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

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

INTRODUCTION

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

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often framed as a “culture war” between the so-called “religious right” and the secular left.<sup>1</sup> The implication of this characterization is that *The Bible* can only be read in one particular way, namely from a literalistic, evangelical perspective.<sup>2</sup> Therefore, the contribution of *The Bible*<sup>3</sup> to law and public debate is often limited to selected texts chosen to support one particular and predictably narrow political ideology.<sup>4</sup> This Article

<sup>1</sup> See, e.g., Martha L. Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 668-69 (2001) (briefly sketching the history of the “culture wars” as a reaction of the “religious right” to the secularization of American society).

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

<sup>3</sup> All citations to *The Bible* in this Article employ the following convention:

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

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

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

contends that a critical reading of *The Bible* yields a significant source for the study of the development of certain key legal concepts that are essential to the development of modern constitutional government.

Since the American Revolution, various religious and political figures have claimed a role for *The Bible* in establishing the American experiment in republican rule.<sup>5</sup> Those claims have often come at the expense of recognizing other influences, such as Enlightenment philosophy.<sup>6</sup> In recent years, the claims of biblical dependence for Anglo-American law have been reborn in the debate over the display of the Ten Commandments in public places.<sup>7</sup> The arguments for the historical importance of the Ten Commandments have often thinly

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

<sup>5</sup> See, e.g., Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 788-89 (1986) (noting the popular influence of religious traditions on the understanding of American law).

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

<sup>7</sup> The Supreme Court addressed the display of the Ten Commandments in public places in two recent, controversial decisions. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. American Civil Liberties Union of Kentucky*, 125 S. Ct. 2722 (2005). In his dissent in *McCreary County*, Justice Scalia acknowledged a common understanding of the Ten Commandments: "The frequency of [Ten Commandments] displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government." *McCreary*, 125 S. Ct. at 2760 (Scalia, J., dissenting). Contrast the much more historically-controlled analysis by Jean-Louis Ska, showing that the relative lack of social stratification within the Decalogue distinguishes it from other legal works of the period, and provides a groundwork for a democratic mentality. Jean Louis Ska, *Biblical Law and the Origins of Democracy*, in *THE TEN COMMANDMENTS: THE RECIPROCITY OF FAITHFULNESS* 146-58 (William P. Brown ed., Westminster John Knox 2004).

veiled the religious motivations of the display advocates.<sup>8</sup> The back and forth over the display of the Decalogue has generated significant debate over the role of religion in contemporary society, but it produced very little intelligent dialogue about the legal texts in *The Bible* itself. The time has come for the introduction of biblical scholarship into the public debate.

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

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<sup>8</sup> See Susanna Dokupil, "Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays, 28 HARV. J.L. PUB. POL'Y 609 (2005) (discussing the difficulty of applying a legal standard to distinguish the religious and secular motivations of Ten Commandments displays). For a valuable challenge to the arguments of display advocates from the vantage point of academic religious studies, see N. Duff, *Should the Ten Commandments Be Posted in the Public Realm? Why the Bible and the Constitution Say, 'No!'*, in THE TEN COMMANDMENTS: THE RECIPROCITY OF FAITHFULNESS 159-70 (William P. Brown ed., Westminster John Knox 2004).

<sup>9</sup> A HISTORY OF ANCIENT NEAR EASTERN LAW (Raymond Westbrook ed., E. J. Brill 2003) (an invaluable collaborative work spanning three millennia in the ancient world, organized by legal topic, historical period, and geographical region); Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13 (1995).

<sup>10</sup> LA CODIFICATION DES LOIS DANS L'ANTIQUITÉ: ACTES DU COLLOQUE DE STRASBOURG 27-29 NOVEMBRE 1997 (Edmond Lévy ed., De Boccard 2000) (a comparative volume with contributions by specialists in cuneiform, biblical, and Roman law).

<sup>11</sup> Raymond Westbrook, *International Law in the Amarna Age*, in AMARNA DIPLOMACY: THE BEGINNINGS OF INTERNATIONAL RELATIONS 28 (Raymond Cohen & Raymond Westbrook eds., Johns Hopkins University Press 2000) (on the legal treaties governing diplomatic relations between ancient Egypt and its vassals in Syro-Palestine in the second millennium BCE).

<sup>12</sup> Martha T. Roth, *The Scholastic Exercise: Laws about Rented Oxen (Sumerian Texts)*, 32 J. CUNEIFORM STUD. 127 (1980).

<sup>13</sup> Samuel Greengus, *The Old Babylonian Marriage Contract*, 89 J. AM. ORIENTAL SOC'Y 505 (1969); Martha T. Roth, *Age at Marriage and the Household: A Study in Neo-Babylonian and Neo-Assyrian Forms*, 29 COMP. STUD. SOC'Y & HIST. 715 (1987); RAYMOND WESTBROOK, OLD BABYLONIAN MARRIAGE LAW (Berger 1988); RAYMOND WESTBROOK, PROPERTY AND THE FAMILY IN BIBLICAL LAW (Journal for the Study of the Old Testament Press 1991).

<sup>14</sup> RICHARD HAASE, EINFÜHRUNG IN DAS STUDIUM KEILSCHRIFTLICHER RECHTSQUELLEN 48-118 (Otto Harrassowitz 1965); Eckart Otto, *Körperverletzung im hethitischen und israelitischen Recht: Rechts- und religionshistorische Aspekte*, in KONTINUUM UND PROPRIUM: STUDIEN ZUR SOZIAL- UND RECHTSGESCHICHTE DES ALTEN ORIENTS UND DES ALTEN TESTAMENTS 192-223 (Otto Harrassowitz 1996); Jonathan R. Ziskind, *When Two Men Fight: Legal Implication of Brawling in the Ancient Near East*, 44 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 13-42 (1997).

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

The literary materials of *The Bible* and the ancient Near East are rarely directly examined for their role in the development of Western politics and judicial thought.<sup>15</sup> The isolation of the academic disciplines from one another often impairs the constructive examination of ancient texts for their contribution to modern thought. The challenge for non-specialists of approaching the literary development of *The Bible* over time, through the mastery of ancient texts in their original languages, makes it difficult for political philosophers or legal historians to recognize *The Bible* as a primary source for the development of constitutional history. Conversely, precisely because of the rigors of academic specialization, biblical scholars have often been reluctant to address such broader theoretical and cultural issues.

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

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<sup>15</sup> While very little literature directly addresses the influence of the ancient Near East on modern constitutional thought, many scholars have applied analytical insights from the field of religious studies to the interpretation of the American Constitution. *E.g.*, JAROSLAV PELIKAN, *INTERPRETING THE BIBLE & THE CONSTITUTION* (Yale University Press 2004) (a historian of religion applies the model of doctrinal development in religious tradition to the interpretation of the Constitution over time); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551 (1985) (a legal scholar applies principles of biblical hermeneutics to the interpretation of the American Constitution). The importance of that sort of interdisciplinary dialogue cannot be overstated. However, this Article seeks to demonstrate a need for the dialogue between legal and religious studies on another point. Scholars such as Pelikan and Perry have made a significant contribution by demonstrating the value of applying the analytical *methodologies* of the study of scripture to the Constitution. This Article seeks to address the correspondence between the *content* of *The Bible* as a piece of ancient Near Eastern legal literature and modern constitutional government. The goal of such an inquiry is to foster historical inquiry into an often ignored source of political thought.

these principles upon the notion of an independent judiciary. In Part I, I demonstrate the importance of *Deuteronomy* as a foundational political document to ancient Jewish communities and suggest the need for a more thorough examination of *Deuteronomy* in that light. In Part II, I compare the ancient Israelite legal tradition to other legal precedents in the ancient Near East. I argue that the Israelite conception of law diverges from other ancient legal systems through the use of an “origin myth” for the creation of the judicial system, which transforms the role of law in the political community. Unlike ancient Near Eastern analogs, the judiciary is constituted according to specific qualifications for appointment to office; the end being the enforcement of the law, not the will of a particular monarch. In Parts III through VII, I explore the implications of this transformation through the fundamental reordering of social and political institutions. Finally, in Part VIII, I argue that the legal corpus of *Deuteronomy* presents a draft constitution, unique in its time. This constitution differs dramatically from the royal ideologies of the ancient Near East and later Greek conceptions of monarchical power. By restructuring the social, religious, and political institutions of ancient Israel, the legal corpus provides an implicit model for the separation of powers and the rule of law. A critical reading of *Deuteronomy* therefore brings to light the first known precedents for two fundamental concepts of modern, secular, constitutional government.

