

# ECONOMIC FREEDOM AND NATIONAL AUTHORITY

## Some Judean-American Comparisons

For DePaul University College of Law

Conference on May 13, 2010

By Jeremy Rabkin

School of Law

George Mason University

### I. Bringing the Jubilee -- and Leaving it Behind

The ringing of that bell is supposed to have announced the promulgation of the American Declaration of Independence in July of 1776. The bell was certainly hanging in the steeple of the Pennsylvania State House in Philadelphia -- in what is now called Independence Hall -- when the Declaration was signed there. The bell has become such an American icon that a full-scale reproduction was given to the City of Jerusalem, as a sort of American offering to Zion. That gift is still on display in "Liberty Bell Park" (known more concisely in Hebrew as "Gan Ha-Pa'amon").

It might have seemed an especially fitting gift, since the bell (in the reproduction as well as the original) is inscribed with a verse from the Hebrew Bible (in the English of the King James Version): "Proclaim liberty throughout the land, unto all the inhabitants thereof." The inscription caught the eye of anti-slavery advocates in the 1830s. They adopted the bell as a symbol of their movement in that era and it is probably that later association that gave the bell its special identification as "the Liberty Bell."

But the biblical verse is not exactly about "liberty," as Americans have understood that term. The full verse reads as follows: "And ye shall hallow the fiftieth year and proclaim liberty throughout the land unto all the inhabitants thereof; it shall be a jubilee unto you; and ye shall return every man unto his possession, and ye shall return every man unto his family." (*Leviticus* 25:10)

The verse is actually about the return of lands to their ancestral owners in the Jubilee year, the conclusion of the seventh of seven cycles of cultivation, each lasting seven years. During that period, the original owners may have been forced

to sell these lands and may have fallen into debt and distress. The Jubilee was not so much about liberty -- in the modern sense of liberating individuals to choose for themselves -- as about restoration, putting things back into their rightful, pre-established order.

Pennsylvania colonists, devoted Bible readers, had, in fact, recognized the original associations of the verse. The bell was commissioned to commemorate the 50th anniversary -- the jubilee -- of the royal charter granted to William Penn's colony in 1702, hence the inscribed verse from *Leviticus*. But even as loyal British subjects in the early 1750s, the city fathers of Philadelphia chose to emphasize the part of the verse speaking of "liberty." And the association with freedom in the modern sense is, of course, what remained with Americans in later times.

The Civil War song, "Marching Through Georgia," proclaims Sherman's march as the time of jubilee: "Hurrah! Hurrah! We bring the jubilee!/ Hurrah! Hurrah! The Flag that makes you free!" But this liberation, enforcing President Lincoln's Emancipation Proclamation, is something quite different from the biblical jubilee: it is imagined as a once-and-for-all, epochal event, not a mere moment in a cycle that must be repeated and renewed every fifty years.

It might be argued that this difference in perspective -- between the biblical understanding of the Jubilee and the American idea of liberation -- sums up something quite fundamental in the contrasting perspectives of biblical religion and modern liberalism. The former seems to emphasize communal submission to divine commands; the latter seems to promise a remaking of the world in the name of individual rights. There is surely much to ponder in this contrast.

But I want to offer a comparison from a different vantage point. Whatever else one may say about the American Founders, they were not prophets -- certainly not in the biblical sense. They could study the Bible (and most of them did) but they had to rely, to a considerable degree, on their own judgment and understanding when crafting the framework which still underlies American law. That sets them at a great remove from Moses and Joshua and the judges and kings of whom we read in the Bible.

What is now called Jewish law, however -- what is now called orthodox or traditional Judaism -- does not seem to derive in its entirety from biblical prophecy, either. Rather, Jewish law came down to later times through the Talmud. The core or grounding of the Talmud is the compilation of rules and admonitions known as the Mishnah, which is thought to have been compiled around 200 C.E. The name might be translated as "repetition" or perhaps "restatement" (related to the word "shaynee," meaning second). It was compiled many centuries after the destruction of the biblical kingdoms and of Solomon's Temple in Jerusalem. The Mishnah seems to reflect the experience of Jewish life in a much later period, when a second Jewish Commonwealth had been restored in the land of Israel. For much of the period, Jews maintained a second Temple in Jerusalem and a considerable degree of political independence, amidst Persian, then Hellenistic and finally Roman imperial

authority in the region. But the leaders, whether princes or priests or sages, no longer could claim direct access to prophecy.

If you compare the rules in the Mishnah with legal standards embraced in early America, there is, in fact, much common ground. In fact, there is much more common ground than one might expect merely from looking at biblical law, as it appears in the biblical texts. At least on some fundamental questions of economic policy (as we would now term it), the religious and political authorities in the restored Judean Commonwealth seem to have accepted rather similar approaches to those embraced by the American Founders. At any rate, that is what I try to illustrate in the examples that follow.

I should say at once, however, that I do not mean to enter into controversy here about the authority of the Oral Law or the degree of innovation in rabbinic Judaism. The Orthodox view is that in addition to the written law, which we have in the Torah, Moses received a great deal of additional explanation at Mount Sinai, which was not written down at the time but passed along in an oral tradition. I do not think anything I say below is necessarily inconsistent with the claim that the sages quoted in the Talmud were enunciating fully authorized (or fully foreseen) elaborations of earlier principles. I am content to point out that what they did say is closer to American practice than one might expect from reading the biblical texts.

Nor do I mean to make any definite claims about influence or causation, when comparing legal standards in post-biblical Judea and in post-colonial America. I want, for the most part, to emphasize some interesting parallels, without committing to any claims about derivations on either side.

