Religion and Race: The Ministerial Exception Reexamined

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RELIGION AND RACE: THE MINISTERIAL EXCEPTION REEXAMINED

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The ministerial exception has, at long last, arrived in the Supreme Court. In Hosanna-Tabor v. EEOC, the Justices will finally consider the controversial bit of doctrine, which shields religious organizations from anti-discrimination suits brought by ministerial employees.\(^1\) In part because the exception guards a highly contested stretch of border between two fundamental constitutional values—equal protection and religious liberty—it has been the subject of significant Circuit discord. While the lower federal courts have recognized and applied some version of the ministerial exception for almost forty years, they have diverged widely on its proper scope and substance.\(^2\) That is, courts have agreed neither on which jobs count as “ministerial,” nor on the kinds of claims from which religious employers are “excepted.”\(^3\) As the other contributors to this colloquy make clear, Hosanna-Tabor seems better positioned to settle the former question than the latter.\(^4\) Nonetheless, I think the case’s appearance on the docket gives us occasion to revisit other controverted aspects of the ministerial exception, and that is my intention here. In what follows, I acknowledge that the ministerial exception serves important constitutional values, but argue that those values must yield to a newer national commitment to end racial discrimination. But I begin with a brief discussion of the ministerial exception and the constitutional principles that it embodies.

I. THE MINISTERIAL EXCEPTION

The ministerial exception emerged from the federal judiciary’s efforts to implement Title VII of the Civil Rights Act in the early 1970s. Congress, it seems, foresaw the potential conflict between anti-discrimination laws and religious liberty, and so wrote an exemption for religious employers into the statute. While the original House bill would not have subjected such employers to Title VII at all, the final Senate version exempted only religious preferentialism related to an employer’s religious mission.\(^5\) Congress revised the law in 1972, however, to permit

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\(^1\) 597 F.3d 769 (6th Cir. 2010), cert. granted 131 S.Ct. 1783 (March 28, 2011).  
\(^2\) The seminal case is McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).  
\(^3\) For an excellent documentation of the divergences, see Christopher Lund, Understanding the Ministerial Exception, ___ N.C. L. REV. ___ (forthcoming 2011).  
\(^4\) The issue in Hosanna-Tabor revolves around whether a “called” teacher at a Lutheran school qualifies as a “minister.” As such, the case seems likely to focus primarily on the so-called “primary duties” test. See Petition for Writ of Certiorari, Hosanna-Tabor, No.10-553, at 10 (Oct. 22, 2010).  
an array of religious groups—including schools and universities—to consider religion when filling a wide variety of positions. Thus, the modern statutory exemption is broad in scope, but relatively shallow in substance: Religious employers may discriminate when hiring for nearly all jobs, but they may do so only on religious grounds—not on the basis of race, gender, or national origin.

The courts quickly concluded, however, that the statutory language did not adequately address the full range of constitutional questions involved. While a narrow exemption in favor of religious preferences might be appropriate for lower-level employees, a venerable body of doctrine seemed to call for greater deference to church autonomy in constitutive decisions about governance and ministering.

And so just two years after the 1972 amendments, in a gender discrimination case, the Fifth Circuit laid out the basic contours of the modern ministerial exception:

We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister, would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment. . . . We therefore hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.

The doctrinal exception, then, is something like a mirror image of the statutory exemption. Rather than broad and shallow, the ministerial exception is narrow and deep: it applies only to a small class of hiring decisions, but it permits almost any kind of discrimination.

