted by the Torah, the monarchy becomes regulated by and answerable to the law . . . . In the classical Mesopotamian legal collections . . . it was the monarch who promulgated law.

Deuteronomy reverses the precedent: here it is law that promulgates the monarch. See also id. at 511; FALK, supra note 49, at 48-50; GREENBERG, supra note 45, at 28; WHITELAM, supra note 45, at 207. Menachem Elon cites to instances of monarchic judicial power in 1 Kings 3:16 et seq., Jeremiah 21:12, 2 Kings 15:5, and 2 Chronicles 26:21 and to monarchic legislation in Joshua 24:25 and 1 Samuel 30:24-25. See MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (Bernard Auerback & Melvin Sykes trans., 1994).

67. The exact semantic may be of consequence. See STRACK & STEMBERGER, supra note 16. See
Tosefta relates to parallel material in the Mishnah in one of three ways: (1) the Tosefta supplements the Mishnah's teaching; (2) the Tosefta preserves an earlier, raw version of the Mishnah's teachings, or (3) the Tosefta provides an independent record of early rabbinic teachings.  

The Mishnah stands out in comparison with much writing from the rabbinic period, including the Tosefta, in terms of its broader organization and deliberate structure. Displaying, if unevenly, the imprints of an editorial hand, the Mishnah is as a rule carefully constructed. It is no wonder that when Maimonides, the great codifier of medieval rabbinic jurisprudence, drafted his code of law he chose to imitate the style of the Mishnah. As such, a thorough analysis of the Mishnah, including its careful editorial frame, provides a unique opportunity to mine distinctive rabbinic attitudes from the early rabbinic period. Recent advances in the scholarly study of the Mishnah have gained much by recognizing the importance of reading the Mishnah synoptically alongside parallel Tosefta passages to better discern the distinctive themes and editorial strategies of the Mishnah. The analysis below employs these methods in undertaking a critical-legal analysis of the relationship between the king and the judiciary, as presented in the Mishnah, in contrast with parallel teachings in the Tosefta.

B. The King and the Judiciary in Early Rabbinic Law

The controversial status of the king in rabbinic law emerges from various passages in early rabbinic writings aside from the Mishnah. In contrast with their portrayal of the Sanhedrin (the high court) and high priest as two of the cornerstones of the Jewish political edifice, these writings equivocate about the stature of the monarchy. Accordingly, they accent the alien nature of kingship, dispute the scope of royal prerogatives and emphasize the need to harness the king's powers.

also infra notes 75 and 76.

68. See infra note 95. Other works were also compiled in this time period, including several exegetical works that interpret the legal sections of the Torah and connect them with the oral traditions. These works are referred to collectively as the Midrash Halakah. See Strack & Stemberger, supra note 16; Jay Harris, Midrash Halakah, in The Cambridge History of Judaism IV: The Late Roman-Rabbinic Period (Steven Katz ed., 2006).


70. This is a project that Jacob Neusner advocated several decades ago in perhaps his most important scholarly work Judaism: The Evidence of the Mishnah (2003). See also Shaye J. D. Cohen, Jacob Neusner, Maimon, and Counter-Rabbinics, 37 Conservative Judaism 48-63 (1983) (applauding Neusner's project but strongly criticizing his method).

71. This ambiguity probably reflects mixed signals generated by the Bible's normative passages in Deuteronomy 17, historical passages in 1 Samuel 8-12, and the uneven monarchic record presented in other portions of the Bible, especially Kings. Later medieval rabbinic commentators continued to debate the desirability of monarchic rule. See especially Maimonides, Hilkhot Melakhim 1:1-3 (Shabse Frankel ed., 1999) and Abravenel, Deuteronomy 17:14 (Mizrahi 1963).

72. See generally Tosefta Sanhedrin 4, Sife and Midrash Tannaim on Deuteronomy 17,
Further, in a stunning passage, the Tosefta even debates the very desirability of the royal office. The king’s rank is openly called into question.

A survey of the Mishnah’s selective treatment of this matter, however, reveals a different orientation altogether. Specifically, evidence from the Mishnah strongly suggests the following conclusions: (1) the king is projected as a leading political figure, with broad executive powers, granted singular license to function independently from legal institutions in order to pursue his political agenda; (2) by repeatedly drawing parallels between the king and high priest, the Mishnah intimates that they stand on par in terms of their position as national leaders; (3) these parallels hint at a dyarchy of prince and priest alongside the Sanhedrin, wherein each officer has a divergent relationship with the Sanhedrin and, more generally, the broader normative legal system; and (4) the above themes are significantly more pronounced in the Mishnah than in the Tosefta, as the latter contains mixed evidence about the standing of the king, and does not deliberately compare him in a favorable manner with the high priest.

To highlight these points, the continuation of this Part will examine the main passages in the Mishnah and Tosefta discussing the monarchy. Part III, Section B, will especially emphasize points (1) and (3) above, focusing on the king’s relationship to the judiciary. Unlike the surviving legacy of the mishnaic teachings, which was transformed by later Babylonian Talmudic exegesis, the approach in this Part is to analyze the Mishnah on its own terms. Part III, Section C, will elaborate further on all the above points, expanding on the larger pro-monarchic orientation of the Mishnah. Rather than exclusively focusing on the content of these passages, this Part will also consider the Mishnah’s rhetorical strategy, which is especially clear when contrasted with the presentation in the

Palestinian Talmud Sanhedrin 2, Babylonian Talmud Sanhedrin 2.

73. See Sifre Shoftim 156, Tosefta Sanhedrin 4:5 (infra note 79).

Tosefta. An analysis of the formulations of the relevant mishnaic passages proves particularly enlightening, as these are largely uncontested, anonymous teachings that have been crafted by a strong editorial hand, and reflect a remarkably consistent tone and style.

1. Mishnah Sanhedrin 2:1-2

The most elaborate treatment of the monarchy in the Mishnah is

75. In my treatment I have attempted to steer a middle course between two extremes that often characterize synoptic studies of the Mishnah and the Tosefta. At one pole, broad topical studies surveying a wide range of material have been undertaken, attempting to discern the distinctive viewpoint of each of these works. Thus, scholars have examined the Mishnah’s and the Tosefta’s respective approaches to tradition, sexuality, gentiles, even to Judaism at large. For a classic example of this kind of scholarship, see Jacob Neusner, Judaism: The Evidence of the Mishnah (2003). The danger of this approach is that, in its great ambition, it tends to generalize by assuming a highly debatable uniformity to each of these texts and to overlook the precise structure and semantic of individual passages. See Chaim Milikowsky, The 'Status Quaestionis' of Research in Rabbinic Literature, 39 Journal of Jewish Studies 201-11 (1988); Peter Schafer, Research into Rabbinic Literature: An Attempt to Define the Status Quaestionis, 37 Journal of Jewish Studies 139-52 (1986). The opposite pole, skeptical about the ability to take a panoramic view, utilizes a zoom lens to critically analyze specific passages. The best example of careful analyses of discrete passages is Saul Lieberman, Tosefta and Tosefta Kifshutah (1992). The limitation of this methodology is that it refrains from tackling the broader thematic questions that are the staple of the first approach. For some related observations, see Cohen, supra note 70. The most successful studies merge these methods: critically examining specific synoptic passages and at the same time culling information relating to larger themes, thereby refining our knowledge of early rabbinic thought and advancing our understanding of the interrelationship of these texts. This Article aims to employ this latter synthetic approach to recover some of the rich political discourse relating to the status of the monarchy in the Mishnah and the Tosefta.

76. Before beginning this inquiry, a methodological clarification is in order. Whether the Mishnah can be evaluated as a whole in order to extract a distinctive attitude on a given normative (halakhic) issue is certainly debatable. Given that the Mishnah is the most carefully redacted early rabbinic text, the possibility of conducting such an inquiry into the Mishnah is more palatable than with other tannaitic works. However, I have done my best to avoid relying on this generalization, and have employed certain additional methodological safeguards in embarking on this study. First, this part begins with close readings of specific passages in the Mishnah, and only then proceeds to make broader generalizations about the Mishnah’s orientation. Second, as the most consequential passages regarding the monarchy have been carefully crafted, their rhetoric is very suggestive about the orientation of the editor(s) of the Mishnah. Third, the various contrasts with the analogous material in the Tosefta further reinforce these points. Similarly, the remarkable consistency of all such mishnaic passages, in contrast with the equivocal treatment in other rabbinic texts, gives fuller weight to the thesis developed below. Finally, I do not negate the possibility that certain similar themes can be detected in passages recorded in other rabbinic texts, and at times I refer to such parallels myself. On these methodological issues, see the works cited in the previous footnote, as well as Shamma Friedman, Tosefta Atikta: Masekhet Pesah Rishon (Hebrew) (Bari Ilan University 2002); Judith Hauptman, Rereading the Mishnah: A New Approach to Ancient Jewish Texts (2005); Alberdina Houtman, Mishnah and Tosefta: A Synoptic Comparison of the Tractates Berakhot and Shebiit (1996); Martin Jaffee, Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 BCE-400 CE (2000); Avraham Walfish, Shitat Ha-Arikhah Ha-Sifrutit Ba-Mishnah ‘Al-Pi Masekhet Rosh Ha-Shanah (Literary Method of Redaction in Mishnah Based on Tractate Rosh Ha-Shanah) (unpublished Ph.D. dissertation, Hebrew University 2001) (available on microfilm, Widener Library, Harvard University); Introducing Tosefta: Textual, Intratextual, and Intertextual Studies (Harry Fox & Tirzah Meacham, eds., 1999).

77. All citations below are based on the printed editions of the Mishnah and on Lieberman’s and Zuckerman’s editions of the Tosefta. I have reviewed most of the variations in the manuscripts and have not found them to be of consequence to my overall thesis.
recorded in the second chapter of tractate Sanhedrin. An initial comparison of this section with analogous material in the Tosefta reveals several glaring discrepancies. Unlike Tosefta Sanhedrin 4:5, which openly debates whether there is a normative obligation to appoint a king altogether, the Mishnah treats the position of the king as axiomatic. Similarly, whereas Tosefta Sanhedrin 4:5 disputes whether the king enjoys the prerogatives described in 1 Samuel 8, Mishnah Sanhedrin 2:4 dramatically affirms the broad powers of the king, including his right of eminent domain: “[The king] may force a way [through private property] and none may oppose him. There is no limitation to the king’s way. The plunder taken by the people [in war] must be given to him, and he receives the first choice [when it is divided].”

The careful editorial strategy of Mishnah Sanhedrin 2 is evinced in its opening lines, read independently of the later Babylonian Talmudic commentary:

The high priest may judge and be judged, testify and be testified against, perform halizah, and have halizah performed to his wife . . . .
The king may neither judge nor be judged, testify nor be testified against, perform halizah nor have halizah performed to his wife . . . .

