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Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels

Barak D. Richman*

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I. INTRODUCTION

In *Goldfarb v. Virginia State Bar*,¹ the Supreme Court put to rest the notion that self-described “learned professionals” were exempt from the nation’s antitrust laws. Rejecting the defendant bar association’s claim that “competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community,”² the Court warned that

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1. 421 U.S. 773 (1973).
2. *Id.* at 786.

carving out such an exemption would empower professionals “to adopt anticompetitive practices with impunity.”³

Despite *Goldfarb*'s grave warning against permitting professionals to engage in anticompetitive collusion, there remain professionals who—in violation of the Sherman Act—painstakingly construct industry rules to secure for themselves a captive market that is subject to their exploitation and control. And despite *Goldfarb*'s sweeping charge to enforce the Sherman Act widely, those professionals continue to claim to be exempted from antitrust scrutiny. But instead of invoking a so-called “learned professionals exemption” to the Sherman Act, they instead hide behind the First Amendment's Religion Clauses. Worse, these professionals employ the First Amendment as a license to suppress the very religious expression the Religion Clauses are designed to protect.

The professionals at issue are America's rabbis, who currently organize cartels that control their placement across the nation. When a synagogue needs to hire a pulpit rabbi, it is confronted with tightly controlled professional organizations with strict placement rules. Those rules require both rabbis seeking employment and congregations hoping to hire a pulpit rabbi to exclusively use designated placement offices run by the rabbinical associations. These rules—which are enforced through punishments to both rabbis and congregations that act independently—prohibit rabbis and congregations from communicating directly and seeking preferred matches through multiple media. The rules thus severely limit the supply of rabbis available to hiring congregations and prevent both rabbis and congregations from enjoying the benefits of an open labor market. They also meaningfully interfere with a congregation's ability to deliberate fully over whom to interview, pursue, and select to be its religious leader of choice. In short, these tight restraints on employment convert the rabbinic organizations into professional cartels that simultaneously restrain the operation of a potentially competitive labor market and prevent congregations from freely expressing their religious practices and beliefs.

Such economic coercion would normally be a textbook Sherman Act violation. Moreover, subjugation of a religious community from pursuing its preferred form of religious practice would be thought to encroach upon the essence of what the First Amendment is supposed to protect. Yet the First Amendment can only offer congregations direct protection from state action. This exposes one of the great limitations of the First Amendment: although the Free Exercise Clause can prohibit government intrusion on religious expression, it does nothing to protect communities from similar intrusion or regulation on the part of private parties, including co-religionists. The Sherman Act, however, does endow parties injured by

3. *Id.* at 787.

anticompetitive conduct with private causes of action and therefore can protect these communities from the religious and economic bullying by the rabbinic organizations.

Yet, in an illustration of the First Amendment's double-edges, the Religion Clauses are not only unable to protect congregations from the economic coercion of rabbinic bodies, but they have been invoked to sanitize that very subjugation. Because the Religion Clauses protect religious groups against certain enforcement actions by the state, any private legal action against these rabbinic organizations—even if such an action was intended to promote religious expression—also must conform to the First Amendment. Therefore, if the Sherman Act were to protect community synagogues and compensate for the shortcomings of the Religion Clauses, it must also jump through the hoops set by those same clauses.

This essay explores this interesting—and important—intersection between the Sherman Act and the First Amendment's religious protections. It focuses on the labor market for pulpit rabbis, in which national rabbinic associations impose rules upon both their members and hiring congregations that deny basic economic freedoms. These freedoms are normally protected by the Sherman Act and, I argue, should be so protected, not only to secure for congregations the benefits of market choice, fair competition, and protection against economic exploitation, but also to secure their religious liberties. After detailing the rabbinic labor market and placement policies, the essay offers a constitutional analysis of alleged First Amendment protections, and a normative analysis of how proper application of the Sherman Act would liberate both the American rabbinate and American Judaism. The central argument is quite simple: both the Sherman Act and the Religion Clauses are intended to protect the populous from entrenched power, one against economic concentration and the other against the concentration of religious authority. When entrenched economic power is religious in nature, the Sherman Act and First Amendment should act in concert, rather than at odds with one another.

II. THE RABBI CARTELS

Most synagogues in the United States belong to one of four movements: Orthodox, Conservative, Reform, and Reconstructionist. The three non-Orthodox movements—the focus of this essay—vary significantly in their theologies and the practices they encourage their member synagogues to adopt, but they are distinct from Orthodox communities (which themselves vary widely) in their adoption of egalitarian gender roles and alteration of

religious law and practices to conform to post-Enlightenment values.⁴ Each of these non-Orthodox movements rests on three institutional foundations: educational seminaries that espouse their distinctive theologies and train rabbis, rabbinical associations that serve as governing and representative bodies for the movement's rabbis, and congregational associations that establish standards for member synagogues.⁵

Each movement's rabbinical association is a professional association, established as a non-profit corporation, that sets the standards for Jewish law and practice for its respective movement, serves the professional and personal needs of its member rabbis, and fosters institutional linkages between the movement's rabbinate and other central organizations. The Rabbinical Assembly (RA) consists of the Conservative movement's 1600 member rabbis worldwide who either have been ordained at the seminaries affiliated with the Conservative movement or rabbis ordained elsewhere who have accepted the tenets of Conservative Judaism.⁶ Similarly, the Central Conference of American Rabbis (CCAR), the professional association of Reform rabbis, and the Reconstructionist Rabbinical Association (RRA) for Reconstructionist rabbis, consist of rabbis ordained at their own seminaries, as well as rabbis ordained elsewhere but who adhere to the movement's central tenets.⁷ Membership in these rabbinical associations is voluntary, but it is essential to rabbis who wish to be employed in synagogues affiliated with their individual movements because among the associations' primary responsibilities is their administration of the placement authorities for their respective movements. These placement commissions, organized under the close supervision of the rabbinical associations' leadership, are laden with restrictive rules designed to promote and protect the employment of their members. Each of the three non-Orthodox rabbinical associations organize placement under similar (and, as will be shown, similarly illegal) rules and are thus subject to the same legal analysis. For the purposes of illustration, the Conservative movement's Rabbinical Assembly will be described in detail and will serve as the object of legal analysis.

