UNLV | William S. Boyd SCHOOL OF LAW

Scholarly Commons @ UNLV Law

Scholarly Works | Faculty Scholarship

2011

Religion and Race: The Ministerial Exception Reexamined

Ian C. Bartrum
University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: http://scholars.law.unlv.edu/facpub

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, and the Religion Law Commons

Recommended Citation
Bartrum, Ian C., "Religion and Race: The Ministerial Exception Reexamined" (2011). *Scholarly Works.* Paper 681.
http://scholars.law.unlv.edu/facpub/681

This Article is brought to you by Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.

Copyright 2011 by Northwestern University School of Law
Northwestern University Law Review Colloquy
Vol. 106

RELIGION AND RACE: THE MINISTERIAL EXCEPTION REEXAMINED

Ian Bartrum[*]

The ministerial exception has, at long last, arrived before the Supreme Court. In *Hosanna-Tabor*, the Justices will finally consider the controversial doctrine that shields religious organizations from antidiscrimination suits brought by ministerial employees.[1] In part because the exception guards a highly contested border between two fundamental constitutional values—equal protection and religious liberty—it has been the subject of significant discord among circuit courts. Although 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 this colloquy's other contributors 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 Court's docket gives us occasion to revisit other controverted aspects of the ministerial exception, and that is my intention here.

In this Essay, I acknowledge that the ministerial exception serves important constitutional values, but contend that those values must yield to a newer national commitment to end racial discrimination. I argue in favor of robust doctrinal protections for church autonomy in most ministerial hiring decisions, but because race occupies a special and central place in our modern constitutional consciousness, I conclude that we cannot permit religious organizations to discriminate on that basis. I begin, however, with

---

[*] Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. Thanks to Akhil Amar, Bruce Ackerman, Katie Graham, Kurt Lash, and Chris Lund for thoughtful insights and commentary. Thanks also to the other participants in this discussion, and especially *Colloquy* editors, for their guidance.

[1] 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011) (link).

[2] The seminal case is *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (link).

[3] *Compare* Clapper v. Chesapeake Conference of Seventh-Day Adventists, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (concluding that parochial school teachers qualify as ministers), *with* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993) (concluding that such teachers are not ministers) (link). For an excellent documentation of further divergences, see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV 101 (forthcoming 2011) (link).

[4] The issue in *Hosanna-Tabor* revolves around whether a "called" teacher at a Lutheran school qualifies as a "minister." As such, the case will likely focus primarily on the so-called "primary duties" test. *See* Petition for Writ of Certiorari at 8–11, *Hosanna-Tabor*, No.10-553 (Oct. 22, 2010) (link).

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 potential conflict between antidiscrimination laws and religious liberty, and thus 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] In 1972, Congress revised the law to permit an array of religious groups—including schools and universities—to consider religion when filling a wide variety of positions.[6] 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.[7]

Courts quickly concluded, however, that the statutory language did not adequately address the full range of constitutional questions involved. Although a narrow exemption in favor of religious preferences might be appropriate for lower-level employees, a venerable line of Supreme Court decisions seemed to call for greater deference to church autonomy in constitutive decisions about governance and ministering.[8] Just two years after the 1972 amendments, the Fifth Circuit laid out the basic contours of the modern ministerial exception in a gender discrimination case:

> 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.[9]

---

[5] Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 90–91 (2002).

[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 (quoting King's Garden, Inc. v. FCC, 498 F.2d 51, 55 n.6 (D.C. Cir. 1964)).

[7] Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2006) (link).

[8] *See* McClure v. Salvation Army, 460 F.2d 553, 559–60 (5th Cir. 1972) (discussing cases).

[9] *Id.* at 560–61.

The doctrinal exception, then, is something like the obverse of the statutory exemption. Rather than broad and shallow, the ministerial exception is narrow and deep: it applies to a smaller class of hiring decisions, but it permits almost any kind of discrimination—including acts of racial discrimination we would find constitutionally abhorrent in almost any other context.