Before discussing various aspects of the monarchy, chapter two commences with a suggestive pair of symmetric passages that capture the stark contrast between the high priest and the king by drawing attention to the high priest’s participation in the judicial process, in contrast with the king. These opening paragraphs take on additional significance in light of chapter two’s placement within tractate Sanhedrin. Whereas the majority of Mishnah Sanhedrin discusses the judiciary—the leading institution in the rabbinic administration that is afforded wide jurisdiction—this tractate also considers the other two prominent officials: the high priest and the king. Given the primary role assigned to the high court, the Sanhedrin, the Mishnah frames its

78. Ephraim Urbach and Jacob N. Epstein use questionable grounds to date this material early. See URBACH, supra note 37, at 441; EPSTEIN, supra note 37, at 55, 417-19. Urbach and Epstein have also been influenced by the Babylonian Talmud’s reconstruction of the historical and rabbinic origins of the Mishnah’s pronouncement in Mishnah Sanhedrin 2:2. For an analysis of Mishnah Sanhedrin 2 and the status of the king in Jewish works of Late Antiquity in general, see Fraade, The Torah of the King, supra note 74, at 25-60.

79. Tosefta Sanhedrin 4:5:
Rabbi Judah says Israel was commanded to do three commandments upon entering the Land: to appoint a king, to build a Temple and to destroy Amalek . . . Rabai Nehorai says the entire unit [commanding the appointment of a king] was only recorded because of the demands [of the people of Israel] . . . .
(Author’s translation).

80. See also Mishnah Baba Batra 6:7. Ephraim Urbach notes the sweeping language of the Mishnah in this context. See supra note 37, at 441.

81. The broad jurisdiction of the Sanhedrin is already apparent in Mishnah Sanhedrin 1:5, which assigns the Sanhedrin a variety of responsibilities which include important extra-judicial tasks. See also Tosefta Sanhedrin 3:4. Mishnah Sanhedrin 11:2 acccents the unique role of the Sanhedrin in disseminating Torah to the Jewish people.
discussion of these other two leaders by considering their opposite relationships with the judiciary.\footnote{82} The Mishnah proceeds to amplify the distinction between these two officials by stating that the high priest must comply with standard laws such as levirate marriages and mourning rituals, which do not apply to the king.\footnote{83} In taking this step, the Mishnah suggests that the king’s independence from the judiciary is symptomatic of his broader independence from the halakhah, the standard law. Conversely, the Mishnah establishes the judiciary’s independence from the king. Importantly, even though the Mishnah presumably recognizes limitations on the king’s autonomy under the law, rhetorically it chooses to focus on his exemptions from the legal system, in contrast with the high priest.\footnote{84}

As described in Part I above, later rabbinic writings debate how to assess the singular autonomy granted to the king in this Mishnah. The Babylonian Talmud clearly marks it as negative (seeing it as an alternative model for non-Davidic kings),\footnote{85} while the Midrash and Palestinian Talmud understand it in a positive manner. Aside from the various difficulties with the Babylonian Talmud enumerated above, its reading undermines the deliberate contrast between the king and high priest inherent in the Mishnah.\footnote{86} This contrast suggests that it is the king’s distinctive role which affords him a greater amount of independence.\footnote{87}

\footnote{82} On this Mishnah, and later interpretations of this Mishnah by the Talmud, Maimonides and other medieval commentators, see SAMUEL ATLAS, Netivim ba-Mishpat ha-Ivri (Pathways in Hebrew Law)(1978).

\footnote{83} Although the Mishnah continues to describe the idiosyncratic manner in which these laws apply to the high priest, it emphasizes that these laws do apply to him on some level.

\footnote{84} The opinion of Rabbi Judah b. Ilai recorded in the Mishnah partially disputes the primary position and illustrates that the Mishnah here is not monologic. See Fraade, The Torah of the King, supra note 74. Yet, overall the anonymous teachings of the Mishnah in this context significantly advance a coherent and uniform approach.

\footnote{85} Jacob N. Epstein sees Mishnah Sanhedrin 2:4 as an echo of this position. While his interpretation is somewhat dubious, undoubtedly this is a problematic source. Fraade, The Torah of the King, supra note 74, at n.51, suggests that Babylonian Talmud Sanhedrin 19a-b would read Mishnah Sanhedrin 2:4 as referring to kings from the Davidic dynasty. Fraade himself proposes that there may be a distinction between a king who joins the judiciary and a king who is presiding on his own. In this vein, it is worth noting that Mishnah Sanhedrin 2:4 seems to amend Tosefta Sanhedrin 4:7 slightly (I assume that the Mishnah here is later than the Tosefta. See infra note 95). The latter states that the king brings his Torah Scroll with him to the “bet din” (a judiciary court), which the parallel Mishnah emends to read as “yoshev be-din” (while judging, which perhaps should be interpreted as, while sitting in royal judgment).

\footnote{86} The medieval commentators add other interesting qualifications to the Mishnah’s pronouncement. See Tosafot and Hidushe Rabbeinu Yonah on Babylonian Talmud Sanhedrin 18b, and Meiri Sanhedrin 65 (Abraham Sofer ed., 1964).

\footnote{87} Fraade, The Torah of the King, supra note 74, at 41, states that the king is superior to the high priest according to the plain sense of the Mishnah, as his honor is safeguarded. This is partially corroborated by Tosefta Sanhedrin 4:1’s description of the high priest’s legal status as akin to that of an “ordinary person.” If one were to transpose this logic to the Mishnah, what would emerge is that the high priest is being treated as an “ordinary person” while the king is being treated as an extraordinary person. However, I am impressed by the symmetry of the Mishnah’s parataxis, which implies equality in standing between the king and high priest. Also, the Mishnah seems to deliberately discard the Tosefta’s labeling of either leader as an “ordinary person.” For the Mishnah, both officers
contrast, the high priest not only does not need this degree of freedom; but, on the contrary, his role as a spiritual leader demands his full compliance with standard norms. Accordingly, his responsibilities are closely linked with those of the Sanhedrin, accentuated by the very rhetoric of the Mishnah. Indeed, the Midrash Halakhah, as specifically quoted by a medieval commentator in his gloss on this Mishnah, confirms this nexus by stating that ideally the Sanhedrin should be composed of priests, “it is preferable that the court include priests and Levites among its members.” In sum, the Mishnah strips the king of judicial authority, which it instead assigns to the judiciary and high priest. At the same time, the Mishnah affirms the king’s leading executive role and buffers him from judicial intervention. The approach of the Mishnah echoes Deuteronomy 17’s assignment of judicial responsibility to parties other than the king (the citation of verses from Deuteronomy 17 in Mishnah Sanhedrin 2:5-6 is therefore noteworthy), even as it emerges as more pro-monarchic than this biblical foundation.

2. The Parallel Approach of Tosefta Sanhedrin

The importance of the opening paragraph in Mishnah Sanhedrin 2 can be better appreciated by contrasting it with corresponding passages in the Tosefta. As opposed to the Mishnah, the Tosefta does not develop the same deliberate comparison and contrast between the king and the high priest. Rather, in assessing the laws relating to these two officials, the opposite impression emerges. Both the king and high priest are placed within the constraints of the halakhah as “ordinary people,” despite several exemptions that apply to each: “if he (the king or high priest) violates a positive or negative commandment or any other commandment he is treated like an ordinary person in all respects.” In fact, Tosefta Sanhedrin even extends the regular legal status of the high priest to homicide laws, notwithstanding his unique role and responsibilities in this substantive area. Moreover, the Tosefta likewise departs from the Mishnah in apparently ruling that both the king and the high priest can seem to be extraordinary, albeit in opposite ways.

88. This nexus is already apparent in Mishnah Sanhedrin 1:5 and is enhanced by the common responsibility of the judge and the high priest to serve as teachers (for the priests’ duty, see the biblical passage Malachi 2:7 and the rabbinic passage Mishnah Sanhedrin 11:2). Later, Maimonides continues to amplify this theme. See, e.g., Hilkhot Sanhedrin 4:15 and Hilkhot Shemita ve-Yovel 13:12-13.

89. Hidushe HaRan le-Sanhedrin 18a. The actual word used in this passage for this preference is mitzvah. The contrasting relationship of the king and the high priest to the judiciary is especially developed in the writings of the medieval rabbi, Rabbi Nissim. See Derashot HaRan 11 (who is not the same figure as the author of the misattributed Hidushe ha-Ran le-Sanhedrin). For an analysis of his position, see MENACHEM LORBERBAUM, POLITICS AND THE LIMITS OF LAW: SECULARIZING THE POLITICAL IN MEDIEVAL JEWISH THOUGHT (2001).

90. Exceptions abound in all directions. See, e.g., TOSEFTA Sanhedrin 4:1-3, 5, 7-8.

participate in, and are subject to the jurisdiction of, the judiciary. To wit, the Tosefta never states that the king cannot be summoned to court.\textsuperscript{92} Further, the fact that an earlier Tosefta (Tosefta Sanhedrin 2:15) only precludes the king from joining the Sanhedrin, the high court, implies that he can function as a lower-level judge.\textsuperscript{93}

By juxtaposing the largely parallel laws of the king and high priest, the Tosefta essentially couples them in the same normative category. This is further reinforced by the Tosefta’s commanding respect for both the high priest (in Tosefta Sanhedrin 4:1) and the king (in Tosefta Sanhedrin 4:2), in contrast with the Mishnah which privileges such respect only for the king. Finally, Tosefta Sanhedrin 4:10 seems to stipulate a novel rule that a king’s wife must be from a priestly family, although the precise meaning of this passage remains uncertain.\textsuperscript{94} Given the significant overlap between much of the substantive material in these Mishnah and Tosefta passages, and the fact that the Mishnah here presents a more carefully crafted rendition of these laws, a plausible hypothesis is that in these passages the Mishnah deliberately revised the earlier teachings of the Tosefta and advanced a distinctive approach.\textsuperscript{95}

\textsuperscript{92} Given the significant overlap in subject matter discussed in the Mishnah and Tosefta in this context, and considering the difference in their respective orientations, it is difficult to suggest that the Tosefta here is merely adding glosses to the Mishnah. If anything, the Mishnah here appears to be later than the Tosefta parallels (see infra note 95). For a discussion of similar methodological considerations in comparing Mishnah and Tosefta passages, see the various references cited supra note 76.