The RA considers its administration of the Joint Placement Commission as one of its most central responsibilities.⁸ Charged with the responsibility

4. See BERNARD LAZERWITZ ET AL., JEWISH CHOICES: AMERICAN JEWISH DENOMINATIONALISM 133–38 (1998) (discussing the origins of and distinctions between the denominations).

5. See *id.*

6. *About Us*, THE RABBINICAL ASSEMBLY, <http://www.rabbinicalassembly.org/about-us> (last visited Apr. 7, 2012) (describing the Rabbinical Assembly as “the international association of Conservative rabbis”).

7. See CENT. CONF. OF AM. RABBIS, <http://ccarnet.org/> (last visited Apr. 7, 2012); RECONSTRUCTIONIST RABBINICAL ASS'N, <http://www.therra.org/> (last visited Apr. 7, 2012).

8. *Mission Statement*, THE RABBINICAL ASSEMBLY, <http://www.rabbinicalassembly.org/about-us/mission-statement> (last visited Apr. 7, 2012).

of connecting RA members seeking employment with congregations searching to hire a pulpit rabbi, the Joint Placement Commission organizes the job market for rabbis seeking employment at Conservative congregations and is the only recognized body with the authority to place rabbis in the Conservative movement. Only RA members are entitled to utilize the commission's placement process, and RA members are required to seek employment as congregational rabbis exclusively through the RA's commission.

The Placement Commission makes available its database of RA rabbinic candidates only to "congregation[s] in good standing of the Conservative movement"⁹ A congregation choosing to enlist in the RA's placement process, however, is subject to explicit conditions. The RA's placement manual for congregations, *Aliyah*, highlights these restrictions in bullet form:

- A congregation may search for a rabbi only through the offices of the Placement Commission. Eligible candidates are those whose resumes are forwarded by the Placement Commission.
- A congregation served by the Commission shall not advertise in the media for a rabbi. If a congregation advertises, it will be removed from the Placement List.
- If a congregation interviews a non-Rabbinical Assembly rabbi without the specific written approval of the Commission, the congregation will be removed from the Placement List.
- If a congregation engages a non-Rabbinical Assembly rabbi without the specific written approval of the Commission, the congregation will lose placement privileges for at least a year the next time it seeks a rabbi. Other consequences may apply. Similar rules apply to rabbinic candidates as well.¹⁰

Consequently, Conservative congregations seeking to find a Conservative rabbi are confronted with what amounts to a Hobson's choice: either the

9. RABBI ELLIOT SALO SCHOENBERG, *ALIYAH: THE RABBINIC SEARCH AS AN UPLIFTING RELIGIOUS EXPERIENCE* 50 (2008), available at <http://www.rabbinicalassembly.org/placement/sitedocs/Aliyah-abridged.pdf>.

10. *Id.* at 3–4.

congregation seeks rabbinic candidates exclusively through the RA or it is foreclosed from RA candidates altogether.

The RA's rules pose an even more meaningful threat to its own members (hinted at in the lattermost bullet, referencing "similar rules" to rabbinic candidates). RA members who seek employment through alternative mechanisms—whether in addition to or instead of the RA Placement Commission—will be punished by the Assembly, including being excluded from using the RA placement processes for an extended period. This applies even for happenstance matches, in which a Conservative congregation was introduced to a particular rabbi outside the RA placement process and developed a strong desire to employ him/her, and that same rabbi has a strong desire to be hired by that congregation. Both that congregation and the rabbi seeking employment must nonetheless go through the RA Placement Commission and are prohibited from directly discussing possible employment without receiving formal permission from the Placement Commission, which in many instances refuses to grant permission. Consequently, the Placement Commission positions itself as an unavoidable intermediary in all rabbinical hiring in the Conservative movement.

The RA Placement Commission exploits its position as an intermediary to both monitor and restrict individual placements. Most meaningfully, the RA filters the selection of candidates congregations may interview, restricting whom a congregation may interview (and hire) and to which congregation a rabbinical candidate may apply. Congregations that contact and interview candidates who are not presented by the RA, even if such candidates are RA members and seeking employment through the Placement Commission, are subject to penalties.

The RA filters candidates for individual placement according to a stated set of rules that give priority to seniority and other RA priorities. For example: (a) congregations with rabbis with the titles of "assistant rabbi" or "associate rabbi" are prohibited from promoting those rabbis to a senior position without permission from the Placement Commission; (b) congregations who have hired an "interim rabbi" to temporarily assume pulpit duties may not consider him/her for the permanent rabbinic position, even if both the congregation and the interim rabbi desire to continue the pulpit relationship; (c) rabbinic candidates need to have a minimum number of years of experience before being permitted to apply to mid-size and large congregations, and conversely, mid-size and large congregations are only permitted to interview candidates with a requisite number of years of experience; new members of the RA are considered to have no more than two years of seniority, regardless of their actual professional experience, thus limiting their application possibilities.

Accordingly, irrespective of the desires of different congregations with different needs, and irrespective of the individual preferences of particular rabbis, RA placement rules restrict the mutual preferences of hiring congregations and rabbis seeking employment. The RA Placement Commission substitutes its own values, preferences, and judgment for those of the congregation's leadership and individual rabbis seeking to build their own careers.