There are, however, several excellent justifications for the exception in something like the form in which it now exists. These arguments 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 make[10]—that arise primarily out of the Free Exercise Clause. There are also compelling structural and prudential claims—what Chris Lund calls the exception's "relational" and "autonomy" components[11]—based in the Establishment Clause.[12] 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.[13] I think a quick assessment of these competing positions can help clarify important questions the exception raises, and it 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.[14] Their argument looks to the intellectual and political history of disestablishment in Europe and the colonies, and they conclude that the Founders were distinctly aware of the dangers that arise when the state interferes in matters of church governance.[15] Theirs is the history of an idea—liberty of conscience—that

[10] Brief Amici Curiae of Professor Eugene Volokh et al. in Support of Petitioner at 6, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 2470847 [hereinafter "Garnett & Berg"] (link).

[11] Lund, *supra* note 3, at 104–05.

[12] For a complete taxonomy of the modalities of constitutional argument (historical, structural, ethical, etc.), see generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

[13] Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 106 NW. U. L. REV. COLLOQUY 96 (2011) [hereinafter Corbin, *Irony*] (link); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007) (link).

[14] *See* Garnett & Berg, *supra* note 10, at 3.

[15] *See id*.

traces its lineage from Thomas Aquinas, to Martin Luther and John Calvin, on to John Locke and the dissenting American Baptists.[16] 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.[17] 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.[18] 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 argues that there are also important structural and prudential reasons to keep the exception alive and strong. He identifies three 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.[21] 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.[22] Lund's "autonomy" component applies these structural lessons to the particularly acute case of ministerial appointments.[23] Choices about spiritual leadership are among the most important constitutive decisions a church can make, and Lund identifies four kinds of prudential concerns that

---

[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. *Id.* at 350−52.

[17] *See* Garnett & Berg, *supra* note 10, at 5−6.

[18] *See id.* at 7−8.

[19] Lund, *supra* note 3, at 104–05.

[20] *Id.*

[21] *Id.* at 121−22.

[22] *See id.* at 125−27.

[23] *Id.* at 131–34.

arise when the state second-guesses their choices.[24] These difficulties arise from the array of 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.[25] 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 employment antidiscrimination laws. 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* of the two religion clauses requires the kind of broad constitutional deference the ministerial exception extends to religious organizations.[26] As a matter of Free Exercise Clause doctrine, she argues that, after the Court's decision in *Employment Division v. Smith*,[27] neutral and generally applicable laws—such as Title VII or the Americans with Disabilities Act (ADA)—need not provide exemptions when they incidentally burden religious practice.[28] As a matter of Establishment Clause doctrine, if courts use the "neutral principles of law" approach in deciding employment cases, the only institutional entanglements likely to arise will actually boil down to Free Exercise Clause exemption claims, which also fail after *Smith*.[29] 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 and 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.[30] Corbin's arguments notwithstanding, I think the Court will likely

---

[24] *Id.* at 134.

[25] *Id.* at 135–46.

[26] Corbin, *Irony*, *supra* note 13, at 98.

[27] 494 U.S. 872 (1990) (link).

[28] Corbin, *Irony*, *supra* note 13, at 104–05.

[29] *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) (link).

[30] For a discussion of the reaction to *Smith*, see Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993) (link).

read *Smith*'s holding as narrowly as possible in future decisions, and the opinion itself provides several important caveats.[31] 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 as the standard of review for state or federal laws that place substantial burdens on religious practice.[32] The Court struck down RFRA's application to state laws as beyond Congress's authority under § 5 of the Fourteenth Amendment,[33] but the statute remains constitutional as applied to federal laws.[34] As the Court made clear in *Gonzales v. O Centro Espirita Beneficente*: "[T]he *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."[35] Title VII and the ADA are, of course, federal laws, which means that even if Corbin is correct in asserting that the Constitution does not require courts to recognize a ministerial exception, it remains likely that RFRA does.[36] Thus, with its cornerstone weakened, Corbin's larger doctrinal argument begins to crumble.