There are several excellent justifications for the exception in something like the form that now exists; claims which are perhaps best understood in terms of the particular constitutional language in which they are rooted. For example, there are persuasive historical and ethical arguments—of the kind Rick Garnett and Thomas Berg have made—that arise primarily out of the Free Exercise Clause. There are also compelling structural and prudential claims—what Chris Lund has called the exception’s “relational” and “autonomy” components—based in the Establishment

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6 Senator Sam Ervin famously claimed his namesake amendment was necessary to “take the political hands of Caesar off of the institutions of God.” Id. at 91.
8 See McClure, 460 F.2d at 559-60 (discussing cases).
9 Id. at 560.
10 Hosanna-Tabor v. EEOC, No. 10-553, Brief Amici Curiae of Professor Eugene Volokh, et. al. (June 20, 2011) [hereinafter “Garnett & Berg”].
11 Lund, supra note 3, at ___
Clause. Of course, not all commentators accept these arguments. Some very thoughtful people, including Caroline Mala Corbin in this discussion, have asked tough doctrinal questions about whether the Constitution requires courts to place religious organizations above the law, so to speak, when they hire and fire ministerial employees. I think a quick assessment of these competing positions can help to clarify the important questions the exception raises, and will provide a nice backdrop for my own thoughts about the difficult constitutional relationship between race and religion.

In their amicus brief to the Court, and again in this colloquy, Professors Garnett and Berg make the case that the ministerial exception is a straightforward entailment of our longstanding constitutional commitment to the institutional separation of church and state. Their argument looks to the intellectual and political history of disestablishment in Europe and the colonies, and concludes that the Founders were distinctly aware of the dangers that arise when the state interferes in matters of church governance. Theirs is the history of an idea—the liberty of conscience—that traces its lineage from Thomas Aquinas, to Martin Luther and John Calvin, on to John Locke and the dissenting American Baptists. For the Founders, this idea was almost certainly the intellectual foundation of both the Free Exercise and Establishment Clauses, and institutional entanglement between civil and religious authorities posed one of the greatest practical threats to the abstract ideal. Garnett and Berg go on to argue that these founding principles gave rise to a uniquely American tradition of institutional separation; a constitutional ethos now reflected in a body of doctrine known as the “church autonomy” cases. Ultimately, they make the historical and ethical claim, rooted primarily in the Free Exercise Clause, that we have a fundamental constitutional commitment to shield church governance questions from most kinds of state oversight, and it is this commitment that the ministerial exception embodies.

Professor Lund has argued that there are also important structural and prudential reasons to keep the exception alive and strong. He has identified three

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12 For a complete taxonomy of the modalities of constitutional argument (historical, structural, ethical, etc.) see PHILIP BOBBITT, CONSTITUTIONAL FATE (Oxford Univ. Press, 1982).
14 Garnett & Berg, supra note ___
15 Id.
16 See generally Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. REV 346 (2002). The idea, succinctly put, is that a just government must not require its citizens to choose between their duties to God and their duties to the state—in effect, forcing a choice between prison and eternal damnation.
17 Garnett & Berg, supra note ___
18 Id.
basic justifications for the ministerial exception; what he calls its “relational,” “conscience,” and “autonomy” components.19 While Lund’s “conscience” component relies on some of the historical evidence described above, his “relational” and “autonomy” components consider instead the relationships between constitutional institutions and the practical consequences of constitutional policy decisions.20 His “relational” justification reflects the basic nature of organized religious institutions, which exist only inasmuch as their memberships share a core set of religious beliefs or principles. The moment that a civil authority starts to impose external membership criteria these organizations cease to be “religious,” as the state, rather than a divine, has begun to define the terms of their existence. Structurally, therefore, a constitutional commitment to disestablishment requires a complete separation between church and civil governance, and a strong ministerial exception protects this division. Lund’s “autonomy” component applies these structural lessons to the particularly acute case of ministerial appointments.21 Choices about spiritual leadership are among the most important constitutive decisions a church can make, and Lund identifies three kinds of prudential concerns that arise when the state second-guesses this process.22 These difficulties arise from the potential remedies employment law may impose, which could involve reinstatement of a dismissed minister, institutional restructuring after a class action suit, or sustained state supervision with its concomitant regulatory entanglements.23 Lund rightly argues that, in practice, these remedies would pose a very serious threat to a church’s spiritual mission. In the interest of constitutional policy, then, it makes good sense to shield religious organizations from the supervisory apparatus of antidiscrimination employment law. Combined, Lund’s “relational” and “autonomy” components suggest that sound constitutional structure and prudence require a broad and deferential ministerial exception.