III. RELIGIOUS PROTECTIONS AND THE SHERMAN ACT

There is little dispute that the RA's placement rules amount to an illegal group boycott. The Sherman Act unequivocally prohibits competitors from colluding to control a market, restrict consumer choice, and exclude competitors. A recent collection of antitrust scholars recently petitioned the Supreme Court to recognize that these "restraints by clergy inflict precisely the harmful economic consequences that Congress intended to prevent when it enacted the Sherman Act."¹¹ A rudimentary antitrust analysis concludes that the Rabbinical Assembly's hiring restraints are in violation of the Sherman Act.

The observation that the RA's placement policies are illegal was not long ago opined in a guest column in *The Jewish Daily Forward*.¹² In response, the RA issued a statement claiming that their policies are "consistent with the First Amendment protections afforded to religious institutions and therefore not likely to be assailable under anti-trust arguments."¹³ The First Amendment, however, offers far less protection than the RA's statement suggests. Perhaps the RA's motivation behind issuing its statement—in addition to providing comfort to its members that its policies and centralized authority will remain undisturbed—was chiefly to drape a religious cloak over the RA's highly economic functions, so as to characterize an economic boycott as a mobilization of expressive conduct.¹⁴

11. Amicus Brief of Antitrust Professors and Scholars in Support of Respondents at 11, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) [hereinafter Amicus Brief of Antitrust Professors].

12. Barak D. Richman, *Rabbi Searches Are Tough, but Are They Illegal?*, JEWISH DAILY FORWARD (Sept. 29, 2010), <http://www.forward.com/articles/131723/> ("The inescapable conclusion is that the RA's practices are illegal, and have been for a long time.").

13. Gilah Dror & Julie Schonfeld, *Statement About the Placement System*, RA NEWS ALERT (Rabbinical Assembly, New York, N.Y.), Oct. 2010 (on file with author).

14. Cf. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (declaring group boycotts to be *per se* illegal if they are motivated by economic purposes and achieve economic effects); *Costello Publ'g Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981) (subjecting the economic

A proper constitutional analysis, however, is largely a power analysis that first evaluates whether the Constitution affords Congress the power to enact legislation that constrains a religious organization's conduct and whether courts have the power to enforce such legislation against those organizations. The first question regarding legislative power references protections afforded by the Free Exercise Clause and, relatedly, the Religious Freedom Restoration Act. The second question regarding a court's authority to enforce such legislation references protections afforded by the Establishment Clause. This section evaluates the ironic question of whether the First Amendment immunizes the Rabbinical Assembly from Sherman Act scrutiny, thereby empowering it to restrict the religious expression of the nation's Conservative congregations.

A. *The Free Exercise Clause, Smith, and the Sherman Act's Neutrality*

Although the language of the First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" is notoriously terse, the Supreme Court has long held that its guarantees of religious freedoms are not absolute.¹⁵ The First Amendment has been interpreted to ensure near-absolute protection of religious belief, but its protections of religious conduct are "qualified."¹⁶ Thus, religiously motivated conduct "remains subject to regulation for the protection of society" since "[t]he freedom to act must have appropriate definition to preserve the enforcement of that protection."¹⁷

The First Amendment does not, for example, restrict Congress from passing and enforcing neutral laws of general applicability even if those laws burden or even prohibit particular religious practices.¹⁸ The seminal 1990 Supreme Court case *Employment Division v. Smith* held that "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the

conduct of religious institutions to Sherman Act scrutiny, recognizing that religious expression is frequent a part of any such institution's conduct).

15. U.S. CONST. amend. I; see *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) ("Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."); *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

16. *Emp't Div. v. Smith*, 485 U.S. 660, 670–71 n.13 (1988).

17. *Cantwell*, 310 U.S. at 304; cf. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc.*, 646 F.3d 983, 986 (7th Cir. 2011) ("The possibility that a law of general application might indirectly and unintentionally impede an organization's efforts to communicate its message effectively can't be enough to condemn the law.").

18. *Emp't Div. v. Smith*, 494 U.S. 872 (1990), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).

First Amendment has not been offended.”¹⁹ Therefore, a law is enforceable under the Constitution even if it significantly burdens a religious practice so long as (1) it is a neutral law of general applicability and (2) it is not specifically directed at a particular religious behavior or motivated by a desire to interfere with religion.²⁰ Neutral laws that burden religion, without any explicit or pretextual intent to target particular religious conduct, do not violate the Constitution.²¹

The Sherman Act is plainly a neutral and generally applicable law that prohibits conduct that Congress is empowered to regulate.²² Moreover, the Sherman Act is both neutral and generally applicable insofar as it applies to all industries and groups.²³ The Sherman Act would therefore pass the first prong of the test from *Smith*.

Additionally, the Sherman Act was not passed with any Congressional intent to target religious groups or religious practice. Although scholars debate Congress’s precise motivations underlying the Sherman Act, none have contended that Congress enacted it with a specific goal to burden religion.²⁴ If anything, Congress’s focus was on ending the anticompetitive behavior of secular entities, such as the trusts that dominated the industrial economy at the time.²⁵

19. *Id.* at 878.

20. *Id.* at 878–79; see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

21. *Smith*, 494 U.S. at 880.

22. *Id.* at 879 (defining a neutral law of general applicability as a “valid law prohibiting conduct that the State is free to regulate”); see also *Gonzales v. Raich*, 545 U.S. 1, 16 (2005) (“Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress ‘ushered in a new era of federal regulation under the commerce power,’ beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890 . . .”).

23. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 689 (1978) (refusing to find an exemption from the Sherman Act for a particular industry on the grounds that given the broad sweep of the Sherman Act, such arguments are “foreclose[d]” to the courts and more “properly addressed to Congress”).

24. For a sampling of attempts to discern the legislative intent behind the Sherman Act, see HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955) (arguing that Congress’s intent was not only to fight trusts, but that they were motivated by an egalitarian political rationale aimed at empowering consumers, maximizing consumer surplus, and equalizing political participation); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (arguing that Congress was chiefly concerned with achieving economic efficiency and advancing consumer welfare); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221 (1956) (arguing for an interpretation that suggests a populist legislative intent from Congress directed at an overall goal of fighting the trusts, with flexibility and political compromise as the means for doing so).