\textsuperscript{93} Babylonian Talmud Sanhedrin 18b seems to harmonize this pronouncement with the Mishnah (see commentaries ad loc.). But this is not the simple sense of the Tosefta, which seems to bring the monarchy and judiciary closer together. \textit{See also} Tosefta Sanhedrin 4:10, which cites a prohibition on appointing kings in the Diaspora, a law that the Babylonian Talmud associates with the Sanhedrin (see Babylonian Talmud Sanhedrin 14a). It should be noted that Tosefta Sanhedrin 2:15 does recognize a difference between the king and the high priest in each one’s capacity to join the Sanhedrin. In addition, Tosefta Sanhedrin 4:3 seems to describe royal punishments that are distinct from those meted out by the judiciary, although the same source debates whether they differ in terms of their respective legal consequences relating to inheritance. This last source raises an important issue not addressed in this Article: the distinction between the king’s leading and participating in the broader judiciary, as opposed to the king’s leading his own royal judiciary (similar to the parallel legal regimes that were operative in medieval England. \textit{See} JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed., 2002)). For the purposes of the analysis in this Article, either form of judicial activity by the king would be sufficient to describe him as having a role with judicial responsibility.

\textsuperscript{94} See Tosefta Sanhedrin 4:2.

\textsuperscript{95} Recent scholarship has challenged the previous orthodoxy that the Tosefta always constitutes a later gloss on the Mishnah, and has demonstrated that often the reverse is the case. Obviously any sweeping presumption is problematic, and each discrete synoptic parallel has to be evaluated separately. \textit{See supra} Part III, Section A. For a very helpful summary of these issues, see the introduction to TOSEFTA ATIKITA, \textit{supra} note 76. Contrast this with the classical position of Abraham Goldberg in \textit{THE LITERATURE OF THE SAGES: ORAL TORAH, HALAKHA, MISNÁ, TÓSEFTA, TALMUD, EXTERNAL TRACTATES} 283-302 (Schmuel Safrai ed., 1987).

It should be noted that although I have argued in various places throughout this Article that the Mishnah appears to be a later redacted version of earlier raw teachings preserved in the Tosefta, this argument is not crucial for my broader thesis. Rather, it is sufficient for establishing my thesis to note that the Mishnah and the Tosefta’s teachings differ in these various contexts, and that the Tosefta has a more variegated view of the king’s role and status. In contrast, the Mishnah appears to be more consistently and uniformly pro-monarchic in its respective passages. This observation stands whether
As chapter two continues, the Mishnah, in contrast with the Tosefta, focuses exclusively on the monarchy and persists in portraying the king in a positive light, highlighting the king’s special prerogatives (Mishnah Sanhedrin 2:4-5). Although these passages do specify unique restrictions that circumscribe royal actions, such as limiting the number of the king’s wives and capping his accumulation of wealth, they present these prohibitions within a positive context. The effect is to offset the deep distrust of royal discretion that is implicit in these restrictions. The concluding Mishnah prohibits various disrespectful modes of conduct toward the king out of a heightened measure of reverence for him. Interestingly, this list is formed by concatenating two distinct sources from the Tosefta mentioned above—one pertaining to the high priest (Tosefta Sanhedrin 4:1), the other pertaining to the king (Tosefta Sanhedrin 4:2)—and adding a new biblical source, “Thou shall surely set over thee a king (Deuteronomy 17:15),” which is interpreted by the Mishnah as requiring “that his [the king’s] awe may be over thee.” For the Mishnah, this respect is mandated only for the king and likely bespeaks his singular stature.

In sum, two main features distinguish the redacted chapter two of Mishnah Sanhedrin from the presumably earlier Tosefta Sanhedrin passages. First, the Mishnah eliminates negative and restrictive positions recorded in the Tosefta that undermine royal authority. Second, the Mishnah employs a parataxis absent from the Tosefta, wherein the king’s standing emerges as equal to the high priest, even as their roles are opposite in nature. These two points might be connected to a certain extent, as the Mishnah’s positing broad royal power implies a high degree of independence from standard normative law.

Importantly, the Mishnah depicts the king’s independence as a positive defining feature of royalty, and portrays the king as filling an administrative position that is parallel in stature to the high priest, a crucial point I will elaborate below. At the same time, the Mishnah enables the formation and ascendancy of an independent judiciary. Indeed, in a fundamental sense, the judiciary is a self-regulating institution. Moreover, according to the Mishnah, the Sanhedrin fills a singular leadership position and bears responsibility for judicial, religious and
even certain national policy matters. Only after opening with an elaborate discussion delineating several of the broad responsibilities of the Sanhedrin (Mishnah Sanhedrin 1:5), does the Mishnah in the second chapter turn to a description of the secondary offices of the king and high priest. Further, the high priest, who is assigned a judicial role, almost becomes merged into the more dominant institution of the court. In the mishnaic scheme the judiciary stands apart and stands atop the administrative hierarchy.

The overall administrative system of the Mishnah, accordingly, consists of a leading institution with two subordinate offices. The primary institution is the judiciary, led by the Sanhedrin, with the high priest functioning along its side, and the king operating in a parallel office that is afforded singular independence to pursue complementary aims. Assessing the role of the king against this backdrop, however, merely highlights the distinctive position of the king. The king’s unique independence from the Sanhedrin, notwithstanding the court’s supreme authority, surely emerges as noteworthy.

C. The Status of the King in Early Rabbinic Law

The political constitution of the Mishnah reflected in the above passages promotes a separation of powers, establishing both judicial and monarchic autonomy without ever introducing a strong notion of checks and balances. Below we will survey two other synoptic passages related to ritual responsibilities and fallibility involving the king and other leading officials that further project the king as a leading official who operates independently from the judiciary. A fuller portrait of the constitutional vision of the Mishnah emerges from a close reading of these sources.

1. Mishnah Sotah 7:7-8

Rabbinic tradition designates the king as the leader who reads the Torah publicly at the post-Sabbatical ceremony known as Hakhel, in contrast with Josephus who identifies the reader as the high priest.99 Beyond assigning the king this public ritual responsibility, the particular presentation of this rite in Mishnah Sotah 7 further amplifies the king’s

99. See Flavius Josephus, Translation and Commentary: Judean Antiquities 4:209 (Steve Mason ed., Louis H. Feldman trans., 2000). The plain sense of Deuteronomy 31:9-13 supports Josephus’s reading. The Mishnah’s identification may be partially based on the king’s duty to transcribe the Torah (which is never mentioned in Josephus, and may be the priests’ duty according to the Temple Scroll). See Fraade, The Torah of the King, supra note 74, at 45. Also, Josephus’s position may be based on the broader ambivalence reflected in his comments about the monarchy, in contrast with the priesthood. See, e.g., Flavius Josephus, Translation and Commentary: Judean Antiquities 4:223; Flavius Josephus, Translation and Commentary: Against Apion II 16:164-66 (Steve Mason ed., John Barclay trans., 2007). See also infra Part IV, Section A.
vital religious role. In listing ritual recitations that must be performed in Hebrew, Mishnah *Sotah* 7:1 counts Hakhel alongside the "blessing of the high priest." Upon closer examination, the deliberateness of this juxtaposition becomes eminently clear. In its substantive teaching and literary construction, the Mishnah draws a strong parallel between the ritual roles assigned to the king and high priest.  

Mishnah *Sotah* 7:7 defines the "blessing of the high priest" as his public Torah reading on Yom Kippur, along with his recitation of the accompanying blessings. This Mishnah vividly depicts the ceremonial procession at this occasion in which a line of officials transport the Torah scroll to the high priest, who then reads from it while standing:

What is the procedure with the blessing of the high priest? The synagogue attendant takes a Torah scroll and hands it to the synagogue president. The synagogue president hands it to the deputy and he hands it to the high priest. The high priest stands, receives [the scroll], and reads from it while standing ... and he recites eight blessings in connection therewith . . . .

The very next passage (Mishnah *Sotah* 7:8) portrays Hakhel, intentionally invoking the same imagery:

What is the procedure with the portion read by the king . . . .? The synagogue attendant takes a Torah scroll and hands it to the synagogue president. The synagogue president hands it to the deputy and he hands it to the high priest and he hands it to the king. The king stands, receives [the scroll], and reads from it while sitting . . . . The same blessings that the high priest pronounces, the king also pronounces . . . .

Like the high priest, the king also conducts a public reading of the Torah, along with the recitation of blessings, accompanied by the same impressive procession that escorted the high priest. Further, the concluding line confirms the deliberate comparison between these two readings, "The king pronounces the same blessings as the high priest . . . ."  

In short, Mishnah *Sotah* 7:7 borrows the king's role of reading the Torah and assigns a parallel duty to the high priest; conversely, Mishnah *Sotah* 7:8 assigns to the king the priestly role of reciting blessings.  

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100. Certain aspects of Mishnah *Sotah* 7 have been studied by David Henshke, *Parshat Ha-Melekh Keitsad? Le-Darkhe Arikhat Ha-Mishnah* (How 'The King's Portion'? On the Methods of Editing the Mishnah), 16 SIDRA 21 (2000).

101. The simple implication of the Mishnah is that the king even says the seventh blessing "[o]n behalf of the priests."

102. The primary role of blessing the people belongs to the priests. See Numbers 6:22-27. Consistently, Mishnah *Sotah* 7:7 labels this ritual as the "blessing of the high priest," rather than the "reading of the high priest" (in contrast, the king's public Torah reading and blessings are labeled the "portion read by the king"). Nevertheless, at times the king also blesses the people. See 1 Kings 8:14.
Mishnah *Sotah*, then, requires two distinct, public ceremonies where the Torah is read and blessings are recited, which has not been adequately understood by modern scholarship. For even as the rabbinic tradition differs from other Second Temple traditions in assigning the post-sabbatical *Hakhel* reading to the king, the Mishnah recognizes the high priest’s leading role in another public reading and benediction ceremony held during the annual *Yom Kippur* Temple service. This dual assignment to the king and high priest coheres with the other passages in the Mishnah that are suggestive of a dyarchy where they both share responsibilities.

By comparing the *Hakhel* ritual recitation of the king to the high priest’s reading on *Yom Kippur*, the Mishnah elevates the king’s role. In fact, the Mishnah goes beyond this by depicting the king as occupying the high priest’s space—the Temple Mount—and especially by including the high priest in the hierarchy of officials that transport the Torah scroll to the king, implying that in some sense the high priest is subordinate to the king. In a similar vein, while the high priest is enjoined to read while standing the king is afforded the privilege of reading while sitting.

As opposed to the Mishnah, Tosefta *Sotah* 7 does not draw a parallel between the sacred readings of the king and the high priest, and the Tosefta certainly does not accent a parallel, dual distribution of leadership responsibilities to the king and high priest. Similarly, the fact that Tosefta *Sotah* 7:13-14 turns to the biblical figure Ezra, a priest, as a paradigm for the king’s *Hakhel* reading militates against the separation of roles implicit in the Mishnah, as Ezra now emerges as a kind of priestly monarch. Tosefta *Sanhedrin* likewise hails Ezra the Priest as a model monarchic figure.

