

RELIGIOUS FREEDOM THROUGH MARKET FREEDOM:  
THE SHERMAN ACT AND THE MARKETPLACE FOR  
RELIGION

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ABSTRACT

*In prior work, I examined certain restraints by private religious organizations and concluded that the First Amendment did not immunize these organizations from antitrust liability. In short, the First Amendment did not preempt enforcing the Sherman Act against certain religious monopolies or cartels.*

*This Article offers a stronger argument: First Amendment values demand antitrust enforcement. Because American religious freedoms, enshrined in the Constitution and reflected in American history, are quintessentially exercised when decentralized communities create their own religious expression, the First Amendment's religion clauses are best exemplified by a proverbial marketplace for religions. Any effort to stifle a market organization of independent religious institutions is inimical to First Amendment religious freedoms, and any effort to employ economic or institutional mechanisms to engineer restraints on such freedoms is appropriately policed by the Sherman Act. Because the Sherman Act is squarely designed to resist unauthorized accumulations of centralized power, it is ideally suited to counteract restraints against religious freedoms and to liberate decentralized religious expression.*

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## INTRODUCTION

During the only recorded debate on the First Amendment's Religion Clauses in the House of Representatives, James Madison spoke of the concern that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."<sup>1</sup> He was referring to the danger of a government being controlled by a particular religious denomination, and thus advocated an Establishment Clause that would prevent a ruling coalition from imposing its religious will on others.<sup>2</sup> But his words also speak to the dangers of dominant sects asserting private power—either through unilateral or cartel arrangements—and suppressing the religious preferences of minorities through non-governmental means.

The chief legal weapon available to combat the abuse of concentrated private authority is the Sherman Act.<sup>3</sup> It is explicitly designed to counteract powerful economic or professional entities from constraining the preferences and dynamism of individual creativity.<sup>4</sup> Thus, when religious organizations pursue private arrangements to preempt or constrain the ability of individuals or smaller groups from pursuing their own religious freedoms, the Sherman Act is not only an appropriate remedy but one that is naturally encouraged by the spirit and jurisprudence underlying the First Amendment.<sup>5</sup>

This Article follows prior work that examined certain restraints by private religious organizations and concluded that, as a doctrinal matter, the First Amendment did not protect these organizations from antitrust liability.<sup>6</sup> This Article offers a stronger argument: First Amendment values demand antitrust enforcement. Because

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1. 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834). The import of Madison's recorded remark has been appreciated by both academics and the U.S. Supreme Court. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183-84 (2012); 1 DOUGLAS LAYCOCK, *RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY* 606-09 (2010).

2. 1 ANNALS OF CONG., *supra* note 1, at 730-31.

3. 14 U.S.C. §§ 1-7 (2012); *see also* Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, 39 PEPP. L. REV. 1347, 1353-56 (2013).

4. *See* Richman, *supra* note 3, at 1349, 1353-55.

5. *See id.* at 1349.

6. *Id.* at 1355-56.

American religious freedoms, enshrined in the Constitution and reflected in American history, are quintessentially exercised when decentralized communities create their own religious expression, the First Amendment's Religion Clauses are best exemplified by a proverbial marketplace for religions.

The Article first examines how the antitrust case law has developed to incorporate constitutional language, illustrating the Sherman Act's importance to the constitutional framework and the natural application of antitrust law to secure constitutional values.<sup>7</sup> It then examines Religion Clause cases and reveals how centrality of choice and personal preference illuminate First Amendment jurisprudence.<sup>8</sup> This emphasis on choice, much like the reverence afforded to consumers in antitrust cases, is especially heightened when religious organizations make hiring decisions—thus acting as both religious and economic actors—as illustrated in the ministerial exception cases.<sup>9</sup> The Article concludes that the Religion Clauses and the Sherman Act reinforce each other, offering effective preservation of religious liberty against public and private authority alike.

#### I. PARALLEL LANGUAGES: THE SHERMAN ACT IN THE CONSTITUTIONAL SCHEME

The Supreme Court's antitrust jurisprudence closely parallels its Establishment Clause jurisprudence's focus on the importance of individual choice to our constitutional scheme.<sup>10</sup> This Part briefly reviews the Court's emphasis on personal choice in both its antitrust and Establishment Clause cases.<sup>11</sup> It then focuses on the importance that the Court places on congregations being allowed to choose their own clergymen free from outside influence.<sup>12</sup>

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7. *See infra* Part I.A.