Finally, I should say at the outset that I don't mean to focus here on technical points of law or procedure but on basic approaches to what is sometimes called "political economy." The legal reforms that occurred in early America in these areas also developed, to a greater or lesser extent, in most modern countries. They are the "modern" parts of what, in the 19th Century, was conceived as "modern" political economy. But these changes happened earlier and more fully in America. And similar approaches had already been embraced in the Judean Commonwealth, nearly two thousand years before the American Founding.

## II. Who Owns the Land?

The Bible emphasizes that the Israelites are not originally from the land of Israel. *Genesis* relates that the first of the Patriarchs, Abraham, was born in far-away Ur and even the Patriarch Jacob -- who was renamed Israel and passed the name to his descendents -- spent most of his life wandering or toiling outside the land that came to bear his name. The Bible does emphasize that God promised the Patriarchs that their descendants would inherit the land of Israel. But the biblical narrative

also makes it clear that divine intervention was required to make good on this promise, from the plagues in Egypt that broke the Pharaoh's hold on his Hebrew slaves, to the manna in the desert that sustained them in their subsequent wanderings, to the divine interventions that allowed Joshua's inexperienced army to defeat the kings of Canaan. The Bible also emphasizes that what God gives, He may take back, if the people of Israel disobey his decrees: "Ye therefore shall keep My statutes and Mine ordinances and shall not do any of these abominations ... [as were done by] the men of the land that were before you ... that the land vomit not you out also, when ye defile it, as it vomited out the nation that was before you." (*Lev. 18: 26*)

The Jubilee seems to encapsulate or dramatize this lesson. Land is not really owned by those who purchase it, because it must revert to its original owners or their families. Yet the original owners are not full owners, themselves, because they cannot permanently alienate their holdings, even if offered enticing benefits to do so. In effect, the law of the Jubilee seems to make clear that all owners of land in Israel are mere tenants, while God remains the ultimate owner, in a special way the Lord of this Land.

The early American view might seem to have been at the very opposite extreme. Here is the Virginia Declaration of Rights, proclaimed less than a month before Jefferson's more famous Declaration of Independence and thought to be one of its models:

... all men are by nature equally free and independent and have inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property; and pursuing and obtaining happiness and safety. (Art. I)

On this account, it might seem that "acquiring and possessing property" is a natural right, so "all men" should have the legal capacity to own or to sell -- and then pass their acquired property to heirs they designate themselves.

But this was not the prevailing view in Europe. America was launching a revolution. In medieval Europe, conquering kings, like William of Normandy, gave land to their followers in return for the promise of military assistance in the future. Great barons would in turn provide land to vassals who promised, in their turn, to provide military assistance to these lords when called to do so. It was obvious to everyone that when a king gave land, he was giving a trust, because the land carried the capacity to sustain military force. Often, too, great lords maintained castles on their lands -- that is, military fortifications -- so giving lands (and the fortifications on them) also meant giving a kind of independence from outside attack. If a lord were in revolt, that independence might be turned against his own king. So the award of land was a political as much as an economic decision.

Down to modern times, it followed -- or was thought to follow -- that land could not be entrusted to those who were not loyal. Blackstone reports, as if it were

an obvious measure of prudence, that land in England could only be owned by subjects of the king. (Vol. II, Ch. 15, Sec. 6) In France, kings took the policy a step further, claiming the right to confiscate even moveable property (such as gold and silver or merchandise) held by foreign merchants who happened to die while in France under the so-called *droit d'aubaine*. The property rights of foreigners were entirely dependent on royal favor and such rights as were granted (as, notably, to foreign merchants) were conceived as personal concessions to particular favored individuals.<sup>1</sup>

To early Americans, this burden on foreigners appeared quite unjust. The first foreign treaty of the United States, the commercial treaty with France in 1778, expressly provided that Americans would be exempted from the *droit d'aubaine* (Art. XI), while also stipulating that neither country would discriminate against imports from the other (Art. III, IV). Even if war should break out between the parties, they pledged to allow resident merchants from the other country a grace period of six months, in which to sell off their local merchandise before departing. (Art. XX)

This treaty was not, at the time, viewed simply as an exchange of courtesies preliminary to a wartime alliance. The Congress which authorized the terms for this treaty was the same one which issued (after some editorial wrangling over details) the famous Declaration of Independence. Decades later, John Quincy Adams, whose father took such a prominent role in these events, proclaimed that the Declaration of Independence and the French Treaty were "parts of one and the same system": the French treaty was "to the foundation of our commercial intercourse with the rest of mankind what the Declaration of Independence was to that of our internal government."<sup>2</sup> James Kent's monumental treatise, *Commentaries on American Law*, which first appeared as J.Q. Adams was expressing these views, articulates the connection: the right to freely dispose of one's own property "is a necessary consequence of ownership and it is founded on natural right."<sup>3</sup>

But this was not the policy followed by American lawmakers in all matters -- and certainly not in relation to ownership of land. The American Revolution started with mass confiscations of Tory property: those not loyal to the revolutionary governments could not be trusted to own land. The newly independent states of America placed themselves in the position of the English king and imposed similar restrictions on ownership of land. Kent's treatise acknowledges that land willed to a foreigner would be subject to confiscation in most American states -- a practice still maintained in many American states even at the end of the 19th Century (as

---

<sup>1</sup> Baldwin, Simeon, "The Modern 'Droit d'Aubaine,'" *Yale Law Journal*, Jan. 1905, pp. 129-132 offers a historical overview.

<sup>2</sup> "Instructions to Mr. Anderson," from Secretary of State J.Q. Adams, May 27, 1823, reprinted in Jonathan Elliot, ed., *The American Diplomatic Code* (J. Elliot, Jr., 1835), pp. 648, 652-53.

