This ambitious volume aims to extract from ancient Jewish literature a range of theories of
government, especially as they pertain to the separation of powers, and particularly the relative
balance of “the crown and the courts.” It does so under a broad definition of ancient
Judaism—including chapters on Qumran, Philo, and Josephus and several on rabbinic literature—and
argues for both a general theory and for differences among the various corpora. Starting with
Deuteronomy 17 on the law of the king and its reception history and extending to broader
conceptualizations of the king and the courts in each of these texts, Flatto argues that ancient Jewish
thinkers have a novel conception of institutional justice that should take its rightful place in the study
of the history of jurisprudence.

Of course, this volume is not the first to engage in the effort of recovering modern concepts in
ancient Jewish materials. The Crown and the Courts is but one of several publications in recent years
to have pointed to the influence of ancient Jewish texts on political theory that has affected the West
in general and American politics in particular. Some of these have focused on the ancient period
itself, such as Joshua Berman’s Created Equal (2011), which focuses on early forms of egalitarianism
in the Bible, while other texts have focused on those (usually Christian Hebraists) who attempted to
revive these biblical and Talmudic traditions in the modern period, such as in Eric Nelson’s The
Hebrew Republic (2011). A fascinating, multiyear and multivolume project entitled The Jewish
Political Tradition, edited by Michael Walzer, Menachem Lorberbaum, and Noam Zohar, aims to
collect a corpus of such political texts in early Judaism, along with commentary on the work. (The
third volume of the series was recently published.) Flatto himself invokes some of this literature,
including these three works and others (although he leaves out an extended project of the Shalem
Center on the topic, including the now-defunct Hebraic Political Studies quarterly journal and the
related volume Political Hebraism).

If we were writing an intellectual history of early twenty-first-century Judaism, Flatto’s volume could
certainly be seen as participating in this trend of (primarily) Jewish scholars looking back at ancient
Jewish sources and drawing upon their political wisdom, but it also distinguishes itself in some ways
from criticisms that some products of this genre have received. Flatto’s descriptions of ancient Jewish
sources are both thick and contextualized, and his appeals to the influence of these materials on later
political conceptions are cogent and level-headed. Rather than presenting an undifferentiated
approach to politics, distinctions are made between different time periods and texts of different
genres and schools.

Furthermore, Flatto never asserts that these political perspectives were enacted in practice. Rather, he views Jewish reflection on political administration as an expression of “the Jewish imagination,” because for the vast majority of the period of ancient Judaism, Jewish political authority in this form was not a pragmatic prospect. That makes this study an exercise in Jewish utopia, in some form, born of Jewish powerlessness, but these ideas, ahead of their time in some ways, still deserve engagement.

This volume brings together multiple areas of expertise, treating primary texts of both Second Temple literature and rabbinic literature, and contextualizing them from the perspective of comparative law. Flatto’s broad training in ancient Judaism and in law, not to mention his Talmudic training, affords him the capability to be at home in each of these fields. And although this is not showcased in the text itself, it is clear that the author is at home with the Greek, Hebrew, and Aramaic languages of his primary sources.

Flatto’s story begins with Deuteronomy 17, which presents an ideal of a very limited monarch—monarchy is only prescribed if requested, and the king is limited in quantity of wives and possessions he may amass in order to limit his power. While other, narrative biblical accounts of monarchy afford different degrees of legitimacy and power to the king, Deuteronomy 17 proves to be extremely influential among ancient Jewish readers, which Flatto proceeds to analyze.

Philo embraces the king as a Jewish leader, but reinvents him as an embodiment of the law, a continuation of Moses into post-Pentateuchal times. A chapter on the Qumran texts (a.k.a. the Dead Sea Scrolls) emphasizes how the monarch has an extremely limited role, while various officials, priests, and councils take leading roles in governance (although this might be more true of later texts than earlier ones). Josephus, who is the first to argue for governance by “theocracy” (a term he invented; Apion II:17), similarly diminishes the significance of the monarchy, while emphasizing the centrality of the Jewish constitution, that is, Torah, and its expositor in Moses. While they each take different angles, all share a commitment to law as the organizing principle of the Jewish polity.

