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Equality in Sheep's Clothing: The Implications of Anti-Discrimination Norms for Religious Autonomy

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I. Introduction

A. *The Freedom-Equality Dialectic*

The most significant dialectic in law and religion jurisprudence over the past fifty years has been between freedom and equality.¹ This struggle has played out in a number of contexts and in a number of legal jurisdictions. This paper will focus on three snapshots — an employment discrimination case from Ontario, Canada;² a pair of German church autonomy cases recently decided by the European Court of Human Rights;³ and the controversy over Catholic adoption services in the State of Massachusetts, and elsewhere in the United States, as well as in the United Kingdom.⁴

Many other examples could be cited, but these comparative illustrations highlight some general recurring issues that arise when religious freedom, on the one hand, and equality/nondiscrimination norms, on the other hand, come into tension with each other. Conflicts between religious freedom and equality seem destined to be a significant, frequent, and controversial feature of contemporary political and legal life, especially with the ascendancy of gay rights claims.⁵ The comparative perspective helps us recognize patterns and trends that might otherwise be harder to see, patterns and trends that are, at least to my mind, quite troubling. I will suggest that in each of these situations equality has been privileged over freedom in systematic, structural ways that bode ill for religious freedom. I will offer a series of suggestions about how the law can do a better job of vindicating the values of both equality and freedom.

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1. See generally Brett G. Scharffs, *Protecting Religious Freedom: Two Counterintuitive Dialectics in U.S. Free Exercise Jurisprudence*, in FREEDOM OF RELIGION UNDER BILLS OF RIGHTS (University of Adelaide Press 2012, page 285) available at <http://iclrs.org/docs/BGS.UsDialectics.2009.08.08.pdf> (for my more detailed description of the freedom-equality dialectic); see also W. Cole Durham, Jr., & Brett G. Scharffs, *The State and Religious Communities in the United States: The Tension Between Freedom and Equality*, in CHURCH AND STATE: TOWARDS PROTECTION FOR FREEDOM OF RELIGION, PROCEEDINGS OF INTERNATIONAL CONFERENCE ON COMPARATIVE CONSTITUTIONAL LAW 362-406 (The Japanese Ass'n of Comparative Constitutional Law ed., 2006).
 2. Ontario Human Rights Comm'n v. Christian Horizons, 2010 ONSC 2105 (Can. 2010) (recent Canadian case from the Ontario Divisional Court, which focused on whether the religious qualifications imposed by Christian Horizons and agreed to by the plaintiff were objectively a bona fide occupational qualification, held that a religiously affiliated organization that ministers to the developmentally disabled violated a lesbian's rights when it fired her for violating the terms of her employment agreement which forbade adultery and homosexual relationships; See *infra* section II).
 3. Obst v. Germany, App. No. 4205/03, (Eur. Ct. H.R., 2010); Schuth v. Germany, App. No. 1620/03, (Eur. Ct. H.R., 2010) (decided by the European Court of Human Rights, the preceding two cases considered whether Germany had violated the rights of respect for family life as guaranteed by Article 8 of the European Convention on Human Rights, when churches were allowed to fire employees who had committed adultery. In an interesting split decision, the same panel of the European Court held that the rights of a church organist who was fired on account of adultery had been violated, while the rights of an employee who was responsible for church public affairs had not been violated); see *infra* § III.
 4. See *infra*, § IV (pertaining to Catholic adoption agencies unsuccessfully seeking exemption from same-sex couple adoption discrimination laws).
 5. See, e.g., Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW J. L & SOC. POL'Y 307 (2010) (describing tensions between liberty and equality in contests between religious freedom and gay marriage).

1. The Freedom-Equality Dialectic in U.S. First Amendment Religion Jurisprudence

In the United States, the struggle for preeminence between freedom and equality in the field of law and religion is evident in both Establishment Clause and Free Exercise Clause jurisprudence.

a. The Establishment Clause

Beginning in the 1970s, Establishment Clause case law was dominated for several decades by the *Lemon* test, the interpretation of which usually hinged upon whether there was an excessive entanglement of religion and the state.⁶ Entanglement is at root an enquiry about institutional autonomy and freedom — freedom of the state from undue interference by and involvement with religion; and freedom of religion from undue interference by and involvement with the state. The dominant metaphor of the time period was Jefferson's wall of separation,⁷ a jurisdictional image that has as its underlying concern the protection of the religious sphere from the secular sphere, and vice versa.⁸ In the past twenty years, the idea of

6. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971):

([E]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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 foster 'an excessive government entanglement with religion.);

see also *Wolman v. Walter*, 433 U.S. 229 (1977) (ruling that reimbursing costs of teacher-led field trips at religious schools violates the Establishment Clause); *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding that loaning instructional equipment and materials to sectarian schools and allowing auxiliary services to be provided on school premises violates the Establishment Clause); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding grants for building maintenance and repair and tax credits to parents to reimburse tuition costs at religious schools violated the Establishment Clause); *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973) (holding reimbursing religious schools for costs of administering and recording state-required examinations violates the Establishment Clause); *Tilton v. Richardson*, 403 U.S. 672 (1971) (prohibiting government grants to religious colleges to build or repair buildings without receiving a permanent pledge that the building would not be used for religious purposes).

7. Letter from Thomas Jefferson to the Danbury Baptists, (on file with the Library of Congress), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>. For examples of court decisions that cite Jefferson's "wall of separation" language, see *Marsh v. Chambers*, 463 U.S. 783, 802 (1983) (addressing a state's practice of opening legislative sessions with a prayer); *Larkin v. Grendel's Den*, 459 U.S. 116, 123 (1982) (addressing a church's influence in a city's liquor licensing process); *McDaniel v. Paty*, 435 U.S. 618, 630 (1978) (addressing a state law that disqualified "priests" and "ministers" from public office); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (addressing a state plan to provide private schools with assistance); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 761 (1973) (addressing a state program to provide financial aid to students at private schools).

8. *See* *Everson v. Bd. Of Educ.*, 330 U.S. 1, 15-16 (1947). The court stated:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion...Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State;

the wall of separation has increasingly come under assault, and Establishment Clause jurisprudence has shifted to focus more on concepts like endorsement,⁹ neutrality,¹⁰ and equal access;¹¹ ideas that all have equality rather than freedom as their preeminent underlying concern.

b. The Free Exercise Clause

Free Exercise jurisprudence has followed a similar trajectory. In the period following World War II, Free Exercise case law centered upon whether burdening religious exercise was justified by a compelling state interest and whether limitations on religious freedom represented the least restrictive means of accomplishing the state's objective.¹² The

see also id. at 26-27; *see also id.* at 516-17 (“[T]he religious freedom Amendment to our Constitution...was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life...”).

9. *See Lynch v. Donnelly*, 465 U.S. 668, 687-688 (1984):

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways...The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 667-8; *see also* *McCreary County v. ACLU*, 545 U.S. 844 (2005) (presenting O'Connor's concurrence and Scalia's dissent which take opposing views about whether an outdoor display of the Ten Commandments constitutes an endorsement of religion); *see* *County of Allegheny v. ACLU*, 492 U.S. 573, 614-15 (1989):

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.

10. *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that a law providing materials and equipment to both public and private schools was not a violation of the Establishment Clause because, in part, the law determined eligibility in a neutral fashion); *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a school district's program of sending public school teachers into parochial schools to provide remedial assistance to disadvantaged children did not violate the Establishment Clause because the decision to send teachers was made on a neutral basis and in accordance with acceptable safeguards).
11. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (holding that it was not a violation of the Establishment Clause to permit a student club focused on religious activities to use school facilities after-hours and with parental consent for the students involved); *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995) (holding that a university could not withhold payments for printing expenses for an approved student journal solely because the journal contained editorial writing that espoused a religious viewpoint); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993) (holding that a school district could not exclude a speaker from using campus facilities after hours who is speaking on an otherwise appropriate topic solely because of his opinion on that subject); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (holding that a school's refusal to allow students to meet on campus for Bible study and prayer was a violation of the Equal Access Act); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a university's policy of excluding religious groups from campus facilities was a violation of the First Amendment because it prevented them from enjoying equal access to the public forum the facilities provided).
12. *See Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a state cannot deny unemployment benefits to a worker who was fired for refusing, in accordance with her religious beliefs, to work on

presumption was in favor of religious freedom. When the state burdened religious exercise, it had the onus of proving that such burdens were justified by weighty, or compelling, state interests, as well as the burden of proving that there were no less restrictive means of protecting those state interests.

Free exercise jurisprudence over the past twenty years has seen a similar shift away from freedom towards equality, most notably in *Employment Division v. Smith*, where the Supreme Court held that state interferences with religious interests are permissible as long as they are general and neutral.¹³ Generality and neutrality are proxies for equality. With this shift in focus, the Free Exercise clause has been reinterpreted to be more concerned with equality than freedom.¹⁴

Interpreting the Establishment Clause in terms of equality seems at least a plausibly defensible construction of what the Establishment Clause was designed to accomplish.¹⁵ Interpreting the Free Exercise clause as an equality norm is much more problematic, since the Free Exercise clause seems to announce on its face that it is concerned with protecting religious *freedom* and not just equality.¹⁶

B. The Civil Rights Landscape

This shift from a freedom paradigm to an equality paradigm has taken place over the past fifty years against a background of significant advances in civil rights. The most important civil rights movements during the past half-century have involved race and gender.¹⁷ Both of

Saturdays, and noting that a mere showing of a rational relationship to a colorable state interest was insufficient); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that only state interests of the highest order are sufficient to overcome legitimate free exercise claims).

13. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (regarding peyote, the court held that, "The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'").
14. See *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775 (2005) (holding that a law prohibiting daycare centers with more than twelve children was a neutral policy of general applicability that did not violate the Free Exercise Clause); *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d 144 (2002) (holding that an otherwise neutral and generally applicable law was a violation of the Establishment Clause when the application was not neutral); *Miller v. Reed*, 176 F.3d 1202 (1999) (a law requiring applicants for drivers' licenses to provide a social security number is a valid and neutral requirement that religious conviction cannot overcome); *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (1990) (holding that the law in question did not violate the Establishment Clause because it was a valid, neutral regulation of general applicability).
15. See Daniel Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2004) (discussing the central role of equality under the Establishment Clause); Carl Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581 (discussing the Supreme Court's shift from a separation approach to an equality-based approach); Brett Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1295-97 (2004) (discussing equality and the Establishment Clause in the context of access to public school facilities).
16. U.S. CONST. AMEND. I.
17. See, e.g., Bill Flax, *The Civil Rights Act's Main Beneficiary Has Been Washington D.C.*, FORBES, February 14, 2012 available at <http://www.forbes.com/sites/billflax/2012/02/14/the-civil-rights-acts-main-beneficiary-has-been-washington-d-c/> (last visited May 10, 2012)(arguing that most modern attitudes about government flow from the moral legitimacy it gained by recognizing civil rights for all races).

these movements have had significant ramifications for religion and religious institutions, but the implications of each movement have been somewhat different.¹⁸

Nondiscrimination norms with respect to race became so dominant that Bob Jones University, which asserted religious reasons for racial separation policies, had its tax-exempt status revoked by the IRS, an action that was upheld by the Supreme Court against a free exercise challenge on the grounds that “racial discrimination in education violates a most fundamental...public policy.”¹⁹ Bob Jones University subsequently reversed its racial policies, declared the former policies a misapplication of Christian doctrine, and asked for institutional forgiveness.²⁰ Interestingly, however, to date the university has never reapplied for tax-exempt status.²¹

Nondiscrimination norms with respect to gender have not had the same far-reaching effects on churches. For example, while a number of religious denominations have changed their doctrines and policies with respect to the ordination of women, a number of large denominations retain a male-only clergy, and efforts to impose non-discrimination norms with respect to the ordination of women clergy have not been successful – at least as of 2010.²²

C. The Confluence of Ascendant Equality and Civil Rights

Today, religion finds itself in the middle of these two powerful cultural forces — the ascendance of equality over freedom when the law intersects with religion, and the emergence of powerful social movements that claim the stature of a struggle for civil rights — movements that have equality as their foundational norm.

One of the most pressing issues facing religious organizations today is what the implications will be of what appears to be an irresistible tide of homosexual equality rights,

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18. For examples of this phenomenon, see the differing experiences of Bob Jones University, whose racially discriminatory policies cost it its tax-exempt status, and the Catholic Church, which is permitted to restrict the ranks of its clergy to men. Both issues are discussed more fully below.
 19. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983); see *id.* at 604 (“[T]he government interest at stake here is compelling,” and “outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs,” and further, that “no ‘less restrictive means’ . . . are available to achieve the governmental interest.”).
 20. Brett G. Scharffs and W. Cole Durham, Jr. *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* (Wolters Kluwer 2010, page 344).
 21. See *Bob Jones University: How to Give*, <https://protect.bju.edu/bju/giving/> (last visited May 9, 2012) (refer to the heading, offering alternative, tax-exempt options for giving, as opposed to giving directly to the university).
 22. See Riazat Butt, *London Buses to Carry Female Ordination Advert During Pope’s Visit*, *THE GUARDIAN*, July 23, 2010, available at <http://www.guardian.co.uk/world/2010/jul/22/london-bus-female-ordination-pope> (last visited March 17, 2012) (exemplifying the significant social and political pressure being applied to religious organizations that do not ordain women, Pope Benedict’s trip to England in the fall of 2010 was met with an aggressive advertising campaign with bus and subway advertisements demanding that the Catholic church ordain women). See also John Hooper, *Vatican Makes Attempted Ordination of Women a Grave Crime*, *THE GUARDIAN*, July 15, 2012, available at <http://www.guardian.co.uk/world/2010/jul/15/vatican-attempted-ordination-women-grave-crime> (last visited May 9, 2012) (the Vatican puts the attempted ordination of women in the same category as heresy, sexual abuse, and schism).

including gay marriage, which is often viewed as a civil rights issue.²³ Will religious organizations that resist recognizing same sex marriages suffer the fate of Bob Jones University? Or will churches be permitted, socially and legally, to continue to impose and enforce various religious requirements for religious weddings, including the requirement that they be between one man and one woman? In other words, for churches, a key question is whether the implementation of nondiscrimination norms with respect to gay rights will more closely resemble those regarding race or gender.

In answering this question, it is helpful to look to recent efforts to apply equality norms to religiously affiliated institutions. Here I will give a quick sketch of three recent cases that highlight the tensions between freedom and equality. I will then suggest a possible framework for finding workable ways of accommodating the freedom and equality interests at stake in controversies like these.

II. Canada: Religious Requirements as Bona Fide Occupational Qualifications

The first case, *Ontario Human Rights Commission v. Christian Horizons*,²⁴ involved a Canadian Christian assisted living center which argued that belief and conduct requirements, including a prohibition on homosexual conduct, were bona fide occupational qualifications, in order to maintain a Christian home environment.

A. *Christian Horizons*

Christian Horizons was founded to minister to people with developmental disabilities within an Evangelical Christian environment.²⁵ It operates more than 180 residential homes in Ontario, Canada, employs a staff of over 2,500, and cares for more than 1,400 people.²⁶ It

23. See, e.g., Andrew Bruck, *Equality in the Garden State: Litigation and Social Activism in the Struggle for Marriage Equality*, 2 HARV. L. & POL'Y REV. 419, 425 (prominent gay marriage advocate, David Buckel, calls gay marriage, "the greatest civil rights movement of our time."); Goutam U. Jois, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L.L. REV. 509, 550 ("[P]roponents of gay marriage (correctly) refer to traditional arguments regarding...civil rights."); Thomas M. Keane, Jr., *Why Gays Seek to Bar the Door to Rogers*, BOSTON HERALD, Jan. 25, 2002, at 29 ("Gay marriage [has become] the SINE QUA NON of the gay civil rights movement."). But see, Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117, 120 ("*Loving* is the standard reference for advocates of various claims and causes aspiring to civil rights legitimacy. Most prominently, *Loving* has been widely co-opted and aggressively expropriated by advocates of same-sex marriage."); David Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 212 ("[T]his is not an issue about civil rights. Blacks and minorities have suffered economic hardship. They've been treated as second class — in the back of the bus, separate bathrooms. None of this applies here in this case.").

24. See *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII) available at <http://canlii.ca/t/29sf6>.

25. *Id.*

26. *Id.* at ¶ 4 ("[C]hristian Horizons believes that it is an Evangelical Christian ministry providing an opportunity for Evangelical Christians to come together in order to reach out and assist historically disadvantaged and marginalized people."). See *id.* at ¶ 4, 10 ("Christian Horizons is the largest community living service provider in Ontario, though it is not the largest in any one area of the province. It receives approximately \$75 million annually [in state funding]." However, the provision of funding was not an issue in the case); *id.* ¶ 54 (actual text of this paragraph is written in French).

endeavors to maintain a “Christian Home Environment,” and many of its daily activities involve prayer and Bible reading.²⁷

At the time, in accordance with its stated policies, the center hired only Evangelical Christians who had agreed to subscribe to a doctrinal statement of faith and conduct, although it ministered to individuals regardless of their religious background or beliefs.²⁸ It adopted a Lifestyle and Morality Statement (the “L&M Statement”), which provided in part, that employees agreed to not engage in “inappropriate behavior deemed to be contrary to the teaching of Jesus and his followers as recorded in the New Testament,” including, “1. extra-marital sexual relationships (adultery), 2. pre-marital sexual relationships (fornication), 3. reading or viewing pornographic material, 4. homosexual relationships.”²⁹

Connie Heintz was employed in 1995 as a support worker at a Christian Horizons’ residence facility.³⁰ She signed contracts, including the L&M Statement, and participated in the religious activities.³¹ Four years later, in the words of the court, Ms. Heintz “came to an understanding of her sexual orientation and entered into a same sex relationship.”³² She told her supervisor that she was in a same sex relationship and was offered counseling to help her return to compliance with the L&M Statement. She was subsequently the subject of other disciplinary actions and eventually resigned.³³

About four months later, she filed a discrimination complaint, which was later referred to as the Ontario Human Rights Tribunal against Christian Horizons, alleging that she had been discriminated against on the basis of her sexual orientation and had been exposed to a poisoned work environment.³⁴ Ontario law protects employees from discrimination on the basis of sexual orientation,³⁵ with a limited exemption for “a religious, philanthropic, educational fraternal or social institution or organization” that serves a particular

27. *Id.* ¶ 47.

28. *Id.* ¶ 44.

29. *Id.* ¶ 68 (stating that Christian Horizons adopted the L&M statement in response to direction from the Ontario Board of Inquiry that it should adopt requirements that reflected its religious nature and would be applicable to all employees. The Lifestyle and Morality Statement (the “L&M Statement”) provided that staff members were discouraged from using tobacco or alcoholic beverages, and prohibited from using or endorsing tobacco or alcohol in the presence of clients.) Further, The L&M statement provided:

While not limiting examples in inappropriate behavior deemed to be contrary to the teaching of Jesus and His followers as recorded in the new Testament, Christian Horizons does reject conduct such as: 1. extra-marital sexual relationships (adultery), 2. pre-marital sexual relationships (fornication), 3. reading or viewing pornographic material, 4. homosexual relationships, 5. theft, fraud, 6. physical aggression, 7. abusive behavior, 8. sexual assault/harassment, 9. lying and deceit, 10. the use of illicit drugs, as being incompatible with effective Christian counseling ideals, standards and values.

30. *Christian Horizons*, 2010 ONSC 2105 ¶ 7.

31. *Id.*

32. *Id.* ¶ 8.

33. *See id.* ¶¶ 8-10 (Heintz testified that “she had become stressed and unable to function properly at work. On her doctor’s advice, she went on medical leave effective August 28, 2000, and on September 22, 2000, she resigned from her employment.”).

34. *Id.* ¶ 11.

35. *See id.* ¶ 12 (citing Human Rights Code, R.S.O. 1990, c. H.19, s. 5 (1) (Can. Ont.), “[E]very person has a right to equal treatment with respect to employment without discrimination because of . . . sexual orientation.”).

community, gives preference in employment to persons similarly identified, and provided that “the qualification is a reasonable and *bona fide* qualification because of the nature of the employment” (the “BFOQ” requirement).³⁶

1. The Ontario Human Rights Tribunal

The Ontario Human Rights Tribunal held for Heintz,³⁷ concluding that Christian Horizons was not eligible for an exemption because it was not “primarily engaged in serving the interests of persons who are adherents to its articles of faith,” and because the employment restriction did not constitute a reasonable and *bona fide* job requirement.³⁸

2. The Ontario Superior Court of Justice

Christian Horizons appealed to the Ontario Superior Court of Justice (the “OSCJ” or “court”), where the primary issue was whether the Tribunal had correctly applied the exemption, and whether the Tribunal’s rejection of the *bona fide* occupational qualification defense was reasonable.³⁹

The court concluded that the Tribunal erred in holding that Christian Horizons was not eligible for an exemption because it did not limit itself to serving clients who were Evangelical Christians.⁴⁰ Thus, the key issue was whether the Tribunal acted reasonably in rejecting the BFOQ defense offered by Christian Horizons.

