

Theocracy and the Rule of Law: A Novel Josephan Doctrine and Its Modern Misconceptions

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Returning to the roots of the notion of “theocracy” helps elucidate this much maligned and misunderstood concept. In popular modern discourse, this term is often used to censure fundamentalist religious leadership that undermines lawful values.¹ Academic scholarship, which applies this label in a more neutral manner, likewise associates it with an absence of formal rules, what Martin Buber famously described as a state of spiritual anarchy.² In this article, I will explore the origins of this term in the writings of Josephus, which reveals a very different, almost opposite notion of theocracy that is grounded in the rule of law and constitutionalism.

The substantial contrast between the original concept and its modern iteration can even be discerned in a recent book entitled *Constitutional Theocracy*, which proposes to co-join these terms.³ Describing the worldwide

- 1 See, e.g., Kevin Phillips, *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century* (New York: Viking, 2006); James Rudin, *The Baptizing of America: The Religious Right's Plans for the Rest of Us* (New York: Thunder's Mouth Press, 2006); Michelle Goldberg, *Kingdom Coming: The Rise of Christian Nationalism* (New York: W.W. Norton & Co., 2006); Randall Balmer, *Thy Kingdom Come: How The Religious Right Distorts the Faith and Threatens America: An Evangelical's Lament* (New York: Basic Books, 2006); Damon Linker, *The Theocons: Secular America Under Siege* (New York: Doubleday, 2006); Ross Douthaut, “Theocracy, Theocracy, Theocracy,” *First Things* 165 (2006): 23-30.
- 2 Martin Buber, *Kingship of God* (New York: Harper & Row, 1967). But see Rémi Brague, *The Law of God: The Philosophical History of an Idea* (Chicago: University of Chicago Press, 2007), 7-8, 145.
- 3 Ran Hirschl, *Constitutional Theocracy* (Cambridge, Mass.: Harvard University Press, 2010).

surge in religion in contemporary times, Ran Hirschl documents the historic increasing popular support for principles of theocratic governance around the globe. At the same time, Hirschl notes a separate, but parallel, spread of the rule of law and judicial review during this period, as numerous countries now endorse the doctrine of constitutional supremacy. Juxtaposing these two parallel developments, Hirschl underscores the deep tension between them. Nevertheless, Hirschl demonstrates how they have been uneasily merged during the last several decades in a burgeoning legal and political order that he labels “constitutional theocracy.” As Hirschl describes at length, this complex scheme applies the superstructure of constitutionalism to the fundamentally distinct mode of governance of a pure theocracy, thereby dramatically constraining and reshaping the latter scheme. What now emerges is a system wherein power resides among political figures who operate within the bounds of a constitution rather than relying exclusively upon the authority of religious leadership. Analyzing the impact of, and justification for, this recent turn, Hirschl’s work supports this trend and calls for its widespread expansion.

Yet an examination of the early history of the doctrine of theocracy exposes that the union which Hirschl describes is hardly a novel idea. In fact, as will be demonstrated below, the notion of constitutionalism – albeit a version that grew out of particular conditions of late antiquity⁴ – underlies the essence of theocracy, and captures its distinctive nature. Moreover, rather than conceiving of pure theocracy as distant from a normative scheme (which is the way Hirschl and other modern thinkers describe the essence of pure theocracy), the core of this concept in early writings is structured around an established legal edifice. Any perceived gap, therefore, is a reflection of how this concept became adulterated, or at least transformed, over the centuries. Therefore, placing a theocratic government within a constitutional legal

4 This qualification is important. Even as I use terms such as “constitutionalism” and the “rule of law” throughout this article, it would be completely anachronistic to suggest that they have identical meanings in the ancient and modern settings. Nevertheless, there is a sufficient continuity in the underlying core ideas, and a deep enough conceptual analogy, to justify employing this vocabulary in a general sense.

At this juncture it is also worth adding the following caveat. When I call for a return to the core definition of theocracy throughout this article, I am of course under no illusion about the gap between the ideal conception and the *realpolitik* ways that theocracies operate in modern times. Instead my argument should be understood as advancing a legal-philosophical claim about the core structure of a theocracy and its ultimate justification, which revolves around the rule of law.

framework restores the prototypical foundations of this political-normative template and serves its primary objectives.⁵

The first known use of the term theocracy appears in the writings of Josephus,⁶ and an analysis of the origins of this concept requires a careful study of his work. Josephus synthesizes early political and legal theory with Jewish socio-religious values to coin the concept of theocracy as an alternative to the classical models of government. Critiquing the instability and tyrannical tendencies of imperial rule, Josephus insists that a lasting polity must instead be built upon the foundations of law. By limiting the role of men and relying instead upon sacral laws, theocracy promises to be such a system. Notwithstanding the violence done to this term over time, or its later transformation, theocracy for Josephus represents a constitutional scheme carefully designed to achieve *libertas* and lawfulness.

Through a close study of a selection of Josephus's writings, this article will adumbrate the contours of the Josephan theocracy and offer a broader account of its significance. Part I opens with a general characterization of Josephus's notion of power that informs his various writings which are analyzed in the body of this article. This part proceeds to review a selection of interrelated exegetical and historical texts from *Jewish War* and *Antiquities* addressing the motifs of authority and law, which collectively form the foundation of Josephus's political theology. Part II turns to Josephus's constitutional writings in *Antiquities*, and especially his theoretical and apologetic treatise *Against Apion*. The latter work, which reflects Josephus's mature political theology, records his seminal statement about theocracy. This part will elaborate on the political and legal dimensions of this concept, and conjecture about its historical determinants. The conclusion of this article will briefly consider the afterlife of the term theocracy and explore certain factors that contributed to its modern transformation.

5 The original nature of the Josephan theocracy shares a similarity with the classical anarchist position as described by Robert M. Cover: "My position is very close to a classical anarchist one – with anarchy understood to mean the absence of rulers, not the absence of law." "The Folktales of Justice: Tales of Jurisdiction," in *Narrative, Violence and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1992), 175. Originally published in *Capital University Law Review* 14 (1984-85): 179-204. The notion of the Josephan theocracy I describe below also approximates the concept of a "nomocracy." On the latter term, see Louis Gardet, *La Cite musulmane: Vie sociale et politique*, 3rd ed. (Paris: Vrin, 1981), 28, 119, 167, 175.

6 *Ag. Ap.* 2.164-65. See the discussion below.

I. Law and Power in Josephus's Exegetical and Political Writings

In his important study of varieties of power in late antiquity, Brent Shaw describes Josephus as a person who is caught “in a severe conflict” between two divergent cultures with disparate notions of power: Roman institutional or formal power versus Judean personal or informal power.⁷ When Josephus assesses Roman power, he assimilates it into terms that are familiar to Judean notions of authority. Accordingly, absent from Josephus's assessment of Roman rule, Shaw underscores, is a description of the ‘constitution’ (in contrast with Polybius and others). For Josephus is blind to the institutional dimension of politics and instead recognizes the personality of the emperor as a familiar locus of power.

Shaw's provocative thesis fundamentally mischaracterizes Josephus's writings. While he rightfully points to the importance of power and politics for Josephus, he overlooks a crucial dimension of Josephus's discourse on these themes. Notions of formal power and reflections upon the ideal ‘constitution’ (*politeia* or *politeuma*) pervade Josephus's writings – not in his description of the Romans,⁸ but rather in his portrayal of the Jews.⁹ For Josephus, Jewish power resides in the formal polity built upon the superstructure of sacral law. It is precisely the supremacy of the formal rule of law over the personal and unpredictable governance of men that establishes the Jewish polity as superior to the Roman one. This article reconstructs Josephus's distinctive political theology, centered upon the rule of law. As this part will demonstrate, Josephus's political theory orients his biblical exegesis, as well as his commentary on current affairs. His theory becomes even more pronounced in the notions of constitutionalism and theocracy that structure much of his later writings, which will be analyzed in Part II below.

7 Brent D. Shaw, “Josephus: Roman Power and Responses to It,” *Athenaeum* 83 (1995): 357-90.

8 But see the analysis of *Ant.* 19 below, where Josephus's constitutionalism influences his description of Roman power as well.

