

**The Chief Magistrate  
Executive Power in Light of Hebraic Republicanism**

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Version: April 19, 2024

Paper to be presented at the

Notre Dame Graduate Conference  
in Political Theory and Constitutional Studies  
May 3, 2024

## Introduction

In the House of Representatives Chamber of the United States Capitol, above the gallery doors, are twenty-three relief portraits of historical lawgivers “noted for their work in establishing the principles that underlie American law.”<sup>1</sup> Given that recent description, the presence of some of them is unsurprising — Founders including George Mason, English jurists like William Blackstone — but others are unexpected, including Moses Maimonides. Undoubtedly a giant in Jewish law and philosophy, Maimonides is not usually remembered as a major figure in the history of modern constitutionalism or American liberty.

However, this may only be because of our imperfect historical memory. The archives of the Architect of the Capitol contain a memorandum that documents the lawgivers’ selection as “makers of the law...and those who influenced the American legal system,” on the basis of input from law professors, attorneys, and a justice of the Supreme Court.<sup>2</sup> Taking the selection committee at its word, why might Maimonides make the final list? In his legal code, Maimonides ruled that even the highest governing officials must always be subject to the rule of law of a higher constitutional order.<sup>3</sup> Maimonides also described the rules that limited the prerogatives available to leaders in times of crisis, including a fundamental law recorded in the

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<sup>1</sup> Architect of the Capitol, "Relief Portrait Plaques of Lawgivers" online at <https://www.aoc.gov/explore-capitol-campus/art/relief-portrait-plaques-lawgivers>.

<sup>2</sup> The memo describing the redaction of the final list of lawgivers, is dated August 17, 1949 and stored in the archive of the Architect of the Capitol’s Curator’s Files, under the title “Reconstruction of Roof Over House Wing and Remodeling House Chamber: Marble Plaques Over Gallery Doors,” a copy of which the Architect’s staff sent to me. Summary details are also contained in a letter from the Architect of the Capitol, David Lynn, to then-Congressman John F. Kennedy, dated February 11, 1952, in which the Architect explains the installation was done pursuant to “Public Law 155, 79<sup>th</sup> Congress, approved July 17, 1945.” For one of the initial proposed lists, not identical to the final listing, containing Maimonides but giving no rationale as to why, see F. Regis Noel, Laurence F. Schmeckebier, George Moriarty, and Donald M. Counihan. “Report of the Committee on Historical Research.” *Records of the Columbia Historical Society, Washington, D.C.* 50 (1948): 477–82.

<sup>3</sup> Moses Maimonides, *Mishneh Torah: Yad ha-Chazakah* (Jerusalem: Hotzaat Shabse Frankel, 2001 [ca. 1180]) (Hebrew), Bk. 14, On Judges [*Shophetim*], Laws of Kings and Their Wars, Chapter 3.

Talmud (*gadol kavod ha-briyot*, “great is human dignity”), requiring leaders to give heavy weight to respecting the human person even in decisions made under the exceptional exigencies of crises and emergencies.<sup>4</sup> The Talmudic constitutional rule Maimonides codified overrides even divinely-inspired decrees and laws and certainly overpowers mere positive laws or executive proclamations.<sup>5</sup>

Maimonides’ rulings were significant precedents for respect for the principles of individual rights, governments limited by the rule of law, and skepticism about absolute monarchy. His writings were influential not only in Jewish law, but among Atlantic political theorists generally, who often cited him by name. Recent scholarship has now established that seventeenth- and eighteenth-century political Hebraism (the use of Hebrew-language rabbinic sources to work out theories of politics and law in early modern Europe and revolutionary America) was an important voice in the development of modern constitutions and republican government. Early modern theorists turned to the ancient “commonwealth of Israel,” stylized as “the Hebrew republic,” as an exemplar among historical models of government.<sup>6</sup> Although there is now recognition that Hebraic republicanism played a decisive role in excluding kingship as a legitimate form of government, there has been surprisingly little attention given to the institutions and models of executive leadership internal to the Hebrew republic and what role they may have played in later constitutional thought.

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<sup>4</sup> Ibid., Laws of Sanhedrin, ch. 24, Law 10.

<sup>5</sup> Babylonian Talmud, Tractate *Berakhot* 19b. For the extension of the dignity limit to a universal rule of law, see Tractate *Sanhedrin* 56b, quoting Tosefta *Avoada Zara* 9.4 (recording the rabbinic tradition that every nation of the world had an obligation “just like” (*k’shem*) Israel to appoint judges in every jurisdiction, in order to establish a just legal system (*dinin*)).

<sup>6</sup> The scholarly literature documenting the phenomenon and influence of political and legal Hebraism has grown considerably in recent years. Sources relevant to the present paper on Hebraism and the American search for a republican executive are collected in Daniel D. Slate, “Franklin’s Talmud: Hebraic Republicanism at the Constitutional Convention and Ratification Debates, 1787-1788,” *Journal of American Constitutional History* 1 (2023): 232–285, 236 n.9.

Recent discoveries in the history of political thought such as these have important implications for constitutional history and contemporary political theory, inviting us to reassess subjects that once seemed settled. Not only are longstanding debates about the meaning of executive power at the founding still lively and ongoing, recent scholarship has suggested that meaning may itself have been undergoing change in the late 1780s.<sup>7</sup> A significant portion of the recent debate has been about how much the president might be compared to a king. This dimension of the debate has brought it into conversation with the growing field of scholarship on political Hebraism. One of the prominent scholars in this field, Eric Nelson, has drawn the surprising conclusion that while the name and title of “king” became completely illegitimate in founding-era America (due to the powerful effect of Hebraist arguments, including those in Tom Paine’s 1776 pamphlet, *Common Sense*), nonetheless the prerogative powers of a king could be—and, Nelson concludes, largely were—assigned to the President in Article II of the Constitution.<sup>8</sup>

This conclusion is wrong. Although I do not dispute the evidence of political Hebraism’s influence on founding-era America, which was considerable and extensive, that evidence does not compel us to accept a “royalist” presidency smuggled in under a non-royal title. At the time

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<sup>7</sup> U.S. CONST. art. II, sec. 1 (executive power of the presidency). For recent debates, see Julian Davis Mortenson, “Article II Vests Executive Power, Not the Royal Prerogative,” *Columbia Law Review* 119 (2019): 1169-1272, esp. 1178-87, and Julian Davis Mortenson, “The Executive Power Clause,” *University of Pennsylvania Law Review* 167 (2020): 1269-1367 (arguing against an expansive, prerogative-style reading of powers granted through Article II’s “vesting clause,” and instead favoring a simpler meaning: the power to execute the laws). For changes in meaning observably by 1789, see Jonathan Gienapp, “Removal and the Changing Debate over Executive Power at the Founding,” *American Journal of Legal History* 63 (2023): 229-50. For similar arguments about the varied meanings and theories of executive power that may have been operative at and after the Constitution’s ratification, see the classic study of Charles C. Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Indianapolis: Liberty Fund, 2007 [1923]), esp. 124-49. For important recent studies of the origins of the presidency, see Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge: Harvard Belknap, 2014); Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (New Haven: Yale University Press, 2015), and Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution* (Princeton: Princeton University Press, 2020)

<sup>8</sup> Nelson, *Royalist Revolution*, 185-91 (argument of James Wilson), 232 (concluding America’s executive holds the British royal prerogative as wielded by the Stuart kings).

of the Founding, political Hebraism had returned to peak influence. Americans did not simply reject the title of king, but the idea of a monarchic ruler generally, seeing it as incompatible with the principles at work in a republican form of government—the very essence of which the Constitution was meant to manifest and protect.<sup>9</sup> The idea of a monarchist principle hidden in the heart of Article II is also plainly in tension with the decidedly antimonarchist principles contained in the republican government guarantee clause of the same constitution’s Article IV.<sup>10</sup>

In this paper, I will argue instead that the Article II presidency drew inspiration from and bears institutional characteristics similar to the executive of the Hebrew republic, including: being commander in chief of national military efforts, yet neither king nor dictator; operating through and subject to the rule of law; sharing important powers concurrently with a senate; the constitutional requirement to be a natural-born citizen of the republic; and the non-kingly title of President. The chief magistrate of Israel’s polity, the biblical judge, was an executive studied and discussed by many of the republican theorists and political thinkers who were highly influential at the time of the Founding. These included not only writers such as James Harrington and Algernon Sidney but also Framers including Roger Sherman and John Adams. Prominent ministers also invoked the example of ancient Israel’s unique constitutional executive in well-attended and widely-circulated American political sermons read by founders such as Benjamin Franklin and George Washington. Hebraic sources on executive power took on a central role in the constitutional thought of the Founding, in part because they offered attractive alternatives to the other archetypical executives history offered—Roman dictators, European

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<sup>9</sup> For the evidence of Hebraism’s constitutional influence and incorporation into Article IV, section 4 of the Constitution (the republican government guarantee clause), see Slate, “Franklin’s Talmud,” 232-285.

<sup>10</sup> See *ibid.*, 282-284.

kings, the Venetian Doge and the Dutch Stadtholder—all of which had been rejected as exemplars for the American republic by 1788.<sup>11</sup> The polity of Israel alone remained.

This paper makes two contributions. First, it intervenes in current jurisprudential debates in constitutional history by demonstrating that we must understand the theorizing about the chief magistrate of ancient Israel if we are to have a complete and accurate understanding of “the executive power” wielded by the Article II President of the U.S. Constitution. Second, this paper shows how attending to this history can inform contemporary political theorizing by recovering an important alternative theory of executive power immutably subject to the rule of law. While the biblical judges enjoyed considerable discretionary power during times of crisis, they were always subject to a higher law and meaningful institutional constraints, described in detail in the political Hebraists’ source texts, including Maimonides’ Code. Among these was an inviolable norm of human dignity (*kavod ha-briyot*) built into any exercise of even the most extreme discretionary power.

In our time, calls for political leaders to invoke emergency powers and operate crisis governments are increasingly the norm rather than the exception. The theory of the politics of exigency this paper recovers relies not on the traditional legal maxim of *salus populi suprema lex esto* (“the safety of the people is the supreme law”) and its glorification of mere survival, but instead bases itself on the Talmudic principle “great is human dignity, which overrides even a divine injunction.” Recovering this theory is both significant for the history of political thought and appealing on normative grounds, since it views establishing and maintaining societies that respect human dignity as the proper end of government and because it does not suffer from the

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<sup>11</sup> The detailed assessment of the other republics, omitted here for reasons of space, is meticulously discussed in Adam Lebowitz, “Dictatorship at the American Founding,” working paper presented at the Stanford Political Theory Workshop, September 29, 2023, manuscript on file.

well-known means-ends defects of prior, dominant theories of emergency, which took the supreme principle of government to be collective safety and security, rather than the unquestionable worth of the human person.

## **The Executive of the Hebrew Republic**

### *1. Harrington*

In his most famous and influential work, *The Commonwealth of Oceana* (1656), James Harrington began with a set of “Preliminaries,” with the purpose of “showing the principles of government.”<sup>12</sup> There, he devoted nearly four times as much space to his discussion of ancient Israel than to all of the other republics combined.<sup>13</sup> Harrington celebrated the political teachings of “ancient prudence,” characterized by liberty and first disclosed to human beings through God’s example of “the commonwealth of Israel.” This prudence was later picked up by Greece and Rome. Harrington identified these ancient regimes as the exemplars of government and political philosophy that can best inform the present. Harrington contrasted them with what he, paraphrasing Gianotti, called “the transition of ancient into modern prudence” beginning with Caesar and characterized by “extinguishing liberty,”<sup>14</sup> Harrington ridiculed those who “puking still at ancient prudence, show themselves to be in the nursery of mother-wit.”<sup>15</sup> Rather, political wisdom consisted in realizing “how unsafe a thing it is to follow fancy in the fabric of a commonwealth, and how necessary that the archives of ancient prudence should be ransacked.”<sup>16</sup>

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<sup>12</sup> James Harrington, *The Commonwealth of Oceana and A System of Politics*, J.G.A. Pocock, ed. (Cambridge, Cambridge University Press, 1992) (hereinafter *Oceana*), 7, 8.