On the other side of the debate, Professor Corbin makes the doctrinal claim that neither religion clause requires the kind of broad constitutional deference the ministerial exception extends to religious organizations.24 As a matter of Free Exercise doctrine, she argues that, after the Court’s decision in Employment Division v. Smith,25 general, neutrally applicable laws—such as Title VII or the ADA—need not provide exemptions when they incidentally burden religious practice.26 And as a matter of Establishment doctrine, if courts utilize the “neutral principles of law”

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19 Lund, supra note ___
20 Id.
21 Id.
22 Id.
23 Id.
24 Corbin, supra note ___.
25 Cite
26 Corbin, supra note ___.

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approach in deciding employment cases, the only institutional entanglements likely to arise will actually boil down to Free Exercise exemption claims—which, again, fail after Smith. That is, while a court must defer to a church’s interpretation of its own doctrine, the Constitution provides no relief when this doctrine runs afoul of a neutral, generally applicable law. From this perspective, the ministerial exception becomes wholly unnecessary because the statutory exemptions provide religious organizations with all the constitutional protection they deserve.

I am generally more sympathetic to Garnett, Berg, and Lund’s arguments than to Corbin’s. The problem with Corbin’s position is that, as a doctrinal claim, it is only as strong as the doctrine on which it relies, and Smith cannot bear the weight she asks of it. First, the case is weak as a matter of precedent. Simply put, Smith was wrong the day it was decided. It provoked intense public outcry at the time and remains very controversial today. Corbin’s arguments notwithstanding, I think it is very likely the Court will read Smith’s holding as narrowly as possible in future decisions, and the opinion itself provides several important caveats.

Second, Congress has undermined the case’s doctrinal value. In response to Smith, Congress passed the Religious Freedom Restoration Act (RFRA), which restored strict scrutiny review of state or federal laws that place substantial burdens on religious practice. The Court struck down RFRA’s application to state laws as beyond Congress authority under Section 5 of the Fourteenth Amendment, but the statute remains constitutional as applied to federal laws. As the Court made clear in Gonzales v. O Centro Espírita Beneficente, “the Federal Government may not, as a statutory matter, substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.” Title VII and the ADA are, of course, federal laws, and so, while Corbin may be correct in asserting that the Constitution does not require courts to recognize a ministerial exception, it remains likely that RFRA does. And with its cornerstone thus weakened, Corbin’s larger doctrinal argument begins to crumble.

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27 *Id.* The “neutral principles” approach, derived from the Court's opinion in *Jones v. Wolf*, asks judges to treat all relevant evidence in a case from a neutral legal perspective, but to defer to church authorities whenever controversies over religious doctrine arise. 443 U.S. 595, 604 (1979).
29 For an excellent discussion of these caveats, including Smith’s explicit preservation of the church autonomy cases, see Lund, *supra* note ___.
33 *Id.* (emphasis supplied) (internal quotations omitted).
34 I realize that some courts, including the Sixth Circuit whence *Hosanna-Tabor* arises, have held that RFRA does not apply in suits between private parties. *General Conf. Corp. of Seventh Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010). This (dubious) reasoning, however, hardly seems apposite in employment discrimination cases, in which the EEOC often sues on behalf of private plaintiffs.
But, despite my general agreement with the ministerial exception’s supporters, I do have serious reservations about its application in the context of racial discrimination claims. There are compelling historical, ethical, and doctrinal reasons to think that racial discrimination presents a special constitutional case; that it in fact invokes constitutional values which supersede the religion clauses. And so, with this generally strong ministerial exception in mind, the next section explores the troubled constitutional confluence of religion and race.