I still harbor serious reservations, however, about the ministerial exception's application in the context of racial discrimination claims despite my general agreement with the exception's supporters. 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 that supersede the religion clauses. So, with this generally strong ministerial exception in mind, Part II 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 the Bill of Rights. Meeting under the auspices of a document that counted "other Persons" at three-fifths their actual number and precluded any limit on the "Importation of

[31] For an excellent discussion of these caveats, including *Smith*'s explicit preservation of the church autonomy cases, see Lund, *supra* note 3, at 153–55.

[32] 42 U.S.C. § 2000bb-1 (2006) (link).

[33] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (link).

[34] *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) (link).

[35] *Id.* (emphasis added) (internal quotations omitted).

[36] I realize that some courts, including in the Sixth Circuit whence *Hosanna-Tabor* arises, have held that the RFRA does not apply in suits between private parties. Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 411 (6th Cir. 2010) (link). This dubious reasoning, however, hardly seems apposite in employment discrimination cases, in which the EEOC often sues on behalf of private plaintiffs. Indeed, *McGill* itself explicitly contemplates RFRA's applicability in such cases. *Id.* (distinguishing copyright cases from employment cases on this basis). It is true, of course, that RFRA does not affect *Smith*'s application to state nondiscrimination laws, and Corbin's argument has correspondingly greater bite in that context.

such Persons" until 1808, Congress began working on a list of rights and privileges reserved to "Free" Americans.[37] In this historical context, one would hardly expect legislators to attempt to balance the newly enumerated liberties against considerations of basic racial equality. 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.[38] 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 one 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.[39] In this Part, 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 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 Ordinance, first enacted by the Confederation Congress two years earlier.[40] The Ordinance, which defined the relationship between territorial settlers and the federal government, has now achieved canonical stature in constitutional argument, and served as something of a constitution in itself for those who settled the northwestern lands.[41] 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."[42] This aspiration spoke to antislavery advocates, in the words of Akhil Amar, as "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

[37] U.S. CONST. art. I. § 2, cl. 3; § 9, cl. 1 (link). The vast majority of "other" Americans were, of course, of African descent.

[38] *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*.") (link).

[39] 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 (1998).

[40] Act of Aug. 7, 1789, 1 Stat. 50 (link).

[41] 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 2012) (on file with author).

[42] 1 Stat. 53 (quoting the Northwest Ordinance of 1787 art. VI) (link).

men, and freedom."[43] 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 became only more intense, of course, and there is not enough 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. Although Chief Justice Roger Taney's convoluted constitutional syntax itself makes *Dred Scott v. Sandford* worth reading, the decision is important here because Taney drew explicit links 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.[44] No longer was the distinction one between "free" and "unfree" persons; in *Dred Scott*, once-unspoken racism emerged as a bright constitutional line. If the aspirational equality at the heart of the Northwest Ordinance elevated it into the constitutional canon, then Taney's unabashed bigotry has certainly condemned *Dred Scott* to the very depths of the anticanon.

These two historical texts—one canonical, the other anticanonical—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.[45] Moreover, the legislative history of the Fourteenth Amendment plainly reveals an intention to repudiate *Dred Scott*.[46] Accordingly, the Amendment's final language flatly rejects Taney's effort to link citizenship with race, and it goes on to guarantee all "persons"—even noncitizens—the "equal protection of the laws."[47] Reaching backwards in time, this new language, won at tremendous cost, reflects national recognition that a fundamental constitutional value had not made it into the original Bill of Rights. In crafting the Reconstruction amendments,

---

[43] AMAR, *supra* note 41, at 450.

[44] Dred Scott v. Sandford, 60 U.S. 393, 407 (1856) (link).

[45] U.S. CONST. amend. XIII; *supra* note 42 and accompanying text; *accord* AMAR, *supra* note 41, at 450.

[46] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Senator Jacob Howard).

[47] U.S. CONST. amend. XIV, § 1.

the Republicans intended to codify this recognition by placing basic racial and ethnic equality at the very heart of the reformed Constitution.