9 Throughout this article I have decided to use the terms “Jews,” “Jewish,” and “Judaism,” since they have popular currency. Nevertheless, the term “Judean” and related terms are often more precise and should be understood as the intended meaning where appropriate. See the preface to Shaye J. D. Cohen, *The Significance of Yavneh and Other Essays in Jewish Hellenism* (Tübingen: Mohr Siebeck, 2010).

A. Biblical Exegesis

A close study of several passages in Josephus's restatement of the Bible in *Antiquities* reveals that he adapted certain (normative and narrative) sections of Scripture in a systematic manner to reflect his distinctive political philosophy.¹⁰ Various essential tropes about leadership are stressed by Josephus in these segments, including a preference for aristocratic (or republican) government; a devaluation of monarchy; and a promotion of the judicial role of the high priest and *gerousia* (council of elders). Moreover, Josephus continually expounds upon a larger motif of the sweeping threat of lawlessness undermining a polity. Most strikingly, Josephus repeatedly advances the rule of law over the rule of man.

Elements of these themes already surface in Josephus's presentation of Deuteronomy's judicial plan.¹¹ Elaborating on Deut 17, he describes the following

10 While scholars have long noticed the elaborate reworking of biblical material in these sections, they have debated to what extent these adaptations are deliberate and systematic, and what caused Josephus to incorporate these modifications. Some scholars assume that Josephus inherited various exegetical motifs, perhaps unwittingly; others conclude that Josephus's changes are largely haphazard; many contend that his changes derive from aesthetic, historic, and apologetic considerations. Below I will demonstrate that Josephus revised certain biblical passages in a systematic manner to reflect his distinctive political philosophy. Josephus's general approach to restating biblical laws has been studied by Louis H. Feldman, *Josephus's Interpretation of the Bible* (Berkeley: University of California Press, 1998); idem, *Studies in Josephus' Rewritten Bible*, JSJSup 58 (Leiden: Brill, 1998); Robert P. Gallant, "Josephus' Exposition of Biblical Law: An Internal Analysis" (PhD diss., Yale University, 1988); and Harold W. Attridge, *The Interpretation of Biblical History in the Antiquitates Judaicae of Flavius Josephus*, HDR 7 (Missoula, Mont.: Scholars Press, 1976). See also James L. Kugel, *Traditions of the Bible: A Guide to the Bible as It Was at the Start of the Common Era* (Cambridge, Mass.: Harvard University Press, 1998); Shaye J. D. Cohen, *Josephus in Galilee and Rome: His Vita and Development as a Historian* (Leiden: Brill, 1979), 35-42; and Isaak Heinemann, "Josephus' Method in the Presentation of Jewish Antiquities," *Zion* 5 (1939-40): 180-203 (Hebrew).

All citations to Josephus are from the Loeb Classic editions. Josephus, *Jewish War*, LCL (Cambridge, Mass.: Harvard University Press, 1927); Josephus, *Antiquities*, LCL (Cambridge, Mass.: Harvard University Press, 1965); Josephus, *The Life*, LCL (Cambridge, Mass.: Harvard University Press, 1926); Josephus, *Against Apion*, LCL (Cambridge, Mass.: Harvard University Press, 1927). I also have frequently consulted the Brill Josephus project edition, where available.

11 The larger context of *Ant.* 4 is Josephus's exposition of biblical laws. For Josephus's restatement of biblical laws relating to judicial administration, see Sarah Pearce, "Josephus as Interpreter of Biblical Law: The Representation of the High

judicial scheme in *Ant.* 4.214-18: justice is to be administered by local municipal judges and Levites, with a central judicial tribunal presiding above them composed of the high priest, prophet, and *gerousia*.¹² Glaringly absent from this list of judicial officials is the king, conforming to Josephus's explicit preference for an (republican) aristocracy over monarchic rule (see *Ant.* 4.223 and 6.36).¹³ In a deeper sense, what animates Josephus's endorsement of aris-

Court of Deut. 17:8-12 according to Jewish *Antiquities* 4.218," *JJS* 46 (1995): 30-42. In explicating this section, Pearce cites Josephus's own comments in *Ant.* 1.17 and 10.218, and his introduction to the laws of the polity in *Ant.* 4.196-97. See also Sabrina Inowlocki, "Neither Adding nor Omitting Anything': Josephus' Promise not to Modify the Scriptures in Greek and Latin Context," *JJS* 56 (2005): 48-65. On the related question of Josephus's conception of, and attitude toward, ancestral laws, see Paul Mandel, "Scriptural Exegesis and the Pharisees in Josephus," *JJS* 58 (2007): 19-32; Bernd Schröder, *Die 'väterlichen Gesetze': Flavius Josephus als Vermittler von Halachah an Griechen und Römer*, TSAJ 53 (Tübingen: J.C.B. Mohr, 1996); and Seth Schwartz, *Josephus and Judean Politics* (Leiden: Brill, 1990), 170-208. See also Steve Mason, *Flavius Josephus on the Pharisees: A Composition-Critical Study* (Leiden: Brill, 1991), 97-105, 331.

- 12 The biblical text (and the Septuagint) specifies the priestly Levites and the contemporary judge as the arbiters in such instances. Thus, Josephus here is making three alterations to the biblical foundation: replacing priests with the high priest; inserting the prophet (perhaps in lieu of the judge); and adding the *gerousia*. Many scholars have attempted to reconstruct the historical or exegetical origins of Josephus's threefold identification. For instance, Sarah Pearce contends that the three judicial actors specified in *Ant.* 4.218 collectively are successors to Moses, the supreme judicial authority. They assume the roles of Eleazar the high priest, Joshua the prophet, and the council of elders, who were Moses's immediate successors according to *Ant.* 4.186.
- 13 For more on the anti-monarchic thrust of Josephus's writings, see, e.g., Steve Mason, *Josephus and the New Testament*, 2d ed. (Peabody, Mass.: Hendrickson, 2003), 108-109; Tessa Rajak, "The 'Against Apion' and the Continuities in Josephus's Political Thought," in *Understanding Josephus: Seven Perspectives*, ed. Steve Mason (Sheffield: Sheffield Academic Press, 1998), 222-46; Christopher T. Begg, "Israel's Demand for a King According to Josephus," *Le Muséon* 110 (1997): 329-48; Yehoshua Amir, "Josephus on the Mosaic 'Constitution'," in *Politics and Theopolitics in the Bible and Postbiblical Literature*, ed. Henning Graf Reventlow et al., JSOTSup 171 (Sheffield: Sheffield Academic Press, 1994), 13-27; Daniel R. Schwartz, "Josephus on the Jewish Constitutions and Community," *Scripta Classica Israelica* 7 (1983-84): 30-52; and David Altshuler, "Descriptions in Josephus' *Antiquities* of the Mosaic Constitution" (PhD diss., Hebrew Union College, 1977), 120ff. For an alternative perspective on monarchy in Josephus, see Nadav Sharon, "Monarchy, Democracy, and Domitian: The Development in the Conception of Monarchy and Governance in the Writings of Josephus" (master's thesis, Hebrew University of Jerusalem, 2006) (Hebrew). I thank the author for sharing this study with me. For more on attitudes toward kingship in other works

toocracy instead of monarchy is his conception of law (as promoted by an aristocracy)¹⁴ as an alternative source of *political strength*. Ultimately, Josephus champions the primacy of the normative order over the rule of men and envisions law displacing the king from his seat of power.

A more explicit instance where Josephus's political philosophy influences his biblical interpretation is evident in the conclusion of the normative section of *Ant.* 4 (4.302ff.), where Josephus records Moses's valedictory speech. Moses describes his "putting together the laws, and assisting in providing the arrangement of the constitution," and then adjures the people to observe the laws. Here Josephus inserts a remarkable exegesis of Deut 13:7-17. These biblical verses describe the grave sin of a person, or an entire city, that promotes the worship of foreign gods. Josephus interpolates his own paraphrase of these laws into Moses's last address,¹⁵ and completely transforms their meaning:

But even if one of their blood relatives should undertake to confound and abolish *the constitution* based upon them [the laws], or indeed a city should do so, [they declared that] they would defend them [the laws] both in common and individually: after prevailing, they would themselves pull it [the rebellious city] down from the foundations and not leave behind the ground of those who had run mad, if that were possible... (*Ant.* 4.309-10) (emphasis added)

In Josephus's scheme, the ultimate transgression of the Torah is not idolatry but rather undermining the constitution and laws.¹⁶ Accordingly, Josephus's

of Second Temple literature, see Odo Camponovo, *Königtum, Königsherrschaft und Reich Gottes in den frühjüdischen Schriften*, OBO 58 (Göttingen: Vandenhoeck & Ruprecht, 1984).

