*Journal of Law and Religion* 36, no. 3 (2021): 576–578 © The Author(s), 2021. Published by Cambridge University Press on behalf of the Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2021.54

*The Crown and the Courts: Separation of Powers in the Early Jewish Imagination*. By David C. Flatto. Cambridge, MA: Harvard University Press, 2020. Pp. 384. $39.95 (cloth); $39.95 (digital). ISBN: 9780674737105.

David Flatto's *The Crown and the Courts: Separation of Powers in the Early Jewish Imagination* is a work of consummate scholarship. It is essential reading for anyone wanting to know about the origins and nature of the separation of powers—a fundamental doctrine of modern constitutionalism, especially in the United States.

Flatto argues that the doctrine of separation of powers first appeared in the early rabbinic literature, spanning the fourth century BCE to the third century CE. He examines "portraits of judicial administration that are recorded in influential writings from the Second Temple and rabbinic periods" (18). Organizing his study into three parts, Flatto first examines the Second Temple literature, then the rabbinic literature, and, finally, he "reflects on the roots, theoretical implications, and afterlife of the prior findings" (22). He shows how "these writings enabled Jewish thinkers to convey ideas about justice, the nature of law, the role of politics, and even the essence of revelation" (22).

Flatto thus demonstrates that the modern doctrine of separation of powers originated in certain biblical texts. The demonstration triggers a question of enormous importance for our understanding of constitutional law and politics: Is a separation of powers based on religion distinguished in any way from a separation of powers based on a secular foundation? Flatto, a professor of law and religion at the Hebrew University in Jerusalem, applies his expertise in both fields to reveal and question the structures underlying rabbinic thinking about law and religion—their identity and their clash.

Before tackling this question, I must focus on a vivid and challenging claim that Flatto makes so elegantly in his title: During the historical epoch Flatto is examining, the separation of powers is not a separation of powers *in fact*. Rather, it is a separation of powers in the *imagination*. The reason is, of course, that the Jews in Palestine lacked sovereign power. They were subjects of Rome. They could conduct their religious affairs as they saw fit as long as their religious practices did not threaten or challenge Rome's dominion, as Rome defined it. But separation of powers is a doctrine with profound political consequences that, had it been implemented, would have directly challenged the unitary dominance of the emperor sitting in Rome.

Flatto's account thus implicitly poses a challenge to political systems that embrace the separation of powers *in fact*, not just in the imagination. Does the playing out of the doctrine in actual government operations in any way alter it? Does the separation of powers *in fact* fulfill the doctrine's ambitions? To answer these questions, I focus on the US system of separation of powers, and my answer is yes, the playing out of the doctrine does profoundly alter it, but, no, the separation of powers cannot fulfill the doctrine's ambitions.

The US system of separation of powers shows how implementation of the doctrine impinges on its purity. At the federal level, the separation of powers is embodied in the Constitution of the United States. Article 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Article 2 provides: "The executive Power shall be vested in a

President of the United States of America." And Article 3 provides: "The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time establish."

However, consider Abraham Lincoln's Emancipation Proclamation. It provides: "That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free."[1] One might have expected, and at the time many did, that Congress, not the president, would have been the source of such a declaration. That expectation was all the more plausible because during the Civil War Congress had passed several laws to regulate the status of slaves, all in the direction of freedom.[2]

Consider also executive branch regulations issued pursuant to congressional authorization. Regulations may do as little as enable the executive branch to implement legislation in a flexible manner, as changing circumstances require. But they may also be far more substantive, so that a statute passed by Congress effectively gives the executive the power to formulate binding legislation. Or take the accusation that in certain decisions judges are "legislating from the bench," using the decision in a single case as a vehicle for doing what the Constitution entrusts to Congress. Of course, the doctrine of precedent—that a court's decision in a particular case will bind the court in future cases sufficiently like the decided case—can be tantamount to legislation when the likeness is only marginal.

One could, of course, argue that the failure of the United States to sustain the pure doctrine of separation of powers is not an inevitable consequence of implementation. That would be true for some elements in the American system of governance, but certainly not for all. For example, some regulations issued by the executive may be tantamount to legislation, but others clearly are not. And it is also true that Congress may in fact have intended for the executive to legislate in its stead, perhaps because it considers the legislation necessary but its members cannot agree on certain details. Or Congress may wish to avoid public criticism for what the legislation permits, empowers, or requires. Also, even when Congress makes the provisions of a law quite specific, leaving no apparent room for executive discretion, details of implementation that escaped Congress's attention may well arise, requiring the executive to make what are clearly legislative decisions.