36. *Christian Horizons*, 2010 ONSC 2105 ¶ 13 (citing Human Rights Code, s. 24 (1) (a):

The right under section 5 to equal treatment with respect to employment is not infringed where, (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colo[r], ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

37. The parties agreed that the main issue was whether Christian Horizons was protected by Section 24(1)(a). Human Rights Code, s. 24 (1) (a). The Human Rights Tribunal determined that Christian Horizons bore the onus of proving:

1. It is a religious organization;
2. It is primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified; and
3. The restriction in employment to persons similarly identified by creed is a reasonable and *bona fide* qualification because of the nature of the employment (the “BFOQ requirement”).

Christian Horizons, 2010 ONSC 2105 ¶ 15.

38. See *Heintz v. Christian Horizons*, 2008 HRTO 22, ¶¶ 160-161 (Can. 2008) (“...[n]o real effort was made to examine whether the requirement was in fact reasonably necessary or whether the employment could be performed without the discriminatory restrictions.”); *Ontario Human Rights Comm’n v. Christian Horizons*, 2010 ONSC 2105, ¶ 18 (Can. 2010) (“[T]he Tribunal also found that Christian Horizons had created a poisoned work environment in its treatment of Ms. Heintz after it became known that she was a lesbian.”).

39. See *id* ¶ 21 (the Tribunal’s decision was subject to a standard of review of “correctness” for questions of law and statutory interpretation, and a standard of “reasonableness” as to findings of fact).

40. The OSCJ concluded that the Tribunal adopted an overly literal interpretation of Section 24(1)(a), an approach that ignored the purposes of the exemption provision — “to confer a right to associate on certain groups so that they can join together to express their views and carry out their joint activities.” *Id.* ¶ 64 (construing Human Rights Code, s. 24 (1) (a)). The Tribunal’s reading of Section 24, the court said, would produce absurd consequences:

The Supreme Court of Canada has adopted a two-part test for determining when a BFOQ defense is available.⁴¹ To simplify, there is a subjective component (the job requirement “must be imposed honestly, in good faith, and in the sincerely held belief” that it is warranted), and an objective component (the qualification “must be related in an objective sense to the performance of the employment concerned”).⁴²

The Court agreed with the Tribunal that the subjective element of the BFOQ test had been met; Christian Horizons “sincerely and honestly believed that the qualification is necessary for the performance of the support worker job.”⁴³

The more difficult question — where the “rubber meets the road” in the words of the Court — was whether the objective test had been satisfied. According to the test articulated by the Canadian Supreme Court in an earlier case, to satisfy the “objective” prong of the BFOQ test, “The employer must clearly demonstrate that the qualification in issue is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.”⁴⁴

As you might expect, this standard is exceedingly difficult to meet. As the Court stated at the outset of its analysis of the issue, “A qualification of religious conformance is one that intuitively would generally not meet the objective criterion.” Quoting the Canadian Supreme Court in another case, *Caldwell v. Stuart*, the Ontario Court noted, that “it will be only in *rare circumstances* that such a factor as religious conformance can pass the test of *bona fide* qualification.”⁴⁵ According to the Court in *Christian Horizons*, “the qualification to be valid

If the Tribunal’s strict, plain language approach is correct, a religious institution will not be able to rely on section 24(1)(a) in order to argue that religious adherence is a *bona fide* qualification, even with respect to those directing a religious missionary or charitable activity, if the activity is offered to those outside the particular faith community. In effect, the religious character of the charitable mission would be rendered impossible if the mission served individuals outside the faith group.

Id. ¶ 66 (construing Human Rights Code, s. 24 (1) (a)). The court concluded that the Tribunal erred in its interpretation and application of Section 24(1)(a) “when it found that Christian Horizons could not rely on the exemption because of the nature of its activity and the clientele served.” *Id.* ¶ 78 (construing Human Rights Code, s. 24 (1) (a)). The court concluded, “Christian Horizons, in fact, primarily engaged in serving the interests of persons identified by their creed, with resultant benefits to individuals with developmental disabilities who live in their group homes and the families of those residents.” *Id.* ¶ 77.

41. Ontario Human Rights Comm’n v. Etobicoke, [1982] 1 S.C.R. 202, 208 (Can.).

42. *Christian Horizons*, 2010 ONSC 2105, para. 80 (CanLII). (citing the *Etobicoke* case, in which the Supreme Court of Canada stated:

To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, *must be imposed honestly, in good faith, and in the sincerely held belief* that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it *must be related in an objective sense to the performance of the employment concerned*, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

43. *Id.* ¶ 85.

44. *Id.* ¶ 89 (quoting *Etobicoke*, [1982] 1 S.C.R. at 208).

45. *Id.* ¶ 90 (quoting *Caldwell et al. v. Stuart et al.*, [1984] 2 S.C.R. 603).

must not just flow automatically from the religious ethos of Christian Horizons. It has to be tied directly and clearly to the execution and performance of the task or job in question.”⁴⁶

The most important precedent considered by the Court in *New Horizons* was *Caldwell v. Stuart*, a case decided by the Canadian Supreme Court. In *Caldwell*, a Catholic school that refused to rehire a teacher who married a divorced man in a civil ceremony in contravention of Church doctrine was held to satisfy the objective BFOQ test, because the “teacher was engaged in educating students in the Catholic faith and expected to assist in their adopting a Catholic way of life.”⁴⁷ In contrast, the Tribunal concluded that the “service Christian Horizons provides is not religious education and indoctrination.”⁴⁸ Unlike the teacher in *Caldwell*, the Tribunal concluded, “the primary role of a support worker is not to help all residents to adopt a Christian way of life, or to carry out a mission of salvation, or to convert residents to the faith beliefs of the organization.”⁴⁹

Christian Horizons responded by submitting that “one cannot separate out the religion from the tasks performed by the support worker,” a title shared by virtually all Christian Horizon employees.⁵⁰ The religious requirements, Christian Horizons argued, were “reasonably necessary to assure the accomplishment of the goal of Christian Horizons to operate Christian homes, with its distinct characteristics for the purpose of providing Christian ministry to people with disabilities and their families.”⁵¹

The Court disagreed that the prohibition on homosexual conduct was an objectively justified BFOQ. The Court concluded that “there is no evidence that anyone, including Christian Horizons leadership, ever considered whether the prohibition on same sex relationships was necessary for the effective performance of the job of support worker in a home where there is no proselytizing and where residents are not required to be Evangelical Christians.”⁵²

But in addition to these procedural shortcomings, the Court found that the work performed by support workers was not sufficiently religious in character to require religious qualifications to perform the work. As the Court put it,

“In the end, notwithstanding some of the Christian practices engaged in by the support workers with the residents described above, the Tribunal found that the support worker *was not engaged in actively promoting an Evangelical Christian way of life* and that services were provided to the people with developmental disabilities of all faiths and those without any faith. *There is nothing about the performance of the tasks (cooking, cleaning, doing laundry, helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments) that requires an adherence by the support workers to a lifestyle that precludes same sex relationships.* (emphasis added).”⁵³

46. *Christian Horizons*, 2010 ONSC 2105 ¶ 90.

47. *Id.* ¶ 91 (quoting *Caldwell*, [1984] 2 S.C.R. at 625) (“[I]n the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school’s legitimate objects are essential to the finding that religious conformance is a *bona fide* qualification.”).

48. *Christian Horizons*, 2010 ONSC 2105 ¶ 92.

49. *Id.*

50. *Id.* ¶ 93.

51. *Id.* ¶ 100.

52. *Id.* ¶ 95.

53. *See Id.* at para. 104.

Echoing the Tribunal's findings, the Court concluded that there was no objective basis for the religious qualifications for support workers. While acknowledging Christian Horizon's subjective belief that the requirement was necessary, when viewed "objectively," the job qualification was not necessary. The Court concluded:

"[F]rom an objective perspective, the support workers are not actively involved in converting the residents to, or instilling in them, a belief in Evangelical Christianity. There is nothing in the nature of the employment itself which would make it a necessary qualification of the job that support workers be prohibited from engaging in a same sex relationship."⁵⁴

In other words, according to the Ontario Court, while endeavoring to convert others to Evangelical Christianity, or teaching and promoting a belief in Evangelical Christianity, would create an objective basis for religious qualifications, being a "support worker" is not objectively sufficiently religious in nature to justify religious qualifications. And so, in the end, the Court concluded that Christian Horizons violated Ms. Heintz rights against employment discrimination.

B. Analysis

There are several ways of reading the Court's rejection of the L&M Statement as a reasonable and *bona fide* job qualification.

1. Process Shortcomings

On the one hand, the Court is critical of the process that Christian Horizons used in adopting the L&M Statement. The Court notes the Tribunal's finding that in order to qualify for an exemption, "the Code requires evidence that the employer put its mind to the issue in a meaningful way, with a recognition that there is an obligation to consider the fundamental rights of others."⁵⁵ In the eyes of the Tribunal, and the Court, Christian Horizons did not fulfill this obligation. The Court concluded, "The evidence about process is relevant to the BFOQ inquiry, as it demonstrates that Christian Horizons never did turn its mind to the reasonable necessity of the qualification in question in relation to the performance of the actual tasks of a support worker."⁵⁶ If Christian Horizons was guilty of merely a procedural imperfection, then it would seem possible for it to revisit its L&M Statement and adopt rules that it reasonably believes have a "direct and substantial relationship" to the actual job performed by a support worker.⁵⁷

In fact, Ms. Heintz, herself, remains an Evangelical Christian, a follower of Christian horizons' ethos in every other way, and is committed and quite capable of performing the job functions of a support worker with the love and care that has typically characterized Christian Horizons' service to people with developmental disabilities and with respect for the Christian Activities in the homes.

54. *Christian Horizons*, 2010 ONSC 2105 105.

55. *Id.* ¶ 96.

56. *Id.* ¶ 97.

57. *See Victory For Charities In Christian Horizons Appeal Decision*, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, <http://arpacanada.ca/index.php/issuesresearch/religious-freedom/936-victory-for-charities-in-christian-horizons-appeal-decision> (last visited Oct. 22, 2011):

2. Religious Character of Support Worker

The Court does not limit its critique of Christian Horizons to procedure. Rather, the Court concluded that, objectively speaking, the work of a support worker is not sufficiently religious to justify the imposition of religious qualifications for the job.

Here the Court, echoing the Tribunal, is on extremely shaky ground. The Court says, in effect, that there is nothing genuinely or sufficiently religious about a support worker's duties that would justify having religious qualifications for the job. After all, the Court opines, a support worker is only performing tasks like cooking, cleaning, and helping residents eat and use the bathroom.⁵⁸ Someone who is homosexual can do these things as well as someone who is heterosexual.⁵⁹

Of course, homosexuals can provide these kinds of services. However, that should not be the determining factor in deciding whether religious adherence to an Evangelical Christian code of conduct is a bona fide job qualification for providing these services in an Evangelical Christian organization.