14 For Josephus an aristocracy offers a vehicle to govern by law, and thus differs from a republic, or an assembly of powerful men. See more in Part I. B. and n. 31 below.

15 Transferring this passage to the culminating section recording Moses's valedictory address further underscores its significance.

16 At times, a political choice is conceptualized in Jewish sources as idolatrous, albeit in various different senses. Thus, 1 Sam 8 conceives of the choice of monarchic rule as an essentially idolatrous betrayal of God's rule. See also Moshe Halbertal and Avishai Margalit, *Idolatry*, trans. Naomi Goldblum (Cambridge, Mass: Harvard University Press, 1992). In a different vein, see Deut 28:36, "The Lord will drive you, and the king you have set over you, to a nation unknown to you and your fathers, where you shall serve other gods of wood and stone," where the verse transitions from disempowerment to idolatry. Alternatively, in Josephus's view, rejecting the Torah's constitution is a way of abandoning God (i.e., idolatry).

exegesis substitutes the sin of idolatry with the offense of revolution, and calls for the utter rejection (literally, destruction) of an alternative political order that is not based on the laws.

The importance of constitutionalism and the vital role of law in constituting the ideal polity are also apparent in Josephus's striking exegesis of the book of Judges in *Antiquities* 5.¹⁷ Introducing this biblical period, Josephus describes a state of lawlessness:¹⁸

After these things the Israelites became inactive with regard to their enemy... they thought little of the order of *their constitution* and no longer paid attention to *the laws*. (*Ant.* 5.132) (emphasis added)

Josephus then clarifies what he means by neglecting the constitution:

Aye, even that aristocracy of theirs was now becoming corrupted. No more did they appoint councils of elders (*gerousia*) or any other of those magistracies beforetime ordained by law. (*Ant.* 5.135)

In other words, according to Josephus, much of the turbulence at the outset of the book of Judges is due to constitutional failure, including the breakdown of the rule of law.

By pointing to political and judicial collapse as the reasons for anarchy at this stage, Josephus is glossing over the causes catalogued in the biblical text: the impartial conquest stressed in Judg 1:27-36, the failure to heed the divine call to sever any ties with the indigenous population underscored in 2:1-5, and the sins of idolatry and intermarriage emphasized in 2:11-3:6. Here, as before, it is not idolatry, but the abandonment of the Jewish constitution that is considered to be the cardinal sin of the Jews.

17 Many scholars have assumed that a primary message of this biblical book is political. Martin Buber, in his *Kingship of God*, famously reads Judges as an anti-monarchic work, and certainly various passages in this biblical book have that connotation. Many scholars disagree, especially insisting that the final chapters of Judges (17-21) have an unambiguous and opposite message. See, e.g., Adele Berlin, Marc Zvi Brettler, and Michael Fishbane, eds., *The Jewish Study Bible* (Oxford: Oxford University Press, 2004), 509.

18 The translation in this paragraph comes from Louis Feldman, "Josephus' Portrayal (Antiquities 5.136-174) of the Benjaminite Affair of the Concubine and Its Repercussions (Judges 19-21)," *JQR* 90 (2000): 263. Feldman's overall treatment of the Benjaminite Affair is an important contribution. See also Louis H. Feldman, *Josephus's Interpretation of the Bible*, 143-44; and Attridge, *Interpretation of Biblical History*, 135-36.

Following this background description of widespread anarchy, Josephus begins his restatement of the book of Judges by skipping to the chaos recorded in its final chapters (the “Benjaminite War” that was engendered by the “Gibeah outrage”), deferring his account of the interim chapters until later in *Antiquities* 5.¹⁹ At first blush, highlighting the analogous themes of the last chapters of Judges would seem to undermine Josephus’s case for aristocratic rule, since these chapters emphatically stress the indispensability of kingship for restoring civic order. Recall the ringing refrain of the final chapters of Judges, “in those days there was no king in Israel; each man doing what was right in his own eyes” (see, e.g., Judg 17:6; 18:1; 19:1; 21:25), which indicates that monarchy is the solution for anarchy. Yet, Josephus carefully sidesteps this implication, and projects the latter chapters of Judges in a different light. By monitoring Josephus’s additional editorial moves, one can reconstruct his bold exegesis which omits the pro-monarchic agenda of these biblical chapters, and instead reinforces his political philosophy.

Josephus commences his narration of the final chapters of Judges with a restatement of Judges 19, but he omits the opening pro-monarchic refrain, “in those days there was no king in Israel...” (Judg 19:1). He likewise hardly cites any of the material from Judg 17-18, thereby not only downplaying the idolatrous sin of the Micah episode, but also eliminating two more citations of the pro-monarchic refrain (Judg 17:6 and 18:1). Similarly, he never cites the final pro-monarchic refrain capping the biblical episode (Judg 21:25), and instead inserts his own statement about the rise of the Benjaminites. After next

19 The scholarly consensus is that the final chapters are a discrete biblical source. See, e.g., Yairah Amit, “The Book of Judges: Dating and Meaning,” in *Homeland and Exile: Biblical and Ancient Near Eastern Studies in Honour of Bustenay Oded*, ed. Gershon Galil et al. (Leiden: Brill, 2009), 307. For more on the dating of this source, see Cynthia Edenburg, “The Story of the Outrage at Gibeah (Jdg. 19-21): Composition, Sources and Historical Context” (PhD diss., Tel Aviv University, 2003) (Hebrew). Interestingly, several early rabbinic texts also date these biblical chapters to the beginning of the book of Judges. See *Seder Olam* 12, *Eliyahu Rabbah* 11:57. See also Feldman, “Josephus’ Portrayal (Antiquities 5.136-174) of the Benjaminite Affair,” 258-59.

A more specific scholarly hypothesis is that chapters 19-21 of Judges contains a polemical attack on the house of Saul, and instead champions the Davidic dynasty. See, e.g., Amit, “Book of Judges: Dating and Meaning,” 297-322; eadem, “Literature in the Service of Politics: Studies in Judges 19-21,” in *Politics and Theopolitics in the Bible and Postbiblical Literature*, 28-40; Marvin Alan Sweeney, “Davidic Polemics in the Book of Judges,” *VT* 47 (1997): 517-29. See also Gregory T.K. Wong, “Is there a Direct Pro-Judah Polemic in Judges?” *SJOT* 19 (2005): 84-110.

recounting the fate of the Danites (excerpting Judg 18), he again returns to the trope of constitutional failure and abandonment of law as engendering the travails of the book of Judges (*Ant.* 5.174-79).

By opening his retelling of the book of the Judges with its final chapters, which portray widespread anarchy as a consequence of an inadequate political infrastructure, Josephus validates his political reading of this entire period. Yet, at the very same time Josephus completely subverts the specific political message of the latter section of this biblical book. Constitutionalism established through an aristocracy, judicial councils, and the rule of law emerges as the solution to anarchy, in Josephus's retelling, silencing the Bible's campaign for kingship.

In the remainder of his restatement of the book of Judges, Josephus returns several times to his own revised political refrain, reiterating something to the effect that in those days there was no lawful aristocracy in Israel. He likewise continues to hail his constitutional vision in subsequent sections of *Antiquities* 5 (see, e.g., *Ant.* 5.186, 5.234, and 5.255). This enables Josephus to easily segue into *Antiquities* 6, where he recounts the strident anti-monarchic themes of the opening chapters of the book of Samuel (a transition that is far more difficult to explain for traditional biblical commentators who accept the pro-monarchic material in Judg 19-21).