The most striking discrepancy between Mishnah *Sotah* and Tosefta *Sotah* is their differing reactions to the historic *Hakhel* reading led by Agrippa, a king of inferior lineage. The Mishnah first records his

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104. The particular comparison here is especially noteworthy, as the king’s role at *Hakhel* is equated with the high priest’s responsibilities on *Yom Kippur*, the most holy day for the Jewish people.

105. A parallel ruling surfaces in Tosefta *Sanhedrin* 4:4 which states that kings of Davidic descent have the exclusive right to sit in the Temple sanctuary.

106. In fact, it is unclear whether the Tosefta even assigns a distinct reading to the high priest altogether. *But see* Tosefta *Yoma* 4:18. This of course depends on whether the Tosefta is a later gloss to the Mishnah here, or an earlier or distinct tradition. See the methodological considerations raised *supra* note 95. The fact that the Tosefta cites the model of Ezra does suggest that it is not operating with the sharp dichotomy of the Mishnah, but this is not foolproof evidence.


108. On the identity of Agrippa in the Mishnah, see DANIEL R. SCHWARTZ, *AGRIPPA I: THE LAST KING OF JUDEA* (1990); Goodblatt, *supra* note 103; Dalya Trifon, *Qeta Mimishnah Ke’edut*
supererogatory act of reading while standing, which generated the praise of the sages: “King Agrippa stood and received it and read standing, for which the sages praised him...” (Mishnah Sotah 7:8). The mutually respectful interaction between the king—according respect for the Torah—and the sages—recognizing his upstanding behavior—informs the rest of the account in Sotah 7:8, as well: “When he reached, ‘Thou may not put a foreigner over thee,’ his eyes ran with tears. They said to him, ‘Fear not, Agrippa, thou art our brother, thou art our brother’.”

The strong approbation for King Agrippa that is voiced in the Mishnah sharply contrasts with the scathing critique of this episode cited in the Tosefta. Tosefta Sotah 7:16 does not record King Agrippa’s respectful standing position, and harshly condemns the generation that meekly reassured King Agrippa about his lineage, “Israel made themselves liable to extermination, because they flattered Agrippa.” The Tosefta unabashedly implies that the rule of King Agrippa was illegitimate and that the people of Israel accordingly had the obligation to denounce him.

These polar reactions to King Agrippa’s Hakhel reading are consistent with the Mishnah and Tosefta’s different orientations toward the monarchy. The Tosefta openly presents positive and negative aspects of the monarchy. In Tosefta Sanhedrin it records opinions that undermine this institution and in Tosefta Sotah it does not hesitate to criticize a problematic regime. The Mishnah, on the other hand, consistently maintains a positive slant toward the monarchy. Instead of vilifying King Agrippa, the Mishnah depicts him heroically, and even adduces corroboratory evidence from the King Agrippa episode that further accents the king’s positive leadership role in the Hakhel ceremony. King Agrippa is likewise presented in a positive religious leadership role in Mishnah Bikkurim 3:4 where he is described or imagined as leading the ceremony of the first fruit offering, and humbling himself by transporting the fruit basket with his own hands. In fact, this may be part of a larger pattern of pro-monarchic historical revision in the Mishnah.

In sum, by employing a deliberate rhetorical construct, Mishnah Sotah presents another instance of the dual distribution of leadership responsibilities to the king and high priest. Tosefta Sotah, in contrast,


109. Other scholars have drawn other (somewhat speculative) inferences from the divergent reactions to Agrippa’s Hakhel reading recorded in Mishnah Sotah and Tosefta Sotah. See the discussion in Trifon, supra note 108, at 35. While this Article’s suggestion (that the differing reactions are emblematic of larger differences between the Mishnah and Tosefta) is also only conjecture, it has the advantage of resonating with the broader orientation of the Mishnah toward the monarchy (in contrast with the Tosefta), and being consistent with the Mishnaic treatment of other historical kings elsewhere. I hope to elaborate upon this latter important observation in a future article, as it relates to the broader historiographic approach of the Mishnah. For now, see Flatto, supra note 74, at 280-283.

110. See Tosefta Bikkurim 2:10 for a slightly fuller account.
does not appear to utilize this parallel construct in this context. Further, by conceiving of Ezra the Priest as a model monarchic figure, the Tosefta does not envision a division of leadership roles altogether. Finally, the distinctive orientation of the Mishnah can be detected in its discussion of the Hakhel laws and the historical memory of Agrippa's reading, as well. As opposed to the asymmetrical material recorded in the Tosefta, the Mishnah presents a uniformly positive portrait.

2. Mishnah Horayot 2-3

Mishnah Horayot offers a highly schematic presentation of the laws concerning the special sin offerings that are obligatory for the atonement of various institutional leaders for certain errors or transgressions (based on Leviticus 4 and Numbers 15).\textsuperscript{111} Mishnah Horayot 1 discusses the laws concerning the special sin offerings brought by the Sanhedrin after declaring an erroneous ruling. Chapter two, in turn, discusses the regulations of the sacrifices brought by the high priest after he errs in a ruling, which are in many ways comparable to those of the Sanhedrin.\textsuperscript{112} The latter half of chapter two introduces the king (called the Nasi, the ruler) as the third official with special sacrificial guidelines (although his obligation is apparently not triggered by a mistaken ruling but rather a misdeed). In doing so, the Mishnah includes the king among the nation's leading dignitaries, even as it treats him separately in certain respects.\textsuperscript{113} While the overt purpose of these passages is to analyze subtleties in sacrificial laws, the broader implication concerns the different foci of power within the rabbinic framework. In addition, Mishnah Horayot conveys that all three institutions of leadership are fallible and responsible for repairing their own failures. This latter point includes the monarch too, notwithstanding the principle of sovereign immunity.


\textsuperscript{112} See Mishnah Horayot 2:1-4 (especially the suggestive language in 2:1).

\textsuperscript{113} The differences include the nature of the error (a ruling or an action), the nature of the sacrifices required, and the rules that govern the obligation to bring the sacrifices. It should be noted that the exact standing of the king according to the passages in chapter two is unclear. On the one hand, the king seems to be at the bottom of the list of these three leadership offices. See Mishnah Horayot 2:6-7. Nevertheless, his very inclusion among the list of leading dignitaries is noteworthy. On the other hand, Mishnah Horayot 2:7 cites Rabbi Eliezer as stating that only the king brings a he-goat (although this may be a function of his wealth). Moreover, Mishnah Horayot 2:5 subtly debates the exact relationship of the king to the high priest and Sanhedrin, as Rabbi Yose Ha-Gelili equates them, while Rabbi Akiva contrasts them. In general, even as much of Mishnah Horayot revolves around the hierarchy of Jewish leadership, its specific rankings may be informed by the stature of the respective leaders as legal adjudicators. Thus, Mishnah Horayot 3:6 ranks the high priest ahead of the Sanhedrin, even though an opposite impression emerges from Mishnah Horayot 2:6-7. The relationship between the opening and closing hierarchies in Mishnah Horayot deserves further study.
that Mishnah Horayot 2:6 explicitly recognizes. 114

The king’s standing is even more prominent in the final chapter of Mishnah Horayot. In its opening passages, chapter three again presents a deliberate comparison between the laws applicable to the high priest and the king:

An anointed high priest who committed a sin . . . and likewise a ruler (=king) who committed a sin . . . an anointed high priest who vacated his appointment, who then committed a sin, and likewise a ruler who vacated his position, who then committed a sin . . . 115

These passages are particularly noteworthy since the Mishnah pursues this comparison even as it assumes that the high priest actually bears greater similarity to the Sanhedrin in the realm of these special sacrificial laws. 116 Moreover, unlike the passages in chapter two that essentially elaborate on the biblical sacrificial scheme appearing in Leviticus 4, the comparison presented in Mishnah Horayot 3 between the king and high priest is an original creation of the Mishnah. Thus, Mishnah Horayot, extending the motif developed in Mishnah Sanhedrin and Mishnah Sotah, emphasizes the essentially parallel standing of the king and the high priest. 117

The climactic statement regarding the monarchy in Mishnah Horayot appears later in chapter three. In an emphatic exegetical comment, Mishnah Horayot 3:3 dispels any possible signs of monarchic inferiority to the other leadership positions in one stroke. Justifying the common rabbinic tradition of identifying the biblical Nasi (ruler) as the king, the anonymous Mishnah states, “Who is meant by ‘ruler’? A king, for it is stated in Scriptures ‘who has violated any of all the things which the Lord his God hath commanded (Leviticus 4:22)’...a ruler above whom there is none but the Lord his God.” This mishnaic teaching constitutes one of the more positive characterizations of the monarchy recorded in all of rabbinic literature. 118

114. This is a crucial point that, as far as I can tell, has been largely ignored. Apparently, Mishnah Horayot is envisioning that the king will come forth on his own and publicly (to the extent that a royal sacrifice receives public attention) admit his error—and not simply leave matters between him and God.
116. See Mishnah Horayot 2.
117. The only difference mentioned in the opening passages of chapter three concerns the limited duration of the monarch’s status relative to that of the high priest. See Mishnah Horayot 3:2. This may indicate that according to the Mishnah, monarchy is more functional and less formal than the high priesthood. However, the status of the king while he functions, and his standing relative to the high priest during his tenure, still must be considered—and this is the focus of this Article. On the question of whether the standing of the king requires functional power, see also Palestinian Talmud Horayot 3:2 (considering the status of King David when he fled from Absalom). Tosefta Sanhedrin 4:11 may implicitly relate to the difference between formal and functional power as well (in its discussion of which leaders must be anointed with special oil).
118. The precise semantic of this statement is somewhat ambiguous. See Meiri Horayot at 276
A comparison with the Tosefta again highlights distinctive aspects of the editorial program of the Mishnah that are absent in what appears to be the raw material of the Tosefta. First, the Tosefta does not record the suggestive comparison of the king and high priest that appears in chapter three of the Mishnah. Second, while Tosefta Horayot 2:2 identifies the Nasi, the ruler, as Nasi of Israel (presumably a reference to the king), it does not invoke the very positive scriptural basis that appears in Mishnah Horayot 3:3 to explain this identification. In light of the Tosefta’s mixed presentation of material regarding the monarchy, this omission is noteworthy. Moreover, in the next passage, Tosefta Horayot, addressing an issue not found in Mishnah Horayot, states that when a Nasi of Israel (=non-Davidic lineage) and a Nasi of Davidic lineage share power, they both bring special sacrifices. The Tosefta’s ruling undercuts the singular stature of the Nasi, and suggests that the special sacrifice is more a function of the king’s de facto political muscle than of his distinguished title. In contrast, Mishnah Horayot, which identifies the Nasi as the king who has no superior other than God, never suggests that two people can simultaneously share this title.