<sup>13</sup> *Ibid.*, 25-28 (Israel), 28-29 (Athens, Lacedaemon, Carthage, Rome, Venice, Switzerland, Holland), 29-30 (Israel again).

<sup>14</sup> *Ibid.*, 8.

<sup>15</sup> *Ibid.*, 131.

<sup>16</sup> *Ibid.*, 69.

Thus, the starting point for Harrington's republican theory, relying on "the Talmudists," was "the Scripture, wherein, as hath been shown, is contained that original whereof all the rest of the commonwealths seem to be copies," that is, Israel.<sup>17</sup> Harrington reminded his readers, "we who have the holy Scriptures, and in them the original of a commonwealth made by the same hand that made the world," to consider the importance of Israel's political institutions.<sup>18</sup> He began by reciting "the doctrine of the ancients," which identified six classical types of government – kingship and tyranny, aristocracy and oligarchy, democracy and anarchy, and named a seventh form, "which only is good," that brought together the virtues of rule by the one, the few, and the many to be the one, good mixed constitution, and identified the first to manifest this form: "The commonwealth of Israel consisted of the senate, the people, and the magistracy."<sup>19</sup> A proper republic included these three elements, since a "commonwealth consisteth of the senate proposing, the people resolving, and the magistracy executing, whereby partaking of the aristocracy as in the senate, of the democracy as in the people, and of monarchy as in the magistracy, it is complete."<sup>20</sup>

To prove his case, Harrington then outlined Israel and the other republics, with the approximate 4:1 ratio of attention to Israel and the others noted before. Harrington had named "the magistracy" as that part of the government that was to execute the laws, and defined its essential quality:

the magistracy, both in number and function, is different in different commonwealths; nevertheless there is one condition of it that must be the same in every one, or it dissolves the commonwealth where it is wanting. And this is no less than that, as the hand of the magistrate is the executive power of the law, so the head of the magistrate is answerable unto the people that

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<sup>17</sup> Ibid., 26, 65. See also p. 69, wherein the assignment of the study of ancient republics at Harrington's imagined constitutional framing begins with Israel.

<sup>18</sup> Ibid., 28.

<sup>19</sup> Ibid., 10, 25.

<sup>20</sup> Ibid., 25.



his execution be according unto the law; by which Leviathan [Harrington's nickname for Hobbes] may see that the hand or sword that executeth the law is in it, and not above it.<sup>21</sup>

Before the establishment of the kingship, the prophet Samuel, as Judge, was Moses' functional successor and was, next to God, "supreme magistrate."<sup>22</sup> The judges of Israel (Harrington named such others as "Othniel, Ehud, Gideon, Jephtha, Samson") were installed by "popular elections," emphasizing that the whole assembly of the people, not just the priests and elders, elected the civil magistrate.<sup>23</sup> In Harrington's Hebrew republic, the people had power over "the election of their magistrates, as the judge or dictator (Judges, 11:11), the king (1 Samuel, 10:17), the prince (1 Maccabees, 14)," sometimes with differing procedures.<sup>24</sup> He made clear that he drew a sharp distinction between kings, akin to those ruling continental Europe, and a prince of a republic, who would be to such kings "the terror and judge of them all."<sup>25</sup>

Harrington observed, however, that while there was some separation in power and function between the people, senate, and magistracy, there could also be concurrent exercise of power: "the Sanhedrim of Israel being thus constituted, Moses for his time, and after him his successor, sat in the midst of it as prince or archon, and at his left hand the orator or father of the

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<sup>21</sup> Ibid. See also M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998) 31-32, who claimed that in H's day, "the executive power" included what we today think of as the judicial power; note that in the Const. The president and senate appoint the judges – this is not so different than Harrington's model of the Sanhedrin appointing the lower courts that operated throughout the Israelite republic. *Oceana*, 28. It is not entirely clear that Vile accurately characterized Harrington; the latter assigned—and insisted on—the supreme and final judicial power to be in the hands of the people: "As an estate in trust becomes a man's own if he be not answerable for it, so, the power of a magistracy not accountable unto the people from whom it was received becoming of private use, the commonwealth loses her liberty." Wherefore the right of supreme judicature in the people (without which there can be no such thing as popular government) is confirmed by the constant practice of all commonwealths, as that of Israel in the cases of Achan and of the tribe of Benjamin, adjudged by the congregation." *Oceana*, 171, and drawing parallel examples from the other republics, 171-72. Cf. U.S. CONST. "the executive power" is vested in the *president* by "We the People").

<sup>22</sup> *Oceana*, 26.

<sup>23</sup> Ibid., 26, 180.

<sup>24</sup> Ibid., 27.

<sup>25</sup> Ibid., 257.

senate.”<sup>26</sup> Israel’s senate, Harrington was careful to note, was notable in that it thus had an executive function.<sup>27</sup> Additionally, Harrington explicitly classified Israel not as a league or confederation, but as a “single” united (that is, national) republic.<sup>28</sup>

Nonetheless, Harrington identified an institutional defect in much of the history of the first Israelite commonwealth, which was that there appeared to be no elected successor to Joshua as chief magistrate. Harrington observed that while he could celebrate Israel as an “equal” republic because of its redistributive, leveling agrarian law, it often was unequal in its “rotation”—while at first Israel’s elections were akin to those of Venice, which Harrington approved, this later changed.<sup>29</sup> The result was that the judge was often akin to the Roman dictator, only raised up and elected in times of crisis and “difficult cases.”<sup>30</sup> This led Harrington to the unusual interpretation of the oft-repeated phrase in the book of Judges, “in those days there was no king in Israel” to mean there was no judge.<sup>31</sup> It is possible that Harrington, by substituting “judge” for “king,” sought to avoid a reading of the book of Judges as endorsing the view that the commonwealth of Israel after Moses and Joshua was defective because it lacked an

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<sup>26</sup> Ibid., 27. Compare the U.S. Vice President sitting at the head of the Senate, with the President proposing legislation.

<sup>27</sup> Ibid., 28.

<sup>28</sup> Ibid., 32.

<sup>29</sup> Ibid., 27, 33, 34, 37.

<sup>30</sup> Ibid., 35. Harrington’s words on Israel: “And the election of the judge, *suffes*, or dictator was irregular, both for the occasion, the term, and the vacation of that magistracy,” a point Harrington noted “as you find in the book of Judges, where it is often repeated that in those days there was no king in Israel, that is no judge.” Ibid., 37. *Suffes* is Harrington’s mis-transliteration of *shophet* שׁוֹפֵט, the Hebrew term for the Judge and cognate with the title of the magistrates of Carthage, the *suffetes* mentioned by Harrington earlier, *ibid.* p. 29.

<sup>31</sup> Ibid., 37.

actual *king*. If instead we read it as Harrington did, the problem the biblical book was announcing was that there was no permanent, regularly-elected judge as authoritative chief magistrate. He explained that a proper republic needs to include a monarchic *fundtional* element (which he calls “dictatorian power”), for without it (dangerous though it can be), the republic will dissolve for other reasons, when exigent crises require a speed and secrecy not to be found in slow, open debates as those of the senate and assembly.<sup>32</sup> This defect as he saw it could be best remedied by making a republic’s chief magistrate elected on regular intervals and to equal terms. Harrington noted his view that the Bible endorsed the establishment of political institutions based on human wisdom, based on Jethro’s Divinely-ratified advice to Moses; he wrote that the ideal way to frame a republic is by looking at Israel’s example and supplementing it with human wisdom informed by ancient prudence, as exemplified by Moses’ advisor and father-in-law, Jethro.<sup>33</sup> Here he was struggling with a regular problem for republican theory: the proper form and mode of a properly republican executive. In his time, although he wrote explicitly that he favored the model of the Venetian council of ten,<sup>34</sup> another solution was equally implied by his own logic: to regularize the role of the biblical judge instead of instituting an actual king. Such an office would answer the needs for quickness and secrecy and would

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<sup>32</sup> Ibid., 131-32.

<sup>33</sup> Ibid., 28, 71.

<sup>34</sup> Ibid., 25, 132-33.

better match the function of the legally-regulated, republican executive Harrington had identified and along with Machiavelli had praised.<sup>35</sup>

Two years after publishing *The Commonwealth of Oceana*, Harrington published a reply to objectors and critics, *The Prerogative of Popular Government* (1658), which expanded on the *Oceana*'s first "Preliminaries" and also presented "the whole Commonwealth of the Hebrews, or of Israel, Senat, People, and Magistracy."<sup>36</sup> For his understanding of ancient Israel, Harrington drew both on rabbinic writings such as those of Maimonides, as well as the works of fellow Hebraists, including Grotius and Selden, whom he called "the ablest Talmudist of our age, or of any."<sup>37</sup> As in *Oceana*, Harrington was candid about his sources: immediately after stating his claim that all public officials in Israel, including "the Judge or Suffes of *Israel*," were elected through "the Suffrage of the People," he wrote:

In this, (especially if you admit the Authority of the Jewish Lawyers, and Divines call'd the Talmudists) the Scripture will be clear, but their Names are hard; wherefore not to make any Discourse more rough than I need, I shall here set them together. The Authors or Writings I use, by way of Paraphrase upon the Scripture, are the *Gemara*, *Babylonia*, *Midbar Rabba*, *Sepher Siphri*, *Sepher Tanchuma*, *Solomon Jarchius*, *Chiskuny*, *Abarbanel*, *Ajin Israel*, *Pesiktha Zotertha*. These and many more being for the Election of the Sanhedrim by the Ballot, I might have spoken them more briefly; for the truth is, in all that is Talmudical I am assisted by SELDEN, GROTIUS, and their Quotations out of the Rabbys [sic], having in this Learning so little Skill, that if I miscall'd none of them, I shew'd a good part of my Acquaintance with them. Nor am I wedded to Grotius or Selden, whom somtimes I follow, and sometimes I leave, making use of their Learning, but of my own Reason. As to the things in this present Controversy, they were no

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<sup>35</sup> Ibid., 131-32. For recent work contrasting the significance of Machiavelli's favoring the legally-constrained dictator against the emergency council of the Decemviri, see Eero Arum, "Machiavelli Against Sovereignty: Emergency Powers and the Decemvirate," *Political Theory* (forthcoming).

<sup>36</sup> James Harrington, *The Prerogative of Popular Government, being a Political Discourse In Two Books* [1658], in *The Oceana and other Works of James Harrington Esq; Collected, Methodiz'd, and Review'd with An Exact Account of his Life Prefixed, by John Toland, To which is added, An Appendix, containing all the Political Tracts wrote by this Author, Omitted in Mr. Toland's Edition*, 3rd ed. (London: A. Millar, 1747), title page, 229. This combined edition of Harrington's writings was available to the Founders; a copy was in John Adams' library.