8. *See infra* Part I.B.

9. *See infra* Parts I.C. and II.B.

10. *See infra* Parts I.A-B.

11. *See infra* Parts I.A-B.

12. *See infra* Part I.C.

A. *The Quasi-Constitutional Language of the Sherman Act*

When the United States Supreme Court called the Sherman Act “the Magna Carta of free enterprise” in 1972,<sup>13</sup> it latched onto a telling metaphor that it has only doubled down on in the years since that decision. The metaphor reflected the Supreme Court’s belief that the Sherman Act amounted to more than a typical statutory expression from Congress, but instead embodied values that reflected the core of American democracy.<sup>14</sup> The Court’s most current invocation of the Sherman Act in quasi-constitutional language was its recent ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, in which the Court articulated the relationship between the Sherman Act and the power of the states in our federalist system.<sup>15</sup> The Court reiterated the Sherman Act’s centrality in our market democracy, stating that “[f]ederal antitrust law is a central safeguard for the Nation’s free market structures. In this regard it is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’”<sup>16</sup>

This language reflects the Court’s understanding that the Sherman Act is central to the nation’s constitutional framework.<sup>17</sup> For that reason, the *North Carolina Dental* Court weighed carefully the relationship between the Act and the states.<sup>18</sup> The majority concluded that the Sherman Act constrains state autonomy,<sup>19</sup> thereby benefitting the states and their citizens.<sup>20</sup> The majority

13. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

14. *See id.* (“[It is] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”); cf. William N. Eskridge, Jr., *America’s Statutory “constitution”*, 41 U.C. DAVIS L. REV. 1, 6 (2007) (“[S]uper-statutes—framing statutes that set forth robust rules for government structure, electoral activities, and public values—articulate a great many of the applicable rules and principles of our Constitution as well as our constitution.”).

15. 135 S. Ct. 1101, 1109-12 (2015).

16. *Id.* at 1109 (quoting *Topco*, 405 U.S. at 610).

17. *See* Eskridge, Jr., *supra* note 14, at 6 (explaining the difference between “America’s (small ‘c’) constitution” and “the U.S. (Large ‘C’) Constitution”).

18. *See N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1109-12.

19. *Id.* at 1109-12, 1117.

20. *Id.* at 1109; *see also* *FTC v. Tico Title Ins.*, 504 U.S. 621, 632 (1992) (“The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom.... Continued enforcement of the national antitrust

observed that “[t]he antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.”<sup>21</sup> Specifically, the majority noted, “[t]he Sherman Act serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public’s welfare.”<sup>22</sup> The dissent, on the other hand, speaking more in constitutional theory than antitrust doctrine, noted the unique constitutional role of states vis-à-vis federal antitrust policy.<sup>23</sup> Justice Alito, writing for the dissent, argued that “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”<sup>24</sup> Indeed, Justice Alito continued, when the Sherman Act was first enacted “in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and [we have previously] refused to assume that the Act was meant to have such an effect.”<sup>25</sup>

The case is a vivid illustration of both the frequency of constitutional language in Sherman Act jurisprudence and the constitutional elements that are central to implementing antitrust policy.<sup>26</sup> In short, the Sherman Act has come to represent a distinct part of the operation of our constitutional scheme, and its application is reflected in a quintessentially constitutional debate over the degree to which free market policies constrain state power.

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policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls.”)

21. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1109.

22. *Id.* (internal citations omitted).

23. *Id.* at 1119 (Alito, J., dissenting).

24. *Id.* (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943) (alteration in original)).

25. *Id.*

26. *See id.* at 1109-112 (majority opinion).

*B. The Consumer-Oriented Language of the Religion Clauses*

The Sherman Act's quasi-constitutional status relates less to a judicial fidelity to neoliberal notions of market efficiency than to a deference to individual choice.<sup>27</sup> The Court's treatment of a consumer's freedom relates to its treatment of other individual prerogatives in a democracy, in particular the constitutional protections cemented in the First Amendment.<sup>28</sup> At the heart of both the First Amendment and the Sherman Act is the protection of individual choice.