25. See generally THORELLI, *supra* note 24.

Accordingly, even if the Sherman Act burdens religious conduct by the Rabbinical Assembly or any other religious group, its application is still constitutional. The Free Exercise Clause does not prevent the application of the Sherman Act to the rules and practices regarding rabbi searches of the Rabbinical Assembly.²⁶

B. RFRA and Pre-Smith Protections

Congress responded to the *Smith* ruling by enacting the Religious Freedom Restoration Act of 1993 (RFRA), which states: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability”²⁷ Recognizing that the Supreme Court’s ruling in *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,”²⁸ Congress attempted to overturn the test from *Smith* and instead re-institute the standard in *Sherbert v. Verner*²⁹ and *Wisconsin v. Yoder*,³⁰ which subjected laws to greater scrutiny. However, RFRA does not curtail application of the Sherman Act to the Rabbinical Assembly since the Placement Commission’s restraints are not protected even under the pre-*Smith* understanding of the Free Exercise Clause. Moreover, subsequent Supreme Court cases limited RFRA to federal law, so the RA would remain subject to—and be in violation of—state competition laws.³¹

1. Pre-*Smith*, Commercial Conduct, and Indirect Burdens

RFRA applies to federal laws, even laws of general applicability, and it therefore prohibits the Sherman Act from “substantially burden[ing] a person’s exercise of religion” unless its “application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³² Congress passed RFRA explicitly “to restore the compelling

26. It should be noted, however, that the protections of the Free Exercise Clause have been extended to organizations and institutions (such as the Rabbinical Assembly) in addition to individuals. See *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

27. Pub. L. No. 103-141, § 3(a), 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 (2006)).

28. *Id.* § 2(a)(4).

29. 374 U.S. 398 (1963).

30. 406 U.S. 205 (1972).

31. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

32. 42 U.S.C. § 2000bb-1(b) (2006).

interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,³³ and the Supreme Court, in its only post-*Smith* application of RFRA—other than clarifying that the central inquiry in RFRA is whether a particular law substantially burdens “a person’s” exercise of religion and whether the government can satisfy the compelling interest test through application of the law “to the person”—relied chiefly on its pre-*Smith* decisions to guide its application of RFRA.³⁴

Even under this standard, however, the Supreme Court found in the vast majority of Free Exercise cases that neutral and generally applicable laws—like the Sherman Act—either did not substantially burden religion or that any burden was justified by a compelling government interest. Commentators have observed that after the Court’s upholding of a Free Exercise challenge to a generally applicable statute in *Yoder*, the Supreme Court “rejected every claim for a free exercise exemption to come before it” for eighteen years.³⁵ These denials of Free Exercise claims include challenges to the requirement of social security numbers, military standards, and the administration of government programs.³⁶

In denying these Free Exercise challenges, the pre-*Smith* Supreme Court both scrutinized with a good deal of rigor how substantially a particular law burdened religious practice, as well as showed significant deference to a state’s claims of a compelling government interest. In *Braunfeld v. Brown*³⁷—a case that applied the pre-*Smith* test to facts that relate thematically to the Rabbinic Assembly’s restraint—the Supreme Court rejected a Free Exercise challenge by observant Jews to Sunday closing laws. The group argued that because Jewish law required them to close their

33. *Id.* § 2000bb(b)(1) (internal citations omitted).

34. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

35. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990).

36. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (permitting the U.S. Forest Service to harvest timber even if doing so would “virtually destroy” a group’s ability to practice its religion); *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting a proposed Free Exercise exemption from individuals having to provide social security numbers); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that an Orthodox Jewish doctor in the Air Force did not have a valid Free Exercise exemption from the Air Force’s dress code because of his religious belief in wearing a yarmulke); *see also Emp’t Div. v. Smith*, 494 U.S. 872, 883 (1990) (“We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in context other than that, we have always found the test satisfied . . .”), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Sossamon v. Texas*, 131 S. Ct. 1651 (2011).

37. 366 U.S. 599 (1961).

businesses on Saturdays, the additional obligation to also close on Sunday would create too great a burden.³⁸ The Court, in an opinion by Chief Justice Warren, wrote that to “strike down . . . legislation which imposes only an indirect burden on the exercise of religion,” particularly in light of the fact that the statute did not prohibit or force any particular religious *belief*, “would radically restrict the operating latitude of the legislature.”³⁹ The Court additionally concluded that the government’s interest in having a uniform day of rest without assorted exceptions was sufficiently compelling to permit the state to establish closing laws that disfavored certain religious minorities.⁴⁰

The pre-*Smith* Court expressed a similarly strong hesitation to permit Free Exercise challenges to give religious organizations exemptions from tax laws and commercial regulations.⁴¹ In *United States v. Lee*, for example, the Court rejected a claim from an Amish business owner that the Free Exercise Clause exempted him from paying Social Security taxes, ruling that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”⁴² Without questioning the central importance of governments maintaining “fiscal vitality,”⁴³ the Court additionally emphasized the compelling interest to the federal government in creating a “comprehensive national program” that had to be “uniformly applicable to all.”⁴⁴ The Court exhibited a similar hesitation in exempting religious organizations from commercial laws even when those laws impacted specific religious conduct, such as when sale and use taxes are applied to sales of religious literature, although it upheld Free Expression challenges to taxes that specifically targeted religious conduct or similar First Amendment expression.⁴⁵ The Court recently characterized these cases to mean that general laws are upheld when carving out exceptions would compromise the underlying purpose of the laws.⁴⁶

38. *Id.* at 601; *see also* *McGowan v. Maryland*, 366 U.S. 520 (1961) (rejecting a similar Establishment Clause challenge to Sunday closing laws).

39. *Braunfeld*, 366 U.S. at 603, 606.