#### I. DEUTERONOMY AS A FOUNDATIONAL POLITICAL DOCUMENT

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

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

<sup>17</sup> S. Dean McBride, *Polity of the Covenant People: The Book of Deuteronomy*, in 41

state's autonomy, if not its existence altogether, was jeopardized by neo-Assyrian hegemony and repeated incursions down the Mediterranean littoral.<sup>18</sup>

Although its language is legal and its metaphors are religious, *Deuteronomy* articulates a complex vision of political philosophy, as was already clear in antiquity. The historian Josephus<sup>19</sup> thus speaks of how Moses presented Israel “with these laws and this constitution recorded in a book.”<sup>20</sup> He begins by describing *Deuteronomy* as “the code of those laws of ours which touch our political constitution,” and concludes by summarizing it as “the constitution that Moses left.”<sup>21</sup> The two references elegantly frame his review of *Deuteronomy* and function like an initial superscription and final colophon that formally

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INTERPRETATION 229 (1987), reprinted in *A SONG OF POWER AND THE POWER OF SONG: ESSAYS ON THE BOOK OF DEUTERONOMY 62* (Duane L. Christensen ed., Eisenbrauns 1993); FRANK CRÜSEMANN, *DIE TORA: THEOLOGIE UND SOZIALGESCHICHTE DES ALTTESTAMENTLICHEN GESETZES 235-322* (Chr. Kaiser 1992).

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

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

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

<sup>20</sup> FLAVIUS JOSEPHUS, *JEWISH ANTIQUITIES*, BOOKS I-IV, at 569 (H. St. John Thackeray trans., Loeb Classical Library 242, Harvard University Press 1930) (Book IV, § 194).

<sup>21</sup> *Id.* at 571, 621 (Book IV, §§ 198, 302).

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

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

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

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

<sup>24</sup> *Deuteronomy* was from ancient times viewed as a constitutional model by Jews. The rabbinic patriarchate in Israel during the second century CE and the exilarchate in Babylon were organized in the spirit of *Deuteronomy*. DANIEL J. ELAZAR, COVENANT & POLITY IN BIBLICAL ISRAEL 196 (Transaction 1995).

<sup>25</sup> The work of Eric Voegelin is no exception to this generalization. It imposes a notion of Greek philosophical reason upon the material, failing to come to terms with the way in which the Near Eastern and Israelite narrative and law represent thought, even if not formulated in propositional terms. 1 ERIC VOEGELIN, ORDER AND HISTORY: ISRAEL AND REVELATION, (Louisiana State University Press 1956).

<sup>26</sup> Only recently has the situation begun to change. Important attempts to correct this oversight include WALTER BURKERT, THE ORIENTALIZING REVOLUTION: NEAR EASTERN

fields of Assyriology and academic biblical studies have also tended to erect disciplinary walls around their areas of research in ways that make it very difficult for them to venture forth and explore the historical and cultural diffusion of Near Eastern law.<sup>28</sup> The result of this interdisciplinary *aporia*, so carefully maintained by all sides, is the loss of a crucial chapter of intellectual history.<sup>29</sup> That loss, in turn, has further consequences: it perpetuates a false dichotomy between the cultures of the eastern and western Mediterranean, between religious law and political thought, between Jerusalem and Athens, between antiquity and modernity. Consequently, the attempt to recover that lost chapter affords a different perspective not only upon the past but also upon the present.

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INFLUENCE IN THE EARLY ARCHAIC AGE (Harvard University Press 1992); MARTIN L. WEST, *THE EAST FACE OF HELICON* (Clarendon 1997); ANFÄNGE POLITISCHEN DENKENS IN DER ANTIKE: DIE NAHÖSTLICHEN KULTUREN UND DIE GRIECHEN (Kurt Raaflaub ed., R. Oldenbourg 1993). From the vantage point of legal history, Raymond Westbrook, an Assyriologist, proposes Near Eastern influence upon Roman law. Raymond Westbrook, *The Nature and Origins of the Twelve Tables*, 105 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG (ROM. ABT.)* 82 (1988).

<sup>27</sup> Ironically, even a volume explicitly providing a valuable comparative perspective on the ancient Mediterranean proves this point. See *LAW, POLITICS, AND SOCIETY IN THE ANCIENT MEDITERRANEAN WORLD* (Baruch Halpern & Deborah W. Hobson eds., Sheffield Academic Press 1993). While bringing together separate studies on law in ancient Mesopotamia, Israel, Greece, Rome, and in rabbinic interpretation, the larger intellectual statement intended by the collection remains unclear. The question of legal, historical, or cultural influence is not considered, one way or another; nor are comparisons or contrasts explored.

<sup>28</sup> There are, of course, exceptions. Several scholars have proposed the significance of biblical and Near Eastern law for contemporary legal and political thought. For example, two ground-breaking studies by Assyriologist Jacob Finkelstein articulate the conceptual categories and legal concepts underlying biblical and cuneiform law and trace their legacy into the modern world: Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 *TEMPLE L.Q.* 169 (1973); and JACOB J. FINKELSTEIN, *THE OX THAT GORED* (Transactions Am. Phil. Soc’y 71:2; American Philosophical Society 1981). See also ECKART OTTO, *DAS DEUTERONOMIUM: POLITISCHE THEOLOGIE UND RECHTSREFORM IN JUDA UND ASSYRIEN* (Walter de Gruyter 1999); and JEAN-MARIE CARRIÈRE, *THÉORIE DU POLITIQUE DANS LE DEUTÉRONOME* (Peter Lang 2001). The last sentence of Otto’s book makes a powerful claim (although one not directly developed within the book itself): “Die Wiege der modernen Demokratie steht nicht nur in Athen, sondern auch in Jerusalem” [“The cradle of modern democracy stands not only in Athens, but also in Jerusalem”]. OTTO, *supra*, at 378 (my translation).

<sup>29</sup> There have been several attempts to recover the tradition of Jewish political thought. However, those attempts usually focus specifically on “Jewish”—that is, post-biblical—political thought. As a result, the specific legal and intellectual contribution of the ancient Near East and of ancient Israel (the Hebrew Bible/Old Testament) is primarily addressed from the perspective and religious claims of later Jewish tradition rather than on its own terms. See DANIEL J. ELAZAR & STUART A. COHEN, *THE JEWISH POLITY: JEWISH POLITICAL ORGANIZATION FROM BIBLICAL TIMES TO THE PRESENT* (Indiana University Press 1985); STUART A. COHEN, *THE THREE CROWNS: STRUCTURES OF COMMUNAL POLITICS IN EARLY RABBINIC JEWRY* (Cambridge University Press 1990) (an astute analysis of the strategies used by the rabbinic community to legitimate their own claim to political authority); 1 *THE JEWISH POLITICAL TRADITION: AUTHORITY* (Michael Walzer et al. eds., Princeton University Press 2000) (a valuable anthology of sources with commentary).

## II. THE "ORIGIN MYTH" OF THE JUDICIAL SYSTEM

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

<sup>30</sup> The more familiar term, "Hammurabi's Code," is a misnomer, since it is unlikely that this ancient text ever had statutory force or was even written with that intention. Moreover, as has been long noted, the text does not constitute a comprehensive "code" of laws. See *Laws of Hammurabi*, in MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 4-7, 71-142 (2d ed., Scholars Press 1997).

<sup>31</sup> *Laws of Hammurabi*, *supra* note 30, §§ 1-5, at 81-82.

<sup>32</sup> Herbert Petschow, *Zur Systematik und Gesetzestechnik im Codex Hammurabi*, 57 ZEITSCHRIFT FÜR ASSYRIOLOGIE 146, 148-9 (1965) (arguing that the first five laws make an implicit statement of value, and demonstrating their link to the literary frame). From another point of view, however, the systematics of the legal corpus entrench class privilege and rigid social stratification. They thus completely undercut the affective rhetoric of the frame, which repeatedly asserts royal solicitude for the socially marginalized (the widow, the orphan, and the poor). Eckart Otto, *Soziale Restitution und Vertragsrecht: Mišaru(m), (an)durāru(m), kirenzi, parā tarnumar, š<sup>e</sup> mišta und d'rōr in Mesopotamien, Syrien, in der Hebräischen Bibel und die Frage des Rechtsstransfers im Alten Orient*, 92 REVUE D'ASSYRIOLOGIE 125, 140 n.64 (1998).

<sup>33</sup> This repeated self-description of Hammurabi as "king of justice" is found in the Epilogue. *Laws of Hammurabi*, *supra* note 30, at 134-36 (xlvi 77; xlviii 7; xlviii 96; xlix 13), and the comment at 142 n.49.

Israelite authors were well tutored in the topical and formal conventions of cuneiform law. They drew upon the Mesopotamian concept of a royal propounder of law but also radically transformed it in light of their own cultural and religious priorities. They transformed precedent by making the royal legislator of biblical law the nation's divine monarch, Yahweh.<sup>34</sup> In that way, the ancient Babylonian generic convention of the royal voicing of law ironically provides an important legal and intellectual source for the distinctively Israelite concept of divine revelation.<sup>35</sup> So close is the connection between the two systems of law that even techniques of legal ordering seem to have been carried over, although implemented in different ways to reflect different cultural values.<sup>36</sup> In Israelite law, just as in cuneiform law, formal matters like textual sequence can thus amount to meta-legal reflections on the priorities of the legal system.<sup>37</sup> Biblical law also manifests an

<sup>34</sup> Moshe Greenberg, *Some Postulates of Biblical Criminal Law*, in YEHEZKEL KAUFMANN JUBILEE VOLUME 5 (Menahem Haran ed., Magnes Press 1960), reprinted in STUDIES IN THE BIBLE AND JEWISH THOUGHT 25 (Jewish Publication Society 1995) (discussing the significance of the royal voicing of law). Future references are to this reprint edition.

