INSIGHTS OBSERVED FROM A COMPARISON OF THE JEWISH LAWS OF COMPETITION AND AMERICAN ANTITRUST LAW

Stephen M. Axinn
Senior Project, Academy of Jewish Religion
Advisor: Dr. Matthew Goldstone
December 2020

Submitted to the Master's Degree Program of the Academy for Jewish Religion in partial fulfillment of the requirements for the degree of Master of Arts in Jewish Studies.

ACKNOWLEDGEMENTS

I am indebted to my advisor, Dr. Matthew Goldstone, who guided me in the development of this thesis. I am also indebted to all of my other teachers at the Academy for Jewish Religion and to my colleagues in the student body who have supported me and overlooked my many flaws. But most of all, to my devoted family and especially my wonderful wife, Stephanie, to whom this thesis and my entire life is dedicated.

TABLE OF CONTENTS

1. INTRODUCTION……………………..…………………………………….................1

2. SUMMARY OF THESIS………………………………………………….................1

3. IMPORTANT PRELIMINARY OBSERVATIONS……………………………...4

4. THE IMPORTANCE OF DIFFERENCES IN THE ULTIMATE SOURCE OF COMPETITION LAW IN WESTERN SOCIETY AND IN HALACHA ……………………………………..…………………….……….………….7

A. ORIGINS OF AMERICAN LAW AND HALACHA IN CONTEXT…………………………………….………………………...10

1. ORIGINS OF AMERICAN ANTITRUST LAW……..…………………………………………………………..10

2. A CLOSER LOOK AT THE LEGISLATIVE HISTORY OF U.S. ANTITRUST LAW…………………………………………...……..………......16

a. THE LEGAL SITUATION PRIOR TO 1890……………..16

b. AMERICAN ECONOMIC AND SOCIAL CONDITIONS AT THE END OF THE 19th CENTURY ....…………………………………………19

c. THE LEGISLATIVE HISTORY OF THE ADOPTION OF THE SHERMAN ACT………………………………….................................21

d. THE HISTORY OF ANTITRUST ENFORCEMENT 1890-1914………………………………………………..................25

e. CONGRESS PASSES THE CLAYTON ACT OF 1914 TO SUPPLEMENT THE ANTITRUST LAWS………...31

B. SHIFTING INTERPRETATIONS OF U.S. ANTITRUST LAWS..………………………………………….............…35

5. ORIGINS OF HALACHIC LAW RELATING TO COMMERCIAL COMPETITION……………………………………………...............39

A. BIBLICAL ORIGINS………………………………………………………................42

B. RABBINIC DEVELOPMENT OF HALACHA CONCERNING RESTRAINTS OF TRADE……………………………………….............…46

C. ANALYSIS OF SPECIFIC TYPES OF RESTRAINTS OF TRADE…………………………………………………………............……50

1. INTRODUCTION…………………………………………….................50

A. MONOPOLIZATION…………………………………..............…50

i. THE APPROACH OF AMERICAN ANTITRUST LAW……………………………...............…..50

ii. THE HALACHIC APPROACH TO MONOPOLIZATION………………………….............…56

iii. THE APPROACHES OF AMERICAN LAW AND HALACHA ON MONOPOLIZATION COMPARED……………..............69

B. HORIZONTAL PRICE FIXING AND CARTELIZATION ……………………………………............…74

i. THE APPROACH OF AMERICAN LAW……….............74

ii. THE HALACHIC APPROACH TO HORIZONTAL PRICE-FIXING AND CARTELIZATION……….................77

iii. COMPARISON OF THE AMERICAN AND HALACHIS APPROACH TO PRICE-FIXING ……………………………………............81

C. NON-PRICE VERTICAL RESTRICTIVE TRADE PRACTICES…………………………………..............84

i. NON-PRICE VERTICAL RESTRICTIVE AGREEMENTS IN AMERICAN LAW…………............…85

ii. HALACHIC APPROACH TO NON-PRICE VERTICAL RESTRICTIVE TRADE AGREEMENTS……………………………………..........88

iii. COMPARISON OF THE AMERICAN AND HALACHIC APPROACH TO NON-PRICE VERTICAL RESTRICTIVE TRADE PRACTICES…..…………………….…...........89

D. SUMMARY AND CONCLUSIONS …………………….............92

INSIGHTS OBSERVED FROM A COMPARISON OF THE JEWISH LAWS OF COMPETITION AND AMERICAN ANTITRUST LAW

I. INTRODUCTION

This thesis brings together the twin loves of my intellectual life—Torah and the American antitrust legal structure designed to regulate competition in commerce. Although these two legal systems markedly differ in terms of their objectives and the populations they are meant to serve, through a comparative analysis of the sources and interpretations of these two legal systems, insights from *halacha* (Jewish law as mediated and understood through the ages by rabbinic tradition) emerge that can enlighten and improve the administration of the American antitrust system.

II. SUMMARY OF THESIS

Students of religion, especially Judaism, tend to focus attention on its spiritual, its historical, and its sacramental roots. Less attention has been given to comparisons between the ways Judaism and the laws of western society have sought to achieve economic justice.[1] For most modern Jews, even Israelis, economic regulation has largely been considered to be the province of the secular authorities who govern commercial relationships in their economic-commercial lives. This view persists, despite the fact that throughout history Jews have been leading thinkers in the discipline of economics and economic justice. Jewish economic thinkers as far apart in their thinking as Karl Marx and Milton Friedman devoted their

[1] One exception to this is Meir Tamari, the prominent Orthodox scholar who has noted that Jewish economic activity in the middle ages "flows basically and primarily from fundamental Jewish philosophy and religious practices." Meir Tamari, *With all Your Possessions: Ethics and Economic Life.* (Jason Aronson, Inc., 1972), 72 (hereinafter "Tamari").

attention to seeking the proper formula for regulating commerce in the public interest. Although these economic thinkers often reached polar-opposite conclusions about the ideal way to regulate competition and commerce, they were all seeking the ideal formula to promote economic justice and well-being on a macro-economic level. Marx, together with Friedrich Engels, was the father of a school that taught that through the means of a centralized, controlled "command economy," the economic injustices of capitalism could be overcome and a resultant society could be achieved that would provide the highest level of overall welfare for its citizenry.[2] Friedman and his school, building on the teachings of Adam Smith, David Riccardo, and John Stuart Mill, believed that the best way to achieve the highest level of overall economic welfare was by adopting a "demand economy" based on unregulated free market principles.

The central tenet in a demand or market economy is that by giving producers and consumers the freedom in an unregulated (or minimally regulated) market environment to determine, guided by their own self-interest, which goods and services the they wish to produce or consume, the market will seek the perfect and most efficient equilibrium to produce just the right output. This flows from the belief that, in a demand economy, the price for any given product will seek the point at which the supply and demand curves for that product intersect. A higher price will reduce demand and a lower price will reduce supply. Thus, say advocates of a demand economy, consumers and producers in an unregulated market will seek

[2] Marx and Engels published *The Communist Manifesto* in 1848, (*Manifest der Kommunistischen Partei)* setting forth the outlines of a command economy.

and find this efficient intersect-point and resources will then be deployed in the best possible allocation to achieve that goal.

In contrast to the demand economy model, command economy thinking proceeds from the belief that a central economic manager and a coordinated central economic plan can best take into account the needs of the society and can, thus, allocate all available resources appropriately to execute the plan. Since the means of production are controlled by the central planning authority, intrinsic and extrinsic threats to the society can be countered by marshalling the productive resources needed to address the threat in a much more efficient manner than would be the case if the resources were independently owned and operated.

One of the hallmarks of a "command economy" is the emphasis placed on the welfare of the entire *community*, as differentiated from a "demand economy" where the focus is on the welfare of the *individual market participant*. While, perhaps, there are no examples of pure command economies or pure demand economies, many point to Cuba or North Korea as examples of a system with many of the hallmarks of a command economy and the United States of America as an example of a system with many hallmarks of a demand economy.

Throughout history, the debate has raged over which of these systems or some hybrid or alternative approach is best. Largely ignored in the search for the best alternative, unfortunately, is the approach developed by the halachic system. This study is designed to offer a contribution to this debate by contrasting the approach of the American antitrust competition law and the halachic laws of

competition in hopes that some insights from that halachic system might nudge the western canon of antitrust and competition law towards a more perfect outcome.

This thesis concludes that the guiding principle of halacha in this area is an amalgamation of the features of both the command and the demand economies. It will be argued that halacha is heavily influenced by the desire to promote inherent values found in the Torah, including the divine vision that all wealth ultimately belongs to G-d, and that all people are created in the image of G-d and bear responsibility for the well-being of other members of their community including Jews and those residing amongst them. In seeking to advance these inherent Torah values, halacha developed principles that foster free and open competition but recognized that competition can become ruinous and can have destructive implications to the community's well-being. To avoid these implications, halacha developed safeguards and controls that are vested in the hands of its respected leaders to ameliorate commercial excesses that threaten the economic equilibrium necessary to the community's economic success.

The interpretation of American antitrust law over the one-hundred thirty years since enactment of the Sherman Act has fluctuated between emphasis on protecting the rights of consumers and producers, seeking to find a workable balance between unrestrained capitalism and market regulation. However, throughout its history, the antitrust law has never succeeded in finding an apolitical accommodation of these two powerful forces that can match the insight that has been achieved, at least, theoretically, by halacha.

III. IMPORTANT PRELIMINARY OBSERVATIONS

A word of caution is necessary at the outset concerning the different meanings and understandings of the nature of law that animates each of these systems. In western legal systems, such as exists in the United States, the law is understood to be a legislative expression of the will of the people, expressed through their elected representatives. Once enacted into law, it then grounds legal and administrative decisions governing society. The judge, the policeman, and the administrator of an agency all take an oath to faithfully uphold the law in the course of their duties. The antitrust laws of the United States, like the rest of American law, is enforced by courts in adjudicating disputes concerning competition in commerce and by the antitrust administrative agencies. Importantly, once enacted, the antitrust laws (like other American laws) are binding and compulsory, not voluntary.

Halacha does not fit neatly into the same model. Halacha is regarded as "revealed" law and is, thus, not arrived at, or subject to, the democratic process. Moreover, its development occurred in times and places when Jews and Israel were no longer sovereign. Accordingly, sovereigns eliminated, cut back, or severely curtailed the binding force of halacha in the sovereign's courts or other civil or criminal adjudicative processes. Consequently, halacha bound only those who chose to submit themselves and their disputes to the rabbinical courts, or *poskim* (halachic decisors). As a result, halacha developed as a more idealized and, arguably, somewhat less pragmatic tool than would be expected of a body of law enforced by the adjudicative machinery of the state. Even in the State of Israel

today, except to a limited extent in such areas such as family law and religious status, halacha is not treated as binding on courts or on the society-at-large.[3]

Another distinction from western legal systems stems from the fact that halacha is, for the most part, rooted in the *Talmud*.[4] Unlike western statute or case law, the Talmudic process typically involves the presentation of an issue in the form of argument and counter-argument, often with the subsequent presentation of slightly altered hypothetical facts and circumstances in an effort to distill guiding principles. Often, a Talmudic discussion of a legal issue concludes with a variety of possible solutions presented and with no single solution determined to be the "halacha". As a result, it is often difficult to extract simple 'black-letter' legal principles that can be used by authorities to resolve disputes or regulate individual behavior.

Indeed, especially today, it is sometimes impossible even to agree on who is even qualified to issue halachic rulings. Almost from the beginning, the Jewish world was fragmented into many communities and religious streams that looked to their own religious leaders for interpretations of halacha with little or no regard for the opinions and rulings issued by the recognized religious leaders in other communities.

---

[3] "Israel will not be an halachic state" according to Prime Minister Netanyahu. Tomer Persico, "Why Israel Will Never Be Governed by Jewish Law" *Haaretz*, last modified June 6, 2019, www.hararetx.com/opinion/why-Israel-will-never-be-gioverned-by-Jewish-law-1.7340104

[3] There are communities of Jews, both inside and outside of Israel, who accept halacha upon themselves not as a result of sovereign compulsion but rather as a result of religious or personal conviction, who seek to live in accordance with their understanding of its requirements.

[4] The compendium of Jewish law and tradition comprising the *Mishnah* and the *Gemara* and being either the edition produced in Palestine circa 400 CE or the larger, more frequently consulted version redacted in Babylonia circa 7th century CE. Although now in written form, it is often referred to as the "Oral Law" to differentiate it from the sacred written texts of the Torah, the Prophets and the Writings, which collectively are sometimes denoted as the "*TaNaKh*".

Lastly, unlike legislators in a democratic system, the ultimate lawgiver in the halachic system does not respond to political pressures and is not subject to replacement through some sort of democratic process. Anyone who accepts the yoke of halacha accepts this reality. While rabbis interpret halacha, except in rare circumstances they do not assume the power to repeal or replace it.[5] Also, unlike western societies, where the law is binding and mandatory on all those living within its borders, adherence to halacha is voluntary in the sense that anyone who is willing to bear the consequences is free to leave a halachic community if they no longer wish to conform to its understanding of halacha. Unlike the situation in western societies where, typically, one who removes himself to another jurisdiction is no longer subject to the law of one's former jurisdiction, a Jew who chooses to abandon a commitment to conduct herself in accordance with halacha may do so without removing themselves physically from the community.

Yet, despite these and other differences, both systems have grappled with the important problem of finding the appropriate balance between the fundamental need of society to encourage producers to meet consumer demand to provide the necessary products and material comforts that are desired, and the upholding of community standards, including the dignity of each member of society.

[5] There are rare reported instances, however, where halacha has been suspended to accommodate significant changes in circumstances or hardships that are created by adherence to the halacha. רש"י בבלי גיטין ס' ע"א ד"ה על לעשות לה'
ואם בא עת לעשות תקנה לשם שמים הפרו דברי תורה לשעה הצריכה '

IV. THE IMPORTANCE OF DIFFERENCES IN THE ULTIMATE SOURCE OF COMPETITION LAW IN WESTERN SOCIETY AND IN HALACHA

In the American legal system, the sources of competition law begin with a few provisions of the U.S. Constitution, such as Article I, Section 8, clause 3 (granting Congress the power to regulate commerce with foreign nations, between the states, and with the Indian Tribes) and Article I Section 8, clause 5 (granting Congress the power to promote the 'useful arts' [the "Patents" clause]).

The Constitution declares in its preamble that the ultimate source of its power lies with the people who elect representatives who enact laws, and the President who executes the law. Judicial officers are nominated by the President and approved (advise and consent) by the Senate. Thus, the people are the ultimate power in the Constitutional system. The Constitution and the government it created are human-centric in every respect.

The sources of competition law in the halachic system are markedly different. These sources are comprised of the Torah and the Talmud, which are traditionally understood to be divinely inspired and the entire body of halachic codes and responsa created by authoritative rabbinic poskim. Halacha is more encompassing in its coverage of human activity than most western legal systems and regulates conduct in all aspects of Jewish life, including matters relating to commercial competition. However, far more attention is devoted to other areas, such as sacramental matters, agriculture, Shabbat and matters of personal status. In the

periods preceding the modern era, halachic decisors tended to focus most of their attention on these other areas of Jewish law.[6]

The differences in ultimate sources help to explain the different characteristics in the basic goals of the two legal systems. Halacha embodies both a system designed to regulate human behavior and to infuse humanity with a moral spirit.[7] Like every other aspect of an observant Jew's life, commercial activities must be carried on with an awareness of one's responsibilities under G-d's law. All of a Jewish businessman's actions are subject to the precepts of Torah, including, for example, honesty in weights and measures, avoidance of misrepresentation, or exploitation of advantage at the expense of one's neighbor or competitor.

Given the very different nature of their ultimate sources, the competition laws and regulations that have developed in these two systems, while showing certain similarities, have developed substantially different solutions to common problems. This study will analyze these solutions in three distinct areas:

1. The issue of 'monopolization', defined as private control over the means of production or distribution of a class of goods or services in a given market by a single firm or individual;[8]

---

[6] Thus, for example, it was possible for Rabbi Yosef Dov Soleveitchik to conclude that in the United States there are no halachic restrictions on competition and, thus, halacha had nothing to say about whether the owners of a kosher pizza shop in New Jersey could prevent a new kosher pizza shop from opening nearby. Quoted by Rabbi Chaim Jachter with Ezra Frazer, *Gray Matter: Discourses in Contemporary Halacha,* (New Jersey: self-published by Jachter, 2000).

[7] For an excellent description of the dual goals of halacha as both a source of legal obligations and a mechanism for uplifting human spirituality, see, Chaim Salman, *Halacha, The Rabbinic Idea of Law* (New Jersey: Princeton U. Press, 2018).

[8] Related terms are "Monopsony," defined as private control over the purchase of a class of goods or services by a single firm or individual, "oligopoly," defined as private control over the means of production or distribution of a class of goods or services by a small group of firms or individuals, and "oligopsony", defined as the control over the purchase of a class of goods or services by a small private group of firms or individuals.

2. Price-coordination, *i.e.* joint action by actual competitors to set or raise prices (typically in the form of price-fixing) or to limit output, through overt or covert agreement; and
3. Non-price vertical arrangements (between customers and suppliers) whereby one party restricts the competitive options available to the other party.

These three areas were selected for comparative analysis because of their importance to the fundamental goal of the proper functioning of the competitive process in either a demand or a command economy in any culture or society. That goal can be expressed as the promotion of productivity and the allocation of the output of goods and services in society through the operation of an essentially open and ethical marketplace. In this study, somewhat more attention will be devoted to the treatment of monopolization because the issue of monopolization presents the most basic threat to the long-run success of competitive markets. While offenses against the market system such as price fixing and vertical non-price restraints are symptoms of a poorly performing market, monopoly prevents an efficient market from functioning at all.

Except for the case of a so-called "natural monopoly," (a monopoly 'thrust upon' an individual or firm due to circumstances beyond its control) each of these areas also embody a moral component in that each necessitates a conscious attempt to distort the normal workings of markets in ways that benefit the actor(s) at the expense of its competitors and, ultimately, the public.

A. ORIGINS OF AMERICAN LAW AND HALACHA IN CONTEXT

i. ORIGINS OF AMERICAN ANTITRUST LAW

Antitrust doctrine focuses on two different phenomena that can cause markets to fail to function efficiently and in a fair manner: structural problems (e.g. market concentration and artificial barriers to entry) and behavioral problems (e.g. collusive or predatory conduct). There is virtually unanimous agreement that collusive or predatory behavior presents a danger to competition and should be banned. Lawyers, economists and courts are not unanimous in their thinking about structural issues.[9]

In an article in the Yale Law Journal in 2017, Lina Kahn succinctly stated the animating premise of American antitrust doctrine first embodied in the legislation known as the Sherman Antitrust Act of 1890[10]:

> ... [B]roadly, economic structuralism rests on the idea that concentrated market structures promote anti-competitive forms of conduct. This view holds that a market dominated by a very small number of large companies is likely to be less competitive than a market populated with many small- and medium-sized companies. This is because: (1) monopolistic and oligopolistic market structures enable dominant actors to coordinate with greater ease and subtlety, facilitating conduct like price-fixing, market division, and tacit collusion; (2) monopolistic and oligopolistic firms can use their existing dominance to block new entrants; and (3) monopolistic and oligopolistic firms have greater bargaining power against consumers, suppliers, and workers, which enables them to hike prices and degrade service and quality while maintaining profits.[11]

Both structural and behavioral concerns were central to the debates that led up to the adoption of the United States' basic antitrust statutes—the Sherman Act

---

[9] Charles E. Mueller, "The New Antitrust: A Structural Approach," *Villanova Law Review*, Vol. 12, no. 764 (1967);
Tejvan Pettinger, "Advantages and Disadvantages of Monopoly," Economicshelp.org, last modified October 4, 2020, https://www.economicshelp.org/blog/265/economics/are-monopolies-always-bad/

[10] 15 U.S.C. § 1-7 (1890)

[11] Lina Khan, "Amazon's Antitrust Paradox," The *Yale Law Journal, Volume 126, no.3,, p.* 564 (2017)

of 1890, the Clayton Antitrust Act of 1914 and the Federal Trade Commission Act of 1914. This section will briefly trace the history and development of American antitrust thinking over the past 150 years and compare it to the development of the halacha of competition law beginning, far longer ago, in the Torah. The next section will then seek to demonstrate that while American (and other western) concepts of antitrust have deviated significantly from its original intent, halacha has remained far more consistently in tune with the humanitarian "economic structuralism" approach prescribed in the Torah. Then, this paper shall argue that the shift in the interpretation of American antitrust law has been misguided and would benefit from a closer identification with halacha, since the biblical emphasis on humanitarian ideals that the framers of American antitrust sought to achieve is still desired by the majority of Americans today.[12]

Unlike the Torah, American antitrust law is awash in written evidence of the intent of its authors. This "legislative intent" is found in the record of the debates and reports generated by the Congress that deliberated the statutes as well as by contemporaneous reportage in the press. Although some jurists and sources have criticized undue reliance on legislative intent when construing legislation such as the enactments that comprise American antitrust law,[13] reliance on statements

[12] In a September 2018 survey by Public Policy Polling, 76 percent of respondents were either somewhat or very concerned that "big corporations have too much power over your family and your community." The figure grew when respondents were asked whether big corporations have too much power over politicians: a stunning 88 percent were at least somewhat concerned, with 71 percent very concerned. David Dayen, "Attacking Monopoly Power Can Be Stunningly Good Politics, Survey Finds," *The Intercept,* last modified November 28, 2018, https://theintercept.com/2018/11/28/monopoly-power-corporate-concentration/

[13] The most important recent critic of reliance on materials other than the precise words of a statute, itself, to determine its meaning was the late Supreme Court Justice Antonin Scalia. He often expressed the view that the job of a court in interpreting legislation was to rely on the plain meaning of the words in the statute itself. He argued that reliance on outside materials such as debates or Congressional reports

reflecting the intention of influential draftsmen and sponsors of legislation has long been a recognized principle of statutory construction.[14]

As will be explained below, the industrial revolution brought about a significant imbalance of power in favor of large consortia (called "trusts") of competing producers, manufacturers, railroads, and bankers which were brought under common control and were then able to wield monopoly or near monopoly power in their respective markets.[15] The power created by the welding together of these competitors into trusts was wielded against both ultimate consumers of their products and smaller independent business rivals in order to eliminate them or cause them to conform to the price and practices demanded by the trusts. Once their opposition was neutralized or eliminated, the trusts used their monopolistic control over their areas of commerce to exploit consumers with higher prices and/or reductions of service or quality. There was no effective legal framework or regulatory structure in place to rectify this imbalance. Lacking a judicial or other remedy, the victims of these practices created a powerful political backlash.