<sup>3</sup> *Commentaries*, 14th ed., O.W. Holmes, ed. (Little, Brown, 1896), Lect. LXVII, Sec. 1 (originally published in four volumes which appeared between 1826-1830)

annotations to the updated, 1896 edition of Kent's treatise indicates<sup>4</sup>). When restrictions on land ownership by aliens were abolished in England in 1870, Parliament took care to include a proviso against ownership that might give rise to political authority (such as a seat in the House of Lords).<sup>5</sup>

On one point, however, American states were pledged from the outset to respect the rights of outsiders, even in relation to land sales and inheritance of land: the Articles of Confederation included a provision guaranteeing that "free inhabitants of each [state] ... shall be entitled to all the privileges and immunities of free citizens in the several states." (Art. IV) The same provision also stipulated that restrictions on property in state law "shall not extend so far as to prevent the removal of property imported into any state to any other state of which the owner is an inhabitant." So there would be no *droit d'aubaine* in American states -- at least not for other Americans.

The Constitution of 1787 restated the guarantee more succinctly and with more precision: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (Art. IV, Sec 2) As Joseph Story's *Commentaries on the Constitution* later explained, "It is obvious that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate or other privileges, except as other aliens [as by special treaties]. The intention of this clause was to confer on them, if one may so say, a general citizenship." (Vol. III, §1800) That such guarantees were thought necessary for citizens of other states reflected the underlying fact that ownership rights were not, in fact, reliably guaranteed to foreigners.

Something similar developed in the Judean commonwealth. To see its full significance, it is worth looking back to the biblical account of how land was originally acquired and distributed. Even in the biblical account, the land had first to be conquered and defended by the Israelites. The conquering army was organized by tribe and the subsequent allocations were also organized by tribe. On the eve of the conquest, when the tribes of Gad and Reuben sought to claim land on the far side of the Jordan, Moses was incensed: "Shall your brethren go to war and shall ye sit here?" (*Num. 32:6*) His indignation seems to have reflected his awareness that these tribes still had the capacity to separate themselves and hold themselves aloof from the subsequent fighting. Moses acknowledged their claim to settle lands beyond the Jordan when they promised to assist the other tribes in seizing the lands on the western side of the river. So in the biblical account, as in medieval Europe, claims to land seem to rest (at least in part) on military contributions to the larger community.

---

<sup>4</sup> *Commentaries*, 14th ed., Vol. IV, pp. 375-76, note d.

<sup>5</sup> Baldwin, "Modern 'Droit d'Aubaine,'" p. 130, endorsing this law on the ground that "it is right to debar foreigners from holding what might enable them to influence directly the conduct of government."

After years of subsequent fighting, Joshua first divides the conquered territory by tribe, before determining on family allocations within each tribal area. (*Josh.* 14: 1-2) The book of *Judges* then offers a continuous narrative of struggles to defend Israel against surrounding peoples. And the fighting still seems to be by tribe -- and sometimes between tribes -- as the land holdings are by tribe. It was, among other things, the integrity of tribal allotments that the Jubilee was supposed to reconfirm every fifty years. Some scholars doubt that the Jubilee was ever regularly observed, however, since it is so rarely mentioned in the biblical accounts of the Israelite kingdoms.<sup>6</sup>

There is much to provoke curiosity. After the northern tribes were conquered by the Assyrians and dispersed to foreign lands, what happened to their tribal allotments? Did the surviving kingdom, comprising the lands assigned to the tribes of Judah and Benjamin, continue to observe Jubilees in their territories? Was there at least a partial jubilee every fifty years, until that kingdom, in its turn, was finally destroyed by the Babylonians? The Bible does not tell us what happened with land ownership in this period.

What is certain, however, is that the Jubilee was not observed in the Second Commonwealth that arose after the Babylonian exile. A second Temple was constructed in Jerusalem, even though the Ark was not recovered and providing a house for the Ark had been one of the original purposes of the Temple. ("See now, I dwell in an house of cedar," says King David, "but the ark of God dwelleth within curtains." *II Sam.* 7:2:) The sabbatical years were restored, leaving the land idle every seventh year. So it must have been possible to calculate when the Jubilee should occur after the seventh sabbatical. But the practice of the Jubilee was allowed to lapse.

In the Judean Commonwealth, then, land holdings were no longer distinguished by tribal ancestry. No effort was made to distinguish between families that might trace their ancestry to the tribe of Judah and those descended from Benjamin. Perhaps such lines of ancestry could no longer be traced. But Levite descent was still recognized. Even so, there was no effort to preserve the biblical system of special land allocations to Levites.

What the Mishnah<sup>7</sup> reports is a limitation on land sales to foreigners -- but only in the Land of Israel, the land that would properly be subject to Jewish political control:

R. Judah says, ... 'They do not rent them [gentiles] houses in the Land of Israel and it goes without saying, fields. But in Syria they rent them houses but not fields.' 'And abroad they sell them houses and rent them fields,' the words of R. Meir. R. Yose says, "in the land of Israel they rent them houses but not fields; in Syria they sell them houses and rent them fields; and abroad they sell them both the one and the other.'" (*Av. Zarah*, I, 8)

---

<sup>6</sup> Baker, David L., *Tight Fists or Open Hands? Wealth and Poverty in Old Testament Law* (Eerdmans, 2009), pp. 96-97, reviews recent scholarly assessments.

<sup>7</sup> Here and below quoting from the translation by Jacob Neusner, Yale Univ. Press, 1988)

Viewed in larger perspective, the resulting legal regime looks quite a lot, after all, like that which developed in early America. Land ownership was no longer tied to a divine scheme of allocation. Title to land could be fully alienated and not simply extended until the next restoration of family holdings at the next jubilee. Tribal affiliation or ancestry no longer mattered -- but nationality mattered, as being a citizen of another state no longer mattered in early American land purchases, as long as the purchaser was a citizen of another American state. In effect, land ownership was, in both schemes, disentangled from family and other narrow loyalties and connected instead with the authority of the nation.