The language of individual choice, as an expression of individual freedom, is central to the Court's understanding of the Religion Clauses. In an opinion concurring with the Court's conclusion that mandated prayer in public schools is unconstitutional, Justice Brennan remarked:

The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election.<sup>29</sup>

The key sentence in the above excerpt deserves repeating: “*In my judgment the First Amendment forbids the State to inhibit that freedom of choice.*”<sup>30</sup> In Justice Brennan's eyes, the constitutional violation occurred by denying individual choice in a setting in which

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27. *See id.* at 1110-12.

28. *See infra* notes 29-33 and accompanying text.

29. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 242 (1963) (Brennan, J., concurring); *see also id.* at 205 (majority opinion) (holding that mandating school prayer violated the Establishment Clause of the Constitution).

30. *Id.* at 242 (Brennan, J., concurring) (emphasis added).

various religious expressions were available.<sup>31</sup> The centrality of individual choice within a diversity of religions has not only been echoed in subsequent Court rulings, but the essence of choice has also been fused to the very foundation of First Amendment freedoms.<sup>32</sup> The Court summarized its Religion Clause rulings in a succinct connection between religious choices and the nation's constitutional fabric: "The rule of th[e]se cases, one which seems fairly implicit in the history of our First Amendment, is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect."<sup>33</sup>

In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, the Court made clear that the primacy of religious choice applies both to individuals and religious organizations, whose autonomy to make their own decisions in accordance to their own community values and preferences also receives dogged constitutional protection.<sup>34</sup> The Court emphasized that its Religion Clause cases embody "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."<sup>35</sup>

It is no accident that the so-called ministerial exception is traced most directly to *Kedroff's* proclamation that "[f]reedom to select the

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31. *See id.*

32. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) ("[The Court's jurisprudence] make[s] clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 490-91 (1986) (Powell, J., concurring) ("[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [Establishment Clause], because any aid to religion results from the private choices of individual beneficiaries."); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("[U]nder Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents of school-age children.")

33. *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 733 (1976).

34. 344 U.S. 94, 116, 119-21 (1952).

35. *Id.* at 115-16. *Kedroff* also relies heavily on the language of choice. *See id.* at 119 (remarking that the state law in question was unconstitutional because it "prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy").



clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”<sup>36</sup> The ministerial exception emerged from a series of circuit court rulings that exempted certain religious organizations from generally applicable employment laws, such as Title VII.<sup>37</sup> Motivated by the Religion Clauses’ charge to protect religious organizations from government intrusion, the Ministerial Exception constitutionally protected churches’ decisions regarding the employment of clergy in instances where those decisions would otherwise violate federal antidiscrimination laws.<sup>38</sup> The Ministerial Exception was not recognized by the Supreme Court until 2012, when the Equal Employment Opportunity Commission tried to enforce the Americans with Disabilities Act against a Lutheran school in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>39</sup>

### C. The Ministerial Exception

*Hosanna-Tabor* was a sweeping decision, in which the Supreme Court decreed that a religious congregation retains the right to choose its own minister, thus enshrining the Ministerial Exception into First Amendment law.<sup>40</sup> Chief Justice Roberts forcefully declared that “[a] church must be free to choose those who will guide it on its way.”<sup>41</sup> Tellingly, the Court equated the employment decision with an expression of religious conviction.<sup>42</sup> When a congregation chooses a spiritual leader and makes a hiring decision, it is expressing core religious values that demand constitutional protection.<sup>43</sup>

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36. *Id.* at 116 (footnote omitted).

37. *See, e.g.,* McClure v. Salvation Army, 460 F.2d 553, 558-61 (1972); *see also* Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. U. L. REV. COLLOQUY 191, 191-93 (2011) (“The ministerial exception emerged from the federal judiciary’s efforts to implement Title VII of the Civil Rights Act in the early 1970s.”).

38. *See, e.g.,* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89, 196 (2012).

39. *Id.* at 177, 180, 196.

40. *See id.* at 196.

41. *Id.*

42. *See id.* at 188-89, 196.

43. *See id.*

In *Hosanna-Tabor*, the Court found the principle of choice fundamental.<sup>44</sup> It concluded that “[b]y 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 faithful also violates the Establishment Clause.”<sup>45</sup>

This holding was well in line with the cases that led to *Hosanna-Tabor*, which place the freedom of religious expression as fundamental to the constitutional ethos, both for individuals and congregations.<sup>46</sup> Indeed, the Supreme Court has authorized *only* a congregation to decide its own form of religious practice.<sup>47</sup> *Watson v. Jones*, a bedrock Religion Clause case, rests on the notion that free exercise is embodied by the ability for a congregation to make choices for itself.<sup>48</sup> In that case, the Court held that “a religious congregation ... by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.”<sup>49</sup>

In describing *Watson v. Jones* in the mid-twentieth century, the Supreme Court validated the centrality of choice in Religion Clause cases:

The opinion radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.<sup>50</sup>

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44. *Id.* at 188.

