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THE ANXIETY OF INFLUENCE AND JUDICIAL SELF-AGGRANDIZEMENT IN RABBINIC JURISPRUDENCE

THE CROWN AND THE COURTS: SEPARATION OF POWERS IN THE EARLY JEWISH IMAGINATION.

David C. Flatto.* Cambridge, MA: Harvard University Press. 2020. Pp. 367. \$39.95 (Hardcover).

*Ethan J. Leib*¹

INTRODUCTION

The separation of powers is often at the center of modern constitutional governance.² But David Flatto's recent book, *The Crown and the Courts*, invites us to think about how (very) early Jewish meditations on the relationship among the monarch, the priests, the rabbis, and the law gave political theory resources for justifying judicial independence and sovereign immunity—perhaps earlier than we realized.³ The book is illuminating, learned, careful in its exegesis, and precise in its exposition. It is magisterial, and its command of its subject matter is downright intimidating.

But it also embraces a method that one might call “Flattonic idealism”: Flatto walks us through a dialectical development of ideas that commences in Deuteronomy 17 and seemingly works

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1. John D. Calamari Distinguished Professor of Law, Fordham Law School. Thanks to Elana Stein Hain, Avi Helfand, Tom Lee, Sam Levine, Chaim Saiman, and Jed Shugerman for conversations about the book under review. Thanks to my *chavruta* group—Rabbi David Hoffman and Peter Beinart—for constant inspiration and stimulation as we make our way through the Daf Yomi cycle together. And thanks to Steven Schlesinger for research assistance and for the perspective from Monsey, NY.

2. See generally M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998).

3. For another effort to develop the constitutional thought of early Jewish sources, see Bernard M. Levinson, *The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy*, 27 CARDOZO L. REV. 1853 (2006).

itself pure through Philo (20 BCE–50 CE), the Qumran literature (200 BCE–100 CE), Josephus (37–100 CE), and, finally, Tannaitic and early Rabbinic literatures (1st–3rd century CE). The core issue from Deuteronomy 17 that Jewish law had to resolve was figuring out how to reconcile a royalist conception of the lawgiver with priest-driven sacral law and a jurisdiction for judges, all of which make appearances in the Hebrew Bible. What culminates, for Flatto, in what is now identifiable to us as the “separation of powers,” happens through conceptual analysis within Jewish texts from the Second Temple period and the ideational reconfiguration of the Jewish polity in the years after its destruction in 70 CE.⁴ Part I below briefly summarizes Flatto’s argument and method.

In Part II, I suggest that Flatto’s method should be supplemented by a more political-economic and psychological approach. Such an effort could yield important insights into how we ultimately think about implementing the separation of powers today. Flatto is appropriately worried that the rabbis, who did the most to carve their own jurisdiction at the end of his story, will be reduced to a materialist and historically contingent narrative in which Jewish political disempowerment gave birth to the rabbis’ investment in a law outside politics.⁵ But this reasonable concern probably leads Flatto to downplay important dynamics that would have enriched his analysis further: the internal contestations for power within Jewish society must help explain why the rabbis drew the lines of jurisdictions as they did in the post-Temple period. Thus, an endogenous rather than exogenous political

4. Levinson imputes much of the separation of powers and judicial independence in constitutional thinking already to Deuteronomy itself (which he reports reconfigures authority from earlier books of the Pentateuch). He attributes to Deuteronomy a “severely truncated” “royal power” that deliberately “hamstring[s]” the king to be only a “titular head of state” “sitting demurely on his throne.” *Id.* at 1881.

5. Flatto’s foil here is JULIUS WELLHAUSEN, *PROLEGOMENA TO THE HISTORY OF ANCIENT ISRAEL* ch. II (1973), and TACITUS, *HISTORIES* 5.1–13 (p. 325 n.2). Flatto explains: “On this reading, the Jewish turn to legalism does not constitute a bold innovation, or even an authentic expression of organic Jewish values. Instead it reflects a necessary solution to a coerced reality” (p. 201). Flatto resists this kind of reduction but is able, from time to time, to acknowledge politics’ relevance: “Living under Roman Rule after the failed Jewish revolts of 66–70 and 132–135 CE, the rabbis were stripped of political authority, and mostly invested their energies in developing their own legal system, and preserving its integrity and autonomy” (p. 133). He is also willing to concede (albeit in a footnote) that the “rabbinic partition between law and power” is “historically contingent” (p. 314 n.3). Yet the main text of the book tells more teleological kind of story even while it is occasionally willing to mention “sociopolitical context” (p. 163).

economy may have contributed to rabbinical jurisprudence on judicial independence and sovereign immunity. It is not (just) that Flatto should have granted a little to the “crits” that, as he puts it, “law constitutes a medium of politics, and legal rhetoric camouflages a deep discourse of power” (pp. 246–47 n.12). Rather, because it is so essential to understanding rabbinic jurisprudence that it is always anxious about its own authority and influence (as I will argue by exploring the reception of Tannaitic work in the Talmud), it is hard to grant Flatto such a thoroughly non-political political theory⁶ of judicial independence and sovereign immunity. Once we appreciate that the propensity for judicial self-aggrandizement⁷ and the institutional strategies for accomplishing that objective have existed since time immemorial, a slightly more realistic accounting of these developments in constitutional theory is made possible. That has lessons not only for our understanding of the rabbis but also for the separation of powers today.