The concluding passages of Tosefta Horayot explicitly address the position of the monarch relative to other leaders (presumably in terms of the sequence in which their respective sacrifices are offered). In an ambivalent comment, the Tosefta states: “A sage takes precedence over the king, since if a sage dies there is no replacement, but if the king dies

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119. The same methodological issues raised above, supra note 95, apply here.
120. At the same time, the nexus between the Sanhedrin and the high priest that emerges in chapter two of the Mishnah is less apparent in the Tosefta. See Tosefta Horayot 1:2, 1:8, 1:10, 2:4. Regarding the king and testimony, Tosefta Horayot 1:10 deserves more careful analysis and comparison with Mishnah Horayot 2:5 and 2:7 and Tosefta Sanhedrin 4 (as this passage in Tosefta Horayot again confirms that a king can testify).
121. Regarding the distinction between Davidic and Israelite (i.e., non-Davidic) kings, see Tosefta Sanhedrin 4:4 and 11 and Babylonian Talmud Sanhedrin 19a-b. It is interesting that the Tosefta discusses these distinct kingdoms explicitly, while the Mishnah never does. Perhaps the Mishnah wants to depict the ideal of a unified kingdom, similar to its ideal description of a national and tribal court system in Mishnah Sanhedrin and Mishnah Horayot. For more sources relating to the difference between Davidic and Israelite kings, see Tosafot Sanhedrin 20b; Meiri Horayot at 279 (and his Introduction to Tehillim) (Abraham Sofer ed., 1964), and Maimonides, Hilkhot Melakhim 1:7-11 (Shabse Frankel ed., 1999).
122. Note, though, that Maimonides, Hilkhot Shegagot 15:9 (Shabse Frankel ed., 2003) combines the ruling of Tosefta Horayot and the language of Mishnah Horayot. See LORBERBAUM, supra note 89.
123. The Tosefta’s extension of the special sacrifice to the Patriarchate may be a further signal of its orientation. See also BABYLONIAN TALMUD, Horayot 1:1b. For more on the term Nasi, see Ezekiel 40-48; David Goodblatt, The Title Nasi and the Ideological Background of the Second Revolt, in THE BAR-KOHVA REVOLT: A NEW APPROACH 118-20 (Aharon Oppenheimer & Uriel Rappaport eds., 1984).
all of Israel are worthy to be kings. The king takes precedence over the high priest . . . “124 Even as Tosefta Horayot surprisingly asserts the king’s priority over the high priest, it offsets this approbatory remark by placing the king beneath the sage, and emphasizing that while sages have singular significance, monarchs are replaceable. Not surprisingly, the Mishnah never records this partially dismissive statement.125 Indeed, the impression conveyed by Mishnah Horayot 3:3, emphasizing the uniqueness of the monarch, runs directly counter to this sentiment.

In sum, by developing the biblical verses into an elaborate sacrificial scheme involving the Sanhedrin, high priest, and king, and by comparing them with one another, Mishnah Horayot presents all three as positions of leadership that require special sacrifices. In addition, by specifically comparing and contrasting the king’s offerings to those of the high priest (especially in chapter three), the Mishnah again suggests that it conceives of these two dignitaries as occupying parallel offices. At the same time, Mishnah Horayot returns to the theme developed in Mishnah Sanhedrin that emphasizes the disparate natures of these leadership positions, as it couples the high priest and Sanhedrin (both depicted in the role of adjudication), in contrast with the king. Finally, by employing certain rhetorical devices, the Mishnah projects the singular stature of the monarchy, despite its limitations, reflecting a pro-monarchic orientation. The king has a central political role and operates independently of the judiciary. The Tosefta omits this material and instead includes rulings and statements that are of a more equivocal nature.

3. Other Mishnaic Material

Various other passages scattered throughout the Mishnah confirm the monarch’s central place in the Jewish administration. Three such passages will be surveyed below.

1) Mishnah Avot 4:13 famously records Rabbi Simeon’s statement that “there are three crowns: the crown of Torah, the crown of priesthood, and the crown of royalty.”126 This passage states plainly what was

124. Tosefta Horayot 2:8-9. See also Trifon, supra note 108.
125. My assumption is that Mishnah Horayot 3:8 was redacted later than the parallel Tosefta passage. In fact, this Mishnah omits reference to the king altogether. If this omission is deliberate, the Mishnah may be avoiding a specification that would partially detract from the king’s stature.
126. The Sanhedrin, and rabbinic judges and sages in general, are often associated with the crown of Torah. The early date of this statement (Rabbi Simeon is a rabbi from the third generation of teachers in the Mishnah) makes this source relevant to a characterization of mishnaic material, even if it appears in Mishnah Avot, which may be of a later date. Admittedly, the fact that it is a discrete, individual teaching makes it less probative in describing the broader mishnaic orientation, than the anonymous, rhetorically elaborate teachings discussed above.

The relevance of other pro-monarchic passages in Mishnah Avot (including 3:2 and several in the chronologically later chapter six) has to be assessed on an individual basis. For more on the dating of
implicit in the various passages surveyed above, identifying three (presumably equal, presumably distinct) sources of authority among the Jewish people.\textsuperscript{127} Despite the fact that it is the teaching of an individual rabbi, and is recorded in a tractate that may have been redacted later than the rest of the Mishnah,\textsuperscript{128} this passage succinctly captures the mishnaic spirit which is manifest in more subtle, but perhaps more consequential, ways in the normative material discussed above. Interestingly, the parallel source in \textit{Abot de-Rabbi Nathan} adds an ambivalent gloss to this statement, stating that ultimately the crowns differ from one another, as priesthood and royalty are inaccessible, in contrast with the accessible "crown of Torah."\textsuperscript{129} This comment, along with the one from Tosefta \textit{Horayot} 2:8 cited above, portrays the monarchy as inferior to Torah leadership since it is ironically either too closed (\textit{Abot de-Rabbi Nathan}) or too open (Tosefta \textit{Horayot}).

2) Mishnah \textit{Yoma} 7:5 contains one of several positive references to the king in Mishnah \textit{Yoma}, which is significant given that this tractate primarily focuses on the high priest’s role during the \textit{Yom Kippur} Temple service.\textsuperscript{130} Mishnah \textit{Yoma} 7:5 is particularly noteworthy as it establishes the king’s prerogative to seek guidance by means of the sacred priestly breastplate, the \textit{Urim v’Thummim}, worn by the high priest.\textsuperscript{131} The pro-monarchic orientation implicit in the Mishnah can be highlighted by comparing it with the parallel teaching in the "Law of the King" section of Qumran’s \textit{Temple Scroll}.\textsuperscript{132} The latter presents the sanction of the priestly \textit{Urim} and \textit{Thummim} as a necessary prerequisite for royal action and thus as a check and limitation on monarchic powers.\textsuperscript{133} Mishnah \textit{Sanhedrin} 2:4, however, affirms broad royal powers

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\item Mishnah \textit{Avot}, see Myron B. Lerner, \textit{The Tractate Avot, in The Literature of the Sages, First Part: Oral Tora, Halakhah, Mishna, Tosefta, Talmud, External Tractates 263} (Shmuel Safrai ed., 1987).
\item The conclusion of the passage subordinates all three crowns to the "crown of the good name," which may be part of a broader anti-establishment thrust present in tractate \textit{Avot}. \textit{See, e.g.,} Mishnah \textit{Avot} 3:5 and 4:15. This source departs slightly from the previous sources which imply that the Sanhedrin (which is likely associated with the crown of Torah) is above the other two offices. For more on this source, see \textsuperscript{127}Cohen, \textit{supra} note 74.
\item See \textsuperscript{128}Lerner, \textit{supra} note 126, at 263-81.
\item R.D.Z. Hoffman characterizes \textit{Abot de-Rabbi Nathan} as Tosefta material. \textit{See Strack & Stemberger, \textit{supra} note} 16, at 226. In any event, it is certainly a parallel source to the Mishnah.
\item The very appearance of pro-monarchic material in a tractate that concentrates on the high priest and depicts the high priest’s leading religious role is itself suggestive.
\item Specifically, this passage grants the king the same access to the \textit{Urim} and \textit{Thummim} that it affords to the high court of the Sanhedrin and to others upon whom the public depends.
\item For a more thorough discussion of the \textit{Temple Scroll}, see \textit{infra} Part IV, Section C. \textit{See also} Lawrence H. Schiffman, \textit{The King, his Guard, and the Royal Council in the Temple Scroll}, 54 Proceedings of the American Academy for Jewish Research 237-59 (1987).
\item This is consistent with the overall orientation reflected in the \textit{Temple Scroll}’s "Law of the King," which promotes a limited form of monarchy, as discussed \textit{infra} Part IV, Section C. \textit{See also} Yigal Yadin, \textit{The Temple Scroll: The Hidden Law of the Dead Sea Sect} (1985); Fraade, \textit{The Torah of the King, \textit{supra} note} 74; Schiffman, \textit{supra} note 132.
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without predicating them on priestly approval. The Mishnah’s political constitution by in large operates with discrete distributions of powers, which are not constricted by checks and balances. Consistently, Mishnah Yoma 7:5 instead conceives of the royal usage of the Urim v’Thummim not as a limiting mechanism which is imposed upon the king, but rather as another royal prerogative to be used at the king’s discretion.134 The Tosefta does not seem to contain this material altogether.

3) Mishnah Yevamot 6:4 records the fact that the king appointed Joshua b. Gamla as the high priest. The Tosafists, medieval commentators, infer from here that the king generally is empowered to appoint the high priest.135 According to this reading, the king has the authority to help form the leadership coalition. In contrast, Tosefta Sanhedrin 3:4 seems to allocate the responsibility for appointing the high priest to the Sanhedrin.136

Overall, the Mishnah envisions a distinctive model of separation of powers, which derives from Deuteronomy, but also revises the biblical approach in important ways. I will return to the mishnaic scheme and its particular elaboration on the tradition of Deuteronomy in the Conclusion. Before concluding, I survey various alternative models of authority and jurisdiction found in pre-rabbinic, Second Temple writings.