Other examples of political theory shaping exegesis abound in Josephus's rewritten Bible in *Antiquities*, including the following: Korach and Zimri lodge forceful protests against the tyrannical rule of whimsical leaders, and their complaints can only be dismissed because the laws are in fact applied in an evenhanded manner in Israelite society (*Ant.* 4.14-36 and 4.141-55); the ideal successors of Moses are legal masters who govern by executing the law (*Ant.* 4.174-88 and 4.324); when Samuel prefers aristocracy to kingship he intends to promote the rule of law (*Ant.* 6.36-44); Absalom's mutiny aspires to establish an autonomous judicial structure, where the king only serves in a secondary role (*Ant.* 7.194-97); and Jehoshaphat's judicial reforms illustrate the possibility of even a non-aristocratic (=monarchic) form of government succeeding as long as it is dedicated to enabling the rule of law (*Ant.* 8.395 and 9.2-6).²⁰ Throughout, these passages reflect Josephus's profound commitment to the rule of law and his deep skepticism about the reign of powerful men.

20 For further elaboration, see David Flatto, "Between Royal Absolutism and an Independent Judiciary: The Evolution of Separation of Powers in Biblical, Second Temple and Rabbinic Texts" (PhD diss., Harvard University, 2010), 164-69.

B. Political Affairs

Josephus's political-theological orientation, especially his preference for aristocracy, priesthood, and the rule of law, and his placement of law at the center of the ideal polity, also color his reflections on contemporary affairs. One important illustration is his mature treatment of the Fourth Philosophy in *Antiquities* (see 18.4-25), which differs from his earlier depiction of the Zealots in the *War* (2.118).²¹ In the *War*, Josephus describes how Judas the Galilean incited his countrymen to revolt against the Romans (in 6 C.E.), scorning their willingness to pay a tribute and thereby defer to mere mortals as only God is their true master. In a derogatory comment, Josephus characterizes Judas as a sophist who founded a (presumably marginal) sect that shared nothing in common with the three Jewish philosophies that he proceeds to describe – the Pharisees, Sadducees, and Essenes.²²

Returning to this event at greater length in *Antiquities* 18, Josephus relates a similar affair, peppered with additional details, and likewise segues into a summary of the various philosophies of Judaism.²³ What distinguishes Josephus's latter report most is not his revised factual record but rather his characterization and evaluation of Judas's viewpoint. In this context, Josephus describes Judas's attitude, and the following it spawned, as establishing a fourth school of philosophy, alongside the three main sects (or schools of thought). By characterizing this approach for the first time as a significant fourth alternative philosophy of Judaism (in contrast with his descriptions of the three Jewish philosophies in the *War* 2.119-66 and *Ant.* 13.171-73), Josephus

21 See the entry by Menahem Stern entitled "Zealots and Sicarii," in *EncJud* 21:467-80. See also idem, "Sicarii and Zealots," in *The World History of the Jewish People*, ed. M. Avi-Yonah and Z. Baras (Tel Aviv: Jewish History Publications, 1977), 8:263-301; and Martin Hengel, *The Zealots: Investigations into the Jewish Freedom Movement in the Period from Herod I until 70 A.D.*, trans. David Smith (Edinburgh: T&T Clark, 1989).

22 Later, Josephus blames the Fourth Philosophy for the revolt against the Romans. See *War* 7.252-55, which links the Sicarii with Judas (who refused Quirinius's census). See Stern, "Zealots and Sicarii," 468. See also Shaye J. D. Cohen, *From the Maccabees to the Mishnah*, 2d ed. (Louisville, Ky.: Westminster John Knox, 2006), 164-66, for a more subtle formulation of the relationship between the Fourth Philosophy and other revolutionary groups. See also n. 27 below.

23 See *Ant.* 18.1-10, and then the summary of the philosophies in *Ant.* 18.11-25. In the former section, Josephus mentions additional details such as Quirinius, Saddok, and the specific argument which Judas and Saddok advanced to inspire the Jewish people to challenge the Roman assessment.

elevates its importance and stature, even as he levels sharp criticisms against its founders and followers for their “innovation and reform.”²⁴

When Josephus proceeds to summarize the tenets of the Fourth Philosophy he employs the following remarkable characterization, “As for the fourth of the philosophies...This school agrees in all other respects with the opinions of the Pharisees, except that they have a passion for liberty that is almost unconquerable, since they are convinced that God alone is their leader and master.”²⁵ By comparing the Fourth Philosophy to the Pharisees – accenting their passion for liberty, their total subservience to God, and their willingness to die for their creed – Josephus surprisingly underscores positive values of this movement which resonate with virtues promoted by Jewish tradition according to *Antiquities* and *Apion*.²⁶

24 See *ibid.*, 18.9. The sharp criticisms leveled against the founders and followers are recorded in *Ant.* 18.6-10. In the continuation of *Ant.* 18.6-10, 23-25, however, Josephus’s remarks contain both a critical and positive dimension, as explained herein.

Scholars have largely amplified Josephus’s negative assessment of the Fourth Philosophy. See, e.g., Stern, “Zealots and Sicarii,” 467ff; Cohen, *From the Maccabees to the Mishnah*, 164-66; and Tessa Rajak, *The Jewish Dialogue with Greece and Rome: Studies in Cultural and Social Interaction*, AGJU 48 (Leiden: Brill, 2001), 202. But Seth Schwartz, *Josephus and Judean Politics*, 188, already notes some of the ambivalence in the *Ant.* 18 account. It seems that for Josephus, the primary error of the Fourth Philosophy was not only related to their message, but their very establishment of a new school. Precisely because Josephus now characterizes them as a competing philosophy, and not just a marginal offshoot, he also negatively assesses the effrontery involved in staking out a novel position.

25 *Ant.* 18.23.

26 Although the precise parameters of this statement are difficult to ascertain, Josephus’s sweeping formulation of affinity here is striking, as is the implication of aligning the Fourth Philosophy with the Pharisees, whose excellence he has just hailed. Moreover, since the Pharisees are the ultimate guardians of the ancestral traditions, the Fourth Philosophy apparently abides by these traditions as well.

In truth, the very novelty of the group which Josephus stresses in this context – their passion for liberty that arises from their conviction in the sole leadership of God – is itself largely consistent with the ancestral traditions, as characterized by Josephus throughout his writings, especially in *Ant.* 4 and *Ag. Ap.* 2. Further, two especially positive characteristics of the Fourth Philosophy which Josephus proceeds to underscore – their dedication to liberty and willingness to die for their creed – are both described as central political virtues of the Jewish tradition in *Ag. Ap.* For more on early Jewish attitudes toward martyrdom, see Rajak, *Jewish Dialogue with Greece and Rome*, 99-136.

In essence, the Fourth Philosophy shares much with “theocracy,” the fourth constitutional structure described by Josephus in *Ag. Ap.* 2, discussed further below.

Apparently, the novel aspect of the Fourth Philosophy that offends Josephus according to *Antiquities* is its radical rejection of all human rule, which even precludes an administrative or juristic body mediating God's will through legal norms (which Josephus sees as indispensable). Further, the Fourth Philosophy operates on the brink of lawlessness, which easily deteriorates into violent civil strife. For Josephus, such lawlessness actually undermines liberty, and subverts the laudatory aspirations of the Fourth Philosophy. Nevertheless, as Josephus's political theology matures from the *War* through the latter sections of *Antiquities* and *Apion*, his evaluation of the Fourth Philosophy changes, and his identification with aspects of its ideology increases.²⁷

A second example occupies the majority of *Antiquities* 19, which is devoted to the narrative of Caligula's assassination and Claudius's rise to imperial power. Considering the almost complete irrelevance of this episode for Jewish history, Josephus's inclusion of this lengthy excursus is puzzling, to say the least.²⁸ In this vein, it is worth drawing attention to one particular episode

Thus, in his later works, Josephus identifies a fourth approach in both schemes (the schools of Jewish philosophy and the constitutional structures), which are interrelated. Yet, theocracy promotes liberty through law, while the anarchic Fourth Philosophy operates on the brink of lawlessness.

See also Isaiah M. Gafni, "Josephus and I Maccabees," in *Josephus, the Bible, and History*, ed. Louis H. Feldman and Gohei Hata (Detroit: Wayne State University Press, 1989), 116-31. For more on the theme of *libertas* in Josephus, see Daniel R. Schwartz, "Rome and the Jews: Josephus on 'Freedom' and 'Autonomy,'" in *Representations of Empire: Rome and the Mediterranean World*, ed. Alan K. Bowman et al. (Oxford: Oxford University Press, 2002), 65-81.