<sup>37</sup> Ibid., bk. II, ch.. 4, 353.

other in *Athens* and *Rome* than they had been in the Commonwealth of *Israel*.<sup>38</sup>

In other words, Harrington had ransacked the “archive of ancient prudence” for the rabbinic interpretation of Israel’s polity. After emphasizing that even Jewish kings were popularly elected, he cautioned readers of the scriptural text: “Where it is affirm’d, that God rais’d up Judges in Israel, it is not denied that the People elected them,” citing Maimonides on the spot.<sup>39</sup> Harrington also explained how the tribes of Israel were thirteen but sometimes (by excluding the Levites from the count) “are reckon’d but Twelve,”<sup>40</sup> – this count appeared in the Founding period as both preachers and political publicists compared the thirteen confederated American states to the thirteen tribes of the Israelite national federation.<sup>41</sup>

In sum, Harrington had observed that Moses “and after him his successor, sat in the midst of [the Sanhedrin] as prince or archon,” a magistracy elected by the people.<sup>42</sup> Harrington had taken care to point out that the Sanhedrin was an unusual type of senate that exercised the powers of the executive magistracy, making its head the chief magistrate.<sup>43</sup> Drawing a clear

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<sup>38</sup> Ibid., bk. II, ch. 3, 343. It is worth noting that there are summary headings penned in the margin in John Adam’s copy; we can be confident he read this page. Harrington later quoted other rabbinic authorities, including “Mikotzi Misna [Mishna] Gemara” (perhaps a reference to Moses b. Jacob of Coucy, known in Hebrew as Moshe miKotzi, one of the Tosafot and author of a halakhic code, *Sefer Mitzvot Gadol*), and the astronomer and Jewish historian Abraham Zacuto. Ibid., bk. II, ch. 4, 354-55.

<sup>39</sup> Ibid., bk. II, ch. 5, 365.

<sup>40</sup> Ibid., 345.

<sup>41</sup> See, e.g., Joseph Huntington, *A Discourse Adapted to the Present Day* (Hartford, 1781), 9–10, and “K” [Benjamin Franklin], “To the Editor of the Federal Gazette.” *Philadelphia Federal Gazette*. April 8, 1788. Reprinted in *The Documentary History of the Ratification of the Constitution* [henceforth *DHRC*], *Volume XVII: Commentaries on the Constitution, Public and Private, No. 5: 1 April to 9 May 1788*, ed. John P. Kaminski and Gaspare J. Saladino. (Madison, WI: The State Historical Society of Wisconsin, 1995), 36–40, 37–38.

<sup>42</sup> Harrington, *Oceana*, 27.

<sup>43</sup> Ibid., 28.

parallel to the head of the Hebrew republic, Harrington described his idealized head of the commonwealth of Oceana as the “Lord Archon”—“whose meekness resembled that of Moses”<sup>44</sup>—characterized as “sole director,” and sitting with the assistance of, a council of fifty legislators “labouring in the mines of ancient prudence, and bringing her hidden treasures into new light.”<sup>45</sup> Harrington chose this account to close the “Second Part of the Preliminaries” of *Oceana* and, significantly, described the highest official of his idealized republic with the chapter’s final word: “president.”<sup>46</sup>

Prior scholarship has observed that Harrington “enjoyed among American political theorists and practitioners a reputation second only to John Locke” and has been recognized as so influential on the American Founding generation that one scholar, writing in the twentieth century, marveled at the need to write an introduction to the republican theorist’s life and works, as none would have been needed (and indeed would have been insultingly presumptuous) in the Founding era.<sup>47</sup> Harrington was celebrated by name by numerous founders, and public speakers could safely assume their audiences’ familiarity with him and his writings.<sup>48</sup> When the president of Yale, Ezra Stiles, delivered his public discourse in 1783 as the end of the Revolutionary War came within sight, he described New England to his American listeners to be “where we have

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<sup>44</sup> *Ibid.*, 179.

<sup>45</sup> Harrington, *Oceana*, “The Second Part of the Preliminaries,” 68. The closing word of the chapter is “president.”

<sup>46</sup> *Ibid.*, 68. Harrington later presented his Lord Archon retiring from public life and giving the government of the commonwealth over to the people, with the new constitution securely in place, after which the people elected him prince for life of their republican commonwealth. He then at appropriate times phased out the standing army and the initial set of taxes to put the commonwealth on a firm footing, with the agrarian law operating throughout. *Ibid.*, 245–46, 251–58.

<sup>47</sup> Charles Blitzer, “Introduction,” to *The Political Writings of James Harrington* (Indianapolis & New York: Library of Liberal Arts, 1955), xi (“Two hundred years ago one would hardly have presumed to ‘introduce’ the political theory of James Harrington to an educated American audience.”)

<sup>48</sup> *Ibid.*, xi–xii.

realized the capital ideas of Harrington's *Oceana*.”<sup>49</sup> Harrington's mode of theorizing, drawing inspiration from what Locke later called “history, both sacred and profane” to identify the principles of “ancient prudence,” traced the operation of free “political reason” back to the book of Exodus and the beginnings of the Hebrew republic.<sup>50</sup> Harrington's thought fit easily into, and helped give political-theoretical structure to, the biblically-saturated republican culture of eighteenth-century America.<sup>51</sup>

## 2. *Sidney*

Written to refute *Patriarcha*, the apologia for absolute monarchy by Robert Filmer, Algernon Sidney's *Discourses Concerning Government* (1698) was, “next after the Bible, the political text-book of the fathers of the Republic.”<sup>52</sup> Like Harrington, Sidney favored the mixed regime of ancient political theory; he observed such mixed constitutions, composed of democratic, aristocratic, and monarchic elements, might nonetheless carry different names “from the part that prevailed.”<sup>53</sup>

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<sup>49</sup> Ezra Stiles, *The United States elevated to Glory and Honor. A Sermon Preached before His Excellency Jonathan Trumbull, Esq. L.L.D. Governor and Commander in Chief And the Honorable The General Assembly of the State of Connecticut, Convened at Hartford, At the Anniversary Election, May 8th, 1783* (New Haven, Connecticut: Thomas & Samuel Green, 1783).

<sup>50</sup> J. G. A. Pocock, “Introduction,” xxi, to *The Commonwealth of Oceana and A System of Politics*, J.G.A. Pocock, ed. (Cambridge, Cambridge University Press, 1992) (hereinafter *Oceana*). John Locke, *Second Treatise* [1690], in Peter Laslett, ed., *John Locke: Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), § 115.

<sup>51</sup> See generally Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (Oxford: Oxford University Press, 2002), Daniel L. Dreisbach, “The Bible and the Political Culture of the American Founding,” in *Faith and the Founders of the American Republic*, ed. Daniel L. Dreisbach and Mark David Hall (Oxford: Oxford University Press, 2014), Mark A. Noll, *In the Beginning Was the Word: The Bible in American Public Life, 1492-1783* (New York: Oxford University Press, 2016), Daniel L. Dreisbach, *Reading the Bible with the Founding Fathers* (Oxford: Oxford University Press, 2017), and Mark A. Noll, *America's Book: The Rise and Decline of a Bible Civilization, 1794-1911* (Oxford: Oxford University Press, 2022).

<sup>52</sup> John Wingate Thornton, *The Pulpit of the American Revolution* (Boston: Gould and Lincoln, 1860), 262. See also Caroline Robbins, “Algernon Sidney's *Discourses Concerning Government*: Textbook for Revolution,” *The William and Mary Quarterly*, 3 (1947): 267–96, and Alan Craig Houston, *Algernon Sidney and the Republican Heritage in England and America* (Princeton: Princeton University Press, 1991).

<sup>53</sup> Algernon Sidney, *Discourses Concerning Government*, Thomas G. West, ed. (Indianapolis: Liberty Fund, 1990 [1698]), ch. 1 § 10.

Sidney described the role and qualifications of a chief magistrate in the sixteenth section of the first chapter of the *Discourses*. He opened this chapter by noting that Israel’s original government, “whose lawgiver was God,” never had a king.<sup>54</sup> Even with divine legislation, Sidney held that the people of Israel had considerable authority to organize their political institutions:

The Israelites, Spartans, Romans and others, who thus framed their governments according to their own will, did it not by any peculiar privilege, but by a universal right conferred upon them by God and nature: They were made of no better clay than others: They had no right, that does not as well belong to other nations: that is to say, the constitution of every government is referred to those who are concerned in it, and no other has anything to do with it.<sup>55</sup>

Holding like other republicans that governments are based on consent and directed at some real or apparent good, Sidney continued:

A people therefore that sets up kings, dictators, consuls, praetors or emperors, does it not, that they may be great, glorious, rich or happy, but that it may be well with themselves and their posterity. This is not accomplished simply by setting one, a few, or more men in the administration of powers, but by placing the authority in those who may rightly perform their office. This is not every man’s work: valour, integrity, wisdom, industry, experience and skill, are required for the management of those military and civil affairs that necessarily fall under the care of the chief magistrates. He or they therefore may reasonably be advanced above their equals, who are most fit to perform the duties belonging to their stations, in order to the publick good, for which they were instituted.<sup>56</sup>

Reciting Plato and Aristotle’s distinction between kings and tyrants (“the first seeks to procure the common good, and the other his own pleasure or profit”), Sidney lambasted the monarchist Filmer for the “gross and mischievous” errors of (1) failing to appreciate the common good as the proper end of government and (2) “that absolute power to which he would exalt the chief magistrate.”<sup>57</sup> Sidney observed, “Moses could not bear it: Gideon would not accept any resemblance of it,” and contrast them with the original despots, “Nimrod, Nimus, Pharaoh, and

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<sup>54</sup> *Ibid.*, ch. 1 § 16, 46.

<sup>55</sup> Sidney, *Discourses*, ch. 1 § 16, 48–49.

<sup>56</sup> *Ibid.*, 49.

<sup>57</sup> *Ibid.*, ch. 2 § 3.



the rest of that accursed crew.”<sup>58</sup> Sidney went on to rebut Filmer’s attempt to characterize ancient Israel as divinely ordained to be a monarchy, citing Calvin as well as additional “approved authors.” The first of these he marshaled for Israel’s aristocratically-tinged mixed constitution were “Josephus, Philo, and Moses Maimonides, with all the best of the Jewish and Christian authors,” including the staunch antimonarchist rabbi and commentator on Maimonides, Isaac Abravanel.<sup>59</sup> Sidney explained, that “the above-mentioned authors agree in the same thing, calling the people’s desire to have a king, furious, mad, wicked, and proceeding from their love to the idolatry of their neighbours, which was suited to their government, both which were inconsistent with what God had established over his own people.”<sup>60</sup>

If Israel was nonetheless for Sidney an idealized mixed constitution (with the aristocratic element dominant), who were the leaders who carried the monarchic element? Sidney answered this at length:

Moses, Joshua, and the other judges, had not the name or power of kings: They were not of the tribe to which the scepter was promised: They did not transmit the power they had to their children, which in [Filmer’s] opinion is a right inseparable from kings; and their power was not continued by any kind of succession, but created occasionally, as need required, according to the virtues discovered in those who were raised by God to deliver the nation in the time of their distress; which being done, their children lay hid among the rest of the people.<sup>61</sup>

Sidney immediately grouped Moses and Joshua together with “the other judges” – they held the same role. Although he went on to assert, like Harrington, that all the judges were “created occasionally,” upon closer inspection Sidney’s grouping of Moses and Joshua with the later judges suggests that the role of judge was not identical to the temporary crisis leader of the

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<sup>58</sup> Ibid. Sidney’s assessment of Nimrod as the first king and tyrant accords with the rabbinic teaching of the same. *Compare* *ibid.*, ch. 1 § 8 (“The mighty hunter, whom the best interpreters call a *cruel tyrant*”) with R. Moshe b. Nachman (Nahmanides/Ramban), Commentary to Gen. 10:9, citing Babylonian Talmud, Tractate *Eruvin*.

<sup>59</sup> Sidney, *Discourses*, ch. 2 § 9, 124.