Popular sentiment against this imbalance of power ultimately resulted in passage of the Sherman Act and other legislation, principally the Interstate

---

was illegitimate since we "are governed by laws and not the intention of legislators." *Conroy v. Aniskoff*, 507 U. S. 511 (1993). He further argued that legislative reports and records of statements made by legislators were unreliable. Blanchard v. Bergeron, 489 U.S. 87 (1989). His approach became known as "textualism." Justice Elena Kagan remarked in December 2017 in "the Scalia Lecture" at the Harvard Law School, "We are all textualists now."

[14] See, e.g. *King v. Burwell*, 135 S. Ct. 2480 (2015). In upholding the Affordable Care Act (Obamacare), Chief Justice Roberts wrote: "it is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. ...But often-times the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'.... So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'... Our duty, after all, is 'to construe statutes, not isolated provisions.'" (Internal citations omitted).

[15] Basic goods and services fell under the control of these trusts, including commodities such as sugar, petroleum, tobacco, meat, cotton, steel, railroads, and coal.

Commerce Act of 1887,[16] a statute specifically aimed at reigning in the power of railroads to discriminate against smaller shippers.

The record of the Congressional debates makes it inescapable that the underlying purpose of these legislative enactments was to protect the less powerful and smaller business entities and consumers against economic coercion administered by the trusts. But the legislative record is silent about promoting productive or distributive efficiencies. Rather, the design of the legislation was to eliminate anti-competitive power brought about by the combination of business rivals so that their competition would benefit the public. Nothing in the legislation was intended to interfere with contractual or other collaborations that might produce greater efficiencies so long as these arrangements did not restrict competition. This is why the language of Section One of the Sherman Act of 1890 simply reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

In short, the law was not aimed at disturbing practices that promoted efficiency; rather it was aimed at combinations of business entities or monopolists using their accumulated power to "restrain trade", i.e. to prevent competition.[17]

We now know that any structural or behavioral conditions that fail to maintain a balanced equilibrium between the power of producers and consumers by impeding robust competition is unlikely to promote the original stated goals of antitrust. As a

[16] 49 U.S.C. § 1-27 (1887)

[17] A classic example of a lawful collaboration is the Newspaper Joint Operating Agreement pursuant to which an evening newspaper and a morning newspaper in the same metropolitan area would share printing presses or delivery trucks such as the 1933 agreement between the two daily newspapers in Albuquerque, NM. 15 U.S.C. § 1801 (1982)

result, throughout most of the 20th century antitrust enforcement and judicial decisions were used to prevent structural market concentration that would lead to producer domination of markets. Following the original "trust-busting" era, at the beginning of the 20th century, the 1950s-1980s were characterized by successive administrations and Supreme Court opinions that sought to de-concentrate markets or to create market structures. These steps aimed to free up markets to allow for ease of entry and consumer choice to maintain the delicate balance between producers and consumers. Cases like *United States v. A.T. & T.,* 552 F. Supp 131 (D.D.C. 1982) (forcing the reorganization of the Bell Telephone System into seven regional independent operating companies, each operating in its own region of the United States) and *United States v. Microsoft,* 253 F.3d 34 (DC Cir 2001) (imposing substantial restrictions on Microsoft including the requirement that it license its application programming interfaces) exemplify this balance-seeking initiative.

However, conservative economic policies beginning in the 1960s and reaching full flower after the millennium have significantly altered the direction of antitrust enforcement. Professor (later Judge) Robert Bork was an early exponent of the (incorrect, in this author's opinion) view that the only relevant intent of the draftsmen of the Sherman Act was economic efficiency.[18] By the late 1980s, courts and antitrust enforcement agencies during the Reagan administration, influenced by the writings of a wave of conservative antitrust thinkers began to accept this view. Examples include the Federal Trade Commission's approval of the merger of Exxon and Mobil, which represented the 1998 recombination of major pieces of the old

[18] Robert H. Bork, "Legislative Intent and the Policy of the Sherman Act*," Journal of Law and Economics,* Vol. 9, No. 7 (1966).

Standard Oil Trust and the reconsolidation of the pieces of the old Bell system monopoly into two giant companies, Verizon and SBC (now renamed ATT) by 2006. Today, market concentration as measured by such crude measures as the four-firm concentration ratio (the market shares of the four leading firms in any relevant market) or the more sophisticated Herfindahl-Hirschman Index ("HHI")[19]. All the measures currently used by antitrust regulators demonstrate that in the past three decades, the United States markets have become increasingly concentrated with fewer firms in most important relevant markets.[20]

To understand how antitrust law has strayed from its original purposes, it is necessary to take a closer look at its origins. A review of the history of the adoption of the U.S. antitrust laws clearly demonstrates that the Sherman Act was enacted to correct the imbalance of balance to protect consumers and smaller competitors. Despite its "ups and downs," at its core, antitrust has always been about seeking that *Pareto optimality* balance which benefits consumers without destroying the incentives of producers to continue to provide improved goods and services that are demanded by society. [21]

---

[19] The HHI is an index of industrial concentration in a distinct relevant market calculated as the sum of the squares of the market shares of all of the actual competitors in that market. An HHI of under 1,000 indicates an unconcentrated market which should trigger antitrust concerns whereas an HHI of 1,800 or more indicates a highly concentrated market that is likely to trigger antitrust concerns and remedial steps by the government, including either litigation to enjoin the transaction or a consent decree requiring divestitures or other remedies. See, U.S. Department of Justice, Federal Trade Commission, *Horizontal Merger Guidelines*, 1997. https://www.justice.gov/atr/horizontal-merger-guidelines-0 (visited 9/19/20)

[20] Abdil Abdela and Marshall Steinbaum, "The United States Has a Market Concentration Problem" *The Roosevelt Institute,* September 11, 2018, https://rooseveltinstitute.org/publications/united-states-market-concentration-problem/

[21] A Pareto optimality or efficiency is defined in economics as a status where no individual or preference criterion can be better off without making at least one individual or preference criterion worse off.

ii. A CLOSER LOOK AT THE LEGISLATIVE HISTORY OF U.S. ANTITRUST LAW

a. The Legal Situation Prior to 1890

The antitrust laws of the United States consist of three primary legislative enactments: The Sherman Act of 1890, as amended, the Clayton Antitrust Act of 1914, as amended, and the Federal Trade Commission Act of 1914, as amended.[22] The legislative history of these three statutes has been the subject of extensive judicial commentary as well as scholarly study.[23] But the history of antitrust did not begin in 1890 with the passage of the Sherman Act.

By 1776, known as the date of "reception" in American jurisprudence of the English common law as authoritative in the new American republic, English common law had taken a decidedly "pro-business" turn following the Queen's Bench decision in *Mitchell v. Reynolds* 1 Pr. Wins. 181 (QB, 1711). English law had come to accept most private ancillary contractual restraints on one's ability to compete.[24]

In the early years under the U.S. Constitution, the law governing commerce was determined not by the federal government, but by individual states. Like the

[22] These statutes have been amended from time to time but most of these amendments have been minor in nature to include such things as changing the dollar amount of fines to be levied for violations or modifications of wording in reaction to interpretations of the statute in the courts. One more substantive change was to the Clayton Act in 1950 with passage of the Celler Kefauver amendment, which modified the statute to make clear that it was designed to reach asset acquisitions as well as stock acquisitions. The Robinson-Patman act of 1936 was a depression-era piece of legislation primarily aimed at curbing price-discrimination that was being practiced by food suppliers in favor of large chain grocers such as A&P. This statute has been interpreted so as to make it almost completely unenforceable today.

[23] Perhaps the most thorough review of the legislative history of the antitrust laws to be found anywhere is Hans B. Thorelli's PhD Dissertation, published as "The Federal Antitrust Policy--Origination of an American Tradition" (The Johns Hopkins Press, Baltimore, 1955).

[24] *Mitchell v. Reynolds* established the rule that a purchaser of a business could restrict his seller from competing with the business provided the restriction was limited in time and geographic area.

English law, law in the several states was highly conservative in its approach and generally favored individual freedom of traders and the sanctity of contracts. However, as American commerce began to move from its agrarian base to a more complex industrial system, it became evident that inconsistent approaches to commercial issues in state laws were hindering commerce that increasingly moved across state lines. However, the federal courts were reluctant to accept jurisdiction in cases involving interstate commerce because they held the view that the Constitution granted federal courts very limited jurisdiction as to matters that were not the subject of specific federal legislation or basic Constitutional requirements.

In the mid-1800s, some major business enterprises and their banking houses began to utilize a "trust" arrangement with their competitors in a pattern designed to restrain competition. These trusts utilized arrangements that granted control over the production and distribution of several direct competitors to a single hand-picked trustee who then could control the production and sale of the goods produced by the constituent parts of the trust at coordinated and supra-competitive prices. Often, these arrangements were facilitated through complex financing and shareholding agreements created and controlled by major financial institutions like J.P. Morgan, Lehman Bros, and Salomon Bros. By the late 1800s, these trusts controlled all or almost all the output of many basic commodities in the United States such as oil, salt, sugar, meat, cotton, petroleum, steel, and tobacco and allowed for monopoly pricing to consumers and down-stream businesses. This device was not effectively restrained by state courts due to precedents that upheld such trusts on the basis of the sanctity of contracts, often relying on the "contracts clause" in the U.S.

Constitution.[25] Other state courts ruled in favor of the trusts on the technical grounds of a lack of anti-competitive clauses in the agreements creating the trusts.[26]

However, some more progressive courts struck these trust combinations down as a violation of the common law of competition. (See, e.g., *Richardson v. Buhl and Alger,* 77 Mich. 632 (1889)). This result, coming just one year before passage of the Sherman Act, indicates the confused state of case law on the eve of passage of the Act.

Before turning to the legislative history of the Sherman Act, it is necessary to review briefly the social and economic conditions in the United States in the period leading up to 1890.

b. AMERICAN ECONOMIC AND SOCIAL CONDITIONS AT THE END OF THE 19TH CENTURY

Law in any culture or civilization that is responsive to popular needs is shaped by the social and economic conditions faced by the society.[27] The end of the Civil War in the United States brought a rapid industrialization, especially in the North and with it, enormous wealth to a small group of men who controlled most of the means of production. Industries like coal, steel, oil, railroads, meatpacking, sugar, cotton, and tobacco originally emerged as fiercely competitive with numerous rivals and boom

---

[25] U.S Constitution, art. 1, sec. 10. See, *Central Shade-Roller Co. v. Cushman,* 143 Mass. 353 (1887).
[26] The typical trust agreement was silent as to its purpose. For a scholarly review of the history of trusts in the business world, see John Morley, "The Common Law Corporation: The Power of the Trust in Anglo-American Business History." Columbia Law Review Vol. 116, p. 2145-2166 (2016).
[27] The science of jurisprudence rests on the belief that legal rules and decisions must be understood in context. Law is not autonomous, standing outside of the social world, but is deeply embedded within society. Lynn Mather, *The Oxford Handbook of Political Science.* (Oxford U. Press, New York, 2011).

and bust periods, leading to wrenching bankruptcies and economic dislocations. The desire to control markets led the owners of large companies, and especially their bankers, to use the aforementioned trust or combination business models to control the supply and distribution of their production and maximize the profitability of their enterprises.

During this same period between the end of the Civil War and 1890, an economic philosophy called "Social Darwinism", also known as "The Gospel of Wealth" gained popularity amongst industrialists and economists in the U.S. and Great Britain. Men like Herbert Spencer, William G. Sumner, and Andrew Carnegie championed this theory which was derived from the earlier writings of English theorists Adam Smith and John Stuart Mill.[28] This movement advocated a *laissez-faire* approach to business and commerce. Adam Smith and John Stuart Mill understood the risk that businessmen would attempt to control markets in order to maximize profits, but they believed the irresistible attraction of supra-competitive profits would soon attract other rivals into the field to overcome the first movers' advantage in extracting monopoly rents. They also believed that any governmental intervention would only create artificial barriers to entry and, rather than preventing

[28] Andrew Carnegie, the creator of the U.S. Steel Corporation trust, wrote in a February 1889 pamphlet called "The Bugaboo of Trusts"*:* "The people of America can smile at the efforts of all her railway magnates and of all her manufacturers to defeat the economic laws by Trusts or combinations, or pools, or 'differentials' or anything of like character. Only let them hold firmly to the doctrine of free competition. Keep the field open. Freedom for all to engage in railroad building when and where capital desires, subject to conditions open to all. Freedom for all to engage in any branch of manufacturing under like conditions." Andrew Carnegie, "The Bugaboo of Trusts," *No. Am. Rev.* Vol. 148, No. 387 (Feb. 1889): 141-150, http://www.jstor.org/stable/25101717. In June 1889, he published a second essay entitled "Wealth," in which he praised the inequality that comes from unrestricted capitalism. He ended the article with the statement "Such in my opinion, is the true Gospel of Wealth, obedience to which is destined someday to solve the problem of the rich and the poor and bring 'Peace on earth among men of Good Will". (sic) "(stet). Andrew Carnegie, "Wealth" *No. Am. Rev.* Vol. 148, No. 391 (June 1889), https://www.swarthmore.edu/socSci/rbannis1/AH19th/carnegie.html.

monopolization, would end up actually encouraging it. Some also believed that the fierce rivalry in industries like oil and railroads was inefficient, wasteful, and was preventing necessary investment.

This philosophy was also championed by many political leaders in America. Monopolies were seen as perfectly acceptable, owing to the fact that they arose from the superior skill, foresight and industry of their owners and that any excesses would soon be extinguished by the ever-present threat of potential competition.

Rapid progress in the mechanical arts was another major factor shaping the culture. Industrial mechanization resulted in tens of thousands of lost manual labor jobs. Innovations in such areas as farm machinery, steam engines, communication (telegraph), and transportation, at the same time, allowed major business firms to penetrate into smaller rural markets and displace local "mom and pop" competition.

Due to the rising power of industrial giants soon after the end of the Civil War, grassroots discontent grew, particularly in agrarian sectors of the economy. One form this reaction took was for small producers to form organizations such as the Patrons of Husbandry and the Grange.[29] These organizations lobbied state legislatures to adopt anti-monopoly legislation, but these efforts were often struck down by state courts on the theory that the Constitution protected businesses' "freedom of contract" rights. The Grangers also organized politically and did manage to force passage of some local state laws regulating the activities of railroads in mid-western and western states. However, these efforts were often futile because the

[29] By 1875, over 19,000 local Grange chapters existed with over 758,000 individual families represented, mostly in the major farming states, including Ohio, the home of Senator Sherman. "The Granger Movement," Encyclopedia Britannica, accessed October 20, 2020, https://www.britannica.com/event/Granger-movement

farmers realized that they relied on Eastern banking and financial institutions for agricultural loans, and these financial institutions were heavily involved in promoting the very anti-competitive combinations the Granger movement was attacking. Thus, the stage was set for a great political fight over federal antitrust legislation.

c. THE LEGISLATIVE HISTORY OF THE ADOPTION OF THE SHERMAN ACT

THOMAS NAST (American, 1840-1902)

Speaking of the bill that would ultimately bear his name, Senator John Sherman, Republican of Ohio, said:

> It does not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government (speech in the Senate. March 21, 1890).

This statement is not precisely correct, because unlike the common law, the Act declared, ‘all’ contracts, combinations and/or conspiracies found to be in restraint of trade, and all acts of monopolization or attempts to monopolize illegal so long as these acts or monopolizations met the jurisdictional dollar threshold of interstate or foreign commerce of the United States. The Act also created a novel

private civil action remedy for private citizens who could demonstrate that they were injured by a violation of the Act.[30] And, unlike then existing state and federal law, the Act applied to both natural defendants and corporations or partnerships that violated the Act. Sen. Sherman's statement, however, was correct to the extent that certain actions that would fall under the new Sherman Act were already violative of American common law as construed, at least, in a number of the states.

Prior to passage of the Sherman Act, in 1887, Congress passed the Interstate Commerce Act, which was aimed at curbing the monopolistic abuses of railroads that carried freight across state lines. Although railroads tended to be natural monopolies in the areas covered by their trackage, still, throughout the 1870s and 1880s, there had been a number of mergers and consolidations among railroad companies eliminating most of the little competition that existed. The resulting monopolies exploited shippers and caused a large political backlash, especially in agricultural and mining states. The Interstate Commerce Act created the Interstate Commerce Commission (ICC), the very first administrative agency in the federal government. The ICC was tasked with responsibility to investigate and prosecute railroads accused of violating the Act by charging unreasonable or discriminatory rates. Railroads were also required to disclose their rate schedules to the ICC and the public.

The following year, Senator Sherman offered a resolution to study the creation of a law to regulate:

[30] In 1914, the Clayton Act expanded this private right of action to provide the successful plaintiff with treble the actual damages plus reasonable attorneys' fees, thus converting civil plaintiffs into "private attorneys general."

> all arrangements, contracts, agreements, trusts or combinations between persons or corporations which tend to prevent free and full competition in the production, manufacture or sale of articles of domestic growth or production or of the sale of articles imported into the United States, or which, against public policy, are designed or tend to foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life. . .

Senate bills were introduced and referred to the Finance Committee where the language was debated and modified. One key modification was to add a provision imposing criminal liability for violations. However, the bills died when the 50th Congress ended.

In the next Congress, Sherman re-introduced his legislation. In a speech on the floor, he explained part of his thinking:

> [T]he intention of the combination is immaterial. The intention of a corporation cannot be proven. If the natural effects of its acts are injurious, if they tend to produce evil results, if their policy is denounced by the law as against the common good, it may be restrained, . . . It is the tendency of a corporation, and not its intentions, that the courts can deal with…
> The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors . . . .It is this kind of a combination we have to deal with now. <u>If we will not endure a king, as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.</u> (Cong. Rec. March 21, 1890) (emphasis added).