I. FLATTONIC IDEALISM

Flatto’s extraordinary book is, in his own words, “an in-depth study of paradigmatic biblical accounts of the administration of justice as expounded by its foremost early interpreters, ranging from the fourth century BCE through the third-century CE” (p. 2). His analysis of “programmatic writings” catalogues “how justice should ideally be administered (rather than empirical descriptions, which reflect the substantial limits on jurisdiction that were imposed on Jews during various historical periods)” (p. 2). In this way, Flatto’s method is overtly exegetical and treats expositions of biblical commentary as the best way to understand Jewish conceptions of legal authority (p. 2). The main argument is meant to revise the standard account of the separation of powers: “[W]ell before the seventeenth and eighteenth centuries, leading Jewish thinkers . . . insisted that legal authority should reside in the hands of learned jurists, and not rulers” (p. 17). And central to Flatto’s story – though this is somewhat more implicit – is that the etiology of this view about law’s independence from

6. See generally JEREMY WALDRON, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* (2016).

7. For a recent meditation on this subject in American constitutional law, see Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 *GEO. L.J.* (forthcoming 2021).

politics did not emerge in the way it did in Europe, as Tony Honoré explains: the idea of judicial independence comes from the Jews earlier than 1607, when Justice Coke tells James I that the king could not judge a lawsuit himself because he was not learned in the law, and earlier than Montesquieu in 1748, who argued that the separation of powers is essential to the freedom of citizens.⁸ Even more important than who built the intellectual foundations of the separation of powers, however, is understanding that watching the Jews grapple with ideas about judicial independence as the Second Temple was destroyed can help us see that it may not be as conceptually linked to modern constitutionalism as we once thought.

For most readers, it will be an arresting idea that judicial independence and sovereign immunity—and their relationship to each other—seem to have developed through biblical hermeneutics. At the least, “[a]pproached from a comparative vantage point, the story of early Jewish jurisprudence represents a pivotal chapter in the general history of legal and political thought” (p. 3). No reader will still think of an inexorable conceptual affinity between the separation of powers and democracy or liberal constitutionalism, specifically. Although the rabbis built atop a juristic paradigm that probably can be said to have been set in motion by Roman jurists who developed legal expertise and advised judges (pp. 5–6), rabbinical jurisprudence forged a distinctive pathway that conceptualized sovereign authority quite differently—contouring law’s jurisdiction in distinctive ways. Jewish jurisprudence, like its Enlightenment corollary, “separate[s] power, by assigning supreme legal authority to a different address than the locus of political authority” (p. 223). And the Jews not only theorized about judicial independence but also workshopped many ideas for institutional embodiment to promote their conception of judicial independence.⁹ Spotlighting this development alone is a major accomplishment in the study of the history of ideas.

Flatto’s story begins in earnest with the Hebrew Bible, which “reveals a list of persons who possess legal authority to varying degrees: the paterfamilias, local townsmen, elders, priests, the high priest, (lay or professional) judges, military leaders, and the

8. See p. 17 (citing TONY HONORÉ, *ABOUT LAW: AN INTRODUCTION* 14 (1995)).

9. Much of chapter 6 is devoted to this institutional thinking (pp. 135–65).

king” (p. 9). Indeed, there is something for everyone if the relevant corpora was the entirety of the canonized Hebrew Bible: the Book of Samuel may be central as the Jews move from a world with God as the fountainhead of all law (with Moses as the human manifestation of the lawgiver), to a world of prophets, judges, and then, transitionally, a world of kings. But for Flatto, the central biblical problematic—which is subject to dialectical development in early Jewish history—is teed up already by Deuteronomy 17. That text envisages, first, that hard legal cases will be adjudicated by “Levitical priests and the judge who is extant in those days”; these actors are authorized (presumptively by God) to announce decisions.¹⁰ The Israelites were expected to follow the verdicts and instructions given by these priests and judges.¹¹ But in the next passages, Deuteronomy “pre-figures” the Jews’ request to Samuel to give them a king like other nations.¹² The biblical commands are clear: the Jews may have a king that God chooses for them, from among themselves (rather than a gentile), so long as the king does not amass too much gold, silver, women, or horses; he also is not permitted to send Jews back to Egypt.¹³ When such a king ascends the throne, Deuteronomy teaches that he is to have God’s teaching written for him on a scroll “before the Levitical priests.”¹⁴ That scroll is expected to remain with the king who must keep it with him and learn from it all the days of his life—learning to fear God, be humble before his fellow man, and follow