<sup>60</sup> *Ibid.*, 125.

<sup>61</sup> *Ibid.*

Roman dictatorship. Rather, it had originally been a more permanent national figure. After all, while it is true Moses' own children did not inherit national leadership, Joshua was his official successor and led the nation with the acclaim and approval of the people.<sup>62</sup> This detail would not have been lost on Sidney's American readers, for whom the Bible was the most familiar text of all. Additionally, Sidney's (and Selden's) rabbinic authority Maimonides described a continuous succession of judges [*shopetim*] and their councils through the centuries of the Israelite commonwealth.<sup>63</sup> The original judge was neither dictator nor despot nor emperor.

Continuing to follow Harrington closely, Sidney gave his description of the federated Hebrew republic:

Having seen what government God did not ordain, it may be seasonable to examine the nature of the government which he did ordain; and we shall easily find that it consisted of three parts, besides the magistrates of the several tribes and cities. They had a chief magistrate, who was called judge or captain, as Joshua, Gideon, and others, a council of seventy chosen men, and the general assemblies of the people.

The first was merely occasional, like to the dictators of Rome; and as the Romans in times of danger frequently chose such a man as was much esteemed for valour and wisdom, God's peculiar people had a peculiar regard to that wisdom and valour which was accompanied with his presence, hoping for deliverance only from him.<sup>64</sup>

Sidney returned to the institutional structure of the ancient Israelite regime after stating that “our question is, whether one form of government be prescribed to us by God and nature, or we are left according to our own understanding, to constitute such as seem best to ourselves.”<sup>65</sup> For himself he wrote, “And if I should undertake to say, there never was a good government in the world, that did not consist of the three simple species of monarchy, aristocracy, and democracy, I think I might make it good. This at the least is certain, that the government of the Hebrews instituted by God, had a judge, the great Sanhedrin, and general assemblies of the people,” and

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<sup>62</sup> Joshua 1:1.

<sup>63</sup> Moses Maimonides, *Mishneh Torah*, Introduction.

<sup>64</sup> Sidney, *Discourses*, ch. 2 § 9, 127.

<sup>65</sup> Sidney, *Discourses*, ch. 2 § 16, 166.

identified the same or similar pattern in Sparta, the Dorian and Ionian cities, Athens, Rome, Venice, Genoa, Lucca, Germany, “the northern nations,” Hungary, Bohemia, Sweden, Denmark, and Poland.<sup>66</sup>

While the office of the biblical judge supplied the monarchic element of his mixed regime, Sidney was careful to insist that “whatever the dignity of a Hebrew judge was, and howsoever he was raised to that office, it certainly differ’d from that of a king.”<sup>67</sup> Sidney nonetheless suggested the monarchic *function* in ancient Israel was the same whether the magistracy was styled a judge or a king: “The judges are said to have been in power equal to kings; and I may perhaps acknowledge it, with relation to the Deuteronomic king, or such as the people might have chosen without offending God.”<sup>68</sup>

Here Sidney appears to hold simultaneously (1) that a government is good only when it displays all three of monarchy, aristocracy, and democracy and (2) that the monarchic element can be manifested only occasionally, as in his equation of the Roman dictators and the later biblical judges raised up to meet times of crisis. He portrays ancient Israel as answering the question of the divinely preferred regime, with a chief magistrate only sometimes present. Yet Sidney also identified the monarchic element in Rome with its permanent chief magistrates, first its elected kings and then “afterwards consuls representing kings.”<sup>69</sup> He does not mention the occasional, temporary dictator at all here when mapping Rome to the pattern of the mixed regime. Perhaps Sidney saw Israel, in the form originally established by Divine institution, to include a normative requirement that the office of judge be a more permanent monarchic element than it later became. The office of judge as held and conducted by Moses and Joshua would then

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<sup>66</sup> Ibid., 166-67.

<sup>67</sup> Ibid., ch. 2 § 9.

<sup>68</sup> Ibid., ch. 2 § 32, 311–12.

<sup>69</sup> Ibid, ch. 2 § 16.

have illustrated the proper operation of the normatively preferred regime. That the people of Israel later failed to maintain their government in its ideal form led Sidney to his observations, merely descriptive rather than prescriptive, that the “other judges” who came later appear in the biblical history more like Roman dictators. These later, “other judges” were raised up to meet new crises, yet they also tended to rule for many years after meeting the crisis, in periodic restorations of the original regime. Harrington, too, appeared to be preoccupied by the normative requirement for the monarchic element to be continuously operative in Israel’s mixed regime, which compelled him to insist that readers should substitute the meaning “in those days there was no *judge* in Israel” for the standard translation of “in those days there was no king in Israel,”<sup>70</sup> identifying as Israel’s institutional defect that the election of the judge was irregular rather than permanent and consistent.<sup>71</sup> Where Harrington appears to have seen this detail as lacking in Israel from the beginning, Sidney may have believed that, in the days of Moses and Joshua, the original form of Israel’s commonwealth included a permanent, popularly-approved chief magistrate who was neither dictator nor king but a truly national republican leader.

Both Harrington and Sidney were interested in what would enable a free, mixed constitution to endure and avoid falling into corruption and ruin.<sup>72</sup> One institutional lesson that

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<sup>70</sup> Harrington, *Oceana*, 37 (“the book of Judges, where it is often repeated that in those days there was no king in Israel, that is no judge”), 131 (“in a commonwealth that is not wrought up nor perfected, this [dictatorian] power will be of very frequent, if not continual use; wherefore it is said more than once upon defects of the government in the Book of Judges that *in those days there was no king in Israel*. Nor hath the translator (though for *no king*, he should have said *no judge*) abused you so much; seeing that the dictator (and such was the judge of Israel) or the dictatorian power, being in a single person, so little differs from monarchy...”).

<sup>71</sup> Harrington, *Oceana*, 37.

<sup>72</sup> On Harrington’s quest for the immortal republic, see Gary Remer, “After Machiavelli and Hobbes: James Harrington’s Commonwealth of Israel,” in Gordon Schochet, Fania Oz-Salzberger, and Meirav Jones, eds., *Political Hebraism: Judaic Sources in Early Modern Political Thought* (Jerusalem: Shalem Press, 2008). Sidney wrote that “all governments are subject to corruption and decay; but with this difference, that absolute monarchy is by principle led unto, or rooted in it; whereas mixed or popular governments are only in a possibility of falling into it.” *Discourses*, ch 2, § 19, 189.

emerges from their studies of republican government is that ancient Israel would have found success if it had maintained a permanent judge as its executive magistrate.

Another interesting passage in Sidney relates to his view of the extraordinary measures the Israel's leaders could take in times of crisis. After reciting examples from Greek and Roman history of tyrannicides and defenders of the people and the common good, Sidney continued to justify the principle of overthrowing tyrants and restoring liberty by citing "the examples of Moses, Aaron, Othniel, Ehud, Barak, Gideon, Samuel, Jephthah, David, Jehu, Jehoiada, the Maccabees, and other holy men" who "are perpetually renowned for having led the people by extraordinary ways (which such as [Filmer] express under the names of sedition, tumult, and war) to recover their liberties, and avenge the injuries received from foreign or domestick tyrants."<sup>73</sup> Sidney's idea of a just sedition appealing to restore liberty from oppression was also in Locke's appeal to heaven (with the latter nearly always invoking it through the case of the Israelite judge Jephthah).<sup>74</sup> American Revolutionary leaders later invoked the principle these two theorists taught to give legitimacy to their war for independence.

Sidney observed that the biblical law allowed for the creation of a king, but under numerous controlling laws and conditions. He quoted Josephus for the point: "He shall do nothing without the advice of the Sanhedrin; or if he do, they shall oppose him."<sup>75</sup> This led him to remark, attacking Filmer's absolutist position, that "God and his prophets give the name of king to the chief magistrate, endow'd with a power that was restrain'd within very narrow limits, whom they might without offense set up,"<sup>76</sup> and "the kings were no less obliged to perform the

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<sup>73</sup> Sidney, *Discourses*, ch. 2 § 24, 228.

<sup>74</sup> Locke, *Second Treatise*, *passim*. See also Yehiel Leiter, *John Locke's Political Philosophy and the Hebrew Bible* (Cambridge: Cambridge University Press, 2018).

<sup>75</sup> Sidney, *Discourses*, ch. 2 § 30, 289, quoting Josephus, *Jewish Antiquities*, bk. 4, ch. 8. See also *ibid.*, ch. 3 § 2, 335.

<sup>76</sup> *Ibid.*, ch. 2 § 30, 289

law than other men.”<sup>77</sup> Sidney quoted Maimonides’ rabbinic legal code, *Mishneh Torah*, for the point that Jewish kings ruled under the law of the Torah’s constitution, and could be subjected to criminal punishment by the Sanhedrin.<sup>78</sup> Whether the Hebrew republic’s chief magistrate was a judge or a king, the office was limited and controlled by the law of the polity.

### 3. *Sigonio*

Earlier exponents of the Hebrew republic who helped inaugurate the tradition of political Hebraism also marked the judge as the chief magistrate of the entire nation. Carlo Sigonio in his 1582 study wrote, “The magistrates of the entire people were first judges, then kings, then princes, and finally kings again, and their seat was the capital city.”<sup>79</sup> Sigonio was careful to note that while the biblical judges as chief magistrates wielded the power to rule, judge, “make deliberations of state, and conduct wars,” nonetheless “they did not enjoy the right to execute anyone they wished, since in all cases they were bound by the law.”<sup>80</sup> They operated as “commanders in chief,” but “the decision to declare wars was not their own.”<sup>81</sup> The Hebrew republic’s executive was “not hereditary—it was bestowed by the acclaim of the people whenever God chose a hero from among them.” Sigonio clarified that what this meant was not a divine election, but one that was providentially inspired, with the people themselves actually choosing who should hold the office of judge: “And when the Bible says that God raised up for the people this or that deliverer, it means that he planted within the people the idea that they

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<sup>77</sup> *Ibid.*, ch. 3 § 2, 336.

<sup>78</sup> *Ibid.*, 290, and ch. 3 § 2, 334–35 (“The Kings of Israel and Judah were under a Law not safely to be transgress’d”).

<sup>79</sup> Carlo Sigonio, *The Hebrew Republic*, trans. Peter Wyetzner (Jerusalem: Shalem Press, 2010), bk. VII, ch. 1 (“Types of Magistrates”), 268. Originally published as *De republica Hebraeorum* (Bologna, 1582).

<sup>80</sup> *Ibid.*, bk VII, ch. 2 (“The Judges of Israel”), 269–70. Sigonio here drew an explicit contrast with kings.

<sup>81</sup> *Ibid.*, bk VII, ch. 2, 270. Compare U.S. Const. art. II, sec. 3

should choose this or that judge to command their war.”<sup>82</sup> Sigonio also believed it likely that the judges “had the power to summon the people, to assemble the senate, or to set before either body whatever proposals they considered to be in the interest of the state.”<sup>83</sup> The judge’s powers and authority were considerably more limited than Sigonio’s reading of the king’s, as the judge’s came “from the laws” – it was a constitutionally-specified and limited office.<sup>84</sup>

#### 4. *Cunaeus*

The Dutch scholar Petrus Cunaeus, drawing far more than Sigonio had on rabbinic sources, also attended to Israel’s political leaders in his 1617 study of the Hebrew republic. Harrington read and cited Cunaeus,<sup>85</sup> and his ideas continued to interest readers well into the following century; Benjamin Franklin possessed a copy in his personal library.<sup>86</sup> The twelfth chapter’s précis began with “On dictators and judges,” and Cunaeus described the office of those who succeeded Moses and Joshua as “the supreme leader of the people, both at home and on the field of battle,” who “had just as much authority” as Israel’s first two leaders. Cunaeus had a tendency of “placing Jewish politics in a Roman context,” often applying Roman categories and titles to Jewish institutions and offices.<sup>87</sup> The judge received similar treatment, and Cunaeus also blended in Greek writers’ description of Rome’s dictators as he developed his analogy:

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<sup>82</sup> Ibid., 270. Compare the proposals of James Wilson at the Federal Convention, who insisted the president should be marked out as the office filled by national choice of the people, unlike the other constitutionally-specified positions of leadership.