The most extensive treatment of the volume is reserved for rabbinic literature, particularly the Mishnah and other Tannaitic materials. One challenge Flatto needs to deal with is that, as opposed to the Second Temple literature, rabbinic literature contains many sources that present the king as a powerful monarch, and not one reined in by the law. Flatto acknowledges that the Mishnah reflects a pro-monarchic orientation, but he focuses on smaller victories for team “separation of powers,” including the fact that the king’s sovereign immunity is based on his being apart from the judicial system rather than the head of it. More convincingly, the idea that the king cannot judge, or judicial incapacity, indicates a separation between the crown and the courts. If one moves beyond the Mishnah, the Tosefta reflects a more restrained vision of monarchical power, which further supports Flatto’s view, although the Babylonian Talmud walks back much of the Mishnah’s position, allowing for the king to judge and be judged for Judean kings, and only excluding kings of the Israelite kingdom, due to pragmatic concerns of power clashes.

Turning to the courts, Flatto acknowledges some other complications to a pure separation of powers account within rabbinic literature. He points to “alternative models” (p. 139f.) of judicial administration, such as royal justice, justice by an individual judge, or priestly justice that do appear...
within rabbinic literature. While each of these approaches, which reflect systems of law in place in biblical and/or Second Temple Judaism, do not lend themselves to the “rule by law” theory Flatto promotes, in each case he notes that these approaches are alternately opposed, limited, or otherwise incorporated into a far more powerful juridical model of institutional justice that carries the day.

Flatt sees the dominant rabbinic view of the courts as one that prefers institutional justice, which “authorizes an autonomous panel of judges to head the legal system” (p. 155) rather than being subject to any monarchical, priestly, or charismatic power base. These anonymous tribunals ensure that what is represented in the rabbinic legal system is not any one individual’s partisan interests but the interests of the very law itself. Different accounts of how the system of courts is structured all match this system. From a historical perspective, Flatto surmises that building courts into institutions may have been a way of building the rabbinic power base in the early centuries of the common era.

The greatest challenge to this view of the anonymous judges is the position of nasi (“elevated one” or “prince”), which both takes on political roles and is positioned at the head of the court system. Flatto’s chapter on the nasi most explicitly and extensively engages in historical-critical methods, arguing that if we explore all appearances of the term (rather than dividing the political and the judicial nasi, as some have argued), we find that the original position of nasi was separate from any role in the court, only to be integrated at a later point, as interested entities sought to assert their power through the court system. This leaves the original, idealized rabbinic court as one without political figures at its helm, even if the nasi did infiltrate it at a later point. Whether due to the outcome of the Bar Kochba revolt or the growth of the Patriarchate, Flatto sees some historical circumstance as the cause for this change (and appears to minimize its significance for that reason, although it is less than clear why this should be the case). With the nasi objection largely neutralized (like that of royal justice earlier in the volume), what remains is the regnant position of institutional justice within early rabbinic literature.

A final section of the book—arguably its most interesting and novel—aims at determining the root cause of this unique ancient Jewish view, determining its theory, and quickly surveying its afterlife. Flatto offers several approaches to account for this divergent rabbinic approach, doing the job of a historian rather than attributing their unique view to some irreducible mystery. After presenting the three themes of Jewish disempowerment, the outsized role of the Pentateuch (particularly Deuteronomy) in early biblical reception, and the inherited view of limited monarchy, he expresses that the most impactful cause of this view is likely “the covenantal factor” (217f.). The Sinai revelation commands the primacy of law, to be administered by human hands, a view of the law and of life that shapes the political view of institutional justice in ancient Judaism. While accounting for contextual factors, he does not rule out the possibility (and, indeed, likelihood) that this is a genuinely Jewish contribution to the field of comparative law, tracing itself back to the very Sinaitic revelation itself.

Significantly, and despite the genre, Flatto is not triumphalist nor does he fall prey to parallelomania. The entire conceit of the book is that these ancient Jewish texts include original exemplars of the separation of powers doctrine, correcting the regnant view that sees that principle as stemming from America’s founding, but Flatto’s goals as presented are scholarly rather than jingoistic. And he makes sure to clarify that, while this is a precedent for the separation of powers now central to multiple systems of government, there are significant differences as well. While the stated and structural
goals of contemporary governments are to support rights and democracy, following Enlightenment ideals, the goals of these ancient Jewish accounts that separate powers are to preserve space for God within governmental administration. Far from a sermon extolling how “the Jews got it right, first,” the volume argues for soberly considering the historical evidence and taking these important and relevant precedents of comparative jurisprudence into account.