10. Deuteronomy 17: 8–9.

11. Deuteronomy 17: 10–13.

12. Deuteronomy 17: 14–15; cf. 1 Samuel 8: 4–20.

13. Deuteronomy 17: 14–17.

14. Deuteronomy 17: 18. For such a central passage, Flatto does not explore just how vague the Hebrew is here: *et mishneh ha'torah ha'zoat . . . m'lifnei ha'cohanim ha'leviim*. It might be that all the king is commanded to have is the teachings that pertain to the king (*ha'zoat*), rather than as Flatto renders it, “a summary of the law.” See Norbert Lohfink, *Distribution of the Functions of Power: The Laws Concerning Public Offices in Deuteronomy 16:18–18:22*, in *A SONG OF POWER AND THE POWER OF SONG: ESSAYS ON THE BOOK OF DEUTERONOMY 336* (Duane L. Christensen ed. 1993) (arguing that it is just a small section of Deuteronomy that would be given as a scroll for the king). It may also be that the transcription onto the scroll had to happen in front of the Levitical priests but that judges otherwise might recede from monarchic rule in a more ministerial role; the passages about priests and judges deciding the hard cases do not obviously survive the establishment of a monarchy (although that is also a plausible reading, one urged by Levinson, *supra* note 3, at 1881–83). The book continues in chapter 18 to focus on the priests, though not the judges, suggesting priests’ continued importance even in an age of monarchy. Yet the priests are also essentially encouraged to head to the Temple, diminishing their authority in other places the Crown may reign.

God's instructions.¹⁵

What Flatto sees unfolding in Deuteronomy 17 is that the “judicial section (Deut 17:8–13) never suggests that the king administers justice” and that the “subsequent royal section (Deut 17:14–20) likewise omits any judicial function for the king” (p. 13). He is correct to point out an important rhetorical difference in how the two sources of law are treated: the priests and judges must be heeded and cannot be strayed from “either to the right or to the left;”¹⁶ the king is told not to “turn aside from his commandment right or left,”¹⁷ which makes it seem as if the king is subject to rather than an agent of law. It is Flatto's project to show how Jewish tradition receives this scheme from Deuteronomy over time, finding a fleshed-out version of it to win a dialectical battle of ideas (even if much else in the Hebrew Bible presumes a more royally-administered judiciary)—eventually settling on a conception that we would call today the separation of powers.

Chapters on Philo, the Qumran literature, and Josephus carefully trace how these strands from Deuteronomy are processed, digested, and repackaged at different moments and in various sub-communities of Jews. To simplify dramatically (and specialists will take much delight in Flatto's wide-ranging expertise here), Flatto finds Philo more generally royalist (pp. 42–44), while those living in Qumran were more focused on the priests and sacral law, with much more qualified royal ideologies (pp. 55–81). For Josephus, however, “the essence of the Jewish polity lies in its legal supremacy” (p. 105). Indeed, on Flatto's reading, Josephus “reconstitutes the entire polity on the foundation of law—perhaps the most dramatic ideal of early Jewish jurisprudence recorded in the entire oeuvre of Second Temple literature” (p. 106).

After the destruction of the Second Temple—and the recognition after the Bar Kokhva Revolt (132–135 CE) that there was not likely to be a Third Temple anytime soon—the rabbis seem to build off of Josephus' gloss on Deuteronomy to center religious law “as the ultimate substitute for political power” (p. 81). Yet, Flatto's read of the Tannaitic rabbis (70–220 CE), who

15. Deuteronomy 17: 19–20.

16. Deuteronomy 17: 11.

17. Deuteronomy 17: 20.

developed the rabbinic legal system that would gain ascendancy within Judaism, reveals more ambivalence than Josephus had about royalism in the rabbis' most important law code, canonized as the Mishnah (around 200 CE): "Following the lead of Deuteronomy 17, the Mishnah proclaims that justice is not the domain of the king, but instead is entrusted to a network of courts In enhancing the autonomy of the courts, however, the Mishnah does not downgrade the king" like Josephus (p. 39). Instead, writes Flatto, "the Mishnah advances an original, recalibrated scheme where the king enjoys a prominent leadership position, but his role is separate from the judiciary and the broader normative system" (p. 39). In short, the rabbis—who are not quite judges themselves but envision themselves as expositors and repositories of the law—return to the dialectic of Deuteronomy, as Flatto sees it.

In the return to Deuteronomy—or in the rabbinical re-interpretation of it—the rabbis craft actual doctrines of sovereign immunity (in a Jewish world with no political sovereign) and judicial independence (where the judges seem to be applying rabbinical law). It is in the Mishnah that Flatto sees the Deuteronomy dialectic finally birthing the separation of powers, encapsulated by the Mishnah's proclamation in Sanhedrin 2:2: "The king can neither judge nor be judged."¹⁸ As Flatto summarizes, "In all, the Mishnah separates the king from legal affairs, and instead vests legal authority in the judiciary [T]he Mishnah affirms the king's leadership role and buffers him from judicial intervention" (p. 116).