### III. Inheritance Law

Whether aliens can inherit -- and how aliens or those outside the community are defined -- is only one issue in inheritance and far from the only point at which laws have imposed significant restrictions. But a similar pattern appears if we take a wider perspective on inheritance.

Inheritance law remains largely in the hands of state governments in America. But the relative uniformity of state laws on inheritance was one of the things that particularly struck Alexis de Tocqueville, when he visited America in the 1830s.<sup>8</sup> In Europe, inheritance, particularly regarding land, was constrained with many legal restrictions. That was so in 18th Century England and restrictions in English law had been incorporated into the law in most colonies.

For some designated estates, primogeniture limited inheritance to first-born sons. Entailed estates could not be broken up. Such restrictions reflected feudal preoccupations with preserving the holdings of great families, since these concentrations of wealth provided the endowment for political authority.

So it was logical that American states abolished such restrictions in the course of the American Revolution or soon after. As Tocqueville notes, Thomas Jefferson, himself, in his short sketch of his political career, devotes attention to his role in persuading the Virginia legislature to make these changes.<sup>9</sup> Jefferson even takes the trouble to emphasize the "dexterous maneuvers, skirmishes in detail and the recovery of small advantages" by his principal opponent in the legislature -- lest the significance of his achievement be under-rated. Jefferson saw the political implications as clearly as Tocqueville:

The transmission of [entailed] property from generation to generation in the same name raised up a distinct set of families who, being privileged by law in

---

<sup>8</sup> *Democracy in America*, Vol. I, Ch. 3 and Appendix VII to Vol. I. All quotations from Tocqueville in the text are from the translation by Harvey Mansfield and Delba Winthrop (Univ. of Chicago Press, 2000), where the relevant discussion here starts on p. 50 and the Appendix at p. 689.

<sup>9</sup> It can be found in Jefferson, *Writings* (Library of America, 1984), pp. 32-33

the perpetuation of their wealth were thus formed into a Patrician order, distinguished by the splendor and luxury of their establishments. From this order, too, the king habitually selected his Counsellors of State, the hope of which distinction devoted the whole corps to the interests & will of the crown.

So Jefferson regarded abolition of entail as replacing "an aristocracy of wealth, of more harm and danger than benefit to society" with "an opening for the aristocracy of virtue and talent" which "was deemed essential for a well-ordered republic." Jefferson goes on to make a more fundamental point (which Tocqueville characteristically fails to mention): the change in Virginia law not only contains the threat of an "aristocracy" but does so "with no deprivation of natural right, but rather an enlargement of it" by "authoriz[ing] the present holder to divide the property among his children equally, as his affections were divided ....." If "property" is a "natural right," then it might seem to follow that owners should not have fundamental restrictions on who they choose as heirs or how many.

Tocqueville, while declining to talk about natural rights, pointed his readers to the ambiguities of the term "democracy" -- here as elsewhere. In the name of "democracy," Napoleon's Code actually required owners to divide their estates equally among heirs, ensuring that estates would be fragmented over the course of a few generations and encouraging the influence of great families to fragment in like manner. That is the logic of discouraging any concentrations of wealth and authority that might rival the central authority of a democratic government. The general American approach, however, was to leave matters to the individual owner, which was thought to follow from recognizing full ownership as a right and a natural right.

Something very similar seems to have developed in the restored Judean "commonwealth" in the period of the Second Temple. It was not simply that the return of lands to tribes was no longer practiced. Other aspects of earlier law, in regard to inheritance, were also modified. At the least, rabbinic interpretation opened very sizable loopholes to circumvent Mosaic constraints on the distribution of property.

Most notably, the Torah stipulates that wealth should be distributed to children in equal portions, apart from the first-born son, who receives a double-portion. (*Deut.* 21:17) As Kent's treatise notes, a 17th Century code for the Massachusetts colony stipulated that a double-portion should go to the first-born son and the rest be divided equally, following the biblical standard.<sup>10</sup> Similar provisions appear in the Koran and have been insisted upon by jurists of Sharia down to the present, who have developed the rule that gifts to outsiders -- as a means to circumvent inheritance rules -- should not be countenanced if the gifts extend to more than 1/3 of the owners estate.

But the Mishnah (which purports to summarize the understandings in place at the end of the Second Temple period and in the immediately succeeding era in

---

<sup>10</sup> Vol. IV, pp. 375-76, note d (in 14th ed.)

Palestine) offers two broad escapes from the biblical law. In a characteristic maneuver, the passage begins with a reaffirmation of the traditional rule and then allows for its circumvention by verbal formulas:

He who says, 'So-and-so, my firstborn son, is not to receive a double-portion' or 'So-and-so, my son, is not to inherit along with his brothers,' has said absolutely nothing. For he has made a stipulation contrary to what is written in the Torah. He who divides his estate among his sons by a verbal donation -- i.e., as opposed to a claim about inheritance -- and so] gave a larger portion to one and a smaller portion to another or treated the firstborn as equivalent to all the others-- his statement is valid. But if he had said, 'By reason of an inheritance, he has said nothing whatsoever.'

... He who writes over his property to others and left out his sons -- what he has done is done. But [some] sages are not pleased with him. [However] Rabban Simeon b. Gamaliel says, 'If his sons were not behaving properly, his memory is for a blessing.'

