

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

Barak D. Richman^{*}

America's rabbis currently structure their employment market with rules that flagrantly violate the Sherman Act. The consequences of these rules, in addition to the predictable economic outcomes of inflated wages for rabbis and restricted consumer freedoms for the congregations that employ them, meaningfully hinder Jewish communities from seeking their preferred spiritual leader. Although the First Amendment cannot combat against this privately-orchestrated (yet paradigmatic) restriction on religious expression, the Sherman Act can. Ironically, however, the rabbinic organizations implementing the restrictive policies claim that the First Amendment immunizes them from Sherman Act scrutiny, thereby claiming the First Amendment empowers them to do what the First Amendment was arguably designed to prevent. This essay evaluates this interesting intersection between the Sherman Act and the First Amendment, and it argues that the Sherman Act can, and must, be vigorously applied against the private rabbinic cartels.

^{*} Professor of Law and Business Administration, Duke University; Scholar in Residence and Senior Fellow, Center on Law, Economics, and Organization, Columbia Law School. Professor Richman is also the President-Elect of Congregation Beth El in Durham, NC.

Saving the First Amendment from Itself: Relief from the Sherman Act

Against the Rabbinic Cartels

Barak D. Richman

I. Introduction	1
II. The Rabbi Cartels.....	3
III. Rabbinic Cartels and Illegal Practices	8
A. The Rabbinical Assembly's Market Power	8
B. The Rabbinical Assembly's Illegal Group Boycott	9
C. A Boycott without Efficiency or Expressive Defenses.....	15
1. A Tired Argument on Expertise and Quality.....	15
2. A Restraint without Defensible Expression.....	19
IV. Religious Protections and the Sherman Act.....	22
A. The Free Exercise Clause, <i>Smith</i>, and the Sherman Act's Neutrality.....	23
B. RFRA and Pre-<i>Smith</i> Protections.....	25
1. Pre-<i>Smith</i>, Commercial Conduct, and Indirect Burdens.....	26
2. RFRA's Gaping Hole.....	30
C. The Establishment Clause, Entanglement, and Intra-Denominational Disputes	31
V. Conclusion.....	35

I. Introduction

In *Goldfarb v. Virginia State Bar*, 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,” the Court warned that carving out such an exemption would empower professionals “to adopt anticompetitive practices with impunity.”

Despite *Goldfarb*’s grave warning against the potential harm from 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 exploitation and control. And despite *Goldfarb*’s sweeping charge to enforce the Sherman Act widely, those professions 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. And in doing so, they pervert the First Amendment, invoking it as a license to suppress the very religious expression the Amendment is 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 cannot act as a sword for congregations, thus exposing to one of the great limitations of the First Amendment: although the Free Exercise Clause can prohibit government coercion or intrusion on religious expression, it does nothing to protect communities from similar intrusion or regulation on the part of religious co-leaders. The Sherman Act, however, does endow parties injured by 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 Amendment's Free Exercise not fails to protect congregations from their movement's leaders, but the Amendment's Establishment Clause might sanitize the very subjugation those leaders impose. Because the Establishment Clause protects religious groups against certain enforcement actions by the state, any 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 compensate for the failure of the Free Exercise Clause to protect community synagogues, it must also jump through the hoops set by the Establishment Clause.

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 an antitrust analysis of the underlying restraints, 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 First Amendment 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.¹ 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.

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 1,600 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.² 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.³ 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

¹ CITE: Facts on Jewish demographics in US.

² *About Us*, THE RABBINICAL ASSEMBLY, http://www.rabbinicalassembly.org/nav/about_us.html (last visited Jan. 2, 2011) (describing the Rabbinical Assembly as "the international association of Conservative rabbis").

³ See CENTRAL CONFERENCE OF AMERICAN RABBIS, <http://ccarnet.org/> (last visited Jan. 2, 2011); THE RECONSTRUCTIONIST RABBINICAL ASSOCIATION, <http://www.therra.org/> (last visited Jan. 2, 2011).

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 Association 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.⁴ Charged with the responsibility 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."⁵ 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.

⁴ *Mission Statement*, THE RABBINICAL ASSEMBLY, <http://www.rabbinicalassembly.org/about-us/mission-statement>

⁵ RABBI ELIOT SALO SCHOENBERG, *ALIYAH: THE RABBINIC SEARCH AS AN UPLIFTING RELIGIOUS EXPERIENCE*, at Appendix A.

- 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.⁶

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

⁶ *Id.* at 3-4.

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. Rabbinic Cartels and Illegal Practices

This section evaluates the Rabbinical Association's placement practices under the Section 1 of the Sherman Act.⁷ It follows the useful template outlined in *California Dental Ass'n v.*

FTC,⁸ to evaluating restraints under Section 1, in which Justice Breyer offers a four-part inquiry:

"1. What is the specific restraint at issue? 2. What are its likely anticompetitive effects? 3. Are there offsetting procompetitive justifications? 4. Do the parties have sufficient market power to make a difference?"⁹

This framework weighs a restraint's anticompetitive effects against its legally cognizable justifications.¹⁰

A. The Rabbinical Assembly's Market Power

As a preliminary matter, it is beyond doubt that the Rabbinical Assembly exercises market power. Its 1,600 members comprise the vast majority of Conservative rabbis. The RA is the recognized professional association for rabbis affiliated with the Conservative movement, and it accordingly sets professional and legal rules for Conservative rabbis and for Conservative Judaism. It is also the lone rabbinical body connecting Conservative rabbis to the Conservative Movement's other organizational bodies, including the United Synagogue of Conservative Judaism. No other professional organization speaks for, or counts as its members in similar numbers, Conservative rabbis. The RA's control over the placement process therefore must be understood within the context of its possession of "market power or a unique access to a business element necessary for effective competition."¹¹

Central to the Rabbinical Assembly's control is its confidence that most Conservative synagogues—the primary employer of Conservative rabbis—seek to hire only Conservative

⁷ 15 U.S.C. § 1

⁸ 526 U.S. 756, 781-82 (1999) (Breyer, J., concurring in part and dissenting in part).

