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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.  

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.  

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. 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.  

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. 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

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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. 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. 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. 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


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 SELDEN, De Synedriis in I 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.16

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 STEMBERGER, 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.”

1. Mishnah Sanhedrin 2:2. For a more thorough evaluation, see infra Part III, Section B.

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!”


19. BABYLONIAN TALMUD Sanhedrin 19a-b.

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.
between the northern kingdom (non-Davidic kings) and the Judean kingdom (the Davidic dynasty). In later biblical legacy, non-Davidic rule is largely associated with political and spiritual corruption, and even national catastrophe. 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. 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.

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. 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.

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.
23. BABYLONIAN TALMUD, Sanhedrin 19a-b.
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 ANTICITY 77-130 (1994).
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.\(^\text{26}\) 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.\(^\text{27}\) (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.\(^\text{28}\) 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.

\(^{28}\) See Cover, supra note 13.

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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.  

Together, Walzer and Cover successfully articulate aspects of the Babylonian Talmudic tradition, but their respective analyses hardly shed light on the core Mishnaic teaching. 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. 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. 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. 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 commentaries, 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 (Magne/ 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.
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.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.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: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....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.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.44 This explanation for the king’s immunity does not necessarily reflect the

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.

40. See Mishnah Sanhedrin 2:2-4.

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).

42. Deuteronomy Rabbah 5:8 citing Psalms 17:2.

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).

44. HENRY OF BRACTON, DE LEGIBUS ET CONSUETUDINIBUS 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. 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. 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


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. 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. 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. 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. At a later stage, however, when Israel developed into a nation with a centralized

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.


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.”\(^5\) 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,\(^5\) 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.  

Various other biblical passages can be adduced along similar lines, 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. 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.  

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.⁵⁸ That is, the verses discussing the administration of justice⁵⁹ never suggest that the king participates in this role. In the next sequence of verses,⁶⁰ 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.”⁶¹ 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.”⁶² 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.⁶³ 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,⁶⁴ but it also belies the notion that the king is the ultimate legal power.⁶⁵ 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, Ezekial 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); I. 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 Mishnah was compiled and collected before the Tosefta. 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 otiote 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).

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:

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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.68

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.69 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.70 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.71 Accordingly, they accent the alien nature of kingship, dispute the scope of royal prerogatives and emphasize the need to harness the king’s powers.72

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 Halakhah. See Strack & Stemberger, supra note 16; Jay Harris, Midrash Halachah, in THE CAMBRIDGE HISTORY OF JUDAISM IV: THE LATE ROMAN-RABBINIC PERIOD (Steven Katz ed., 2006).

69. See Isadore Twersky, INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH) (1980).

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, Mishnah 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, Sifre 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...
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 accents 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.\(^2\)

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.\(^3\) 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.\(^4\)

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),\(^5\) 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.\(^6\) This contrast suggests that it is the king’s distinctive role which affords him a greater amount of independence.\(^7\) In

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\(^2\) 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).

\(^3\) 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.

\(^4\) 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.

\(^5\) 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).

\(^6\) The medieval commentators add other interesting qualifications to the Mishnah’s pronouncement. See Tosafot and Hidushe Rabbienu Yonah on Babylonian Talmud Sanhedrin 18b, and Meiri Sanhedrin 65 (Abraham Sofer ed., 1964).

\(^7\) 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.\footnote{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 Shemitah ve-Yovel 13:12-13.} 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.”\footnote{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).} 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.”\footnote{Exceptions abound in all directions. See, e.g., TOSEFTA Sanhedrin 4:1-3, 5, 7-8.} 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.\footnote{See Numbers 35:28, Mishnah Makkot 2:6-7.} 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.
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. 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.

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. 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.

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.

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. 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. 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.

94. See Tosefta Sanhedrin 4:2.

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. See supra Part III, Section A. For a very helpful summary of these issues, see the introduction to TOSEFTA ATIKITA, supra note 76. Contrast this with the classical position of Abraham Goldberg in THE LITERATURE OF THE SAGES: ORAL TORAH, HALAKHA, MISHNA, TOSEFTA, 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 Hakkel, 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

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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.\(^{100}\)

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 . . . .”\(^{101}\) 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.\(^ {102}\)

\(^{100}\) 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.\(^{103}\) 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.\(^{104}\) 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.\(^{105}\)

As opposed to the Mishnah, Tosefta *Sotah* 7 does not draw a parallel between the sacred readings of the king and the high priest,\(^{106}\) 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.\(^{107}\)

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.\(^{108}\) 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.109 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.110 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,
does not appear to utilize this parallel construct in this context. Further, by conceiving of Ezra the Priest as a model monarchical 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 *Hakkel* 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).\(^\text{111}\) 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.\(^\text{112}\) 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.\(^\text{113}\) 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.