II. RACE, RELIGION, AND CONSTITUTIONAL HIERARCHY

Unspoken racism remained a central part of the new Constitution when the First Congress convened in 1789 to draft a Bill of Rights. Meeting under the auspices of a document that counted “other Persons” at three-fifths their actual number, and which precluded any limit on the “Importation of such Persons” until 1808, Congress began work on a list of rights and privileges reserved to “Free” Americans. In this historical context, one would hardly expect legislators to attempt to balance the newly enumerated liberties against considerations of basic racial equality. And, of course, no such balance was struck in drafting the First Amendment, which, as Hugo Black was fond of reminding us, presents itself in starkly absolute terms. As a result, it is very difficult to argue, as a historical or textual matter, that the Framers or Ratifiers intended to limit the free exercise of religion to racially nondiscriminatory practices. It is equally clear, however, that our Constitution has changed a great deal since 1789. Indeed, the original sin of black slavery very nearly ended the entire American endeavor before it was a hundred years old, and there is no denying that new constitutional values—values forged in the crucibles of war and civil disobedience—now inform and temper our founding principles. In this section, I hope to bring history, ethos, and doctrine together to demonstrate that the most important of these new principles is a virtual ban on racial discrimination—a ban that now trumps even religious liberty.

A. History

Congressional efforts to undermine the Constitution’s invidiously racist features began almost as soon as the Legislature convened. Indeed, on the very day the First Congress began debate on the religion clauses it reaffirmed the Northwest

Indeed, McGill itself explicitly contemplates RFRA’s applicability in such cases. Id. (distinguishing copyright cases from employment cases on this basis).
36 See, e.g., Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (“I read ‘no law ... abridging’ to mean no law abridging.”).
37 For an enlightening account of the “reconstruction” the Bill of Rights underwent following the Civil War, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (Yale, 2000).
Ordinance, first enacted by the Confederation Congress two years earlier. The Ordinance, which defined the relationship between territorial settlers and the federal government, has now achieved canonical stature in constitutional argument, and it served as something of a constitution in itself for those who settled the northwestern lands. Central among the conditions and covenants it established was a promise that the Northwest Territory would remain free soil: “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.” It was this aspiration that spoke to anti-slavery advocates as what Akhil Amar has called “a much purer symbol of what America could and should be—a symbol of the West, a symbol of the future, a symbol of hope, a symbol of free soil, free men, and freedom.” And while efforts to end slavery are not in themselves efforts to end racial distinctions or discrimination, the Northwest Ordinance is certainly historical evidence that, from the earliest days, many Americans believed that political compromises had left something fundamental—a basic equality principle of the highest order—out of the new Constitution.

The national debate over slavery would become only more intense, of course, and there is not space here to rehearse all of the political wrangling of the next half-century. It is worth briefly considering, however, the Supreme Court’s bungled attempt to put an end, once and for all, to that debate. While Chief Justice Roger Taney’s convoluted constitutional syntax itself makes Dred Scott v. Sandford worth reading, what is important here is the explicit link he drew between race, citizenship, and constitutional rights. One can conceivably read the Northwest Ordinance in racially neutral terms—as an attack on slavery of any kind—but it is impossible to miss the constitutional significance that Taney placed on race in Dred Scott. By concluding that the Constitution treated blacks as “so far inferior that they had no rights a white man was bound to respect” he definitively tied the privileges of citizenship to racial identity. No longer was the distinction one between “free” and “unfree” persons; in Dred Scott the once unspoken racism emerged as a bright constitutional line. And if it is the aspirational equality at the heart of the Northwest Ordinance that elevated it into the constitutional canon, it is certainly Taney’s unabashed bigotry that has condemned Dred Scott to the very depths of the anti-canon.