⁹ *Id.* at 782.

¹⁰ *Id.*

¹¹ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

rabbis. Little is more important to a religious community than the theologies and observances of its religious leader, and since a congregation's decision to affiliate with a particular movement embodies the very essence of its religious preferences and ideology, it is of paramount importance that its leader abides by the tenets of the same movement. Although a congregation surely might consider interviewing candidates of assorted affiliations and from different educational backgrounds, it is confronted with a Hobson's Choice when forced to choose between only obtaining access to RA job candidates versus being denied access to RA candidates altogether. Therefore, not only do RA members constitute nearly the entire supply of Conservative rabbis, but they also constitute the vast share of the market for pulpit rabbis hired by Conservative synagogues. By controlling access to that market, RA leaders create and control the bottleneck to a Conservative congregation's pool of potential leaders.

B. The Rabbinical Assembly's Illegal Group Boycott

The RA is a professional association that requires all of its members to participate exclusively in its search process. Although the RA seeks to advance the professional interests of its members, each member rabbi is nonetheless a potential or actual competitor with each other. RA rabbis compete for available jobs, and their effective supply is inversely correlated to their wages. Although RA members might they share professional and ideological goals, and although they frequently collaborate to advance the interests of their movement and the larger Jewish community, they are undeniably competitors within a defined labor market.

Accordingly, the Sherman Act prohibits collaborations among these competitors that lessen competition. Although the Sherman Act surely would permit the RA to act as a central clearinghouse of resumes and hiring congregations—a procompetitive venture that would bring benefits to congregations, RA members, and the entire labor market—the placement process the

RA organizes imposes severe limitations on how rabbis can market themselves and how congregations can seek their ideal rabbinic leader. Equally meaningfully, the RA enforces these rules by exacting penalties on non-conforming rabbis and congregations, including the threat of expelling rabbis from the RA if they transgress rules on placement.¹² Because the RA requires participating Conservative synagogues to enroll exclusively in the RA placement process, rabbis excluded from the RA are shut out of the hiring market and Conservative synagogues that seek to hire rabbis through separate avenues are excluded from the RA's supply of available rabbis. In short, in abiding by the rules of RA membership, RA members are collectively agreeing both to exclude congregations who search for rabbis through multiple mechanisms and to boycott any rabbi who seeks employment independently.

This amounts to what is colloquially described in antitrust parlance as a group boycott. Group boycotts are horizontal agreements among competitors to refuse to deal with certain disfavored groups or individuals.¹³ Such restraints "have long been held to be in the forbidden category"¹⁴ under Section 1 and are one of the categories of restraints that the Supreme Court has found to be *per se* illegal.¹⁵ Group boycotts triggering *per se* illegality generally involve "joint efforts . . . to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny the relationships the competitors need in the competitive struggle."¹⁶ When concerted refusals to deal cannot be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive . . . the

¹² *Rabbi Assembly Suspends Feldman for Three Years*, Palm Beach Daily News, Nov.29, 2000; *Rabbi is Censured, Not Expelled, by Her Conservative Colleagues*, N.Y. Times, Jan. 27, 2005, at B4.

¹³ *Id.* at 293-294 (1985).

¹⁴ *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

¹⁵ *NYNEX Corp. v. Discon*, 525 U.S. 128, 134-36 (1998), (listing cases in which the Supreme Court applied the *per se* rule to invalidate group boycotts).

¹⁶ *Nw. Wholesale Stationers*, 472 U.S. at 294 (citing SULLIVAN, LAW OF ANTITRUST 229-30 (1977)) (internal quotations omitted).

likelihood of anticompetitive effects is clear and the possibility of countervailing precompetitive effects is remote.”¹⁷

By imposing coercive conditions both on rabbis seeking employment and on hiring congregations, the RA’s placement process restraints both on labor supply and on consumer freedom. This causes several types of competitive harm.

First, the RA placement process restricts consumer choice. Consumer preferences and the economic forces that consumer freedoms exert are paramount to sustaining a competitive market and thus are at the core of antitrust law. The Supreme Court has warned that “[a] restraint that has the effect of reducing the importance of consumer preference ... is not consistent with this fundamental goal of antitrust law,”¹⁸ and that “[a]bsent some countervailing procompetitive virtue ... an agreement limiting consumer choice by impeding the ‘ordinary give and take of the market place,’ cannot be sustained.”¹⁹ Consequently, horizontal restrictions that “cripple the freedom” of market actors and “thereby restrain their ability to [transact] in accordance with their own judgment” are condemned by the Sherman Act.²⁰

The RA placement rules fall squarely in the category of rules prohibited by the Sherman Act because they significantly restrict congregations’ ability to exercise their freedoms as consumers. Synagogues are foreclosed from searching widely for their ideal rabbi and instead are confronted with two stark options, neither of which is satisfying to many Conservative synagogues: either hire exclusively under the RA’s rules, or lose access to a great majority of the market’s available Conservative rabbis. Many synagogues affiliated with the Conservative Movement might want to consider rabbis ordained at different seminaries, or at least interview

¹⁷ *Id.*

¹⁸ *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 107 (1984).