<sup>35</sup> Bernard M. Levinson, "You Shall Not Add to It": Canonical Paradoxes and Strategies for Religious Innovation in Ancient Israel, 50 NUMEN: INT'L REV. FOR HIST. RELIGIONS 1, 12-15 (2003).

<sup>36</sup> For example, in both contexts, the initial law in a legal composition also played a larger theme-setting role. That technique, which Petschow (*supra* note 32, at 148-49) was able to recover in his important study of cuneiform legal systematics, was also recovered for biblical law by medieval rabbinic exegesis, which devoted considerable effort to questions of legal ordering. Nachmanides (1194-1270 CE) astutely identified a difficulty in the arrangement of the Covenant Code (*Exodus* 21-23): laws concerned with manumission of slaves (*Exodus* 21:2-11), are placed at its very beginning, where they even precede a series of apodictic laws that govern capital cases (*Exodus* 21:12-17). The priority thereby granted to slave or property law over capital law he accurately recognized as anomalous; in fact, such an arrangement is also inconsistent with the norms of cuneiform law (which he could not have known, of course). In response, he argued that the placement of the manumission laws reflects the first verse of the Decalogue, both in topos (manumission) and in language. Thus, God's self-introduction in the Decalogue—"I, Yahweh your God, led you out [הוֹצֵאתִיךָ] of Egypt, out of the house of bondage [עֲבָדִים, lit., slaves]" (*Exodus* 20:2)—is echoed in reverse order (following common scribal practice in the Near East, i.e., *AB :: B'A'*) in the first law of the Covenant Code, which requires manumission of male slaves after six years: "If you purchase a Hebrew slave [עֶבֶד], six years shall he work but in the seventh year he must go out [צָא] free" (*Exodus* 21:2). The priority granted the manumission of the individual slave thus follows from the collective manumission of Israel from slavery in Egypt. In effect, the priority of manumission law affirms that the priority of the lawgiver (and thus of the legal system in this case) is freedom. Although Nachmanides could not use the language of "redactor," he nonetheless recognized that the systematics of the laws themselves make a statement of value and are themselves a source of meaning. See RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH: EXODUS 340 (Charles B. Chavel ed. & trans., Shilo 1973). Nachmanides was preceded in his analysis by *Midraš Exodus Rabbah* 30:15, which may have served as his source. See MIDRASH RABBAH EXODUS 363 (S. M. Lehrman trans., Soncino 1983).

<sup>37</sup> For a *tour de force* defense of this position, see FINKELSTEIN, *supra* note 28. This brilliant analysis by an Assyriologist with a strong interest in the reception of cuneiform legal motifs by later Roman, European and American law provides a powerful reading of the systematics of the Covenant Code (*Exodus* 21-23) as a transformation of the values and ordering systems evident in the *Laws of Hammurabi* and the *Laws of Eshnunna*. There are difficulties, however, in his dating of biblical material to the second millennium. Moreover, in arguing that seeming textual

explicit concern to ensure the integrity of the judicial system that is evident in cuneiform law. For example, the principle of talion (“an eye for an eye”) represents the standard punishment for physical injury to an individual in biblical law.<sup>38</sup> Later legists broadened that principle’s application so that it might also protect due process. They stipulated that false accusation in court should also be punished “measure for measure”: the perjurer is held liable for whatever punishment his accusation would have inflicted upon the accused.<sup>39</sup> The legal rationale involved elevates talionic justice to a coherent sanction not only against physical injury but also against injury to the body of the legal system itself.<sup>40</sup>

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

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disturbances in biblical law represent important statements of value, he invariably attributes those value statements to an assumed original legal author, rather than allowing the possibility that they represent reordering by a later editor.

<sup>38</sup> *Exodus* 21:24; *cf. Leviticus* 24:15-22.

<sup>39</sup> *Deuteronomy* 19:15-21.

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

<sup>41</sup> See RAYMOND WESTBROOK, *STUDIES IN BIBLICAL AND CUNEIFORM LAW* 2-6 (J. Gabalda 1988); JEAN BOTTÉRO, *MESOPOTAMIA: WRITING, REASONING, AND THE GODS* 113-24, 169-77 (University of Chicago Press 1992); Bernard M. Levinson & Molly M. Zahn, *Revelation Regained: The Hermeneutics of י and א in the Temple Scroll*, 9 *DEAD SEA DISCOVERIES: J. CURRENT RES. ON SCROLLS & RELATED LITERATURE* 295 (2002).

<sup>42</sup> HANS ULRICH STEYMANS, *DEUTERONOMIUM 28 UND DIE ADÈ ZUR THRONFOLGEREGELUNG ASARHADDONS* 143-94 (Universitätsverlag and Vandenhoeck & Ruprecht 1995) (showing that the neo-Assyrian treaty form is presupposed as literary model by *Deuteronomy* 28, perhaps via Aramaic translations).

<sup>43</sup> En-Lil, meaning, “Lord Storm,” was the Mesopotamian storm god, and was considered the most active and powerful deity in the pantheon.

laws not in cosmic history but in human history as the *ipsissima verba* of Hammurabi himself. Speaking in the first person in the literary frame of the legal corpus, he repeatedly insists that the laws are, *awâtīya ša ina narīya ašturu* [my cases, which I have inscribed on my stela] and *awâtīya šūqurātīm* [my precious cases].<sup>44</sup> Nonetheless, despite this concerted effort to attach a myth of origins to both the monarch's authority and to the laws themselves, there is a striking omission. The key institutions of justice—the office of judge and the organization of the judicial system—are simply presupposed as self-evident. Their origin is nowhere addressed.

Precisely that omission is directly thematized by the Hebrew Bible, which, in fact, preserves two sophisticated narratives about the origins of ancient Israel's judicial system.<sup>45</sup> In the context of the exodus from Egypt, shortly after the wondrous event at the Sea of Reeds, the archetypal leader Moses is represented not only as Israel's nationalist leader but also as its chief justice: "Moses sat as judge for the people, as the people stood about Moses from dawn to dusk."<sup>46</sup> While visiting the Israelite camp in the desert, Jethro, the Midianite father-in-law of Moses, grew puzzled as he observed this process. As Jethro watched Moses and "saw how much he had to do for the people," he asked him to explain why he was required to spend the entire day sitting, surrounded by a milling crowd. Upon hearing the reply—"It is because the people come to me . . . . When they have a dispute, they come before me, and I decide between one person and another . . . ."<sup>47</sup>—Jethro responded sharply:

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

<sup>44</sup> These repeated affirmations derive from the epilogue of the legal corpus. *Laws of Hammurabi*, *supra* note 30, at 136, 134 (xlix 19-21, xlvi 12-13).

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

<sup>46</sup> *Exodus* 18:13. All Bible translations are my own.

<sup>47</sup> *Exodus* 18:14-16.

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*officers of tens*. Let them sit as judges for the people at all times. Have them bring every major *case* to you, but let them decide every minor *case* themselves. Make it easier for yourself by letting them share the burden with you.<sup>48</sup>

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

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

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

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<sup>48</sup> *Exodus* 18:17-22 (emphasis added).

<sup>49</sup> *Exodus* 18:24-26.

<sup>50</sup> *Exodus* 19-24.

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

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

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

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

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<sup>51</sup> See MICHAEL FISHBANE, *BIBLICAL INTERPRETATION IN ANCIENT ISRAEL* (Clarendon 1985); JAMES L. KUGEL & ROWAN A. GREER, *EARLY BIBLICAL INTERPRETATION* (Westminster 1986); JAMES L. KUGEL, *TRADITIONS OF THE BIBLE: A GUIDE TO THE BIBLE AS IT WAS AT THE START OF THE COMMON ERA* (Harvard University Press 1998). For an annotated bibliography on “inner-biblical exegesis,” see BERNARD M. LEVINSON, *L’HERMENEUTIQUE DE L’INNOVATION: CANON ET EXEGESE DANS L’ISRAËL BIBLIQUE 69-98* (Editions Lessius 2005) (entitled, *Les phénomènes de réécriture au sein de la Bible hébraïque: Essai bibliographique*).

<sup>52</sup> BERNARD M. LEVINSON, *THE HERMENEUTICS OF INNOVATION: THE IMPACT OF CENTRALIZATION UPON THE STRUCTURE, SEQUENCE, AND REFORMULATION OF LEGAL MATERIAL IN DEUTERONOMY 424-32* (University Microfilms 1991); MARC Z. BRETTLER, *THE CREATION OF HISTORY IN ANCIENT ISRAEL 65-70* (Routledge 1995).

<sup>53</sup> *Exodus* 18.

<sup>54</sup> *Exodus* 19-24.