This Court's conclusion is breathtaking, not only in its scope and sweep, but also for its near perfect disregard for what Christians believe to lie at the heart of their religious vocation. The Court concludes, objectively speaking, that proselytizing and teaching doctrine are sufficiently religious to warrant religious requirements as job qualifications, but caring for the disabled is not a sufficiently religious activity to warrant similar protection.⁶⁰

When Courts start declaring what is and is not "objectively" religious, we should all get nervous. This is especially true in a case like this, where the Court's "objective" analysis completely misses the point of what can only be described as central Christian doctrine.

In reading the Court's curt dismissal of caring for the disabled as being sufficiently religious to warrant protection, one's mind is drawn to the parable of the Sheep and the Goats, recorded in Matthew 25: 31-64, where Jesus Christ taught:

"When the Son of man shall come in his glory, and all the holy angels with him, then shall he sit upon the throne of his glory:

"And before him shall be gathered all nations: and he shall separate them one from another, as a shepherd divideth *his* sheep from the goats;

"And he shall set the sheep on his right hand, but the goats on the left.

"Then shall the King say unto them on his right hand, Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world:

[W]e're relieved to see the court found that the exemption provision in the Ontario Human Rights Code which permits certain charities, including religious charities, to selectively hire employees who share the same beliefs makes no private/public distinction. This means that Christian charities may continue to serve non co-religionists in society all while maintaining their internal religious ethos and integrity...Of course, we are also disappointed that the Court found it reasonable for the OHRT to have concluded that Christian Horizons did not meet an objective test for a bona fide occupational requirement for Ms. Heintz's job, but the Court was instructive as to how that situation may be corrected.

58. See *Christian Horizons*, 2010 ONSC 2105 ¶ 104.

59. *Id.* ¶ 105.

60. See *Christian Horizons*, 2010 ONSC 2105.

“For I was an hungered, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in:

“Naked, and ye clothed me; I was sick, and ye visited me: I was in prison, and ye came unto me.

“Then shall the righteous answer him, saying, Lord, when saw we thee an hungered, and fed thee? Or thirsty, and gave thee drink?

“When saw we thee a stranger, and took thee in? or naked, and clothed thee?

“Or when saw we thee sick, or in prison, and came unto thee?

“And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.”⁶¹

In this passage, Jesus teaches that service to the most needy and vulnerable is at the very heart of Christian commitment. It is what separates the sheep, those who will sit on Christ’s right hand and receive “eternal life,” from the goats, those who will sit on his left hand and “shall go away into everlasting punishment.”⁶²

C. Reflections

There are several things worth noticing about the Court’s analysis in *Christian Horizons*. First, the Court’s stated concern for procedure suggests that perhaps *Christian Horizons* can craft job qualifications that include religious dimensions that are more closely aligned with the job description of the worker. This approach, however, seems unlikely to get them too far, since the Court is concerned with more than just procedure.

Second, the Canadian Supreme Court’s test for what constitutes an objective BFOQ is extremely restrictive. As the *Christian Horizon* court notes, “a qualification of religious conformance is one that intuitively would generally not meet the objective criterion.”⁶³ The Court is correct in concluding that in applying this test, “it will be only in rare circumstances that such a factor as religious conformance can pass the test of bona fide qualification.”⁶⁴ So, responsibility for the narrow scope of the BFOQ exemption for religious qualifications lies squarely at the feet of the Canadian Supreme Court. It seems unlikely that many religious qualifications will be deemed “reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.”⁶⁵ If conscience exemptions are only available when failing to grant them would pose a danger to the employee, other employees or the general public, then we should expect that exemptions will be exceptionally rare.⁶⁶

Third, the Court is deeply dismissive of the religious exemption claim. For one thing, there is no consideration by the court of the possibility that the anti-discrimination provision, as applied to religiously affiliated companies, violates the Canadian constitutional freedom of

61. 25 *Matthew* 31-46 (King James).

62. *Id.*

63. *Christian Horizons*, 2010 ONSC 2105 ¶ 90.

64. *Id.*

65. *Id.*, ¶ 80.

66. *Id.*, ¶ 90.

religion and belief rights of Christian Horizons or its other employees.⁶⁷ For another, while the Court notes that an exemption might exist in an educational setting, it never considers whether a home setting, which is what the Christian Horizon residential facilities are meant to resemble, is also a place where a high degree of regard for religious autonomy ought to exist. Schools are not alone in being institutions where teaching takes place; homes, too, are a place where beliefs are not only taught, but also modeled.

On a related note, the Court does not consider at all the rights and interests of the patients and their families, who presumably have chosen a Christian setting for their care. Perhaps the patients and their families have rights or interests in having residential homes that are avowedly Evangelical Christian to be able to require their employees to have beliefs and behavior that reflect the Christian doctrines of the sponsoring organization. As the court notes in the first sentence of its factual summary, "Christian Horizons was founded in 1965 with the goal of creating an organization to minister to individuals with developmental disabilities within an Evangelical Christian environment."⁶⁸ Yet, the Court does not even consider whether the belief and conduct requirements by which all Christian Horizons employees agree to abide are reasonably related to creating and maintaining this Evangelical Christian environment. Thus, the *raison d'être* for Christian Horizon's existence is not considered as a possible rational basis for the job qualifications it imposes on its employees.⁶⁹

Finally, and to my mind most problematically, the Court exhibits what can only be described as unreflective arrogance in its disquisition on what is and what is not sufficiently "religious" work to warrant the protection of an exemption for religious qualifications. While teaching and preaching are sufficiently religious to warrant an exemption, the Court says, caring for the physically and mentally disabled is not.⁷⁰

The deep irony of the Ontario Court's reasoning is that it concludes that caring for the most needy is not sufficiently infused with religious significance for there to be religion-based job qualifications to do the work. For a Christian (at least some Christians) there may be nothing more central to what it means to live one's religion than this very thing.

No one, certainly not Christian Horizons, is claiming that homosexuals cannot take care of the disabled. Rather, what they are claiming is that to do the job in the name of Christian Horizons, a Christian organization that demands belief and conduct in conformity with its understanding of Christian doctrine, one can be expected to adhere to one's agreement to do so in accordance with a clearly stipulated set of beliefs and conduct.⁷¹

Christian Horizons is a striking example of the triumph of equality over freedom. Christian Horizons' freedom to define itself and its mission is trumped by Heintz's equality interest in not facing discrimination on the basis of her sexual orientation. In the view of the Ontario Court, religious qualifications are justified only when an employee is engaged in work that is genuinely religious, and the Canadian Court does not hesitate to conclude that

67. *Id.* ¶ 3. The Court declines to address the constitutional question since it was not raised until the appellate level, and when it was raised it was by an intervener in the case, *id.*

68. *Id.* ¶ 4.

69. *Id.* ¶104.

70. *Id.*

71. *Id.* ¶4.

caring for the most vulnerable and needy does not count as sufficiently religious work to warrant an exemption.⁷²

III. ECHR: German Church Employment Autonomy Cases

A second context in which the interplay of freedom and equality is evident is in recent church employment cases decided by the European Court of Human Rights.

A. *Michael Obst and Bernhard Schuth*

In September 2010, the European Court of Human Rights handed down decisions in two factually similar cases in which church employees were dismissed for adultery.⁷³ One case involved Michael Obst, a German national who was the European director of public relations for the Church of Jesus Christ of Latter-day Saints (the LDS, or Mormon Church). After informing the Church that he was involved in an extra-marital affair, Mr. Obst was dismissed from his job and later excommunicated from the Church.

The second case involved Bernhard Schuth, a German national who served as organist and choirmaster in a Catholic parish in Essen. The Church learned that Schuth, who was separated from his wife, was expecting a child with another woman with whom he was living, and dismissed him from his job.

1. The German Courts

Both Obst and Schuth appealed their dismissals through the German labor courts, and to the German Federal Constitutional Court, which ultimately ruled against them. In both cases, the German courts relied on an earlier precedent holding that Church employers had the right to autonomy in governing their affairs;⁷⁴ under German law, churches could govern their affairs in accordance with religious and moral precepts provided that they did not conflict with the fundamental principles of the legal order of the State.⁷⁵

2. The European Court of Human Rights

Obst and Schuth each appealed to the European Court of Human Rights, claiming that the German courts had violated their rights under Article 8 of the European Convention for

72. *Id.*

73. *Obst v. Germany*, No. 425/03 (Eur. Ct. H.R. 23 Sept. 2010), *available at* http://www.strasbourgconsortium.org/cases.php?page_id=10#portal.case.php?tribunal_case_id=4; *Schuth v. Germany*, No. 1620/03, (Eur. Ct. H.R. 23 Sept. 2010), *available at* http://www.strasbourgconsortium.org/cases.php?page_id=10#portal.case.php?tribunal_case_id=6.

74. *See Obst*, No.425/03 Eur. Ct. H.R. at 14 (2010); *Schuth*, No. 1620/03 Eur. Ct. H.R. at 22 (2010).

75. *Obst*, No.425/03 Eur. Ct. H.R. at 14 (2010) (articulating that in the implementation of legal provisions concerning protection against dismissal, the labor courts are bound by the requirements of Churches on two conditions: first, these requirements should reflect those established by the churches and secondly, by applying these requirements, the labor courts should not be in contradiction with the basic principles of legal order. This includes the general prohibition of arbitrariness and notions of “morality” and “public order”. It is, therefore, up to the labor courts to ensure that churches do not hold their employees to unreasonable demands of loyalty).

the Protection of Human Rights and Fundamental Freedoms ("ECHR").⁷⁶ Article 8 provides, "Everyone has the right to respect for his private and family life, his home and his correspondence."⁷⁷ Limitations on this right must be "in accordance with the law" and "necessary in a democratic society . . . for the protection of health or morals, or for the protection of the rights and freedoms of others."⁷⁸ The Court consolidated the cases.

The issue before the European Court was whether the German Courts struck an appropriate balance between the petitioners' Article 8 rights to respect for their private life against the rights of the respective churches to exercise autonomy and religious freedom in conducting the churches' affairs.⁷⁹ The Court noted that under Article 9 of the ECHR,⁸⁰ the autonomy of religious communities was protected against undue interference by the State, read in light of the freedom of assembly and association rights of Article 11.⁸¹

To the surprise of many observers, the cases resulted in a split decision: a panel of the European Court of Human Rights held that the Mormon Church's dismissal of *Obst* did not violate his Article 8 rights, but the same panel concluded that the Catholic Church's dismissal of *Schuth* did violate his Article 8 rights.⁸² The different outcomes were not based purely upon a perceived difference in the seriousness of adultery in the respective doctrines of the two churches, nor was the difference based specifically on the respective importance and centrality of their employment responsibilities to the religious mission of the respective churches.⁸³

76. *Obst*, No. 425/03 Eur. Ct. H.R. at 3 (2010); *Schuth*, No. 1620/03 Eur. Ct. H.R. at 3 (2010).

77. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8(1), 3, Sept. 1953, 213 U.N.T.S. 221. See *Obst*, 23 Eur. Ct. H.R. (2010) ¶ 28; *Id.* ¶ 28 [hereinafter ECHR]; See *Schuth*, 23 Eur. Ct. H.R. (2010), ¶ 43.

78. ECHR, 3, Sept. 1953, 213 U.N.T.S. 221.

79. *Obst*, No. 425/03 Eur. Ct. H.R. at 3 (2010); *Schuth*, No. 1620/03 Eur. Ct. H.R. at 3 (2010).

80. See ECHR, 3, Sept. 1953, 213 U.N.T.S. 221. at art. 9:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

81. See *id.* at art. 11:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

82. See *Obst*, 23 Eur. Ct. H.R. (2010), ¶¶ 52-53; *Schuth*, 23 Eur. Ct. H.R. (2010) ¶ 75.

83. See *Obst*, 23 Eur. Ct. H.R. (2010), ¶¶ 11, 51 (noting that adultery is regarded by Mormons as a very serious sin, but further declaring that its "conclusions should not be construed as implying that any adultery constituted in itself sufficient reason for dismissal [without notice of] an employee of a church, but that [the dismissal was permissible because] of the seriousness of adultery in the eyes of the Mormon Church and the important position," as well as the fact that he had voluntarily assumed the obligations of loyalty that his position entailed); see *Schuth*, 23 Eur. Ct. H.R. (2010), ¶

Rather, the panel said, the German labor courts in the *Schuth* case erred by not carefully balancing Schuth's right to respect for his private and family life against the competing interests and rights of the Church.⁸⁴ According to the European Court, in assessing Schuth's interests, the German courts focused too narrowly on his interest in keeping his job.⁸⁵ The Court also emphasized that while Schuth owed the Catholic Church a duty of loyalty, his employment contract could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce.⁸⁶ The Court also emphasized Schuth's limited alternative employment opportunities.⁸⁷

In the *Obst* case, in contrast, the European Court panel concluded that the German labor courts had engaged in a proper balancing of all of the rights and interests involved. The panel was of the view that dismissing *Obst* was necessary to preserve the Church's credibility, in light of the nature of his post. The Court also concluded that the harm suffered by *Obst* was comparatively limited, given the general nature of his skills and his relatively young age.

B. Analysis

As an astute observer of the European Court, Melbourne Law School Professor Carolyn Evans recently observed, a betting person would not have predicted different outcomes in these two cases.⁸⁸ If church autonomy is a strong right, then the right of both churches to dismiss highly visible employees for violating fundamental church doctrine would be expected.⁸⁹ If, on the other hand, the right to respect for one's private life is sufficient to outweigh church autonomy interests in one of these cases, one might reasonably have expected it to outweigh the church autonomy interests in both of them.⁹⁰

Second, the Court did not take the easy road of declining to review church hiring and firing decisions. One could imagine the Court taking an approach more deferential to church autonomy – saying, for example, that it is not in a position to second guess or evaluate church doctrines about what is and is not sinful conduct that warrants dismissal. The Court did not suggest that these personnel issues should be left to churches. The Court does not even

13 (similarly noting the abhorrence of adultery and the importance of the employee's position, the court states, "In view of the fundamental principles of the Catholic Church...the applicant, by maintaining an extramarital affair with another woman who was expecting his child...not only committed adultery but [was also guilty of] bigamy."); *see id.* ¶ 21 ("The pre-eminent importance of marriage was part of the fundamental principles of religious and moral requirements of the Catholic Church. It was not just a link and a contract, but also a sacrament."); *see id.* ¶ 25. The Court also noted that a prior tribunal had determined that, "The parish could not continue to employ the applicant without losing all credibility on the compulsory nature of its religious and moral requirements...It did not seem conceivable...[that Schuth and his employers could] continue to celebrate the liturgy together."

84. *Schuth*, 23 Eur. C.T. H.R. (2010), ¶ 67.

85. *See id.*

86. *See id.* ¶ 71.

87. *See id.* ¶ 73.

88. CAROLYN EVANS, RELIGIOUS AUTONOMY AND SECULAR EMPLOYMENT STANDARDS: DEVELOPMENTS IN THE EUROPEAN COURT OF HUMAN RIGHTS (2010), available at <http://iclrs.org/media/2010/english/documents/Evans-Carolyn-FirstPlenary-English.pdf>.

89. *See id.*

90. *See id.*

discuss whether it has the competence or jurisdiction to substantively review the personnel decisions of churches.

Third, the Court's balancing could well prove alarming to Churches, which may not have realized that in the eyes of the European Court, the future employment prospects, and even the familial interests of their employees, must be taken into account when deciding whether or not to fire an employee for misconduct.

Fourth, the cases seem to reflect a growing confidence on the part of the judges of the European Court to substitute their own judgment for that of other entities, including the highest courts of member countries. In these cases, blame was placed at the feet of the German Courts for not taking seriously the job of balancing the equality and family life rights of the employees against the religious freedom and autonomy rights of the churches, even though the German courts applied longstanding precedent.⁹¹

C. Reflections

Resulting, as it did, in a split decision, perhaps it is difficult to draw deep conclusions about how the Court is likely to adjudicate church autonomy cases in the future. But what is striking is that the Court does not take seriously the jurisdictional argument that it should not involve itself in the personnel matters of churches.⁹² Rather, it exhibits considerable confidence in balancing the rights of nondiscrimination on the part of the employee against the rights of religious autonomy of the churches.⁹³ Like the Ontario Court in *Christian Horizons*, the European Court of Human Rights can be viewed as taking sides about what kind of work is sufficiently religious to warrant protection. The irony is that one can imagine an argument that the organist's role is at least as central to the church's religious work as that of the director of public affairs. While the public affairs spokesman represents the church in a very public way, so does the organist, who participates in the public worship and liturgy of the church.⁹⁴

IV. United States and United Kingdom: Catholic Adoption Agencies

A significant issue that has arisen in a variety of jurisdictions relates to pluralism versus a formulaic equality in deciding who is eligible to participate in providing adoption services.

91. Schuth (No. 1620/03), Eur. Ct. H.R. ¶¶ 34-35 (stating that under the German Weimar Constitution, Section 137(3), churches and affiliated organizations have autonomy in their internal affairs and they can create employment contracts that reflect their values; this was the law followed by German courts before the case went to the European Court of Human Rights).

92. *Id.*

93. *Id.* ¶ 69.

94. Evans, *supra* note 74, at 4 (“[T]he relevant Church regulations required someone in Mr. Scuth's position 'to respect and comply with the fundamental principles of Catholic moral and religious precepts.’”).

A. Catholic Charities

1. Massachusetts

Catholic Charities had facilitated adoptions in the State of Massachusetts for more than one hundred years. State legislation was enacted forbidding discrimination on the basis of sexual orientation by adoption agencies. Catholic Charities sought and was denied a religious exemption from the state legislature and then-Governor, Mitt Romney, whose legal advisers were of the view that an exemption would require either legislation or a judicial ruling.⁹⁵ Faced with a decision to either follow Catholic Church doctrine and policy or bend to the state regulation, Catholic Charities shut down its operations entirely in the State of Massachusetts in 2007.⁹⁶

2. Washington, D.C. and the United Kingdom

More recently, in 2010 Catholic Charities shut down its adoption services in Washington, D.C. when faced with a similar choice between bending to legislative requirements for facilitating same-sex couple adoptions and following Church doctrine concerning homosexuality.⁹⁷ Catholic adoption agencies in the United Kingdom have also been forced to shut down because of their refusal to facilitate same-sex couple adoptions.⁹⁸

95. See Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POLY 297, 300 (2008):

[G]overnor Romney proposed a bill to exempt religious organizations from the state's anti-discrimination requirements when providing adoption or foster placement services. This exemption...would not allow discrimination based on race, creed, national origin, gender or handicap...[but it] would have allowed religious organizations to deny adoptions to gay couples, and only gay couples.

In a letter to House and Senate leaders, Romney wrote "It is a matter beyond dispute, and a prerequisite to the preservation of liberty, that government not dictate to religious institutions the moral principles by which they are to carry out their charitable and divine mission."

96. *Id.* at 297 ("[S]adly, we have come to a moment when Catholic Charities in the Archdiocese of Boston must withdraw from the work of adoptions, in order to exercise the religious freedom that was the prompting force for having begun adoptions many years ago."); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 479 (2008). See also Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, 11 THE WEEKLY STANDARD 33, May 15, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp>.

97. See *Same-Sex Marriage Law forces D.C. Catholic Charities to Close Adoption Program*, CATHOLIC NEWS AGENCY (Feb. 17, 2010), <http://www.catholicnewsagency.com/news/same-sex-marriage-law-forces-d.c.-catholic-charities-to-close-adoption-program/> ("The D.C. City Council's law recognizing same-sex marriage required religious entities which serve the general public to provide services to homosexual couples, even if doing so violated their religious beliefs. Exemptions were allowed only for performing marriages or for those entities, which do not serve the public.")

98. Christopher Brocklebank, *Catholic Adoption Agency Fights to Retain right to Discriminate Against Same-Sex Couples*, PINK NEWS: EUROPE'S LARGEST GAY NEWS SERVICE, Oct. 7, 2010, <http://www.pinknews.co.uk/2010/10/07/catholic-adoption-agency-fights-to-retain-right-to-discriminate-against-same-sex-couples>; Deacon Keith Fournier, *Last Catholic Adoption Agency in UK Refuses to Compromise with Caesar*, CATHOLIC ONLINE, Aug. 21, 2010, http://www.catholic.org/international/international_story.php?id=37908&wf+rsscol; Sally

B. Analysis

The cases of Catholic Charities adoption services are a particularly poignant example of the triumph of equality over religious freedom. As George Washington University Law School professors Ira Lupu and Bob Tuttle note, in the “calculus of accommodation . . . the risk of withdrawal of valuable and not easily replaced social services is also a significant policy consideration.” They cite the example of Catholic Charities of Boston as “a case that sadly illustrates the social costs that may be incurred when religious charities are faced with nondiscrimination requirements in tension with faith principles.”⁹⁹

The Catholic Charities situation is another clear example of equality rights trumping religious associational freedom. Even if other agencies, public as well as private, are available to serve same-sex couples, this agency is rendered ineligible to provide adoption services due to their conscientious objection to facilitating adoptions by homosexual couples. This seems particularly unfortunate given the fact that many adoption agencies have been created and designed to serve particular communities.¹⁰⁰ Situations like these leave us to wonder whether our civil society is really so brittle that it cannot accommodate service providers with a variety of viewpoints and missions.