¹⁹ *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (2009) (*quoting* *Nat’l Soc’y of Prof. Engineers v. United States*, 435 U.S. 679, 692).

²⁰ *Klor’s*, 359 U.S. at 212.

rabbis from alternative movements so as to better understand what distinguishes RA rabbis from their colleagues. However, RA rules prohibit synagogues from approaching anyone independently, thus limiting a synagogue's search to rabbis who have entered themselves into the applicant pool. Professional searches for other important jobs, particularly those that lead organizations, often require a broad, creative, an aggressive recruitment of qualified individuals. RA search rules prohibit synagogues from searching the labor market and finding a candidate best suited for their particular communities.

Moreover, the RA's opaque rules regarding who may be interviewed limit whom among RA members a synagogue may interview. The RA search rules institute a seniority system that limits whom a synagogue may consider for employment. Many congregations, particularly those representing large communities in urban centers, are prohibited from considering rabbis without significant congregational experience. Many such congregations are thus unable to hire a young rabbi or one with alternative experience, even if their leaders decide such an individual would best suit their institution. Similarly, small and newer congregations, particularly those in rural communities or those in small Midwestern and Southern towns, are often permitted to interview only a short list of candidates filtered by the RA search committee and are denied access to the larger group of job seekers. These congregations are not permitted to compete with larger and more established congregations in a free and open labor market.

Second, the RA limits competition among rabbis seeking employment. Although professional organizations have previously argued that competition among their members is not in the public interest, the Supreme Court has soundly responded that "[t]he heart of our national economic policy long has been faith in the value of competition,"²¹ and that "the statutory policy

²¹ Standard Oil v. FTC, 340 U.S. 231, 248 (1951)

precludes inquiry into the question whether competition is good or bad.²² Accordingly, a professional association that interferes with competition among its members and “imposes [its] views of the costs and benefits of competition on the entire marketplace” violates the Sherman Act’s core principle.

The RA’s rules on placement commit this cardinal transgression by limiting competition in the labor market for pulpit rabbis. Because the RA membership rules require members to seek employment exclusively through its search process, and because RA search rules require congregations to exclusively enroll in their search process, there is no meaningful employment competition between RA rabbis and non-RA rabbis. Before being able to compare rabbis on individual merits or qualities, congregations must make a foundational and rather conceptual decision about the movement in which it will search. This significantly limits individualized comparisons and thus reduces inter-denominational competition between rabbis for employment. The RA placement rules also limit intra-denominational competition because the RA Placement Commission filters the candidates that congregations may interview.

Of course, the RA’s restrictions do not stifle competition among congregations who seek to hire particular rabbis, and many rabbis are remunerated handsomely because of intense competition among congregations. By limiting competition among rabbis for employment and requiring synagogues to search exclusively through their own process, the RA significantly enhances this competition among congregations, thus inflating the wages of its own members. A recent study discovered that rabbis earn significantly more—upwards to two-to-three times more—than Catholic priests and Protestant ministers.²³

²², *Nat’l Soc’y of Prof. Engineers*, 435 U.S. at 695.

²³ *On the Pulpit, Rabbis Earn More Than Christian Clergy*, The Jewish Forward, Sept. 24, 2010.

Third, the RA placement rules impose entry barriers for graduates of new seminaries, and thus limits competition both between the RA and other rabbinical associations as well as between the Conservative seminaries and other seminaries. Graduates of independent seminaries, such as the Hebrew College, that seek employment in Conservative synagogues are foreclosed from the main pathway to find congregations looking to hire rabbis. They may enhance their employment prospects by joining the RA, but obtaining membership is difficult, often subject to discretionary standards, and imposes an ideological litmus tests.

The difficulty in finding employment for graduates of these alternative seminaries not only cements the RA's control over the market for rabbis in Conservative synagogues, but it provides an anticompetitive advantage for graduates of Conservative seminaries. This reduces the ability of independent seminaries to assure their graduates access to a fair labor market and challenge Conservative seminaries for the best students and faculty. Conservative Jews worldwide (and maybe even Conservative Judaism itself) are harmed when competition between seminaries is restricted and when mainstream religious leaders and religious institutions maintain entrenched supremacy through anticompetitive restraints rather than competing on intellectual and spiritual merits.

This is precisely the competitive harm that the antitrust laws are designed to prevent. The Supreme Court has warned that concerted refusals to deal can limit entry and harm smaller or independent competitors,²⁴ and such a "constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered."²⁵ For this reason, the Supreme Court "has long held that certain concerted refusals to deal or group

²⁴ See *Klor's*, 359 U.S. at 209 (1959) (condemning a group refusal because, in part, it "seriously handicapped [a smaller retailer's] ability to compete.")