The text goes on to consider what happens when a donor tries to assign a property with the donation to take effect only at his death: who gets the produce of such lands in the meantime? It is a question that might still occupy able tax lawyers and accountants in a modern legal system. Its presence in the Mishnah shows, among other things, that such questions were already provoking rabbinic reflection some 2,000 years ago. Here, as in many areas, they provided escapes around strictures. They did something very similar with the biblical prohibition on taking interest for loans.

#### IV. Interest on Loans

In modern America, "usury" is associated with charging excessive interest. But the Biblical prohibition seems more encompassing. "Thou shalt not give interest to thy brother ... Unto a stranger thou mayest give interest, but unto thy brother thou shalt not give interest." (*Deut.* 23:20-21). Or are there ways to limit the force of this prohibition?

In medieval Europe, some Christian authorities fastened on the term "your brother." If it had once been an admonition restricting Israelites from charging interest to fellow Israelites, it might now be interpreted as a restriction on Christians charging interest on fellow Christians, since the advent of the new covenant made Christians [in the view of many Christian theologians] into spiritual children of Abraham. According to one version of this interpretation, it would still be permissible for Jews to loan money on interest to Christians since Jews remained outside this new "fellowship" of Christians.

Some distinguished commentators, including Thomas Aquinas, held to the broader view. Christian teachings of universal love implied that all men must now

be considered "fellows." Therefore it would be wrong for anyone to charge interest to anyone, even Jews to Christians. But the view that prevailed in medieval Europe was more indulgent. Just as the medieval Church took an indulgent view of public brothels -- as safety valve against worse offenses -- it generally sanctioned loaning at interest so long as it was not treated as fully respectable; in practice that meant, so long as it was confined to marginal groups like Jews.

In the early period of the Reformation, Protestant reformers took a different approach. In some ways, they were more morally ambitious -- so, for example, they tried to close public brothels. They were not prepared to indulge lending on interest if it were truly contrary to biblical law. Calvin and others offered a competing interpretation: the law could be seen as a special protection for the poor, hence a prohibition on burdening the neediest with interest charges rather than a general restriction on all commercial lending.<sup>11</sup>

But the force of the underlying concern affected patterns of commerce for many centuries in Christian Europe. As Aristotle had also decried interest as unnatural, the underlying unease may not have been entirely due to biblical piety. Something similar occurred in the Islamic world, where Koranic strictures against charging interest still require special arrangements -- so called "Sharia-compliant banking."

Given this subsequent history, it is all the more notable that the ancient rabbinic authorities seem to have been much more comfortable with interest payments, even by Jews borrowing from other Jews. They did not embrace any of the partial evasions urged by Christian authorities in later centuries. The Mishnah, in fact, still contains statements endorsing the general rule, such as this:

[But if] he sold his field to him and said to him, "If you pay me the entire sum now, lo, it is yours for a thousand *zuz*, but if you pay me at the time of the harvest, it is twelve *maneh* [1200 *zuz*]," it is forbidden." (*Bava Metsia* 5:2)

Rather than restricting the practice of credit payments to a marginal class of lenders or a special category of borrowers, the sages found open-ended formulas to escape the main restriction. Here is an alternate formulation from the same era:

If one buys from his fellow on condition that he will pay within twelve months, the vendor may say to him, "You may have it for less if you pay now," and he need not fear that he is violating the usury law. (*Tosefta Bava Metsia*, 6: 12)

A recent study interprets the passage this way: "If the 'regular' price of the goods already included the cost of credit, then the transaction was allowed. The salesperson simply had to avoid saying that he was increasing the price for

---

<sup>11</sup> For a more detailed account, see Nelson, Benjamin, *The Idea of Usury, From Tribal Brotherhood to Universal Otherhood* (Univ. of Chicago Press, 2d, ed., 1969)

credit."<sup>12</sup> Similar formulas were allowed to accommodate practical needs in most areas of economic life, as the same study concludes: "The Rabbis were concerned only with the fact that usury was banned. They then applied the ban without a thought as to whether the borrower was rich or poor. And when they developed techniques for circumventing the ban, they completely disregarded the purpose of the biblical prohibition ["to protect the poor"]. They extended the ban to all persons, rich and poor, and then developed ways to overcome the restrictions."<sup>13</sup> In other words, the sages changed a potentially far-reaching economic constraint into a matter of ritual law, which could be satisfied with legal fictions and ritual formulas.

When we turn to the history of usury laws in early America, we see a somewhat similar pattern. In the first part of the 17th Century, New England ministers denounced "usury" in vehement terms, ignoring Calvin's qualifications. The result was to impose great hardship -- or encourage surreptitious dealing -- among New England merchants, who were always short of capital and dependent on bills of exchange from buyers and suppliers in England. On a similar understanding, the arch-Calvinist Dutch Reformed Church had demanded, in the 1620s, that bankers or "Lombards" be excommunicated for charging interest on regular loans.

By the end of the 17th Century, however, Cotton Mather, one of the leading clergymen of New England, insisted that money must be understood as a commodity, for whose use an owner was as entitled to charge a price as he would be in renting a house or a horse: "there can be no reasonable pretence that should bind me to lend my Money for nothing, rather than any other Commodity whatsoever: nor can a Contract in this case be more blameable than in any other."<sup>14</sup>

Most American states retained some limits on interest payments in the name of suppressing "usury." A recent study by an economic historian reports that most cases reaching the courts "involved personal loans between neighbors or acquaintances and particularly loans given to those in dire and immediate need. They did not address the impersonal transactions represented in bills of exchange, banking contracts or commercial ventures."<sup>15</sup> A recent study of banking regulation in early 19th Century America reports that restraints on interest charges -- and penalties for violating such limits -- were actually least severe in states with the broadest suffrage: people hungry for loans were not supportive of restraints on

---

<sup>12</sup> Gamoran, Hillel, *Jewish Law in Transition, How Economic Forces Overcame the Prohibition Against Lending on Interest* (Hebrew Union College Press, 2008), p. 20, with many more examples from this era, pp. 15-38.