As of this point in the debate, the bill did not address single-firm monopoly conduct. In order to violate the bill's provisions, the defendant would have had to participate in some form of joint action with another entity. Subsequently, Section 2 forbidding unilateral conduct resulting in monopolization or attempts to monopolize

or conspiracies to monopolize was added. The modified bill passed the Senate by a vote of 52 in favor and 1 opposed. The House passed similar legislation and on July 2, 1890, it was signed into law by President Benjamin Harrison.[31]

One scholar has noted that the record of the debates in the House and Senate was based on "muddy thinking" and was full of inconsistencies.[32] Nevertheless, the consensus among scholars is that the legislative record is overwhelmingly clear that the sentiment of those who voted for the legislation was to rectify the imbalance of power between large consortia and smaller business entities and consumers that had become so widespread in the nation.[33]

d. <u>THE HISTORY OF ANTITRUST ENFORCEMENT 1890-1914</u>

Four presidential administrations struggled with enforcement of the new federal antitrust law from 1890 to 1914: Presidents Harrison, Cleveland, McKinley and T. Roosevelt. Congress, having passed the legislation, turned its attention

---

[31] The constitutionality of the Sherman Act was tested quickly. In 1895, the Supreme Court decided *U.S. v. E. C. Knight Co.,* 156 US 1 (1895), which declared that while the Act was constitutional as applied to shipment of sugar across state lines, it was unconstitutional as applied to manufacturing in general and to the refining of sugar in particular since manufacturing is a local activity, taking place in a fixed geographical location within a state and, therefore, not "interstate commerce." Ten years later in *Swift & Co., v. United States,* 196 US 375 (1905), the Court held that manufacturing was part of a "stream of commerce" that crossed state lines (in this case the slaughter and preparation of beef carcasses) and, so, was within interstate commerce.

[32] Thorelli, *The Federal Antitrust Policy,* 217.

[33] See, e.g. John Kirkwood and Robert Lande, "The Chicago School's Foundation is Flawed: Antitrust Protects Consumers," *U of Baltimore School of Law Research Paper* No. 2009-17, accessed August 4, 2020 (November 2009) https://scholarworks.law.ubalt.edu/?utm_source=scholarworks.law.ubalt.edu/all_fac/715&utm_medium=PDF&utm_campaign=PDFCoverPages

elsewhere and did nothing further for twenty years to assist the executive branch to enforce the law or the judicial branch to interpret it. Until the Roosevelt administration came into office, Attorneys General (who were tasked with the responsibility for bringing federal litigation to enforce the law) were indifferent or even hostile to antitrust enforcement. Apparently, there was a feeling that since a private right of action had been included in the law, enforcement could be left in the hands of "private attorneys' general."[34]

The first federal enforcement case brought under the Sherman Act involved price fixing of coal in and around Nashville, Tennessee. The local U.S. Attorney in Tennessee, with no support, whatsoever, from the Attorney General or the U.S. Department of Justice secured a court victory.[35] However, during the remaining thirty-two months of the Harrison administration, this was the only victory the government secured. Two cases were dismissed by courts and four others were still pending at the end of Harrison's term.[36]

It was not until McKinley's assassination in 1901 and the succession of his Republican Vice-President Theodore Roosevelt to the presidency that there was any interest shown in antitrust enforcement. Soon after taking the reins of office, in March 1902 Roosevelt brought a landmark suit against the Northern Securities Corporation, a trust controlling competing railroads operating out of the Chicago rail hub and controlling all rail traffic to the Northwestern United States. Northern Securities was controlled by the bankers J.P. Morgan and James J. Hill.

[34] Thorelli, *The Federal Antitrust Policy*, 371.
[35] *United States v. Jellico Mountain Coal Co., et al,* 43 Fed. 898, 46 Fed. 432 (1890)
[36] See Thorelli, *The Federal Antitrust Policy*, 376.

Just weeks later, in May 1902, the Roosevelt administration brought another suit to dissolve the “Beef Trust”. The filing of the Beef Trust complaint was a deliberate effort to overturn the ruling of the Supreme Court in the *E. C. Knight* “sugar trust” case since meat packing was a “local” manufacturing activity. To this and other criticisms of his strong advocacy of antitrust enforcement, Roosevelt said: “No more important subject can come before the Congress than the regulation of interstate business.”[37] Filing suit to challenge the trust was one thing—winning cases, however, would be a long time coming.

L. Earl in the Binghamton Press.

The federal courts were in very conservative hands at the outset of the Roosevelt administration and they managed to stifle most of the cases brought before them. However, in March 1904, the Supreme Court handed down its landmark 5-4 decision in the *Northern Securities* case. Justice John Marshall Harlan wrote the majority opinion holding that the stockholders of the Northern Securities Company intended to eliminate all competition between the competing railroads they controlled and, therefore, “no scheme or device could more certainly come within

[37] Theodore Roosevelt, “Second Annual Message” (Speech, Washington, DC, December. 2, 1902), UVA Miller Center, https://millercenter.org/the-presidency/presidential-speeches/december-2-1902-second-annual-message.

the words of the [Sherman] Act."[38] The argument that the trust was validly created under Illinois state law was brushed aside by the majority.

> It would be extraordinary if the court, in executing the Act of Congress could not lay hands upon that company and prevent it from doing that which, if done, would defeat the act of Congress. (*id*. at 346)

The remedy ordered by the Supreme Court was an injunction against the stockholders of the Trust from exercising voting power over the trust, effectively resulting in restoring the independence of the constituent railroad companies.

The next major Supreme Court ruling construing the Sherman Act was "The Meatpackers Case" brought by Roosevelt, *United States v. Swift & Co.,* 196 U.S. 375 (1905). The government's petition alleged that the meat packers who comprised the Beef Trust controlled about sixty percent of the total trade in fresh meat in the United States. They were alleged to have purposely used their joint control to depress the "paying price" for live cattle. They were also alleged to be working in combination to achieve a monopoly of the supply and distribution of fresh meat.[39]

To avoid the thrust of the holding in the *E.C. Knight* "sugar trust" case that manufacture was local and, thus, not within the jurisdictional requirement of interstate commerce, the unanimous Court, speaking through Justice Oliver Wendell Holmes[40] determined that the essence of the combination was to control the purchase of live cattle and the subsequent sale of carcass beef, all of which involved interstate commerce. Moreover, said Justice Holmes, the fact that each of

---

[38] 193 U.S. 326, 327 (1904)
[39] 122 Fed. 529ff
[40] Justice Holmes had dissented in *Northern Securities.*

the separate acts included in the combination, standing alone, were lawful did not matter. "The plan may make the parts unlawful. Intent is almost essential to such a combination... ". (at 196 U.S. 396). Again, as in *Northern Securities,* the remedy was an injunction, effectively dissolving the Trust.

There matters largely stood until May 15, 1911 when two landmark decisions were handed down by the Supreme Court on the same day--*Standard Oil v. United States*[41] and *United States v. American Tobacco Co.*[42] In the *Standard Oil* decision, the Court was dealing with the powerful oil trust created and controlled by John D. Rockefeller. Although the Standard Oil trust controlled about 90 percent of the refining capacity in the United States in 1904, competitors had eroded its share to approximately 60-65 percent by 1911.[43] Writing for the Court, Chief Justice White explored in depth the meaning of the term "restraint of trade" in English common law concluding with the statement that the term, as used in the Sherman Act, was intended to apply to all contracts, combinations or conspiracies and that Congress chose not to enumerate the manifold ways in which violations might occur. Instead, the Court ruled:

> And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in

[41] 221 U.S. 1 (1911)
[42] 221 U.S.106 (1911)
[43] Jeff Desjardins, "Chart: The Evolution of Standard Oil," *visualcapitalist.com,* last accessed June 1, 2020, https://www.visualcapitalist.com/chart-evolution-standard-oil/.

the statute had or had not in any given ease been violated. *Thus, not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law, and in this country, in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.* (emphasis added) 221 US 1, 60.

-

This decision was a ‘game changer’ in antitrust. Holding that only ‘unreasonable’ restraints of trade were covered by the statute, the Court made it much more palatable to succeeding generations of courts and scholars, as well as legislators in Congress. *Standard Oil* is still good law today nearly 110 years after it was decided.

The remedy imposed by the Court was the dismantling of the Standard Oil trust into seven separate companies (the “Seven Sisters”). They all remained independent until Standard Oil of New Jersey (renamed Exxon) acquired Mobil Oil (formerly Standard Oil of New York (SOCONY)) in 1999. Standard Oil of California

(now Chevron) subsequently acquired Gulf Oil and Texaco (an original seven sister). The other sisters are still independently owned and operated today.[44]

Not included in this brief survey of the early history of the Sherman Act are many other important decisions, but there is one case that involved the famous Otis Elevator Company, (which built, and for decades occupied, the building in which the Academy for Jewish Religion is currently located).[45] In 1901 the New York federal court rendered its decision in *Otis Elevator, et al.,* 107 Fed, 131 (Cir, NY 1901). Otis had, through acquisitions, accumulated a vast number of patents covering elevator machinery and processes and sued any alleged infringers who sought to compete in the manufacture of elevators. The defense put forth was that Otis had lawfully acquired these patents, often through the acquisition of the companies that held them. However, the Department of Justice, under President T. Roosevelt, had determined that Otis had unlawfully achieved monopoly power through "pooling" patents to the extent that no one else could built an elevator without infringing one or more Otis-controlled patents. Therefore, Otis was in violation of Section 2 of the Sherman Act. The court dismissed the Otis defense and entered judgment for the government.[46]

---

[44] The *American Tobacco* case resulted in the dissolution of the Duke tobacco trust which controlled virtually all of the manufacture and distribution of manufactured cigarettes.
[45] I should also mention that many years later, the author was privileged to become chief outside litigation counsel for Otis.
[46] Otis Elevator, et al., 107 Fed. 131 (Cir, NY 1901), last accessed October 5, 2020, https://www.justice.gov/atr/page/file/1139406/. This defense—that a patentee loses the right to enforce its patent when the patent is used to further anticompetitive practices—came to be known as the 'patent misuse" defense and was upheld for the first time by the U.S. Supreme Court in *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U.S. 502 (1917). It is, today, a standard defense in patent litigation.

e. CONGRESS PASSES THE CLAYTON ACT OF 1914 TO SUPPLEMENT THE ANTITRUST LAWS.

There were two unanticipated consequences in the wake of passage of the Sherman Act. First, the statute was used against organized labor unions, which were viewed by some courts as combinations of competitors (in the sale of their labor, in restraint of trade; and second, although contracts, combinations and conspiracies in restraint of trade were now prohibited, the elimination of competition resulting from mergers or acquisition of competitors was not expressly prohibited). Thus, in the wake of passage of the Act, there was a wave of mergers that had essentially the same power-consolidating effect as the now banned combinations and trusts.

Towards the end of the Taft Administration and in the first few years of the Wilson Administration, a Commission on Industrial Relations was established to look into possible improvements in the law to deal with these two issues. In Woodrow Wilson's first State of the Union Address on December 2, 1913, he urged the Congress to pass legislation "to prevent private monopoly more effectively than it has been prevented" and that "the Sherman Act's debatable ground[47] should be reduced as much as possible by explicit legislation...".[48] The result was the passage in 1914 of the Clayton Antitrust Act. To deal with public sentiment that now favored labor union organizations, section six of this statute exempted from the coverage of the antitrust laws the labor of a human being. Section seven of the Act

[47] Ambiguous language.
[48] Woodrow Wilson, "State of the Union Address" (speech, Washington, D.C., December 2, 1913), InfoPlease, www.infoplease.com/primary-source/government/presidential-speeches/state-union-address-woodrow-wilson-december-2-1913.

declared certain mergers of corporations unlawful (but only through acquisitions of their shares, not their assets)[49] where the effect of the merger "may be substantially to lessen competition in any line of commerce and in any section of the country or to tend to create a monopoly" (Section 7). Section two of the statute banned price discrimination unless related to the quantity of the commodities purchased,[50] exclusive dealing, unfair methods of competition, and interlocking directorates of corporations above a certain size.[51]

In 1914, Congress also passed companion legislation creating the Federal Trade Commission and giving it jurisdiction to enforce the provisions of the Clayton Act. Private parties were also given a private right of action to enforce many of its provisions. Passage of these two 1914 enactments was motivated by the apparent failure of the courts to interpret the Sherman Act to achieve the objectives of eliminating the business practices and structural arrangements that Congress sought to end with its passage in 1890. President Wilson called on Congress to strengthen the antitrust laws on the books, and especially to enhance the protections for consumers and protect small business enterprises. Congress responded in the affirmative and passed the Clayton Act and the Federal Trade Commission Act in 1914. Congress' action demonstrated that the protection of small businesses and ultimate consumers, which had animated passage of the

[49] Section seven was amended in 1950 to close the so-called "asset loophole".

[50] An attempt to remove this "quantity" loophole was implemented in the passage of the Robinson-Patman Act in 1936 which amended Section 2 of the Clayton Act. Subsequent history demonstrated that the issue of price discrimination was harder to fix than anticipated and, as of today, the Robinson-Patman Act is considered almost unenforceable. See, e.g. Roger Blair & Christina DePasquale, "Antitrust's Least Glorious Hour: The Robinson-Patman Act*," Journal of Law and Economics, Vol. 57,* (2014): 201.

[51] An inter-locking directorate refers to the case where an individual serves as a director of two or more corporations that are in competition.

Sherman Act, was still an important Congressional priority. It also demonstrated the extent to which antitrust had become an accepted part of the political, economic and commercial landscape in the United States, despite the power of large corporations and the efforts of powerful businessmen to kill it in its cradle.

The period following adoption of the Clayton Act actually saw a new, possibly unrelated form of cooperation between large American corporations and the government. Companies like Ford Motor Company and The American Telephone and Telegraph Company, partnered with Washington on social welfare programs and were considered bulwarks in the development of a burgeoning middle class. During the First World War, the American industrial sector did much to turn the tide of battle. The era of the "Robber Barons" was expunged from the memory of most Americans.

With the onset of the Great Depression in 1930, the Hoover Administration was more interested in protecting jobs and the economy than in enforcing antitrust. During the depression there were wholesale bankruptcies and failures, especially of smaller enterprises. Consequently, the Roosevelt Administration re-focused attention on the protection of small "mom and pop" businesses from the large national corporate titans. Thus, as mentioned above, Congress in 1936 passed the Robinson-Patman Act[52] designed to close the "quantity loophole" which had enabled major purchasers, like the Great Atlantic & Pacific Tea Company (A&P) to drive the small independent grocer on Main Street out of business, often because the quantity discounts A&P and others received enabled them to price the sale of

[52] 15. U.S.C.§13a

basic foods like milk and bread at prices below the independent retailer's cost. The expressed aim of the statute was to ensure that large merchants were not provided with discounts unavailable to smaller merchants. However, in practice, Robinson-Patman never achieved its objective because the courts interpreted it in such a way that it was easily evaded.[53]

Antitrust enforcement gained new force in the period following the end of World War II and especially with the beginning of the Kennedy Administration in 1961. In the next two decades, there was robust enforcement in virtually all areas of antitrust, especially in the area of criminal price-fixing which saw, for the first time, executives being sentenced to prison.[54] The Kennedy and Johnson Administrations also challenged many corporate mergers and acquisitions, fearing "a rising tide of economic concentration in the American economy."[55]

B. SHIFTING INTERPRETATIONS OF U.S. ANTITRUST LAWS

By the mid-1970s, legal scholars such as Professors (later Judges) Robert Bork and Ward Bowman at the Yale Law School and Richard Posner at the University of Chicago mapped out a much more restrained orbit for antitrust, which gained judicial support during the Reagan years (1980-1989) and has only started to

---

[53] See, e.g. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. 509 U.S. 209 (1993),* one of a series of cases that has made it very difficult for a private plaintiff to prevail in litigation under the Robinson-Patman Act. The Federal Trade Commission is the federal agency charged with enforcement of the Act (since it is an amendment to the Clayton Act) and it has not brought a single enforcement action under the Act since the year 2000.

[54] In 1959, several executives of companies producing hand tools were sentenced to 90 days in jail for price-fixing violations. *United States v. McDonough Co.,* 1959 Trade Cas. 69482. at 75887-88 (S.D. Ohio Oct. 13, *1959).* Then, in a major case in February 1961, several electrical equipment manufacturing executives from companies including General Electric, were sentenced in Philadelphia, PA to short prison terms. This served as a significant deterrent to other would-be price-fixing conspirators.

[55] *Brown Shoe v. United States,* 370 U.S. 294, 370 (1962)

be reconsidered in the past few years. The belief that animated the original passage of the antitrust law—that market structure characterized by concentration and the sheer corporate size of firms in particular markets were threats to the fabric of society—was challenged by these scholars. Instead, they argued new discoveries in the field of micro-industrial organization economics disclosed that the true goal of all economic regulation, including antitrust enforcement, was not de-concentration of markets but the efficient utilization of the economic resources of society to promote economic efficiency, and furthermore that the size and scale of enterprises was beneficial to achieving this goal. This belief was nicknamed "The New Economic Learning."

This neo-classical New Economic Learning theory, espoused by the so-called "Chicago School," led by Dr. Frank H. Knight and Nobel laureate Professor Milton Friedman, was based on a benign view of capitalism and enterprise. A basic tenet is that free and unrestrained markets are likely to be the best allocator of productive resources, rewarding those firms that satisfy consumer demand and punishing those that fail to do so. Government interference with markets, on the other hand, was viewed as likely to promote inefficiency.[56] Professor Bork popularized this theory in his influential 1978 book entitled *The Antitrust Paradox*[57] in which he misleadingly referred to the goal of antitrust as "consumer welfare."[58] In fact, the

---

[56] The classic example was said to be efforts to promote small independent local grocers as opposed to the large chain-store supermarket competitors. See, Jonathan Baker, "Recent Developments in Economics that Challenge Chicago School Views," *Antitrust L. Journal* Vol. 58, p. 645 (1989)

[57] Robert Bork, *The Antitrust Paradox: A Policy at War With Itself,* (New York: Basic Books, 1978).

[58] The term "consumer welfare" standard can be understood as the maximization of consumer surplus (i.e. The most productive use of resources at the lowest cost to consumers). However, as the term is used by Bork, it includes producer surplus as well as consumer surplus, and so can be reduced to a standard that promotes maximum efficiency without regard to whether the benefit of this efficiency is captured by consumers or producers. See, e.g., Joe Kennedy, "Why the Consumer Welfare Standard

goal advanced by Bork and others had little to do with the notion of the welfare of consumers as such. Instead, the goal was the use of “price theory” economics, which maintained that unregulated markets were the best vehicles for allocating scarce resources to their highest and best use. “Price theory” economics assumes that an unrestricted market is the best vehicle to determine the market-clearing price. Beginning in the 1970s, courts, ultimately including the U.S. Supreme Court, began to interpret the antitrust laws in accordance with this approach.[59]

Under the influence of this new economics-driven approach, the federal antitrust agencies under presidents Reagan and the first president Bush retreated from antitrust enforcement in areas except for criminal price-fixing conspiracies. Soon, Supreme Court and lower court opinions began to turn away state governments and private plaintiffs seeking to enforce antitrust claims. Although the Clinton and Obama administrations’ antitrust enforcement agencies made an effort to revive enforcement of antitrust, particularly in the area of horizontal and vertical mergers, they had only limited success in the face of the new and more conservative case law precedents and an appellate judiciary, many of whom had been appointed during the Reagan-Bush years.

In sum, it could be argued that antitrust enforcement followed a pendulum-like pattern during the first 100 years following the passage of the Sherman Act. The

---

Should Remain the Bedrock of Antitrust Policy,” *Information Technology & Innovation Foundation*, last accessed May 31, 2020, (October 2018), docs.house.gov › HHRG-115-JU05-20181212-SD004.

[59] See, e.g. *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S.85 (1984); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*509 U.S. 209 (1993).

beliefs and policies aimed at protecting consumers and small business, that animated the original antitrust legislation was ignored in the early decades after enactment of the Sherman, Clayton and Federal Trade Commission Acts, during the Great Depression, the war years and the Reagan-Bush era. There was a significant increase in enforcement during the Truman years (1945-1953) followed by a more passive approach in the Eisenhower years (1953-1961). The Kennedy-Johnson years (1961-1969) saw significant enforcement with new ground broken in the courts as both the government and private parties challenged horizontal, vertical, and even conglomerate mergers, as well as in enforcement against monopolization and restraints of trade involving practices such as "tie-in" sales practices and exclusive dealing. Then, beginning in the mid-1970s, an era of far more conservative thinking pervaded the courts and the government agencies, exemplified by the teaching of the economists at the University of Chicago. The influence of "Chicago School" thinking is still prevalent as of this writing.

Given the abundant evidence of legislative intent that led to passage of the Sherman Act of 1890, it is remarkable to observe how far the current interpretation of American antitrust law differs from that envisioned by its draftsmen, especially their concern for the less powerful participants in the marketplace. Some scholars have argued that American antitrust laws are written in such broad—almost Constitutional language—that the draftsmen intended that they ought to be reinterpreted by the courts as new conditions and circumstances unfold in the American economy.[60] Ironically, many of these scholars, such as the late Justice

[60] Indeed, during her confirmation hearing, Judge Amy Coney Barrett made this precise claim.