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“At that time, I said to you, ‘I am unable by myself to bear you. Yahweh your God has multiplied you, so that today you are as numerous as the stars of heaven. . . . How can I possibly, all by myself, bear the heavy burden of your legal disputes? Choose for each of your tribes individuals who are wise, discerning, and reputable . . . .’”<sup>55</sup>

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

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

At that time I said to you, “I am unable by myself to bear you. Yahweh your God has multiplied you, so that today you are as numerous as the stars of heaven. . . . But how can I bear the heavy burden of your disputes all by myself? Choose for each of your tribes individuals who are wise, discerning, and reputable to be your leaders.” You answered me, “The plan you have proposed is a good one.” So I took your tribal leaders, wise and experienced men, and appointed them heads over you: *officers of thousands, officers of hundreds, officers of fifties, and officers of tens*, and officials for your tribes. I further charged your magistrates as follows: “Hear out your fellow men: You must adjudicate justly between any man and a fellow Israelite or a stranger. You shall not be partial in judgment: hear out low and high alike. Fear no man, for judgment is God's. And any *case* that is too difficult for you, you shall bring to me and I will hear it.”<sup>56</sup>

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

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<sup>55</sup> *Deuteronomy* 1:1-13.

<sup>56</sup> *Deuteronomy* 1:9-17 (emphasis added).

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

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

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<sup>57</sup> Thomas Römer, *The Book of Deuteronomy*, in *THE HISTORY OF ISRAEL'S TRADITIONS: THE HERITAGE OF MARTIN NOTH 178* (Steven L. McKenzie & M. Patrick Graham eds., Sheffield Academic Press 1994).

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

<sup>59</sup> It is all but inconceivable that this argument could be reversed, making *Exodus* 18 the later text that revises and corrects *Deuteronomy* 1. The move from a problem-free to a problematic text is most unlikely, especially since the two specific issues identified here go beyond merely mechanical matters of manuscript transmission (where random errors may be expected). Instead,

An additional example confirms this model of revisionist authorship, since a subtle but telling change of language underscores *Deuteronomy*'s reworking of *Exodus* 18. In the original account, Jethro defined the attributes required for appointment to judicial office thus: "capable men who are god-fearing, trustworthy men who refuse bribes."<sup>60</sup> These prerequisites—pragmatism, piety, and moral probity—were gained in and through life experience, were accessible to all, and did not presuppose formal training. As Moses specifies the qualifications for judicial office in the structurally-similar list of *Deuteronomy*, he strikingly departs from Jethro's pragmatic and democratic model. The new list places an unprecedented three-fold emphasis upon a different kind of acumen: "men who are wise, discerning, and knowledgeable."<sup>61</sup> The thrice-articulated, sole condition of office in the new context—"wisdom"—appears disconnected from any particular realm of practical life experience. It is rather a product of professional study and training, as the formal competence associated with entry into a guild or school. In *Deuteronomy*, the judicial system's foundation narrative has clearly been restructured from a later vantage point, one that elevates the distinctly scribal virtue of "wisdom" into the essential qualification for judicial office. With that substitution, the scribal authors of *Deuteronomy* reveal both their revisionist hand in the composition of this narrative and their own professional training and commitments.<sup>62</sup>

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

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they involve substantive matters of Israelite theology and national identity, where the pious desire to "correct the record" may readily be imagined. For that reason, the attempt by John Van Seters to argue that *Deuteronomy* 1 was composed prior to *Exodus* 18 cannot be defended. *Contra* John Van Seters, *Etiology in the Moses Tradition: The Case of Exodus 18*, 9 HEBREW ANNUAL REVIEW 355 (1985); John Van Seters, THE LIFE OF MOSES: THE YAHWIST AS HISTORIAN IN EXODUS-NUMBERS (Westminster/John Knox 1994). For a more detailed challenge to Van Seters, see Bernard M. Levinson, *Is the Covenant Code an Exilic Composition? A Response to John Van Seters*, in IN SEARCH OF PRE-EXILIC ISRAEL: PROCEEDINGS OF THE OXFORD OLD TESTAMENT SEMINAR 272 (John Day ed., T. & T. Clark 2004).

<sup>60</sup> *Exodus* 18:21.

<sup>61</sup> *Deuteronomy* 1:13; MOSHE WEINFELD, DEUTERONOMY AND THE DEUTERONOMIC SCHOOL 244-45 (Clarendon 1972). The translation of the final term of *Deuteronomy* 1:13 as an active participle ("knowing") requires a slight emendation of the received Hebrew (Masoretic) text, which instead has the passive participle ("experienced"). The change makes the word consistent, however, with the first two terms of the list, and requires the change only of the vowels (normally regarded as a later stage of the textual tradition), while leaving the consonantal text intact. *Id.* at 244 n.2.

<sup>62</sup> The single best study of the scribal background of *Deuteronomy* remains Weinfeld's *Deuteronomy and the Deuteronomistic School*. *Id.* His work opened a new perspective on the analysis of *Deuteronomy* as the work of literati familiar with a wide range of both Near Eastern and Israelite literature.

authors in seeking acceptance for their work. The authors' selection of textual speaker is part of this compositional strategy because it places their revision of tradition quite literally in the mouth of Moses, the very spokesman of tradition. The attribution of a text to a prestigious speaker from the past, technically called "pseudepigraphy," is a literary device well attested in antiquity. In this case, the critical analysis of tradition and the transformation of the status quo are effectively garbed in the voice of authoritative legal tradition.<sup>63</sup> This insight also provides a clue that elsewhere, too, *Deuteronomy's* retold past may be a corrected past, one structured in light of the authors' priorities in the present.<sup>64</sup> That revisionist voice reveals itself in narrative form in the case of *Deuteronomy 1*. It assumes legal form within the laws of *Deuteronomy*, in a section concerned with the judiciary and the broader public administration.<sup>65</sup> The interpretive richness of these laws could easily escape the non-specialist reader. The issues that they raise emerge indirectly, as much from what they omit as from what they assert.

### III. "THE LAWS REGULATING OFFICIALS" AND THE TRANSFORMATION OF SOCIETY

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

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<sup>63</sup> Morton Smith, *Pseudepigraphy in the Israelite Literary Tradition*, in PSEUDEPIGRAPHA I: PSEUDOPYTHAGORICA—LETTRES DE PLATON—LITTÉRATURE PSEUDÉPIGRAPHIQUE JUIVE 191 (Kurt von Fritz ed., Vandoeuvres 1971); BERNARD M. LEVINSON, DEUTERONOMY AND THE HERMENEUTICS OF LEGAL INNOVATION 47-48, 97 (Oxford University Press 1997) (treating the use of pseudepigraphy in *Deuteronomy*); Moshe J. Bernstein, *Pseudepigraphy in the Qumran Scrolls: Categories and Functions*, in PSEUDEPIGRAPHIC PERSPECTIVES: THE APOCRYPHA AND PSEUDEPIGRAPHA IN LIGHT OF THE DEAD SEA SCROLLS 1 (Esther G. Chazon & Michael Stone eds., Brill 1999) (examining the use of pseudepigraphy in the Dead Sea Scrolls); David G. Meade, PSEUDONYMITY AND CANON: AN INVESTIGATION INTO THE RELATIONSHIP OF AUTHORSHIP AND AUTHORITY IN JEWISH AND EARLIEST CHRISTIAN TRADITION (J.C.B. Mohr-Siebeck 1986) (addressing the theological issues raised by false attribution).

<sup>64</sup> Bernard M. Levinson, *The Hermeneutics of Tradition in Deuteronomy: A Reply to J. G. McConville*, 119 J. BIBLICAL LITERATURE 269, 269-86 (2000).

<sup>65</sup> *Deuteronomy* 12-26.

<sup>66</sup> See Baruch Halpern, *Jerusalem and the Lineages in the Seventh Century BCE: Kinship and the Rise of Individual Moral Liability*, in LAW AND IDEOLOGY IN MONARCHIC ISRAEL 11, 27, 74-75 (Baruch Halpern & Deborah W. Hobson eds., JSOT Press 1991) (a stimulating analysis of the archaeological and literary evidence and of *Deuteronomy's* connection to the immense social

population, he began to dismantle Judah's extensive rural cultus and the familiar clan structure that supported it. Josiah's so-called "reform" of 622 BCE continued this process as he centralized the cultus and established the Jerusalem Temple as the exclusive site for legitimate worship of Yahweh.<sup>67</sup> Cult sites other than those in Jerusalem were demolished, while the Temple itself was purged of any elements not viewed as Yahwistic. Even previously legitimate Yahwistic shrines in the countryside were declared illegitimate, despite their legacy of having legendary patriarchal and prophetic figures associated with them. The legal corpus of *Deuteronomy*, which is intimately connected with this comprehensive transformation of Judean society and religion, thus had two primary goals: (1) to stipulate that sacrifice is legitimate only at the central sanctuary (implicitly, the Jerusalem Temple); and (2), conversely, to abolish the multiple local altars and sanctuaries throughout Judah as illegitimate.<sup>68</sup>

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

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

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change wrought by Hezekiah and Josiah).

<sup>67</sup> 2 Kings 22-23.

<sup>68</sup> LEVINSON, *supra* note 63, at 23-52.

<sup>69</sup> *Deuteronomy* 12:1-16:17.

<sup>70</sup> *Deuteronomy* 16:18-18:22.

<sup>71</sup> Moshe Weinfeld, *Judge and Officer in Ancient Israel and in the Ancient Near East*, 7 ISRAEL ORIENTAL STUDIES 65 (1977) (offering a reconstruction of the historical background of the professional appointees).