45. *Id.* at 188-89.

46. *See, e.g.,* *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871).

47. *See id.*

48. *See id.*

49. *Id.* at 722.

50. *Kedroff v. Saint Nicholas Cathedral of the Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 115-16 (1952) (footnote omitted).

A year after *Watson* was decided, the Supreme Court was tasked with resolving *Bouldin v. Alexander*, another inter-denominational dispute.<sup>51</sup> In *Bouldin*, Washington D.C.'s Third Baptist Church, an unincorporated religious congregation, became embroiled in an internal dispute pitting the founder of the Third Baptist Church and his minority faction against the majority of the congregation that opposed the installation of the minority's favored trustees.<sup>52</sup>

The Court ruled that the congregation's will and choice were paramount.<sup>53</sup> Writing for the majority, Justice Strong cleverly noted that the dispute between members of a congregation cannot, in accordance with the Religion Clauses, be decided upon religious doctrine: "It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property."<sup>54</sup> The Court reasoned that respect for the Religion Clauses demands deference to neutral principles and thus the choices of congregation's members: In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of the majority by a minority is a void act.<sup>55</sup>

As one commentator noted, this emphasis on the congregation's choice is representative of a fidelity to the constitutional values of the first amendment: "*Watson* and *Bouldin* may represent not simply the pursuit of 'fair' outcomes in resolving disputes within religious bodies, but rather the application of general free exercise principles."<sup>56</sup>

Both *Watson* and *Bouldin*, as well as *Kedroff*, were about the justiciability of intra-denominational disputes by the Court.<sup>57</sup> It is precisely the concern for individual choice that leads to "[t]he general rule ... that courts are prohibited by the First Amendment

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51. 82 U.S. (15 Wall.) 131 (1872).

52. *Id.* at 137.

53. *See id.* at 139-40.

54. *Id.* at 139.

55. *Id.* at 140.

56. John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & C.R. L. REV. 1, 18 (1997).

57. *See Kedroff v. Saint Nicholas Cathedral of the Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 95-97 (1952); *Bouldin*, 82 U.S. (15 Wall.) at 39; *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 713 (1871).

from getting involved in intra-church disputes when doing so would require them to become entangled in religious affairs.”<sup>58</sup>

When faced with a question of justiciability of a lawsuit about the governance of a religious organization, the core investigation is whether the dispute can be resolved with neutral legal principles.<sup>59</sup> This is because the core value of the First Amendment is that when there is a question of practice of religious expression, it is only to be decided by the religious community itself.<sup>60</sup> As the Supreme Court has recognized, “[o]urs is a government which by the ‘law of its being’ allows no statute, state or national, that prohibits the free exercise of religion.”<sup>61</sup> As the Court has noted, this prohibition also extends to the actions of the courts.<sup>62</sup> While “[t]here are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property....[,] when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.”<sup>63</sup> The Court has emphasized that “under our Constitution [this principle] necessarily follows in order that there may be free exercise of religion.”<sup>64</sup>

In sum, while the Religion Clause cases directly assess various forms of government intrusion, they reflect a more fundamental constitutional value: that the core exercise of religious freedom is the exercise of religious choices—on one’s own behalf and also on behalf of religious organizations.

## II. FREEDOM IN A RELIGIOUS MARKET

Just as these Religion Clause cases reveal the centrality of choice in the face of religious codes of conduct, Sherman Act cases address consumers’ rights to a free market in the face of ethical codes

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58. 2 WILLIAM W. BASSETT ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* § 10:44 (2013).

59. *See* *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

60. *See id.*; *see also* *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970).

61. *Kedroff*, 344 U.S. at 120.

62. *Id.* at 120-21.

63. *Id.* (footnote omitted).

64. *Id.* at 121.

imposed by producers.<sup>65</sup> An explanation of these seminal Sherman Act cases illustrates how the Sherman Act adeptly handles the invocation of ethical codes within a market framework.