Scalia were “strict constructionists” when it came to the U.S. Constitution but far more prepared to reinterpret statutes passed by Congress. Especially since statutes are far easier to amend or repeal than the provisions of the U.S Constitution, it is this author’s opinion that statutes, like the U.S. antitrust law, should be construed and enforced in accordance with the expressed intent of Congress and amended by Congress when circumstances warrant. In the case of the antitrust laws, that intent is un-mistakable—these laws were enacted to protect the interests of the ultimate consumer and the independent small business firms by preventing mega-corporations or combinations of firms from engaging in practices that take advantage of their power to stifle the opportunities for smaller enterprises to compete and of consumers to gain the benefits of robust competition for their purchasing power. It is significant that every time Congress has amended the antitrust laws, the amendments were designed to strengthen them in accord with the original Congressional intent.[61]

V. ORIGINS OF HALACHIC LAW RELATING TO COMMERCIAL COMPETITION

The history of the halacha concerning regulation of commercial competition is sparse by comparison with the American antitrust experience. Undoubtedly there

[61] For example, the Cellar-Kefauver amendment to the Clayton Act in 1950 strengthened antitrust enforcement against anti-competitive mergers by eliminating the so-called asset loophole to give plaintiffs the power to challenge asset acquisitions whereas the original version of Section 7 (15 U.S. C. §18) restricted jurisdiction to acquisition of a corporation’s shares of stock. The Hart-Scott-Rodino Act of 1978 (15 U.S.C. § 18A) gave the federal antitrust enforcement agencies automatic waiting periods before mergers or acquisitions above a certain size could be consummated and the power to compel discovery of documents that could be used to mount an attack against such transactions. The Antitrust Civil Process Act of 1962 (15 U.S.C. § 1311, et seq) gave the federal antitrust agencies subpoena power in the course of antitrust investigations.

was a rich history here but, unfortunately, it largely occurred at a time when historical records were not preserved and are not available for systematic study today. There are only a few passages in the Torah that indicate a concern with commercial competition, some of which will be described below. Of course, commercial competition is surely not the central focus of the Bible. Nevertheless, in the centuries that followed the biblical era, as commerce began to flourish in the Middle East, both the Jewish communities and the surrounding cultures in which Jews lived began to develop a body of laws and customs regulating commercial competition which proved to be the seeds that would influence later generations of rabbis.

For example, there are extensive records surrounding Rome's enactment of laws that were binding throughout the Empire, including in Palestine, regulating competition. In approximately 50 BCE, Rome enacted the *Lex Julia de Annona*, a law prescribing heavy fines for anyone interrupting the supply of corn. In 301 CE, the Romans also adopted legislation putting a ceiling on maximum prices for essential goods. And in 483 CE, Rome adopted legislation calling for severe penalties, including property confiscation for anyone engaging in abuse of monopoly power, such as through price gouging or engaging in combinations in restraint of trade.[62]

Even earlier, in Greece, there is a report of a famous trial in 386 BCE against grain importers who combined together to refrain from competing with one another in order to purchase shipments of grain from Attica at artificially low prices only to

[62] See, D.V. Cowen, *Ancient Origins of Competition Law,* Vol.20 Advocate Forum 38 (August 2007)

then seek to sell the grain at vastly inflated prices in the local market.[63] So, when the rabbis began introducing regulations concerning competition in the Talmudic era, they were not writing on a *tabula rasa*.

Below is a brief summary of the other available documentary sources of halachic material on commercial competition from the time of the Bible to modern times: Similar to the American experience, as Jewish society moved forward from biblical times to the modern era, there was a need for laws to be promulgated throughout the community to maintain a balance between the interests of the weak and the powerful in the world of commerce. What was not similar, however, was that the halacha of competition was developed by men who were committed to Torah values. Thus, instead of the "bare-knuckles" values expressed in sources like Carnegie's "Gospel of Wealth," the Torah emphasized such values as care and concern for the vulnerable members of society, love of the neighbor, charity for the resident alien, and concern for the welfare of the economic health of the entire Jewish community—and especially those within it who were vulnerable to the abuse of economic power. While the rabbis clearly appreciated the value of a robust economy to Jewish society, and there are statements in the codes and responsa that can be construed as encouraging competition, the overall approach of the rabbis to the subject of competition is not the promotion of efficiency or the amassing of wealth, so much as it is the protection of the welfare and livelihood of the members of the community.

[63] Lambros Kotsiris, "An Antitrust Case in Ancient Greek Law," *International Law,* Vol. 22, Iss. 2, (1988).

United States antitrust law embodies an overarching belief in the virtue of individual economic incentives within a system of free market capitalism and in a regulatory framework designed to promote competition as a core value. However, it is only marginally concerned with promoting morality.[64] On the contrary, as understood by the courts, the law promotes "ruthless competition."[65] "Ruthless competition" is not a Torah value.[66] In this respect, as will be shown below, the halacha of commercial competition charts a different course than that of American antitrust doctrines.[67]

A. BIBLICAL ORIGINS

If Judaism is defined as a system of living in accordance with the revealed will of G-d, both economically as well as socially and ritually, then the origin of Jewish economic law relating to competition begins with the Torah *she-bikhtav* (written law), especially the five books of Moses. However, as humanity progressed forward from the Iron Age, new conditions, affecting those who looked to the Torah *she-bikhtav* for authoritative guidance, changed. In response, a new Torah *she-*

[64] One could certainly argue that antitrust was intended by its framers to operate as a moral system designed to promote individual opportunity and fair-play in the market. However, this intent is not expressed either in the language of the statutes or, for the most part, in case law.
[65] S*tandard Oil Co. v. FTC* 340 US 231, 248 (1951). "Entertaining claims of excessive competition would undermine the functions of the antitrust laws" *Stamatakis Indus. Inc., v. King* 965 F.2d 469, 471 (7th Cir 1992), citing Snyder and Kauper, "Misuse of the Antitrust Laws: The Competitor Plaintiff," *Mich L. Rev.* Vol. 90 (1991): 551.
[66] See, *e.g.* Exodus 23:5
[67] It is also important to understand that the rabbinic laws regulating commerce emerged at a time when the Jewish community was no longer sovereign in its land and, therefore, the rabbis could only seek to regulate the commercial behavior of that segment of the Jewish community who chose to submit themselves to rabbinical jurisdiction as a matter of religious conviction or social pressure to conform. The non-Jews with whom Jews had commercial dealings were not bound by rabbinic enactments or response and thus, Jews were also required, when dealing with non-Jews to conform their behavior to the laws enforced by the local sovereign.

be’al peh (oral law) emerged. This oral law is traditionally understood as also imprinted with the divine imprimatur and its authority is deemed to be just slightly less than the written law. One hallmark of the written law is its demand that people must learn to control their selfish physical, spiritual, and economic desires and work to create a society in which each individual can enjoy an equitable share of G-d’s bounty.[68] Manufacturers and tradesmen, along with everyone else, were judged by this standard.

Compared to the antitrust legislation adopted by the U.S. Congress, the Torah is less systematic in its approach. Thus, it is harder to tease out of the text of the *TaNaKh* (the Hebrew Bible), a compelling narrative explaining and supporting the motivation for its laws related to economics or commercial activities. In addition, there is little or no discussion in the TaNaKh about business competition, perhaps because the concept was not deemed sufficiently important or developed for inclusion.

Nevertheless, any listing of the demands that reflect the Bible’s attitude towards trade and commerce could certainly begin with the 10th *dibbur* (commandment) (Ex. 20:14, Deut. 5:18), since coveting or craving is close to the core of the competitive urge in business or commerce.[69] As Abraham Joshua

---

[68] Volumes have been written to explain the command in Lev. 19:1-2 וַיְדַבֵּר יְהוָה אֶל־מֹשֶׁה לֵּאמֹר דַּבֵּר אֶל־כָּל־ עֲדַת בְּנֵי־יִשְׂרָאֵל וְאָמַרְתָּ אֲלֵהֶם קְדֹשִׁים תִּהְיוּ כִּי קָדוֹשׁ אֲנִי יְהוָה אֱלֹהֵיכֶם׃ (“The Lord spoke to Moses saying: Speak to the whole Israelite community and say to them: You shall be holy, for I, the Lord your G-d, am holy”). Nachmanides, in discussing this passage said: “A Jew who wants to attain holiness must temper his passions and control his desire for excess” (Commentary to Lev. 19:2).

[69] לֹא תַחְמֹד בֵּית רֵעֶךָ לֹא־תַחְמֹד אֵשֶׁת רֵעֶךָ וְעַבְדּוֹ וַאֲמָתוֹ וְשׁוֹרוֹ וַחֲמֹרוֹ וְכֹל אֲשֶׁר לְרֵעֶךָ
(“You shall not covet your neighbor’s house: you shall not covet your neighbor’s wife, or his male or female slave, or his ox or his ass, or anything that is your neighbor’s”). (Ex. 20:14). וְלֹא תַחְמֹד אֵשֶׁת רֵעֶךָ וְלֹא תִתְאַוֶּה בֵּית רֵעֶךָ שָׂדֵהוּ וְעַבְדּוֹ וַאֲמָתוֹ שׁוֹרוֹ וַחֲמֹרוֹ וְכֹל אֲשֶׁר לְרֵעֶךָ׃ (“You shall not covet your neighbor’s wife.

Heschel has indicated, the tenth commandment is about much more than wanting that which is forbidden:

> In its beginning and end, the Decalogue deals with the liberty of man. The first Word—I am the Lord thy God, who brought thee out of the Land of Egypt, out of the house of bondage— reminds him that his outer liberty was given to him by God, and the tenth Word— Thou shalt not covet!—reminds him that he himself must achieve his inner liberty.[70]

The Torah further commands that Israel rest on Shabbat and the festivals and that the land rest during the periodical Sabbatical *Shemitah* and Jubilee (*Yovel)* years (See, Exod. 23:11; Lev. 25). The commandments to remember and to guard Shabbat and to let the land lie fallow during the Shemitah and Yovel years are another form of self-control that limits the urge to be constantly engaged in the pursuit of material wealth. There is an implicit signal contained in these sections of the Torah that the pursuit of wealth and possessions is of lesser importance than the recognition of mankind's total dependence on the Lord as a basic Jewish value.[71] The dictates of the Jubilee Year specifically drive home the message that all material wealth ultimately belongs to G-d and not to the one who happens to be its temporary possessor. As a consequence, during the Jubilee year, each of the original tribes was to recover its ancestral land holdings, slaves were freed, and debts forgiven. These commandments speak volumes against the notion symbolized on Wall Street by the expression "greed is good" or "he who dies with the most toys wins!"

You shall not crave your neighbor's house, or his field, or his male or female slave, or his ox, or his ass, or anything that is your neighbor's"). (Deut. 5:18)

[70] A.J. Heschel, *The Sabbath*, (New York: Farrar, Straus & Giroux, 1951), 89.

[71] Rabbi Yosef Yitzchak of Lubavich taught "even with the greatest efforts a man cannot increase his wealth above that which the Almighty has allocated to him..." *Hayom Yom-Lubavitch* (K'far Chabad, 1972) entry for the 4th of Av.

In furtherance of this basic value, Lev. 25:14 commands that כִּי־תִמְכְּרוּ מִמְכָּר֙ לַעֲמִיתֶ֔ךָ א֥וֹ קָנֹ֖ה מִיַּ֣ד עֲמִיתֶ֑ךָ אַל־תּוֹנ֖וּ אִ֥ישׁ אֶת־אָחִֽיו. ("When you sell property to your neighbor, or buy any from your neighbor, you shall not wrong one another"). Lev. 19:14 states: לֹא־תְקַלֵּ֣ל חֵרֵ֔שׁ וְלִפְנֵ֣י עִוֵּ֔ר לֹ֥א תִתֵּ֖ן מִכְשֹׁ֑ל וְיָרֵ֥אתָ מֵּאֱלֹהֶ֖יךָ אֲנִ֥י יְהוָֽה׃ ("Do not place a stumbling block in the path of the blind"). Another biblical command: וְכִֽי־יָמ֣וּךְ אָחִ֔יךָ וּמָ֥טָה יָד֖וֹ עִמָּ֑ךְ וְהֶחֱזַ֣קְתָּ בּ֗וֹ גֵּ֧ר וְתוֹשָׁ֛ב וָחַ֖י עִמָּֽךְ . אַל־תִּקַּ֤ח מֵאִתּוֹ֙ נֶ֣שֶׁךְ וְתַרְבִּ֔ית וְיָרֵ֖אתָ מֵּאֱלֹהֶ֑יךָ וְחֵ֥י אָחִ֖יךָ in Lev. 25:35-36 requires that if your brother becomes poor and comes to you, even if he be a stranger, you shall allow him to live with you and you shall not extract usury from him, but you shall fear G-d and let him live with you.[72]

In addition to the core value that accumulation of individual wealth and power is of secondary importance, the Torah insists that, in business dealings, one must adhere to principles of honesty and fairness. For example, the command to maintain "just weights and measures" (Lev. 19:36) is the basis for an entire corpus of later rabbinic development about fair dealing.[73] Similarly, the commandment in Deut. 19:14 -- לֹ֤א תַסִּיג֙ גְּב֣וּל רֵֽעֲךָ֔ -- is about much more than moving one's neighbor's physical markers. In the Torah, tampering with a person's boundary markers was equivalent to theft.[74] Thus, it has been understood by rabbis and scholars throughout the generations that לֹ֤א תַסִּיג֙ גְּב֣וּל רֵֽעֲךָ֔ includes forbidding one's rival's encroachment on another's ability to earn a living or to attack his reputation.

[72] This is the foundation, among other things, for the prohibition of "*ribbit*", the taking of interest from a fellow Jew, even if he is willing to pay it. ריבית is a contraction of the words מרבית and תרבית both of which refer to forms of interest added to the principal of a loan.

[73] See, *e.g.* Makkot 24a, which defines refraining from "doing evil to one's neighbor" as "not infringing on one's neighbor's trade."

[74] See, e.g. Commentary in the *Hertz Chumash on Deut. 19:14*, Second Ed., (Soncino Press, 1966), 830.

Torah law emphasizes the responsibility of each person towards the other. וְאָֽהַבְתָּ֥ לְרֵעֲךָ֖ כָּמ֑וֹךָ אֲנִ֖י יי (Love your neighbor as yourself, I am the Lord) Lev. 19:18. And, above all, the Torah emphasizes that it is G-d who rules the world and to whom each of us is accountable (see, e.g., Deut. 10:12). Thus, the Bible teaches that humans are social beings with responsibility for one another's welfare (see, e.g. Isa. 58:6-7).[75] This is but a sampling of the teachings of the written TaNaKh that serve as restraints on a Jew's economic conduct. They are enjoined upon each individual Jew with language such as "You shall fear your G-d, I am the Lord" (Lev.19:14, 32) or "I, the Lord, am your G-d who brought you out from the land of Egypt." (Lev. 19:35-36). And, as referenced already, Jews are enjoined to follow the model of holiness of the Lord: "You shall be holy for I the Lord your G-d am holy".[76]

Foundational commands such as these strongly influenced the rabbinic attitude to control and restrain the profit motive and the shape of commerce in the halachic system, to which we now turn.

B. RABBINIC DEVELOPMENT OF HALACHA CONCERNING RESTRAINTS OF TRADE

By the time of the redaction of the Mishnah (about 220 C.E.), a rich halachic tradition had begun to emerge based on two things: the written Torah, and the development of the oral law in the pre-Mishnaic era that interacted with the laws of

[75] An important distinction should be observed here between halacha and secular common law in the West. While common law regards each person as independent with only limited responsibilities for the welfare of others, halacha understands each individual as an important part of a cohesive Jewish community with responsibilities for one another's material as well as spiritual welfare. See, Steven Resnicoff, *Understanding Jewish Law* (Matthew Bender & Co., 2012), Ch. 3.; *Shulhan Aruch, Yorea Deah*, 247, et seq.

[76] Lev. 19:2

the Greco-Roman commercial world in which Jews then found themselves. It was, thus, in the "*Torah she-be'al peh*" (Mishna and Gemara[77]) that the rules governing competition and restraints of trade first developed into a unique and more comprehensive body of halachic law and practice. This body of law soon reflected many of the practical realities faced by Jews engaged in commerce in the Mishnaic era and thereafter. But, a core principle, established as a matter of religious conviction, continued to be that, to G-d each person must make an accounting as to how he has managed his business affairs, and that G-d will demand a reckoning from those who fail to obey G-d's laws, including the commandment not to covet the property of one's neighbor, to refrain from productive activities on Shabbat and festivals, to provide for the poor and to engage in *talmud Torah* (the rigorous study of Torah, including the oral Torah and halacha), etc.[78]

One such example of halachic development was the competition doctrine "*G'neivat Da'at*" ("stealing another's mind") drawn from a single Torah verse (Gen. 31:26), somewhat out of context.[79] In the hands of the rabbis, this verse became the basis for prohibiting many different forms of misrepresentation—from diluting wine, to concealing latent defects in merchandise. Similarly, the doctrine of "*lifnei iver*" ("stumbling block before the blind") developed into an elaborate set of

[77] The *Gemara* is the component of the Talmud comprising rabbinic commentary on the Mishnah. There are two versions of the Gemara, one redacted in Jerusalem in about the year 300-350 C.E. and, a more comprehensive version redacted in Babylonia around the year 550-600 C.E.

[78] See e.g. Makkot 24a wherein King David established 11 *middot* (attributes or virtues) as the basis for the 613 mitzvot, one of which is not to infringe upon another's trade.

[79] וַיֹּ֤אמֶר לָבָן֙ לְיַעֲקֹ֔ב מֶ֣ה עָשִׂ֔יתָ וַתִּגְנֹ֖ב אֶת־לְבָבִ֑י וַתְּנַהֵג֙ אֶת־בְּנֹתַ֔י כִּשְׁבֻי֖וֹת חָֽרֶב׃ ("And Laban said to Jacob, "What did you mean by keeping me in the dark and carrying off my daughters like captives of the sword?"). Spoken by Laban to Ya'akov who had snuck away with his wives, Rachel and Leah. The phrase means literally, stealing one's heart. It is aimed at misrepresentations, including statements that are literally true but leave a false impression. See, e.g. Chulin 94a where Mar Shmuel rebuked his servant for misleading a gentile about the kashrut of a chicken. See also, *Shulhan Aruch. Choshen Mishpat*, 228:6.

prohibitions against selling potentially harmful products.[80] A classic case of *lifnei iver* embodying both the rabbis' understanding of commercial reality and religious ethics is found in BT Tractate Avodah Zarah (Idolatry) 2a and 6a, wherein a Jew is forbidden to engage in a business transaction with a gentile for three days prior to a gentile's religious holiday in order to prevent the gentile from profiting from the transaction and then offering thanks to an idol or mentioning the name of the idol in violation of Lev. 19:14.

These and other principles created by the rabbinic mind demonstrate that halacha developed to embody the belief that how one accumulates wealth must be consistent with Torah values, and should not involve immorality or actions physically or mentally harmful to one's fellow man. Competition between man and his brother was encouraged, but it had to be tempered by the aforementioned restrictions.

The development of halacha concerning commercial competition certainly did not end with the redaction of the Gemara. Successive generations of poskim issued halachic responsa, resolving questions relating to competition issues. Because these poskim lived throughout the Jewish diaspora and their decisions lacked the universal acceptance accounted to the Talmud, there arose a certain inevitable amount of variation and localization of rules of competition. Codes such as Maimonides' *Mishneh Torah* and Rabbi Yosef Karo's *Shulhan Aruch* did much to address this diversity of halachic rules and to normalize halacha in this area, but over time, as poskim in different generations and in different parts of the Diaspora

[80] Lev. 19:14. Literally "before a blind person," this concept has been extended by the rabbis to misleading anyone so as to cause them to go astray or commit a sin. Sifra de-vei Rav, Kedoshim 2:14. See, generally, Dr. Hershey Friedman, "Placing a Stumbling Block Before the Blind Person: An In-Depth Analysis,*" jlaw.com, last accessed May 26, 2020,* http://www.jlaw.com/Articles/placingstumbling.html,

both commented on these codes and continued issuing responsa in cases brought to them, this diversity, again, became a reality.