It is within the structure of this intellectual history that Flatto can forthrightly claim that this case of early Jewish jurisprudence has enduring influence, despite the dissonance of “beginning with a comprehensive mosaic legislation crammed with religious laws, and ending up with a blank set that tolerates all religious practices” (p. 238). The volume applies an approach of consilience, bringing together the various approaches found in the ancient sources, despite their divergences. Josephus is not Philo is not Qumran is not the rabbis, and Flatto’s account points to discordances and multiple voices even within each of these corpora (especially, but not only, the explicit multivocality of Qumran and rabbinic literature). Flatto’s approach is to be very honest and clear about the differences within and between the approaches, but also to group them all together as “writings [that] break with the regnant paradigm” and “collectively project law’s independence” (p. 199). The price of this honesty in presenting the sources is that it leaves something to be desired for someone reading the book and expecting a consistent approach of “separation of powers” from ancient Judaism.

Understandably, although unfortunately, the volume does not consider the afterlife of the rabbinic juridical models in the Talmuds, outside of a few cases, as it limits its primary rabbinic treatment to Tannaitic literature. This is understandable, given the massive undertaking that engaging all Talmudic material (not to mention Aggadic Midrash) would entail, but its absence is felt. The short concluding chapter considering the reception history of the ancient Jewish conception of political power discusses not the Talmud but Rabbenu Nissim Gerondi and his famous account of two types of jurisprudence, judicial and monarchical. Flatto considers Gerondi’s scheme, which overrides the court’s exclusivity and gives the king space to operate within it, to be a reversal of the rabbinic approach, albeit one understood within the monarchocentric times of the medieval period.

However, one might wonder whether much of the cause for Gerondi’s divergence from the models discussed in Flatto’s volume might actually stem from Talmudic rather than medieval developments. Certainly the oft-invoked Talmudic principle that “the courts can administer lashes and [otherwise] punish not according to the Torah” (bSan 46a and parallels), appearing in the Babylonian Talmud and attributed to a Tannaitic rabbi, would pose a problem for Flatto’s account. One would be forced to either explain why judges can arrogate to themselves punitive power apparently outside of institutional justice, or otherwise to explain, as Gerondi does, that these powers are actually monarchic powers that have been assimilated into the court system. Either way, this is an important Talmudic adjustment to the separation of powers doctrine.

One other place that it is possible to push back on Flatto’s approach regards the depiction of Moses in the book. While we hear about Moses in the section on Philo’s approach, wherein the king internalizes and represents the law, the rabbinic account of Moses does not feature much in the study. Especially in light of Moses’ depiction as a (non-Philonic) king in some Midrashic texts, and the related Talmudic praise of Moses as possessing “Torah and [political] greatness in one place” (bSan 36a and parallels), there is reason to wonder if the rabbis see separation of powers as so significant.
Ironically, where this teaching appears, it asserts that “from Moses to Rabbi [Judah the Nasi], we have never found Torah and greatness in place.” That the humans most responsible for completing the Torah and the Mishnah both achieve this accolade of integration of powers is certainly noteworthy, and might suggest an ideal other than that of institutional justice, at least on the legislation plane.

One somewhat discordant aspect of the book is the degree to which it engages in the comparative enterprise, both in content and in framing. As for self-presentation, the volume appears to put its comparative aspects first. The blurbs on the book jacket are all by scholars of Judaism and law in the modern period. Both the title, with its reference to “separation of powers,” and the claim in the book’s introduction that “this book offers a revision of th[e] summary account” of Tony Honoré that “the idea that the ruler should not himself be a judge, and should not interfere with judges” (p. 17) emerged only in the seventeenth and eighteenth centuries, emphasize comparative aspects of the book that would be interesting to a general audience.

Yet all but twenty pages of the book is situated far from the modern period, as it does the work of analyzing and characterizing Jewish texts of late antiquity, in their historical context. One wonders whether the goal is to draw in the general reader to these abstruse texts with these more contemporary “hooks.” Indeed, the reader often gets the sense that the chapters on ancient Jewish texts are streamlined to present smoother presentations of the material, often relegating the litigation of exegetical complexities to the footnotes (or sufficing with a citation of Flatto’s dissertation). The resulting sense, at least for this ancient Judaism scholar, is that Flatto is almost restraining himself from a more engaged treatment of the classical materials in the interests of allowing access to an envisioned audience that is more at home with contemporary literature than these ancient texts.

Whatever detailed concerns one might have with this book, it is a work of prodigious scholarship that presents clearly and rigorously an important aspect of Jewish thought in the classical period. As we have seen in recent years, the issue of separation of powers that the volume addresses is more relevant than ever. Precisely at a time that has seen tensions between branches of government, when both major American political parties have complained about the ever-expanding executive power, and as many see institutional justice on the decline—precisely now, this is a book whose time has come.

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