V. A Pattern of Privileging Equality Over Freedom of Religion and Association Claims

These cases are very different in their factual and legal settings. They involve a range of issues. What they have in common is that in each of these cases, equality rights and freedom rights are viewed as being in conflict, and in each case there is a strong tendency — by legislatures and, especially, by courts — to favor equality norms over freedom norms. In *Christian Horizons*, the equality interests of the lesbian employee was preferred over the religious freedom rights of the Christian residential home; in the European Court of Human Rights cases, the European Court confidently balanced the freedom and equality interests and in one of the two cases announced that the German Courts did not sufficiently weigh the equality interests of the employee dismissed for adultery; and in the Catholic adoption agency

Thompson, *British Catholic Adoption Agency Closes*, THE CHRISTIAN SCIENCE MONITOR, Aug. 27, 2010, available at <http://www.csmonitor.com/Business/The-Adam-Smith-Institute-Blog/2010/0827/British-Catholic-adoption-agency-closes>; See *Gay Adoption to Proceed: UK Catholic Agency Loses Fight Over Same-Sex Parents*, THE HUFFINGTON POST, (Aug. 22, 2010) http://www.huffingtonpost.com/2010/08/22/catholic-adoption-agency-_n_689711.html; *Ruling Forces Last Catholic Adoption Agency in England and Wales to Cease Adoptions*, CATHOLIC NEWS AGENCY (Aug. 20, 2010), <http://www.catholicnewsagency.com/news/ruling-forces-last-catholic-adoption-agency-in-england-and-wales-to-cease-adoptions>.

99. Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW J. L. & SOC. POL'Y 274, 303 (2010) (“[S]tate law required all adoption agencies, secular or religious, to follow broad nondiscrimination guidelines, and the state legislature was unwilling to provide an exemption for religiously affiliated agencies that did not want to make such placements.”).

100. See, e.g., IT'S ABOUT LOVE, <https://www.itsaboutlove.org/ial/ct/eng/site/adopting-families> (last visited Oct. 22, 2011) (organization that places children for adoption by Mormon families); BLACK ADOPTION PLACEMENT AND RESEARCH CENTER, <http://www.baprc.org> (last visited Mar. 15, 2011) (seeks to place African-American children with African-American families).

situations, the equality rights of same-sex couples were placed above the religious freedom and conscience rights of Catholic Charities.

These cases reflect a much deeper pattern of equality trumping liberty, both within the United States and beyond. Indeed, in surveying law and religion trends around the world over the past twenty years, one of the most notable patterns is the systematic preferencing of equality over liberty interests.

As noted earlier, for example, in the U.S. in the 1970's and 1980's, religious conservatives lost a long list of Establishment Clause cases, where state aid of some sort was repeatedly denied to religiously affiliated organizations such as parochial schools.¹⁰¹ It was only when the key litigators adopted a new strategy focusing on equal treatment that the tide began to turn. In the late 1980's and 1990's, conservatives won a series of Establishment Clause cases by arguing for equal treatment, non-discrimination, neutrality, and equal access.¹⁰² As the equalitarian arguments gained traction, the Supreme Court moved away from the *Lemon* test, with its emphasis on entanglement, and moved towards concepts such as neutrality, equal access, and nondiscrimination.

It is interesting that proponents of gay rights underwent a similar strategic shift. While efforts in the 1980's and early 1990's for gay rights focused on liberty interests of homosexuals, such as the right to be left alone in the privacy of their own bedrooms,¹⁰³ major strides in gay rights began in the late 1990's and early 2000's when the arguments in favor of

101. See *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (holding that a program in which state-employed teachers taught students at parochial schools was entanglement in violation of the Establishment Clause); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding that financial aid program paid for by the state and benefiting parochial schools was entanglement in violation of the Establishment Clause); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that a state policy of making direct salary payments to teachers in parochial schools was excessive entanglement and a violation of the Establishment Clause).

102. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (Doubleday, Random House 2007) (describing in detail this string of conservative legal victories in this much-discussed book on the Supreme Court). It started with Jay Sekulow, general legal counsel for the Jews for Jesus, who won unanimous support from the Supreme Court in *Bd. Of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). In that case, Sekulow opted to avoid relying on freedom of religion and instead argued that the Los Angeles International Airport, which had evicted a member of Jews for Jesus who was distributing pamphlets in the airport, had violated his First Amendment right to freedom of speech:

Sekulow thought the eviction of the Jews for Jesus minister was a speech case, not a religion case. What the airport was doing what censoring free speech – and it didn't matter whether the speech concerned religion or politics...What made Sekulow's idea so appealing was that the Court had been far more generous in extending protection to controversial speech than to intrusive religious activities.

Id. at 90; *Id.* at 92 (after his success in that first case, Sekulow used similar legal arguments to win cases for a variety of religious groups across the country, and eventually, with the help of Pat Robertson, started a conservative counterpart to the ACLU (American Civil Liberties Union) called the ACLJ (American Center for Law and Justice).

103. See Thomas Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 85 (1980) (discussing libertarian themes of bedroom privacy); Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 528 (1986); Jane Larson, *Women Understand So Little, They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 399-400 (attributing family and sexual privacy to principles of libertarianism).

gay rights began to focus more overtly on a message of equality.¹⁰⁴ With remarkable speed, arguments based upon freedom and autonomy were transformed into sweeping arguments for equal treatment.

To be sure, there can be no gainsaying the rhetorical force of equality, both in the context of law and religion and in the context of gay rights. Nevertheless, these cases raise genuine concerns that other important values are being overlooked in the headlong rush to vindicate equality. Do we have reason to be concerned about equality's pre-eminence as a legal and political value?

VI. In Search of a Way Out

When issues like these are viewed exclusively (or even predominantly) through a prism of equality, if they are seen as simple situations where non-discrimination norms are at issue, then it seems almost inevitable in our current political climate, that the equality claims will win out over the religious freedom claims of churches and religiously-affiliated non-profit and charitable organizations.

I suggest that the search for balance in this area will be based on two factors. The first is having a deeper understanding and appreciation for the values in addition to equality that are implicated in situations like these. The second is having a greater appreciation for the multiple meanings of equality, and the limits of equality as a principle that can serve as the fulcrum for settling political and legal grievances like the ones discussed here.

A. Values in Addition to Equality

1. Institutional Autonomy and Jurisdiction

Each of the cases discussed here have an important institutional dimension. In each of these cases, there is a systematic discounting of the relevant religious autonomy interests, as they come into conflict with the equality and non-discrimination claims. To a significant extent, organizations, be they religious or secular, who define themselves according to an ideology or mission should be allowed to hire or serve those who share that ideology or mission. Is this discrimination? In a sense, of course it is. It is also freedom — the freedom to define and pursue one's own values and mission.

Courts especially, should be encouraged to think more seriously about jurisdictional boundaries where they will and will not involve themselves in the internal dynamics of such institutions. For example, if a church, or other explicitly religious service organization, expects its employees to live in accordance with church doctrine, and the employee agrees to these standards as a term of employment, courts should take more seriously arguments that they should abstain from involving themselves in disputes about employment issues that

104. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562-563 (2003) (noting the inequality of a law under which only same-sex couples, but not opposite-sex couples, were prohibited from engaging in deviant (anal or oral) intercourse); *Baker v. Vermont*, 170 Vt. 194, at 197-198, 744 A.2d 864 (1999) (holding that same-sex couples could not be denied benefits equal to those afforded to opposite-sex couples); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 344, 798 N.E.2d 941 (2003) (reaching a similar conclusion).

involve clear departures from those standards. If a Christian home for the disabled requires its employees to agree to standards of faith and conduct, courts should ask themselves whether they really have jurisdiction and competence to decide cases involving the enforcement of those religious norms. If a religiously affiliated adoption agency has doctrinal reasons for opposing certain types of adoptions, that organization should not be expected to leave its religious commitments at the door in order to be eligible to participate in civil society.

Religious organizations are not necessarily unique in this regard. Gay bars should be able to hire people sympathetic to gay rights, the Republican Party should be allowed to hire Republicans, and women's clubs should be allowed to hire exclusively women, if they want to. Even if public accommodation laws are taken into account, churches are not good candidates for treatment as places of public accommodation.¹⁰⁵

2. Liberal Pluralism versus Secularism

Each of these cases illustrates a tendency for secular legal systems to transform from a framework of secularity to a monochromatic imposition of secularism. Elsewhere I have argued that the state should strive to create a framework of secularity characterized by neutrality and pluralism, rather than a system of secularism characterized by a secular ideology that requires conformity and uniformity in accordance with perceived secular values.¹⁰⁶

Each of the three illustrations considered here are examples of a robust secularism muscling out difference. A liberal democracy need not — ought not — demand conformity of its citizens. Rather, a liberal democracy should carve out safe space where people can live out their lives and commitments within broad parameters without undue interference or oversight by the state. Frameworks of rights and protections are necessary, of course, but cases such as these reflect an unfortunate tendency of governments to try to extract uniformity from their subjects.

105. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW J. L. & SOC. POL'Y 274, 297 (2010):

In their normal operation of conferring sacraments and religious recognition, communities of faith are the very antithesis of the concept of 'public accommodations.' Even if their houses of worship are open to the general public for purposes of prayer, virtually all faiths that administer sacraments operate on theological norms of exclusivity. Be it baptism, Bar or Bat Mitzvah, marriage, blessings at the time of death, or other rites of inclusion in the religious community, many houses of worship will confer sacraments only on those who, by ancestry, deed, or explicit commitment, have become (and remain) members of the faith. . . . Organizations that are generally open to all without regard to religion are less sympathetic candidates for exemption from obligations to serve members of same-sex couples. . . . This pattern obtains quite frequently in religiously affiliated organizations such as Catholic Charities, Lutheran Social Services, or Jewish Community Centers, which provide social services or recreational opportunities regardless of faith affiliation.

106. Brett G. Scharffs, *Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism*, 6 RELIGION & HUM. RTS. 109 (2011).

The extent to which national unity is based upon conformity was explored in a deeply meaningful way a half century ago in the flag salute cases.¹⁰⁷ In the 1940 case, *Minersville School District v. Gobitis*,¹⁰⁸ the Supreme Court, focusing on the state's right to determine appropriate means to inculcate patriotism in children, held that a state statute that compelled flag salutes in public schools, and made no exemption for religious objectors, was constitutional. What followed is what has been called the greatest outbreak of religious intolerance in twentieth-century America. At least thirty-one states took legal steps to expel children who refused to salute the flag in schools. Numerous instances of vigilantism against Jehovah's Witnesses who refused to salute the flag were reported. These included mob beatings, burning of Jehovah's Witnesses Kingdom Halls, and attacks on houses where Jehovah's Witnesses were believed to live.¹⁰⁹ One of the most common occurrences of vigilantism was the arbitrary imprisonment of Jehovah's Witnesses. Sometimes this imprisonment was for the purpose of protecting the Jehovah's Witnesses from mobs, but more often it was an instance of the involvement of the authorities in the persecution of Jehovah's Witnesses after *Gobitis*.