40. *Id.* at 608–09.

41. *United States v. Lee*, 455 U.S. 252 (1982).

42. *Id.* at 261.

43. *Id.* at 258.

44. *Id.* at 261–62.

45. The Court distinguished the imposition of general taxes that burdened religiously motivated conduct from specific taxes that targeted a First Amendment activity, such as solicitation. *Compare* *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990), *with* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), *and* *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

46. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006).

Under this case law, the Rabbinic Assembly's claim that RFRA exempts it from the Sherman Act is unlikely to prevail. First, and most significant, the Sherman Act imposes little, if any, burden on "a person's" exercise of religion. The Sherman Act burdens no member of the Rabbinical Assembly from their commitment to observe Jewish laws or serve in their capacity as a congregational rabbi. Even the religious elements of the Rabbinical Assembly's mission itself (if the organization is identified as a "person" under the statute) is not compromised by the Sherman Act, which does nothing to prevent the professional organization from fulfilling its mission to establish religious standards and support its clergy members. These purported burdens on religious exercise pale in comparison to the burdens placed on the UDV Church by the Controlled Substances Act, which outlawed the sacramental tea church members use to give communion,⁴⁷ or to the Seventh Day Adventist, who was denied unemployment benefits even though her religious conviction was the cause of her unemployment.⁴⁸

Second, the Sherman Act is intended to be a sweeping statute, without exceptions, to advance Congress's policy of competition.⁴⁹ The Court has rejected claims that certain professions are exempt from the Sherman Act's policy of promoting competition, so tailoring an exemption for RA members compromises that congressional policy. The Court has consistently remarked that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act," which "shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."⁵⁰ Rabbinical candidates entering a competitive labor market should be subject to the rules of competition that govern other labor markets since, like the Amish business owner, the rabbis "enter into commercial activity as a matter of choice."⁵¹ Although one's personal religious practices are not commercial activity, an effort to control the hiring of rabbis to pulpit positions nationwide certainly is.

47. *Id.* at 425.

48. *Sherbert v. Verner*, 374 U.S. 398 (1963).

49. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) ("And our cases have repeatedly established that there is a heavy presumption against implicit exemptions . . ." (citing *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962)); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.")).

50. *Goldfarb*, 421 U.S. at 787-88 (quoting *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 553 (1944)).

51. *United States v. Lee*, 455 U.S. 252, 261 (1982).

In sum, under the standards set out by both the pre-*Smith* Court's interpretation of the Free Exercise Clause and the modern Court's interpretation of RFRA, enforcing the Sherman Act against the Rabbinical Assembly does not "substantially burden a person's exercise of religion," and RFRA therefore does not curtail the Sherman Act's scrutiny of the Rabbinic Assembly's placement practices.

2. RFRA's Gaping Hole

In *City of Boerne v. Flores*, the Supreme Court ruled that RFRA was unconstitutional as applied to laws made by state and local governments.⁵² The Court held that while Section V of the Fourteenth Amendment empowers Congress to "enforce" the Fourteenth Amendment, that enforcement power is limited to enacting legislation that "is only preventive or remedial" of constitutional violations.⁵³ The Court ruled that Congress exceeded its Section V authority in passing RFRA because the statute lacked "proportionality or congruence between the means adopted and the legitimate end to be achieved."⁵⁴

RFRA therefore does not curtail state law, including the individual competition laws that each state has enacted.⁵⁵ Many of these state competition laws "use statutory language that tracks the federal statutes closely [and] by either statute or state supreme court declaration, they hold that on substantive issues federal case law should be regarded as precedential."⁵⁶ Although Congress, through RFRA, might have curtailed application of federal antitrust laws, it has no authority to limit state antitrust laws, which by and large are substantively equivalent.⁵⁷

In the wake of the *City of Boerne* ruling, sixteen states also enacted so-called "mini-RFRA" laws to reinstate pre-*Smith* protections of religious conduct against their own laws.⁵⁸ Therefore, just as RFRA could be read as

52. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

53. *Id.* at 508 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (internal quotations omitted)).

54. *Id.* at 530.

55. 16 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2401 (2d ed. 2006).

56. *Id.* ¶ 2410; *see also id.* ¶ 2401 ("Nearly all states have legislation that emulates the Sherman Act, while a somewhat smaller number also have statutes emulating provisions of the Clayton Act.").

57. For example, New York—the state in which the RA is located—has a tradition of interpreting its state antitrust act, the Donnelly Act, in conjunction with the Sherman Act. *See Anheuser-Busch, Inc. v. Abrams*, 520 N.E.2d 535, 538–39 (N.Y. 1988) ("[T]he Donnelly Act—often called a 'Little Sherman Act'—should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result.").

58. *See* ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2009); CONN. GEN. STAT. ANN. § 52-571B (West 2009); FLA. STAT. ANN. §§ 761.01–.05 (West 2010); IDAHO CODE ANN. §§ 73-401 to -

a limitation of the Sherman Act, mini-RFRAs might similarly limit some corresponding state antitrust statutes. In these sixteen “mini-RFRA states,” application of the antitrust laws is subject to pre-*Smith* protections. In the thirty-four states without mini-RFRA statutes, however, there is no such limitation. Therefore, even if RFRA and mini-RFRAs are broadly interpreted to limit applying competition laws to the conduct of religious organizations, they still do not limit the application of state antitrust laws in these thirty-four states.