<sup>13</sup> *Id.* pp. 176-77.

<sup>14</sup> Quoted in Valeri, Mark, "The Rise of Usury in Early New England, Common-Place, April 2006, which also reports the excommunication policy of the Dutch Reformed Church and the denunciations of usury by earlier generations of New England ministers.

<sup>15</sup> *Id.*

lending.<sup>16</sup> By the mid 19th century, another study finds, loosening of restraints had reached the point where "the great bulk of commercial transactions must have been largely unaffected by usury laws."<sup>17</sup> In other words, while prohibitions against charging "excessive interest" remained part of the law in most American states, such prohibitions had dwindled to near ritual significance.

## V. Choice of Law in Commercial Disputes

Legal historians who try to understand what encouraged the growth of commerce in early modern Europe have noticed that commercial development actually preceded the growth of strong governing institutions. In fact, it was the growth of commerce that helped to finance active government. One factor emphasized by some recent accounts was the existence of competing legal systems, as the medieval Church insisted on its independence in administering its own canon law and weak civil authorities had to allow localities and merchants to establish their own legal systems.

The development of a distinctive *Lex Mercatoria* or "law merchant" reflected the willingness of divided authorities in late medieval and early modern Europe to let merchants work out their own standards and their own systems of adjudication for the management of trade -- and ensuing disputes -- when commerce finally advanced beyond direct exchange at local trade fairs. Merchants who could rely on special, ad hoc merchant courts to resolve their contract disputes were able to escape the clutches of grasping princes. Trading centers which respected the independence of merchant law grew rich by doing so.<sup>18</sup>

Those who find these interpretations persuasive see the American republic as a culminating example of how the process worked. The American system provided a check on manipulative authority by insisting on a right to jury trials, even for civil disputes (a practice guaranteed in the 7th Amendment and by now something unique to American law). State legislatures and state appellate courts might be tempted to impose particular political biases. But states were, to some extent, competing for business and it was often possible to arrange for disputes to be taken to more congenial courts in other states. In the 19th Century (and down to 1938, when the U.S. Supreme Court repudiated the practice) there was a doctrine

---

<sup>16</sup> Benmelech, Efraim and Moskowitz, Tobias, "The Political Economy of Financial Regulation From U.S. State Usury Laws in the 18th and 19th Centuries" (SSRN, 2009)

<sup>17</sup> Rockoff, Hugh, "Prodigals and Projectors: An Economic History of Usury Law in the United States from Colonial Times to 1900," NBER Working Paper, June 2003

<sup>18</sup> Berman, Harold, *Law and Revolution, The Formation of the Western Legal Tradition* (Harvard Univ Press, 1983), Vol. I, pp. 342-356.

encouraging federal courts to offer a competing "federal common law" for commercial disputes -- providing another potential escape from particularly onerous or invidious state law doctrines.<sup>19</sup>

The idea that competition of jurisdictions encourages courts to develop rules and procedures most conducive to trade -- or as sometimes put, to economic efficiency -- may be exaggerated or optimistic. But it has obvious logic behind it. Where competing forums are available, participants in commerce can make their own choices about where to take their disputes for resolution. It is at least a reasonable assumption that they will gravitate to jurisdictions which are most receptive to their concerns. In international commercial contracts today, where parties stipulate that disputes should be settled by arbitration, the most common stipulation is that the arbitrators should follow the rules and procedures in place in New York -- a state with long and varied experience in commercial disputes and presumably for that reason, a special degree of attentiveness to commercial concerns. Stipulations for "New York rules" are not uncommonly agreed in contracts where neither firm actually operates in New York.

One might think religious authorities would be hostile to this approach. It has indeed been argued that commercial development was restricted in the Ottoman realms because Muslim authorities -- seeking to protect a religious law that, in contrast to canon law in medieval Europe, extended to all aspects of social life -- were distrustful of legal adjudications by laymen. Judges were appointed by political rulers who did not feel bound to appoint the most learned or highly regarded scholars as "kadis." Modifications to Sharia to accommodate special needs were possible but rare.<sup>20</sup> There was no counterpart to the *lex mercatoria* in Muslim lands, because religiously trained judges maintained a monopoly on adjudications and rarely had extensive commercial experience of their own.

It might seem logical that similar exclusive claims would have been advanced by rabbinic authorities. The Book of *Deuteronomy* seems to provide plenty of warrant for doing so:

Judges and officers shalt thou make thee in all thy gates which the Lord thy God giveth thee, throughout thy tribes and they shall judge the people with just judgment.

... If there arise a matter too hard for thee in judgment ... being matters of controversy within thy gates: then shalt thou arise and get thee up into the place which the Lord thy God shall choose; And thou shalt come unto the priests the Levites and unto the judges that shall be in those days and inquire; and they shall show thee the sentence of judgment. (16: 18, 17: 8-9)

---

<sup>19</sup> For review of this literature, Zywicki, Todd, "The Rise and Fall of Efficiency in the Common Law," *Northwestern Univ. L.Rev.*, Vol. 97, p. 1551 (2003)

<sup>20</sup> Schacht, Joseph, *Introduction to Islamic Law* (Clarendon Press, 1964), pp. 189, 202-04. "The whole concept of an institution is missing" (p. 206) so the idea of local ordinances for a local community -- including guarantees of loans or contracts by a merchant community -- was hard to sustain. On the importance of the latter in the development of European merchant law, see Greif, Avner, *Institutions and the Path to the Modern Economy, Lessons from Medieval Trade* (Cambridge Univ Press, 2006), p. 347.