One might quibble that Flatto seems a little too sure that the Mishnah is "royalist," "pro-monarchic," and offers "positive characterizations of monarchy" (pp. 114, 116, 118, 124). Whether the Mishnah actually "elevates the king's role" (p. 120) in a time when there was no such king, Flatto's most important insight in this part of the book is that the king "is granted a kind of sovereign immunity in court, not as a concession, but on principle, because he is subject only to God's jurisdiction" (p. 115). The Mishnah's position is also distinctive, Flatto teaches, as other Tannaitic sources that were not canonized from around the same time are much less clear about the separation of powers that leads to

18. Levinson's view is that Mishnah Sanhedrin also elevates kingship by "no longer subordinat[ing] the monarch to law." Levinson, *supra* note 3, at 1881 n.128. For Levinson, this is a departure from Deuteronomy, not a manifestation of it.

sealed-off judicial independence.¹⁹

Flatto ultimately considers the Mishnah's effort to promote sovereign immunity and judicial freedom from political control an "endorsement" of the Deuteronomy 17 scheme (p. 127). Robert Cover, in reviewing similar sources, also notices the Mishnah's "norm of sovereign judicial incapacity."²⁰ Yet Flatto's book beautifully shows that "[r]ather than advancing the independent propositions of sovereign immunity and sovereign judicial incapacity, [the] Mishnah . . . couples them" (p. 127). In so coupling them, Flatto helps us see a kind of trade-off made at the ideational level: judges and their law will leave alone some members of political life if they are left free to interpret the law themselves without political interference. Flatto thinks there is a clear arc that moves from Deuteronomy 17 to the picture of law's independence from rulers—and rulers sitting outside of, and immune from, law's jurisdiction (p. 199).

Notice a few things about Flatto's methodological approach—which are apparent even in his programmatic statement about what he set out to do. Here is what he says in his Introduction: "it is a principal thesis of this book that Jewish legalism is not a reluctant response to disempowerment or merely functional in its aims, but instead a deeply rooted ideology, anchored in the themes of revelation" (pp. 16–17). So, although he is willing to acknowledge the "rabbinic movement" in the post-Second Temple period and its "socio-political context" as an effort to re-center Jewish law and promote its integration and solidarity function at a critical juncture in Jewish history (pp. 163–65), there is a sense in which the core ideas that Jewish jurisprudence brings to the world stage in coupling sovereign immunity and judicial independence were all immanent, all the time (p. 219). Flatto's is essentially a Jewish story about texts that were committed to an idea of a revelation—and a Jewish tradition about how to read and interpret those texts. In a way, it is looking at how the rabbis read Deuteronomy, from an internal point of view.

19. Flatto performs some exegetical work on the parallel Tosefta Sanhedrin, which recounts similar rabbinical pronouncements—but ones that do not get included in the more authoritative Mishnah (pp. 116–18). From my perspective, the very fact that the canonical source more obviously engages in a rabbinical power grab is all the more reason to see this "ruling" in the Mishnah as a self-conscious effort to sideline political and priestly power in order to centralize the rabbis' hold on the law. More on that to come in Part II.

20. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAPITAL U. L. REV. 179, 183 (1985).

Not that there is anything wrong with that. I have many friends and family members who are rabbis.

II. A LITTLE REALISM?

And yet. There is another more politically and psychologically attuned way to think about the rabbinic movement—not so much from outside, but from within its battle for the hearts and minds of Jews after the Second Temple period. Whatever else the rabbis may have been doing while the Temple was still around—or between 70 and 135 CE, when the Jews might have reasonably hoped for the coming of a Third Temple—one could acknowledge that they were in the process of seeking to build a “rabbinic state” after 135 CE (p. 165).²¹ For that project to succeed, the rabbis would have to elevate law—and their jurisdiction over it—over potential kings and priests, who in any event were losing their everyday relevance to the experience of Jews living after the failure of the Bar Kokhva Revolt. Another reading of much of what the rabbis did in Tannaitic times was making royalism even more recessive; one can construe what Flatto sees as elevation through sovereign immunity as actually a nudging-out-of-the-way for whenever in the future a king should come again. Thus, much of what Flatto sees as “pro-monarchy” during this early rabbinic period (p. 202) may be better understood as a further effort to “other” political leaders—monarchic or priestly—and find a way to use jurisdiction as a discourse of a different and supreme power of its own. Although the rabbis weren’t exactly judges,²² their jurisprudence was calibrated to flourish within the judicial system that they were in the process of constructing through their movement.

Another way to appreciate how the rabbinic project centers its own jurisdiction, animated in part by its anxiety about its own authority, is to consider some notable features of the Babylonian Talmud, the most important work of rabbinic Judaism that remains a primary source for Jewish legal practice and thinking

21. Flatto himself uses the language of a rabbinic state but distances himself from the idea by putting “state” in quotation marks.

22. Most scholars agree that there was no central rabbinic court in the second century. See generally BETH A. BERKOWITZ, EXECUTION AND INVENTION: DEATH PENALTY DISCOURSE IN EARLY RABBINIC AND CHRISTIAN CULTURES 15 (2006). But that did not stop them from thinking of “themselves as rabbinic judges whose word has the power of deed.” *Id.* at 71.

today. The Babylonian Talmud presents itself as a commentary upon the Mishnah, taken up by the next generation of rabbis (carrying forward oral traditions of law and narrative).²³ But it is also, more significantly, the natural outgrowth of the rabbinic movement commenced in the Tannaitic period. Indeed, seeing what the rabbis do so often in the Talmud more generally allows us to retroject and understand better what the rabbis were up to as they launched their movement in earnest. That facilitates a different window into Flatto's story that is somewhat more realist than idealist about the history of ideas, and it provides an important mooring in modern debates about judicial independence and sovereign immunity.