<sup>72</sup> *Deuteronomy* 16:18-20. This law served as one of the sources for the historically-later account of origins of the judicial administration discussed above in *Deuteronomy* 1. There are clear literary ties between this legal unit and the earlier narrative concerning the Mosaic appointment of judges: the Mosaic charge in the second person, "You must adjudicate justly" (*Deuteronomy* 1:16), echoed here in the third person as, "They must adjudicate for the nation, ruling justly" (*Deuteronomy* 16:18). The following "mirror for magistrates," which requires

Several cultic regulations follow,<sup>73</sup> which are reused from the first section of the legal corpus. At this point of thematic transition from “cultus” to “justice,” the repetition provides a literary bridge between the two sections, while also locking them together in an *AB :: A'B'* pattern.<sup>74</sup> The new unit then continues, providing a comprehensive blueprint for the institutional structure of the Judean polity:

- The local court system with its procedural rules<sup>75</sup>
- The “High Court” at the Temple in Jerusalem<sup>76</sup>
- The office of the monarch<sup>77</sup>
- The priesthood<sup>78</sup>
- The office of prophet<sup>79</sup>

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

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

<sup>73</sup> *Deuteronomy* 16:21-17:1.

<sup>74</sup> LEVINSON, *supra* note 63, at 135-37.

<sup>75</sup> *Deuteronomy* 17:2-7.

<sup>76</sup> *Deuteronomy* 17:8-13. Because the literary setting of *Deuteronomy* is the ancient past, its authors never refer directly to Jerusalem, in order to avoid any anachronism that would betray the literary fiction. Instead, they use a circumlocution to refer to the Jerusalem Temple: “the place that Yahweh shall choose” (see, for example, *Deuteronomy* 17:8, 10). See further LEVINSON, *supra* note 63, at 4, 23.

<sup>77</sup> *Deuteronomy* 17:14-20.

<sup>78</sup> *Deuteronomy* 18:1-8.

<sup>79</sup> *Deuteronomy* 18:9-22.

<sup>80</sup> *Deuteronomy* 16:18-18:22.

<sup>81</sup> See S. R. DRIVER, A CRITICAL AND EXEGETICAL COMMENTARY ON DEUTERONOMY 135, 199, 206 (3d ed., T. & T. Clark 1902); accord MAYES, *supra* note 58, at 261-62.

<sup>82</sup> If the concern were simply administrative, the paragraphs would be organized consistent with office-holder’s rank within the organizational hierarchy, whether “top-down” or “bottom-up.” Indeed, the principle of organizing legal paragraphs in a sequence that reflects social rank, from higher to lower, has long been recognized within Israelite and cuneiform legal collections. In the Israelite context, note the sequence of the goring ox laws in the Covenant Code: death of male or female *adult* (*Exodus* 21:28-30), death of male or female *minor* (*Exodus* 21:31), death of male or female *slave* (*Exodus* 21:32). Showing the operation of this ordering principle in cuneiform law, see Petschow, *supra* note 32, at 146-72. For its operation in biblical law, see Stephen A. Kaufman, *The Structure of the Deuteronomic Law*, 1/2 MAARAV: J. FOR STUD. OF NORTHWEST SEMITIC LANGUAGES & LITERATURES 105, 116-17, 132-33, 135, 141 (1978-1979).

subordinate the entire institutional life of ancient Judah to the authority of Deuteronomic Torah.

#### IV. THE TWO-FOLD TRANSFORMATION OF LOCAL JUSTICE

The program of drawing the consequences of cultic centralization for other spheres of public life begins with the structure of justice in the local sphere. Here *Deuteronomy* introduces two innovations, corresponding to the two distinct contexts for local justice that existed prior to centralization. The first was the system of the “elders,” who were deeply rooted in the clan network of the Judean countryside and thus operated independently of any centralized state authority.<sup>83</sup> They held court at the “village gate,” which provided the conventional site for a public hearing.<sup>84</sup> It was precisely that autonomy of the elders and the clan network—as the bearers of the traditional way of life and with a vested interest in its preservation—that centralization sought to dismantle in order to restructure Judean society.<sup>85</sup> The authors of *Deuteronomy* therefore replaced the older system with a new and professionalized judiciary in order to bring local clan justice under centralized authority. Strikingly, the new judges are installed precisely in the seat of honor reserved by tradition for the elders, who are here summarily evicted from office, replaced—like Jethro in *Deuteronomy* 1—without even being mentioned: “Judges and judicial officers shall you appoint for yourself *in each of your village gates*.”<sup>86</sup> This new and

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<sup>83</sup> On the elders, see Moshe Weinfeld, *Elders*, in 6 ENCYCLOPAEDIA JUDAICA 578-80 (Encyclopaedia Judaica 1972); LESLIE J. HOPPE, THE ORIGINS OF DEUTERONOMY (University Microfilms 1978); Leslie J. Hoppe, *Elders and Deuteronomy*, 14 ÉGLISE ET THÉOLOGIE 259 (1983); JOACHIM BUCHHOLZ, DIE ÄLTTESTEN ISRAELS IM DEUTERONOMIUM (Vandenhoeck & Ruprecht 1988); JAN CHRISTIAN GERTZ, DIE GERICHTSORGANISATION ISRAELS IM DEUTERONOMISCHEN GESETZ 173-225 (Vandenhoeck & Ruprecht 1994).

<sup>84</sup> *Deuteronomy* 21:19, 22:15, 25:7; *Ruth* 4:11; see also Victor H. Matthews, *Entrance Ways and Threshing Floors: Legally Significant Sites in the Ancient Near East*, 19 FIDES ET HISTORIA 25 (1987); Eckart Otto, *Ša'ar*, in 8 THEOLOGISCHE WÖRTERBUCH ZUM ALTEN TESTAMENT 358 (G. J. Botterweck & H. Ringgren eds., Kohlhammer 1995).

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

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

now professionalized judiciary assumed responsibility for all routine legal cases.<sup>87</sup>

A second context for local justice prior to centralization also required transformation. Certain legal cases required cultic resolution, either by means of a judicial ordeal officiated over by a priest<sup>88</sup> or a judicial oath of innocence sworn at a sanctuary or temple and thus symbolically in the presence of the divinity.<sup>89</sup> The recourse to the

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

<sup>87</sup> It is important to indicate that this replacement may not have been absolute. The elders are depicted as active in another section of the legal corpus, which primarily addresses sex and family law. Scholars have divided on how to understand the elders’ retention there: either it amounts to the contraction of their area of responsibility to such cases alone, so that the new system exists alongside the old; or it reflects the compositional history of the legal corpus, with that section representing an older stratum of law that has not been brought into conformity with the core legislation that reflects centralization. Scholars who maintain the coexistence of the two systems include: Weinfeld, *supra* note 83, at 578-80; WEINFELD, *supra* note 61, at 234; Jacob Milgrom, *The Ideological and Historical Importance of the Office of Judge in Deuteronomy*, in ISAC [sic] LEO SEELIGMANN VOLUME: ESSAYS ON THE BIBLE AND THE ANCIENT WORLD 3.129, 3.138 (Alexander Rofé & Yair Zakovitch eds., E. Rubinstein 1983). More compelling, in my view, is the analysis of the laws where the elders are active as an earlier and pre-Deuteronomic stratum of the legal corpus. Rofé, *supra* note 45, at 200-201; MAYES, *supra* note 58, at 284-85, 304. For the challenge that this stratum is indeed Deuteronomic, see Otto, *supra* note 84, at 375-76; Eckart Otto, *Soziale Verantwortung und Reinheit des Landes: Zur Redaktion der kasuistischen Rechtssätze in Deuteronomium 19-25*, in PROPHETIE UND GESCHICHTLICHE WIRKLICHKEIT IM ALTEN ISRAEL: FESTSCHRIFT FÜR SIEGFRIED HERMANN 290 (Rüdiger Liwak & Siegfried Wagner eds., W. Kohlhammer 1991). Unfortunately, this entire question concerning the respective spheres of authority of the elders and the official judicial system is not addressed by HANOCH REVIV, *THE ELDERS IN ANCIENT ISRAEL: A STUDY OF A BIBLICAL INSTITUTION* 61-70 (Magnez 1989). By discussing neither the installation of the judicial officials (*Deuteronomy* 16:18-20) nor the law of the king (*Deuteronomy* 17:14-20), he avoids challenges to his claim that Deuteronomy retains the institution of the elders essentially intact in its pre-settlement form. LEVINSON, *supra* note 63, at 124-26. By failing to address the crucial issue of legal history, he advances an argument whereby the literary stylization of *Deuteronomy* as a Mosaic address to Israel prior to the entry into the promised land is confused with its actual historical setting. The logical error involved is analogous to reading SHAKESPEARE’S *THE TRAGEDY OF JULIUS CAESAR* [1599] as if it were composed in ancient Rome, contemporary with Caesar’s assassination (44 BCE).