#### *A. Markets and Nonmarket Values*

The Sherman Act has been used reliably to pierce self-aggrandizing claims that consumers do not benefit from competition or that antitrust immunity must protect certain privileged roles in the economy. In the landmark case of *Goldfarb v. Virginia State Bar*, the Supreme Court rejected the notion that there was an exemption to the antitrust laws for the so-called “learned professions.”<sup>66</sup> Even though the Court was addressing restraints imposed by its own profession, its ruling was clear and unanimous: “The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act.”<sup>67</sup> Moreover “the public-service aspect of professional practice [is not] controlling in determining whether [the Sherman Act] includes professions.”<sup>68</sup>

Fundamental to the Sherman Act, then, is a deep commitment to the rights of consumers to choose their own path, independent of perceived benefits from “ethical” restraints by producers or professionals of high social status.<sup>69</sup> In a case where the restraint on trade was ostensibly meant to protect the nation’s population from a scourge of shoddy and dangerous buildings, the Supreme Court held that “we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.”<sup>70</sup> The Court recognized that “the free opportunity to select among alternative offers” goes to “[t]he heart of our national economic policy.”<sup>71</sup>

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65. See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 462-63 (1986); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 684-85 (1978); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975).

66. 421 U.S. at 786-87.

67. See *id.* at 787 (citing *Associated Press v. United States*, 326 U.S. 1, 7 (1945)).

68. *Id.* (citing *United States v. Nat’l Ass’n. of Real Estate Bds.*, 339 U.S. 485, 489 (1950)).

69. See *id.* at 789-90, 792.

70. *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 696.

71. *Id.* at 695 (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

Doubling down on this principle, the Court found that it was simply inconsistent with the Sherman Act for organizations of professionals to disrupt the freedom of choice in a market,<sup>72</sup> even where it is argued “that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices.”<sup>73</sup> The Court dismissed this argument as “nothing less than a frontal assault on the basic policy of the Sherman Act.”<sup>74</sup>

In each of these cases, the professionals in question created intricate codes of ethics that served, altruistically or otherwise, to limit the ability of the consuming public to partake in an open market.<sup>75</sup> The antitrust case law recognizes very forcefully that the professional classes cannot be held exempt from the Sherman Act.<sup>76</sup> They are not exempt from liability for engaging in the kinds of forbidden conduct that creates anticompetitive effects.<sup>77</sup> It is dangerous, in fact, to assume that codes of ethics will protect markets against anticompetitive conduct.<sup>78</sup>

Antitrust law targets codes of ethics precisely because the promulgators of those codes think they are acting from beneficence. And because beneficence is more often misplaced paternalism,<sup>79</sup> ethical codes that harm consumers are nonetheless difficult to remove. For these reasons, antitrust cases have a long and effective history of policing codes of ethics.<sup>80</sup> In *North Carolina Dental*, the Supreme Court warned against the dangers of confusing self-imposed restraints of a producing class with benevolence in the

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72. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465-66 (1986).

73. *Id.* at 463.

74. *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695).

75. *See, e.g., id.* at 455-66.

76. *See supra* notes 66-75 and accompanying text.

77. *See supra* notes 66-75 and accompanying text.

78. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 684-85, 695.

79. *See* Samuel G. Freedman, *Seeing and Battling a 'Cartel' in the Hiring of Rabbis*, N.Y. TIMES (Aug. 24, 2012), <https://www.nytimes.com/2012/08/25/us/law-professor-sees-cartel-in-hiring-of-rabbis.html> [<https://perma.cc/N5DR-X7TE>] (“Professional cartels are in some ways even more pernicious than a cartel of manufacturers.... There’s a degree of paternalism. On the one hand, it’s genuinely born out of concern. The rabbis who run the placement system really think they know what’s best for their congregations. But by controlling the marketplace with their ossified rules, they are doing long-lasting damage.”).

80. *See supra* notes 66-75 and accompanying text.

form of ethical norms.<sup>81</sup> The Court's concern was that "established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor."<sup>82</sup> And the Court prescribed a solution too: "In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability."<sup>83</sup> In proscribing this type of centralized private regulation, the Court forcefully secured the central position of the Sherman Act in American life and its role in protecting consumers' right to choose.<sup>84</sup>

### *B. The Case of a Religious Cartel*

In the realm of the practice of religion, a private body is no less capable of imposing restraints on free expression than the government. This Part articulates how a cartel of ministers, such as the Rabbinical Assembly, exercises control over the freedom of religion in a number of ways.<sup>85</sup>

In the case of the Rabbinical Assembly (RA), the organization that comprises the Conservative movement's 1700 rabbis,<sup>86</sup> control over expression is both pervasive and self-perpetuating.<sup>87</sup> Membership in the RA is "voluntary, but ... essential," to being employed by a congregation that wants to affiliate itself with a particular movement.<sup>88</sup> The RA administers placement commissions that are

81. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1111 (2015).