Consider what happens on an average page of the Talmud.²⁴ The compilers arranged dialogues following the order of most of the Mishnah, breaking up the discussion so as to suggest that the excurses that follow by the Amoraic rabbis are mere elaborations, explanations, or deeper dives on the subjects primed by Mishnah.²⁵ Yet even at the surface, the Talmud arrogates interpretive power for itself, all the while regarding the Mishnah as properly canonized and as if the later rabbis may not disagree with Tannaitic codifications.²⁶

A critical reading of the Talmud may reveal that as the Mishnah is being reaffirmed in each section, its very authority is being destabilized. Sometimes the Talmud offers a lengthy debate in an effort to reconstruct which Tannaitic rabbi said what, and whether it is possible that the attribution in the Mishnah is correct.

23. The Babylonian Talmud is often thought to have been principally elaborated in the Amoraic period (200–550 CE) which immediately followed the Tannaitic period, but probably did not assume the form in which we have received it until a redaction effort by anonymous compilers in 600–770 CE. For my dating approximations here, I am relying on DAVID WEISS HALIVNI, *THE FORMATION OF THE BABYLONIAN TALMUD* xxix (Jeffrey Rubenstein trans., 2013).

24. As many readers will know, there is also a Palestinian Talmud. But modern rabbinical Jews treat the Babylonian Talmud as authoritative. “Talmud” will hereinafter refer to the Babylonian Talmud or the Bavli.

25. See generally BARRY SCOTT WIMPFHEIMER, *THE TALMUD: A BIOGRAPHY* (2018).

26. There is some evidence that at least some first-generation Amoraic rabbis were allowed to disagree with the Tannaitic rabbis some of the time—Rav and Shmuel, particularly. But the rules of the Talmud generally make clear that this is exceptional. See generally *Tractate Eruvin* 50b (“Rav is a Tanna and has authority to differ with Tannaitic sources”); Richard Kalmin, *Changing Amoraic Attitudes Toward the Authority and Statements of Rav and Shmuel: A Study of the Talmud as a Historical Source*, 63 *HEBREW UNION COLL. ANN.* 83 (1992).

Other times what you read is a more explicit attack on the Mishnah with a Baraita or Tosefta—oral traditions from the Tannaitic period that were left out of the Mishnah’s more authoritative redaction. It is hard not to conclude from watching these evasions of the Mishnah that the Amoraic rabbis stuck inheriting the Mishnah both wanted to hold onto it, because it reaffirms rabbinical jurisdiction, but also needed to resist it, to preserve room for their interpretive creativity. For students of Harold Bloom, the rabbis might be said to suffer from the “anxiety of influence,” and make their mark “by misreading one another, so as to clear imaginative space for themselves.”²⁷ About 100 times in the Talmud, someone announces *chasurei m’chasra v’hacha katanei*:²⁸ something is missing in this Tannaitic source and it should read differently. For the Orthodox, perhaps these announcements just reflect the reality of oral traditions and clarify erroneous transmissions. But the more secular might say that this is outright arrogation—or what Bloom might call “revisionism” (rather than heresy).²⁹

There is yet another feature of Talmud to consider: the Amoraic rabbis are being presented to posterity by compilers, sometimes called the Stammaim.³⁰ This group of collators who arranged the dialogues and ordered them ultimately infused the entire enterprise with its received legal meaning for generations to come—all while remaining anonymous and hiding their editorial hand. Thus, whoever authored the Talmud itself, assuredly members of an elite group of jurists who grew out of the rabbinical movement, almost certainly continued the process of treating their predecessors authoritatively while misreading them creatively.³¹

27. HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 5 (1973).

28. I used two different methods of searching through the Talmud’s text and found a little more than 100 uses one way and slightly fewer than 100 another way. Thanks to Rabbi David Hoffman for helping me navigate these search techniques. Halivni offers a paradigmatic example from *Tractate Ta’anit* 26b, HALIVNI, *supra* note 23, at xxxiv–xxxv (making a rather different kind of point about the proper dating of different strata in the Talmud). But other examples abound. Later in Halivni’s book, he comments on examples from *Tractate Shabbat* 102a, *Tractate Giṭtin* 54a, *Tractate Chullin* 73a, and *Tractate Chullin* 118a. See HALIVNI, *supra* note 23, at 20–22.

29. BLOOM, *supra* note 27, at 29 (“The ancestor of revisionism is heresy, but heresy tended to change received doctrine . . . rather than by what could be called creative correction, the more particular mark of modern revisionism.”).