27 Interestingly, Josephus concludes this segment by blaming the uprising on Florus, the Roman procurator. See *Ant.* 18.25, 20.252-58. As many have noted, Josephus's account in *Ant.* differs considerably from the *War*, where he holds the rebelling Jews (including those connected with the Fourth Philosophy) as primarily culpable for the revolt against Rome. See, e.g., Cohen, *Josephus in Galilee and Rome*, 152-60. By shifting the blame to Florus in *Ant.*, Josephus further vindicates the Fourth Philosophy in *Ant.*

28 There is widespread scholarly consensus that this material originates from one or more external sources which Josephus relied upon, although the identity of the author(s) remains uncertain. Theodor Mommsen pointed to Cluvius Rufus, while Feldman challenges this hypothesis, and makes several alternate suggestions. See the discussion in Louis H. Feldman, *Studies in Hellenistic Judaism*, AGJU 30 (Leiden: Brill, 1996), 164-76. See also Klaus Scherberich, "Josephus und seine Quellen im 19. Buch der 'Antiquitates Iudaicae' (*Ant. Iud.* 19,1-273)," *Klio* 83 (2001): 134-51. Many have assumed that Josephus is just filling out his work at this point, stretching to reach the Dionysian twenty. See, e.g., Cohen, *Josephus in Galilee and Rome*, 59. Josephus offers his own rationale for this extended tangent, explaining

recorded in *Antiquities* 19: the effort to restore the Republic in the Roman Senate following the assassination of Caligula (see *Ant.* 19.158-200). Why would Josephus dare to return to this moment of insurrection when he is living in imperial Rome? Moreover, what is its lasting legacy for Josephus?²⁹

Sentius's speech in the Senate calling for a restoration, reproduced in its entirety by Josephus (*Ant.* 19.167-84), conveys an impassioned plea for the values of republicanism (or aristocracy, in the important parallel version of this episode in the *War* 2.204-205), and constitutes a forceful critique of the imperial system. By highlighting this event, Josephus accomplishes something akin to what K. R. Bradley described as the general effect of Suetonius's *Lives*:³⁰

that Caligula's death was of the greatest importance for saving Palestinian Jewry from ruin (*Ant.* 19.15-16). In addition, Louis Feldman points to Agrippa's leading role in facilitating Claudius's ascension to power in Josephus's rendition of this affair. See *Ant.* 19:236ff. Agrippa's role is even more pronounced in the parallel account in *War* 2.206-13. See Feldman, *Studies in Hellenistic Judaism*, 164-76. Both of these reasons fail to adequately explain this elaborate digression. My alternative suggestion, which I present below, relates to contemporary rule, and the proper role of law and power within the polity. In a similar vein, see Feldman's passing suggestion (*Studies in Hellenistic Judaism*, 172) that perhaps Josephus detected an analogy between Caligula and Domitian. For a loosely parallel notion, see Shaw's important analysis of the story of Asinaios and Anilaios recorded in *Antiquities* 18. Brent D. Shaw, "Tyrants, Bandits and Kings: Personal Power in Josephus," *JJS* 44 (1993): 176-204. Most germane to my analysis are the brief, but important, comments of Steve Mason, *Judean Antiquities 1-4*, XXVII-XXIX.

- 29 The question is heightened by the fact that other classical writers hardly refer to this event. Cassius Dio only describes it in a short paragraph in his lengthy *Roman History*. See Dio's *Roman History*, Book LX. Tacitus, who was an open critic of the Augustan solution, does not record this phase of the Caligula affair altogether. In fact, while Tacitus repeatedly celebrates the republican ideal of open debate, he considers the actual expression of hostilities toward the imperial form in the political field to be fruitless. See Chaim Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge: Cambridge University Press, 1950), 160-67. For Tacitus, the achievement of *libertas* depends less on the constitutional framework than on how people use their political institutions and the character they develop under any political structure. Suetonius does refer to this event twice, but each time only briefly. *Suet. Div. Claud.* 10:3ff; *Div. Calig.* 60. See also Andrew Wallace-Hadrill, *Suetonius: The Scholar and His Caesars* (New Haven: Yale University Press, 1984), 112ff; and Richard J. A. Talbert, *The Senate of Imperial Rome* (Princeton: Princeton University Press, 1984).
- 30 K. R. Bradley, *Lives of the Caesars: Suetonius* (Loeb Classical Library 31; trans. J.C. Rolfe; Cambridge, Mass.: Harvard University Press, 1998), 21. Bradley refers in his final line to the two instances where Suetonius describes the Senatorial debate following Caligula's assassination (see n. 29 above), and two other moments of likely lesser significance (see *Suet. Div. Tib.* 50; *Div. Oth.* 12.2).

...To write a work assessing previous regimes was in itself something of a political act, because by holding up to scrutiny the power of the Caesars, Suetonius was constantly reminding his readers that the Principate was an autocratic form of rule totally at odds with ancient Roman traditions of free government and capable of disintegrating into despotism of the worst kind at any moment....

In a similar sense, Josephus describes an historic moment to underscore to his readers that even though an emperor replaced the senatorial Republic, *libertas* remains elusive under both political structures,³¹ “...inasmuch as it leaves matters not to the wisdom of the laws, but to the angry whim of those who are in authority” (*Ant.* 19.172). Both republican and imperial forms of government can deteriorate into tyrannical forms since they rely on men, rather than the stable and inviolable rule of (sacral) law. Herein lies the political act of Josephus, which lays the groundwork for a distinctive Jewish political model that overcomes the deficiencies of republican and imperial rule.

II. Constitutionalism and Theocracy

Josephus’s systematic political thought is most apparent in his “constitutional” writings in *Antiquities*, and especially *Apion*. Both the opening and closing paragraphs of *Antiquities* capture the centrality of the constitutional framework for this book.³² Commencing his work with a programmatic statement, Josephus sets out his agenda to describe the history and constitution of the Jews (*Ant.* 1.5, and see 1.11-20). The concluding passages, which delineate all of the high priests who officiated since Aaron, twice enumerate changes in the governmental constitution at various stages of Jewish history (see *Ant.* 20.229, 234, 251, and 261). Throughout the legal sections of *Antiquities* 3 and 4, which

31 Even though Josephus likely prefers republican government (which is similar to his aristocratic ideal, alluded to in the parallel passage in *War*) to an imperial one (which is similar to the monarchic form of rule that he opposes), Josephus presumably intends to critique both schemes. For both forms of government rely on powerful men, and therefore easily deteriorate into tyrannical rule, rather than on durable and just laws. A government of law can only be achieved by the kind of aristocracy he refers to in *Ant.* 4, or better yet, a theocracy (as he discovers in his mature philosophy), as he describes in *Ag. Ap.* 2.

32 See Schwartz, “Josephus on Jewish Constitutions and Community,” 30-52; and Amir, “Josephus on the Mosaic ‘Constitution’,” 13-27.

restate many of the commandments of the Torah, Josephus repeatedly refers to the Jewish constitution in framing his presentation (see, e.g., *Ant.* 3.84, 322; 4.181-84, 193-98, 302, and 309-12). Here Josephus begins a sustained political-theological argument, which he refines in *Apion*, that the Torah's laws constitute the foundation of the successful polity of the Jews.

Josephus's ultimate statement of political theology is recorded in his final work, *Against Apion*. In the words of Martin Goodman, *Apion* comes "as close as a Jew ever came to political theorizing about the nature of...a perfect state."³³ This work also emerges as the most proudly Jewish of Josephus's writings, presenting Josephus's fully developed reflections on the role of law and the Jewish constitution in the (ideal) Jewish polity.³⁴

The utopian nature and ahistorical tone of *Apion* can be detected throughout this work. Instead of the fracturing sectarianism, civil unrest, and religious disobedience of the *War*, *Antiquities*, and *Life*, Josephus portrays a united and devout Jewish people. By flattening the past and projecting toward an inexorable future, Josephus's Judaism emerges as steadfast, able to transcend the fluctuations of temporal affairs and stand impervious to historical setbacks. In presenting this idealized portrait, *Apion* ambitiously elaborates upon the political-theological motifs of Josephus's earlier works, and underscores their profound societal implications, which particularly resonate for post-70 C.E. Jews.