38 Northwest Ordinance, 1 Stat. 50 (1789).
39 For an excellent discussion of the Ordinance’s symbolic importance in our constitutional imaginations, see AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 448-51 (forthcoming) (on file with author).
40 Northwest Ordinance 1 Stat. 50 (1789).
41 AMAR, supra note 37, at 450.
42 Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).
These two historical texts—one canonical, the other anti-canonical—reveal both the centrality of the race question in antebellum constitutionalism and the decisive answer we have now settled upon. Indeed, the first postwar amendments spoke directly to these texts. The Thirteenth Amendment, which abolished “slavery or involuntary servitude,” self-consciously echoes the language of the Northwest Ordinance’s central covenant, thus elevating the territorial aspiration to a fundamental national commitment. And the legislative history of the Fourteenth Amendment plainly reveals an intention to repudiate Dred Scott. Accordingly, the final language flatly rejects Taney’s effort to link citizenship with race, and goes on to guarantee all “persons”—even noncitizens—the “equal protection of the laws.” Reaching backwards in time, then, this new language—won at tremendous cost—reflects a national recognition that a fundamental constitutional value had not made it into the original Bill of Rights. In crafting the Reconstruction amendments, the Republicans intended to codify this recognition by placing basic racial and ethnic equality at the very heart of the reformed American Constitution.

Perhaps most significantly, the Fourteenth Amendment’s fifth section created an entirely new Congressional power to remediate racial discrimination—a potential federal intrusion into private conduct well beyond any imagined in 1789. Congress quickly put this authority to work, passing laws—the Enforcement Acts—that targeted the Ku Klux Klan and other white supremacy groups, which had largely ignored both the Amendment and the earlier Civil Rights Act of 1866. The Republicans well understood that a network of private organizations—many, like the Klan, with direct pretensions to religion—still governed southern culture and life. To this end, the Enforcement Acts directly targeted “unlawful combinations” and “conspiracies” of citizens that might obstruct black access to legal equality. And, even as these Acts proved ineffectual, the Republicans pushed through further legislation aimed at private acts of racial discrimination. The Civil Rights Act of 1875 promised blacks the “full and equal enjoyment” of public accommodations, and established a five hundred dollar fine for those who failed to so provide. These efforts leave little doubt that those who drafted the Fourteenth Amendment believed that the hard won racial equality principle should reach deep into American culture and life; indeed, it should temper and qualify freedoms and associations once thought to be well beyond federal supervision.

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43 See supra note 40 and accompanying text; accord AMAR, supra note 39, at 450.
44 E.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Senator Jacob Howard).
45 U.S. CONST. AMEND. XIV (1868).
46 Id. § 5.
47 16 Stat. 140 (1870); 17 Stat. 13 (1871).
48 17 Stat. 13 (1870).
49 18 Stat. 335 (1875).
The Republicans, of course, miscalculated the constitutional ethos of their time. In fairly short order, Reconstruction fell by the wayside, the Supreme Court eviscerated the Fourteenth Amendment and struck down the Civil Rights Act, and the promise of racial equality withered on the vine. And over the next half century organized religion played a central role in the emergence of an overtly racist society. But just because the Radical Republicans’ Fourteenth Amendment was an idea ahead of its time does not change the original meaning and intention of the Equal Protection Clause. As a historical matter, the Clause was meant to reach into American life and impose new constitutional conditions—racial conditions—on previously private behaviors and decisions, and among its primary targets were religiously affiliated groups that had dominated southern culture both before and after the war. While that intention clearly did not align with the existing ethos, our constitutional values would go through another dramatic recalibration in the years following World War II; shifts which the next section briefly explores.

B. Ethos

In the late 1940s, black soldiers returning from the war against Nazism found themselves thrust back into the racial subordination of Jim Crow and northern sequestration. Their discontent found an outlet in the NAACP, whose legal arm began strategizing, and executing, a coordinated constitutional attack on the institutions of racial discrimination. These efforts came to dramatic fruition in the Supreme Court with Brown v. Board of Education and its progeny, which declared racial segregation illegal in most spheres of American life. In 1955, the Reverend