30. See generally HALIVNI, *supra* note 23, at 3–61 (“Part I: The Stammaim”).

31. One example of the Stammaim potentially making up a Baraita to reflect their

Of course, it is possible that retrojecting the Amoraic and Stammaitic anxiety of influence back onto their progenitor rabbis during the Tannaitic times—the core period of Flatto’s focus—is unfair. After all, the rabbinical principle of *yeridat ha’dorot* (the decline of the generations) essentially holds that the further Jews get from revelation and Moses, the less likely they are to have the intellectual and spiritual resources to grasp the law.³² So as the generations of rabbis get later in time, anxiety would only tend to grow³³—and perhaps that anxiety should be imputed only gently to the Tannaitic rabbis who set the movement in motion.

But even the rabbis during the time of the Mishnah understood that they were trying to create rather than merely implement a biblical command that put law at the center of the polity, a location where they could maximize their own jurisdiction. Consider, for example, Steven Fraade’s rendering of the rabbinic posture: commentary and codification “simultaneously faces and engages the text that it interprets and the society of ‘readers’ for whom and with whom it interprets.”³⁴ Some of what it means to face and engage a society of readers is to construct the idealized authority offering the interpretation.³⁵

own cultural values can be found in JEFFREY L. RUBENSTEIN, *THE CULTURE OF THE BABYLONIAN TALMUD* 124–25 (2003) (arguing that certain characterizations about non-rabbinic or uneducated Jews in the Stammaitic stratum of the Talmud are “Stammaitic creations pseudepigraphically attributed to Tannai[itic rabbis]”); *accord id.* at 130 (“[W]hile mostly attributed to Tannaim, these traditions are Stammaitic pseudepigraphs.”).

32. Consider *Tractate Shabbat* 112b: “Rabbi Zeira said that Rava bar Zimuna said, If the earlier scholars were sons of angels, we are mere sons of men; if they were sons of men, we are like donkeys. And not like the clever donkeys of Rabbi Chanina ben Dosa and Rabbi Pinchas ben Yair, but like regular asses.” *Tractate Shabbat* 112b is discussed in RUBENSTEIN, *supra* note 31, at 35. See also *Tractate Yoma* 9b (“Even the fingernail of the earlier generations is better than the whole body of the later ones.”).

33. Post-Talmudic Geonic rabbis (7th–10th century CE) developed a principle of *hilkheta k’vatrei*, which allowed the law to follow the practice developed by later authorities. See generally 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 267–72 (Bernard Auerbach & Melvin J. Sykes trans., 2003). So much for *yeridat ha’dorot!* Asher ben Jehiel (sometimes called the Rosh or Asheri), who lived from 1259 to 1327, put it evocatively: “At any given time, there is only ‘the judge of that time,’ and he may choose not to follow the views of his predecessors . . . [O]ne may ‘demolish and create’ . . .” *Piskei ha-Rosh*, Sanhedrin ch. 4, #6 (quoted in 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES*, at 269).

34. STEVEN D. FRAADE, *FROM TRADITION TO COMMENTARY: TORAH AND ITS INTERPRETATION IN THE MIDRASH SIFRE TO DEUTERONOMY* 14 (1991).

35. E.g., BERKOWITZ, *supra* note 22, at 17 (highlighting that Tannaitic sources combine “nostalgia and utopianism”). See also *id.* at 54–55 (exploring Moshe Halbertal’s suggestion that the rabbinic method often has the legal interpreter standing inside and outside the canonical text).

Given Flatto's interest in avoiding reductive readings about how the rabbis considered their role in the world's political ecosystem at the time, he did not spend enough time in the book mining the rabbis' other audiences: the Jews themselves, just as the rabbis sought to engage in their constructivist project of bringing their law to the center of Jewish life, especially at that most destabilizing and decentering moment, when the Temple was destroyed.

There are at least some hints that this kind of constructivist project was self-conscious in Tannaitic times. But to see it clearly, one must focus not on the locus of political authority in Jewish monarchy, but on the priests' authority over law in the period before 70 CE. One might say that the real contest for rabbinical jurisdiction was not with a weak royal sovereign but with the priestly caste, who administered the sacral law that the rabbis would need to move into their sphere of influence.³⁶ Rereading the Mishnah in Tractate Pesachim, which recounts how the priests handled sacrifices in the Temple, can remind us that even in Temple times the rabbis started their efforts to opine on how the law should be administered: the Mishnah comments that the priests cleaned the courtyard on the Sabbath "which was not in accordance with the views of the sages."³⁷ Here we get a glimpse that the rabbis of the Mishnah saw that their main competitor for power over the law's jurisdiction was not a prior generation of rabbis or a monarchy, but the priests,³⁸ whose subjects might have seen them as the relevant authority, even after the Temple was destroyed. Jeffrey Rubenstein aptly elucidates: "the rabbis [] competed with priests for religious authority. Many rabbinic traditions polemicize against priests in an effort to minimize priestly claims to leadership in the postdestruction era."³⁹ If Flatto had spent more time on the political economy within the Jewish polity in Tannaitic times, he surely would have done more

36. See, e.g., SHAYE J.D. COHEN, *FROM THE MACCABEES TO THE MISHNAH* 219 (3d ed. 2014) ("In 70 CE, . . . the priests not only lost their jobs but also the institutional base of their power . . . This was the vacuum the rabbis tried to fill. Ultimately, they succeeded, but victory was gained only after a struggle. The rabbis were opposed by various segments among the wealthy and the priesthood and by the bulk of the masses in both Israel and the Diaspora."). Flatto recognizes some of these dynamics about priestly justice in his chapter 6, but with a somewhat different emphasis.