33 Martin Goodman, *Rome and Jerusalem: The Clash of Ancient Civilizations* (London: Allen Lane, 2007), 209.

34 For more on *Apion*, see John M. G. Barclay, *Against Apion: Translation and Commentary*, ed. Steve Mason (Leiden: Brill, 2006), XVII-LXXI; Clifford Orwin, "Judaism as Regime: Josephus' Defense of the Torah in *Against Apion*" (conference paper presented at Shalem Center's Political Hebraism Conference, Jerusalem, Israel, December 26-29, 2006); Martin Goodman, "Josephus' Treatise Against Apion," in *Apologetics in the Roman Empire: Pagans, Jews, and Christians*, ed. Mark Edwards et al. (Oxford: Oxford University Press, 1999), 45-58; John M. G. Barclay, "Josephus v. Apion: Analysis of an Argument," in *Understanding Josephus: Seven Perspectives*, ed. Steve Mason (Sheffield: Sheffield Academic Press, 1998), 194-221; Rajak, "Against Apion and the Continuities in Josephus's Political Thought," 222-46; Louis H. Feldman and John R. Levison, eds., *Josephus' Contra Apionem: Studies in its Character and Context*, AGJU 34 (Leiden: Brill, 1996); Aryeh Kasher, *Flavius Josephus: Against Apion* (Jerusalem: Zalman Shazar Center, 1996) (Hebrew); Arnaldo Momigliano, *Essays on Ancient and Modern Judaism*, trans. Maura Masella-Gayley (Chicago: University of Chicago Press, 1994), 58-66; and Shaye J. D. Cohen, "History and Historiography in the *Against Apion* of Josephus," in *Essays in Jewish Historiography: In Memoriam Arnaldo Dante Momigliano*, ed. Ada Rappaport-Albert (Middletown, Conn.: Wesleyan University Press, 1988), 1-11.

The latter part of *Apion* (2.145-86), which extols the virtues of the Jewish constitution, focuses substantively on the character, supremacy, and achievement of the Jewish legal system.³⁵ By the same token, when Josephus describes the role of the priests in this context he easily shifts from their judicial responsibility to the overall administration of the ideal Jewish polity. His almost seamless transition between politics and law reflects the blurring of these categories in Josephus's mature political theology.

The strong nexus between politics and law finds its most profound expression in this section as well. Rejecting the time-honored threefold constitutional scheme of the Greco-Romans (monarchy, oligarchy, and democracy), Josephus now introduces a fourth alternative to characterize Judaism:³⁶

...But our legislator took no notice of any of these, but instituted the government as what one might call...a "theocracy," ascribing to God the rule and power...

While Josephus does not explicitly address the manner in which God governs, this becomes eminently clear from the wider context: through God's comprehensive laws, as stated by Moses the legislator, and as administered by God's priests. Unlike the classical three forms of government which rely upon men, the governance of God relies upon just and lasting laws.

35 Scholars debate about whether to view this material as a discrete unit or part of a broader apology presented in the work at large. See Barclay, *Against Apion*, XIX-XX; Dagmar Labow, *Flavius Josephus Contra Apionem* (Stuttgart: Kohlhammer, 2005), LXXVI-LXXXI; and Christine Gerber, *Ein Bild des Judentums für Nichtjuden von Flavius Josephus: Untersuchungen zu seiner Schrift Contra Apionem*, AGJU 40 (Leiden: Brill, 1997), 67-99. There is also an ongoing dispute about whether the material in this section was authored by Josephus or by others, or whether Josephus here reworked earlier material. See Barclay, *Against Apion*, 353-62; Katell Berthelot, *Philanthropia Judaica: Le debat autour de la "misanthropie" des lois juives dans l'Antiquite*, JSJSup 76 (Leiden: Brill, 2003), 368-74; Gerber, *Bild des Judentums*, 100-18; and G. P. Carras, "Dependence or Common Tradition in Philo *Hypothetica* VIII 6.10-7.20 and Josephus *Contra Apionem* 2.190-219," *SPhilo* 5 (1993): 24-47. It seems clear to me that even if Josephus depended in part on earlier sources (such as the *Hypothetica* or Ps-Phocylides), he carefully selected or even adapted this material, and deliberately included this in *Apion*. Indeed, an important implication of my analysis below is that the political theology recorded in *Apion* reflects a mature and more sweeping formulation of ideas that play a profound role already in *Antiquities*. These ideas also have an important apologetic dimension that especially resonates post-70 C.E. which has been largely unappreciated by scholars. See below. For a more detailed discussion, see Flatto, "Between Royal Absolutism and an Independent Judiciary," ch. 3.

36 *Ag. Ap.* 2.164-65.

Tracing back to Mosaic legislation, Jewish law's ancestry surpasses all other legal traditions according to Josephus,³⁷ and its corpus remains constant throughout Jewish history. Despite dramatic changes in circumstances – military defeats, loss of autonomy, and diasporic dispersion – Jews maintain absolute fidelity to their law. Contrasting the approach of the early Greeks, who obeyed the wishes and whims of the king (*Ag. Ap.* 2.154-55), the Jews have always upheld their laws and conducted themselves in a steadfast manner:

As for us, although we have undergone countless different fortunes, thanks to the changes among the kings who ruled Asia, we have not betrayed the laws even in the most extreme crises... (*Ag. Ap.* 2.228)

Later on Josephus describes the courageous nature of this ongoing commitment:

We have trained our courage not for undertaking wars of self-aggrandizement but for preserving the laws. While meekly enduring defeat of other kinds, whenever people force us to alter our regulations then we undertake wars, even when it is beyond our capacity, and we hold out to the bitter end. (*Ag. Ap.* 2.272)

In highlighting the antinomy between laws and wars, Josephus clearly also intends to distinguish the Jews from the Romans.³⁸ While Romans accumulate

37 Josephus's claim of legal supremacy even extends to Rome, as I elaborate upon below. While Josephus's pride has a polemical tone, the juristic themes he accents are indeed original and anticipate various notions of jurisprudence that only enter the Western legal imagination in early modern times. See my brief comments in the conclusion below, and the more extensive remarks in the introduction to Flatto, "Between Royal Absolutism and an Independent Judiciary." The contribution of the Jews to the early history of jurisprudence should be compared and contrasted with that of the Romans, which is very much wrapped up in the role of power and empire. On the latter, see Aldo Schiavone, *The Invention of Law in the West* (Cambridge, Mass.: Harvard University Press, forthcoming).

38 This insight is meant as an important addition and corrective to recent scholarly works that describe *Apion* as an attempt by Josephus to frame Judaism in terms that are appealing to Roman civilization. See, e.g., Jonathan C. Edmondson, Steve Mason, and James Rives, eds., *Flavius Josephus and Flavian Rome* (Oxford: Oxford University Press, 2005); John M. G. Barclay, "Judaism in Roman Dress: Josephus' Tactics in the *Contra Apionem*," in *Internationales Josephus-Kolloquium Aarhus*, ed. Jürgen U. Kalms (Münster: Lit, 2000), 231-45; Gunnar Haaland, "Jewish Laws for a Roman Audience: Toward an Understanding of *Contra Apionem*," in *Internationales Josephus-Kolloquium Brussel*, 282-304; and Martin Goodman, "Josephus

imperial power and triumph in battle, Jews bravely safeguard their laws. Moreover, their unswerving loyalty extends to all sectors of Jewish society, which differs markedly from other nations who entrust the law solely to a jurist class. The stark contrast between Jewish and Roman civilization is likewise reflected in the fundamentally different ways they each achieve order. Whereas the organization of Roman civilization, as perceived by Josephus,³⁹ is especially evident in the operation of its military camps and expeditions, the structure of Jewish civilization is most apparent in its disciplined commitment to live according to the laws.

Josephus amplifies this distinctive quality of the Jews one more time toward the end of *Apion*:

...for most people, by now, transgressing the law has become a fine art!
But certainly not among us. Rather, even if we are deprived of wealth,
cities, and other good things, at least the law endures for us immortal...
(*Ag. Ap.* 2.276-77)

Josephus's larger message, in the aggregate, is even more emphatic. The only polity that will perpetually achieve lawfulness, order, and *libertas*, Josephus stresses, is one governed by a theocracy – the inviolable rule of the ideal, sacred law.