82. *Id.*

83. *Id.*

84. *See id.* at 1117.

85. I first voiced concern that the Rabbinical Assembly's (RA's) practices violated the antitrust laws in *Rabbi Searches Are Tough, but Are They Illegal?* FORWARD (Sept. 29, 2010), <https://forward.com/opinion/131723/rabbi-searches-are-tough-but-are-they-illegal/> [<https://perma.cc/54X5-XDPE>]. The chief motivation was not for the law's own sake. *Id.* ("[R]ecognizing the illegality of the RA's placement practices forces us to confront many of Conservative Judaism's deepest challenges, including the critical importance of heeding the grassroots needs of Conservative Jews and the creativity of nontraditional congregations. Ultimately, conforming to the law will be good for congregations, good for the Conservative movement and it will be good for the RA as well."); *see also supra* note 2 and accompanying text.

86. *See Conservative / Masorti Movement*, RABBINICAL ASSEMBLY, <https://www.rabbinicalassembly.org/about-us/conservative-masorti> [<https://perma.cc/T3TT-6ZXC>].

87. *See Richman, supra* note 3, at 1369.

88. *Id.* at 1350.

restrictive in their rules; restrictions that profoundly impact a congregation's right to practice as it chooses.<sup>89</sup>

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 [Placement 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-RA rabbi without the specific written approval of the [Placement Commission], the congregation may be removed from the Placement List.
- If a congregation engages a non-RA rabbi without the specific written approval of the [Placement Commission], the congregation will lose placement privileges.
- Similar rules apply to rabbinic candidates as well.<sup>90</sup>

The tension with the principles of the First Amendment's Religion Clauses is obvious. For instance, despite Chief Justice Roberts's visceral language about the importance of a community choosing its own minister, the RA has laden that process with restrictions designed precisely to centralize control over choice.<sup>91</sup> That upward channeling of power from the practicing congregation to the cartel is anathema to the tradition of free expression embodied by the Religion Clauses.<sup>92</sup>

As dangerous as a self-regulated cartel of professionals is to competition in any field, religious organizations are under unique threat from that anticompetitive conduct. Religious freedom, manifested by the expression of religious values, is in peril if we fail to enforce the Sherman Act to preserve fair markets for religion.

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89. *Id.* at 1350-53.

90. ELLIOT SALO SCHOENBERG, ALIYAH: THE RABBINIC SEARCH AS AN UPLIFTING RELIGIOUS EXPERIENCE! 9 (2011), <https://www.rabbinicalassembly.org/placement/sitedocs/Aliyah-abridged.pdf> [<https://perma.cc/UEJ5-2U7B>]; see also Richman, *supra* note 3, at 1351 (quoting an earlier version of *Aliyah*).

91. Compare SCHOENBERG, *supra* note 90, at 9, with *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

92. See *Hosanna-Tabor*, 565 U.S. at 196.



Because of the nature of religious leadership and the sincerity of congregants in preserving their traditions, there is a natural danger for market consolidation and exclusionary conduct.<sup>93</sup> That conduct also introduces dynamic costs. For example, a congregation that is not responsive to its constituents, that *cannot* be responsive because of restraints placed on it by a cartel, is destined to fail in the long run.<sup>94</sup> In the short run, the cartel is undeniably infringing on the congregation's ability to exercise free expression.<sup>95</sup> This is nothing short of oppression in contradiction to the spirit of the First Amendment of the Constitution.<sup>96</sup>

Moreover, it is not enough to say, as the RA does, that these cartel restraints are benign or beneficial.<sup>97</sup> As a matter of law, that is irrelevant in the context of a group boycott.<sup>98</sup> As a matter of fact, disallowing particular market choices is by definition a limit on expression.<sup>99</sup> A congregation's autonomy is, as we have seen, central to the vibrancy of religious life in this country.<sup>100</sup> A free market for religious belief, secured by the Sherman Act, preserves religious liberty, pursuant to the rights guaranteed by the First Amendment. Not only then does the First Amendment not preclude enforcement of the Sherman Act, it encourages it.