<sup>83</sup> Ibid., 270. Compare U.S. Const. art. II, sec. 3 (That the president “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper”).

<sup>84</sup> Ibid., bk. VII, ch. 3 (“The Kings”), 272.

<sup>85</sup> See Harrington, *Oceana*, 165.

<sup>86</sup> Edwin Wolf 2nd and Kevin J. Hayes, *The Library of Benjamin Franklin* (Philadelphia: American Philosophical Society & Library Company of Philadelphia, 2006), 231.

<sup>87</sup> Petrus Cunaeus, *The Hebrew Republic*, trans. Peter Wyetzner (Jerusalem: Shalem Press, 2006), 228 n. 129 (translator’s note).

[G]iven their power to command and to make laws they might well have been called praetors and dictators, though the sacred histories call them ‘judges’ for much the same reasons. But Flavius called them *monarchai* [monarchs], which was the same name the Greeks gave to Sulla, Cinna, Marius, and the other Roman dictators. These judges received their powers out of necessity in times of great political strife; and through difficulty and danger they discovered that they were always successful in war, while the rashness of kings often led Fortune to desert them. At times the judges also took an active part in civil matters, and tried cases (though only the more serious ones, for they rarely sat on tribunals). Their task was to give orders, to take command, and to manage the highest affairs of state.<sup>88</sup>

Cunaeus linked his analysis with that of Josephus, whose *Antiquities of the Jews* exerted a considerable influence on the continent-wide scholarly effort on the Hebrew republic.<sup>89</sup>

Although Cunaeus described the judge as the “supreme leader” of the republic, there was another institution involved in making “decisions of state,” the “great council” or Sanhedrin of seventy in the capital city, a body Cunaeus described as “the Senate” and whose members he named simply as “senators” or more fully as “the senators of the Sanhedrin.”<sup>90</sup> Among their powers were enacting national legislation, trying the cases of high national officials who criminally abused their authority, selecting the king, and taking “counsel about waging wars, overthrowing enemies, and expanding the empire,” powers concerned with “the kinds of decisions that dealt with the welfare of the entire nation and the highest matters of state,” which they made in consultation with assemblies of the people.<sup>91</sup>

##### 5. *Political Sermons*

While many Americans read and relied on European Hebraic republicans, they also took it upon themselves to develop the theme of the Hebrew republic and apply it to their own

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<sup>88</sup> Ibid., bk. I, ch. 12, 47.

<sup>89</sup> See Jacob Abolafia, “Spinoza, Josephus, and the Critique of the Hebrew Republic,” *History of Political Thought* 25 (2014): 295–316.

<sup>90</sup> Cunaeus, *Hebrew Republic*, bk. I, ch. 12, 48–50.

<sup>91</sup> Ibid., 50. Compare U.S. Const. art. I, sec. 3 (Senate’s powers, including trying impeachments), art. I, sec. 8 (joint powers of the Senate and House of Representatives, including over wars and international trade) and art. II, sec. 2 (presidential powers of treaty-making and appointment of ambassadors with advice and consent of the Senate).



circumstances during and after the Revolution.<sup>92</sup> In these sources, it is often necessary to notice American authors' uncited or implied references to the Hebraic republicans.<sup>93</sup>

Samuel Landon, recently elected president of Harvard, gave the election sermon on May 31, 1775, as the Revolutionary War raged and the colonies began organizing themselves as independent polities. He described ancient Israel as an exemplar for America in his own day:

The Jewish government, according to the original constitution which was divinely established, if considered merely in a civil view, was a perfect republic. The heads of their tribes and elders of their cities were their counsellors and judges. They called the people together in more general or particular assemblies,—took their opinions, gave advice, and managed the public affairs according to the general voice. [...] Every nation, when able and agreed, has a right to set up over themselves any form of government which to them may appear most conducive to their common welfare. The civil polity of Israel is doubtless an excellent general model, allowing for some peculiarities; at least, some practical laws and orders of it may be copied to great advantage in more modern establishments.”<sup>94</sup>

This sermon was, by official vote of the Massachusetts Provincial Congress, “sent to each minister in the colony, and to each member of the Congress.”<sup>95</sup>

Samuel Cooper gave his discourse *On the Day of the Commencement of the Constitution* in 1780.<sup>96</sup> He recited theme after theme indicating “a striking resemblance between our own circumstances and those of the antient Israelites.”<sup>97</sup> In particular, he spoke about how

The form of government originally established in the Hebrew nation by a charter from heaven, was that of a free republic, over which God himself, in peculiar favour to that people, was pleased to

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<sup>92</sup> See generally Harry S. Stout, *The New England Soul: Preaching and Religious Culture in Colonial New England* (Oxford: Oxford University Press, 1986); Nathan O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven: Yale University Press, 1977); Ellis Sandoz, ed., *The Political Sermons of the Founding Era, 1760-1805*, Second Edition, 2 vols. (Indianapolis: Liberty Fund, 1998), and John Wingate Thornton, *The Pulpit of the American Revolution, or, the Political Sermons of the Period of 1776* (Boston: Gould and Lincoln, 1860).

<sup>93</sup> For this methodological necessity, see Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University of Kansas Press, 1985), ix-xii, 7, 68-69. See also Dreisbach, *Reading the Bible with the Founding Fathers*, 147.

<sup>94</sup> Samuel Langdon, *Government corrupted by Vice, and recovered by Righteousness* [1775], reprinted in John Wingate Thornton, *Pulpit of the American Revolution* (Boston: ), 239–40.

<sup>95</sup> Thornton's editorial note, *ibid.*, 231.

<sup>96</sup> Reprinted in Sandoz, *Political Sermons of the American Founding Era*, 1:629-56.

<sup>97</sup> *Ibid.*, 631.

preside. It consisted of three parts; a chief magistrate who was called judge or leader, such as Joshua and others, a council of seventy chosen men, and the general assemblies of the people. Of these the two last were the most essential and permanent, and the first more occasional, according to the particular circumstances of the nation. Their council or Sanhedrim, remained with but little suspension, through all the vicissitudes they experienced, till after the commencement of the christian era. And as to the assemblies of the people, that they were frequently held by divine appointment, and considered as the fountain of civil power, which they exerted by their own decrees, or distributed into various channels as they judged most conducive to their own security, order, and happiness, is evident beyond contradiction from the sacred history. Even the law of Moses, though framed by God himself, was not imposed upon that people against their will; it was laid open before the whole congregation of Israel; they freely adopted it, and it became their law, not only by divine appointment, but by their own voluntary and express consent. Upon this account it is called in the sacred writings a covenant, compact, or mutual stipulation.<sup>98</sup>

Cooper's language was very similar to the institutional structure given by the Hebraists. On the Israelite republic's democratic character, he quoted Sidney—"a great author, who wrote conclusively, who fought bravely, and died gloriously in the cause of liberty."<sup>99</sup> Cooper reinforced the point that it was the judge who was the intended chief magistrate of the Hebrew Republic, pointing out that in the return from the Babylonian exile God restores this original constitution, in which there was no king.<sup>100</sup> "[T]wice established by the hand of heaven in that nation," the republic of Israel "points out in general what kind of government infinite wisdom and goodness would establish among mankind."<sup>101</sup> This was even stronger than Harrington's view, which held Israel's government was human prudence, albeit Divinely ratified.

Cooper nonetheless referred explicitly "the immortal writings of Sidney and Locke, and other glorious defenders of the liberties of human nature," by which he may have meant to include Harrington, whose ideas he followed closely throughout, for it was in these writings that one could find "all the principles and arguments upon which the right of our present

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<sup>98</sup> Ibid., 634.

<sup>99</sup> Ibid., 636.

<sup>100</sup> Ibid., 633.

<sup>101</sup> Ibid., 636-37.

establishment is provided.”<sup>102</sup> Cooper, however, did not follow Sidney in calling Israel an aristocratic mixed regime, but a free republic.<sup>103</sup>

By the time of the Convention in 1787, Americans were well-prepared to think of their recent wartime leader and likely first president in biblical terms, for Washington was repeatedly compared to the chief magistrates of ancient Israel, especially the pre-monarchic judges from Joshua onwards. In 1783, the year the Revolutionary War concluded with the Treaty of Paris, the preacher John Murray, delivered a discourse that, like others before and after, drew a close parallel between the American States and the ancient republic of Israel.<sup>104</sup> Basing his sermon on the saga of Gideon in the biblical book of Judges, Murray declared “the text exhibits a case as nearly resembling our own, as ancient fashions can be accommodated to modern times.”<sup>105</sup> Again and again Murray marveled at how closely the Americans’ struggle against England paralleled that of Israel against Midian, “their near kinsman.”<sup>106</sup> Washington is figured as the Judge Gideon, “the Jewish Commander” and “great General”<sup>107</sup> raised up as deliverer of Israel, “solemnly commissioned to sustain the arduous and important trust of their JUDGE, DICTATOR, AND COMMANDER IN CHIEF.”<sup>108</sup> Murray, without citation, here echoed verbatim Harrington’s description (captain, judge, dictator) of the executive of the Hebrew republic. Further, the Israelites were not simply organized into tribes but were “the states of Israel.”<sup>109</sup> Those who did

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<sup>102</sup> Ibid., 639.

<sup>103</sup> Ibid., 534-35.

<sup>104</sup> John Murray, *Jerubbaal, or Tyranny’s Grove Destroyed, and the Altar of Liberty Finished – A Discourse on America’s Duty and Danger* (Newbury-Port: John Mycall, 1784).

<sup>105</sup> Ibid., 8.

<sup>106</sup> Ibid., 9, and *passim*.

<sup>107</sup> Ibid., 16.

<sup>108</sup> Ibid., 11 (emphasis in original). See also *ibid.*, 17 (“All the glorious success of this expedition, and all the consummate Generalship with which it was conducted, could not shield the Dictator from the shafts of envy”) and *ibid.*, 43 (“Like Israel’s Dictator, the American Gideon rose—like him he conquered—and like him too, he retires.”)