<sup>88</sup> Moshe Weinfeld, *Ordeal of Jealousy*, in 12 ENCYCLOPAEDIA JUDAICA 1449-50 (1972) (Encyclopaedia Judaica 1972); TIKVA FRYMER-KENSKY, *THE JUDICIAL ORDEAL IN THE ANCIENT NEAR EAST 474-80* (University Microfilms 1977); Tikva Frymer-Kensky, *The Strange Case of the Suspected Sotah* (Numbers *v* 11-31), 34 VETUS TESTAMENTUM 11 (1984); Tikva Frymer-Kensky, *Suprarational Legal Procedures in Elam and Nuzi*, in STUDIES ON THE CIVILIZATION AND CULTURE OF NUZI AND THE HURRIANS IN HONOR OF ERNEST R. LACHEMAN 115 (M. A. Morrison & D. I. Owen eds., Eisenbrauns 1981).

<sup>89</sup> *Exodus* 22:8, 9, 11 (22:7, 8, 10 in Hebrew); see also KAREL VAN DER TOORN, *SIN AND*

cultus was necessary in ambiguous or disputed legal cases where—in the absence of witnesses and evidence—there were insufficient grounds to issue a judicial finding based upon empirical criteria. In such cases, the litigants were remanded to the sanctuary to swear an oath before the deity who, by virtue of his access to suprarational knowledge, presided over the hearing and ruled as omniscient Judge.<sup>90</sup>

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

The two legal paragraphs<sup>95</sup> introducing this double transformation of local justice interlock.<sup>96</sup> By stipulating that a preponderance of witnesses<sup>97</sup> is the necessary condition for conviction in the local sphere,<sup>98</sup> the first paragraph in effect restricts the jurisdiction of the local courts to cases that can be empirically resolved. Within the limits of that operational restriction, however, local judicial authority is maximized, since the local judiciary is empowered to try capital cases and even to adjudicate serious religious transgressions like apostasy, on condition that witnesses are available. The second paragraph, concerned with judicial procedure at the Temple, is equally dialectical in its legal logic, since it is concerned neither with ritual trespass nor

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SANCTION IN ISRAEL AND MESOPOTAMIA: A COMPARATIVE STUDY 45-55 (Van Gorcum 1985) (on the forensic function of oaths).

<sup>90</sup> LEVINSON, *supra* note 63, at 110-27.

<sup>91</sup> In such cases, the convention of the judicial oath is attested in both biblical and cuneiform law. The technical formula in biblical law is *שבועת יהוה*, “an oath by Yahweh” (Exodus 22:11 [22:10 in Hebrew]). That represents the exact interdialectical equivalent of the Akkadian *nīs ilim*, “[oath by] the life of the god.” Similarly, the biblical formula that stipulates the cultic location of the judicial oath is: *אל האלהים*, “before God” (Exodus 21:6; 22:8 [22:7 in Hebrew]). That formula corresponds precisely to the Akkadian: *ina mahar ilim*. For examples of judicial oaths in the context of cuneiform law, see *Laws of Hammurabi*, *supra* note 30, §§ 9, 23, 107, 120, 126, 266, at 82-83, 85, 101, 104, 105, 130.

<sup>92</sup> Centralization thus created a “judicial vacuum in the provincial cities.” WEINFELD, *supra* note 61, at 234-35.

<sup>93</sup> *Deuteronomy* 12.

<sup>94</sup> *Deuteronomy* 17:8-10.

<sup>95</sup> *Deuteronomy* 17:2-7, 17:8-13.

<sup>96</sup> LEVINSON, *supra* note 63, at 127-33.

<sup>97</sup> *Deuteronomy* 17:6.

<sup>98</sup> *Deuteronomy* 17:2.

with questions of cultic purity or impurity. Indeed, such cases are not even mentioned here.<sup>99</sup> Instead, the paragraph demarcates the jurisdiction of the court at the Jerusalem Temple, paradoxically, by employing secular cases of criminal or civil law. If any such case “extends beyond your ken”<sup>100</sup>—that is, should neither witnesses nor evidence be available—then the ambiguous case must be remanded to the central Temple, since it requires divine adjudication.

#### V. THE TRANSFORMATION OF THE CENTRAL SANCTUARY

In the process of establishing the central sanctuary as the High Court, *Deuteronomy* also radically revises the traditional form of cultic justice. The changes involve the locus of cultic justice, access to which now requires pilgrimage to the central Temple.<sup>101</sup> The changes also affect, more subtly, the form of justice:

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

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

<sup>99</sup> *But cf. Haggai* 2:10-13.

<sup>100</sup> *Deuteronomy* 17:8.

<sup>101</sup> *Deuteronomy* 17:9-10.

<sup>102</sup> *Deuteronomy* 17:8-13.

<sup>103</sup> *Exodus* 28:30; *Leviticus* 8:8.

for judicial oracles.<sup>104</sup> Nor is there any hint of a judicial ordeal officiated over by a priest or of a judicial oath before the divinity. Instead of employing specific language appropriate to the setting of an oracular ruling at the Temple, as the context demands, the unit substitutes Deuteronomic cliché.<sup>105</sup> No longer is a traditional priestly “ruling” (*torah*) at issue, one concerned with specific, *ad hoc* questions of cultic purity or impurity.<sup>106</sup> The reference to the oracular responsum—על פי התורה אשר יורו—“according to *the instruction* [i.e., the *torah*] that *they shall teach you*”<sup>107</sup>—remains cultic only in vestigial terms, so strongly is it colored by the language and thought of *Deuteronomy*. The oracle from the Temple bespeaks the distinctive priorities of the authors of the legal corpus, and repeatedly emerges as scribal “word” (*dabar*).<sup>108</sup> Zion’s sanctuary has here been completely transformed by Sinaitic law.

## VI. THE TRANSFORMATION OF THE MONARCHY

The reconfiguration of the judicial system under centralization has implications for the executive branch. By assigning supreme judicial authority to the Temple, *Deuteronomy*’s authors deny the monarch his most prestigious, and thus most jealously guarded, bailiwick. After all, ensuring justice was one of the defining attributes of kingship throughout the ancient Near East.<sup>109</sup> It was the responsibility of the king to prevent the oppression of those who lacked power—the widow and the orphan—by guaranteeing them access to the protections of the law. Fulfilling that royal duty was a benchmark of office, as attested across a wide range of Near Eastern literature, linguistically,

<sup>104</sup> *Deuteronomy* 33:8, 10; see P. J. Budd, *Priestly Instruction in Pre-Exilic Israel*, 23 VETUS TESTAMENTUM 1 (1973) (providing a useful overview); J. Begrich, *Die priesterliche Torah, in WERDEN UND WESEN DES ALTEN TESTAMENTS* 63 (Walter de Gruyter 1936) reprinted in *GESAMMELTE STUDIEN ZUM ALTEN TESTAMENT* 232 (Chr. Kaiser 1964) (the first study of the priestly proclamation as a *Gattung* [literary genre]).

<sup>105</sup> The formula “that Yahweh will choose” (*Deuteronomy* 17:10) conforms, for example, to similar formulae found elsewhere, both in the narrative frame of the legal corpus (*Deuteronomy* 5:1, 29; 6:3, 25; 7:11) and in the laws themselves (*Deuteronomy* 12:5, 11, 14, 18, 21, 26, etc.). Similarly, the admonition, “You must not turn aside, either to the right or to the left, from the word . . .” (*Deuteronomy* 17:11) recurs at *Deuteronomy* 5:32; 17:20. The rationale given for capital punishment of those who refuse to submit to the authority of the central sanctuary—“Thus shall you purge the evil from Israel. And all the people shall hear and be afraid” (*Deuteronomy* 17:12b-13a)—also recurs elsewhere in the legal corpus (*Deuteronomy* 13:11; 19:20; 21:21).

<sup>106</sup> As in *Leviticus* 13:59; 14:2, 32, 54, 57; 15:32; or *Haggai* 2:11.

<sup>107</sup> *Deuteronomy* 17:11.

<sup>108</sup> *Deuteronomy* 17:10, 11.

<sup>109</sup> Bernard M. Levinson, *The Reconceptualization of Kingship in Deuteronomy and the Deuteronomistic History’s Transformation of Torah*, 51 VETUS TESTAMENTUM 511, 514-19 (2001).

geographically, and chronologically.<sup>110</sup> At Ugarit, this motif is represented by Dan El in the Aqhat epic and by prince Yaššib's reproof of Kirta, his father, for failing to behave like a king by neglecting the royal duty to hear the cases of widows and orphans.<sup>111</sup> That Kirta was mortally ill at the time was not countenanced as a valid excuse. That the monarch had prime responsibility for justice was also taken for granted in ancient Babylon, as is evident in Hammurabi's elegant claim that Marduk commissioned him *dannum enšam ana la ḥabālim, kīma Šamaš ana šalmāt qaqqadim wašemma mātīm nuwwurim* [so that the strong might not oppress the weak, to shine forth as the sun to the black-haired ones, and light up the land].<sup>112</sup> The monarch was viewed as having particular legal acumen. Thus Hammurabi is endowed by Šamaš, the sun god, with special ability to perceive the principles of "justice and righteousness" [*kittum u mīšarum*] that inform his laws.<sup>113</sup> This royal topos of divinely-inspired judicial insight was carried over into Israelite literature and applied to the Israelite monarch. On behalf of the Davidic monarch, the psalmist thus petitions: "O God, grant the king your judgments; the king's son, your righteousness!"<sup>114</sup> David and Solomon directly and by delegation heard complex legal cases and entertained judicial appeals. Royal prerogative even entitled the monarch to pardon a capital offense that would otherwise legally require execution by the blood avenger.<sup>115</sup>

As supreme judge, the monarch could operate freely as regards type of case, area of responsibility, or stage of proceeding. In other words, as judge, the king was not restricted to being either a final court of appeal, as in the case of the woman from Tekoa,<sup>116</sup> or a protector of the poor, as in the case of the ewe lamb.<sup>117</sup> Most important, the king would frequently preside over ambiguous legal cases involving only claim and counter-claim, with neither party able to summon witnesses or provide evidence in support of their account. One such case still survives as a legendary example of judicial brilliance: Solomon's adjudication of the two prostitutes who contested maternity over their

<sup>110</sup> S. E. Loewenstamm, *Law, in* 3 THE WORLD HISTORY OF THE JEWISH PEOPLE: ANCIENT TIMES 232 (Benjamin Mazar ed., Rutgers University Press 1971).