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

\(^{113}\) 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.\(^{118}\)

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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).


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 lb. 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.\(^1\) 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,\(^2\) 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 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.”\(^3\) This comment, along with the one from Tosefta Horayot 2:8 cited above, portrays the monarchy as inferior to Torah leadership since it is ironically either too closed (Abot de-Rabbi Nathan) or too open (Tosefta Horayot).

2) Mishnah Yoma 7:5 contains one of several positive references to the king in Mishnah Yoma, which is significant given that this tractate primarily focuses on the high priest’s role during the Yom Kippur Temple service.\(^4\) Mishnah Yoma 7:5 is particularly noteworthy as it establishes the king’s prerogative to seek guidance by means of the sacred priestly breastplate, the Urim v'Thummim, worn by the high priest.\(^5\) 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 Temple Scroll.\(^6\) The latter presents the sanction of the priestly Urim and Thummim as a necessary prerequisite for royal action and thus as a check and limitation on monarchic powers.\(^7\) Mishnah Sanhedrin 2:4, however, affirms broad royal powers

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\(^{2}\) 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 Avot. See, e.g., Mishnah 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 COHEN, supra note 74.

\(^{3}\) R.D.Z. Hoffman characterizes Abot de-Rabbi Nathan as Tosefta material. See STRACK & STEMBERGER, supra note 16, at 226. In any event, it is certainly a parallel source to the Mishnah.

\(^{4}\) 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.

\(^{5}\) Specifically, this passage grants the king the same access to the Urim and Thummim that it affords to the high court of the Sanhedrin and to others upon whom the public depends.


\(^{7}\) This is consistent with the overall orientation reflected in the Temple Scroll’s “Law of the King,” which promotes a limited form of monarchy, as discussed infra Part IV, Section C. See also YIGAL YADIN, THE TEMPLE SCROLL: THE HIDDEN LAW OF THE DEAD SEA SECT (1985); Fraade, The Torah of the King, supra note 74; Schiffman, supra note 132.
without predicking 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{135} Tosafot Yoma 12b.

\textsuperscript{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

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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.\footnote{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.\footnote{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.\footnote{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,\footnote{144} perhaps as a member of the Gerousia or the Sanhedrin.\footnote{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,\footnote{146} and he also presided with them.

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

\footnote{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 \textsuperscript{supra} Part III.C. 3. Feldman labels this as a pro-priestly revision. \textit{Flavius Josephus, Judean Antiquities 1-4}, at n.705. \textit{See also} Goodblatt, \textit{supra} note 24, at 95 (who discusses the requirement of approval from other leaders).

\footnote{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 \textit{Antiquities} 9.4), and his account of Second Temple Hasmonean kings (for example, his discussion in \textit{Antiquities} 14 and \textit{Wars} 4). The mix of idyllic principles and political realities would undoubtedly produce an inconsistent picture of monarchic powers and responsibilities.


\footnote{147} This action at least indicates that a quasi-executive could join something akin to a judicial body. \textit{See Goodblatt, supra} note 24, at 114-115; Flavius Josephus, Judean Antiquities 1-4, \textit{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.

\textbf{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

\begin{thebibliography}{99}
\bibitem{148} See Belkin, \textit{supra} note 144, at summary conclusion.
\bibitem{149} See Kugel, \textit{supra} note 137, at 597.
\bibitem{150} See Naomi G. Cohen, \textit{Contemporary Political Overtones of Philo} 10 \textit{WORLD CONGRESS OF JEWISH STUDIES} 253.
\bibitem{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.
\end{thebibliography}
proper balance between excess and deficiency." 152 Such a king will "honor equality, be impervious to bribes and give just judgments"—all classic indicia of a just judge. 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. 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. 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, 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. 157 In Philo's scheme, the king and the high priest may

152. See id. at 160 et seq.
153. See id. at 169. See also Exodus 18:21 and Deuteronomy 16:18-20.
154. PHILO, supra note 151, at §§ 170-72.
155. Id. at §§ 173-75.
156. Id. at §§ 188-192.
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).
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. 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. Next, the scroll presents a section known as the “Law of the King,” 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. 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.” 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,” in a normative sense rather than a hortatory one, 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). The limitation of the king’s judicial powers also emerges from other