37. *Tractate Pesachim* 64a.

38. Another example of the Mishnah's commenting on priestly behavior that was not in accordance with rabbinical interpretation is in *Tractate Menachot* 67b.

39. RUBENSTEIN, *supra* note 31, at 88.

remarking on how law was used and constructed as part of the rabbinical movement. We could then more easily see how the promotion of judicial independence might have been a mechanism for the rabbis to centralize control over their competitors for legal authority. Figuring out where the monarchy belonged in this constellation of power must have been informed by and shaped by their real competitors.

The rabbis' strategy for sustaining their control over law worked not only by developing all the relevant codifications that would ultimately control the Temple service (were there to be a new Temple in the future), but also by using a kind of sovereign immunity principle with respect to the priests as well. In some rabbinical discussions of the Temple, the rabbis resort to an idea of *shvut d'mikdash*: the rabbinical prophylactic rules—in contradistinction to biblical law—just do not apply in the Temple.⁴⁰ Like the sovereign immunity rules for the king that Flatto focuses upon in his discussion, the immunity for the priests can also be seen as a strategy to keep competitors for legal authority at bay: the immunity works (here, as there) to carve a space of rabbinical supremacy, all while feigning to “elevate” an entity by rendering it outside the law.

There is plenty of lip service in the Talmud for how zealous and vigilant the priests might have been (though by the time of Amoraic and Stammaitic pronouncements about the priests, there had been no Temple service in recent memory at all).⁴¹ Yet there is little doubt that at the time of the Mishnah itself, the rabbis saw priestly authority as worth sidelining. Although the Temple was gone after 70 CE, the rabbis had to ensure that their jurisdiction over law would reign supreme. For all of Flatto's effort to show that the rabbis harken back to Deuteronomy 17 in their understanding of royal authority, 17:18 actually has the king receiving his legal scroll from the Levitical priests, not from the rabbis or judges;⁴² and Deuteronomy 18 keeps the priests in charge of the Temple even under monarchy. Yet the priests disappear from Flatto's narrative about the rise of the rabbinic state, for the most part. The rabbis must be deliberately putting

40. See, e.g., *Tractate Eruvin* 103a.

41. The phrase *kohanim zrizim hem* (“the priests are vigilant”) appears in *Tractate Shabbat* 20a and 114b; *Tractate Eruvin* 103a; *Tractate Pesachim* 59b and 65a; and *Tractate Bava Batra* 90a.

42. I discuss this passage *supra* note 14.

the priests in their place,⁴³ not only because without the Temple priestly jurisdiction disappears, but also because the rabbis need Judaic society to let them take over the sanctuary of Jewish law.

There is perhaps no better way to see how the rabbis of the Mishnah really thought of the priests—and construct rabbinical supremacy over them—than by considering the opening of Mishnah Yoma, which recounts the High Priest’s activity in preparation for the holiest day of the year, Yom Kippur.⁴⁴ There we see that it is the elders of the court—a stand-in for the rabbis themselves—that instruct the High Priest’s preparations. They say to the High Priest, essentially: “repeat after us with your own mouth so you don’t forget what you need to do and in what order, if you even ever learned it in the first place.”⁴⁵ The elders were there to train the High Priest, it seems, but they also had the ability to put words in his mouth and have him channel their own rulings in the lead-up to the service. Evocatively, after all the training, the elders then administer an oath as a mechanism of control before they take their leave.⁴⁶ As they leave, they remind the High Priest: “You are our agent and an agent of the court—and you may not depart from how we have instructed you.”⁴⁷ After the administration of the oath, the Mishnah reports, the High Priest left and cried—and the elders left and cried, too.⁴⁸

It is hard not to read this as the rabbis seeking to gain ascendancy over the priests regarding some of the most important law on the most important day of the year. Everyone might be crying because the more collaborative governance scheme of

43. Consider also the end of *Tractate Pesachim* 121a in which the rabbis debate mostly whether the priests should be seen as suspicious or lazy.

44. See *Mishnah Yoma* 1.

45. *Id.* That is my punchier translation.

46. *Id.*

47. *Id.*

48. *Id.* *Tractate Yoma* 19a–19b actually expresses some concern about the oath and its invocation of the language of agency in the Mishnah: “Rav Huna the son of Rav Yehoshua [a fifth-generation Amoraic rabbi] said that the priests in the performance of their service are agents of God,” remarking that legal difficulties arise if the priests are seen as direct agents of the rabbis (who themselves are not authorized to do the service). To solve the legal problem with deeming the High Priest an agent of the rabbis, the Talmud emends the Mishnah. “This is what they actually said to the High Priest: We administer an oath to you based on our understanding and the understanding of the Court.” Ironically, the rabbinical understanding of the law as it was received around 400 CE led the Talmud to change the Mishnah’s specification of the ritual by which the rabbis controlled the High Priest. All the same, rabbinical law is sustained while the gist of the hierarchy is also preserved.