C. The Establishment Clause, Entanglement, and Intra-Denominational Disputes

Courts are appropriately leery of entering into ecclesiastical disputes. When confronted with a legal dispute that requires the dissection and interpretation of religious or doctrinal authority, any court intervention or ruling amounts to an endorsement of a particular religious position and thus runs afoul of the Establishment Clause (it might also transgress the Free Exercise Clause, since the ruling infringes on the losing party’s expression). Therefore, “[t]he general rule is that courts are prohibited by the First Amendment from getting involved in intra-church disputes when doing so would require them to become entangled in religious affairs.”⁵⁹

The First Amendment does not, however, prohibit courts from intervening in intra-denominational disputes altogether. To the contrary, the Supreme Court affirmed courts’ roles in resolving such disputes. When adjudicating a property dispute between competing factions in a local Presbyterian congregation, the Court noted, “[t]here can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.”⁶⁰

404 (West 2009); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); MO. ANN. STAT. §§ 1.302–.307 (West 2010); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2006); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2010); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West 2009); R.I. GEN. LAWS ANN. §§ 42-80.1-1 to -4 (West 2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (West 2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (West 2009); UTAH CODE ANN. §§ 631-5-101 to -403 (West 2008); VA. CODE ANN. §§ 57-1 to -2.02 (West 2009).

59. 2 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 10:44 (2011).

60. *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

The First Amendment, however, “severely circumscribes” how civil courts can intervene.⁶¹ A series of Supreme Court rulings have interpreted the First Amendment to require courts to adjudicate such disputes relying only on “neutral principles of law” to guide its judicial intervention.⁶² For example, in *Gonzalez v. Roman Catholic Archbishop*, which involved a dispute over the rightful occupier of a chaplaincy established by will, the Supreme Court prohibited a civil court from determining whether a disputant satisfied “qualifications required by the canon law” to serve as a chaplain for the Roman Catholic Church.⁶³ However, “the civil courts could adjudicate the rights under the will without interpreting or weighing church doctrine, but simply by engaging in the narrowest kind of review of a specific church decision—i.e., whether that decision resulted from fraud, collusion, or arbitrariness.”⁶⁴ Similarly, the Court in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* invalidated a state court ruling that conditioned a granting of property on a church’s adherence to a traditional faith and doctrine and required any court intervention to avoid ecclesiastical determinations.⁶⁵ The Court stated the rule clearly:

[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without “establishing” churches to which property is awarded.⁶⁶

This “neutral principles” approach extends to situations in which rival intra-denominational factions dispute over the appointment of clergy. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, for example, the Supreme Court refused to prevent the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church—which the Court described as the “Mother Church”—from defrocking a local bishop even when he and local parishioners argued the Mother Church acted arbitrarily and not in

61. *Id.*

62. *Id.*; *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

63. *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (“Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.”).

64. *Presbyterian Church*, 393 U.S. at 451 (discussing *Gonzalez*).

65. *Id.* at 447.

66. *Id.* at 449.

accordance with Church doctrine.⁶⁷ Recognizing that the Serbian Orthodox Church was “a hierarchical church [whereby] the sole power to appoint and remove its Bishops rests in the Holy Assembly and Holy Synod,” the Court ruled that “the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity.”⁶⁸ To intervene in hiring disputes within a hierarchical polity, the Court concluded, necessarily requires doctrinal evaluation or review of ecclesiastical authority.⁶⁹ The Court gave similar deference to hierarchical church authority during Cold War challenges to the Russian Orthodox Church, when American parishes wanted to assume possession of Russian Orthodox property and to appoint their own Archbishop.⁷⁰ Recognizing that “[t]here are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property,” the Court concluded that civil courts cannot trump church rule “when [a] property right follows as an incident from decisions of the church custom or law on ecclesiastical issues.”⁷¹

Importantly, the neutral principles approach does permit intervention in some intra-denominational disputes, which is possible when hierarchical ecclesiastic relationships do not characterize the relationships among the parties. The Supreme Court, beginning with the seminal case of *Watson v. Jones*⁷² in 1872, has consistently contrasted *hierarchical* orders, such as the Russian Orthodox Church in *Kedroff* and the Serbian Orthodox Church in *Milivojevich*, with *congregational* systems. In hierarchical orders, as the term suggests, the congregation is “a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general

67. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *see also Gonzalez*, 280 U.S. 1.

68. *Milivojevich*, 426 U.S. at 696, 709.

69. *Id.* at 708–09 (“To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.” (quoting *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring))).

70. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

71. *Id.* at 120–21.

72. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

organization.”⁷³ In contrast, the Supreme Court has recognized that authority in congregational orders lies in their self-governance.⁷⁴ Churches (or synagogues) in congregational orders might be affiliated with a religious denomination or movement, but they are constituted as independent entities and develop and adhere to their own rules of governance and organization. For congregational orders, the Establishment Clause prohibits interference with congregational decisions, not hierarchical decisions.⁷⁵

Thus, when an intra-denominational dispute occurs between Jewish factions within a synagogue—a congregational polity—then neutral principles permit civil courts to enforce the congregation’s by-laws and secure its self-governance. In *Park Slope Jewish Center v. Congregation B’nai Jacob*, for example, a synagogue’s majority exercised its authority to engineer significant changes in religious practices, forcing members who resisted the change to form their own congregation.⁷⁶ When the synagogue’s rival factions continued to dispute the synagogue’s membership criteria, the New York Court of Appeals intervened to enforce a stipulation “that arose out of a religious disagreement but was resolved in secular terms.”⁷⁷ Thus, neutral principles of law enabled—and compelled—New York’s civil courts to resolve lingering disputes over “the ownership of the premises, the area of the synagogue that each congregation could use, the payment for use, and the percentage that each congregation would receive upon sale or demolition.”⁷⁸ Citing *First Presbyterian Church* and invoking *Avitzur v. Avitzur*, a decision it issued a decade earlier that enforced a facially neutral provision in a religious wedding contract (or *Ketubah*), the New York Court of Appeals concluded that court intervention is permitted so long as “no

73. *Id.* at 722–23; *see also Kedroff*, 344 U.S. at 110 (“Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head.”).

74. *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 140 (1872) (holding that the appointed trustees of the property of a congregational church “cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules”).