Indeed, the determination to root out racial discrimination went well beyond the simple promise of equal protection of the laws, and included efforts to weaken or destroy social institutions that perpetuated white supremacy in the South. The Fourteenth Amendment's Privileges or Immunities Clause took aim at a host of slavery codes that tightly controlled the exercise of religion among blacks.[48] Aware that much religious teaching denounced slavery as immoral, and fearful that religious meetings could become engines of slave revolt, many southern states had enacted laws to closely monitor religious exercise.[49] And, beyond suppressing religiously inspired resistance, the slave codes actively employed religion to help enforce, if not justify, the worst kinds of racial discrimination.[50] Kurt Lash has pointed out that, "[e]ven when a religious gathering received the state's imprimatur, the content of the sermon was dictated by proslavery Christian ideology with the message invariably focused on the biblical admonition that slaves 'obey their masters.'"[51] Writing before the Civil War, abolitionist William Goodell observed that slaveholders often utilized religion as a tool of spiritual subjugation: "The claim of chattlehood extends to the soul as well as to the body, for the body cannot be otherwise held and controlled. There is no other religious despotism on the face of the earth so absolute, so irresponsible, so soul-crushing as this."[52]

With these practices in mind, members of the Thirty-Ninth Congress repeatedly pointed to the abuse—indeed, the "debauch[ment]"—of religion to racist ends as among the South's great offenses against slaves' independent and equal humanity.[53] Thus, many of the Fourteenth Amendment's drafters intended to include not just free exercise, but also

---

[48] *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1131–37 (1994) [hereinafter Lash, *Exercise*]; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L. J. 1085, 1142–45 (1995) [hereinafter Lash, *Establishment*].

[49] *See, e.g.*, Lash, *Establishment*, *supra* note 48, at 1137 n. 234 (citing an Alabama law that mandated the presence of "five respectable slave-holders" at any black religious meeting).

[50] *See* Lash, *Exercise*, *supra* note 48, at 1135.

[51] *Id.*

[52] WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 254 (Negro Univs. Press 1968) (1853) (quoted in Lash, *Establishment*, *supra* note 48, at 1137).

[53] *See* Lash, *Establishment*, *supra* note 48, at 1142–43 (collecting Congressional commentary). The quoted language is taken from Ohio Representative James Ashley's speech to the House in support of the Thirteenth Amendment: "[Slave power] has silenced every free pulpit within its control, and *debauched thousands which ought to have been independent*." CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865) (emphasis added).

freedom from oppressive and discriminatory religious establishments, among the privileges and immunities guaranteed to all American citizens.[54]

Additionally, § 5 of the Fourteenth Amendment created an entirely new congressional power to remediate racial discrimination—a federal intrusion into private conduct well beyond any imagined in 1789.[55] Congress quickly put this authority to work when it passed the Enforcement Acts aimed at the Ku Klux Klan and other white supremacy groups, which had largely ignored both the Amendment and the earlier Civil Rights Act of 1866.[56] 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.[57] 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 "full and equal enjoyment" of public accommodations, and it established a five hundred dollar fine for those who failed to so provide.[58] These efforts leave little doubt that the Fourteenth Amendment's drafters believed that hard-won principles of racial equality 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.

The Republicans, of course, miscalculated the constitutional ethos of their time. In fairly short order, Reconstruction fell by the wayside[59] and the Supreme Court eviscerated the Fourteenth Amendment and struck down the Civil Rights Act,[60] withering the promise of racial equality on the vine. And over the next half century, organized religion played a central role in the emergence of an overtly racist society.[61] However, just because the Fourteenth Amendment was an idea ahead of its time does not change the

---

[54] *See* Lash, *Establishment*, *supra* note 48, at 1142–45. This same sentiment might undercut a ministerial exception that protects acts of racial discrimination, inasmuch as such an exemption represents some official sanction of discriminatory religious practices.

[55] U.S. CONST. amend. XIV, § 5.

[56] Act of May 31, 1870, 16 Stat. 140; 1871 Enforcement Act, 17 Stat. 13. Indeed, the 1871 Act was known colloquially as the "Ku Klux Klan Act" because it directly targeted organized racial intimidation and violence in the South. Rebecca E. Zietlow, *Free At Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 284–85 (2010) (link).

[57] 17 Stat. at 14.

[58] 18 Stat. 335, 336 (1875).

[59] 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, at 564–82 (1988).