²⁵ *FTC v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned.”²⁶ The RA’s concerted refusals surrounding its placement processes are conduct squarely condemned by the Supreme Court and are paradigmatic Sherman Act violations.

C. A Boycott without Efficiency or Expressive Defenses

A group boycott, even one that “imped[es] the ordinary give and take of the market place,” is permitted under the Sherman Act if its legally cognizable merits outweigh its anticompetitive harm.²⁷ The RA could claim two justifications to defend its restraints, one related to promoting quality and the other related to promoting expression. Quality improvement is a procompetitive justification recognized by antitrust law, and a restraint might withstand antitrust scrutiny if its purported quality improvements outweigh any inefficiencies the restraint otherwise creates.²⁸ Additionally, because the RA is a religious association, it could invoke a line of cases in which courts permitted “expressive boycotts” under the Sherman Act because the concerted action in question was more expressive than economic. However, neither of these justifications protects the RA’s restraints from antitrust liability.

1. A Tired Argument on Expertise and Quality

The RA has argued that a rabbi’s job, and therefore the rabbinic job placement process, involves unique and complex features that justify unusual control and intervention in the labor market. Specifically, it has claimed that rabbis “live and work under unusual and often exceptionally challenging stresses that derive from the multivalent nature of the relationship of

²⁶ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985). Moreover, the Supreme Court has declared that group boycotts such as the one at hand, when groups “with market power boycott suppliers or customers in order to discourage them from doing business with a competitor,” are per se illegal, obviating any need for an efficiency analysis. *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 458 (1986).

²⁷ *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986).

²⁸ *Id.* (holding a restraint “cannot be sustained [without a] countervailing procompetitive virtue [...like] the creation of efficiencies in the operation of a market or the provision of goods and services.”)

rabbis to their synagogues” and that a placement system designed to “address these unique professional challenges ... benefits not only rabbis and their families but the Jewish community as a whole.”²⁹

This is a species of a market failure argument, in which a restraint is justified as achieving a superior market outcome. The current placement process, the RA claims, “lends a long-term view to placement, an exceptionally complex process of matching spiritual leaders to the dynamic and diverse systems that are congregations.”³⁰ The RA thus argues that it is in a unique position of expertise to design a placement system that best suits the needs of rabbis and congregations alike.³¹ An open labor market, the argument suggests, would not work as well in these circumstances.

This market-failure argument echoes those made by physicians, engineers, and other professionals who previously requested immunity from the Sherman Act. These professional associations, like the RA, claimed that the nature of their profession required rules of self-governance, even when such rules controlled output and restrained consumer choice. The Supreme Court has repeatedly rejected these arguments.

First, as a general matter, the Supreme Court has not accepted arguments suggesting that restraints on competition are consistent with the Sherman Act. In rejecting arguments from engineers that restraints on competition would improve quality, the Court held that the Sherman Act “reflects a legislative judgment that ultimately competition will produce not only lower

²⁹ Gilah Dror & Julie Schonfeld, *Statement About The Placement System*, RA NEWS ALERT (October 2010) (“[I]t could not be clearer to the RA that rabbis and their families live and work under unusual and often exceptionally challenging stresses that derive from the multivalent nature of the relationship of rabbis to their synagogues. As a result, a system that attempts to address these unique professional challenges, and thereby encourages talented individuals to enter and remain in the profession despite those challenges, benefits not only rabbis and their families but the Jewish community as a whole”)

³⁰ *Id.*

³¹ *Id.*

prices, but also better goods and services.”³² In rejecting similar arguments from attorneys, the Court emphasized that the statute “precludes inquiry into the question whether competition is good or bad.”³³ The Court will be similarly skeptical of the RA’s claims that their tight control of the labor market for rabbis improves quality outcomes.³⁴

Accordingly, a restraint must enhance competition in order to survive Sherman Act scrutiny. The RA presumably claims that the exceptionalism of rabbinic services requires the RA to restrain the hiring market, perhaps because congregations are incapable of taking “a long-term view to placement” or of handling the “exceptionally complex process” that involves hiring a rabbi. The RA cannot, however, justify its restraint on paternalist grounds and instead must explain why its intervention advances competition. Professional associations have previously argued that restraints on competition were justified because they protected consumers from a market’s complexity and exceptionalism, but the Supreme Court has repeatedly rejected such arguments. In response to engineers, the Court stated “the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote commerce than competition. . . . is not permitted.”³⁵ When physicians created a professional association with restrictive self-governance rules, justifying the restraints on the complexity of providing healthcare services, the Court ruled that the Sherman Act does not “distinguish [one industry]

³² *Nat’l Soc’y of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978) (responding to arguments from engineers that their restraints on trade resulted in better quality results); *see also* *FTC v. Sup. Ct. Trial Lawyers Ass’n*, 491 U.S. at 423.

³³ *Id.*

³⁴ The Rabbinical Assembly has exhibited a history of ambivalence towards the forces of competition, and in fact the placement process was designed with the specific intent of stifling competitive forces. *See* FIERSTEIN, A CENTURY OF COMMITMENT: ONE HUNDRED YEARS OF THE RABBINICAL ASSEMBLY, 55-57 (2000) (“Clearly, the competition for plum positions in the large cities was a frequent source of unhappiness for those whose aspirations could not be met. As the Rabbinical Assembly grew, by the late 1920s, it was increasingly demanding a central voice in the placement process.”).