But here again, the Mishnah seems to accommodate quite different arrangements. Property disputes would be decided by a three judge court, with each of the parties appointing one of the judges and the third appointed by mutual consent or by the choice of the initial two judges. There follows a typical Talmudic controversy about limitations on eligibility to serve as a judge. Rabbi Meir is reported to have said that parties might object to the judges selected by opponents. Other sages are reported to have understood the rule as limiting such vetoes to cases where the nominee was clearly invalid, because, for example, a relative of the plaintiff. But this view is also disputed:

If one litigant said to the other, 'I accept my father as reliable, I accept your father as reliable, I accept three herdsmen [to serve as judges] - R. Meir says, 'He has the power to retract.' And the sages say, 'He has not got the power to retract.' (*Sanhedrin* 3:1)

So quite a lot is left to the consent of the parties. What about those who should never be trusted to judge disputes? The discussion in the Mishnah quickly addresses this question:

And these are those who are invalid [to serve as witnesses or judges]: 1) he who plays dice; 2) he who loans money on interest; 3) those who race pigeons [that is, gamblers], 4) those who do business in the produce of the Seventh Year [when Jews are supposed to let the land lie fallow].

But even these exclusions are qualified:

Said R. Judah, 'Under what circumstances? When [those listed here] have only that as their profession. But if they have a profession other than that, they are valid [to serve as witnesses or judges].'

These passages purport to describe a period when there was still a central judicial authority in Judea, which might have insisted on closer control by authorized adjudicators. In later times, of course, disputants who brought their cases to a rabbinic court were even more bound by the consent of both parties regarding choice of "forum" because rabbinic courts rarely had the authority to insist that a recalcitrant party submit to their authority, particularly if he was from another place.

There was only one major exception to such choice -- the strong admonition against taking disputes to outside (that is, non-Jewish) authorities.<sup>21</sup> A large part of the reason for this restriction seems to have been the fear that outsiders would not be impartial because they would frequently be connected with local powers, who could exercise direct force -- obviating the need for consent of both parties. It was, in this sense, the exception that proved the rule.

Commenting on developments in a much later period, when rabbinic courts agreed to hear pleas from those who had received commercial notes at second hand

---

<sup>21</sup> See *Shulkhan Arukh, Hoshen Hamishpat* ("Laws of Judges"), Ch. 26 : "It is forbidden to appear for trial before heathen judges in their courts of law, even regarding a lawsuit that they [the heathen judges] adjudicate like the Israelite law." (summarizing a slightly more obscure passage in *Gittin*)

but advanced claims on their own behalf (rather than on behalf of the original assignee), Isaac Herzog's very learned work on Jewish property law notes the parallel with developments in English common law and offers this explanation: "Jewish law ... had its eyes open to the demands of commercial life, and viewing economic progress as in itself desirable from the moral standpoint, Jewish civil law kept on continually readjusting itself to the ever-increasing expansion of trade and commerce by its inherent process of elasticity ...."<sup>22</sup>

## VI. Accounting for parallels

Thomas Jefferson remarks, in one of his letters to John Adams (when they were both long retired from public life and had time to peruse old books), that to understand "the philosophy of the Hebrews ... their Mishna, their Gemara, Cabbala, Jezirah [sic], Sohar, Cosri [sic] and their Talmud must be examined and understood in order to do them full justice."<sup>23</sup> He gives no indication, however, that he had ever been tempted to do so or that he had much idea of what he would find if he did. Yet far from being generally incurious, Jefferson possessed one of the most wide-ranging intellects of the Founding generation.

The American Founders knew the Bible but knew very little about what Jewish law did with biblical precepts in post-biblical times. If one wanted to show a direct "influence" of Jewish law and institutions on American legal practice, one might look at some of the learning brought into English law in the 16th and 17th Centuries by extraordinary humanists like John Selden, who made a close study of tractate *Sanhedrin*. But I doubt one would find more than a few stray curiosities -- like Selden's assurance to Puritans that they need not worry that biblical prohibitions would apply to boys dressed in women's clothes on the stages of London theaters (citing Maimonides, among others, for this reassuring judgment).<sup>24</sup>

Some writers have indeed seen very direct links. Max Weber's scholarly rival, Werner Sombart, did not want to waste time on Protestant intermediaries, insisting that modern capitalism was essentially the product of Jews and "Jewish spirit." And he would not hear of pedantic quibbles about the genealogies of American practices: "Often enough, when I have asserted that modern capitalism is nothing more or less than an expression of the Jewish spirit, I have been told that the history of the United States proves the contrary. .... Nevertheless, I uphold my assertion that the United States (perhaps more than any other land) are filled to the brim with the Jewish spirit."

---

<sup>22</sup> Herzog, Isaac, *The Main Institutions of Jewish Law* (Soncino Press, 1965), Vol. I, p. 211-212

<sup>23</sup> Letter to John Adams, Oct 12, 1813. In Cappon, Lester, ed., *The Adams-Jefferson Letters* (Univ. of Nor. Car. Press, 1959), p. 383

<sup>24</sup> For an account of Selden's interest in Talmudic sources, Tuck, Richard, *Rights of War and Peace* (Oxford Univ Press, 1999), pp. 118-120

Sombart points not just to Lehman Brothers and Kuhn-Loeb and other Wall Street bankers but to the "simple fact" that Jewish merchants "during the 17th and 18th Centuries" allowed the North American colonies to escape British trade restrictions through "active business relations with the West Indian Islands and with Brazil," so it can be said with "some justification ... that the United States owe their very existence to the Jews." Accordingly, "what we call Americanism is nothing else, if we may say so, than the Jewish spirit distilled." And "we must not leave unmentioned," as Sombart later exclaims, in a final triumphant proof, that in the Revolutionary War, "the Jews played no small role as financiers" -- beyond Haym Salomon and "the Cohens in Georgia ... the most prominent of them all was Robert Morris, the financier par excellence of the American Revolution."<sup>25</sup>