There is a role for ministerial organizations such as the RA. Developing a certification system can help the traditions to maintain a lineage and authenticity, without imposing a restriction on expression.<sup>101</sup> Nonetheless, it is very different to say that a congregation *should* hire a certain minister because she has been trained well by us and saying that the congregation *must* hire a minister that has been trained by us, as the RA does.<sup>102</sup> In the former case, the congregation still retains its autonomy. That is, the community

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93. See Richman, *supra* note 3, at 1350-53.

94. See *id.* at 1351-53.

95. See *id.*

96. See *Hosanna-Tabor*, 565 U.S. at 196.

97. See SCHOENBERG, *supra* note 90, at 9.

98. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959).

99. See Richman, *supra* note 3, at 1355, 1369.

100. See *Hosanna-Tabor*, 565 U.S. at 196; *supra* Parts I.B-C.

101. See Richman, *supra* note 3, at 1350, 1369-70.

102. See SCHOENBERG, *supra* note 90, at 8-9.

retains its ability to express its religious values and to find a person to lead it—a fundamental constitutional right of the congregation.<sup>103</sup>

### *C. Religious Life in a Free Market*

A competitive marketplace for religion is not just mandated by Constitutional values, it is also the framework that would bring the greatest social benefit. Just as any competitive marketplace generates superior output and quality than one characterized by monopolies and cartels, an open marketplace for religion expands both the availability and quality of religious experience, nurturing the vibrant religious communities that organizations such as the RA ostensibly seek. This Section offers a brief sample of the social science scholarship that examines how alternative market environments shape the health of religious communities. It illustrates that just as a free market of ideas fosters the development of healthy perspectives, market environments for religions are associated with largescale religious participation and expression.

Social scientists studying religions, in both the United States and elsewhere, have concluded that societies in which religions compete with each other foster greater religious participation.<sup>104</sup> In a study of religious life in Sweden, a country with an established religion, researchers found evidence that competition was associated with a more vibrant religious community: “[H]igher degrees of religious pluralism are associated with higher levels of church attendance.”<sup>105</sup> They write that their empirics are in line with market competition theory:

[A]n analysis of the religious market led us to assume that the more competition “religious firms” face, the more likely they would be to adapt their products to the demands of the consumers in order to maintain or increase their market share. We expected that such adaptation to consumer tastes would make

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103. See *Hosanna-Tabor*, 565 U.S. at 196.

104. Eva M. Hamberg & Thorlief Pettersson, *The Religious Market: Denominational Competition and Religious Participation in Contemporary Sweden*, 33 J. SCI. STUDY RELIGION 205, 205, 214 (1994) (comparing the level of religious participation in Sweden with the United States).

105. *Id.* at 206, 212.

religious consumption higher, the more competitive a religious market is ... the results were consistent with our theoretical assumptions.<sup>106</sup>

Congregationalist structures, which like market organizations are decentralized and resist hierarchy, especially thrive in competitive environments.<sup>107</sup> As one economist wrote: “Competition in the religious marketplace results in a congregationalist market structure where each congregation is independently founded and funded by voluntary contributions from its members.”<sup>108</sup>

Scholars of American history and religious sociology have made similar arguments. Sociologists Roger Finke’s and Rodney Stark’s in *The Churching of America* describe the American religious landscape as a religious free market, in which “churches compete for souls.”<sup>109</sup> Professor Rick Phillips summarizes Finke’s and Stark’s hypothesis succinctly: “[W]henver one church enjoys a virtual religious monopoly, rates of participation within the monopoly church are low, because no single organization can meet the diverse religious needs of an entire society.”<sup>110</sup> They thus argue that American religious life enjoys the vibrancy of a free market in large part because the Religion Clauses prohibit state establishment and ensure religious competition.<sup>111</sup> In contrast, Europe’s tradition of state-established denominations secures a monopoly that is unresponsive to consumer preferences.<sup>112</sup> Their argument succinctly connects

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106. *Id.* at 213 (“[E]ven on the nearly monopolistic Swedish religious market, characterized by a state-supported dominant church, competition, to the (limited) extent that it does exist, seems to have the effects we would expect: to provide an incentive for the Church of Sweden to adapt its supply of divine services to the tastes of the consumers.”).