<sup>111</sup> THE CUNEIFORM ALPHABETIC TEXTS FROM UGARIT, RAS IBN HANI AND OTHER PLACES, texts 1.17.V.4-8 and 1.19.I.19-25 (Aqhat), 1.16.VI.43-50 (Kirta) (M. Dietrich, Otto Loretz, & J. Sanmartin eds., Ugarit-Verlag 1995). For text and this translation, see UGARITIC NARRATIVE POETRY 58, 68 (Simon B. Parker ed., Scholars Press 1997); see also John Day, *The Canaanite Inheritance of the Israelite Monarchy, in* KING AND MESSIAH IN ISRAEL AND THE ANCIENT NEAR EAST: PROCEEDINGS OF THE OXFORD OLD TESTAMENT SEMINAR 75, 86-87 (John Day ed., Sheffield Academic Press 1998) (discussing the topos).

<sup>112</sup> *Laws of Hammurabi, supra* note 30, i.27-44, at 76 (my translation).

<sup>113</sup> Greenberg, *supra* note 34, at 27-28.

<sup>114</sup> *Psalm* 72:1.

<sup>115</sup> 2 *Samuel* 14:1-24.

<sup>116</sup> 2 *Samuel* 14:1-24.

<sup>117</sup> 2 *Samuel* 12:1-14.

one surviving baby.<sup>118</sup> That exercise of royal wisdom was therefore deliberately included in the collection of legends whose function was to legitimate and glorify Solomon as rightful heir to the Davidic throne as he consolidated his rule over the United Monarchy.<sup>119</sup>

It can hardly be an accident, therefore, when *Deuteronomy* pointedly requires that precisely such cases (lacking both witnesses and evidence) must be remanded to the Temple.<sup>120</sup> With the Temple complex located adjacent to the royal palace, the slap in the face to the monarch could not be more stinging, as *Deuteronomy* takes justice completely out of the king's hands. The legal corpus is remarkably consistent on this point. Throughout the previous laws regulating the administration of justice in the local and central spheres,<sup>121</sup> there is a stunning silence about the judicial function of the king. That same silence is now maintained in the law establishing the monarchy. Just as the earlier laws, although concerned with the judicial administration, pointedly ignore the king's traditional role, so *Deuteronomy's* "Law of the King" just as pointedly omits his responsibility for justice. So consistent is the suppression of the monarch's judicial role that it points to the authors' rejection of that norm:

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

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<sup>118</sup> 1 *Kings* 3:16-28.

<sup>119</sup> GARY N. KNOPPERS, 1 TWO NATIONS UNDER GOD: THE DEUTERONOMISTIC HISTORY OF SOLOMON AND THE DUAL MONARCHIES 83-87 (Scholars Press 1993-94) (showing how Solomon is redactionally aggrandized in conventional Near Eastern terms as possessing superior skills of royal administration as well as encyclopedic wisdom); WEINFELD, *supra* note 61, at 254-57 (carefully analyzing the transformation of the concept of wisdom within the passage, from pragmatic shrewdness to judicial insight).

<sup>120</sup> *Deuteronomy* 17:8-13.

<sup>121</sup> *Deuteronomy* 16:18-20; 17:2-7; 17:8-13.

deviate left or right from the commandment, so that he, together with his descendants, may long reign over his kingdom in Israel.<sup>122</sup>

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

In being thus constituted by the Torah, the monarchy becomes regulated by and answerable to the law.<sup>128</sup> If the notion of the

<sup>122</sup> *Deuteronomy* 17:14-20.

<sup>123</sup> *Deuteronomy* 17:14-15.

<sup>124</sup> *Deuteronomy* 17:16-17.

<sup>125</sup> Critical components of royal prestige that are obscured or contracted in this law include the monarch’s playing a significant role in the state cultus, serving as defender of the Temple, initiating and conducting military campaigns, and the unrestricted right to a harem as a sign of both wealth and potency. KNOPPERS, *supra* note 119, at 2.223-25; Gary N. Knoppers, *The Deuteronomist and the Deuteronomic Law of the King: A Reexamination of a Relationship*, 108 ZEITSCHRIFT FÜR DIE ALTTESTAMENTLICHE WISSENSCHAFT 329 (1996); Gary N. Knoppers, *Rethinking the Relationship between Deuteronomy and the Deuteronomistic History*, 63 CATH. BIBLICAL Q. 393 (2001); Levinson, *supra* note 63, at 138-43 (on the eclipse of royal judicial authority).

<sup>126</sup> *Deuteronomy* 17:18-20.

<sup>127</sup> Norbert Lohfink argues that “Torah” refers to *Deuteronomy* 12-28 for the Deuteronomistic author of this passage. 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., Eisenbrauns 1993); see also Georg Braulik, *Die Ausdrücke für “Gesetz” im Buch Deuteronomium*, 51 BIBLICA 39 (1970), reprinted in *STUDIEN ZUR THEOLOGIE DES DEUTERONOMIUMS* 11, 36-38 (Katholisches Bibelwerk 1988).

<sup>128</sup> Post-biblical Jewish tradition fails to maintain this utopian constitutional vision. Rabbinic authors were confronted by biblical sources that were inconsistent about the status of the monarch. More important, they also had to deal with the gap between utopian vision and pragmatic political reality. On that basis, Jewish law in the Mishnah (ca. 200 CE) abandons the constraints imposed by *Deuteronomy* and no longer subordinates the monarch to law: “The king can neither judge nor be judged, he cannot act as a witness and others cannot bear witness against him” (*Mishnah Sanhedrin* 2:2). See further Michael Walzer, *The Constitution of Monarchy*, in *1 THE JEWISH POLITICAL TRADITION*, *supra* note 29, at 139 (noting the “failure to incorporate kingship within a constitutional structure” and suggesting reasons for it). For the above translation of the *Mishnah Sanhedrin*, see HERBERT DANBY, *THE MISHNAH* 384 (Oxford University Press 1933).

accountability of the office-holder to the law applied simply to a disreputable judicial official (as in *Laws of Hammurabi* § 5), it would not warrant comment. In terms of legal and intellectual history, however, its extension to the monarchy is astonishing. In the classical Mesopotamian legal collections discussed earlier, it was the monarch who promulgated law.<sup>129</sup> *Deuteronomy* reverses that precedent: here it is law that promulgates the monarch. The revisionist nature of this text also helps provide the rationale for the sequence of laws in this unit. The law concerned with justice at the Temple<sup>130</sup> now both literally and figuratively preempts the law of the king.

## VII. THE TRANSFORMATION OF PRIESTHOOD AND PROPHECY

The final two laws in this unit fill out *Deuteronomy's* reconceptualization of public offices by turning to the institutions of priesthood and prophecy.<sup>131</sup> It was imperative to reconfigure the traditional priesthood. As a consequence of cultic centralization, the rural priests who had officiated at the local altars suddenly became disenfranchised, since they lost their source of prebend. This law seeks to redress that loss of economic support by guaranteeing the displaced priests a new right to officiate on equal status with the priesthood already ensconced at the central sanctuary. The corrective nature of the unit on priesthood is also clear in its literary structure. It opens with two concise, apodictically-formulated laws that enshrine the priestly right to sacrificial emolument.<sup>132</sup> Only then does there follow the adjustment that, as a result of centralization, stipulates that the countryside priests should have access to income at the central Temple.<sup>133</sup> This provision for redress appears as a formally distinct coda.<sup>134</sup> In contrast to the apodictic form of the preceding legislation, it is formulated as a conditional case addressing a specific contingency. This legislation granting the displaced Levites equal access alongside the Temple's entrenched priesthood was almost certainly more utopian than pragmatic. The welcoming of their brothers from the countryside as equals would entail the sharing of the lucrative status quo by the

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<sup>129</sup> See, e.g., Greenberg, *supra* note 34 at 27-28; and Lohfink, *supra* note 127, at 308.

<sup>130</sup> *Deuteronomy* 17:8-13.

<sup>131</sup> The law governing the Levitical priesthood (*Deuteronomy* 18:1-8); and the law governing the institution of prophecy (*Deuteronomy* 18:9-22).

<sup>132</sup> *Deuteronomy* 18:1-5.