IV. A COMPARATIVE PERSPECTIVE ON EARLY HEBRAIC POLITICAL THEORY

Second Temple writings concerning the Jewish political administrative framework provide an important window into how Jewish writers in the post-biblical, pre-rabbinic period interpreted the biblical tradition and utilized it along with various contemporary influences to construct a model for a Jewish political system. This body of literature provides us with a rare opportunity to assess the interpretive range of possibilities that were available to the early rabbis, since these writings are roughly contemporaneous and operate with the same biblical foundation. By contrasting the rabbinic approach with other Judaic writings from a similar period, one can better capture the distinctive constitutional and political philosophy that animated the early rabbis in constructing their mishnaic scheme. In this Part, I briefly consider how three prominent

134. For several relevant biblical passages relating to the Urim and Thummim, see Exodus 28:30, Numbers 27:2, 1 Samuel 14, 28:6, Ezekiel 2:63 and Nehemiah 7:65.
135. Tosafot Yoma 12b.
136. But see Tosefta Yoma 1:4. In practice, during late Second Temple times, King Herod assumed the authority to appoint the high priest, in contrast with the previous hereditary method (which was interrupted at various points when competing priests usurped the position during the Hasmonean period). See Isaiah Gafni, The Historical Background, in THE LITERATURE OF THE SAGES, FIRST PART 19 (1984).
writers from this period, in specific passages that relate to Deuteronomy 17, articulate the Jewish tradition’s allocation of judicial responsibility, and the role of the king, if any, in the judiciary. Specifically, I survey passages from Josephus’s Jewish Antiquities, Philo’s Special Laws and Qumran’s Temple Scroll. I then summarize these various models and contrast them with the political system advanced by the Mishnah.

A. Josephus on the King and the Judiciary

In the Jewish Antiquities, Josephus, the great Jewish historian of late antiquity, provides a panoramic history of the Jews from biblical times until their failed revolt against the Romans during the latter half of the first century CE, an event he witnessed with his own eyes. In the early sections of Jewish Antiquities, Josephus restates large sections of the Bible, often interpolating subtle and innovative commentaries.137 The restatement of the laws of Deuteronomy 17 in Josephus’s Jewish Antiquities IV, sections 214 and 223-24, suggests that the judiciary operates independently of the monarch. The ruler’s responsibility in establishing the court system is limited to setting up an autonomous network of municipal courts (each with seven justices). Regarding the actual administration of justice, the system requires that the municipal courts refer hard cases to Jerusalem, where the high priest, prophet, and council of elders (the Gerousia) serve as the leading judicial authorities.138 A parallel passage expanding upon Deuteronomy 17 in Josephus’s Against Apion, section 2:194, further highlights the central role of the high priest in judicial affairs, stating that the high priest’s duty is to “safeguard the laws, adjudicate in cases of dispute, [and] punish those convicted of crime.”139 In the enumeration of those who have judicial responsibility, the king is conspicuously absent.

Elaborating on the verses regarding the king (Deuteronomy 17:14-20), Josephus expresses a general ambivalence about the institution of the monarchy. Thus, Josephus opens Jewish Antiquities IV, section 223, with an emphatic statement endorsing aristocracy as the best polity.140 In Josephus’s ideal framework, the rule of law will be supreme, and God will be sovereign. Accordingly, a king is appointed only if the people insist on a monarchy. In such a case, Josephus adds, justice must be the king’s concern, and he must be subservient to the laws. What Josephus intends is not an aggrandizement of royal responsibilities, but rather a

137. See James L. Kugel, The Bible as It Was 586 (2001).
139. See id. at n.667. These sources are somewhat ambiguous as to whether the high priest participates in an institutionalized judiciary, or as a—or perhaps the—independent judicial authority.
140. Whether Josephus is calling for a specific form of government here is debated among scholars. See id.
restraint and limitation on the king’s authority. In this vein, Josephus continues, the monarch must solicit the counsel of the high priest and the advice of the elders (the Gerousia) before he acts. This suggests a dramatic form of subservience to these latter two institutions.141 Here too Josephus never states that the king participates in the judiciary.

A fuller treatment of Josephus’s depiction of monarchic powers, based on his descriptions of more recent historical events, reveals a more complex picture. This likely reflects the difference between Josephus’s ideal political vision and his realistic portrayal of political life in late antiquity.142 For instance, Josephus’s restatement of Deuteronomy 17 seems inconsistent with his two retellings of the trial of Herod, then governor of Galilee, who is summoned to court after executing some brigands.143 Josephus’s accounts strongly suggest that the king is protected by sovereign immunity (and Herod who aspires to be king is attempting to enforce this privilege), and that the king (in this case the actual king, Hyrcanus) also has a role in judging the perpetrator,144 perhaps as a member of the Gerousia or the Sanhedrin.145 In another place, Josephus describes his own experience when he assumed command in the Galilee in 66-67 C.E., a kind of executive position. He selected a council of seventy men to serve as archons for the Galilee,146 and he also presided with them.147

In sum, in his restatement of Deuteronomy 17 in Jewish Antiquities and Against Apion, Josephus implies that the high priest, along with the

141. The need for approval from other leaders has parallels in the Temple Scroll, and, to a much more limited extent, Mishnah Sanhedrin 2:4 (just in terms of waging war), as discussed supra Part III.C. 3. Feldman labels this as a pro-priestly revision. FLAVIUS JOSEPHUS, JUDEAN ANTIQUITIES I-4, at n.705. See also GOODBLATT, supra note 24, at 95 (who discusses the requirement of approval from other leaders).

142. A complete account of Josephus’s depiction of monarchic powers would require an analysis of both his restatement of biblical narratives about kings (for example, his description of King Jehoshaphat in Antiquities 9.4), and his account of Second Temple Hasmonean kings (for example, his discussion in Antiquities 14 and Wars 4). The mix of idyllic principles and political realities would undoubtedly produce an inconsistent picture of monarchic powers and responsibilities.


144. Samuel Belkin draws an opposite conclusion. See SAMUEL BELKIN, IN HIS IMAGE: THE JEWISH PHILOSOPHY OF MAN AS EXPRESSED IN RABBINIC TRADITION (1960). See also the critique of Louis Feldman in LOUIS FELDMAN, JOSEPHUS AND MODERN SCHOLARSHIP, 1937-1980 (1984). For a complex formulation concerning whether the king judges independently or alongside a judicial body, see GOODBLATT, supra note 24, at 111.

145. See GOODBLATT, supra note 24, at 94-119. See also JOSHUA EFRON, STUDIES ON THE HASMONEAN PERIOD (1987); SETH SCHWARTZ, IMPERIALISM AND JEWISH SOCIETY: 200 B.C.E. TO 640 CE (2004); Seth Schwartz, 47 J. JEWISH STUD. (1996) (reviewing GOODBLATT, supra note 24)(discussing the role of the Gerousia and its relationship to other leadership officials).


147. This action at least indicates that a quasi-executive could join something akin to a judicial body. See GOODBLATT, supra note 24, at 114-115; FLAVIUS JOSEPHUS, JUDEAN ANTIQUITIES 1-4, supra note 138, at n. 669.
elders and perhaps the prophet, are in charge of judicial matters.\textsuperscript{148} The impression that one gathers from these sources is that these officials operate independently from the king, assuming there even is a king; and that if there is a king, he is subservient to these officials. This is particularly manifest in Josephus's statement that the king requires consent from other officials before acting. Other writings of Josephus, especially his treatment of the Herod trial, convey a different impression, likely reflecting political realities. They imply that the official king is immune from the court's jurisdiction, and that the king has a role in the exercise of judicial powers.

\section*{B. Philo on the King and the Judiciary}

A leader of the large diaspora Jewish community of Alexandria in the first half of the first century C.E., Philo was a prolific writer who authored a multivolume series of commentaries on the Pentateuch.\textsuperscript{149} In his \textit{Special Laws}, Philo expounded upon the Decalogue and related biblical passages, often interpreting them in an allegorical style that betrays Hellenistic influence. In a rather elaborate section of his \textit{Special Laws IV}, on "The Appointment of Rulers,"\textsuperscript{150} Philo calls for the use of elections, as ratified by God, for selecting the ruler.\textsuperscript{151} Following his discussion of the monarch's appointment, Philo turns to the role of the monarch in the national polity, delineating the particular requirements and responsibilities of this office in sections 158-188. From the tone and substance of these passages, it becomes clear that Philo considers the monarch to be the highest national official. Thus, at the end of section 164, Philo states that the king possesses an "ensign of sovereignty which none can impeach, formed in the image of its archetype, the kingship of God." In a similar vein, the beginning of section 170 describes the king as "the person who has been judged worthy to fill the highest and most important office." In marked contrast with Josephus's explicit reservations about the monarchy, Philo openly endorses the king as the leading administrative official.

In detailing the responsibilities of the king, Philo enumerates judging and the appointment of judges as important duties. Turning to the verses from \textit{Deuteronomy} 17, Philo restates the biblical instruction for the king to write the "sequel of the law" with his own hand as a way of ensuring that "the king's scepter will be this very law, ensuring equality and the

\textsuperscript{148} See Belkin, \textit{supra} note 144, at summary conclusion.
\textsuperscript{149} See Kugel, \textit{supra} note 137, at 597.
\textsuperscript{150} See Naomi G. Cohen, \textit{Contemporary Political Overtones of Philo} 10 \textit{WORLD CONGRESS OF JEWISH STUDIES} 253.
\textsuperscript{151} Philo, \textit{On the Special Laws IV}: 151-57 (F. H. Colson, 1929). Philo calls for elections rather than a mere chance system of lots, which was a classic Greek method for choosing magistracies.
proper balance between excess and deficiency."\textsuperscript{152} Such a king will "honor equality, be impervious to bribes and give just judgments"—all classic indicia of a just judge.\textsuperscript{153} Responsible for the proper functioning of the entire legal system, the king must delegate responsibilities to lower-level officials who share his workload, including the dispensation of justice. The king should limit his direct adjudication to "greater matters," which Philo surprisingly defines as cases where there is a disparity between the social standing of the two litigants.\textsuperscript{154} In order to illustrate this structural model, Philo cites the biblical model implemented by Moses, the ideal ruler, who delegated judicial responsibilities at Jethro's recommendation.\textsuperscript{155} According to Philo, the king leads the nation, and his responsibilities include running the judicial system, both directly and by assigning lesser matters to lower-level judges.

In a subsequent section,\textsuperscript{156} Philo seems to inconsistently identify the priests as the master judges. Expanding on Deuteronomy 17:8-13, Philo interprets these verses as referring to a situation where a judge (not an individual citizen) is uncertain about the law. In such a circumstance, Philo explains, the local judge should defer to the expert judges who have keener powers of discernment. In this context, Philo states that the superior judges are the priests and especially the high priest, who gain particular advantage because of their superb dedication to mastering even the minutiae of the law, and their clarity of apprehension due to their prophetic powers. Given the proximity of these sections in the Special Laws, in all likelihood Philo is not contradicting his earlier words, but rather envisioning a complex system of superior courts. Philo seems to advance the following highly original dual scheme: (1) the king is the ultimate judge for "greater" cases (where a disparity exists in the social standing between the parties), and he uses his intimidating presence and rarefied wisdom in adjudicating such matters without prejudicing either party; and (2) the priests are the supreme judges for "difficult" cases which demand complex legal analysis, and they call on their profound expertise and even prophetic capacities in illuminating such matters.\textsuperscript{157} In Philo's scheme, the king and the high priest may

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\item[152.] See id. at 160 et seq.
\item[153.] See id. at 169. See also Exodus 18:21 and Deuteronomy 16:18-20.
\item[154.] PHILo, supra note 151, at §§ 170-72.
\item[155.] Id. at §§ 173-75.
\item[156.] Id. at §§ 188-192.
\item[157.] This fascinating scheme apparently stems from an exegetical point. Moses, the model of the philosopher-king, is instructed to deal with "great matters" (as formulated in Exodus 18:22). The High Priest, in contrast, is instructed to deal with "difficult matters" (as formulated in Deuteronomy 1:17). For a twentieth-century version of the distinction between "great" and "difficult" matters requiring judicial expertise, see Isaac Zeev Soloveitchik, Hidushe Maran Riz Ha-Levi: Al Ha-Torah 31-32 (1973).
\end{enumerate}
\end{footnotesize}
each assume the mantle of leading judicial authority, depending on the nature of the matter.