This situation was exacerbated by the fact that Jews in the Diaspora lived under different sovereign regimes, each of which enforced its own secular laws of trade and commerce. These laws and regulations were binding on both their Jewish and non-Jewish subjects, whenever the Jews traded with non-Jews in those societies. The halachic doctrine of "*dina demalchulta dina*" ("the law of the land is the law") also greatly contributed to the variation and diversity in this area.[81] There is a dispute about the scope of *dina demalchulta dina. Sefer HaTerumot* (46:8) limited the scope of the doctrine to matters of taxation, currency regulation, and other matters directly related to matters of interest to the king (i.e., government finance). Others, however, extended its scope to cover most areas of private law as well.[82] It was generally accepted, however, that the principle did not apply to matters of religious or ritual observance.

The late Lord Rabbi Jonathan Sacks provided the following summary of the development of rabbinic doctrine on what he called "Markets and Morals":

> In general, then, the rabbis favored markets and competition because they generated wealth, lowered prices, increased choice, reduced absolute levels of poverty, and in the course of time extended humanity's control over the environment, narrowing the extent to which we are the passive victims of circumstance and fate.. . . . Admittedly, Jewish law permitted protectionist policies in some cases to safeguard the local

---

[81] The doctrine, *dina demalchulta dina* is likely a doctrine adopted out of necessity as the Jewish people found themselves living under powerful non-Jewish sovereigns. Some, like Rambam and Rashbam, claim that it stems from the agreement of Jewish subjects to live under the dominion of non-Jews. Others claim it is based on the sovereign's ability to eject Jews from the land. A third approach claims it is based on the ability of the sovereign to strip one of his property or possessions. See, generally, Resnicoff, Understanding Jewish Law, p. 82 et seq., J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Cardozo L. Rev.,* Vol.12 (1991): 829, 834-35.

[82] *Resp. Rashba*, Vol. 1, No. 895.

> economy, especially when the outside trader did not pay taxes. There were also times when rabbinic authorities intervened to Lower prices of essential commodities. But in general, they Favored the free market, nowhere more so than in their own Professional sphere of Jewish education. . . .”.[83]

C. ANALYSIS OF SPECIFIC TYPES OF RESTRAINTS OF TRADE

1. INTRODUCTION

We now turn to a comparative analysis of three genres of trade regulation in the American and halachic context—the offenses of “monopolization,” “Price-Fixing (Cartelization),” and “Restrictive Trade Practices.”

a. MONOPOLIZATION

i. THE APPROACH OF AMERICAN ANTITRUST LAW.

Section 2 of the Sherman Act makes it unlawful for any person to:

> monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . .

Section 2 establishes three separate offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize." It is critical to note that the statute treats the term “monopolize” as a transitive verb. Thus, merely possessing a monopoly in some relevant market is not an offense under the statute. Rather, it is the act of attempting to achieve or achieving a monopoly through means other than “superior skill, foresight or industry” that

[83] Jonathan Sacks, “Markets and Morals,” *First Things*, August 2000, https://www.firstthings.com/articles/2000/08/markets-and-morals.

constitutes the offense.[84] The offense of monopolization or attempted monopolization requires the act of achieving or seeking to achieve monopoly status.[85] It does not forbid monopoly, *per se,* but rather the actions taken, consciously, to obtain monopoly power. Thus, a firm that achieves monopoly power by dint of lawful conduct (e.g. making a better mousetrap) does not violate the law, at least technically.[86] For example, in the famous *Alcoa* case, Alcoa possessed 64% of the relevant market for the production and sale of virgin aluminum ingot in the United States. Writing for the Second Circuit Court of Appeals, Judge Learned Hand determined that such a market share was sufficient to establish monopoly power. However, the court acknowledged that if such a monopoly was not the consequence of deliberate conduct by the defendant, the conduct would not violate Section 2.[87] It must be noted that while the *Alcoa* precedent has never been expressly overruled, it has been under relentless attack from conservative legal

---

[84] This felicitous language was coined by Judge Learned Hand in the famous decision in *United States v. Aluminum Company of America,* 148 F.2d, 416, 429-3 (2d Cir. 1945).

[85] Monopoly is typically defined as "a single seller who possesses the power to set price or exclude competition within a relevant market." A single *buyer* with this power is labelled a 'monopsonist." Monopsonists are also subject to the civil and criminal sanctions of Section 2. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 223-24 (1948); *Swift & Co. v. United States,* 196 U.S. 375, 400-02 (1905). Though not specified in the statute, obtaining monopsony power, or attempting or conspiring to do so, is also unlawful. *Confederated Tribe of Siletz Indians v. Weyerhaeuser Co.* 411 F3d 1030 (9th Cir. 2005).

[86] See. *United States v. Aluminum Co of America,* 148 F.2d 416 (2d Cir. 1945).

[87] However, as Judge Learned Hand found, Alcoa was guilty of embracing each new market opportunity as it arose, which was sufficient to satisfy the test of deliberately and intentionally seeking monopoly power in violation of the law. As he put it in *Alcoa,* "no monopolist monopolizes **unconscious** of what he is doing." (*United States v. Aluminum C*o. of America, 432.)

scholars and judges since the late 1970s and would probably not be cited today by advocates before the Supreme Court.[88]

It is important to note that, under Section 2 of the Sherman Act, the action of a single individual or firm is sufficient to trigger a violation, provided the requisite market power exists, plus some conscious effort to achieve or maintain it. Unlike Section 1 of the Act, joint action is not required. The separate offense of conspiracy to monopolize, however, does require joint action by two or more actors.

As a matter of economic theory, monopoly power cannot be maintained without significant "barriers to entry" that foreclose, or make extremely challenging, entry into a market within a reasonable time frame.[89] American law will not condemn a defendant who happens to possess a monopoly share of a market unless there are durable and significant entry barriers. Examples of such barriers are patents that may prevent manufacture of competing goods, lack of access to essential raw material inputs, or scale economies possessed by the monopolist that could not be relatively easily matched by a new entrant.

---

[88] One of many critical analyses of *Alcoa* is Marc Winerman and William E. Kovacic, "Learned Hand, 'Alcoa' and the Reluctant application of the Sherman Act," *Antitrust L J.,* Vol. 79, No. 1 (2013), 295-347.

[89] Barriers to entry are defined by Joseph Stiglitz as costs that must be incurred by a new entrant that did not have to be borne by a market incumbent. G. Joseph Stigler, *The Organization of Industry 67* (Chicago: U. Chicago Press, 1968). Joe Bain defined entry barriers as any factor that permits firms already in a market to charge supra-competitive prices while deterring other firms from entering and competing away the incumbency advantage. Joe Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Cambridge: Harvard University Press, 1962). The Supreme Court has often cited entry barriers or their absence as grounds for decisions but has never actually defined the term. Lower courts have defined barriers to entry as costs that would be borne by a new entrant that were not incurred by the incumbent firm or "factors that prevent new rivals from timely responding to an increase in price above the competitive level". *U.S. v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

Notwithstanding, thanks in large part to the influence on courts and scholars of Judge Robert Bork's 1978 book, *The Antitrust Paradox,*[90] American courts continue routinely to reject the argument that "bigness" itself, should be condemned because of the effect of very large enterprises on the competitive process or smaller rivals.[91] Bork maintained that small businesses often tend to be inefficient. American antitrust law, he argued, is designed to promote efficiency, not to structure a market that promotes a multitude of smaller and less efficient enterprises. This is a corollary to the fundamental premise of the so-called "Chicago School" economic reasoning:

> [R]ational economic actors working within the confines of the market seek to maximize profits by combining inputs in the most efficient manner. A failure to act in this fashion will be punished by the competitive forces of the market."[92]

In part, the Chicago School approach arose in reaction to an earlier legal-economic approach known as "the Harvard School," which argued that markets characterized by undue concentration or monopolization inherently under-performed competitive markets and penalized consumers.[93]

Beginning in the late 1970's, decisions of the Supreme Court have significantly embraced the Chicago School notion that the goal of antitrust is not the structure of market competition, but the promotion of allocative efficiency. This

---

[90] Robert Bork, *The Antitrust Paradox,* (New York: Basic Books, 1978).

[91] But see, Tim Wu, *The Curse of Bigness--Antitrust Law in the New Gilded Age,* (New York: Columbia Global Reports, 2018).

[92] Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change* (North Carolina: UNC Press, 1991), 107.

[93] Thos. A. Piraino, "Reconciling the Harvard and Chicago Schools, A New Antitrust Approach for the 21st Century," *Indiana L. Journal,* Vol. 82,, Iss. 2, (Spring 2007): 345, 360.

approach has appreciably curtailed Section 2 enforcement. For example, the courts have imposed a requirement in Section 2 cases that the alleged monopolist must have engaged in "willful conduct to obtain or retain monopoly power that a firm lacking monopoly power would find to be uneconomic."[94] In addition, the conduct must be "predatory" or "exclusionary."[95]

Contrast these requirements with the *Alcoa* approach of Judge Learned Hand. The *Alcoa* test for unlawful monopolization is satisfied when there is a finding of a sufficient degree of market power (never precisely defined but probably approaching 50% of a relevant market), plus some deliberate effort to acquire or maintain this market power. The now prevalent "Chicago" approach requires the combination of substantial market power (probably in excess of 50%), plus a course of exclusionary conduct that unambiguously is designed to injure rivals or prevent a rival's potential entry into competition. Courts adopting the Chicago approach require convincing evidence of such predatory intent, whereas, under *Alcoa* courts would rely on economic indicia or market statistics to determine intent based on the theory that monopolists never act unconscious of the consequences of their conduct.

However, for purposes of examining comparisons between American antitrust doctrines vis-à-vis monopolization and halacha, it is crucial to focus on the underlying moral-ethical basis for Section 2. Over sixty years ago, the Supreme

[94] *United States v. Grinnell*, 384 U.S. 563, 570--71 (1966)
[95] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458, (1993)

Court expressed the underlying philosophy of the Sherman Act in general and Section 2 in particular:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . Section 2 also advances its core purpose by ensuring that it does not prohibit aggressive competition. . Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals--sometimes fatally. While it may be tempting to try to protect competitors, such a policy would be antithetical to the free-market competitive process on which we depend for prosperity and growth. *Northern Pac Ry. Co. v. United States,* 356 U.S. 1, 4 (1958). (emphasis added)

This quotation is an apt example of what Harvard Professor Michael Sandel summed up by describing America as having drifted from "*having* a market economy to *becoming* a market society" (emphasis in original).[96] Sandel goes on to explain his terms: "The difference is this: a market economy is a tool--a valuable tool--for organizing productive activity. But a market society is a place where almost everything is up for sale. We need to ask whether this is the kind of society we want."[97] What Professor Sandel now decries is also what the framers of the Sherman Act indicated that they were seeking to avoid. The Sherman Act, as envisioned by its authors, is aimed at curbing the increasing power of enterprises over their customers and suppliers:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of

[96] Michael Sandel, *What Money Can't Buy, The Moral Limits of Markets,*. (New York: Farrar, Strauss & Giroux, 2012).

[97] Michael Sandel, "Q&A with Michael Sandel: From Market Economy to Market Society," interview by Michael Tomasky, The Daily Beast, July 13, 2017, https://www.thedailybeast.com/q-and-a-with-michael-sandel-from-market-economy-to-market-society.

> economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, *no matter how small*, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. (emphasis added). [98]

However, as currently construed by the Supreme Court, this "freedom to compete" has been subordinated to the freedom of large business enterprises to pursue policies that can be defended as efficient while at the same time snuffing out rival competitive forces.

If this is now the American approach, how does halacha approach monopolization?

ii. THE HALACHIC APPROACH TO MONOPOLIZATION

Fundamental to the issue of monopolization in any society is the conflict between interests of established dominant businesses and that of consumers. If established dominant firms can successfully deter or prevent new entrants from reaching customers, they can extract supra-competitive prices to the disadvantage of consumers. On the other hand, if new entry is unrestricted, businesses considering entering a market will be reluctant to invest the resources needed to establish a position and produce goods and services that consumers demand.

Given the complexity of this conflict, it is not surprising that the Talmud was not able to resolve it definitively. Perhaps the most comprehensive treatment of this problem in the entire Talmud is found in BT Bava Batra 21b-22a. The Gemara

[98] *U.S. v. Topco Associates,* 405 U.S. 596, 610 (1972)

begins the *sugya* (the Talmudic passage) by positing the case of a person who is operating a grist mill in a confined area[99]—an alleyway—(מבואה) who is faced with threatened entry of a new competitor in the same alleyway. The sugya begins by stating Rav Huna's opinion that the established grist mill operator can absolutely bar a new competitor from the alleyway on the basis that to allow him to enter would "disrupt my livelihood."[100] The sugya then indicates that perhaps Rav Huna's opinion is supported by a *baraita*[101] that lays down the principle that a fisherman, setting fish traps, must keep his traps a distance away from another fisherman who already laid traps in the same stream or river. The Gemara proceeds to reject this baraita, as support for Rav Huna's opinion, on the basis that fish instinctively go towards the source of food and, thus, are not like humans who are capable of shopping around.

Next, the Gemara offers a Mishna in possible support of Rav Huna's position. In this Mishna (Mishna*,* Bava Metzia 4:12) Rabbi Yehuda states that a shopkeeper cannot entice children into his shop by offering them free treats. Although Rabbi Yehuda does appear to support the position of Rav Huna, this Mishna records that the Sages disagreed with Rabbi on the basis that the shopkeeper can say to his rival, "I offer one version of treats to the children and you are free to offer another." The reference to the Sages disagreeing indicates that the halacha is in accord with the view of the Sages and not Rabbi Yehuda.

---

[99] Antitrust lawyers would characterize this as a "relevant geographic market."
[100] It is significant that Rav Huna is concerned solely with the welfare of the established grist mill operator and is unconcerned with the effect of his monopoly on local consumers.
[101] *Baraitot* are statements by *Tannaim* that were not included in the redaction of the Mishna, but were preserved elsewhere and are considered authoritative.

The Gemara then considers the possibility that perhaps Rav Huna's opinion is supported by the view of the Sages. This support is also rejected on the basis that because while the shopkeeper could say to his competitor, "If I distribute one kind of treat to the children, you can distribute another," the grist mill owner does not have that option available to him.[102]

Next, in apparent refutation of Rav Huna's opinion, the Gemara offers another baraita, stating that one may open a shop or a bathhouse adjacent to an existing store or bathhouse and the other cannot protest because the new entrant can say "You operate in your space, and I operate in my space." However, the Gemara challenges the authority of this baraita by pointing to a contrary view of the *Tannaim* (rabbis of the Mishnaic era): that the residents of an alley have the right to agree that various trades can be barred from competing in their alleyway, unless the newcomer is already a resident of the alley. Indeed, Rabban Shimon Ben Gamliel goes even further and declares that the residents could even prevent a resident from competing.

After discussing the somewhat related issues of competing teachers of children and traveling salesmen wishing to offer their wares, the Gemara then turns to Rav Huna ben Yehoshua (as distinguished from Rav Huna). Rav Huna ben Yehoshua's opinion asserts that while non-residents can be prevented from competing, a resident of the alleyway or a non-resident who agrees to pay the town taxes like a resident, cannot be prevented from competing. The Gemara then

[102] Why the first mill owner could not offer some form of price-competition viz. "grind 10 pounds, get the 11th pound free" is not explained.

concludes this phase of the sugya by saying the halacha cannot be found. Thus, we are left with no clear choice between Rav Huna's view that the incumbent grist mill owner is entitled to protection against any new competitor and Rav Huna Ben Yehoshua's view that one who is a resident or who agrees to pay the taxes owed by a resident is free to compete.

The majority of later poskim have followed the view of Rav Huna Ben Yehoshua. Importantly for our purposes, the majority view seems to recognize that a balance must be struck between the interests of a monopolist entrepreneur who invests in order to compete and the consumers who stand to benefit from competition in the form of lower prices and better quality.[103]

In an interesting article, Lidia Levine proposes that the rabbis in this sugya were prepared to dismiss the interests of the incumbent entrepreneur to protect the interests of consumers in the benefits of competition. She then cites Nachmanides (Rabbi Moses ben Nachman, 1194-1270), propositioning that entrepreneurs who find themselves competing with one another are encouraged to engage in collusion to mitigate the deleterious impact of competition on their respective businesses.[104] Under American law, this form of collusion would result in an indictment!

---

[103] See authorities collected in Rabbi Chaim Jachter, "Hasagat Gevul: Economic Competition in Jewish Law," *Jewish Law Articles,* last accessed October 13, 2020, http://www.jlaw.com/Articles/hasagatgevul.html*. This* is an excerpt from the book by Rabbi Chaim Jachter with Ezra Frazer, *Gray Matter: Discourses in Contemporary Halacha*, (New Jersey: Kol Torah Publications, 2006).

[104] Lidia Levine, "A Little Competition Never Hurt Anyone,",בכורי הפרדס *(B'corei HaPardes),* Vol 1, Tammuz 5769 (2009): 86, 93, https://elmad.pardes.org/wp-content/uploads/2016/04/Bikurey-HaPardes-a-Journal-of-the-Pardes-Institute-of-Jewish-Studies-Advanced-Studies-Program-2009.pdf.

How the sugya grapples with the questions presented is more significant than the resolution of the issue, or the lack thereof. The text is grappling with providing consumers with the benefits of robust competition and protecting the investments and incentives of business-people to risk their capital and efforts to create a business that will insure their livelihood.

What can be gleaned from this sugya is the way in which the competing concerns are juxtaposed in an effort to reach a guiding principle. In seeking a balance, the halacha must consider the interests of the incumbent trader in preserving his livelihood, the sponsor of new competition who seeks to earn a livelihood, the interests of the community in benefitting from price and quality competition, and what level of preference should be afforded residents vis-à-vis new entrants from other areas. Ideally, this balance will vary from case to case and from context to context, which may explain why the various baraitot cited in the sugya seem to reach contrary results. It also highlights the contrast with the American approach to antitrust—which concerns itself primarily with the process of competition rather than the interests of individual traders.

While this sugya does not resolve the underlying issue of whether monopolies are subject to protection or not,[105] the sugya does appear to recognize

[105] The *Shulchan Aruch* (*Choshen Mishpat* 156:5) and *Aruch Hashulchan* (*Choshen Mishpat* 156:6-7) follow the view of Rav Huna ben Yehoshua. The Meiri (Bava Batra 21b) even rejects the analogy of restricting the setting of new fishing nets near old ones. From this, one might conclude that the Gemara is opposed to almost any restrictions on the right to enter into competition. For example, the *Shulchan Aruch* (*Choshen Mishpat,* Siman 156:5) says in part: If one did not yet pay taxes and now he wants to work and will pay taxes, there are those who say his fellow craftsman can stop him until he rents a house and becomes like a member of the city. The Ramah cites a different caveat – that he may only open in a different alleyway in that city (See Tosafot, Bava Batra 21b).

the need for a certain degree of economic protection for a local sole supplier. American law, as originally formulated in the Sherman Act offered no such promise of protection. However, as currently interpreted, monopolists are tolerated and, indeed protected, so long as it cannot be proven that have engaged in predatory or exclusionary conduct.

The halachic treatment of this difficult balancing exercise displays both the kind of humanity that is embedded in halacha but absent in western antitrust legislation, as well as a concern for the creation of conditions that are conducive to capital formation. Later commentators continued to seek, on a case-specific basis, the appropriate balance between the benefits of new competitive entry and the needs of the owners of established businesses to continue to support themselves and their families.[106] Although this sugya leaves much to later interpretation, one thing that seems clear is that, even in this early period of halachic history, the rabbis were cognizant of the need to strike a balance that would encourage entrepreneurial activity while protecting the kind of society envisioned by the Torah, in which each Israelite was precious in the sight of G-d.[107]

---

[106] An interesting mid-point compromise comes from the Rashba (*T'shuvot* 3:83). He writes that while the second store may open – he cannot actively go after and pursue customers of the first business. For a comprehensive description of the continuing debate over the limits of new entry that challenges a business enjoying monopoly status in the halacha, see Jachter and Fraser, *Grey Matter*.

[107] Rav Huna is explicit in seeking to protect the incumbent. Similarly, the first baraita (the fishermen) is protective of the incumbent. The dispute between Rabbi Yehuda and the Sages in Mishna Bava Metzia 4:12 concerns whether one shopkeeper's promotional offer will or will not injure the other shopkeeper's livelihood. The remaining cases in the sugya also seek to balance the benefits of competition from non-residents and peddlers and the harm to incumbents. In all these examples we see the rabbis struggling with the problem of finding the right balance between protectionism and the benefit of additional competition for the consumer. Clearly, the struggle is to try to find a way to express the Torah value that all mankind is precious in the sight of G-d.