Only three years later, in *West Virginia State Board of Education v. Barnette*, the Supreme Court made a rare one-hundred-eighty-degree reversal, holding that there was a First Amendment right against being compelled to participate in reciting the Pledge of Allegiance.¹¹⁰ The court addresses the *Gobitis* precedent head on: "[At] the very heart of the *Gobitis* opinion [it is reasoned that] 'National unity is the basis of national security,' that the authorities have 'the right to select appropriate means for its attainment,' and hence reaches the conclusion that such compulsory measures toward 'national unity' are constitutional."¹¹¹ The Court then questions whether compulsion, rather than persuasion and example, is a constitutional means of achieving such unity:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.¹¹²

107. W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 167-170 (Aspen/WoltersKluwer 2010) (discussion of the flag salute case is adapted from this cited source).

108. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

109. See DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 163-67 (1962) (providing a comprehensive discussion of the treatment of Jehovah's Witnesses after *Gobitis*).

110. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

111. *Id.* at 640 (quoting *Gobitis*, 310 U.S. at 595).

112. *Id.* at 640-41.

The transition from the thinking in *Gobitis*, to that in *Barnette*, can perhaps in part be explained by increased national unity present in the United States in 1943 when the U.S. was deeply involved in World War II, and in 1940 when the U.S. had not yet entered the war, and nationalism and isolationism were powerful political forces. But, these two cases also reflect very different attitudes toward the need for unity of belief about important issues, and what the proper mechanisms are for generating such unity. The *Barnette* Court sides squarely with persuasion, patience, and example, not to mention tolerance for differences of opinion: “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”¹¹³ The Court adds, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹¹⁴

The transition in the underlying thinking of what underlies and helps inculcate national unity and patriotism from *Gobitis* to *Barnette* is striking. While *Gobitis* prescribes the need for unity based upon unanimity, *Barnette* proposes unity based upon pluralism and respect for differences. *Gobitis*, in a very real sense, is predicated upon the need for enforced equality; *Barnette* sees room for freedom as well.

3. Conscience

Each of the situations discussed above involve the systematic discounting of conscience. A liberal society need not demand uniformity of belief. One of the strengths, not to mention one of the key attractive features, of a liberal democracy is that conformity is not viewed as a necessary condition for political stability. It was John Locke in the seventeenth century who observed that the political magistrate need not impose religious conformity in order to create the social glue that would create social stability; rather, respecting religious differences and creating a safe space for religious minorities would generate gratitude and loyalty towards the state.¹¹⁵ Much of the political discontent that seems to run so deeply in our society today seems to be based upon fears of political and social orthodoxies being imposed upon those who disagree.

Two specific ways in which we have developed considerable experience in accommodating difference is in creating a safety valve, conscientious objection, for those who object on the basis of conscience to participating in war, and in so-called “conscience clause” provisions that

113. *Id.* at 641. The Court then adds:

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Id. at 641-2.

114. *Id.* at 642.

115. See John Locke, *Letter Concerning Toleration*, in *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 13-17 (2010).

provide exemptions to those who have principled opposition to participating in certain medical procedures, such as abortion.¹¹⁶ Our experience in these areas suggests that we have the intellectual and political resources to accommodate difference without demanding conformity and without unduly harming the rights and interests against which conscience claims are asserted.

a. Conscientious Objection

We have a wealth of experience dealing with conscientious objection claims in the area of the military draft, where legislative exemptions for those with religious convictions against bearing arms have provided relief for would-be soldiers drafted into military service.¹¹⁷ These exemptions have been extended by courts to those who were unsure whether their objections were religious,¹¹⁸ and even to those who were quite insistent that their objections were ethical rather than religious in nature.¹¹⁹

These exemptions have a long historical pedigree. George Washington, in a letter to Quaker clergy, explained why he supported exemptions, insofar as possible, from military service for Quakers:

Your principles and conduct are well known to me; and it is doing the people called Quakers no more than justice to say, that (except their declining to share with others the burden of the common defense) there is no denomination among us, who are more exemplary and useful citizens.

116. See 32 CFR 1636, Title 42 U.S.C. § 300a-7 (2006).

117. See, e.g., *Girouard v. United States*, 328 U.S. 61, 62, 68 (1946) (allowing naturalization of a citizen opposed to war, in spite of answering negatively the question, “If necessary, are you willing to take up arms in defense of the country?”). In *Girouard* the Court states:

The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Id. at 68. *Contra* *United States v. Schwimmer*, 279 U.S. 644 (1929) (reaching the opposite conclusion in interpreting the same act), *overruled by* *Girouard*, 328 U.S. 61 (1946). See also, *Gillette v. United States*, 401 U.S. 437 (1971) (holding that selective service act accommodations of conscientious objection do not violate the Establishment Clause and are not required by the Free Exercise Clause).

118. Selective Service Act of 1948, 50 App. U.S.C.A. § 456(f) (2006) (Limiting its exemption to those “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”). See *United States v. Seeger*, 380 U.S. 163 (1965) (allowing conscientious objection to military service even though Seeger’s objections were not strictly religious because ethical beliefs took the functional place of religious belief in his life).

119. *Welsh v. United States*, 398 U.S. 333 (1970) (allowing conscientious objection to military service even when applicant affirmatively did not characterize his objection as being religious). In *Welsh*, the Court states:

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time. . . such an individual is as much entitled to a ‘religious’ conscientious objector exemption. . . as is someone who derives his conscientious opposition to war from traditional religious convictions.

Id. at 340. *But see* *Gillette v. United States*, 401 U.S. 437, 443 (1971) (denying conscientious objector status to an individual who opposed a specific war, but not war in general).

I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.¹²⁰

If equality is our overriding concern, then we would not give conscience-based exemptions to military service. Everyone would be required to bear the burdens of war equally. When we think exclusively in terms of equality, there is no need to take seriously conscience-based objections of those who are in the minority. But general and neutral laws can discriminate. This is the lesson of conscientious objection, where the deep identity-defining commitments of different people create different burdens with respect to military service; this is also the lesson of *Employment Division v. Smith*, where rules that applied equally resulted in very unequal burdens upon members of the Native American church, for whom the religious use of peyote was important.¹²¹

b. Conscience Clauses

Similar experience has occurred in the nearly forty years since *Roe v. Wade*, with “conscience clause” enactments on the state and federal level that seek to strike a balance between a woman’s right to an abortion, on the one hand, and the conscious objection to providing abortions of some doctors, other health providers, and hospitals.¹²² These

120. Letter from George Washington to the Annual Meeting of Quakers (Sept. 1789), available at <http://teachingamericanhistory.org/library/index.asp?document=393> (last visited Oct. 23, 2011), quoted in Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW J. L. & SOC. POL’Y 206, 221 (2010).

121. See *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Minnersville School Dist. Bd. Of Educ. V. Gobitis*, 310 U.S. 586, 594-95 (1940) (“[T]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities,” without noting that *Gobitis* was overturned by the supreme Court three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)). See *Id.* at 885 (while the Supreme Court found that the Free Exercise Clause did not require an exemption for members of the Native American Church, going so far as to assert that creating an exemption would create an untenable political situation in which every person could become a law unto themselves, Congress disagreed, passing legislation that created an exemption for the religious use of peyote, an accommodation that has not resulted in political instability or extreme religious freedom claims that cannot be balanced against compelling state interests); see American Indian Religious Freedom Act Amendment of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2007)) (legalizing religious use of peyote by Native Americans); see also *Lyng v. Nw. Indian Cemetary Protective Ass’n*, 485 U.S. 439, 455 (1988) (prior to the amendment, the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2007), was treated by the Supreme Court as a “sense of Congress joint resolution” that “has no teeth in it. . . Nowhere in the [AIRFA] law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.

122. See, e.g., Church Amendment, Title 42 U.S.C. § 300a-7 (2006), § 300a-7(b)(1) (1973). Responding to *Roe v. Wade*, the Amendment states that receipt of public funds

by any individual or entity does not authorize any court or any public official or other public authority to require such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.

See Ensuring that Dept. of Health & Human Serv. Funds do not Support Coercive or Discriminatory Policies of Practices in Violation of Federal Law 5 U.S.C. § 301, 45 C.F.R. 88.1-88.5 (2009) (During the waning days of his presidency, George W. Bush issued new right of conscience rules, which were

accommodations have resulted in what Washington and Lee law professor Robin Fretwell Wilson describes as a “live-and-let-live” landscape where a woman’s right to access to an abortion and health care providers’ religious or moral objections to being involved in performing abortions have each been vindicated — although neither has been vindicated entirely.¹²³

If the conflict between religious freedom and equality norms is viewed as a zero sum game, where power is the defining feature of how issues are to be resolved, it is likely that solutions will always be deeply inimical to the interests of one group or another.¹²⁴

For example, in states where gay marriage has been recognized by legislatures rather than courts, exemptions have been put in place to protect religious leaders from being required to perform gay marriages and protecting organizations that do not participate from discriminatory treatment.¹²⁵ It may be that taking into account religious concerns is what made political compromise possible.

B. Liberalism and the Limits of Equality

Each of the cases discussed in this paper illustrates the ascendancy of equality over freedom. The problem is not that equality is unimportant or an attractive moral or political ideal (it is); rather, the problem is that equality is a principle that must exist in concert with other political and moral values. After all, both religion and gay rights received equal treatment in the Brezhnev-era Soviet Union¹²⁶ and in Mao-era China.¹²⁷ The state systematically tried to eliminate each.

rescinded by President Obama on March 10, 2009, promulgated by the Department of Health and Human Services, which broadened the protection for conscience-based objections made by healthcare professionals, and denied federal funds to any health care entity that discriminates against hiring, promoting, or extending benefits to an individual who refuses to participate in any procedure that is against his or her moral or religious convictions). *See generally* Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 *BYU J. PUB. L.* 475, 483-492 (cataloguing federal and state efforts to accommodate conscience claims after *Roe v. Wade*).

123. Wilson, *supra* note 80, at 478.

124. *See, e.g.*, Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 *U. ILL. L. REV.* 205 (2010) (responding to Douglas Laycock’s and Robin Wilson’s arguments for religious exemptions relating to gay marriage, Gilreath proposes that “we should analyze objections to same-sex marriage in light of group-based equality issues, and not subordinate Gays’ and Lesbians’ collective equality rights to the political power of individual religious objectors”); “[A]t the center of the crossroads of the substance (as opposed to the rhetoric) of the Gay marriage debate is the question of power: who has it, who wants it, and what those who already have it will do to keep it.” *Id.* at 207; *Id.* at 220 (stating that exemptions for religious dissenters are a power play, “a means of subordinating the collective equality rights of Gays and Lesbians to the imperatives of individual religious dissenters,” and that providing exemptions aims at the “social subordination of Gays”).