107. Carmel U. Chiswick, *Competition vs. Monopoly in the Religious Marketplace: Judaism in the United States and Israel* 4-5 (IZA Discussion Paper No. 7188, 2013), <http://ftp.iza.org/dp7188.pdf> [<https://perma.cc/K8AA-GUXS>].

108. *Id.*

109. See generally ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA 1776-1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* (1992).

110. Rick Phillips, *Can Rising Rates of Church Participation Be a Consequence of Secularization?*, 65 SOC. RELIGION 139, 144 (2004) (citing FINKE & STARK, *supra* note 109).

111. See FINKE & STARK, *supra* note 109, at 17-21; see also Phillips, *supra* note 110, at 144.

112. See, e.g., generally Hamberg & Pettersson, *supra* note 104 (examining the religious market in Sweden).

the achievements of the Religion Clauses with the policy objectives motivating the Sherman Act.

Although Finke's and Stark's theories have attracted criticism, chiefly for their more doctrinaire elements, critics do not disagree with the role of free religious markets on religious participation.<sup>113</sup> Professors Jonathan P. Hill and Daniel V. A. Olsen, in an empirical assessment of Finke and Stark, support their argument that a free market for religion spurs innovation and inspires participation:

We suspect that when religious competition motivates religious suppliers to engage in religious innovation, it less often involves change among *existing* religious groups more often involves the creation of totally new congregations, new religious groups ... or a major change in the leadership of currently existing congregations.<sup>114</sup>

Scholars of American Judaism, including those who aim to advance a normative agenda to strengthen Jewish religious participation, have reached similar conclusions. Dennis W. Carlton and Avi Weiss—an accomplished antitrust scholar and a renown rabbi, respectively—present a compelling study of the value and effect of competition and education within the Jewish experience.<sup>115</sup> Professors Carlton and Rabbi Weiss note that as a matter of history, Judaism has a long tradition, both in practice and in expression, of encouraging dissent and innovation in the religious marketplace.<sup>116</sup> They identify this embrace of dissent as a cherished value and a sustaining strength of Jewish tradition:

[T]eaching was not the realm of a select few. This failure of any interest group to relegate Torah teaching to itself carried through to Talmudic times and later. While restrictions on general competition arose, Torah teachers typically were free of

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113. See generally Jonathan P. Hill & Daniel V. A. Olson, *Market Share and Religious Competition: Do Small Market Share Congregations and Their Leaders Try Harder?*, 48 J. SCI. STUDY RELIGION 629 (2009).

114. *Id.* at 647.

115. See generally Dennis W. Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival, and Jewish Attitudes Toward Competition in Torah Education*, 30 J. LEGAL STUD. 253 (2001).

116. See *id.* at 260-63, 271-72.

any such restrictions. It is particularly remarkable that the scholars—who were in large part in control of Jewish law—generally chose not to close their profession or enact restrictions on entry but instead chose to keep competition thriving in their profession. As the Talmud recognizes, there are benefits to such competition: “Jealousy among scholars increases wisdom.”<sup>117</sup>

This resistance to hierarchy and conformity is a feature, not a bug, of Jewish tradition, and it reflects the broader findings of social scientists studying religious life elsewhere. Growth in religious participation is associated with a lack of centralized control, dissent, innovation, and competition.<sup>118</sup> If religious leaders want to expand religious participation, they ought to recognize the value of market mechanisms and competition across religious groups.<sup>119</sup> And if they do not recognize the value of competition, the antitrust laws can show them the way.

#### CONCLUSION

The jurisprudential languages of the Sherman Act and the Religion Clauses go hand in hand, and not merely by accident. Both are designed to liberate individual energies and resist entrenched power, and thus both guarantee quintessential market values: personal freedom, individual expression, and subjective choice. The recognition by American law that religious life is subject to market forces does not debase it. To the contrary, it is the free exercise of market-oriented choice that creates a fertile ground for the development of community worship and practice in the United States.<sup>120</sup>

For these reasons, we see constitutional values seeping into Sherman Act cases, and we see Sherman Act principles motivating Religion Clause cases. This interplay reveals the importance of continuing to apply the Sherman Act to combat monopolistic and cartel authority in all facets of life, religious and otherwise.

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117. *Id.* at 272.

118. *See id.* at 260-63, 271-72.

119. *See supra* note 114 and accompanying text.

120. *See supra* Part I.B.