Deuteronomy 17 was lost to history as the rabbinical movement won the day.⁴⁹ The rabbis effectively suspect the priests regularly, finding methods to subjugate them to rabbinical law; whatever sovereign immunity might exist is perforce a strategy of domination rather than elevation. It seems likely that the same dynamic is at play with the imaginary kings of the Mishnah, as well.

In the final analysis, the rabbis might have been anxious about their authority, but they knew what legal hierarchy to create for the Jewish polity. It is plausible to see the concepts of “judicial independence” and “sovereign immunity” as interlocking pieces of the bedrock for their new regime.

The rabbis in the third century, the first Amoraic rabbis, already projected the success of their Tannaitic predecessors as they considered what the world to come would look like. Rabbi Yehoshua ben Levi’s son, Rav Yosef, had a near-death experience and reported what he saw in the hereafter in Tractate Pesachim:⁵⁰ “I saw an inverted world—the high ones were at the bottom of society and the lowly were elevated.” His father said to him: “You saw the clear and true world. But where, pray tell me, did the scholars and rabbis find themselves in the world to come?” Rav Yosef responded: “Where we are here, we are the same status there—and I heard some saying ‘praiseworthy is the one who arrives to the next world with his studies in his hands.’”⁵¹ So the rabbis, even in an inverted world and in the world to come, control the order of things and are able to sustain their supremacy in the rabbinic state that they idealize, project, retroject, and construct all at the same time.

49. The Talmud’s gloss on this Mishnah in *Tractate Yoma* 19b foregrounds the rabbis’ suspicion of the High Priest, but focuses on the worry that he might belong to the Sadducee sect and perform the service according to their traditions rather than according to the rabbis’ instructions. The dynamic of trying to get the priests to buckle to rabbinic authority remains even in the later Amoraic understanding of the Mishnah.

50. *Tractate Pesachim* 50a. Rabbi Yehoshua ben Levi operates somewhere in the liminal space between Tannaitic and Amoraic rabbis. Rashi calls him an Amoraic rabbi in *Tractate Niddah* 18b (and this story from Pesachim appears in Amoraic material), but he does appear in Tannaitic sources like *Mishnah Ukzin* 3:12. See RABBI NOSSON SCHERMAN, INTRODUCTION TO THE TALMUD: HISTORY, PERSONALITIES, AND BACKGROUND 321 (Schottenstein Daf Yomi ed. 2019).

51. *Tractate Pesachim* 50a.

CONCLUSION

What, then, to say about any of this for theorists of the separation of powers in modern constitutional democracies? Flatto's book will surely dazzle readers in Jewish studies, Jewish law, and Jewish history. Political theorists and historians of ideas who trace the separation of powers to particular configurations in European history will also be illuminated by Flatto's meticulous work; his final chapter offers a rich comparative lens to digest many lessons of the book for ancient and modern jurisprudence (pp. 222–33). Yet for contemporary students of constitutional law and judicial politics, it is essential to consider a dose of realism after the Flattonic idealism. That is because coupling judicial independence and sovereign immunity, as Flatto teaches the Jewish tradition does earlier than people probably assume,⁵² is not only achieved through a dialectical process of parsing written and oral Torah from a conception of revelation. Rather, it involves creative acts of interpretation and using law as a discourse of power.⁵³

At least one important lesson for readers willing to supplement Flatto's book with a somewhat more *political* political theory is that the rabbis successfully crafted their own jurisdiction and independence all while getting competitors out of the way, using a tool of sovereign immunity. To watchers of the U.S. Supreme Court, perhaps some of this will not be terribly surprising: the Court is routinely unconcerned with separation of powers deviations in favor of judicial power.⁵⁴ That judges contour their jurisdiction to aggrandize themselves is as human as it was prevalent even as the rabbinical movement burgeoned in the post-Temple period. Still, Flatto's fabulous book will also get more people to affix their attention on how invocations of sovereign immunity (or, perhaps, a "political question" doctrine

52. Flatto also appropriately concludes that "separation of powers need not serve democratic goals, but can derive from an altogether different genealogy related to the autonomy and integrity of law" (p. 225).

53. In some respects, Flatto's discussion of *Marbury v. Madison* gestures here, all while finding a way to strip the politics from law (pp. 228–229).

54. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (permitting broad policymaking in the Judicial Branch's Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (permitting the Judicial Branch to appoint an independent counsel as a prosecutorial officer to investigate the Executive Branch); *United States v. Nixon*, 418 U.S. 683 (1974) (upholding a Judicial Branch subpoena against an assertion by the President of "executive privilege"); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (upholding a broad delegation to the Supreme Court in the Rules Enabling Act).

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in which the political branches cannot be judged) may be part of an important trade for sustaining judicial independence, now as then. And that what looks principled from one standpoint might, from another perspective, be an instrument of establishing judicial supremacy.

Indeed, you may learn from this. ש"מ