125. *See* Lupu & Tuttle, *supra* note 83, at 275 (stating that Vermont, Connecticut, Maine, and New Hampshire became the first four states enacting legislative measures recognizing same sex measures, and “all of these legislative enactments include provisions designed to respect the liberty of religious communities to maintain their own teaching and practices on this subject.”).

126. *See generally* Simon Karlinsky, *Russia's Gay Literature and Culture: The Impact of the October Revolution*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 347, 363 (Martin Baum Duberman, Martha Vicinus & George Chauncey, Jr., eds., 1990) (Stating that the Soviet Union’s repression of homosexuals was brutal; two particularly well-known episodes are the sentencing of Gennady Trifonov to hard-labor from 1976-1980 for privately circulating his gay poems, and the horrific dismemberment of an aging homosexual actor by drunk army officers in a

Additionally, equality is itself a complex concept with many competing conceptions. Philosophers have debated for years whether equality as a political principle demands equality of resources, equality of opportunity, equality of outcomes, or something else.¹²⁸ Similarly, the legal meaning of a concept such as equal protection is far from straightforward, and requires different things in different contexts.¹²⁹ Equality as a negative right to be free

Leningrad bar, which was brought to the world's attention by another Russian poet, Viktor Sosnora, in a book published in East Germany in 1979); Edward J. Derwinski, *Religious Persecution in the Soviet Union*, in US DEP'T OF STATE BULLETIN (Nov. 1986), available at http://findarticles.com/p/articles/mi_m1079/is_v86/ai_4618399/

Soviet law and penal practices single out religious activists for especially harsh treatment. Those convicted under the criminal code for 'religious crimes' are sentenced to strict regime labor camps and designated — together with political activists — as 'especially dangerous state criminals,' a category that disqualifies them from amnesties or leniency...Believers who are incarcerated in psychiatric hospitals face an especially agonizing choice, since they are often promised immediate release if they renounce their belief in God.

127. See generally Tiffany Brown, *Hostile Society Keeps China's Gay Community Cowed*, CHINESE CULTURAL STUDIES: HOMOSEXUALS IN MODERN CHINA: FOUR RECENT PRESS REPORTS <http://acc6.its.brooklyn.cuny.edu/~phalsall/texts/c-gays.html> (last visited March 18, 2012) (noting that while China was historically accepting of homosexuals, murder and persecution of homosexuals became prevalent during the Cultural Revolution); RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY 95 (2005) (stating that there are stories alleging that Mao's Red Guards held public castrations of homosexuals); *History of Homosexuality*, CHINA THROUGH A LENS (Oct. 4, 2002) <http://www.china.org.cn/english/2002/Oct/44940.htm> (“[T]he government considered homosexuality to be a social disgrace or a form of mental illness. The police regularly rounded up gays and lesbians. Since there was no law against homosexuality, gays and lesbians were charged with hooliganism or disturbing public order.”); *Religion in General*, CHINESE CULTURAL STUDIES: PHILOSOPHY AND RELIGION IN CHINA <http://acc6.its.brooklyn.cuny.edu/~phalsall/texts/chinrelg.html> (last visited March 18, 2012) (stating that the Cultural Revolution also brought persecutions against religion, including the closure of churches and temples, and the seizure of property).
128. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 2 (2000), quoted in Stefan Gosepath, *Equality*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Edward N. Zalta ed., Spring 2011), available at <http://plato.stanford.edu/entries/equality> (last visited Oct. 23, 2011) (“[P]eople who praise [equality] or disparage it disagree about what they are praising or disparaging.”).
129. See Thomas Walker, *Suspect Classification*, in *The Oxford Companion to the Supreme Court of the United States* 848 (Kermit Hall et al. eds, 1992)

The Due Process Clause . . . and the Equal Protection Clause of the Fourteenth Amendment prohibit federal and state governments from engaging in certain forms of discriminatory behavior. . . . It is legitimate for the law to treat individuals differently if such classification is reasonable and designed to accomplish a compelling government interest The Constitution only prohibits discrimination that is invidious, arbitrary, or irrational. The validity of the government action depends largely on the criterion on which the discrimination is based The Supreme Court has determined certain classifications to be constitutionally suspect. Discrimination based on any characteristic that the Court has declared suspect is presumed to be irrational and constitutionally invalid. When such discrimination is constitutionally challenged, the courts proceed with strict scrutiny and the government carries a difficult burden of proof to justify the legitimacy of its actions. The Supreme Court, for example, has declared race and religion suspect.

Id. at 848. See generally *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (determining recently that homosexuals are a suspect class deserving of the strict scrutiny standard because, the government “would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. . . .”); See generally *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that sexual orientation merits at least heightened scrutiny, and perhaps even strict scrutiny, from the courts); U.S. Dep’t of Justice, Statement of the Attorney Gen. on Litigation Involving the Def. of Marriage Act (February 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag->

from some form of state interference is very different than equality as a positive entitlement that can be demanded from the state, from other citizens, or both.¹³⁰ Equality can also be construed as a demand for equal respect, or recognition of moral equivalence.¹³¹ Demands like these become much more problematic, since they try to achieve by legislative or judicial fiat, what can only be granted willingly by people whose hearts and minds have been convinced. Simple demands for equality are politically potent, but they leave many important questions unanswered.

Advocates of gay rights, as well as religious minorities (and all religions are religious minorities in the United States, as well as when viewed in a global context), would do well to recall that homosexuals, like members of every religious denomination, are likely to remain a minority.¹³² If gay rights advocates are right about the biological determinism of sexual orientation,¹³³ then homosexuals are likely to represent everywhere and always a minority of less than ten percent of the population.¹³⁴

222.html (“[A]fter careful consideration...the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.”).

130. See, e.g., Wilson, *supra* note 80, at 482. Noting that,

While *Roe* and *Griswold v. Connecticut* established very strong rights for women and couples to have access to abortion and contraceptives, their effect is limited because they established only the right of non-interference by the state in these decisions. Neither decision forced anyone to perform an abortion or provide contraceptives. Despite that crucial limitation, abortion and family planning advocates worked strenuously over several decades to extend these limited non-interference rights into positive entitlements to the assistance of others in effecting one's private choice.

See, e.g., Lupu & Tuttle, *supra* note 82, at 293:

Same-sex marriage, however, is not a negative liberty, at least with respect to the state. The state creates and maintains a monopoly over the legal institution of marriage . . . Because the state creates this benefit, denial of access to marriage has a very different character from the state's denial of funding for, or other restrictions on, abortion services. With respect to abortions, the state satisfies its obligation simply by refraining from coercively restricting access. The right to marry, however, is the affirmative right of access to the state's administrative process for granting that benefit. It rests on a claim of equality, not a claim of fundamental liberty.

See also, Stern, *supra* note 5, at 311 (examining the implications of treating same-sex marriage as either a matter of either freedom or equality).

131. For example, the Annenberg Institute, a group that advocates for educational reform, argues that:

Equality means focusing on the equal moral value of all people. It may seem absurd to have to make explicit this premise; yet many educational and, by extension, social inequalities, can be understood to derive, at least in part, from a fundamental failure to focus on the moral equivalence of persons.

Thea Renda Abu El-Haj, *Equity, Difference, and Everyday Practice: Taking a Relational Approach* (2007), http://www.annenberginstitute.org/equity/pdf/Essay_El-Haj.pdf (last visited Mar. 18, 2012).

132. *National Survey of Sexual Health and Behavior*, INDIANA UNIVERSITY

<http://www.nationalsexstudy.indiana.edu> (last visited March 18, 2012) (examining a recent study of the American homosexual population, conducted by the National Survey of Sexual Health and Behavior in 2010, which determined that 7% of women and 8% of men identify as gay, lesbian, or bisexual.).

133. See, e.g., SIMON LEVAY, *GAY, STRAIGHT, AND THE REASON WHY: THE SCIENCE OF SEXUAL ORIENTATION 207* (2011). (Supporting research suggesting homosexuality is mostly, if not entirely, genetic in origin, LeRay concludes that:

Equality is not a sufficient norm to protect the interests of homosexuals or religious minorities. For this reason, it seems tactically, if not strategically, unwise to view gay rights as being in an eternal power struggle with religion. As Professor Thomas Berg has persuasively argued, gay rights have much in common with religious freedom: both represent important, deep currents of personal identity.¹³⁵ Peoples' sexual orientations, like religious commitments, are often extremely deeply felt constitutive elements of personal identity and self-definition.¹³⁶ Members of both communities would do well to be more sensitive and sympathetic to the needs and interests of the other.

Political winds can turn, and equality does not demand recognition of gay rights; it does not demand the recognition of any rights, rather, merely their equal vindication or suppression.

VII. Conclusion

In entering the political and rhetorical minefields of gay rights and religious liberty, one always runs a high risk of being misunderstood or misconstrued. As I have tried to make clear, I am not suggesting that equality is not an important value. It is important as a moral, political, and legal principle. But it is not a sufficient value upon which we can construct a comprehensive system of belief — whether moral, political, or legal.

I am also not suggesting that the conflicts that arise in the types of cases discussed in this paper are not real. They are real, and the solutions to these conflicts are not always obvious.

I am not suggesting that the solutions are easy. But when important values conflict, the perfect vindication of some of those values is unlikely to allow the vindication of other important values.

Thus, we must find ways of accommodating, integrating, harmonizing, and hopefully vindicating the values of both freedom and equality. Equality is a powerful idea and an important concept, but equality alone is not sufficient as a political or moral ideal. In our concern for equality, we must remember that prisoners in the gulag are equal.

Sexual orientation is an aspect of gender that emerges from prenatal sexual differentiation of the brain. Whether a person ends up gay or straight depends in large part on how this process of biological differentiation goes forward, with the lead actors being genes, sex hormones, and brain systems that are influenced by them.)

134. *National Survey of Sexual Health and Behavior*, INDIANA UNIVERSITY, *supra*.

135. Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW J. L. & SOC. POL'Y 206, 212 (2010):

The first commonality is that both same-sex couples and religious objectors argue that certain conduct is fundamental to their identity, and that they should be able to engage in it free from unnecessary state interference or discouragement. For same-sex couples, the conduct in question is to join personal commitment and fidelity to sexual expression — a multi-faceted intimate relation — in a way consistent with one's sexual orientation. For religious believers, the conduct is to live and act consistently with the demands made by the being that made us and holds the whole world together.

136. *Id.* (“both same-sex-marriage and religious claimants seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged”).