In sum, with respect to the benefits of competition to dissipate monopoly power, the guidance offered by this sugya is somewhat murky.[108] On the one hand, the Gemara and the later commentators appear to approach the issue from the standpoint of protecting the incumbent monopolist from 'free-rider' entry by one who is not contributing his share of taxes to the community. On the other hand, once the new entrant becomes part of the community (pays taxes or becomes a resident in the opinion of some authorities), the monopolist must be prepared to compete against the new rival. The threatened evils of monopoly—the ability to charge a supra-competitive price and to wield the power to exclude competition—do not seem to generate the sort of concerns in Jewish law that are expressed in American antitrust opinions like *Alcoa*.

Yosef Ibn Migash (1077-1141, Lucena, Spain) made this principle explicit, in permitting competition from an outsider:

> How could I approve the welfare of the few, namely the few local merchants, at the expense of the many, namely the community who would thus be able to benefit from reduced prices.[109]

This tendency to balance the needs of the community for protection against the evils of monopoly with the needs of individual traders in the marketplace to have a reasonable degree of protection of their business interests appears to be followed in the *Rema*'s (Rabbi Moshe Isserles) 16th century resolution of a dispute between two Italian publishers of Rambam's *Mishneh Torah*.[110] After the original publication

---

[108] Murkiness is more acceptable in Talmudic sugyot than in judicial rulings in a system like the American litigation setting where the goal is predictability of outcome so that those in the marketplace can feel confident that they know the limits of acceptable commercial conduct. Similarly, a *posek* presented with a concrete case to resolve is often required to render a decision effectively resolving an actual dispute.
[109] Hiddushim Bava Batra 21b. See also Meiri, *Beit ha-Behirah* to Bava Metzia 40b.
[110] *Reponsa Rema*, no. 10 (A. Ziv, ed. 1970)

by Rabbi Meir ben Isaac Katzenellenbogen (also known as the *Maharam Padua*) of an edition of the *Mishneh Torah* with his own extensive commentary, a second publisher offered an edition that was a direct copy of the Katzenellenbogen edition, including the *Maharam Padua*'s annotations. Katzenellenbogen brought the matter before the *Rema* for a halachic ruling (responsum). *Rema* concluded that the second publisher's work should not be purchased by any Jew until Katzenellenbogen's entire edition was entirely sold out.

A somewhat related issue arose in certain medieval European Jewish communities that involved the rabbinic doctrine of "*chezkat hayishuv*" (right of settlement). Since Jewish immigration was severely limited in many parts of medieval Europe, many Jewish communities in the Rhineland and in Poland required Jews, seeking to become residents of the town and to engage in a specific trade already being conducted there by other resident Jews, to obtain permission from the governing Jewish authority before seeking any necessary permit from local secular authorities. In these communities it was often the case that in order to obtain a license from the gentile sovereign, a substantial bribe to the authorities was necessary. If a Jewish immigrant with a specific trade or business wished to settle in a community in which another resident then possessed a licensed monopoly position (purchased from the gentile authorities), the Jewish authorities could deny the immigrant the right to settle and practice his trade.[111] One commentator suggested that these halachic rulings, protecting a local monopoly, arose not as a

[111] *Chezkat hayishuv* was a localized doctrine, peculiar to central European communities, and was not practiced in Spain or the Levant. Tamari, *With All Your Possessions,* 113.

result of economic considerations but “to minimize injustice and promote maximum public welfare.”[112] While there are several authorities who supported this form of monopoly protection,[113] others took the opposite view based on the ruling of R. Huna b. Yehoshua in Bava Batra 21b-22a.[114]

There is a related halachic concept known as “*m’arufiya.*”[115] This concept, like “*chezkat hayishuv,*” protects one trader against entry by rivals, out of concern for the expenditure that the holder of the patent or license has expended, without regard to the competitive effect. M’arufiya involves a situation where a resident Jew, in a gentile sovereign’s land, having made a substantial payment to receive a coveted license from the sovereign, is then confronted with the fact that another Jew has out-bid him later by offering the sovereign a higher price. The first Jew’s license is then revoked and the higher bidder obtains the right instead. On occasion, this second Jew might be a newcomer to the area, perhaps a refugee who was fleeing some pogrom or other crisis such as a pogrom or massacres in his own homeland.

An analysis by a 15th century Italian Rabbi named Yoseph Ben Shlomo Colon, in ruling for the first merchant, reveals some halachic principles at play in such as case:

> Shimon has forestalled that which Reuven was in the midst of purchasing. Shimon can set up a similar business elsewhere without any loss. Unless Shimon can show that his profit margins here are

---

[112] Tamari, *With All Your Possessions, 114*.
[113] See, e.g. Pinkas Padua (1583); “Responsa of the Sages of Rome,” *Bet Ha’otzar* Vol. 1, 57-58; Mordechai, Bava Batra*,* para. 517; T’shuvot Maharam of Rothenburg Sec. 883.
[114] Rabbi Zalman Margolis, T’shuvot Bet Ephraim, *Chosen Mishpa*t, Section 27 (early 19th century); Also, Piskei Din Shel Batei Ha Din HaRabbanim Bet Din, (Tel-Aviv-Yaffo, 1957)
[115] A halachic term meaning an acquired property right worthy of protection. Tamari, *With All Your Possessions,* 117.

> substantially higher than in another city, he can be prevented from operating without Reuven's consent. Reuven has made a considerable investment in time and money. Shimon, by obtaining a permit to lend money [the nature of the business in question here] is, in effect, preventing the original investor, Reuven from conducting his business, thus destroying his livelihood.[116]

This ruling draws us into a pre-existing controversy between Rashi and Rabbenu Tam about competition for a business opportunity. In BT Kiddushin 59a, there is a question raised about Rabbi Abba who purchased a piece of land for which Rabbi Giddel was already negotiating. We read: עני מהפך בחררה ובא אחר ונטלה הימנו מאי. ("If a pauper is engaging in the acquisition of a loaf of bread that he found, and another came and took it from him, what is the halacha?)" The response (by Rabbi Nappaha to Rabbi Abba) is that such a person is a *rasha* (wicked individual). Rashi understood this rule to apply broadly to any case in which one acquires something of value while another was in the act of acquiring it, even if the asset was widely available and could easily be replaced.[117] Rabbenu Tam, on the other hand, interprets this rule only to be applicable in situations where someone has expended some effort to acquire an asset that has some value, and is not readily available elsewhere. For Rabbenu Tam, where the asset is either not valuable or attainable elsewhere, the interloper should not be required to obtain the asset elsewhere and will not be barred from interfering with the first person's attempted acquisition. Rabbenu Tam limits the applicability of the rule of עני מהפך

---

[116] T'shuvot Maharik, Section 132. https://www.sefaria.org/Teshuvot_Maharik.132?lang=bi It is somewhat puzzling that Rabbi Yosef would have permitted Shimon's tactic if he could have shown that in his new city he could earn substantially higher profit in his business. This shows considerable concern for the profit of the usurper and none for the resident who was out-bid.

[117] A distinction is drawn between an owned asset which is offered for sale and an ownerless or abandoned (*hefker*) object. In the case of *hefker*, even if person A casts a garment over it, which is not a recognized mode of acquisition, person B can come and acquire it without being labeled a *rasha*.

only to cases where "A" is making an effort to acquire something of value and "B" preempts him.[118] Rabbenu Tam's approach is considered normative.[119] This ruling appears consistent with the baraita in Bava Batra 21b, requiring fishermen to remain at some distance from another fisherman who had already cast his nets at a particular spot in a river or stream. In the case where there are other fish in the stream, it is not necessary to poach on the other fisherman's position.[120]

Rabbinic rulings on the subject of m'arufiya are not consistent. Some rulings appear to accept the notion that in certain situations it was necessary and appropriate for the community to step in to protect the monopoly status of a business or the vested rights of someone holding an exclusive license to engage in business from the sovereign. For example, the *Chatam Sofer* (Responsa, Part 5, *Chosen Mishpat* 79) ruled that communities ought to step in to ensure survival for a monopoly to remain economically viable. In the 20th century, Rav Moshe Feinstein goes a step further and says that a new competitor offering the same services can be prevented from competing, if such new entry would impair the incumbent's ability to earn as much as the average person in his socio-economic class. Feinstein extends this concept in the context of an effort to build a new synagogue close to an existing synagogue, endangering the livelihood of the incumbent rabbi.[121]

---

[118] Tosafot, Kiddushin 59a s.v. Ani

[119] *Aruch HaShulhan, Chosen Mishpat* 237:1

[120] Tosafot, *Talmud Bavli,* Kiddushin 59a. This assumes that the fish are not classified as *hefker* (because the first fisherman has expended some effort and expense to bait his nets, etc.). But in the fishermen's case, the Gemara never inquired as to the motive of the second fisherman or the fact that he could make more money fishing in this location than in another.

[121] *Igrot Moshe, Choshen Mishpat* 1:38. Dr. Aaron Levine (a contemporary authority in the area of economics and halacha who served as chairman of the Economics Department at Yeshiva University) wrote in his book *Free Enterprises and Jewish Law: Aspects of Jewish Ethics,* 19-20 that, in modern

The unsettled state of halacha on this subject is evidenced by the following comment by Rabbi Doniel Neustadt:

> A competitor may only open a store or a business if he will not cause the existing business to go under. If opening a second store, however, would result in putting the established store out of business, then the second store may not open its doors. Even if the owner of the existing store has another business that could support him, and even if he is independently wealthy, it is still prohibited to compete against him if it would force this particular business of his to shut down completely. This is the consensus of the majority of the poskim, and a beis din is empowered to censure any business person who does not adhere to this ruling.
>
> If, however, the new store is offering better prices, better service or more of a selection, etc., then most poskim allow the second store to open its doors. They maintain that the uppermost concern is the welfare of the consumer and time will tell which of the stores will survive. A minority opinion in the poskim, however, puts the welfare of the vendors first and prohibits the opening of the second store even though the public would have benefited from the new store.[122]

From the above observation, it can be seen that the poskim are still wrestling with finding the "sweet spot" that allows vendors to flourish while protecting consumers against the exploitation of vendor monopoly (or even oligopoly) power. Recall that in *Mishnah* Bava Metzia 4:12 there was a dispute between Rabbi Yehuda and the Sages. Rabbi Yehuda defended the position of merchants who protested price-cutting in the form of promotional free-goods (nuts and treats) offered by a rival, while the Sages upheld the position of consumers who benefitted

society, power companies and urban transit companies (so-called "natural monopolies") are contemporary examples of industries requiring protection in order to survive.

[122] https://torah.org/torah-portion/weekly-halacha-5758-yisro. As of 1997, Rabbi Neustadt was the Principal of the Yavne Teacher's College in Cleveland, OH and is now Moreh D'atra of Chai Lifeline, Inc.

from the promotional free-goods offer. The *Shulchan Aruch* adopts the position of the Sages, which has become the accepted halacha.[123]

This discussion is also important if only to demonstrate the concern about the limitations on "ruthless competition" imposed by the halacha that are entirely absent in the modern secular commercial world.[124] While, in general, the rabbis expressed some confidence in the workings of the marketplace to attract new entry that would provide a check on the exercise of monopoly power over the long-term, they expressed considerable concern with interference by Reuven in Shimon's business expectations. They also allowed for individual communities, through local legislation, to control monopoly power directly:

> Rabbinic literature reflects a faith in the long-run workings of countervailing forces as a means of curbing monopoly power. Nonetheless, should society desire to control a monopoly directly, it may do so through communal legislation. At the other extreme, the desirability of limiting competition in the 'natural' monopoly phenomenon finds explicit recognition in the responsa literature.[125]

Thus, we see mirrored in the halachic literature the same contrarian impulses reflected in American law, pitting individual liberty to compete against the protectionist demands of already established dominant enterprises. But while American law proclaims that antitrust is not about competitors but is, instead, solely about the process of competition, the views of the rabbis are more nuanced,

[123] *Shulhan Aruch, Chosen Mishpat*, 228.18

[124] On ruthless competition, see discussion in Levine, *Free Enterprise and Jewish Law:,* 21 et seq, infra.. In part, Rabbi Levine states: "The attitude of Jewish law toward ruinous competition reflects a mediation between the social values of economic efficiency and industrial justice".

[125] See, Aaron Levine, *Free Enterprise and Jewish Law,* (New Jersey: KTAV Publishing, 1980) 19-20. (hereinafter "Levine").

humane and subjective. In appropriate cases, their concern for the welfare of the individual trader often overcomes their desire to secure the full benefits of competition for consumers and for the Jewish community. This seems to reflect the essential Torah value that emphasizes the importance of the individual's place in the community and far less importance on the accumulation of individual wealth. It also reflects the willingness of the rabbis to tailor individualized solutions to thorny issues rather than to insist on *stare decisis*. This may well reflect the difference in the needs of American society for predictability in the application of law in order to serve the model of "blind justice," whereas, halacha places more reliance on the poskim to insure equity within broad halachic parameters. Clearly, the rabbis envision a society where the people are willing to place their trust in rulings that reflect Torah values and therefore are prepared to grant more discretion in the poskim.

iii. THE APPROACHES OF AMERICAN LAW AND HALACHA ON MONOPOLIZATION COMPARED

Notwithstanding the presence of the same eternal struggle between those forces that seek to protect monopoly power and those that seek to erode it in both economic systems, there are significant differences in the underlying principles animating the legality of monopolization and monopoly status in American law and in halacha. American law, as presently understood (although not as understood by its framers) is based on the acceptance of neo-classical Chicago-style free-market economics and the concomitant fear of regulatory intrusion into the workings of the free market. It is also based on the proposition that the productive resources of society should be allowed to reward the most efficient enterprises and that the optimum allocation of resources will flow from allowing individual market participants

to engage in profit-maximizing behavior. Therefore, it tolerates ruthless competition that produces market concentration, even when all or almost all competitive alternatives have been eliminated, unless it can be proven to have been obtained or maintained through predatory (i.e. willfully injurious) behavior effectively directed against other market participants.[126] It also recognizes, as necessary and benign, certain "natural" monopolies where competition would likely prevent the attainment of efficiency outcomes, e.g., public utilities, that could not, in the face of price competition, justify the high level of capital expenditures needed to develop a structure to efficiently serve the public.[127]

By contrast, halacha engages the problem of monopoly from the perspective of Torah values, referred to above. Although monopolies that prevent people from entering into competition and earning a livelihood are viewed with suspicion, the livelihoods of market participants are protected even to the extent of facilitating or maintaining a trader's monopoly status, if to do otherwise would cause his livelihood to dissipate.[128] This is evidenced, for example in the majority of rulings on *Hasagat Gevul* and *M'arufiya,* discussed above.

As noted above, American law is far more protective of large and even monopolistic market participants and far more intolerant of the claims of consumers

---

[126] The recent complaint filed by the U.S. Department of Justice and eleven states against Google on October 20, 2020 is an interesting example of an attack on a company that possessed an out-sized share of the Internet search market (assuming that such a market is a properly defined antitrust relevant market) which was originally obtained without misconduct, but is allegedly maintained by deliberate policies employed by Google such as obtaining default placement on smartphones and other Internet devices. Whether such policies constitute predatory conduct as that term is understood by Supreme Court case law will be tested as this case moves forward.

[127] In such cases, however, American law insists on strict regulation of the public utility monopoly as to such matters as rates, employment, etc.

[128] Teachers of Torah to children are, as noted by Carlton and Weiss, *The Economics of Religion*, an exception to this rule.

or small businesses unable to compete with giant competitors, since the commonly accepted goal of antitrust is to protect the process of competition and not the survival of individual competitors. One can see the extent to which the Supreme Court's approach to this issue has changed over time. In 1962, the Warren Court stated:

> It is competition, not competitors, which the Act protects. *But we cannot fail to recognize Congress' desire to protect locally owned business*. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[129] (emphasis added)

But, just two decades later the Court put it quite differently:

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns, but out of concern for the public interest[130]

Because, as noted above, American antitrust laws were framed using general language such as "competition", "monopolization" and "restraint of trade", a debate persists to this date as to where to strike the balance between the interests of consumers or large and powerful firms that claim they are creating an efficient market mechanism. The debate is often framed as being between "the welfare of consumers" and "total welfare."[131] These are specialized legal terms of art that can

---

[129] *Brown Shoe v. US*, 370 US 294 (1962). *Brown Shoe* was a case brought under Section 7 of the Clayton Act, which was originally enacted in 1914 but amended in 1950 after a long and contentious Congressional debate. This case represents the high-water mark of liberal construction of the antitrust laws with respect to protection of small independent business firms against large and powerful competitors. It does not represent the current state of the law. However, as demonstrated above, the Warren Court's understanding of Congressional motivation is an accurate summarization of the Congressional record.

[130] *Spectrum Sports v. Mcquillan* 506 US 447,458 (1997)

[131] See, e.g. Kirkwood, *The Essence of Antitrust,* Fordham L. Rev., Vol. 18, (2013): 2425, 2427.

be understood as meaning in the case of "welfare of consumers," lowering the cost or increasing the quality and availability of goods and services to the ultimate consumer. In the case of "total welfare," the term means improving the overall productive efficiency of the various producers in the market. Scholars of the so-called "Chicago School" and their colleagues explain that when productive efficiency increases, the benefits will be passed along to the ultimate consumer, assuming the market is competitive.[132] Scholars of the so-called "Harvard School" argue that the legislative history and proper interpretation of the antitrust laws require that they be construed to protect, first and foremost, the interests of consumers and small businesses, even if to do so results in some loss of productive efficiency.[133]

For the last five decades, the courts, the federal antitrust agencies, and much of the academy have largely embraced the Chicago School mode of thinking. However, in the past few years, there has been a noticeable shift back towards Harvard School thinking, often led by enforcers and courts in other western jurisdictions.[134]

The Supreme Court's recognition in the 1960s that one of the important purposes of the antitrust laws is to give some protection to less efficient small traders against large, powerful, and presumably more efficient competitors is reminiscent of the protectionist spirit that animates the Talmud's protection of the

---

[132] Robert Bork, "Legislative Intent and the Policy of the Sherman Act*,"* J. Law & Econonmics Vol. 9, No, 7 (1966).

[133] Alan J. Meese, "Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why we Should Keep It," NYU L. Rev. Vol. 85, (2010): 659.

[134] Anu Bradford, Adam Chilton and Filippo Lancieri, "The Chicago School's Limited Influence on International Antitrust," U Chicago L. Rev, Vol. 87 (2019): 297.

fisherman and Rav Huna's protection of the mill owner in the alleyway from competitive intrusion.[135]

However, in the last forty years, American antitrust law has made a significant turn away from the welfare of the market participants, towards the goal of overall efficiency. No longer is the independent "mom and pop" store model worthy of consideration, let alone special protected status as was the case, for example, in 1936 with the passage of the Robinson-Patman Act, which was directly aimed at protecting small "main-street" retailers from their efficient chain-store rivals. The "Chicago School" neoclassical law and economics "price theory" microeconomics is now the conventional approach of courts and antitrust regulators. This approach is quite removed from the human-centric approach of halacha or, for that matter, of the intent of the draftsmen of the Sherman, Clayton, or Robinson-Patman Acts.

At a deeper level, halacha does not prize either a "market economy" or a "market society" as those terms are employed by Professor Michael Sandel. Instead, it prizes a moral society based on fundamental Torah values, such as the right of every individual to an equitable share of G-d's bounty and the idea that all wealth ultimately belongs to G-d. While outcomes in individual cases will differ based on their specific facts and circumstances, what has changed in American antitrust law is the set of values considered to underpin the policy of antitrust enforcement. The change has been from protection of the process of competition which was thought to benefit the ultimate consumer to the maximizing of efficiency and producer surplus. What makes the analysis of competition in halacha so

[135] As we have seen, Rav Huna's position did not become normative halacha. However, Rav Huna's view continues to command respect and at least some support in the halachic literature.

different and compelling is that the underlying values mentioned above have not changed, notwithstanding the changes in Jewish society. This fundamental difference in analytical approach is also seen in other areas of competitive analysis, as is shown below.

b. HORIZONTAL PRICE FIXING AND CARTELIZATION

i. The Approach of American Law

Pursuant to Section 1 of the Sherman Act, horizontal price fixing[136] among competitors or cartels[137] aimed at reducing the supply of products or services is *per se* unlawful[138] and subject to criminal penalties as well as to the civil remedies of treble damages and injunction.[139] Price fixing is a classic *per se* unlawful case of a scheme to cause harm to the public.