C. The Dead Sea Scrolls on the King and the Judiciary

Among the most important of the Dead Sea Scroll texts that were discovered in the mid-twentieth century is the Temple Scroll. Apparently written by an ascetic sectarian group that lived in the Judean desert around the second century B.C.E., this book restates sections of the Pentateuch in a manner that reflects their sectarian ideology.\textsuperscript{158} After restating the verses from Deuteronomy 17:8-13 regarding the judiciary’s authority to resolve legal matters, the Temple Scroll proceeds to restate the next sequence of verses in Deuteronomy 17:14-21 describing the royal office.\textsuperscript{159} Next, the scroll presents a section known as the “Law of the King,”\textsuperscript{160} which elaborates on the duties and prerogatives of the monarch (based partially on an amalgam of verses from Exodus, Leviticus, Numbers and Deuteronomy). Scholars have demonstrated that this section is a discrete literary unit which the redactor of the Temple Scroll incorporated into the larger composition.\textsuperscript{161} Among the prominent responsibilities of the king enumerated in the Law of the King is the duty to judge the people: “they (= the council) sit with him [the king] in order to hear legal rulings and Torah teachings…” and “he [the king] should not distort justice, nor take bribes in order to distort true justice.”\textsuperscript{162} Thus, the Law of the King establishes that the king has judicial responsibilities. However, the Law of the King constricts the king’s judicial autonomy in fundamental ways. To wit, it requires the king to partner in his judicial role with a council composed of twelve princes, twelve priests, and twelve Levites. Further, by interpreting the biblical phrase, “that his heart should not become haughty over his brothers,”\textsuperscript{163} in a normative sense rather than a hortatory one,\textsuperscript{164} the Law of the King demands that the king defer in his judicial capacity to the decision of this advisory council (in which he apparently participates).\textsuperscript{165}

The limitation of the king’s judicial powers also emerges from other

\textsuperscript{158} See Kugel, supra note 137, at 576, 610.
\textsuperscript{159} YADIN, supra note 133, at 11Q19 LVI.
\textsuperscript{160} Id. at 11Q19 LVII-LVIX.
\textsuperscript{161} See Id.; Lawrence H. Schiffman, supra note 132, at 275-288; Andrew M. Wilson & Lawrence Wills, Literary Sources in the Temple Scroll, 75 HARV. THEOLOGICAL REV. 275 (1982).
\textsuperscript{162} YADIN, supra note 133, at LVII: 13-14, 19-20.
\textsuperscript{163} Deuteronomy 17:20.
\textsuperscript{165} It may be that there is some legal evolution in the Temple Scroll’s treatment of these matters. See Yoav Barzilay, Ofiah Ha-Mekori Ve-Arikhatah Ba-Mishnit Shel Torat Ha-Melekh Be-Megilat Ha-Mikdash (The Law of the King in the Temple Scroll: Its Original Characteristics and Later Redaction) 72 TARBIZ 59-84 (2003).
sources in the *Temple Scroll*. Both in an earlier section\textsuperscript{166} and in a later one\textsuperscript{167} discussing the adjudication of specific substantive laws, the leading judicial officials seem to be the priests, Levites, and judges, while the king is not even mentioned. In fact, the entire Law of the King, which is the king’s charter, is written by the priests on behalf of the king. The king is instructed to abide by the Law of the King, and even transport it with him,\textsuperscript{168} in fulfillment of *Deuteronomy*’s charge to the king to possess a scroll.\textsuperscript{169} The symbolism implicit in this act is that the king derives his authority from this charter, meaning his empowerment derives, in a certain respect, from the priests.

The cumulative impression from the *Temple Scroll*, including the Law of the King, is that the judiciary is primarily composed of priests, Levites and judges, and the king’s judicial role is thereby contracted. This structure parallels the *Temple Scroll*’s requirement that the king consult with the high priest’s *Urim* and *Thummim* before waging war, discussed in Part III.C, which demonstrates that the king’s authority is limited by the priests in other areas as well. The king, then, participates in judicial affairs, but in a limited manner, and apparently not as a full member of the judiciary.

Other post-biblical Jewish writings provide additional portrayals of the role of the monarchy and its relationship to the judiciary.\textsuperscript{170} Yet, this brief survey of several seminal pre-rabbinic texts provides an important window into some of the more prominent attitudes of this period. Further, the passages examined above are particularly instructive in that they all begin with the same source—*Deuteronomy* 17, the rather exceptional biblical text that envisions an independent judicial authority—as the authoritative biblical point of departure. Nevertheless, the three sets of texts differ fundamentally in their respective visions of the ideal administration and the degree to which they aim for separation of powers. According to certain references in Josephus, the judicial authority is independent from the monarchy (assuming there even is a monarch), and the monarch requires the approval of the judicial authority for various state actions. In Philo’s writings, by contrast, the monarch (the leading political figure) stands in charge of the judiciary, and is uniquely qualified to function as the superior judge for “greater” cases. Finally, according to the *Temple Scroll* the king contributes to the judicial order, but mostly works alongside, or even beneath, the priests.
Levites and judges. In contrast, the Mishnah, which also clearly operates against the backdrop of Deuteronomy, projects an entirely different scheme: the king has significant stature, but his role is separate from, and independent of, the judiciary and the broader normative system.

CONCLUSION

While separation of powers has been a cornerstone of American constitutionalism ever since Madison, recent academic writings have probed the scope and nature of this doctrine, and have even raised trenchant challenges to its utility and role in modern governance. In particular, legal scholars have discussed the viability of separation of powers in the context of party competition; the relationship of allocation of power to the notion of checks and balances; the alternative models of institutional separation that have been adopted by other modern democracies; the balance of powers within the administrative state; the role of an independent judiciary in relation to the other branches; and the nature of separation of powers in an emergency constitution.

This Article aims to deepen our understanding of the constitutional themes of separation of powers and judicial independence by exploring their conceptual origins, and focusing on their understudied historical, comparative and structural dimensions. Following the lead of early modern European political writings, this study returns to the formative theories of governance inherent in the early Hebraic tradition. An examination of these neglected Hebraic texts from a modern critical perspective exposes their subtle discourse relating to governance and allocation of powers, especially the political theory implicit in the Mishnah.

In comparison with most other administrative systems from Antiquity and Late Antiquity, the Mishnah’s model is unique. In the ancient Near Eastern world the king was the lawgiver and its final arbiter. In the
surrounding Roman world, the Emperor stood atop the legal system and functioned as the ultimate legal authority. Even in the biblical world of ancient Israel, the dominant viewpoint projected the king as the central figure in the legal system. In marked contrast, the early Hebraic position of the Mishnah entrusted legal authority to independent judges, and displaced the king from the judiciary.

While the Mishnah follows the lead of Deuteronomy in envisioning an independent judicial body, it also revises the biblical constitution in important ways. Unlike the deuteronomic political blueprint which imagines the king as occupying an inferior position to that of the judiciary, the Mishnah calls for a strong and independent monarch. What is so striking about the Mishnah is that it refuses to demote the king, unlike Deuteronomy, the Temple Scroll and Josephus. Instead, the Mishnah boldly proposes a king who is granted singular autonomy and who leads without being constricted by the grand judicial body. The king has his distinctive political calling, and must be allowed to pursue his mission without unnecessary interference. The king cannot judge, but in many respects the court cannot govern either. Early Hebraic thought presents a model of separation of powers that enables a true division of administrative responsibilities among the leading officials of the state.

An examination of these early Hebraic sources not only sheds light on the conceptual origin of these constitutional themes, but also has relevance for modern constitutional jurisprudence. Aspects of Hebraism likely shaped the conceptions of the Founding Fathers, including their notions of authority. Given the recent call in contemporary legal scholarship, especially since INS v. Chadha, for an original understanding of the separation of powers doctrine, there is particular value in reconstructing the intellectual foundation that supported the framers of the Constitution. More generally, the above study enriches our perspective on several issues


that have been at the forefront of modern constitutional scholarship. Below I wish to briefly highlight several of the contemporary resonances that derive from the texts examined above.181

1) Different Models and Goals of Separation of Powers

Bruce Ackerman's recent writings have emphasized that supporting the separation of powers doctrine does not predetermine how power should be divided.182 A variety of models of separation of powers exist in modern democracies, and each one deserves independent evaluation in order to measure which is most successful. Considered from the wider perspective advanced in this study tracing back to early Hebraic sources, Ackerman's observation is all the more forceful, as separation of powers has undertaken a variety of forms from the period of its inception.

Yet viewing the plurality of models from this larger frame also challenges a corollary argument that Ackerman advances. In order to evaluate the various systems of separation of powers, Ackerman probes further and inquires, "[S]eparating power on behalf of what?" In response, he enumerates three objectives of separation of powers, all relating to the broader aim of promoting democracy.183 This study, however, reveals that the notion of separation of powers was developed in an ancient world that was far from democratic. Distributing power in such an environment was therefore oriented toward achieving political aims other than democratic ones, such as effective administration, superior enforcement and enhanced security.

Appreciating the fuller range of political goals that separation of powers can help achieve has important implications for assessing the role of this doctrine in contemporary times as well. Consider the highly contested issue of separation of powers under an emergency constitution. In this volatile atmosphere, achieving democracy may only be one of several administrative objectives, and alternative goals may also be served by redistributing power. To illustrate, the controversial unitary executive theory is probably best understood not as a vehicle for democracy, but as a way of achieving effective governance in dangerous times.184 Exposing

181. Other interesting issues that deserve consideration include the nature of sovereign immunity; the way courts use history and historiography; the relationship between the separation of powers doctrine and church and state issues; how disempowered or underrepresented groups can contribute to the discourse of power and politics; and the formalist and functionalist approaches to separation of powers.
182. See Ackerman, New Separation, supra note 10.
183. The first ideal is democracy; the second ideal is professional competence (in implementing democratic laws); the third ideal is the protection and enhancement of fundamental rights. See id., at 640.
184. On the unitary executive theory see, for example, Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L...
the primary (and extra-democratic) justification for such a theory enables one to better evaluate its desirability. It will also be consequential in determining the parameters of the exercise of executive authority, including the degree of transparency that is required. Democratic considerations may call for increased visibility, but security considerations may demand greater confidentiality.