³⁵ *Nat’l Soc’y of Prof. Engineers*, 435 U.S. at 689-690

from any other provider of goods and services,”³⁶ and “whatever may be its peculiar problems and characteristics, the Sherman Act . . . establishes one uniform rule applicable to all industries alike.”³⁷

Similarly, the Supreme Court has rejected expertise as a justification for preempting the choice of consumers.³⁸ Even when consumers have great difficulty evaluating quality or information, a professional association “is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.”³⁹ Thus, when a professional organization fears that consumers “will . . . make unwise and even dangerous choices” and thus takes action to remove consumer choice, it commits a “frontal assault on the basic policy of the Sherman Act.”⁴⁰ Under this reasoning, congregations, rather than the RA, should decide which rabbinic candidates they should interview. The Sherman Act prohibits the RA from usurping a congregation’s freedom to select its own spiritual leader.

Lastly, the RA makes an additional type of quality argument, claiming that its restrictive placement system is necessary to “encourage[] talented individuals to enter and remain in the profession.”⁴¹ With this, the RA presumably means that an open labor market will lead to wages and work satisfaction for rabbis that are not sufficiently desirable to attract the individuals the RA wants to draw into its rabbinate, and restraints are therefore necessary to inflate wages and improve the desirability of pulpit positions. This argument is akin to long-rejected “ruinous competition” arguments, which most was famously advanced in 1897 by an early railroad trust that claimed that forcing the cooperating railroads to compete would lead to the economic

³⁶ *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 349 (1982).

³⁷ *Id.* at 349-50 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)).

³⁸ *See F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 462 (1986) (finding that even if one assumes that consumers could not comprehend the information, a group of dentists could not refuse to submit x-rays to insurers for the purposes of determining whether dental procedures were justified, in the name of price-cutting).

³⁹ *Id.* at 463.

⁴⁰ *Id.*; *National Society of Professional Engineers*, 435 U.S. at 695.

⁴¹ Dror & Schoenfeld, *supra* note 29.

demise of several.⁴² The Sherman Act requires that competitive forces, not monopolistic restraints, attract entry into a labor market. Provider-sponsored restraints push supply and wages above competitive levels, to the disadvantage of consumers and to the detriment of social welfare.

2. A Restraint without Defensible Expression

Sherman Act case law involving “expressive boycotts” acknowledges the noneconomic features of certain expressive restraints, and the antitrust analysis in such cases involves more than a simple balancing of efficiencies. However, recognizing that “every concerted refusal to do business with a potential customer or supplier has an expressive component,” and refusing to “create a gaping hole” in antitrust law by excepting expressive boycotts from Sherman Act scrutiny,⁴³ the Supreme Court has been vigilant in subjecting even expressive boycotts to antitrust law.

The leading Supreme Court case on this point is *FTC v. Superior Court Trial Lawyers Ass’n (SCTLA)*,⁴⁴ in which attorneys who represent indigent criminal defendants collectively refused to continue working unless the District of Columbia increased the attorneys’ compensation. The attorneys claimed that their collective action was to bring public attention to a critical matter of public policy and to vindicate the Constitutional rights of criminal defendants, and thus claimed that the First Amendment protected their economic mobilization. The Supreme Court, however, deemed the boycott to be a naked restraint on trade.⁴⁵ “No matter how altruistic

⁴² *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897) (“In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin shall be its accompaniment.”).

⁴³ *FTC v. Sup. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 431 (1990).

⁴⁴ 493 U.S. 411 (1990).

⁴⁵ *Id.* at 427-428. It is instructive that the circuit court ruling in *SCTLA*, which the Supreme Court overturned, employed a more nuanced balancing of the Sherman Act and the First Amendment. *Sup. Ct. Trial Lawyers Ass’n v. FTC*, 856 F.2d 226 (D.C. Cir. 1988). Remanding the lower FTC’s ALJ ruling, the D.C. Circuit employed more of a balancing test, holding that, because of First Amendment concerns, expressive boycotts are condemned only if they

the motives of respondents may have been,” the Court ruled, “it is undisputed that their immediate objective was to increase the price that they would be paid for their services.” Accordingly, the restraint was an economic, and not an expressive, boycott. This, the Court concluded, was in stark contrast to the boycott at issue in *NAACP v. Claiborne Hardware Co.*,⁴⁶ in which the Supreme Court held that First Amendment justifications protected, and the Sherman Act did not condemn, a consumer boycott of a business with racially prejudicial policies. In *Claiborne Hardware*, the Court permitted the boycotters to engage in “peaceful, political activity” that was not intended “to destroy legitimate competition”⁴⁷ but, to the contrary, designed to spread “[e]quality and freedom [which] are preconditions of the free market.”⁴⁸

Perhaps the central test that emerges from *SCTLA* lies in whether the parties orchestrating the boycott would gain financial benefit from the restraint.⁴⁹ Whereas “[t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves, ... the undeniable objective of [SCTLA’s] boycott was an economic advantage for those who agreed to participate.” This “decisive” difference, the Court concluded, meant that the “reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who ‘stand to profit financially from a lessening of competition in the boycotted market.’”⁵⁰ The resulting test, therefore, gives very little First Amendment protection to group boycotts that generate economic benefit for its participants.

pose “a significant threat to competition.” *Id.* at 252-53. The Supreme Court’s correction of the circuit court ruling illustrates that a balancing approach is incorrect, and instead that the Sherman Act applies more categorically to expressive boycotts.