Three aspects of Josephus's argument in this context resonate with themes from his earlier works discussed above. First, Josephus promotes law over power, especially monarchic power. In this vein, he taps into the anti-monarchic sentiment of the Roman Republic that persists even during the Principate, recalling the post-Caligula interregnum attack on imperial rule for its tyrannical tendencies. Second, Josephus represents the Jewish legal system as a firm and durable political structure. That is, he deliberately distinguishes his portrait of the ideal polity from the risks of anarchy or innovation that undermine other political arrangements. It was precisely these latter deficiencies that plagued the Israelites during the period of the Judges or the Romans under despotic rulers, and which fundamentally undermined the Fourth Philosophy. Finally,

as Roman Citizen," in *Josephus and the History of the Greco-Roman Period: Essays in Memory of Morton Smith*, ed. Fausto Parente and J. Sievers, StPB 41 (Leiden: Brill, 1994), 329-38.

39 See Shaw, "Josephus: Roman Power and Responses to It." Both the Romans and the Jews had a constant, daily dimension to their respective modes of order: quotidian life in Roman military camps, and the daily regulations which are prescribed by Jewish law.

Josephus focuses attention on the singular merit of Jewish law – which content he described in *Antiquities* and whose essence he captures in *Apion* – which continues to flourish in his lifetime. Indeed, the Jewish commitment to law eclipses that of all other civilizations, including Rome.

By these successive arguments Josephus not only portrays the Torah as promoting an ideal polity, but even succeeds in restoring contemporary Jewry to a dignified political position, despite suffering a catastrophic blow to its sovereignty in 70 C.E.⁴⁰ In the aftermath of this tragedy, Jews were relentlessly subject to their enemies' taunts, including the blistering charge that recent political events signal the divine rejection of the Jewish people.⁴¹ A revealing paragraph in *Apion* captures a similar animus:

...For he (=Apion) says that it is evidence of the fact that we do not employ just laws or worship God as we should that [we do not govern,] but are subservient to other nations, one after another, and that we have experienced some misfortunes affecting our city. (*Ag. Ap.* 2.125)⁴²

- 40 Josephus encountered political issues from a unique vantage point that combined Greco-Roman and Jewish perspectives on the themes of power and governance. During the latter decades of the first century C.E., however, both of these viewpoints were colored by a political landscape filled with turmoil and confusion. Changes in the Roman world, including the chaotic “Year of the Four Emperors,” the transition to the Flavian dynasty, and especially the tyrannical rule of Domitian, raised challenges for Roman political ideologies. The balance between imperial power and the popular distribution of political rights was now a primary concern. In the case of the Jews, the political crisis of the late first century C.E. was far more dramatic. After the Romans crushed the uprising of Palestinian Jews in 66-70 C.E., Jews confronted an entirely new political reality in which virtually all traces of Jewish governance had been wiped out.
- 41 Of course this would become a familiar trope that circulated widely beginning with Augustine's Doctrine of Jewish Witness. For more on anti-Jewish polemics in late antiquity, see Peter Schäfer, *Judeophobia: Attitudes Toward the Jews in the Ancient World* (Cambridge, Mass.: Harvard University Press, 1997). For more on later anti-Jewish polemics, culminating in the Augustinian doctrine, see Marcel Simon, *Verus Israel: A Study of the Relations between Christians and Jews in the Roman Empire AD 135-425*, trans. H. McKeating (London: Littman Library of Jewish Civilization, 1986); and Jeremy Cohen, “Revisiting Augustine's Doctrine of Jewish Witness,” *JR* 89 (2009): 564-78.
- 42 One of Josephus's responses to this charge is stated in *Ag. Ap.* 2.134, “...while we, being free, used to rule in addition over the surrounding cities for about 120 years up till the time of Pompey the Great; and when all the monarchs, on all sides, were hostile to the Romans, ours alone because of their loyalty, were maintained as allies and friends.” While these lines brag about the past autonomy and political clout of the Jews, they must have been difficult for Josephus to express or record

Reeling from a crushing defeat, Josephus (and many other Jews) confronted sweeping theological and political questions such as why the chosen people were spurned, and whether sovereignty and territorial control are the sole barometers of political success?⁴³ For Josephus the answers to these theological and political questions intersect and find their fullest expression in his mature writings: the essence of the Jewish polity lies in its legal supremacy, which continues to flourish in contemporary circumstances. In other words, Josephus successfully propounds a political-theological vision of Judaism that can be sustained even in a dramatically transformed landscape.

As Josephus states at the end of *Antiquities*, the chain of Jewish leadership has led from a monarchy to a priestly aristocracy, and therefore currently approximates the form of an ideal government.⁴⁴ Among the primary responsibilities of the priestly aristocracy is administering a legal system, a function that continues to be as relevant as ever in Josephus's lifetime. Moreover, the juristic advances of post-destruction Jewry reflect their perpetual commitment to legal excellence. All of this implies that a modern Jewish polity – a theocracy – can be rebuilt on the foundation of law.

Responding to the post-70 C.E. upheaval by Jewish opponents, Josephus develops and refines a striking, alternative political model of theocracy to characterize the Jewish polity which withstands criticism, and instead challenges all other nations. Theocracy rejects the notion of governance by men, and replaces it with the concept of governance by God's laws. Only this template will consistently achieve *libertas* and lawfulness.

In wrestling with these political-theological themes in the shadow of the Roman defeat of the Jews, Josephus anticipated, in a certain sense, the famous challenge that Saint Augustine faced three centuries later in his *City of God*.⁴⁵

after the great fall of 70 C.E. Not surprisingly, Josephus articulates a more comprehensive response to this charge, what I refer to below as his political-theological vision of Judaism.

For additional discussion of *Ag. Ap.* 2.134 and related passages, see John M. G. Barclay, "The Empire Writes Back: Josephan Rhetoric in Flavian Rome," in *Flavius Josephus and Flavian Rome*, 315-32.

43 These would remain the enduring questions of Jewish political philosophy. See Ruth R. Wisse, *Jews and Power* (New York: Nextbook, 2007); Michael Walzer et al., eds., *The Jewish Political Tradition* (New Haven: Yale University Press, 2000-2006); and David Biale, *Power and Powerlessness in Jewish History* (New York: Schocken Books, 1986).

44 *Ant.* 20.224-34.

45 Of course by this point the Roman Empire had already converted to Christianity,

After the sacking of Rome in 410 C.E. by the Goths, Augustine grappled with the importance of worldly power according to Christian theology. In response, he formulated his famous distinction between the “City of God” and the “City of Man,” which constitutes one strategy for confronting this issue. Josephus, centuries earlier, championed an entirely different approach. On the Jewish wasteland left behind by the Romans Josephus gradually built the edifice of a new political-theological and juridical construct, which he completed after three decades and labeled a “theocracy.”

Apion then offers a paean to, and a petition for, the primacy of the ideal law of the Jews and the theocracy it sustains, which serves as a model for other legal and political systems.⁴⁶ Viewing Jewish history retrospectively, and looking ahead as well, Josephus identifies sacral law as the one constant in Jewish life, at least from his idyllic (and ahistoric) perspective.⁴⁷ The law constitutes the essence of Jewish institutional power, and this form of power is superior to the Roman variety which is wielded at the mercy of strong men. *Contra Shaw*, conceptions of the formal power of sacral law and reflections upon the ideal “constitution” of theocracy pervade Josephus’s biblical exegesis and political commentary, and dominate the mature political theology of his later works.

and Christians had enjoyed political sovereignty for nearly a century, which makes the comparison to the Jewish predicament following 70 C.E. loose at best.

46 *Apion* seeks to introduce this optimal template to the entire civilized world. Sounding a triumphant note near the end of *Apion* (2.284), Josephus asserts that just as God permeates the whole universe, so too law, as ideally realized in the Jewish theocratic polity, has influenced all of humanity.

47 This article adds a new chapter to the study of post-biblical and pre-rabbinic Jewish law that has rightfully received much attention in several recent studies documenting the significant growth in Jewish law in the post-biblical and pre-rabbinic period. See Aharon Shemesh, *Halakhah in the Making: The Development of Jewish Law from Qumran to the Rabbis* (Berkeley: University of California Press, 2009); and Vered Noam, *From Qumran to the Rabbinic Revolution: Conceptions of Impurity* (Jerusalem: Yad Ben Zvi Press, 2010) (Hebrew). While these other works demonstrate the growth of substantive law, this article captures the centrality of law as a conceptual phenomenon, and its prominence for a leading political theology of Jewish late antiquity.