To violate the law, some form of joint action or agreement must be established—but the joint action or agreement can be implied, rather than express, and often is oral and can be quite informal. Price-fixing can be established without an actual agreement through a practice known as "price-signaling". A classic example of this

[136] Horizontal, in this context, refers to price-fixing agreements between two traders at the same level of commerce as opposed to vertical price-fixing, which occurs when a manufacturer seeks to control the price at which its dealer resells the same product

[137] A good definition of a "cartel" is a combination of producers for the purpose of regulating production and, frequently, prices, and an association by agreement of companies or sections of companies having common interests so as to prevent extreme or unfair competition. John Lee, *Strategies to Achieve a Binding International Agreement on Regulating Cartels: Overcoming Doha Standstill*, (Berlin: Springer, 2016), 13.

[138] The "*per se*" concept essentially means that, once the offense of price-fixing is established by the facts of the case, no justification, such as the reasonableness of the prices fixed, is allowed by the courts. This can be contrasted with other types of antitrust concerns such as exclusive dealing or tying the purchase of one product to the purchase of another, which is governed by the rule of reason.

[139] It is also a *per se* offense for competing producers of commodities or goods to agree to limit output since limiting supply is an effective method to cause prices to rise.

would be where one competitor publicly announces a price increase and states that the increase will remain in effect unless one or more competitors undercuts the price. As long as other rivals are aware of this announcement and engage in "follow-the-leader" pricing, a violation can be established on the theory that such a statement amounted to an invitation to enter into a price-fixing conspiracy and the response of the others in following the upward price movement amounts to acceptance of the invitation. On the other hand, simple "conscious parallel" behavior is lawful. Such a case might occur if competitors see that a rival has raised prices and without any such invitation to coordinate, independently opt to match the price increase.

The underlying principle in the prohibition of price-fixing is protection of the public interest. It is based on the conviction that, as Adam Smith famously said in 1776:

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.[140]

Also included in the Sherman Act's prohibition on "contracts, combinations and conspiracies in restraint of trade" is the practice of "bid-rigging.". This typically occurs in the context of government contracting, where bidders collude in order to allocate the winning bid to one member of the conspiracy, often with a tacit or express agreement to award contracts to other competitors in ensuing government bids.

---

[140] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations,* (London, W. Strahan and T. Cadell, 1776), Book 1, Ch. 10, Part 2.

Price-fixing and bid-rigging are *per se* offenses under American law, meaning that once the conduct is established, a court will not permit a defendant to advance any defense.[141]

The driving force behind American antitrust enforcement with respect to price-fixing and bid-rigging is the belief that competition is best served by a multitude of decision-makers, acting independently, each fearful that if they attempt to raise price or reduce quality, customers will abandon them and turn to a rival. Given that price-fixing *conspiracies* are typically accomplished in secret and are difficult to detect by victims of price-fixing and bid-rigging conspiracies, severe sanctions are provided by American law for violations. In addition to large criminal fines and the threat of imprisonment, victims who can prove that they have been injured by reason of the violation are empowered to act as "private attorneys general" and are provided with the right to recover treble their actual damages plus reasonable attorneys' fees if they succeed, as an incentive to root out violations.

However, as many legal commentators have observed, beginning in the 1970s, here too, there was a pronounced shift in the underlying policy of American courts and regulators away from the classic view that the law was designed to advance social and political objectives to the view that the law's goal should be enhancing efficiency goals.[142] It is frequently claimed by proponents of this approach that a certain degree of coordination is required to justify the capital

---

[141] *United States v. Socony-Vacuum Oil Co., Inc*., 318 U.S. 150 (1940). However, here to then Prof. Bork disagreed that courts should apply the *per se* rule to price-fixing and bid-rigging and urged, instead, a thorough analysis of the costs and benefits of the price-fixing or bid-rigging behavior before condemning it. Robert H. Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*," Yale L. J*. Vol. 75 (January 1966): 373.

[142] See, e.g. Jonathan Baker, "The Case for Antitrust Enforcement*," Journal of Economic Perspectives,* Vol. 17, No. 4 (Fall 2003): 27-50.

investment required to create efficient productive resources, to counter foreign state-controlled and subsidized enterprises or to prevent ruinous cutthroat competition.[143]

State-sponsored cartels such as the Organization of Petroleum Exporting Countries ("OPEC") exemplify the harm cartels can do to competition when they coordinate output. However, OPEC and its members successfully escaped prosecution under U.S. antitrust law because they enjoy "sovereign immunity" under the laws of the United States.[144]

ii. The Halachic Approach to Horizontal Price-Fixing and Cartelization

BT 9a relates a case involving a private arrangement between two butchers in a town who appear to have formed a cartel intended to support higher prices for animal hides sold into the local market. Each butcher agreed that if he slaughtered a carcass on the day assigned to the other butcher, he would destroy the hide of the carcass he slaughtered without offering it in the market. Once, butcher "A" slaughtered a carcass on the day assigned to butcher "B". Butcher "B," whose day it was to sell his carcass, tore up the hide of the animal he slaughtered, thus maintaining the reduced supply of hides to tanners and keeping the price of hides artificially high. However, butcher "B" then brought his claim before Rava who awarded him compensation from butcher "A" for the lost value of the hide. Rabbi

[143] See, e.g. Bork, "The Rule of Reason," 373.

[144] See, I*nternational Ass'n of Machinists v. OPEC,* 477 F. Supp. 553 (C.D. Cal. 1979). OPEC is a peculiar cartel because it consists of sovereign states who are immune from attack under international law in the courts of another sovereign and also because it operates in plain sight. A more typical price-fixing cartel consists of competitive suppliers or manufacturers and its operations are concealed from the public.

Yeimar bar Shelamya objected on the basis that butcher “A” should have been fined for violating the agreement rather than being required to compensate butcher “B” for his loss on the basis that this anti-competitive agreement was the type of arrangement the residents of a city could approve. Rav Papa agreed with Rava and expressed what has become the normative view that community-approved private cartels are permitted only if there is no respected halachic authority in the area (אדם חשוב). But, if there is such an אדם חשוב in a community, only he can be looked to approve such arrangements between competitors and, without his approval, such arrangements are void.[145] What is significant about this sugya for our purposes is that the Talmud apparently has no difficulty with private price-fixing or output limiting (the same thing) agreements between competitors provided that such agreements are approved by some independent individual or communal authority.

While this ruling indicates a level of rabbinic concern for the welfare of merchants, it is balanced by the requirement that the arrangement must be approved either by the community who will bear the burden of the higher cost occasioned by the agreement or by the אדם חשוב who is presumably concerned with the welfare of both the butchers and the tanners (consumers of hides).[146] Indeed,

---

[145] 89a relates a dispute over whether it was proper to appoint inspectors to supervise prices. The Nasi’s house appointed inspectors for the category of weights and measures, and the category of prices, but Shmuel insisted that inspectors for prices should not be appointed because he believed the market would self-correct. Importantly, the Gemara rejects his view. Rabbi Rami bar Hama in the name of Rabbi Yitzhak maintained that inspectors for weights, measures and prices should be appointed. See also Rashbam who confirms that inspectors are not appointed to deal with prices (Rashbam on 89a). According to the Meiri (Menachem Ben Solomon Meiri (1249-1310, France)) (ad. bc) even with the concurrence of the "important person," regulations which are injurious to the community are invalid if they have not been agreed to by the citizens themselves. The Meiri’s views seem to reflect a concern for the welfare of consumers even at the expense of producers. Perhaps he is a precursor of the Harvard School’s approach to shifting the balance of welfare towards ultimate consumers.

[146] The ruling, however, is in sharp variance from the law in the modern State of Israel. The Economic Cartel Law of 1988 (as amended) provides criminal and civil sanctions for price-fixing cartels among other things. (Economic Competition Law Act, 5748-1988)

the Meiri commented on this sugya and concluded that, normally, artisans do not have the authority to stipulate prices even with the approval of a distinguished man, since such practices cause a loss to the townspeople.[147]

The butcher sugya suggests the propriety of some form of price controls if approved in an appropriate manner. However, as the United States learned during its experience with mandatory price-controls during part of the Nixon years, any form of governmental mandatory price regulation usually fails because of political disputes and the myriad necessary exceptions and conditions such regulations require.

In the Jerusalem Talmud, the question of price controls was subject to a disagreement between the *Exilarch* [the political leader of Babylonian Jewry] and the [Talmudic] Sages. The Yerushalmi (Bava Batra 5.5) relates that the Exilarch appointed market officers to supervise prices as well as measures. Rav was appointed by the Exilarch, both to inspect weights and measures and to punish for violations of the Exilarch's price controls. However, Rav refused to regulate prices based on the view set forth in BT Bava Batra 89a that a market inspector does not have jurisdiction over prices in the market. The Exilarch considered Rav's refusal to be contemptuous of his authority and had him imprisoned.

The Rambam commented on price regulation, as follows;

> "The court is required to appoint officials in every county and every city who will circulate among the stores and validate the scales and the measures and set the prices.... Anyone who profiteers and sells dearly is punished with lashes (until) he sells at the market price."[148]

[147] See also, *Mishneh Torah*, Sales 14:10-l; *Shulhan Aruch, Chosen Mishpat*, 231:20.
[148] *Hilchot Genaiva,* 8,20; quoted in the *Shulchan Aruch, Chosen Mishpat* 231:20-21.

According to Rashbam (Shmuel Ben Meir 1085-1158, France, the grandson of Rashi), market officers are not appointed to supervise prices and prevent merchants from charging supra-competitive prices. He argued "it is logical that this is not necessary, for if one wants to sell at a high price, another who needs money will sell more cheaply, all the buyers will go to him, and the first will be forced to sell cheaply."[149] The dispute evidences the tension between the view that the markets should be regulated by the state and the view that the markets are essentially self-correcting. It is interesting that in this case, the Jerusalem Talmud appears to support the view of the sages, which seem more in line with the self-correcting markets approach of the Chicago School than with the other reported cases in the Talmud. The Meiri's view reported above (f.n.145) seems to place confidence in the judgment on behalf of the municipality in the person of the אדם חשוב to determine whether and when to take the power to set prices out of the hands of the merchants in the market and place it in the regulator.

Some additional support for the Meiri's view is found in rabbinic responsa which rules that in the face of price-gouging by merchants, a community could regulate pricing of essential commodities. For instance, it was found to be appropriate for the townspeople to set a maximum price of wool to be charged by all the merchants of wool until the prices return to proper market levels. This remedy was approved by Rabbi Samuel de Medina (1505-1589, Thessalonika) (*Responsa Maharashdam*, YD 117) if approved either by a majority of the "*tovei ha'ir*" (the "good people" of a city)

[149]Rashbam on Bava Batra 89a

[150] or by the Torah sages in the town, provided, the option remained for an integral community within a larger one (e.g. a village within a larger city) to opt-out of such an arrangement. Another approved boycott involved a different group of butchers:

> "The butchers in our community have raised the prices of meat and are selling more dearly than (is common) in the area. We have decided that this is opposed to honesty and justice and wish to make a firm agreement that no one shall buy meat from the butchers until they sell at the price prevailing in other communities of this area. It might also be appropriate for consumers to create a co-op and bypass the price-gouging merchant.[151]

iii. COMPARISON OF THE AMERICAN AND HALACHIS APPROACH TO PRICE-FIXING

There is an important difference between the American approach and halacha with respect to price-fixing. Price-fixing is *per se* unlawful and, indeed, criminal under American law. Once price-fixing is shown to have occurred, no economic or other justification is allowed, no matter how reasonable it might seem to the court or the jury.

Halacha, on the contrary, permits price-fixing—provided it is controlled with proper safeguards by a recognized authority, without dissent from any of the residents in a given market (if in the absence of a אדם חשוב), or by the אדם חשוב in communities, where one exists.[152] While halachic sources encourage price competition so long as markets are both behaving competitively and benefitting the community, whenever competitive forces fail to function or are viewed as destructive

[150] For a definition of *tovei ha'ir*, see *Encyclopedia Talmudit*, Vol. 19, s.v.*טובי העיר.*
[151] See, discussion and CJLS 1986 responsum, *infra,* at p.94
[152] BT Bava Batra 9a.

to the community (as where they result in individual suffering), price competition can be curtailed with appropriate safeguards.[153]

The American law of pricing supports a free market system where, theoretically at least, each individual seller or buyer is expected to be a price-seeker, looking for the best price at which a transaction can occur (competitive market price). American law provides punishing sanctions for price-fixing in order to protect an open and robust competitive market. Halacha views private agreements to control market pricing as an alternative to a free market, but one that needs careful safeguards and to be operated under appropriate supervision.[154] As in the case of monopolization, halacha blends moral and economic considerations that protect the society rather than a complete abdication of community regulatory oversight or outright prohibition.

For example, consider the law of *Ona'ah*. The concept of "Ona'ah" (defined as a grossly unfair or oppressive price) has no counterpart in American law.[155] The prohibition of Ona'ah is a form of price control to assure that buyers are not left at the mercy of a monopolistic seller or a cartel in a Jewish marketplace. Halacha developed a concept of a "just price" which was based not on economics but rather on a moral or religious foundation. Basic commodities, such as wine, oil, fruit, vegetables, and bread were deemed essential to human life and could not be sold

[153] See, Tamari, *With All Your Possessions,* p. 100.
[154] BT Bava Metzia 11:23 states "…[T]he townspeople may stipulate prices, measures and the wages of workers". See also BT Bava Batra 9a; Maimonides, *Mishneh Torah,* Law of Sales 14:10-11 "Artisans may agree among themselves to limit their work but if there is an distinguished man (אדם חשוב) in the community, only with his approval". For the contrary view, see footnote 130, supra.
[155] *Ona'ah* is understood to refer to a price used to buy or sell that deviates by a prescribed amount (usually 1/6th) from the established price in the marketplace. See, Bava Metzia 49b. It stems from the commandment in Ex. 22:20 and Lev. 19:33, "and the stranger you shall not oppress."

over and above the just price, defined as the market price for such goods. Anyone charging more is guilty of theft. Akin to the principle of Ona'ah is the concept of *hafka'at she'arim* (undue profiteering). As Israeli Justice Menachem Elon explains: *hafka'at she'arim* (profiteering) is "raising the price of a commodity beyond the accepted level, or that fixed by a competent authority"[156] Similarly, hoarding in order to cause a price increase[157] or price gouging on the sale of items that are ritually required to be used or consumed at a particular festival, such as particular sacrifices, *lulavim* (palm branches for the holiday of *Sukkot*), etc. is condemned as theft.

As mentioned above, it is an accepted notion in American antitrust opinions that "the antitrust laws protect competition, not competitors." By contrast, halacha recognizes the "important man," presumably one steeped in Torah learning—as empowered to set aside concerns about the health of competition, if doing so would advance, say, the ability of butchers in a small town to support themselves and their families. Again, Jewish law is concerned with the welfare of traders as well as consumers, presumably expressing the Torah value that everyone is entitled to an equitable share in G-d's bounty and, thus, permits the community or the court to "fix" prices in order to achieve the social and moral objectives of the Torah.

---

[156] See, Michael Makovi, "New Wine in Old Flasks, the Just Price and Price-Controls in Jewish Law" (Munich RePEc Archive, January 2016): 9 et seq., *https://core.ac.uk/download/pdf/211619247.pdf*

[157] BT Bava Batra 90b

c. NON-PRICE VERTICAL RESTRICTIVE TRADE PRACTICES

This section analyzes such practices as market and territorial division and exclusive dealing. These agreements differ from so-called "horizontal cartel agreements" that restrict competition between actual competitors in important respects. In these cases, competition is restricted through vertical restraints on the alienation of goods or services that have been sold to a downstream purchaser (perhaps from a manufacturer to a wholesaler, or from a wholesaler to a retailer). These arrangements often involve franchise or other customer-supplier agreements.

A straightforward example is automobile manufacturers and distributors placing restrictions on the resale of vehicles from their authorized dealers, such as forbidding the dealer from selling outside a given territory or from unauthorized locations. These arrangements are private arrangements that have the potential to either injure competition or to enhance it. There are significant differences in the way that they are dealt with in American law and in halacha.

i. NON-PRICE VERTICAL RESTRICTIVE AGREEMENTS IN AMERICAN LAW

Beginning in the 19th century, manufacturers developed the practice of advertising and promoting products directly to consumers, but selling these products through independent middlemen or retailers. As a result, manufacturers had a vital interest in the way in which the products were resold to consumers, including the price at which they were sold, and in appropriate cases, how the retailer provided after-sale service. However, there was a long-standing rule known as "the restraints

on alienation doctrine," inherited from English law, which held that a seller could not place restrictions on the resale of articles of commerce once he parted with dominion and control of the article to a purchaser. Thus, at one point the Supreme Court had held that any attempt by the manufacturer of Schwinn bicycles to restrict the price at which a bicycle shop could resell its bicycle was a *per se* offense under the Sherman Act.[158] The law in *Schwinn* effectively prevented sellers from setting any level of control over its dealers.

This rule proved unworkable in the modern economy and was expressly overruled by the Supreme Court in the case of *Continental Television, Inc. v. GTE Sylvania, Inc.*[159] The *GTE-Sylvania* case involved a manufacturer of television receivers that granted exclusive territories to its dealers, and restricted their right to sell these products from different locations or to deliver them to customers outside their assigned territory. At the time Sylvania was a relatively minor manufacturer of televisions as compared to companies like RCA and Zenith, and its management believed that in order to induce its dealers to feature its products, it needed to grant them exclusivity and protection from competition from other Sylvania dealers. The Court approved this practice, expressly overruling its earlier *Schwinn* precedent.

This ruling revolutionized vertical distribution practices in the United States. Now, despite having parted with ownership of the product, manufacturers who could offer reasonable business justifications for restricting downstream dealers' resale practices no longer faced antitrust consequences. This has led to a variety of approved practices, including restrictions on the downstream dealers' ability to

---

[158] *United States v. Arnold Schwinn & Co.,* 388 U.S. 365 (1967)
[159] 433 U.S. 36 (1976)

purchase from the supplier's rivals, the look and feel of dealerships, service levels, and the like. The rule today is that a vertical arrangement is only invalid if it can be shown that it is likely to foreclose the ability of rivals to compete.[160] Thus, if there are other merchants available to rival manufacturers, and the products covered by the restriction represent a relatively small share of the overall market, the arrangement is presumptively lawful (and even pro-competitive since it incentivizes the parties to make additional investments to promote the sale of the products covered by the agreement). If, however, such an agreement were to foreclose two competing sellers from the possibility of reaching, say 30-40 percent of a market, such an agreement or series of agreements would be presumptively unlawful and would require a strong rational justification, so that a court could conclude, under all the circumstances, that the arrangement was "reasonable."[161]

A similar rule prevails for arrangements that forbid a retailer to deal in merchandise from other manufacturers. Thus, a franchisee, such as a fast food outlet or an electronics dealer can be lawfully restricted to dealing only in brands authorized by the manufacturer that grants the dealer a franchise. The legality of such restrictions is based on the factual showing that retail customers expect a certain array of products or services from a franchised dealer and other fast food franchisors or manufacturers have other alternatives than the foreclosed dealer.[162]

Similarly, a manufacturer or distributor will often agree with its authorized retail dealers not to franchise others within a certain distance in return for the dealer

---

[160] *Methodist Health Services v. OSF Healthcare System,* 859 F.3d 408 (7th Cir. 2017)

[161] *Tampa Electric v. Nashville Coal Co.,* 365 U.S.320 (1961); but see, *Omega Environmental v. Gilbarco, Inc.* 127 F.3d 1157 (9th Cir. 1997), which de-emphasizes reliance on the share of foreclosure.