[60] Civil Rights Cases, 109 U.S. 3 (1883) (link); Slaughter-House Cases, 83 U.S. 36 (1873) (link).

[61] 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 (2005).

original meaning and intention of the Equal Protection Clause. As a historical matter, Republican authors of the Clause meant to reach into American life and impose new constitutional conditions—racial conditions—on previously private behaviors and decisions. Among its targets were Southern perversions of religion and religious practice and religiously affiliated groups that helped facilitate racial oppression before and after the war.[62] Although 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 Part 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 executing a coordinated constitutional attack on the institutions of racial discrimination.[63] 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.[64] In 1955, the Reverend Martin Luther King, Jr. emerged as the leader of the Montgomery Bus Boycott, and within a decade, a massive civil disobedience movement engulfed the nation.[65] This movement posed profound questions for American democracy and eventually precipitated 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,[66] the nation had come to terms with the promise the Radical Republicans had originally made, but not delivered, in 1868. It took a war, an occupation, and eventually a massive social uprising, but

---

[62] 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. 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.

[63] *See, e.g.*, Henderson v. United States, 339 U.S. 816, 818 (1950) (ending racial discrimination under the Interstate Commerce Act) (link); Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948) (invalidating racial property covenants) (link).

[64] 347 U.S. 483, 493 (1954) (link). For *Brown*'s progeny, see, for example, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (courtrooms) (link); Turner v. City of Memphis, 369 U.S. 350, 353 (1962) (per curiam) (public restaurants) (link); Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956) (per curiam) (municipal buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955), *vac'g* 223 F.2d 93 (5th Cir. 1955) (per curiam) (municipal golf courses); Baltimore City v. Dawson, 350 U.S. 877 (1955), *aff'g* 220 F.2d 386 (4th Cir. 1955) (per curiam) (public beaches).

[65] *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 143–205 (1988).

[66] Richard Nixon, *Statement on Signing the Voting Rights Act Amendments of 1970* (June 22, 1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2553 (link).

racial equality finally assumed a place at the very center of our constitutional structure.[67]

Bruce Ackerman famously argues that three "constitutional moments" dramatically reshaped our constitutional landscape over the last century and a half.[68] While Reconstruction is plainly one such moment, Ackerman argues that two other events that were not memorialized in new constitutional text also qualify: the New Deal revolution and the civil rights movement.[69] These periods of dramatic political upheaval and mobilization allowed us to adopt more highly evolved constitutional principles. They are, in effect, 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.[70] To complicate matters more, each of these regimes incorporates, or synthesizes, certain salient features of its predecessors.[71] 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.[72]

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 for constitutional change. A crucial part of this evolutionary process, however, is *some* codification of the principles that motivate a constitutionally empowered social movement.[73] 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.[74] 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

---

[67] In truth, probably only the most radical of the 1868 Republicans envisioned the kinds of racial equality in the social sphere that we now associate with the Civil Rights Movement.

[68] 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 REVOLUTION].

[69] REVOLUTION, *supra* note 68; BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 99 (1998) [hereinafter TRANSFORMATIONS].

[70] *See* FOUNDATIONS, *supra* note 68, at 58, 80; REVOLUTION, *supra* note 68.

[71] REVOLUTION, *supra* note 68.

[72] *Id.*

[73] *See* FOUNDATIONS, *supra* note 68, at 288.

[74] REVOLUTION, *supra* note 68.

summarizes 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."[75] In other words, the statutes make good on the Reconstruction-era 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 enlarged federal administrative machinery and fundamentally changed our conception of government's role in society, the ethical groundwork was finally laid to accept the Reconstruction challenge. Still, it took massive civil disobedience 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, racial equality is surely the hardest-won (and most often threatened) American constitutional principle. It is for these reasons that we defend it most vigilantly. 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 following Part explores some doctrinal reasons to think that this should be the case when the racial equality principle runs up against religious freedom.