75. Lower federal and state courts have also recognized this distinction. *See, e.g., Cent. Coast Baptist Ass’n v. First Baptist Church*, 65 Cal. Rptr. 3d 100, 119 (Ct. App. 2007) (“If the principle of government in a church is that the majority of the congregation is the decision-making body, courts must defer to the decisions of that body. A court may act to ensure that the governing body adheres to the acknowledged rules by which it conducts its affairs . . . so long as this undertaking does not require the court to inquire into religious doctrine.”). The line of California Supreme Court cases from which this reasoning is drawn originated with the U.S. Supreme Court’s ruling in *Watson*, 80 U.S. (13 Wall.) at 723.

76. *Park Slope Jewish Ctr. v. Congregation B’nai Jacob*, 686 N.E.2d 1330, 1330–31 (N.Y. 1997); *see also Sillah v. Tanvir*, 794 N.Y.S.2d 348 (App. Div. 2005) (enforcing a petition to install properly elected trustees of Islamic Falah of America, a religious institution, under the state’s religious corporations law).

77. *Park Slope Jewish Ctr.*, 686 N.E.2d at 1332.

78. *Id.*

doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result.”⁷⁹

Accordingly, even though a private action against the Rabbinical Assembly under the Sherman Act would amount to an intra-denominational dispute, neutral principles of law can readily adjudicate such a claim. Whether a plaintiff is a rabbi, to whom the labor market is foreclosed, or a congregation, which is denied the benefits of an open labor market, the claim would not involve any ecclesiastical determinations, and resolution of the dispute does not involve an entanglement with religious questions. The organizational relationships between the relevant parties illustrate the neutral principles involved.

First, like the synagogue at issue in *Park Slope*, American synagogues are independent nonprofit corporations, incorporated under state law and governed by a board of directors. Many synagogues are affiliated with the national organizations that lead the different movements, but affiliation is a voluntary decision by the congregations and, like other congregational polities, the authority to make those affiliation (and other ritualistic) decisions lies in congregational self-governance. Specifically, a synagogue affiliated with the Conservative movement might be a dues-paying member of United Synagogue of Conservative Judaism (USCJ), an umbrella association of Conservative congregations, and thus voluntarily abides by USCJ’s Standards for Congregational Practice (which, importantly, recommends but does not require adherence to the RA placement policies).⁸⁰ But being a member of USCJ does not place the congregation under USCJ’s authority. A Conservative-affiliated synagogue might also, but does not have to, hire a rabbi who is a member of the Rabbinical Assembly, but that rabbi is an employee of the congregation. Although the rabbi might be obligated to adhere to the Rabbinical Assembly’s code of conduct, the congregation is not subject to the RA’s authority whatsoever. The economic and organizational relationships between a Conservative congregation and

79. *Avitzur v. Avitzur*, 446 N.E.2d 136, 139 (N.Y. 1983). Compare *id.*, with *Congregation Yetev Lev D’Satmar v. Kahana*, 879 N.E.2d 1282, 1286 (N.Y. 2007), in which a New York civil court refused to intervene in an internal dispute in a Jewish congregation over the succession of the Grand Satmar Rabbi because part of the dispute depended upon whether a former president was a member of the synagogue, and “membership issues such as those that are at the core of this case are an ecclesiastical matter.” See also *Kahana*, 879 N.E.2d at 1286 (Smith, J., dissenting) (concluding that neutral principles can determine whether members were elected properly).

80. *Standards for Congregational Practice*, THE UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM, http://uscj2004.aptnet.com/Standards_for_Congre5973.html (last visited Apr. 7, 2012).

the national Conservative organizations are products of voluntary assent, not religious hierarchical authority.⁸¹

And second, the relationships between individual congregations and national organizations, such as the Rabbinical Assembly and United Synagogue, are governed by contracts that contain neutral terms. When enlisting the Rabbinical Assembly to select a rabbi, for example, its leaders agree to a list of concrete procedures (described in Part II) that resemble those in a contract binding a homeowner to a real estate agent. A court can readily interpret and enforce this contract without passing upon a doctrinal issue, implementing a religious duty, or interfering with religious authority.⁸² Importantly, a court can similarly use neutral principles to determine whether that restrictive contract complies with the Sherman Act.

In sum, adjudicating a Sherman Act claim against the Rabbinical Assembly does not intervene within a hierarchical polity, does not involve an unconstitutional entanglement of religion, and does not require interpretation of any ecclesiastical doctrines. The synagogue is an independent congregation that voluntarily engages in contractual relations with national organizations. Those contracts can readily be interpreted—and any dispute between the congregation and the national bodies can readily be adjudicated—under neutral principles of law.

D. The Ministerial Exception

On January 11, 2012, the United States Supreme Court unanimously declared in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* that a “ministerial exception” exempted religious organizations from employment discrimination suits from ministerial employees.⁸³ The Court reasoned that a constitutionally guaranteed freedom of a religious organization to select its ministers “is implicated by a suit alleging discrimination in employment.”⁸⁴ Such an exception was grounded in both Religion Clauses of the First Amendment:

By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the

81. The decentralization of authority is arguably central to the American Jewish experience, and perhaps even central to the Jewish Diaspora experience that has characterized Judaism for two millennia. The imposition of external authority upon, or the denial of community autonomy over, independent congregations is largely antithetical to Jewish history, theology, and governance.

82. See *Avitzur*, 446 N.E.2d at 138–39.

83. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

84. *Id.* at 705.

faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.⁸⁵

The depth of the Court's ruling, in both rhetoric and votes, introduces the possibility that the ministerial exception might bar a Sherman Act suit against the Rabbinic Assembly. Indeed, the question presented to the Court characterized the ministerial exception as a bar against "employment-related lawsuits brought against religious organizations by employees performing religious functions."⁸⁶ Such a characterization left open the possibility that the exception would bar suits against professional associations of clergy, such as the Rabbinical Assembly (which may be properly characterized as a "religious organization"⁸⁷), and that "employment-related lawsuits" could include Sherman Act challenges to cartel-like restraints imposed by the Rabbinical Assembly and other professional associations of clergy that control an employment market through anticompetitive restraints.⁸⁸ In other words, if the ministerial exception applied to all matters of "employment," it might exempt broad categories of legal actions beyond those related to employer-employee relations.