<sup>109</sup> Ibid., 17.

not wholeheartedly support the cause of “Israel’s liberty” were the “unprincipled Tories in Israel.”<sup>110</sup> When the war was won, and “Israel’s liberty and independence fully secured,” then “[t]he Dictator” went “on to treat with the loyalists as to law, and justice did appertain.”<sup>111</sup> Murray went on to mark Gideon’s great humility in triumph, ascribing the victory entirely to Divine Providence and the work of his soldiers, as well as his famous refusal of a crown.<sup>112</sup> He described the scene’s significance:

By the unanimous suffrage of the nation, GIDEON is invited to ascend a throne: they are ready to receive him as Monarch in Israel:—and offer to settle the crown upon his issue-male, as their hereditary property in lineal succession: and thus they consent tamely to surrender to their General, those precious liberties with which heaven had made them free—and even entreat him to trample with his feet on those rights of his country, he had so gloriously protected with his hands:—But, behold the patriotic greatness of soul, with which he stems the popular torrent. He positively refuses the unadvised present—earnestly corrects the mistaken zeal from which it sprang—and solemnly reminds them of an eternal maxim of truth, which no change of circumstances can justify any nation in forgetting—viz. that the reins of kingly authority become no other hands than those of the all-perfect Sovereign of the universe. *I will not reign over you—neither shall my son—the LORD alone shall reign: he alone is worthy to sway an absolute scepter:*—he only is fit to sit Monarch on a throne—before him only every knee should bow—at his feet should sceptered mortals cast their crowns—there should they lay them down—to resume and wear them no more forever—and he who refuses this rightful homage to the only Supreme, deserves to be treated as a tyrant among men, and a rebel against God.<sup>113</sup>

For Murray there was no need to look only to a Roman model. Gideon was “the Jewish Cincinnatus,” exemplary for “Declining the sovereignty, for which no man in Israel was better qualified---he refuses rewards which none ever did better deserve.”<sup>114</sup> Murray, like Harrington before him, readily combined Judaic and classical political symbols and alternated between Roman and Israelite comparisons. He echoed Tom Paine’s famous declaration – *the law alone shall be king in America* – the summation of Paine’s own Hebraist antimonarchist argument. Murray also drew a parallel to the “Congress of seventy rulers” who he named “the seventy

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<sup>110</sup> Ibid., 18.

<sup>111</sup> Ibid., 19.

<sup>112</sup> Ibid., 20.

<sup>113</sup> Ibid., 21.

<sup>114</sup> Ibid.

fathers of the country—the long and avowed guardians of those liberties, which GIDEON had vindicated with the risque [sic] of his life.”<sup>115</sup> It was a clear parallel between the Continental Congress and the Great Sanhedrin set up in Moses’ day and continuing thereafter—“that august and venerable Council” “the instruments heaven had provided for conducting the affairs of Israel when he [Moses] should be no more.”<sup>116</sup>

It was disastrous when Israel later fell to idolatry and ingratitude, “soon followed by that nation’s reduction to that state of vassalage, under the tyranny of the patricide Abimelech—who insolently waded” through the blood of his own family “to that very throne which his venerable father refused to ascend, when his way to it was opened by his country’s unanimous call.”<sup>117</sup> Even elective monarchy freely consented to was illegitimate (the longstanding position of the Hebraic republicans); the Hebrew Republic already had the model of a proper, legitimate executive in its judges and had no need of kings. Murray continued by pointing to the biblical text as an eternal political teaching, warning America about the danger of an internal regime change, whereby the republic could be lost to a conspiracy for a tyrannical monarchy.<sup>118</sup> Murray admitted Washington had not been offered a crown, but said this was because any notion of monarchy was held inherently absurd in America.<sup>119</sup> He hoped for the time when America would be a great unified republic (“May all the states be ONE”), but he was also sure there would never come a day “wherein its free, REPUBLICAN CONSTITUTIONS shall be exchanged for a dangerous Aristocracy—or for a regal tyranny still more unsufferable!”<sup>120</sup> Washington could

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<sup>115</sup> Ibid., 26-27.

<sup>116</sup> Ibid., 51.

<sup>117</sup> Ibid., 25.

<sup>118</sup> Ibid., 26. (“These things have been written for generations to come---they happened for our ensamples---they were recorded for our learning---and nothing but stupidity of the first rate, can pass them unobserved. Every step by which Abimelech rose to Israel’s throne, seems to have been carefully marked, for the same purposes as beacons are lighted—to notify approaching dangers—and tell the public when it is time to take the alarm.”)

<sup>119</sup> Ibid., 43.

<sup>120</sup> Ibid., 43, 59, 71.

have become, like Sulla, “perpetual Dictator in Rome,” or like Caesar, or like Thrasybulus in Athens or Cromwell in Britain, but his character was such that he did not hold that ambition.<sup>121</sup> Instead, Washington, “As Jerubbaal, when his work was done, returned to his native city— behold the AMERICAN CINCINNATUS greatly returning to his beloved privacy!<sup>122</sup> America was deeply obligated—to Divine Providence above all, as Murray kept repeating—and especially to the many political leaders who had led the country through the war, including “the JERUBBAAL of AMERICA for *all the goodness he has shewed to our Israel.*”<sup>123</sup>

When Murray delivered this sermon, it was only a few years before the Federal Convention met in Philadelphia. He held the America of the time, with the Articles of Confederation still operative, identical to the republic of confederated states of ancient Israel, with language identical to Harrington’s when describing the Hebrew republic’s executive, the biblical Judge.<sup>124</sup> Moreover, he identified Washington with the most overtly antimonarchist of all of Israel’s Judges, Gideon/Jerubbaal.

Whether at the scale of a single state or all of them united in common purpose, the idea of comparing American republican leaders to the biblical judges was commonplace. Ezra Stiles, president of Yale and the strongest Hebraist in America, spoke in May 1783, a few months before the Treaty of Paris ended the war, of the time when “Congress put at the head of this spirited army the only man on whom the eyes of all Israel were placed,” and referred to

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<sup>121</sup> Ibid., 44.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid., 47.

<sup>124</sup> Ibid., 11. For further proof of how closely Murray followed Harrington he declaimed also on the importance of obtaining and executing agrarian laws – controversial in Rome, but central to the constitution of Israel, and strongly favored by Harrington’s *Oceana*. See *ibid.*, 56 (warning of the danger “when individuals are permitted to purchase or possess such enormous tracts of land as may gradually work them up to an influence, dangerous to the liberty of the state”).

Washington as “this American Joshua.”<sup>125</sup> On December 11, 1783, the pastor of Philadelphia’s Third Presbyterian Church, George Duffield, delivered a political sermon giving thanks for independence and the newly restored peace.<sup>126</sup> Discoursing on “our American Zion,” he repeatedly drew a parallel between Israel and America and equated America’s Revolutionary commander in chief with the first judge to lead Israel into the land. Duffield spoke admiringly about “the illustrious Washington, the Joshua of the day,” operating as leader “of his chosen states.”<sup>127</sup> On May 12, 1785, another preacher, Yale’s Samuel Wales, compared the executive of his state, “our governor and commander in chief,” simultaneously to “a Moses, a Joshua, or a Samuel.”<sup>128</sup>

On May 10, 1787, as the Constitutional Convention was set to convene in Philadelphia, Elizur Goodrich discoursed on the “tribes of Israel,” united “into a holy nation and commonwealth” consenting to the divine sovereignty in “their civil and sacred constitution.”<sup>129</sup> He described how “the free electors of Israel” chose the republic’s leaders, “their judges and public magistrates.”<sup>130</sup> Similar themes continued after the new national government was established. In an election sermon, Stephen Peabody described Moses as “the chief magistrate” when discussing the pre-monarchic Israelite government during a discourse on good government

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<sup>125</sup> Ezra Stiles, *The United States elevated to Glory and Honor* [1783], reprinted in John Wingate Thornton, *The Pulpit of the American Revolution* (Boston: , 1860), 442.

<sup>126</sup> George Duffield, *A Sermon Preached on a Day of Thanksgiving* (Philadelphia & Boston: T. & J. Fleet, 1784), reprinted in Sandoz, *Political Sermons*, 773.

<sup>127</sup> *Ibid.*, 776 (American Zion), 784 (equating Washington with Joshua), 786 (drawing a parallel between them as leader of “his chosen states”).

<sup>128</sup> Samuel Wales, *The Dangers of our national Prosperity; and the Way to avoid them: A Sermon Preached before the General Assembly of the State of Connecticut* (Hartford: Barlow & Babcock, 1785), reprinted in Sandoz, *Political Sermons*, 857, 858.

<sup>129</sup> Elizur Goodrich, *The Principles of civil Union and Happiness considered and recommended. A Sermon Preached before his Excellency Samuel Huntington, Esq. L.L.D. Governor and Commander in Chief, and the Honorable the General Assembly of the State of Connecticut* (Hartford: Hudson and Goodwin, 1787), reprinted in Sandoz, *Political Sermons* 913.

<sup>130</sup> *Ibid.*, 920-21.

and virtuous political leadership.<sup>131</sup> Peabody's stepson was secretary to President John Adams and the Peabody family often visited the Adams home.<sup>132</sup>

During the ratification debates in 1788, Samuel Langdon returned to his 1775 themes in more detail (and developed as well some of Cooper's), again at a crucial moment in American history. He delivered *The Republic of the Israelites An Example to the American States* on June 5, 1788, shortly before New Hampshire's convention reconvened and voted to ratify (and, as the ninth state, bring into effect) the Constitution.<sup>133</sup> Langdon, a former president of Harvard and classmate of Samuel Adams, was "a confidant of the leading patriots of the region" of New England, "well represented the mind of the revolutionary generation in his political sermons," and "was prominent in securing the adoption of the federal Constitution as a delegate to the New Hampshire state convention in 1788."<sup>134</sup> Early in his discourse, Langdon remarked

As to every thing excellent in their constitution of government, except what was peculiar to them as a nation separated to God from the rest of mankind, the Israelites may be considered as a pattern to the world in all ages; and from them we may learn what will exalt our character, and what will depress and bring us to ruin.<sup>135</sup>

Langdon's use of the phrase "pattern to the world in all ages" paraphrased and recalled Pericles' speech in Thucydides' *History* and Harrington's Preliminaries.<sup>136</sup> Langdon noted the historical innovation and importance of ancient Israel: "It was a long time after the law of Moses was given before the rest of the world knew any thing of government by law," and he thought other

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<sup>131</sup> Stephen Peabody, *A Sermon Delivered at Concord, before the Honourable General Court of the State of New Hampshire, at the Annual Election* (Concord: George Hough, 1797), reprinted in Sandoz, *Political Sermons of the American Founding Era*, 2:1326.

<sup>132</sup> Editorial note in Sandoz, *Political Sermons*, 2:1322.

<sup>133</sup> Reprinted in Sandoz, *Political Sermons*, 1:943-67.

<sup>134</sup> *Ibid.*, 942.

<sup>135</sup> *Ibid.*, 945-46.

<sup>136</sup> For the parallel, see, e.g., *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War*, ed. Robert B. Strassler (New York: Touchstone, 1996), 112, 114



historical republics, including Sparta, Athens, and Rome, compared unfavorably with that of Israel.<sup>137</sup>

Langdon also closely followed Harrington, as Cooper did, but also went beyond him, denominating Israel as “a proper republic” and an example to the USA, at a time when new federal Constitution was already in hand and before his listeners for their ratification. Langdon described how the Israelites had an initial government after the exodus from the tyranny of Egypt, “[b]ut the great thing wanting was a permanent constitution.”<sup>138</sup> This improved constitution included “a senate” of “seventy men, chosen from among the elders and officers,” “as necessary for the future government of the nation, under a chief commander.” (046). As the people had a voice in choosing the senators, and “in all public affairs from time to time,” Langdon concluded “the government therefore was a proper republic.” (946-47). He went on to describe how “the government of each tribe was very similar to the general government. There was a president and senate at the head of each, and the people assembled and gave their voice in all great matters,” having not yet, in Langdon’s view, innovated the practice of delegating representatives (947). Langdon referred to the highest official in the Israelites’ general government as the “chief magistrate.”<sup>139</sup> Just as the tribes’ governments were permanent, so too the self-similar national government; in Langdon’s telling, the Hebrew republic’s president would, too, be permanent, unlike the occasional, dictator-like figure in Harrington’s model.

That, at least, had been the intention. Langdon argued Israel failed to realize its potential and become the model for the ancient world it was intended to be. He believed this happened

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<sup>137</sup> Ibid., 950.

<sup>138</sup> Ibid., 946.