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50 For an excellent account of the election of 1876, in which Democrats conceded the Presidency to Rutherford B. Hayes in return for the end of Reconstruction, see Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877 (1988).
51 The Slaughter-House Cases, 83 U.S. 36 (1873); The Civil Rights Cases, 109 U.S. 3 (1883).
52 Many scholars have explored the connections between religion and racial discrimination (and violence) in the years following the Civil War. For a particularly thoughtful account, see Edward J. Blum, Reforging the White Republic: Race, Religion, and American Nationalism 1865-1898 (LSU Press, 2005).
53 I recognize that there is a great deal of literature debating whether those who ratified the Fourteenth Amendment intended to reach civil and social rights; and, indeed, there is much controversy about the legality of the ratification process itself. I will say only that the record reveals that the Fourteenth Amendment is almost entirely a product of Republican political engineering, and thus I think it is fair in this case to rely more heavily on “drafters’ intent” than on ideas about public meaning.
Martin Luther King, Jr. emerged as the leader of the Montgomery Bus Boycott, and within a decade a massive civil disobedience movement had engulfed the nation.\footnote{Taylor Branch, Parting The Waters: America in the King Years 1954–63 144-206 (1988).} Out of this movement, with the profound questions it posed for American democracy, came a fundamental evolution in our constitutional ethos. By the time President Richard Nixon reaffirmed and extended the basic tenets of the Voting Rights Act in 1970,\footnote{Richard Nixon, Statement on Signing the Voting Rights Act Amendments of 1970 (June 22, 1970) reprinted in John T. Woolley & Gerhard Peters, The American Presidency Project [online], available at http://www.presidency.ucsb.edu/ws/?pid=2553.} the nation had come to terms with the promise the Radical Republicans had made, but not delivered, in 1868. It took a war, an occupation, and eventually a massive social uprising, but racial equality finally assumed a place at the very center of our constitutional structure.

Bruce Ackerman has famously argued that three “constitutional moments” have dramatically reshaped our constitutional landscape over the last century and a half.\footnote{Bruce Ackerman, 1 We The People: Foundations (1991) [hereinafter Foundations]; Bruce Ackerman, 3 We The People: The Civil Rights Revolution (forthcoming, on file with author) [hereinafter Civil Rts. Revolution].} While Reconstruction is plainly one such moment, Ackerman argues that two other episodes—events not memorialized in new constitutional text—also qualify: the New Deal revolution and the Civil Rights Movement.\footnote{Civil Rts. Revolution, supra note __, at __; Bruce Ackerman, 2 We The People: Transformations 99, 256 (1998).} These periods of punctuated political equilibria allowed us to adopt more highly evolved constitutional principles; they are, in fact, significant constitutional amendments accomplished outside of the Article V process. For Ackerman, this means that Americans have actually lived in four distinct constitutional republics or “regimes”: the Founding regime, the Reconstruction regime, the New Deal regime, and the Civil Rights regime.\footnote{Foundations, supra note __, at 58, 80; Civil Rts. Revolution, supra note __, at ___.} To complicate matters more, each of these regimes incorporates, or synthesizes, certain salient features of its predecessors.\footnote{Civil Rts. Revolution, supra note __, at ___.} For example, the New Deal revolution fundamentally changed our ideas about the role government can and should play in ameliorating class disparities, but left racial injustices largely untouched. The Civil Rights Movement then extended these New Deal principles into the racial sphere.\footnote{Id. In Ackerman’s words, The Civil Rights-New Deal regime integrated the concerns of the 1860s and the 1930s into a whole that was larger than its parts. Although the first Reconstruction was concerned with racial equality, it lacked the administrative machinery to sustain this commitment; though the New Deal did legitimate the activist state, it lacked a broad commitment to racial equality. It remained for Americans of a later generation to construct a New Deal-Civil Rights regime which tried to move beyond}
Ackerman’s ideas are highly sophisticated and rely, to some degree, on each of the modalities of constitutional argument. Fundamentally, however, his claim is about the evolution of our constitutional ethos. It is an effort to explain how our democracy comes to reflect new conceptions of justice without losing sight of the hard won victories of previous generations—all given an anachronistic amendment mechanism that no longer provides a meaningful avenue of constitutional change. A crucial part of this evolutionary process, however, is some codification of the principles that motivate a constitutionally empowered social movement.\textsuperscript{63} In the case of the Civil Rights Movement, Ackerman claims this codification took the form of certain “landmark statutes”: the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act.\textsuperscript{64} He believes that we should now regard these statutes as part of the constitutional canon, at the very least, and perhaps as part of the Constitution itself. Ackerman has summarized the change in ethos this way: “The landmark statutes represent a sustained commitment by the American people to root out the institutionalized humiliation of minorities in crucial spheres of social life, and to transform these sociological realities providing an effective guarantee of equality in each of these spheres.”\textsuperscript{65} In other words, the statutes make good on the Reconstruction promise to aggressively promote racial equality, even at the expense of once jealously guarded private liberties.