<sup>133</sup> *Deuteronomy* 18:6-8.

<sup>134</sup> As in the *clausula finalis* of the Roman law known as the *lex Aquilla*, there is also in biblical law the phenomenon of "new provisions being joined to an existing code as an appendix instead of being worked in properly." DAVID DAUBE, *STUDIES IN BIBLICAL LAW* 77 (Clarendon 1947).

priests at the central sanctuary. The narrative of Josiah's reforms suggests that the priests were far less willing to do this than was hoped for by this legislation's authors.<sup>135</sup>

The unit on prophecy<sup>136</sup> is most striking for its inclusion here in the first place. The prophet's inclusion in this section on public officials amounts to an act of assimilation that routinizes the office of prophet as now simply one among all the other institutions of the state. This institutionalization of prophecy strikingly departs from convention, since Israelite tradition normally placed the Yahwistic prophet in sharp opposition to the state. In particular, prophets appointed to state office represented the Yahwistic prophet's greatest adversaries. Such "civil servant" prophets were systematically delegitimated, castigated as the prophets of foreign deities, as in Elijah's famous contest with the prophets of Ba'al on the slopes of Mount Carmel,<sup>137</sup> where his adversaries were, more likely, simply prophets in the employ of Israel's King Ahab. Elsewhere, too, prophets who aligned themselves with the state, as part of its bureaucracy, were accused of uttering oracles inspired by "a lying spirit."<sup>138</sup> The conventional dichotomy between prophet and state is thus here brought to an end.

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

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<sup>135</sup> 2 Kings 23:9.

<sup>136</sup> Deuteronomy 18:9-22.

<sup>137</sup> 1 Kings 18.

<sup>138</sup> 1 Kings 22:23.

<sup>139</sup> Deuteronomy 18:18.

<sup>140</sup> See JOSEPH BLENKINSOPP, PROPHECY AND CANON: A CONTRIBUTION TO THE STUDY OF JEWISH ORIGINS (University of Notre Dame Press 1977).

<sup>141</sup> Deuteronomy 13:1-5.

<sup>142</sup> Deuteronomy 18:19-20.

<sup>143</sup> Note the interesting suggestion by Christa Schäfer-Lichtenberger that the contraction of royal authority corresponds to a reciprocal realignment of prophetic authority in Deuteronomy 18:9-22. CHRISTA SCHÄFER-LICHTENBERGER, JOSUA UND SALOMO: EINE STUDIE ZU AUTORITÄT UND LEGITIMITÄT DES NACHFOLGERS IM ALTEN TESTAMENT 103-106 (E. J. Brill

Classical Israelite prophecy is here co-opted by the specific religious, political, and social program of the legal corpus of *Deuteronomy*.

### VIII. THE UNIT AS A DRAFT CONSTITUTION

*Deuteronomy's* laws of public offices emerge as the blueprint for a transformed society, one in which the key judicial, administrative, and cultic branches of government each have their separate spheres of authority defined and allocated by a single, sovereign text,<sup>144</sup> to which each is equally responsible.<sup>145</sup> The key idea of this charter is that no one branch of public office is superior to the other; rather, each is equally subordinate to *Deuteronomy's* Torah. It is the legal corpus of *Deuteronomy* that assigns each branch its function and specific sphere of influence; brings each branch of the administration into relation to one another as part of a broadly conceived whole; grants each judicial, executive, cultic, and prophetic institution its legitimacy; and assigns each institution a standard of performance and therefore a criterion of evaluation.<sup>146</sup> Constituted by the law, they must also answer to it.

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

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1995). Her approach extends the observations of Lohfink, *supra* note 127, at 306, 313-14.

<sup>144</sup> *Deuteronomy* 16:18-18:22.

<sup>145</sup> Lohfink, *supra* note 127, at 305-23.

<sup>146</sup> The text's speaker, the "Moses" of *Deuteronomy*, is represented as creating the entire public administration of the state: outlining terms, conditions, and areas of responsibility; providing operational guidelines (including conditions of appointment, such as professional training, probity, citizenship, or lineage); defining areas of restricted or prohibited activity; and selectively including sanctions for abuse of office.

“flow chart” that statically describes the organization of the public sphere. Rather, the unit critically engages the conventions of status, kinship, and political power that prevailed in its time. Conventional norms of social status, like the clan elder’s judicial role in the village gate, are rejected, replaced by professional competence and conformity to Torah.

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

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

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<sup>147</sup> Julius Wellhausen recognized this issue long ago, although in reference to specific material that he regarded as later insertions into the legal corpus. He refers to “dieser unpraktische Idealismus” [“this impractical idealism”] and insists “die Anschauung eines wirklichen jüdischen Reiches scheint hier schon gänzlich zu fehlen” [“the concept of an actual Jewish state already appears to be completely absent here”]. JULIUS WELLHAUSEN, *DIE COMPOSITION DES HEXATEUCHS UND DER HISTORISCHEN BÜCHER DES ALTEN TESTAMENTS* 192 (4th ed., Walter de Gruyter 1963) (1885) (my translation); see also Lothar Peritt, *Der Staatsgedanke in Deuteronomium*, in *LANGUAGE, THEOLOGY, AND THE BIBLE: ESSAYS IN HONOUR OF JAMES BARR* 182, 190 (Samuel E. Balentine & John Barton eds., Clarendon Press 1994) (marshaling Wellhausen’s analysis in an acerbic challenge to Lohfink’s model).

constitution.<sup>148</sup> It promotes the idea of a public text as regulating the institutional structure of government and permits no single institution to emerge as superior either to the other branches of government or to the charter to which all are accountable.<sup>149</sup>

The unit reflects no conceivable historical reality, no actual state apparatus. The judicial organization and legislative structure that *Deuteronomy* seeks to put into place were visionary and without precedent. At each point, this section of *Deuteronomy* thus significantly departs from the institutional and social status quo of its time. *Deuteronomy's* subordination of the monarch to a sovereign legal text that regulates his powers and to which he is accountable has no known counterpart in the ancient Near East. It is equally distinct from the classical Greek ideology of kingship.<sup>150</sup> To be sure, Greek political theory of the fifth century BCE devoted considerable attention to exploring the lawful authority and relative merits of different forms of government. Moreover, there was a clear recognition among the Greek intelligentsia that respect for law commanded a higher loyalty than that owed by a citizen to any particular monarch or government (especially in cases of tyranny).<sup>151</sup> Nonetheless, even that strong affirmation of

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

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

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

<sup>151</sup> In classical Greece, the principle that law commands a greater loyalty than that owed a monarch is clear in several different contexts. Writing ca. 440 BCE, Herodotus provides an account of the symbolic encounter on the Hellespont between the Persian king, Xerxes, and the exiled king of Sparta, Demaratus. HERODOTUS, *THE PERSIAN WARS*, III, BOOKS 5-7, at 403-409

respect for law over obligation to government differs from *Deuteronomy's* radical argument that even the supreme political authority is himself accountable to the law, on an equal basis with other citizens. On that basis, *Deuteronomy's* blueprint for a "Torah monarchy" arguably helps lay the foundations for the later political conception of a constitutional monarchy.

#### CONCLUSIONS

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

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

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

A similar conviction that law supercedes government animates the plot of *Antigone*, by Sophocles. Antigone, tried for treason in having buried her rebel brother despite King Creon's prohibition, never questions the validity of his royal authority or of the prohibition itself. She simply asserts that she acted out of allegiance to a higher law. The duty to her brother, she argues, supercedes that owed the king: "[N]or did I think your proclamations strong enough to have power to overrule, mortal as they were, the unwritten and unfailing laws of the gods." SOPHOCLES, *ANTIGONE*, at 44-45 (Hugh Lloyd-Jones ed. & trans., Loeb Classical Library 21, Harvard University Press 1994) (lines 453-55, emphasis added). I have here corrected that translation at one point. Whereas Lloyd-Jones rendered νόμια (*Id.* at 44, line 455) as "ordinances," I have substituted "laws." The latter is both more accurate and more appropriate to the judicial context of Antigone's speech as a direct response to Creon's immediately preceding charge, where the same term had been rendered correctly: "And yet you dared to transgress these laws [νόμους]?" (*Id.* at 42-43, line 449, emphasis added).

the yoke of aggressive imperial taxation, in order to establish an independent Judean polity. The draft constitution they wrote was part of a larger attempt to purchase freedom and cultural autonomy. In purely pragmatic terms, this utopian bid for freedom was a tragic failure. Historically, there was simply no opportunity for it ever to be implemented.<sup>152</sup> More profoundly, however, the visionary document remains to be discovered. *Deuteronomy* is a monument to the human intellect. A long tradition of legal hermeneutics and political debate was central to its composition. Yet the text's significance has been obscured by the pervasive "cultural illiteracy" regarding academic biblical scholarship. For that reason, the interdisciplinary dialogue proposed here could permit new ways of looking at both the past and the present, and lead to a more adequate understanding of intellectual and legal history. Such a dialogue would provide an overdue corrective to the ideological and polarizing use of *The Bible* in contemporary American political debate and jurisprudence: a use that does justice neither to *The Bible* nor to the history of law.

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