⁴⁶ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁴⁷ *Id.* at 913-14.

⁴⁸ *FTC v. Sup. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 427 (1990).

⁴⁹ *Id.* at 426 (“the undeniable objective of their boycott was an economic advantage for those who agreed to participate”).

⁵⁰ *Id.* at 427 (internal citations omitted).

In *Costello Publishing Company v. Rotelle*,⁵¹ the D.C. Circuit more specifically addressed the issue of balancing the Sherman Act and the free exercise of religion.⁵² In *Rotelle*, an independent publisher brought an antitrust action against the Catholic Church after the Church issued a memorandum to booksellers, requesting that they refrain from distributing the plaintiff's prayer book—which the Church described as an unapproved translation—and instead distribute one published by a division of the Church.⁵³ The court rejected the Church's claim of a First Amendment exemption from the antitrust laws, holding that a religious organization is not immune from antitrust scrutiny simply because its actions are religiously motivated. To the contrary, a religious institution is fully subject to the Sherman Act when its actions are designed to secure its "survival in the marketplace."⁵⁴

Although there is little case law subjecting religious organizations to the Sherman Act, *Rotelle* is consistent with the standard laid out in *SCTLA*. Both cases fully subject religious and expressive organizations to the Sherman Act, and although application of the Sherman Act takes into consideration the expressive or religious nature of the underlying conduct, economic conduct that inflicts substantial harm to competition is subject to standard Sherman Act scrutiny.

Accordingly, in evaluating any of the RA's religious or expressive justifications for its restrictive placement system, a reviewing court will duly note the substantial harm to competition the RA's restraints cause. A court will also note that many of the RA's placement rules clearly serve to protect the economic well-being of RA members, including rules that punish congregations from employing alternative search processes and rules that prohibit congregations from hiring "transitional rabbis" or rabbis with less congregational experience

⁵¹ *Costello Pub. Co. v. Rotelle*, 670 F.2d 1035 (1981).

⁵² *Id.* at 1049.

⁵³ *Id.* at 1040-41.

⁵⁴ *Id.* at 1049.

than the RA deems acceptable for certain positions. These rules, which are often in tension with the mutual desires of both congregations and individual rabbinical applicants, reward loyal RA members with continued employment and enhanced bargaining power. They also disadvantage alternative rabbinical associations and depress demand for non-RA rabbis. Perhaps most pernicious, these restrictive rules empower RA leadership to maintain a strong measure of internal control, punishing deviating RA members and insulating themselves from competitive threats. They do not serve religious purposes, and they are not necessary to guide or advise congregations in their search to hire a talented pulpit rabbi.

Since these rules accrue such economic benefit to RA members, application of *SCTLA* and *Rotelle* would obviate an inquiry into the religious purposes underlying the restraints. Viewing the RA's placement process through the lens of *SCTLA* reveals that the system is designed to maximize control over the labor market while squelching the independence of both member rabbis and congregations. The restraints contain little, if any, expression, and no restraint is necessary to achieve a particular expressive belief. Thus, antitrust case law convincingly establishes that the RA's rules amount to a group boycott, that RA restraints hinder market competition and frustrate participants, and the RA is in violation of the Sherman Act.

IV. Religious Protections and the Sherman Act

The accusation that the Rabbinical Assembly's placement practices are in violation of the Sherman Act was not long ago opined in a guest column in *The Jewish Daily Forward*.⁵⁵ 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

⁵⁵ Barak D. Richman, *Rabbi Searches Are Tough, but Are They Illegal?*, JEWISH DAILY FORWARD, Sept. 29, 2010, available at <http://www.forward.com/articles/131723/> ("The inescapable conclusion is that the RA's practices are illegal, and have been for a long time.")

under anti-trust arguments.”⁵⁶ 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 influence the antitrust analysis under *SCTLA* and *Rotelle*.⁵⁷ 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.⁵⁸ The First Amendment has been interpreted to ensure near-absolute protection of

⁵⁶ Gilah Dror & Julie Schonfeld, *supra* note 29.

⁵⁷ See *supra*, notes 44-54 and accompanying text.

⁵⁸ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (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.”)

religious belief, but its protections of religious conduct are “qualified.”⁵⁹ 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.”⁶⁰

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.⁶¹ 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 First Amendment has not been offended.”⁶² 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.⁶³ Neutral laws that burden religion, without any explicit or pretextual intent to target particular religious conduct, do not violate the Constitution.⁶⁴

The Sherman Act is plainly a neutral and generally applicable law that prohibits conduct that Congress is empowered to regulate.⁶⁵ Moreover, the Sherman Act is both neutral and generally applicable insofar as it applies to all industries and groups.⁶⁶ The Sherman Act would therefore pass the first prong of the test from *Smith*.

⁵⁹ *Employment Div. v. Smith*, 485 U.S. 660, 670 n. 13 (1988).

⁶⁰ *Cantwell*, 310 U.S. at 304.

⁶¹ *Employment Div v. Smith*, 494 U.S. 872 (1990).

⁶² *Id.* at 878.

⁶³ *Id.* at 671; *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

⁶⁴ *Id.* at 880.