Conclusion

In conclusion, I wish to reflect upon the profound gap that has emerged between the original meaning of theocracy and its contemporary usage noted in the introduction above. If the core of theocracy advances a normative order, and the very impetus for its formulation is an objection to the unbridled rule of men, then how did this notion become so transformed that in its modern incarnation it essentially has the opposite meaning? While the pejorative resonance in modern discourse may derive from a profound distrust of clerical authorities in the West and the sense that religious law imposes fundamentalist values, or worse, masks dangerous autocratic impulses which defy the tenets of democracy, the cleavage between theocracy and the rule of law can also be traced to certain larger phenomena. Underlying the modern usage is a sensibility that separates the theocratic regime from its normative framework, notwithstanding its juristic roots. Three factors, which deserve greater study in another forum, have contributed toward this transformation:

1) An Alternative Conception of Theocratic Rule

While the Josephan theocracy assumes a normative structure, the essential identification of theocracy with a system of law is far from obvious. *A priori*, a conception of the kingship of God does not require a commitment to the rule of law. Consider in this regard the core of Christian theology where the sovereignty of heaven demands absolute faith and devotion, but not legal obedience. Even within the Hebraic tradition, various biblical passages that trumpet the kingship of God do not emphasize God's direct rule through laws.⁴⁸

Moreover, even the few biblical passages that adopt an unequivocal vision of a theocracy may intend to espouse an ideal of spiritual anarchy. Promoting an ideal of immediate and unmediated divine rule can readily assume an antinomian form.⁴⁹ Accordingly, the decisive conceptual turn in Josephus's

48 These passages presumably are consistent with human kingship, and the placement of legal authority in the hands of mortal kings. The few biblical passages that adopt an unequivocal vision of a theocracy referred to immediately below, however, openly reject human kingship.

49 This emerges from various biblical passages. See the discussion in the introduction to Flatto, "Between Royal Absolutism and an Independent Judiciary."

treatment is translating theocracy into the direct rule of the divine king through sacral law.⁵⁰ But the basic term can sustain a different, essentially opposite, connotation.

2) *The Early Modern Transformation of Theocracy*

A crucial shift in the meaning of theocracy of a different kind occurred in the early modern period. In an important study of the legacy of Hebraic political ideas, Eric Nelson has demonstrated the profound influence of Josephus's doctrine of theocracy on early modern Western thought.⁵¹ Yet, Nelson does not emphasize the conceptual metamorphosis that transpired when the concept of theocracy was appropriated during this latter period. It is precisely in following this trail where matters take a counter-intuitive, and even ironic, turn.

As Nelson explicates, Josephus's notion of theocracy paved the way for supporting, of all things, a doctrine of religious toleration in the early modern period. Explaining this effect, Nelson states that early modernists understood that according to Josephus's ideal the head of the Israelite *politeia* was the civil sovereign, who was entrusted with the administration of Mosaic laws. As the laws encompass both civil and religious affairs, what emerges is that the civic authority (as opposed to the sacral authority, such as the high priest) also administers religious laws.⁵² Adopting this model in early modern times, however, leads to a paradoxical result, for the only religious laws that a civic authority would support in practice are those that serve a civic purpose. Therefore, the early modern version of theocracy mandates a divinely ordained emptying of religious laws, i.e., a divinely ordained notion of toleration.

Beginning with a comprehensive Mosaic legislation crammed with religious laws and ending up with a virtually blank set that tolerates all religious practices is difficult to fathom. Yet, this transformation can be traced to a crucial inversion that the concept of theocracy undergoes when it passes

50 Other important Jewish works from late antiquity similarly focus on the primacy of law, even though they do not directly operate with the concept of theocracy. Rooted in the biblical trope of the Sinaitic covenant, it is their enduring commitment to, and profound elaboration of, this conception which generates a jurisprudence of the rule of law. See *ibid.*

51 See Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Cambridge, Mass.: Harvard University Press, 2010), 88-137.

52 Accordingly, the imprimatur of the civic authority is necessary to authorize religious laws. See *ibid.*, 90-91.

through the early modern filter. Even though sixteenth- and seventeenth-century writers understood the Josephan doctrine as vesting law in the civic authority, the essence of Josephus's theocracy emphasizes the reverse idea. In a theocracy, the sacral, legal authority orders and structures the polity. Or, more accurately, the immutable sacral laws of God, which are mediated through the priestly judicial administrators, constitute the entirety of Israel's polity.⁵³

The early modern adaptation of the notion of theocracy, then, enables a political entity vacated of particular legal doctrines. In such a revised scheme, the civil authority must embrace laws supplied from elsewhere. Viewed from this new perspective, the theocratic regime represents an institution in need of lawful ordering.

3) *Religion, Law, and the State in Early Modern Politics*

Another dramatic ideological shift that took place during the early modern period has significant implications for the way the concept of theocracy has evolved over the centuries, albeit in a more indirect manner. During this phase of Western history the role of religion within the polity changed dramatically with collateral consequences for the nature of the state and the rule of law. Not only did this era foster the rise of Enlightenment rationalism with its eroding effect on spiritual mores, but even within the sphere of religion, the parameters of ecclesiastical authority were recalibrated, and the domain of the church was separated from the state enterprise.

The impact of these developments on the notion of theocracy is manifest when one takes stock of the similarities and differences between the ascendancy of law in late antiquity and the early modern era. At first blush, the similarities between these phases are substantial. Surveying Josephus's oeuvre (alongside other leading Jewish writings from late antiquity), one discerns certain essential constitutional tropes that only find expression in the West in early modern and modern jurisprudence.⁵⁴ Select writings from Josephus promote the autonomy

53 Nelson (*ibid.*, 179-80 n. 13) notes that the early modernist reading of Josephus, which understands legal authority as belonging to the civic authority rather than the priests, may not be the simple reading of Josephus. Of course, Nelson's formulation is far too equivocal. It is clear from the analysis in this article that Josephus understands legal authority as the sacral responsibility of priests, and that sacral laws are the essence of the polity. This is especially true in *Apion*, where the notion of a theocracy is fully formulated and developed.

54 To be sure, some of these ideas already surfaced to a limited extent in pre-modern Western law, but the leading legal position of the monarch was never fully

of law, and assign its discrete administration to independent judicial institutions. Similar notions, such as the separation of powers, an independent judiciary, and the rule of law, become cornerstones of modern Western thought. Moreover, the core of Josephan theocracy champions the singular capacity of law to structure and govern a civil society, a quintessentially modern perspective.

Nevertheless, despite these arresting resemblances the seismic religious changes that transpired in the wake of modernity contributed to the fundamental divergence between these respective schemes. The original notion of theocracy in Jewish late antiquity advanced a concept of legal supremacy rooted in the religious order. Situated beyond the reach of sovereign power, Jewish theorists envisioned a discrete legal edifice built upon a sacral structure and operating apart from the dominant political machine. Here the rule of law arose apart from, or even contrary to, the political entity, as a bold alternative to the governance of men. In contrast, during the early modern period the heightened emphasis on the authority of law arose from within the state, as a medium of political governance. At the same time, religion was now deliberately exiled from the public sphere and relegated to the periphery of national concerns. In this alternative configuration, religion no longer serves as a vibrant source of normative traditions relevant to the larger political landscape. Instead, law undergirds the modern administrative state, and the vestige of theocratic rule is encountered as beyond the scope of legal operation.

Collectively, these three factors – the alternate antinomian connotation of theocracy as anarchy, the way its legacy was transformed in early modern discourse to focus on the civic authority, and the weakening of its sacral base with the advent of modernity – contribute to the contrary meaning of theocracy in contemporary discourse. Yet, returning to the original notion of theocracy and its numerous intertexts in the writings of Josephus demonstrates how deeply it is embedded within a normative framework. Recovering the thick meaning of theocracy can have enduring implications for the modern setting as well. Beyond supporting Hirschl's appeal to join modern theocratic regimes with constitutional institutions, a more ambitious merger should be the ultimate aspiration. Since the primary mandate of a theocracy is to achieve legal order, theocratic governments should be constructed in a manner that realizes their internal call to execute the uniform application of just laws.

challenged throughout the pre-modern period, and therefore legal authority was always within his grasp. See the introduction to Flatto, "Between Royal Absolutism and an Independent Judiciary."