158. See Kugel, supra note 137, at 576, 610.
159. Yad, supra note 133, at 11Q19 LVI.
160. Id. at 11Q19 LVII-LVIX.
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).
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-Arikhah Ata Ba-Mishnit Shel Torat Ha-Melekh Be-Megilat Ha-Mikadosh (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\(^\text{166}\) and in a later one\(^\text{167}\) 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,\(^\text{168}\) in fulfillment of *Deuteronomy*'s charge to the king to possess a scroll.\(^\text{169}\) 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.\(^\text{170}\) 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,

166. YADIN, *supra* note 133, at LVI.
167. *Id.* at 11Q19 LXI.
168. See *id.* at the end of LVI, and the beginning of LVII.
Levites and judges.\textsuperscript{171} In contrast, the Mishnah, which also clearly operates against the backdrop of Deuteronomy 17, 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;\textsuperscript{172} the relationship of allocation of power to the notion of checks and balances;\textsuperscript{173} the alternative models of institutional separation that have been adopted by other modern democracies;\textsuperscript{174} the balance of powers within the administrative state;\textsuperscript{175} the role of an independent judiciary in relation to the other branches;\textsuperscript{176} and the nature of separation of powers in an emergency constitution.\textsuperscript{177}

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

\textsuperscript{171} Despite this summary conclusion, it is interesting to note that all of the Second Temple and rabbinic sources analyzed in this Article contain counter voices—even the Mishnah. See supra note 84.

\textsuperscript{172} See Levinson & Pildes, supra note 10.

\textsuperscript{173} See Epstein, supra note 10.

\textsuperscript{174} See Ackerman, New Separation, supra note 10; Bruce Ackerman, Meritocracy v. Democracy (on the Reform of the House of Lords), 29 LONDON REVIEW OF BOOKS 9 (March 8, 2007).


\textsuperscript{177} See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006); Tushnet, supra note 10.
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

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178. The question of Hebraic influence on American constitutionalism, including the American doctrine of separation of powers and an independent judiciary, is an important subject of inquiry requiring a separate study. See the important recent article by Eric Nelson, 'Talmudical Commonwealthsmen' and the Rise of Republican Exclusivism, 50 HISTORICAL JOURNAL 809 (2007), which provides a model for such a study (this article analyzes the Hebraic influence on early modern republicanism). For background on the possible channels of influence of Hebraism on European and American constitutionalism, see DOUGLASS G. ADAIR, THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY 26 (2000); BAILYN, supra note 5, at 23, 34-35; HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 245-69 (2003); ROSENBLATT, supra note 4, at 5-13; RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 82-100 (1979); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 16, 48, 98, 200 (1969); Richard Tuck, Grotius and Selden, IN THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, at 499, 529 (J.H. Burns & Mark Goldie eds. 1991).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{184} Exposing

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\textsuperscript{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.

\textsuperscript{182} See Ackerman, New Separation, supra note 10.

\textsuperscript{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.

\textsuperscript{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.
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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 threelfold division defended in the Federalist Papers, and the threelfold 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. Similarly, the early Hebraic sources examined

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


188. See Bialyn, 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.\textsuperscript{191} 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.\textsuperscript{192} Stripped of political authority, the rabbis primarily dedicated their energies toward developing their own legal system.\textsuperscript{193} Nevertheless, in coming to terms with the realities of imperial success, they likely gained a certain appreciation for the political achievements of the Romans.\textsuperscript{194} 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.\textsuperscript{195}

\footnotesize{\textsuperscript{191} The Mishnah groups the high priest together with the Sanhedrin, the high court. \textit{See supra} Part III. \textsuperscript{192} \textit{See} SCHWARTZ: IMPERIALISM AND JEWISH SOCIETY, supra note 145. \textsuperscript{193} \textit{See} Gafni, supra note 136. \textsuperscript{194} \textit{See} GOODBLATT, supra note 24, chapter 5; Emanuel Friedheim, Politique et rabinisme en Palestine romaine: opposition, approbation et réalités historiques, \textit{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. \textit{See} DAVID A. LOPEZ, SEPARATIST CHRISTIANITY: SPIRIT AND MATTER IN THE EARLY CHURCH FATHERS (2004). \textsuperscript{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.\(^{196}\)

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.\(^{197}\) 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


\(^{197}\) *Id.*, at 27-34, 69-74.
that it is a two thousand year old conflict.198

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.199 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.200 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 Deuteronomy, the 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. 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

198. Id. at 17. Of course, the entire critical legal studies movement has challenged the possibility of separating law from politics. See, e.g., 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 Kahn, supra note 195, at 43-46.


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).