Sombart did not speak from affection. Similar perceptions were sometimes voiced, however, by an observer who repudiated the mysteries of race theory but knew the aristocratic patterns of earlier times in Europe: "I do not know a country where the love of money holds a larger place in the heart of man and where they profess a more profound scorn for the theory of the permanent equality of goods." That is one of Tocqueville's quick characterizations of America. (I,3; 50) He makes only one connection with Jews: that you may see rich men in America concealing their wealth from envious eyes in a way that makes one "think of a Jew in the Middle Ages." (171)

We can still see interesting parallels, without insisting on causation. Even to the sense of having a special mission in the world. Lincoln spoke of Americans as an "almost chosen people."<sup>26</sup> But he was echoing a thought that was there from the beginning. "It has been often remarked," a New England clergyman asserted in a 1799 sermon, "that the people of the United States come nearer to a parallel with Ancient Israel than any other nation upon the globe. Hence 'Our American Israel' is a term frequently used; and common consent allows it apt and proper."<sup>27</sup>

A decade earlier, the opening paragraph of the opening paper in *The Federalist* reported a more secular version of this thought: "It has been frequently remarked" -- already! -- "that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice or whether they are forever destined to depend for their political constitutions on accident and force." Tocqueville again saw the pattern but with far less satisfaction: "Americans, in their relations with foreigners, appear impatient at the least censure and insatiable for praise. ... One cannot imagine a more disagreeable and talkative patriotism. It fatigues even those who honor it." (II, 16, 585)

---

<sup>25</sup> *The Jews and Modern Capitalism*, M. Epstein, trans. (Transaction, 1982), p. 38, 43-44, 59

<sup>26</sup> Speech to New Jersey Senate, Feb. 21, 1861

<sup>27</sup> Cited in Cherry, Conrad, *God's New Israel, Religious Interpretations of American Destiny* (Rev. ed, Univ of Nor. Caro. Press, 1999), Frontis.

Let me conclude with some suggestions about commonalities in background outlook between the early American republic and the restored kingdom of Judea. They may, at least, lay the ground for speculating about the way common premises generated somewhat parallel legal policies in these two regimes, at least on the topics discussed here.

In the first place, then, we might notice a common appreciation for the good things of this world, an aversion to ascetic (or heroic) renunciation. The opening chapter of the Mishnah discusses the proper time for morning and evening recitations of a prayer, which includes the assurance (excerpted from *Deuteronomy*) that if the Israelites will hearken to God's commandments, they will enjoy "the rain of your land in its season ... that thou mayest gather in thy corn and thy wine and thine oil. And ... grass in thy field for thy cattle and thou shalt eat and be satisfied." (11:14-15)<sup>28</sup> Starting with George Washington, American presidents have offered proclamations of Thanksgiving -- without considering it in the slightest way vulgar or beneath notice to emphasize gratitude for bountiful harvests and rising prosperity.

Second, both in early American writings and in the literature of the Judean re-founding, there is a great emphasis on the well-being of the whole nation and not merely on the spiritual perfection of individuals. Where loosening economic constraints promotes prosperity, both the sages of the Mishnah and the statesmen of early America sought to loosen constraints. We don't need to think they were indifferent to spiritual concerns, but they did not regard them as at odds with advancing prosperity. At the least, we can say that they did not conceive the perfection of the few as necessarily in opposition to the welfare of the many.

So, in consequence, neither the sages nor the American Founders sought to preserve the authority of a special group of families. Historically, one of the strongest motives to treat commerce with suspicion is that it may elevate the wrong people, those who merely happen to excel at acquiring wealth rather than those who -- for deeper or higher or older reasons -- deserve to have a special and protected status. If you do not need to worry about protecting the status of such a class, you can be more open to commerce and more respectful of the characteristics -- methodical application to tasks, relentless effort, detachment from local partialities -- that promote success in commerce. Putting the point most succinctly, if you don't care about protecting particular family pedigrees, you may find it easier to consider overall economic consequences in abstraction from their political ramifications.

Perhaps there is also this: If you don't rely on the prestige of particular, established elites, if you leave a lot of scope for private economic initiative, you must

---

<sup>28</sup> For further elaboration of the claim, see Lifshitz, Yosef Yitzhak, "Foundations of a Jewish Economic Theory," *Azure*, Autumn 5765/2004, which offers a compelling contrast between the biblical and rabbinic appreciation of wealth accumulation (and private ownership) with later Christian doctrines of self-denial which disparaged private ownership.

rely a great deal on respect for law. Indeed, you must invoke an authority above or behind the law which is not subject to mere human calculation. Whatever degree of innovation there is in the formulas of the Mishnah, they are never acknowledged as innovations. The proof in rabbinic expositions of the law is almost always a saying from the biblical text or at least from some venerable authority. Despite Jefferson's boast of having cleansed Virginia of feudal holdovers, no American state actually repudiated the basic structure of the English common law, none committed itself to a complete reworking of its arcane classifications and obscure terminology. Kent's *Commentaries* thus devoted many pages to a review of feudal land law, as essential to understanding American land law even in the 1820s. (Vol. III, Lect. LII, 487-508)

The Constitution of 1787 was certainly a great innovation in many ways. But even the cool, hard-headed essays of *The Federalist*, which acknowledge the inevitability of compromise and imperfection in this human document, acknowledge the possibility that the result may be Providential: "It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution." (No. 37, 198-99)