⁶⁵ *Smith*, 494 U.S. 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.”).

⁶⁶ *See Nat’l Soc’y of Prof. Engineers 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”).

Additionally, the Sherman Act was not passed with any Congressional intent to target religious groups or religious practice. Although scholars debate Congress' precise motivations underlying the Sherman Act, none have contended that Congress enacted it with a specific goal to burden religion.⁶⁷ If anything, Congress' focus was on ending the anticompetitive behavior of secular entities such as the trusts that dominated the industrial economy at the time.⁶⁸

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.

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."⁶⁹ 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,"⁷⁰ Congress attempted to overturn the test from *Smith* and instead re-institute the standard in *Sherbert v. Verner*⁷¹ and *Wisconsin v. Yoder*,⁷² which subjected laws to greater scrutiny.

⁶⁷ 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' 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 fighting the trusts with flexibility and political compromise in the means for doing so).

⁶⁸ See generally HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955).

⁶⁹ Pub. L. No. 103-141, § 3(a), 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1).

⁷⁰ *Id.*

⁷¹ *Sherbert v. Verner*, 374 U.S. 398 (1944).

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.

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.”⁷³ Congress passed RFRA explicitly “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,⁷⁴ 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.⁷⁵

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 a free exercise challenge to a generally applicable statute in *Yoder*, the Supreme Court “rejected every claim for a free

⁷² *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁷³ 42 U.S.C. §2000bb-1 (2006).

⁷⁴ 42 U.S.C. §2000bb(b)(1) (2006).

⁷⁵ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

exercise exemption to come before it” for 18 years.⁷⁶ These denials of Free Exercise claims include challenges to the requirement of social security numbers, military standards, and the administration of government programs.⁷⁷

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*⁷⁸—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 businesses on Saturdays, the additional obligation to also close on Sunday would create too great a burden.⁷⁹ 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.”⁸⁰ The Court additionally concluded that the government’s interest in having a uniform day of rest without

⁷⁶ Mitchell McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990).

⁷⁷ See, e.g., *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); *Lyng v. Northwest Indian Cemetery Protective Association*, 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); see also *Smith*, 494 U.S. 883. (“We have never invalidated any government 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.”)

⁷⁸ 366 U.S. 599 (1961).

⁷⁹ *Id.* at 601; See also *McGowan v. Maryland*, 366 U.S. 520 (1961) (rejecting a similar establishment clause challenge to Sunday closing laws).

⁸⁰ *Braunfeld*, 366 U.S. at 603, 606.

assorted exceptions was sufficiently compelling to permit the state to establish closing laws that disfavored certain religious minorities.⁸¹

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.⁸² 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.”⁸³ Without questioning the central importance of governments maintaining “fiscal vitality,”⁸⁴ 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.”⁸⁵ 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.⁸⁶ 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.⁸⁷

⁸¹ *Id.* at 608-09.

⁸² *United States v. Lee*, 455 U.S. 252 (1982).

⁸³ *Id.* at 261.

⁸⁴ *Id.* at 258.

⁸⁵ *Id.* at 261-62.

⁸⁶ 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. Board of Equalization of California*, 493 U.S. 378 (1990) *with* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) *and* *Follet v. McCormick*, 321 U.S. 573 (1994).

⁸⁷ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 435.

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,⁸⁸ or to the Seventh Day Adventist, who was denied unemployment benefits even though her religious conviction was the cause of her unemployment.⁸⁹

Second, the Sherman Act is intended to be a sweeping Act, without exceptions, to advance Congress' policy of competition.⁹⁰ 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."⁹¹ Rabbinical candidates entering a competitive labor market should be subject to the

⁸⁸ *Id.* at 425.

⁸⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁹⁰ *Standard Oil v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975) ("And our cases have repeatedly established that there is a heavy presumption against implicit exemptions") (citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) and *California v. FPC*, 369 U.S. 482, 485 (1962)).

⁹¹ *Id.* at 788 (quoting *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553 (1944)).

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.”⁹² Although one’s personal religious practices are not commercial activity, an effort to control the hiring of rabbis to pulpit positions nationwide certainly is.

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.⁹³ 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.⁹⁴ 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.”⁹⁵

RFRA therefore does not curtail state law, including the individual competition laws that each state has enacted.⁹⁶ 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

⁹² *United States v. Lee*, 455 U.S. 252, 261 (1982)..

⁹³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁹⁴ *Id.* at 532 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

⁹⁵ *Id.*

⁹⁶ AREEDA & HOVENKAMP, ANTITRUST LAW, ¶2401.

hold that on substantive issues federal case law should be regarded as precedential.”⁹⁷ 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.⁹⁸

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.⁹⁹ Therefore, just as RFRA could be read as 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

⁹⁷ *Id.* at ¶2410; *see also* ¶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.”)

⁹⁸ 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*, 71 N.Y.2d 327, 334-35 (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.”).