C. 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*.[76] In that case, the Court confronted a direct clash between religious freedom and racial equality, and in so doing, offered some valuable insights into the potential hierarchy of the two principles. In deciding against the religious institution, the Court covered some of the same historical and ethical ground I discussed above. The Court's decision is thus a doctrinal recognition of our evolving ethical commitment to racial equality, a commitment that now places substantive constraints on existing doctrines with which it may conflict. In this way, *Bob Jones* manifests precisely the kind of intergenerational synthesis—the blending of constitutional

[75] *Id.*

[76] 461 U.S. 574 (1983).

regimes—that Ackerman describes. For these reasons, I think it is very useful to explore *Bob Jones*'s lessons with an eye towards the appropriate substance of the ministerial exception.

The case arose out of a dispute over Bob Jones University's tax status. Section 501(c)(3) of the Internal Revenue Code exempts any organization operated for "religious, charitable . . . or educational purposes"—conditions the University seems to satisfy twice over.[77] Beginning in 1970, however, the Internal Revenue Service (the IRS) decided that it could "no longer legally justify allowing tax exempt status . . . to private schools which practice racial discrimination."[78] 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."[79] 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.[80] The University, an eleemosynary institution, interpreted the Bible as forbidding interracial dating or marriage and therefore expelled students who engaged in or encouraged these practices.[81] When the University received notice that the IRS would revoke its tax-exempt status, which it had enjoyed since 1954, it filed suit in federal district court.[82]

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.[83] The Fourth Circuit reversed, and in so doing, rejected the University's Free Exercise and Establishment Clause claims.[84] The circuit court applied strict scrutiny to the Free Exercise Clause claim and concluded that the government had a compelling interest to eradicate both public and private racial discrimination.[85] Even more interesting, the circuit court purported to apply the *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.[86] For the Fourth Circuit,

---

[77] I.R.C. § 501(c)(3) (2006).

[78] *Bob Jones Univ.*, 461 U.S. at 578.

[79] *Id.* at 579.

[80] *Id.*

[81] *Id.* at 580–81.

[82] *Id.* at 582.

[83] *Id.*

[84] Bob Jones Univ. v. United States, 639 F.2d 147, 153–55 (4th Cir. 1980) (link).

[85] *Id.* at 153.

[86] *Id.* at 154. The *Lemon* test, derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (link), consists of three prongs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not

racial discrimination, like polygamy before it, was an evil so profound that it could find no refuge in the religion clauses.[87]

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."[88] In language worth quoting, the Court offered its reasons for concluding that ending racial discrimination in education was such an interest: "[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 constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[89] 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 religious and 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 *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. The extended discussion in *Bob Jones* regarding our national commitment to end racial discrimination—"[f]ew social 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.[90] 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.

In truth, permitting the state to supervise even this limited class of ministerial hiring decisions opens the door to some of the compelling objections that others in this colloquy have raised. In particular, any kind of state oversight of ministerial hiring seems to compromise the important interests Chris Lund identifies as within the ministerial exception's

---

foster an excessive government entanglement with religion." *Id.* at 612–13 (internal quotations and citation omitted).

[87] *See* Reynolds v. United States, 98 U.S. 145, 164–166 (1878) (upholding a ban on polygamy) (link).

[88] *Bob Jones Univ.*, 461 U.S. at 603.

[89] *Id.* at 604 (footnote omitted).

[90] *Id.* at 595.

"structural" and "autonomy" components.[91] If courts are to enforce Title VII's nondiscrimination provisions against religious institutions they must necessarily impose some secular criteria, even on constitutive kinds of hiring decisions. Likewise, court-supervised remedies will almost certainly result in the kinds of administrative entanglements the *Lemon* test seems to preclude. Nonetheless, I suggest that these encroachments on religious freedom are necessary if we hope to uphold our newer and overriding national commitment to end racial discrimination. In our modern hierarchy of constitutional rights, racial equality simply ranks above religious liberty—and the doctrinal protections afforded religious organizations under the ministerial exception should reflect this reality.

CONCLUSION

This colloquy's contributors approach the ministerial exception from a number of angles, but my approach may be the most idiosyncratic. While I tend to 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 racial equality thus occupies a special place among our democratic traditions. Black slavery brought us to a catastrophic civil war less than a century after the founding of our nation, 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* 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.

[91] *See supra* notes 19–25 and accompanying text.