Echoing Flatto, one might say that the separation of powers in the United States is a separation of powers in the early *American* imagination. It is not a pure separation in the realization of the founders' dreams.

The rabbis who developed the doctrine of separation of powers had no need, of course, to confront any of these dilemmas. They simply had no sovereign power. So the difference between the

1 By the President of the United States of America: A Proclamation, January 1, 1863, Series: Presidential Proclamations, 1791–2016, Record Group 11: General Records of the United States Government, 1778–2006, National Archives. John Yoo has persuasively argued that Lincoln depended on his constitutional authority in issuing the Proclamation, and that Lincoln's dependence explains the Proclamation's careful boundaries: "He did not free any slaves in the loyal states, nor did he seek to remake the economic and political order of Southern society. Lincoln never claimed a broad right to end slavery. Rather, the Emancipation Proclamation was an exercise of the president's war power to undertake measures necessary to defeat the enemy." John Yoo, "Unitary, Executive, or Both?," *University of Chicago Law Review* 76, no. 4 (2009): 1935–2018, at 2013.

2 See, for example, the First Confiscation Act of August 6, 1861, 12 Stat. 319, which negated owners' claims to escaped slaves whose labor had been used on behalf of the Confederacy. Of course, the states of the Confederacy were in rebellion when President Lincoln issued the Proclamation, and Lincoln cited that rebellion in the text of the Proclamation to justify its issuance as an exercise of his powers as commander-in-chief.



https://doi.org/10.1017/jlr.2021.54 Published online by Cambridge University Press

theoretical doctrine of separation developed by these theorists and the practical decisions required by implementation of the doctrine in the United States may be the full explanation for the differences between the early Jewish and the American approaches. The fact that in the early Jewish case, the source of the doctrine was religion and in the American case the source was not religion did not play a significant role. I say "significant" because the personal motivations of individual framers may, in some cases, have stemmed from religious belief. But the overwhelming consensus among the framers and their publicly stated justification for implementing the doctrine focused on forestalling the excessive accumulation of power by a single individual. It focused on rule by the people, the *demos*. It focused, in other words, on democracy.

The framers' orientation was political, the rabbinic sages' religious. Their distinct orientations drove the development of the separation of powers doctrine. But at the heart of the religious orientation of the Jews was an intensely political desire—the desire to be forever free from the slavery the Jews had experienced in Egypt, to prevent their political leaders from seizing pharaonic power.

Religion, like the ideology of democratic rule of the framers, is a fundamental orientation toward the world. By that I mean that both the religious orientation of the Jewish thinkers and the democratic orientation of the framers molded how their adherents perceived the world and deeply influenced what the adherents wanted to achieve in and through the world. Religion does not stand apart from the democratic ethos in its pragmatic impact on political and social affairs. A religion may, indeed, be murderous and intolerant, but so can flawlessly representing the will of a murderous and intolerant *demos*. A religion may be kind and generous and tolerant. But the will of a democratic electorate can be so as well.

Finally, religion may, but need not, require a belief in a god or gods—it may, but need not be, theistic.[3] Neither Buddhism nor Hinduism requires a belief in a god, yet they are both predominantly (but by no means universally) considered religions. They are fundamental orientations toward the world.

Had a government put the rabbinic theory into practice, the result might well have provided a model for the US experiment. It might well have made the framers aware that a pure separation of powers may not be possible in practice. And the American experiment shows that a separation of powers that *is* possible can fail to protect against the tyranny of even a democratically elected executive. Note the January 6 attacks on the United States Capitol.

By recovering a separation of powers tradition in rabbinic theory, Flatto opens up new perspectives and questions on a well-established political and legal doctrine, inviting both religious and secular scholars to contemplate the doctrine anew.

*Arthur J. Jacobson*
*Max Freund Professor of Litigation & Advocacy Emeritus, Benjamin N. Cardozo School of Law, Yeshiva University*

3 Of course, what one means by the term *god* is a highly controverted and complex matter, varying from religion to religion, from culture to culture and deeply rooted in a vast and labyrinthine history. For example, in Hebrew there is no single word equivalent to the English word *God*. Rather, as in Islam, there are multiple names for (meaning "attributes of") this single, ineffable concept. For example, the term YHWH, often called the Tetragrammaton (four letters) in English, and commonly read or spoken as *Yahweh*, is made from the first letters of four words often used in the Hebrew Bible to describe *God*—the letters *yodh*, *he*, *waw*, he—for the words meaning *that which is, was, and will be* or, compactly put, *existence*.



https://doi.org/10.1017/jlr.2021.54 Published online by Cambridge University Press