<sup>139</sup> Ibid., 947.

because, after the judgeships of Moses and Joshua, the chief magistracy and national senate were allowed to lapse, with the people neglecting to elect replacements:

Let us view their state, in the first place, under the judges. Tho' the national senate was instituted for the assistance of Moses as captain-general and judge of the nation, and this was a plain intimation that in all succeeding times such a senate was necessary for the assistance of the supreme magistrate: yet after Joshua and the elders of his time were dead, it does not appear that they took the least care to fill their places.<sup>140</sup>

Arguing similar lapses occurred in the self-similar tribes, Langdon observed, “we find this remark repeatedly made in the book of Judges—“*In those days there was no king in Israel, but every man did that which was right in his own eyes*”—that is in plain terms, there was no authority any where, but every man was left to act as he pleased.”<sup>141</sup> This despite the fact that “there was so plain an intimation that the same government was to be continued,” with occasional remembrance of a popular right “to appoint a chief commander,” such as Gideon or Jephtha.<sup>142</sup>

Here, Langdon appears to have drawn the conclusion I suggested Sidney (and perhaps Harrington as well) had reached about Israel, that the true original of Israel that had been meant as a timeless exemplar was the form of government in the era of Moses and Joshua, rather than that of the “other judges” who came later and were raised up only by occasional circumstance. It was in its original form that the “republic of the Israelites” was for Langdon “an example for the American states,” per his discourse’s title, and he urged his listeners among the state’s political leadership not to falter in instituting and maintaining their new constitutional government; certainly they should not later demand an absolutist king, which for Israel had brought “the total

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<sup>140</sup> Ibid., 952.

<sup>141</sup> Ibid., 952.

<sup>142</sup> Ibid., 953.

loss of their republican form of government.”<sup>143</sup> They only recovered it after returning to the land of Israel after the Babylonian exile, upon which “they appointed a general senate of seventy elders, called by them the Sanhedrin, with a supreme magistrate at the head, for the government of the nation.”<sup>144</sup> Both the senate and supreme magistrate were permanent institutions and, as at the beginning, elected by the voice of the people. There is no indication here that Langdon saw the restored constitution of the Second Commonwealth of Israel as marked by a temporary, dictator-like chief magistrate, but rather, as in the days of Moses and Joshua, a permanent “president.”<sup>145</sup>

Langdon went on to give a lengthy application of his study of Israel, commenting, “If I am not mistaken, instead of the twelve tribes of Israel, we may substitute the thirteen states of the American union.”<sup>146</sup> He drew many obvious parallels, applying Moses’ title to George Washington, who was “captain-general of our armies,” and the constitution was “an heavenly charter of liberty for these United States.”<sup>147</sup> All that was left for America to secure the heavenly blessing was “the establishment of a general government, as happily formed as our particular constitutions, for the perfect union of these states,” something he and his listeners would ratify in a matter of weeks.<sup>148</sup>

Langdon noted the executive of the national constitution held power delegated by the people and to them remained accountable for any abuse of the same or deviation from duty:

Even the man, who may be advanced to the chief command of these United States, according to the proposed constitution; whose office resembles that of a king in other nations, which has always been thought so sacred that they have had no conception of bringing a king before the bar

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<sup>143</sup> Ibid., 955. Cf. U.S. Const. art. IV, § 4 (republican form of government guarantee clause).

<sup>144</sup> Ibid., 956.

<sup>145</sup> Ibid., 947.

<sup>146</sup> Ibid., 957.

<sup>147</sup> Ibid., 958.

<sup>148</sup> Ibid., 958-59.

of justice; even he depends on the choice of the people for his temporary and limited power, and will be liable to impeachment, trial, and disgrace for any gross misconduct.<sup>149</sup>

This was akin to Sidney's point, sourced in Maimonides' codification of the Talmud:

distinguishing between Davidic kings, who were accountable to the law and stood trial for any crimes; and other kings, who were insolent and impious and held themselves above any law.<sup>150</sup>

The American president was one "whose office *resembles* that of a king" – he was not a king in truth, not even an elected monarch, as James Wilson had emphasized at the Federal Convention the year before: "All know that a single magistrate is not a King."<sup>151</sup> Instead, while the presidency stood for the monarchic *functional* element in America's tripartite constitution, the office was much more akin to the judges of Israel's commonwealth, accountable like everyone else to a higher constitutional law.

## 6. *The Hebrew Republic during the Federal Convention*

Sidney's description of Israel as a model republic<sup>152</sup> was later reprinted Philadelphia, while the Federal Convention met in that city, in the *Pennsylvania Mercury's* serialization of John Adams' *Defence of the Constitutions of the United States*. Mary Sarah Bilder has recently shown how this serialization of Adams' influential text shaped the discussions and thinking of the Convention week by week and month by month.<sup>153</sup> July 20, 1787, the day the *Pennsylvania Mercury* reprinted Adam's excerpt and discussion of Sidney's description of the Hebrew republic as an ideal mixed constitution, with the judge as the executive, was one of the most

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<sup>149</sup> Ibid., 959.

<sup>150</sup> Sidney, *Discourses*, ch. 2 § 30, 290.

<sup>151</sup> Farrand, *Records*, 1:96.

<sup>152</sup> Sidney, *Discourses*, ch. 2 § 16, 166-67]

<sup>153</sup> Mary Sarah Bilder, "The Soul of a Free Government: The Influence of John Adams' *Defence* on the Constitutional Convention," *Journal of American Constitutional History* 1 (2023): 140.

intense days of discussion in the Convention about the proposed national executive.<sup>154</sup> Adams' *Defence* relied on other Hebraic republicans, as well. The following week, the same newspaper printed Adams' excerpts and comments on Harrington's *Oceana* and *Prerogative of Popular Government*, including his discussion of the agrarian law and his characterization of Israel as a government not of servants, not of subjects, but of citizens.<sup>155</sup> Adams' *Defence* "was taken very seriously indeed by the delegates in Philadelphia,"<sup>156</sup> and has been acknowledged since 1787 to have had a significant effect on the Founding, with Benjamin Rush writing to Richard Price that the book "has diffused such excellent principles among us," saying of Adams that "Our illustrious minister in this gift to his country has done us more service than if he had obtained alliances with all the nations of Europe."<sup>157</sup>

Some of the framers, however, had already been thinking of Israel as a model for a stronger, revised American national government years prior. Recall how Harrington described Israel as a "united" (national) republic to distinguish it from leagues and confederations. In 1784, the same year Murray's discourse was published, the framer Roger Sherman—the only founder to sign every one of America's major state papers—published a reply to Pelatiah Webster on the question of how the Articles of Confederation might be reformed. In this reply, he praised "the civil polity of the Jews" and urged Webster "*once more* to consult his bible, and duly weigh and consider the civil polity of the *Hebrews* which was planned by Divine Wisdom" as the exemplary model for the American republic.<sup>158</sup>

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<sup>154</sup> *The Pennsylvania Mercury, and Universal Advertiser* (Philadelphia, Pennsylvania), July 20, 1787, p. 1, col. 2 (front page). Max Farrand, *The Records of the Federal Convention of 1787* (New Haven and London: Yale University Press, 1966), 2:60-70.

<sup>155</sup> *The Pennsylvania Mercury, and Universal Advertiser* (Philadelphia, Pennsylvania), July 27, 1787, p. 1, col. 2.

<sup>156</sup> Nelson, *Royalist Revolution*, 206, 335 n.125.

<sup>157</sup> Benjamin Rush to Richard Price, June 2, 1787, reprinted in Farrand, *Records*, 3:33.

<sup>158</sup> See Slate, "Franklin's Talmud," 253-55.

Webster's *Dissertation on the Political Union and Constitution of the thirteen United States of North America* (written February 16, 1783) has long been noted for its wide influence and identity as a plausible source for the idea of federalism that took shape at the Federal Convention four years later.<sup>159</sup> The historian George Bancroft, taking note of its influence, observed, "The tract awakened so much attention that it was reprinted in Hartford, and called forth a reply."<sup>160</sup> Sherman supplied that reply to Webster and went on to serve a pivotal role at the Convention three years later.

At the Convention itself, one of Sherman's final tasks there was as a member of the Committee of Eleven, which helped give the Constitution its near-final substance before being beautified by the Committee of Style and Arrangement. An additional fundamental law the Committee of Eleven added to the Presidency, which had not been there before, was the natural-born citizenship requirement, adopted by the Convention without objection.<sup>161</sup> This was not imposed on any other office detailed in the Constitution, and is reminiscent of the requirement imposed by Deuteronomy 17 on any elected king of Israel to be a natural-born member of the nation. When we consider that Sherman had been among the least enthusiastic members of the convention for a strong, independent chief executive, preferring one much more closely connected to the legislature, it is reasonable to wonder whether Sherman was responsible for adding this requirement to the presidency, to align its laws with those of the monarchic institution the Hebraists understood as the less-preferred regime. We unfortunately know little

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<sup>159</sup> Hannis Taylor, "Pelatiah Webster: The Architect of Our Federal Constitution," *Yale Law Journal*, Vol. 17, No. 2 (December 1907), 73-85.

<sup>160</sup> George Bancroft, *History of the Formation of the Constitution of the United States of America, in two volumes*, vol. 1, 6th ed. (New York: D. Appleton and Co., 1889), 86.

<sup>161</sup> Thach, *Creation of the Presidency*, 117, 122. Farrand, *Records*, 2:494, 2:536.

about the inner workings of the Convention's committees and can do little more than note the close parallel.<sup>162</sup>

The Committee of Eleven is nonetheless known for something else, as well. It is perhaps best remembered for innovating the institution of the Electoral College.<sup>163</sup> While superficially having little to do with the model of the Hebraic republic, the expectation of how the electoral college would function suggests otherwise. As Professor Hoxie reminds us, the Framers at the Convention “believed that ‘in nineteen cases out of twenty,’ the matter would have to be referred to the Senate to decide!”<sup>164</sup> Functionally, that would result in a selection of the chief magistrate through a mechanism remarkably similar to the election of the head of the Hebrew republic, who while acclaimed by the people was, as Maimonides wrote, was chosen to lead in conjunction with the Great Sanhedrin.<sup>165</sup> Not long after, the question of uncertain election shifted to be the responsibility not of the Senate but the House, but the first intention is noteworthy, given Sherman's presence on this Committee.

In 1793, the Supreme Court identified another way in which the American president differed from the English monarch. George Washington had asked the Court, through a July 18, 1793 letter from Secretary of State Thomas Jefferson, for an advisory opinion on twenty-nine questions regarding the United States' foreign policy with France. The Court replied with its own letter on August 8, 1793, explaining that because of the separation of powers instituted by

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<sup>162</sup> See William Ewald, “The Committee of Detail,” *Constitutional Commentary*, Vol. 28 (2012), 199.

<sup>163</sup> John R. Vile, “The Critical Role of Committees at the U.S. Constitutional Convention of 1787,” *Journal of American Legal History*, Vol. 48, No. 2 (Apr. 2006), 170.

<sup>164</sup> R. Gordon Hoxie, “The Presidency in the Constitutional Convention,” *Presidential Studies Quarterly* Vol. 15, No. 1 (1985), 30.