The Court limited its holding to construct a narrow ministerial exception, ruling only that the ministerial exception applied to certain suits by employees against religious employers.⁸⁹ The petitioners conceded, in fact, that the exception does not apply to suits by third parties, does not restrict tort claims, and does not restrict laws involved in the "general regulation of the labor pool."⁹⁰ Petitioners themselves indicated that the ministerial exception only bars claims "that challenge a church's right to hire, fire, evaluate, or make rules for its own ministers." Nothing in either the Court's ruling or the parties' arguments suggest that the exception would bar suits by independent congregations against religious organizations with which they contract, or by independent clergy who suffer economic harms from religious organizations. To be sure, the Court indicates no intention to immunize clergy from the consequences of asserting its economic power to injure the economic freedoms of rivals or consumers. Mistakenly infringing

85. *Id.* at 706.

86. Brief for the Petitioner at i, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

87. Amicus Brief of Antitrust Professors, *supra* note 11, at 1.

88. *Id.*

89. *Hosanna-Tabor*, 132 S. Ct. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit.")

90. Reply Brief for the Petitioner at 20, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

on economic rights in the name of protecting religious interests crosses Judge Posner's admonition: "The commercial tail must not be allowed to wag the ecclesiastical body."⁹¹

A deeper understanding of the ministerial exception reveals that its essence vindicates a congregational polity's use of the Sherman Act against powerful clergy. The Supreme Court emphasized that the constitutional motivation behind the exception is "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission,"⁹² and the exception is designed to prevent "government interference with an internal church decision that affects the faith and mission of the church itself."⁹³ Because in congregational polities the internal decision over which minister, pastor, or rabbi to hire lies in the congregation itself, immunizing a professional organization of clergy from Sherman Act liability actually is *contrary* to the motivations underlying the ministerial exception. This spirit underlying the ministerial exception was born long before the Supreme Court recognized it earlier this year. In *McClure v. Salvation Army*, a Fifth Circuit opinion that first articulated a constitutional bar on employment discrimination claims against religious employers by ministerial employees, the court passionately observed that "[t]he relationship between an organized church and its ministers is its lifeblood" and "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."⁹⁴

Any claim by the Rabbinical Assembly—or their reform or reconstructionist counterparts—of being protected by the ministerial exception, therefore, is misguided on both legal and theological grounds. True, courts are prohibited from regulating a hierarchical religious order, like the Catholic Church in *Gonzalez* and the Serbian and Russian Orthodox Churches in *Milivojevich* and *Kedroff*, and are appropriately prohibited from intervening in matters concerning the appointment and retention of clergy by religious employers. But the ministerial exception is targeted to protect the employment relationship between religious organizations and its ministerial employees from government regulation. In congregational orders, where authority is invested in the congregation, the protected relationship is between the congregation and its clergy, not the clergy's professional relationship with itself. Moreover, claiming that the exception immunizes all conduct related to seeking and obtaining clergy undermines the ministerial exception itself. The exception is founded on a constitutional

91. *Schleicher v. Salvation Army*, 518 F.3d 472, 477 (7th Cir. 2008).

92. *Hosanna-Tabor*, 132 S. Ct. at 710.

93. *Id.* at 707.

94. *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972).

commitment to safeguard the religious freedom of individual communities—the very autonomy and self-determination that many have argued has fueled the blossoming of diverse Jewish experiences for two thousand years. The ministerial exception not only does not bar a Sherman Act suit, but its motivations might even encourage one.

IV. CONCLUSION

The Rabbinical Assembly's rules governing its Joint Placement Commission are illegal. Since the Central Conference of American Rabbis and the Reconstructionist Rabbinical Association have developed similar rules governing the placement of pulpit rabbis, those rabbinic organizations are also in violation of the law. Each placement system imposes severe restrictions on the labor market for pulpit rabbis without creating any identifiable pro-competitive benefit, and they are outside the protection of the First Amendment. By instituting its placement rules, these rabbinic organizations are acting to advance their own commercial interests to the detriment of the welfare of consumers, namely the congregations and congregants who hire and ultimately benefit from a rabbi's services.

There is much that is troubling about claiming that the First Amendment protects these organizations from Sherman Act scrutiny. First, it reflects an arrogant rejection of the decentralization that has sustained Jewish communities worldwide for nearly two millennia—through global wars, holy wars, unfriendly host nations, dramatic technological change, and spectacular social change. And second, it invokes the First Amendment to sanitize what is little more than the suppression of religious expression. The First Amendment may not, and ought not, be used to subvert itself. Although the First Amendment does not support a claim against the rabbinic organizations that stifle religious expression, the Sherman Act does. At the very least, the First Amendment should not prevent a claim that would advance its principles.

Permitting the Sherman Act to fulfill its mandate from Congress to promote competition and dislodge entrenched concentrations of power will not only liberate congregations from economic restraints. It will also significantly contribute to the vitality of Judaism in America. Were rabbinical organizations to adopt rules that are consistent with the Sherman Act—rules that empower individual communities and defer to the preferences of both congregants and rabbis—they would kindle the passions and empower the dynamism that Jewish communities have shown over time. Submitting to the Sherman Act might also transform the national rabbinic

organizations themselves, reorienting them away from authoritarian placement policies and towards an empowering role in which they help rabbis pursue fulfilling careers and abet congregations to hire the rabbi that best suits their needs. Doing so would advance social welfare consistent with the dictates of the Sherman Act, advance the First Amendment's principles of free religious expression, and advance the strength and robustness of American Judaism.