⁹⁹ *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 -404 (2009); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); MO. ANN. STAT. §§1.302-.307 (West 2010); N.M. STAT. §§28-22-1 to 28-22-5 (2006); OKLA. STAT. ANN. tit. 51, §§251-258 (West 2010); 71 PA. CONS. STAT. ANN. §§2401-2407 (West 2009); R.I. GEN. LAWS §§42-80.1-1 to -4 (2006); S.C. CODE ANN. §§1- 32-10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. §§110.001-.012 (Vernon 2009); UTAH CODE ANN. §§ 63L-5-101 to -403 (2008); VA. CODE ANN. §§ 57-1 to -2.02 (2009).

general rule is that courts are prohibited by the First Amendment from getting involved in intrachurch disputes when doing so would require them to become entangled in religious affairs.”¹⁰⁰

Fear that rulings will entangle or endorse religious authority has convinced courts to refrain, when possible, from intervening within intra-denominational disputes. In *Gonzalez v. Roman Catholic Archbishop of Manila*, for example, the Supreme Court prohibited a civil court from determining the qualification of a chaplain of the Roman Catholic Church,¹⁰¹ and in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Court invalidated a state court ruling that conditioned a granting of property on a church’s adherence to a traditional faith and doctrine.¹⁰² An interesting recent example involving an internal dispute in a Jewish congregation was the fight over the succession of the Grand Satmar Rabbi, in which the New York Court of Appeals refused to compel arbitration before rabbinical court to determine the outcome of synagogue elections.¹⁰³ Courts in these cases consistently adhere to the prohibition of judicial inquiry into what religious doctrine requires and whether religious authorities are administering doctrine correctly.

Such deference has also transferred into cases involving the appointment of clergy. In *Serbian Orthodox Diocese v. Milivojevich*, 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” and “a hierarchical church [whereby] the sole power to appoint and remove its Bishops rests in the Holy Assembly and Holy Synod”—from defrocking a local bishop even when he and local parishioners argued the Mother Church acted arbitrarily

¹⁰⁰ W. Cole Durham and Robert Smith, *RELIGIOUS ORGANIZATIONS AND THE LAW*, at §10:44 (2011).

¹⁰¹ *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, (1929).

¹⁰² *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

¹⁰³ *Congregation Yetev Lev D’Satmar v. Kahana*, 9 N.Y.3d 282 (2007).

and not in accordance with Church doctrine.¹⁰⁴ The Court gave similar deference to hierarchical church authority during Cold War challenges to the Russian Orthodox Church, when American parishes wanted to appoint their own Archbishop.¹⁰⁵ Citing these cases, the Rabbinical Assembly might suggest that it has the authority to organize the placement of its rabbinate, and that any interference by a court enforcing the Sherman Act amounts to an unconstitutional entanglement in an internal dispute of a religious order.

Any claim of Establishment Clause protection, however, is severely misguided, not just for legal reasons but also on 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. But the Supreme Court has long contrasted such *hierarchical* orders 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 organization.”¹⁰⁶ In contrast, the Supreme Court has recognized that authority in congregational orders lies in their self-governance.¹⁰⁷ Churches (or synagogues) in congregational orders might be affiliated with a religious denomination or movement, but they

¹⁰⁴ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, (1976), rehearing denied 429 U.S. 873 (1976). See also *Gonzalez*, *supra* note 101.

¹⁰⁵ *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

¹⁰⁶ *Watson v. Jones*, 13 Wall. 679, 722-723 (1872); see also *Kedroff* (“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.”)

¹⁰⁷ *Bouldin v. Alexander*, 15 Wall. 131 (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.”)

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.

It is critical, then, that American synagogues are (probably without exception) independent entities. Established as nonprofit corporations under state law and governed by a board of directors, synagogues only have contractual relationships with the national organizations that lead the different movements. 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).¹⁰⁸ 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.

In short, the relationships a Conservative synagogue has with USCJ and the RA—and indeed the relationship any American synagogue has with the national institutions that organize the respective movements—is entirely voluntary. While a congregation might enter into a contractual relationship with a national rabbinic organization (for rabbinic placement) or an association of synagogues (for affiliation), the source of the legal authority in those relationships

¹⁰⁸ Standards for Congregational Practice, United Synagogue of Conservative Judaism, http://www.uscj.org/Standards_for_Congre5973.html

are based, like all contracts, on mutual assent. This is no accident, but rather is central to the American Jewish experience—indeed, central to the Jewish Diaspora experience, which has for two millennia created the Judaism we now know. Synagogues are to be creations of their respective communities, and the imposition of external authorities or the denial of community autonomy is antithetical to both history and theology.

Any claim by the Rabbinical Assembly—or their Reform or Reconstructionist counterparts—of being protected by the First Amendment is therefore both legally and theologically false. Legally, it overlooks the congregational order that organizes American synagogues and their relationships to national bodies. Theologically, it amounts to an effort to deprive local congregations of the very autonomy and self-determination that has fueled the blossoming of diverse Jewish experiences for two thousand years.

V. 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 procompetitive 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 ultimate 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 to dislodge entrenched concentrations of power will not only liberate congregations. It also will significantly help non-Orthodox Judaism in America. Were the rabbinical organizations to adopt less restrictive rules that were consistent with the Sherman Act—rules that empower individual communities and defer to the preferences of both congregants and rabbis—it would kindle the passions and empower the dynamism that Jewish communities have shown over time. It also would transform the functions of the national rabbinic organizations over placement, away from an autocratic role and towards a role that supports and assists both its members to find employment and congregations to hire the rabbi that best suits their needs. Doing so would both advance social welfare, consistent with the dictates of the Sherman Act, advance the First Amendment's principles of free expression, and advance the strength and vitality of American Judaism.