<sup>165</sup> Moses Maimonides, *Mishneh Torah*, Book 14 *Shophetim* (“Judges”), Treatise on Sanhedrin, ch. 1, codifying Babylonian Talmud Tractate *Sanhedrin* 88b. That every leader would need to be acclaimed by the people is attested by Babylonian Talmud Tractate *Berakhot* 55a (“We do not appoint a leader without consulting with the community”).

the Constitution and the Supreme Court's role as a court of final appeal, it was inappropriate for the justices "extrajudicially deciding the questions alluded to, especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to executive Departments."<sup>166</sup> In other words, the Constitution had left to the executive branch the determination of presidential constitutional questions. The Chief Magistrate had an independent role in constitutional interpretation of Article II powers. He was, in a real sense, an executive judge.<sup>167</sup>

### **"A Law of Liberty:" The Hebraists' Rabbinic Constitutional Sources<sup>168</sup>**

For the Hebraic republican theorists much-read at the Founding—Harrington, Sidney, Milton, and Paine's popularization of the latter in *Common Sense*—a king was out of the question. They could and did point to the shift from the era of the judges to that of the kings in ancient Israel as marking both the transformation of the form of government and the biblical history's signal that a kingless republic was the Divinely-preferred regime. That left the judge of Israel as the model republic's preferred executive, a point developed repeatedly by both European and American Hebraic republicans. The President of Article II is best understood as modeled on the biblical judge, the executive of the Hebrew republic, but now made a permanent and regularly-elected figure. In establishing the presidency, the Founders drew on—and supplied the defects identified by—the influential republican constitutional teachings of James

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<sup>166</sup> Letter from Chief Justice Jay and Associate Justices to President George Washington, August 8, 1793, reprinted in Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* (7th ed. 2015), 52.

<sup>167</sup> The clearest example of executive-as-interpreter may have been Abraham Lincoln. The approach Lincoln took to interpreting the constitution during the crisis presented by the Civil War paralleled, in many respects, the emergency discretionary powers of the judge of Israel. See e.g., Michael Stokes Paulsen, "The Civil War as Constitutional Interpretation." *University of Chicago Law Review*, Vol. 71 (2004): 691-727.

<sup>168</sup> The phrase is Sidney's. *Discourses*, ch. 3 § 2, 335, §3, 337 (describing Israel's constitution).



Harrington and Algernon Sidney, who portrayed ancient Israel’s government as an exemplar for all time, but one that also might yet be further improved in certain details.

There is a profound constitutional and political-theoretical implication to this history. Harrington relied on the “Talmudists” for his account of the commonwealth of Israel, and Sidney for his part on Abravanel, Josephus, and above all Maimonides. They both emphasized how the Hebrew republic’s magistrates were subject to the law, and in this they were equal to all members of the polity.<sup>169</sup> Sidney cited Maimonides for precisely this point, quoting a Latin translation of his comprehensive legal code, the *Mishneh Torah*.<sup>170</sup>

Maimonides in his Code presented a model of executive crisis leadership very different than what has come down to us as the legacy of European monarchs and Roman autocrats.<sup>171</sup> He ruled that kings, like everyone else, were subject to the law, but his real focus for the leader of the polity of Israel was the Judge [*shophet*, or *dayan*] and his court.<sup>172</sup> When Maimonides codified the Talmud’s rule that the higher constitutional law of the Torah takes precedence over the command of the polity’s ruler, he drew on a source that explicitly identified the judge Joshua operating in the monarchic *function*, but without the role or title of king.<sup>173</sup> The judge, whether

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<sup>169</sup> Harrington, *Oceana*, 25. Sidney, *Discourses*, ch. 3 § 2, 335–36.

<sup>170</sup> Sidney, *Discourses*, ch. 2 § 30, 290 (“I know not whether the Spartans were descended from the Hebrews, as some think; but their kings were under a regulation much like that of the 17 of Deut. tho [sic] they had two: Their senate of twenty eight and the ephori, had a power like to that of the Sanhedrin; and by them kings were condemned to fines, imprisonment, banishment, and death [...] The Hebrew discipline was the same; *Reges Davidicae stirpis*, says Maimonides, *judicabant & judicabantur*. They gave testimony in judgment when they were called, and testimony was given against them: Whereas the kings of Israel, as the same author says, were *superbi, corde elati, & spretores legis, nec judicabant, nec judicabantur*; proud, insolent, and contemners of the law, who would neither judge, nor submit to judgment as the law commanded.”) Thomas G. West, who edited the reprint of the *Discourses*, comments that Sidney’s terse citation to “More Nevochim” — Maimonides’ Guide for the Perplexed — “appears incorrect; the reference is to *The Code of Maimonides (Mishneh Torah), Book 14: The Book of Judges* (New Haven: Yale University Press, 1949), Treatise One: Sanhedrin, ch. 2, p. 8.

<sup>171</sup> See, e.g., William Blackstone, *Commentaries on the Laws of England* (London, 1765), 1: 132.

<sup>172</sup> Maimonides, *Mishneh Torah*, Laws of Kings and Their Wars, ch. 3 (kings subject to law).

<sup>173</sup> *Ibid.*, ch. 3, Law 10 (codifying Babylonian Talmud, Tractate *Sanhedrin*, 49a, giving the meaning of Joshua 1:18). See commentary of *Kesef Mishneh* on Maimonides there, confirming his Talmudic source

as the popularly acknowledged greatest sage in the generation, or in council with the Great Sanhedrin, had the power to deviate from the normal constitutional order when “the need of the hour” [*tzorech ha-sha’ah*] required it, but this with an absolute limit: the leader was required to respect and give great weight to the dignity of every human individual.<sup>174</sup> Maimonides codified this rule from the Talmud, explaining that while emergency measures ordered by Israel’s chief magistrate could be legally binding, they would be totally void if they came into conflict with respect for the worth of the human person, because the principle, “great is human dignity, which overrides even a divine injunction,” was received as controlling.<sup>175</sup> While the Talmud is careful to distinguish the rules of decision unique to Jewish judges, it does not list the dignity limit as among those that was idiosyncratic to ancient Israel; instead, the rabbinic political tradition understood the dignity limit to extend generally as a binding, universal rule of law to all human societies.<sup>176</sup> This is in stark contrast to the “standard model” of emergency discretionary power present throughout the canon of political and constitutional theory, from Cicero down to Walzer, that allows derogation from and violation of individual rights during times of crisis and emergency under the rationale of the “law of necessity” and the legal maxim *salus populi suprema lex esto* (“the safety of the people is the supreme law”).<sup>177</sup>

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<sup>174</sup> Maimonides, *Mishneh Torah*, Laws of Sanhedrin, ch. 24, Law 10. See also R. Yaakov b. Asher, *Tur Choshen Mishpat* §2, in Karo, Y., et al. *Tur ve-Shulhan `arukh he-hadash* (Jerusalem: Mekhon Shulhan Melakhim, 2006 [Venice, 1475]) (Hebrew). I have treated these subjects at greater length in “Great is Human Dignity: An Alternative Theory of Emergency Power” Paper Presented at the 2023 Annual Meeting of the American Political Science Association.

<sup>175</sup> *Ibid.*, and see also *Mishneh Torah*, Laws of Rebels, ch. 1, and Babylonian Talmud, Tractates *Sanhedrin* 46a, *Yevamot* 90b, *Berakhot* 19b (transmitting the rules received through the oral tradition).

<sup>176</sup> See Babylonian Talmud, Tractate *Sanhedrin* 56b, quoting Tosefta *Avoada Zara* 9.4 (recording the rabbinic tradition that every nation of the world had an obligation “just like” (*k’shem*) Israel to appoint judges in every jurisdiction, in order to establish a just legal system (*dinin*)).

<sup>177</sup> Marcus Tullius Cicero, *De Legibus*, Clinton Walker Keyes, trans. (Heineman Loeb Classical Library, 1928 [ca. 58-32 BCE]), 466-67; Niccolo Machiavelli, *Discourses on the first ten books of Titus Livius*, Christian E. Detmold, trans., in M. Lerner, ed., *The Prince and the Discourses* (New York: Modern Library, 1950 [1531]), 202-204, and generally chs. 35, 40; Thomas Hobbes, *Leviathan* (Indianapolis: Hackett, 1994 [1651]), 3, 219; Locke, *Second Treatise*, §§ 157-160; 167; Edward Coke, *The reports of Sir Edward Coke Kt. in English, compleat in thirteen parts* (London: E. & R. Nutt, 1727) 10:139b (*Keighley’s Case*); Blackstone, *Commentaries*, 1:242-244; Jean-Jacques

If the American presidency, as now seems likely, was modeled not on European kings or Roman dictators, but on the judge of Israel as taught by the Hebraists' reading of the rabbis, we need to rethink the emergency powers available and contained in "the executive power" the Constitution vests in the president. Maimonides' summation of the laws and institutions of the Jewish commonwealth's government exerted considerable influence on early modern political thought and in particular on the development of theories of republican government. Petrus Cunaeus extended Carlo Sigonio's early study of the *republica hebraeorum* and relied heavily on Maimonides' *Mishneh Torah*, as did the English parliamentarian, common lawyer, and historian of political thought John Selden, who co-authored of the Petition of Right. It is worth noting that in response to a claim sourced from the standard model of *salus populi*-based necessity, Selden's riposte in Parliament was: "*Salus populi suprema lex est, et libertas popular summa salus populi*" ("The safety of the people is the supreme law, and the liberty of the people is their greatest safety").<sup>178</sup> Harrington by his own admission largely followed Selden's Hebraism.

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Rousseau, *The Social Contract*, V. Gourevitch, trans. (Cambridge: Cambridge University Press, 1997 [1762]), 138–140; James Kent, *Commentaries on American law*, 10th ed. (New York: Brown & Company, 1860), 1:253, 2:275; Herbert Broom, *A selection of legal maxims, classified and illustrated*, 7th American ed. (T. & J. W. Johnson & Co., 1874), 1; Muhammad Munir, *Special reference No. 1 of 1955*, in I. Jennings, *Constitutional Problems in Pakistan* (Cambridge: Cambridge University Press, 1957), 299; Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2006) 247–49, 252–54 & ch. 16; and generally Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New York: Harcourt, Brace & World, 1963), John Ferejohn & Pasquale Pasquino, "The law of exception: A typology of emergency powers," *International Journal of Constitutional Law*, 2(2) (2004): 210–39, and Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006). By contrast, the principle that forbids derogations that violate human dignity has been codified after the Second World War, in a major treaty. See *International Covenant on Civil and Political Rights*. Adopted on December 16, 1966 by the United Nations General Assembly, G.A. Res. 2200. Entered into force on March 23, 1976. 999 U.N.T.S. 171, 6 ILM 368.

<sup>178</sup> Quoted in Paul Christianson, "Ancient Constitutions in the Age of Sir Edward Coke and John Selden," in Ellis Sandoz, ed., *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Indianapolis: Liberty Fund, 1993), 155. Compare William Pitt in Parliament the following century, on November 18, 1783: "Was it not *necessity*, which had always been the plea of every illegal exertion of power, or exercise of oppression? Was not *necessity* the pretence of every usurpation? *Necessity* was the plea for every infringement of human freedom. It was the argument of tyrants: it was the creed of slaves." *The Speeches of the Right Honourable William Pitt, in the House of Commons* (London: Longman, Hurst, Rees and Orme, 1806), 1:90–91 (emphasis in original) (probably paraphrasing the political Hebraist John Milton's *Paradise Lost*, bk. 4, lines 393–94, "...and with necessitie, / The Tyrants plea, / excus'd his devilish deeds.")

Algernon Sidney, lionized as a martyr to the republican cause, openly cited Maimonides in his famed republican treatise, *Discourses on Government*, for major points in his antimonarchist stance. Clergy in America during the imperial crisis, Revolution, and critical period between independence and ratification of the new constitution frequently compared the American states to the Hebrew republic, often recycling the same institutional structure the earlier Hebraic republicans had presented in their portrayal of ancient Israel's form of government. Maimonides' place in American constitutional history and theory thus must be accounted for, beyond the architecture of the House Chamber in the U.S. Capitol.