In a sense, this returns to Ackerman’s primary argument: separation of powers can assume a variety of forms. However, which form is most desirable not only turns on the efficacy of each in achieving democratic ends, but also in determining which other valuable ends they serve, and the respective priorities among these alternative goals.

2) Binary Separation and the Distinction between Politics and Law

Scholarly studies of the constitutional separation of powers tend to examine the tripartite division of governmental responsibilities. The simultaneous focus on this threefold distribution derives from the three articles of the United States Constitution, the threefold division defended in the Federalist Papers, and the threefold scheme described by Montesquieu. However, the Founding Fathers’ citation of Montesquieu as a source for the separation of powers doctrine relies on his partial misinterpretation of English constitutionalism. While the English system involved the King, Lords and Commons, these three estates shared representation, but did not assume distinct administrative functions. To the extent that there was a distribution in functions within the English model, it was between two branches. As Adam Tomkins has demonstrated, the English model of separation of powers in the seventeenth and eighteenth centuries essentially divided authority between the king and parliament.

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186. This applies to scholarly articles, books, and treatises in the areas of constitutional law and federal courts.


188. See Bailyn, supra note 5, at 71-3, n.16 and the sources cited therein.

189. Id.

190. Tomkins argues that the essential confrontation in the English model of separation of powers is between the crown and parliament. The judiciary, however, is not part of the equation since the confrontation secures accountability through political, not legal, means. This distinction has a certain parallel with the Hebraic model of separation of powers, as discussed immediately below. See Adam Tomkins, Public Law chs. 1-2 (2003); The Republican Monarchy Revisited, Constitutional Commentary 737-760 (2002).
in this Article also essentially portray a twofold division of power. However, unlike the English system, theirs is a distribution of power between the king and the court.

Retracing the origins of separation of powers, then, exposes two distinct historical modes of separation: between (1) the king and parliament; and (2) the king and the court. Moving forward to the tripartite division in American constitutionalism does not entirely efface these initial twofold distributions of power. Within the tripartite division of power, there are distinct subdivisions and sub-tensions between each two respective branches of government. Therefore, the dynamic of each respective relationship needs to be separately assessed, alongside the simultaneous interrelationship of all three branches.

This Article's examination of the early Hebraic sources specifically focuses our attention on the relationship between the executive and the judicial branches, and on the implication of promoting a division between them. In reflecting upon the nature of this distribution of power, it is worth returning briefly to the Mishnah's separation between the king and the court which is especially suggestive.

The slogan of the Mishnah—a king cannot judge nor be judged—is a reciprocal statement which not only divides these two institutions, but gestures at a more sweeping separation between the spheres of politics and law in general. The driving force behind this partition may derive from the contextual background to the Mishnah's pronouncement. Compiled in early third century C.E. Palestine, the rabbis of the Mishnah were living under the Roman empire after the failed Jewish revolts of 66-70 and 132-135 C.E. Stripped of political authority, the rabbis primarily dedicated their energies toward developing their own legal system. Nevertheless, in coming to terms with the realities of imperial success, they likely gained a certain appreciation for the political achievements of the Romans. Reflecting on power from their distinctive perspective, the rabbis advocated separating between the realms of politics and law. Even their vision of the ideal Jewish leadership scheme recorded in the Mishnah, therefore, included a partition between the institutions of the monarchy and the judiciary.

191. The Mishnah groups the high priest together with the Sanhedrin, the high court. See supra Part III.
192. See SCHWARTZ: IMPERIALISM AND JEWISH SOCIETY, supra note 145.
193. See Gafni, supra note 136.
194. See GOODBLATT, supra note 24, chapter 5; Emanuel Friedheim, Politique et rabbinisme en Palestine romaine: opposition, approbation et réalités historiques, 59 THEOLOGISCHE ZEITSCHRIFT 97-112 (2003). The rabbinic appreciation of political power that is reflected in certain rabbinic writings should be contrasted with the approach of early church fathers, especially before Constantine, but also the approach of Augustine after Constantine. See DAVID A. LOPEZ, SEPARATIST CHRISTIANITY: SPIRIT AND MATTER IN THE EARLY CHURCH FATHERS (2004).
195. The Mishnah does not provide an elaborate conception of the political realm beyond the
The rabbinic aspiration to erect a barrier between law and politics resonates with fundamental themes in American constitutionalism as well, beginning with *Marbury v. Madison*. As Paul Kahn stresses:

Ironically, modern legal interpretations of *Marbury* locate its brilliance in the assertion of political strategy that accomplishes its end of empowering the Court while avoiding any command to the executive. . . . On this view, governance by the courts must be defended on political grounds, just like any other assertion of political authority. The significance of *Marbury*, however, lies in the other direction, that is in the distinction of law from political action.\footnote{196. Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* 16 (1997).}

Kahn locates the magnitude of the *Marbury* decision precisely in the partition that it erects between law and politics. He then continues to elaborate on the fundamentally different nature of these two areas—law as the realm of reason, and politics as the realm of action—and on the implications of their separation for American constitutionalism.\footnote{197. *Id.*, at 27-34, 69-74.} A fuller reflection on the history of this division is beyond the scope of this Article, but the essential continuity of this aspiration as manifest in various periods since late antiquity should be underscored. Further, it should be emphasized that although *Marbury* sought to preserve the independent nature of each one of these realms, this is precisely what Jefferson opposed. Similarly, the Mishnah promotes a parallel partition, and the later Babylonian Talmud which reverses the Mishnah tries to resist this division as well. As Kahn further points out, the conflict over *Marbury* is never fully resolved, and this insight runs even deeper when we realize that it should be separated from the legal sphere. Accordingly, the primary rabbinic contribution appears to be in claiming the centrality of this division. Indeed, the Mishnah’s approach to separation of powers is to make a very general statement about the distinct responsibilities of each institution (the king and the judiciary). In this sense its approach to separation of powers is rather simple, even thin. This corresponds to aspects of the American Constitution that did not adopt a very elaborate system of separation of powers, but rather enumerated responsibilities of each branch. Certain recent proposals relating to separation of powers try to develop much more intricate models of this doctrine with more elaborate forms of checks and balances. For instance, Neal Katyal’s recent calls for separation of powers within the executive branch would require a whole new complex scheme of inner-executive checks and balances. See *supra* notes 173, 185. My study at least raises the question about whether an elaborate form of separation of powers is wise, or even viable.

Another possibly way to think about this issue may be from the vantage point of the *Youngstown* dispute between Justices Black and Jackson about whether to adopt a formalistic or functional approach to separation of powers, which continues to be a central question in constitutional jurisprudence. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Richard H. Fallon, *The Dynamic Constitution* 173-177 (2004). Returning to my study, it is worth noting that even though most of the Hebraic sources are rather formalistic, the Mishnah’s formulation is general enough (and thin enough) to allow for all sorts of functional adjustments. (Josephus failed to allow for such flexibility, and his formalistic reading of *Deuteronomy* 17 is not surprisingly very inconsistent with the political balance of powers that actually existed in first century life, as described *supra* Part IV.A).
that it is a two thousand year old conflict.\footnote{198. Id. at 17. Of course, the entire critical legal studies movement has challenged the possibility of separating law from politics. See, e.g., \textit{Roberto Mangabeira Unger, The Critical Legal Studies Movement} (1986). Nevertheless, the rabbinic statement of the Mishnah insists that these realms should ideally be distinguished, and much of American jurisprudence shares this aspiration. See the perceptive remarks in \textit{Kahn, supra} note 195, at 43-46.}

3) The Evolving Nature of Separation of Powers

Recent scholarship, especially since the 2000 election, has revisited the contentious issue of the limits and parameters of judicial review.\footnote{199. \textit{Id.} at 17. Of course, the entire critical legal studies movement has challenged the possibility of separating law from politics. See, e.g., \textit{Roberto Mangabeira Unger, The Critical Legal Studies Movement} (1986). Nevertheless, the rabbinic statement of the Mishnah insists that these realms should ideally be distinguished, and much of American jurisprudence shares this aspiration. See the perceptive remarks in \textit{Kahn, supra} note 195, at 43-46.} One particular scholarly controversy concerns the nexus between judicial independence and judicial review, debating whether the idea of judicial review follows inevitably from the formation of a truly independent judiciary.\footnote{199. See the sources on judicial independence cited \textit{supra} note 10; and additionally \textit{Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice} 15 (2004); Symposium, Bush v. Gore, 68 U. CHI. L. REV. 613 (2001); Marbury v. Madison: A Bicentennial Symposium, 89 VA. L. REV. 1105 (2003).} This Article demonstrates that the establishment of an independent judiciary has an indeterminate relationship to the notion of judicial power over other branches of government. According to \textit{Deuteronomy}, the \textit{Temple Scroll}, and even more Josephus, the executive is subordinated to an independent judiciary. In contrast, the Mishnah both promotes the notion of an independent judiciary and protects the political autonomy of the executive. This would suggest that one can be staunchly committed to the independence of the judiciary without insisting that it has any control over other branches. Therefore, granting the judiciary power over other branches is a distinct legal and political choice that we make.

In addition, this Article provides an interesting perspective on the almost inevitable tensions generated by the allocation of power. What is essential to realize is that just as today there are intensive debates about the parameters of judicial independence, so too similar struggles occurred in the ancient era. \textit{Deuteronomy}'s constitution represents a dramatic departure from most of the Bible and ancient Near Eastern literature. Likewise, the administrative structure advanced by the Mishnah is jettisoned by the later (and ultimately more influential) Babylonian Talmudic tradition.

This study highlights the precarious and dynamic nature of separation of powers. From one vantage point, this should inspire a more resolute commitment to safeguarding the political preferences of American constitutionalism, such as judicial independence, judicial review, and the tripartite division of administrative functions against their perpetual challengers. Yet from another perspective, this broader survey suggests

that the allocation of power is a dynamic process that always needs to be challenged and modified. Rather than viewing our constitutional choices as inexorable, we should see them as operating within an evolving framework. We must perpetually inquire whether they should be extended or reversed, and how they can be adapted to better achieve our collective political aspirations. A return to the origins of our constitutional values can help us identify the paths to our preferred destinations.

201. This resonates with the insight of Juan Linz concerning presidential democracy, which has been so successful in the United States and yet failed to live up to that potential in other political atmospheres (such as Latin America). See Juan J. Linz, Presidential or Parliamentary Democracy: Does It Make a Difference?, in 1 The Failure of Presidential Democracy 3 (Juan J. Linz & Arturo Valenzuela eds., 1994).