[162]*Jefferson Parish Hospital District No.2 v. Hyde* 466 U.S. 2 (1984)

confining its sales to a specific location or geographic area. In return, the retail dealer is likely to agree not to open in another physical location without the prior approval of the manufacturer or distributor. These practices create zones of exclusivity. To the extent that the products involved do not have a dominant share of the product market involved, these arrangements are generally presumed to be lawful. Although such agreements undeniably have the effect of eliminating intra-brand competition, they can easily be justified on the basis that some degree of exclusivity is needed to induce the retail dealer to invest in specialized structure, equipment, inventory, and signage that identifies it as an authorized dealer in the products in question and thus, they promote inter-brand competition.[163]

ii. HALACHIC APPROACH TO NON-PRICE VERTICAL RESTRICTIVE TRADE AGREEMENTS

Perhaps the first recorded vertical restraint on alienation was the institution of the Jubilee year in Lev. 25:8-24. It could be characterized as a vertical non-price restraint in the sense that G-d, the "upstream distributor" of the land of promise retained a certain degree of control over the product (the land of Israel) that G-d was delivering. The restriction was that the land could not be alienated beyond the next Jubilee year when it had to revert to the tribe originally designated by G-d to possess it.[164] This arrangement has some similarities and many differences from the type of restraints covered by American law, described above. But like an

[163] *United States v. Arnold Schwinn,* 388 U.S. 365 (1967).
[164] This example is not really analogous since G-d never actually sold the land but merely granted Israel a license to use it.

automobile dealer who is forbidden to sell his cars to people outside his assigned area of responsibility, the member of the tribe that was originally given the land was not free to sell it in perpetuity outside his own tribe. In this way, the means of (agricultural) production were controlled by the upstream "Seller" in order to achieve the Seller's goals of maintaining ultimate control over the means of production in the desired manner. Like the upstream automobile distributor, the Jubilee restriction is designed to achieve an objective desired by G-d, while limiting the ability of the downstream possessor of the land to maximize his profits from his possession of the land by selling it in perpetuity. And in the case of the Jubilee restriction, the Torah seems less interested in the welfare of the individual farmer who possesses the land than in the ultimate goal of maintaining the original division of the land among the tribes.

The Jubilee year was observed, we are told, until the destruction of the First Temple, but ceased to be operative during the Second Temple period because the land was no longer entirely within the control of Israel.[165]

A later example of a non-price vertical restraint is found in BT Bava Batra 91a, noted above, where it is recorded that a person may not earn a profit by buying

[165] See, authorities gathered at https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-jubilee (visited 10/6/20); see also, *Mishneh Torah*, *Hilchot Sh'mita v'Yo'vel*, 10:10.

and then reselling articles that are deemed essential to sustenance such as wine,[166] oils,[167] flour and, perhaps, eggs.[168]

The reason for these non-price vertical restraints appears to be the concern that the resale of essential materials will lead to what modern economists call "double marginalization"—the second merchant charges a profit markup based on the price he paid the first merchant, which included a profit for the first merchant. The more merchants who handle the goods, the more double marginalization. Thus, the Gemara reflects the view that the restraint on the right of a merchant to resell goods to other merchants is to maintain a fair price for essential goods in order to protect the ultimate consumer and the society.

iii. COMPARISON OF THE AMERICAN AND HALACHIC APPROACH TO NON-PRICE VERTICAL RESTRICTIVE TRADE PRACTICES

As we have seen in other areas, there is a sharp distinction between the American impersonal, market-based approach to the law of competition and the halachic approach, which is based on the primacy of Torah-based values. Torah infuses law with ethical considerations. The Torah states (Lev. 25:14): "If you sell something to your neighbor or buy something from your neighbor's hand, you shall

---

[166] Rabbi Yehuda ben Beteira is said to have sold wine as a middleman because, in his opinion, wine leads to licentiousness. BT Bava Batra, 91a

[167] Rabbi Elazar ben Azaria is said to have sold oil through middlemen because oil was plentiful (and thus, not deemed essential) in his local area and there was no concern that reselling oil would cause its price to rise above market levels. *ibid.*

[168] As to eggs, the Gemara says that one may not earn a profit twice from the sale of eggs. Rav and Shmuel disagreed about the meaning of this statement with one saying eggs could not be resold for twice what the merchant paid for them and the other saying it was permissible to sell eggs through middlemen.

not wrong one another." Halacha extends this rule to cover excessive pricing. The Talmud (BT Bava Metzia 50b) ruled that if the overcharge is more than one-sixth -- i.e., the retailer sells an item for a price that is one-sixth higher than what is generally accepted as a fair price—the sale is null and void as Ona'ah[169]. Similarly, if an individual is unaware of the true value of an item and wishes to sell it, one must not take advantage of the seller's ignorance and underpay. The law against overcharging was extended by the Talmud to include excessive markups on necessities (BT Bava Batra 90a).

Another example that demonstrates that halacha infuses the rule of law with Torah's ethical values is found in BT Bava Metzia 83a; Rav ordered Rabbah bar bar Hanan to compensate porters who negligently broke a barrel of his wine. When Rabbah asked Rav if his ruling was in accord with the law, Rav quoted Proverbs 2:20 "and keep the paths of the righteous". To the same effect is BT Bava Metzia 108a: "The Sages of Neharde'a say: . . . [O]ne should not perform an action that is not right and good, even if he is legally entitled to do so."[170] To quote one modern commentator on the subject, "Achieving the highest level of ethical behavior in the marketplace and practicing the social responsibility that must accompany success in business are the hallmarks of the 'way of the pious.'"[171]

American antitrust law is based on the belief that Adam Smith's "invisible hand" that controls markets best promotes both consumer and producer welfare.

---

[169] See discussion of Ona'ah which voids transactions at prices which are determined to be oppressive at page 85, supra.
[170] To the same effect, see BT *Makko*t 24a
[171] Dr. Hershey Friedman, "The Impact of Jewish Values on Marketing and Business Practices*." Journal of Macromarketing*, Vol. 21 (June 2001): 74

But, as noted above, determining when to step in and “slap” the invisible hand when it is over-protecting consumers or producers has taken American antitrust interpretation on something of a roller-coaster trajectory over the last 130 years, with many ups and downs in enforcement and governmental enforcement.

Halacha’s approach to dealing with commercial competition has been a much smoother ride over the centuries. To the rabbis, competition is seen as one of many tools that seek to harness man’s instincts and desires, and redirect them to enhance the Torah values of a just society. Competition, to the rabbis, is one tool among others that is employed in the quest for a society based on Torah values rather than commercial concerns, as is the case in modern antitrust jurisprudence.[172]

While notions like productive efficiency are recognized as values in the rabbinic texts, they are never allowed to become the primary value. The debate between the sages and Rabbi Yehuda in *Mishna* Bava Metzia 4:12 over whether a shopkeeper can try to entice children, who are sent into the market to buy other items, into his shop with treats, or whether he can engage in below-market pricing is resolved in both cases in favor of consumers (the sages’ view) and not merchants (Rabbi Yehuda’s view). This notion of seeking an outcome that favors consumers over producers or merchants runs through much, if not all, of the rabbis’ treatment of

---

[172] As has been argued above, the intention of the original Congressional draftsmen of the antitrust laws was to protect consumers and small entrepreneurs in an effort to provide a more egalitarian society. However, as currently understood, antitrust is viewed as another form of economic regulation that should be stripped of all humanitarian concerns. See, Daniel Crane, “The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy,” *Antitrust L. Journal,* Vol. 72, No. 3, (2014); 835. In 1982, I debated Robert Bork at the annual meeting of the American Bar Association in Dallas, TX during which he falsely claimed that the antitrust laws were never intended to address any social evils; instead their only purpose was to promote the economic goal of efficient output of productive resources.

halacha in this area. We also see the sages' view prevailing in the major medieval codes of Jewish law, the *Mishneh Torah* and *Shulhan Aruch*.[173]

One can read the acceptance by the rabbis through the view of Rabbi Huna ben Yehoshua, which favors competition between merchants that results in benefits to consumers the same way. Again, competition is seen as a tool that enhances "consumer welfare" in the literal sense of that expression (rather than in the "Bork-ian" sense) unless the competition threatens to completely destroy the livelihood of the producers or merchants. It must be noted that where the benefits of robust competition might threaten areas of commerce the rabbis deemed essential, (e.g. kosher slaughter) they did not hesitate to reign it in.[174]

A contemporary case embodying this approach found its way into a responsum by the Committee of Jewish Law and Standards (CJLS) of the Rabbinical Assembly in 1986, entitled "Co-Ops for Kosher Meat." In response to the question of whether it was permissible to establish a kosher meat co-op in an area where there was already an established kosher butcher who was charging more than consumers felt was appropriate, Rabbi David Lincoln concluded that if a community feels that they are not being treated fairly by the local kosher butcher, it is acceptable for them to form a purchasing co-op.[175]

---

[173] *Mishneh Torah*, Hilchot Mechira 18:4; m. Bava Metzia 4:12. *Shulhan Arukh*, *Choshen Mishpat* 228:18.
[174] The exception that proves the rule here may be in the case of Torah education of children where the rabbis have permitted virtually unrestricted competition. For a full discussion, see Dennis Carlton and Avi Weiss, "The Economics of Religion, Jewish Survival and Jewish Attitudes Towards Competition in Torah Education," *NBER*, Working Paper 7863, (2000).
[175] Rabbi David H. Lincoln, "Co-ops for Kosher Meat," *Proceedings of the Committee on Jewish Law and Standards*, (1986/1990): 237, et seq.
https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/lincoln_coops.pdf

D. SUMMARY AND CONCLUSIONS

In a 2018 speech, the Assistant Attorney General of the United States in charge of the Antitrust Division of the U.S. Department of Justice, Makan Delrahim, noted that "antitrust and Jewish law, perhaps, are not the most obvious pairing."[176] It has been the purpose of this thesis to demonstrate that American antitrust is much the poorer for it. It is my thesis that Jewish law has quite a bit to say to American antitrust law, and to antitrust thinkers and scholars. Based on the history of the origination of American antitrust law, I believe it is clear that, like Jewish law, it was intended by Congress to advance both consumers' and producers' interests and Congress has never swayed from that point of view.

Sadly, the purpose intended by the passage of the Sherman and Clayton Acts (to dissipate the power of the original trusts of the late 19th century) has been distorted by the same powerful interests that favored producers over consumers then, and still do today. It is ironic that the same conservative forces in our society that praise jurists for adhering to the original intention of the Congress in enacting legislation, consistently refuse to do so when it comes to antitrust interpretation.

The same current emphasis on the supremacy of economic interests over human interests that declared that corporations enjoy the privileges and immunities of the First Amendment, especially freedom of speech in *Citizens United v. Federal*

---

[176] Makan Delrahim, "The Pursuit of Justice: Lessons in Competition from Judaism," (speech, Beverly Hills, CA, December 8, 2018), Department of Justice, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-beverly-hills-jewish-community.

Election Commission 558 U.S. 310 (2010) is on display in the current antitrust approach of the American government and most American courts. The current debate over the future of antitrust is actually the same 1890 debate described above.

Jewish law, grounded as it is in Torah values, counsels that the welfare of all human beings is the point and purpose of commerce and competition. Such notions are not utopian or overly idealistic. The rabbis were quick to come to the defense of the forces of production when they were truly threatened to the point of being side-lined by the interests of consumers. Clearly, the rabbis understood the notion that without efficient production, society would suffer; but, ultimately the core message of the Torah—that all wealth and bounty ultimately belongs to the Lord—led them to seek to create and maintain an economic structure of equilibrium between these two opposing forces. There is great wisdom in this prescription and, we need to remind ourselves and our leaders to model our competitive structure in accordance with this sage advice.

BIBLIOGRAPHY

BOOKS

Bain, Joe. *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries.* Boston: Harvard U. Press, 1962.

Bork, Robert H. *The Antitrust Paradox*. New York: Basic Books, 1978.

Eisner, Marc Allen. *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change*. North Carolina: UNC Press, 1991: 107.

Elon, Menachem. *Jewish Law: History, Sources, Principles.* Philadelphia: The Jewish Publication Society, 1994.

Frazer, Ezra. *Gray Matter: Discourses on Contemporary Halacha*. Teaneck: Jachter self-published, 2000.

Frazer, Ezra, and Chaim Jachter. *Gray Matter: Discourses in Contemporary Halacha*, Teaneck: Kol Torah Publications, 2006.

Heschel, Abraham Joshua. *The Sabbath*. New York, Farrar, Straus & Giroux, 1951.

Lee, John. *Strategies to Achieve a Binding International Agreement on Regulating Cartels: Overcoming Doha Standstill*. Berlin: Springer, 2016: 13.

Levine, Aaron. *Economics & Jewish Law.* Hoboken: KTAV Publishing House, 1987.

Levine, Aaron. *Free Enterprise and Jewish Law*. Hoboken: KTAV Publishing House, 1980.

Mather, Lynn. *The Oxford Handbook of Political Science,* New York: Oxford University Press, 2011.

Resnicoff, Steven. *Understanding Jewish Law*. Newark: Matthew Bender & Co., 2012.

Salman, Chaim. *Halacha, The Rabbinic Idea of Law*. (New Jersey: Princeton U. Press, 2018).

Sandel, Michael. *What Money Can't Buy: The Limits of Markets.* New York: Farrar, Straus & Giroux, 2012.

Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations,* Book 1, Ch. 10, Part 2. London: W, Strahan and T. Cadell, England, 1776.

Stigler, Joseph. *The Organization of Industry.* Chicago: University Chicago Press, 1983.

Tamari, Meir. *With All Your Possessions: Jewish Ethics and Economic Life*. Northdale: Jason Aronson, 1998.

Thorelli, Hans. *The Federal Antitrust Policy: Origination of an American Tradition.* Baltimore: The Johns Hopkins Press, 1955.

Wu, Tim. *The Curse of Bigness—Antitrust Law in the New Gilded Age*. New York: Columbia Global Reports, 2018.

ARTICLES AND JOURNALS

Abdela, Abdil and Marshall Steinbaum. "The United States has a Market Concentration Problem." *The Roosevelt Institute.* (September 11, 2018). www.TheRooseveltInstitute.org/wp-content/uploads/2018/09the-united-states-has-a-market-concentration-problem-brief-final.pdf

Baker, Jonathan. "Recent Developments in Economics That Challenge Chicago School Views." *Antitrust L. Journal* Vol. 58 (1989): 645.

Baker, Jonathan. "The Case for Antitrust Enforcement." *Journal of Economic Perspectives,* Vol. 17 No. 4 (Autumn 2003): 27.

Blair, Roger & Christina DePasquale, "Antitrust's Least Glorious Hour: The Robinson-Patman Act*," Journal of Law and Economics, Vol. 57,* (2014): 201.

Bleich, J. David. "Jewish Law and the State's Authority to Punish Crime." *Cardozo L. Rev*. Vol. 12 (1991): 829.

Bork, Robert H. "Legislative Intent and the Policy of the Sherman Act." *J. L & Econ*. Vol. 9 (1966): 7.

Bradford, Anu, Adam Chilton and Filippo Lancieri. The Chicago School's Limited Influence on International Antitrust." *U. Chicago L. Rev.* Vol. 87 (2019): 297.

Carlton, Dennis and Avi Weiss. "The Economics of Religion, Jewish Survival and Jewish Attitudes Towards Competition on (sic) Torah Education." *National Bureau of Economic Research* (2000).

Carnegie, Andrew. "*The Bugaboo of Trusts." No. Amer. Rev.* Vol. 148 (1889): 141.

Cowen, D.V. "Ancient Origins of Competition Law," *Advocate Forum*, Vol. 20 (August 2007): 38.

Crane, Daniel. “The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy,” *Antitrust L. Journal*, Vol. 72, No. 3, (2014); 835.

Dayen, David. “Attacking Monopoly Power Can Be Stunningly Good Politics, Survey Says.” Last modified November 28, 2018. https://theintecept.com/2018/11/28/monopoly-power-corporate/concentration/

Friedman, Dr. Hershey. “Placing a Stumbling Block Before the Blind: an In-Depth Analysis” *Jewish Law Articles* (2002). https://www.jlaw.com/articles/placingstumbling.html

Friedman, Dr. Hershey. “The Impact of Jewish Values on Marketing and Business Practices.” *Journal of Macromarketing*, Vol. 21 (June 2001): 74

Jachter, Chaim. “Hasagat Gevul: Economic Competition in Jewish Law.” *Jewish Law Articles* (2002). www.jlaw.com/articles/hasagatgevul.html

Kahn, Lina. “Amazon’s Antitrust Paradox.” *Yale L. Journal* Vol. 126 (2017): 564.

Kauper, Thomas. “Misuse of the Antitrust Laws: The Competitor Plaintiff” *Mich. L. Rev.* Vol. 90 (1991): 551.

Kennedy, Joe. “Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy,” *Information Technology & Innovation Foundation,* last accessed May 31, 2020, (October 2018), docs.house.gov › HHRG-115-JU05-20181212-SD004.

Kirkwood, John. “The Essence of Antitrust.” *Fordham L. Rev.* Vol. 81 (2013): 2425.

Kirkwood, John and Robert Lande. “The Chicago School’s Foundation is Flawed: Antitrust Protects Consumers” *ScholarWorks, All Faculty Scholarship* (2008). https://scholarworks.law.ubalt.edu/all_fac/715/

Kotsiris, Lambros. “An Antitrust Case in Ancient Greek Law.” *Int’l Law* Vol. 22 (1988): 451. https://scholar.smu.edu/til/vol22/iss2/7

Levine, Lidia. “A Little Competition Never Hurt Anyone.” *B’kurei Ha’Pardes,* Vol. 1, Tammuz 5769 (2008). https://elmad.pardes.org/wp-content/uploads/2016/04/Bikurey-HaPardes-a-Journal-of-the-Pardes-Institute-of-Jewish-Studies-Advanced-Studies-Program-2009.pdf

Makovi, Michael. “New Wine in Old Flasks, the Just Price and Price-Controls in Jewish Law” (Munich RePEc Archive, January 2016): 9 et seq. https://core.ac.uk/download/pdf/211619247.pdf

Meese, Alan. “Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It.” *N.Y.U. L. Rev*. Vol. 85 (2010): 659.

Morley, John. “The Common Law Corporation: The Power of the Trust in Anglo-American Business History.” *Columbia Law Review*, Vol. 116 (2016): 2145-2166.

Mueller, Charles E. “The New Antitrust: A Structural Approach” *Villanova Law Review,* Vol. 12, no. 764 (1967).

Persico, Tomer. “Why Israel Will Never Be Governed by Jewish Law” *Haaretz*, last modified June 6, 2019. www.hararetx.com/opinion/why-Israel-will-never-be-gioverned-by-Jewish-law-1.7340104.

Pettinger, Tejvan. “Advantages and Disadvantages of Monopoly,” *Economicshelp.org*, last modified October 4, 2020. https://www.economicshelp.org/blog/265/economics/are-monopolies-always-bad/.

Piraino, Thomas. “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century.” *Indiana L. Journal* Vol. 82 (2007): 345.

Sacks, Jonathan. “Markets and Morals.” *First Things* (August 2000). https://www.firstthings.com/article/2000/08/markets-and-morals

Winerman, Marc and William Kovacic. “Learned Hand, ‘Alcoa’ and the Reluctant Application of the Sherman Act.” *Antitrust L. Journal* Vol. 79, (2013): 295.

MISCELLANEOUS

Britannica. “Granger Movement.” last modified February 12, 2020, Britannica.com/event/Granger-movement

Delrahim, Makan. “The Pursuit of Justice: Lessons in Competition from Judaism.” (speech, Beverly Hills, CA, December 8, 2018), Department of Justice, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-beverly-hills-jewish-community.

Department of Justice/Federal Trade Commission. “Horizontal Merger Guideline.” (August 19, 2010). https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

Desjardins, Jeff. "Chart: The Evolution of Standard Oil." visualcapitalist.com, last accessed June 1, 2020, https://www.visualcapitalist.com/chart-evolution-standard-oil/

Lincoln, Rabbi David H. "Co-ops for Kosher Meat." Proceedings of the Committee on Jewish Law and Standards, (1986/1990): 237, et seq. https://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/lincoln_coops.pdf

Piskei din Shel Batei Ha'Din Ha"Rabbanim Bet Din (Tel Aviv-Yaffo 1957)

Sandel, Michael. "Q&A with Michael Sandel: From Market Economy to Market Society." interview by Michael Tomasky, The Daily Beast, July 13, 2017, https://www.thedailybeast.com/q-and-a-with-michael-sandel-from-market-economy-to-market-society.

T'shuvot Bet Ephraim, Chosen Mishpat Section 27.

T'shuvot Mahram of Rothenburg, Section 883.

T'shuvot Maharik, Section 132.

T'shuvot Mordechai, Bava Batra, Paragraph 517.

T'shuvot Pinkas Padua, *Responses of the Sages of Rome*, Bet Ha'otzar Vol. 1, 57-58.

Wilson, Woodrow. "State of the Union Address." (speech, Washington, D.C., December 2, 1913), InfoPlease, www.infoplease.com/primary-source/government/presidential-speeches/state-union-address-woodrow-wilson-december-2-1913.