Historically, then, the Radical Republicans intended to place significant racial qualifications on many previously sacrosanct rights, but the constitutional culture initially rejected their efforts. After the New Deal, which dramatically changed our conception of government’s role in society, the ethical groundwork was finally laid to accept the Reconstruction challenge. Still, it took a massive civil disobedience movement and intense political struggle for the Civil Rights Movement to codify racial equality as a fundamental constitutional value. By virtue of its historical and ethical pedigrees alone, then, racial equality is surely the hardest won (and most often threatened) of American constitutional principles. It is for these reasons that we defend it most vigilantly. And when the commitment to promote racial equality comes into conflict with other constitutional principles, it is often the other principles that must give way. The next part explores some doctrinal reasons to think that this should be the case when the racial equality principle runs up against religious freedom.

\textsuperscript{63} \textit{Foundations, supra note ___}, at 288.
\textsuperscript{64} \textit{Civil Rts. Revolution, supra note ___}, at ____.
\textsuperscript{65} \textit{Id.}
B. Doctrine

The contributors to this colloquy differ as to which constitutional doctrine should guide our thinking about the ministerial exception. Some believe the “church autonomy” cases are the right place to start, while others claim that Employment Division v. Smith provides the best answers. I certainly agree that all of these cases are relevant—the autonomy cases more so than Smith—but the most relevant doctrine for my purposes emerges from what others may think an improbable source: the Supreme Court’s 1983 decision in Bob Jones University v. United States.66 In that case, the Court confronted a fairly direct clash between religious freedom and racial equality, and in so doing offered some valuable insights into the potential hierarchy of the two principles. And in deciding against the religious institution, the Court covered some of the same historical and ethical ground I have tread above. Thus, I think it is very useful to explore Bob Jones’s lessons with an eye towards the appropriate substance of the ministerial exception.

Section 501(c)(3) of the Internal Revenue Code exempts any organization operated for “religious, charitable ... or educational purposes”; conditions Bob Jones University seems to satisfy twice over.67 Beginning in 1970, however, the Internal Revenue Service decided that it could “no longer justify allowing tax exempt status to private schools which practice racial discrimination.”68 The IRS concluded that the phrase “religious, charitable ... or educational purposes” was actually shorthand for the “basic common law concept of charity”; which does not embrace groups that act “contrary to public policy.”69 Because of the “national policy to discourage racial discrimination in education,” the IRS decided that racially discriminatory organizations were no longer eligible for tax-exempt status.70 Bob Jones University, an eleemosynary institution, interpreted the Bible as forbidding interracial dating or marriage, and therefore expelled students who engaged in, or encouraged, these practices.71 When the University received notice that its tax-exempt status—which it had enjoyed since 1954—was to be revoked on these grounds, it filed suit in federal district court.72

The District Court ruled against the IRS, based in part on the University’s claim that the revocation burdened their exercise of religion and established a governmental preference for churches that promote certain public policies.73 The Fourth Circuit reversed, and in so doing rejected the University’s Free Exercise and

68 Bob Jones Univ., 461 U.S. at 578 (citations omitted).
69 Id. at 579 (citations omitted).
70 Id.
71 Id. at 580-81.
72 Id. at 582.
73 Id.
Establishment Clause claims.\textsuperscript{74} The Circuit Court applied strict scrutiny to the Free Exercise claim, and concluded that the government had a compelling interest in eradicating both public and private racial discrimination.\textsuperscript{75} Even more interesting, the Circuit Court purported to apply the \textit{Lemon} test to the Establishment claim, but actually ended up concluding that “certain governmental interests are so compelling that conflicting religious practices must yield in their favor”—even if this results in government preferentialism.\textsuperscript{76} For the Fourth Circuit, racial discrimination, like polygamy before it, was an evil so profound that it could find no refuge in the religion clauses.\textsuperscript{77}

The Supreme Court agreed with the Circuit Court, reasoning that “[o]n occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct.”\textsuperscript{78} In language worth quoting, the Court offered its reasons for concluding that ending racial discrimination in education was such an interest:

\begin{quote}
[T]he government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.\textsuperscript{79}
\end{quote}

In this conflict between religious freedom and racial discrimination, then, the Court made it quite clear which constitutional value must triumph. Race, given its historical and ethical lineage, is special. Other forms of discrimination—gender, disability, and even sexual orientation—are working their way up the hierarchy; but, for now, race remains special.

There is no denying, of course, that the ministerial exception is not concerned with racial discrimination in education. Moreover, church autonomy in constitutive decisions is certainly a more significant constitutional concern than the comparatively minor burdens the tax code may impose. For these reasons, the Court may well conclude that the lessons of \textit{Bob Jones} are inapposite in this context. Nonetheless, it is also true that nothing in the historical or ethical arguments I have made is specific to racial discrimination in education; indeed, those arguments may actually be more powerful in the employment context. And the extended discussion in \textit{Bob Jones} of our national commitment to end racial discrimination—“[f]ew social

\begin{footnotes}
\item[74] \textit{Bob Jones Univ. v. U.S.}, 639 F.2d 147, 153-55 (4th Cir. 1980)
\item[75] \textit{Id.} at 153.
\item[76] \textit{Id.} at 154.
\item[77] \textit{See Reynolds v. United States}, 98 U.S. 145 (1878) (upholding ban on polygamy).
\item[78] \textit{Bob Jones Univ.}, 461 U.S. at 603.
\item[79] \textit{Id.} at 604.
\end{footnotes}
or political issues in our history have been more vigorously debated and more extensively ventilated”—suggests that it may trump even the constitutional protection of church autonomy. In any case, it gives us good reason to think that, at least in the case of racial discrimination, the reach of the ministerial exception may be limited.

III. Conclusion

The contributors to this colloquy have approached the ministerial exception from a number of angles, but the approach I have taken may be the most idiosyncratic. While I basically agree with those who support a broad and deferential exception on historical and structural grounds, I do not believe that we should allow religious organizations to make employment decisions based on race. Race has a long and controverted constitutional history, and thus racial equality occupies a special place in our democratic traditions. Black slavery brought us to a catastrophic civil war before the nation was a century old, and the post war constitutional amendments sought to permanently end both slavery and racial discrimination. The Fourteenth Amendment, however, was an idea ahead of its time. The federal government simply lacked the administrative apparatus to force race equality on an unwilling constitutional culture. But by the 1950s, the administrative state was well entrenched, and the groundwork was laid for a revolution in our racial ethos. That revolution came in the form of the Civil Rights Movement. After a century and a half of political struggle, civil war, and civil disobedience, racial equality finally assumed its place among the most fundamental of our constitutional values. The Court’s decision in Bob Jones University v. United States is doctrinal evidence that when racial equality comes into direct conflict with religious freedom, it is the latter that must give way. Other forms of employment discrimination are certainly undesirable, but at this moment in our constitutional evolution they cannot trump religious freedom. Racial equality, however, has been the animating principle of a fully consolidated constitutional revolution. It now imposes special constitutional conditions on virtually every sphere of American life—conditions from which even religious organizations are not exempt.

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80 Id. at 595.