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**Comment on Brett G.
Scharffs' *Equality in
Sheep's Clothing: The
Implications of Anti-
Discrimination Norms
for Religious Autonomy***

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Of the many things the Constitution leaves us to puzzle out on our own, one of the most intriguing is the lack of a hierarchy for the different fundamental rights. In a conflict between equal protection and religious freedom, for example, which takes priority? The Framers left us no “order of preference” list, and there does not seem to be any objective basis upon which we can agree when one right prevails over another. So, what happens in such contests is a judicial weighing and balancing of constitutional rights, with outcomes depending upon the particular facts, the doctrinal test used, and the relevant societal norms. Brett Scharffs believes that this balancing has become skewed in recent years, in favor of equality and at the expense of religious freedom.¹ In his thought-provoking article in this volume, he surveys several cases in the United States, Canada and Germany to support his argument that equality concerns are now regularly “trumping” religious freedom. I have a lot of sympathy for Professor Scharffs’s concern. Speaking as a member of the Muslim religious community, currently slammed in American public discourse on the grounds that *sharia* does not respect equality,² I can readily believe that contemporary western societies are placing the principle of equality in a privileged position of judgment over religious exercise rather than seeking to find a balanced weighing of equality and religious freedom claims together. And I agree that this could be dangerous. A balance weighted in favor of equal protection over religious freedom seems plainly inappropriate in a constitutional scheme that does not create such a hierarchy of these rights.³ To make an intentional pun, religious freedom and equality are *equally* important, according to the Constitution, so it seems clear to me that we should not tolerate judicial favoritism of one over the other.

Given my initial openness to Brett Scharffs’s premise, therefore, I was surprised that by the end of his article I found myself not completely convinced. In his presentation of several cases to show that equality is trumping religious freedom, I see evidence not of trumping, but rather of judicial balancing — perhaps imperfect, but not an obvious overriding of religious freedom by equality. His article leaves me with the sense that he might be on to something, but wondering if there are better cases out there to prove his point. And this is not the only way in which I think he underserves himself. There also seems to be some tantalizing but unrealized potential in Professor Scharffs’s insightful ideas about secularity (versus *secularism*) and pluralism, but he stops short of using them to make any specific proposal for improving the status quo. It seems to me that if he pushed these ideas to their fullest

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1. Professor Scharffs reduces this conflict to one between “freedom and equality.” Brett G. Scharffs, *Equality in Sheep’s Clothing: The Implication of Anti-Discrimination Norms for Religious Autonomy*, 10 Santa Clara J. Int’l L. 125 (2012). I find it to be a bit too much of a rhetorical abstraction, since freedom for one person can feel like oppression to another. For example, a gay rights claim for equal treatment could be reframed as a claim for freedom to make autonomous decisions about sexual activity, in which case a conflict with religious exercise would be a conflict between one kind of freedom and another, not between “freedom” and “equality” per se. For this reason, I will use more specific terms than “freedom and equality” in this Comment.
 2. The advocacy accompanying the “anti-*sharia*” legislation movement, to take just one example, centers on arguments that *sharia* discriminates against women, non-Muslims, and homosexuals. See, e.g., AMERICAN LAWS FOR AMERICAN COURTS, AMERICAN PUBLIC POLICY ALLIANCE (Oct. 11, 2011), http://publicpolicyalliance.org/?page_id=195 (“Shariah law discriminates against women, homosexuals, non-Muslims, liberal or reforming Muslims”).
 3. I realize that Professor Scharffs’s survey is not limited to the United States. I have framed my remarks in reference to the United States because this is the legal system I know best.

potential, he would uncover some powerful tools with which to creatively address the problem he presents. Although he does not do it here, I do hope his future work will expand on the implications of those very interesting ideas.

I. Trumping or Balancing?

Before I explain why Professor Scharffs's current paper has failed to convince me, let me first note where I agree with him. If it is in fact true that equality claims are, as he says, being "systematically preferenced"⁴ over religious freedom, I agree that this is a serious problem. While some may find nothing very objectionable about a regular disadvantaging of religious freedom when it comes into competition with the law of the land, I am not one of them. That is because I do not think the law of the land is always "better" than the practices of our religious communities. Sometimes the reverse might be true. What if, for example, the laws of the land protect slavery, and a religious institution refuses to hire slave owners? In that case, we can imagine that protection of religious freedom against the law of the land would be an eminently good thing, even potentially helping to evolve society for the better. On the other hand, religious practices are not always superior, either. And, because there is no non-subjective way to conclude which is which, there should be no presumed priorities. Careful judicial weighing of the competing rights and principles seems the only logical course.

So *if* it is true that equality is systematically dominating every contest between it and religious freedom, I agree that this should be corrected. But Brett Scharffs's presentation does not, to my mind, sufficiently make the case. For example, *Ontario Human Rights Commission v. Christian Horizons*⁵ is presented by Professor Scharffs as a "striking example of the triumph of equality over freedom."⁶ In that case, he reports that the Canadian Supreme Court applied the "bona fide occupational qualification" (BFOQ) standard of the religious organization exemption to Ontario's non-discrimination employment law to conclude that Christian Horizons' employment restrictions based on sexual orientation did not qualify as a BFOQ for the job of support worker. Therefore, Christian Horizons was not entitled to the exemption and lost the discrimination suit brought by a former employee. The Court's reasoning seems to me to be a reasonable balancing of the crucial principles at stake. As I understand it, Ontario has a law that prohibits discrimination for sexual orientation in employment. But Ontario recognizes that this presents a conflict for some religious practices, so it allows religious institutions to opt-out of the non-discrimination laws that otherwise would apply to them. But this opt-out is not absolute. It only exempts them if they can establish that the discrimination is sufficiently relevant to the job at issue. Christian Horizons was apparently not able to do this, so it was not entitled to the exemption. In the words of the Court, "[t]here 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."⁷

4. Scharffs, *supra* note 1.

5. Ont. Human Rights Comm'n v. Christian Horizons, 2010 ONSC 2105 (Can. 2010).

6. Scharffs, *supra* note 1.

7. Christian Horizons, 2010 ONSC at 64.

Brett Scharffs's analysis of this case exaggerates the holding significantly. According to him, "[t]he Court says, in effect that there is nothing genuinely or sufficiently religious about a support worker's work that would justify having religious qualifications for the job."⁸ But that is not what the Court says. The Court is not declaring whether the job of support worker is "religious enough" to justify having *any* "religious qualifications." Rather, it is deciding whether *this specific* religious qualification is sufficiently related to *this specific* job. Christian Horizons lost because they presented insufficient evidence to show why abstaining from a same-sex relationship is a necessary qualification to perform the stated job of cooking, cleaning, and dressing patients. The Court did not rule that the job of service worker is not religious enough to justify *any* religious qualification. Just not this one.

Professor Scharffs, however, reads the holding to say that service work is not "religious enough" to justify the exemption. To prove that the Court is wrong, he quotes numerous biblical passages to show that support work is a quintessentially Christian thing to do. He concludes that the Court's holding "is breathtaking . . . [in] its near perfect disregard for what Christians believe to lie at the heart of their religious vocation."⁹ But the ruling is not about the religiosity (or non-religiosity) of the job, but rather, about the connection between the job qualification and the job. In other words, as I understand Ontario's law, the state is willing to exempt religious organizations from its employment discrimination law for those situations where a job sufficiently requires the discriminatory employment rule. But it is not willing to give religious institutions a *carte blanche* to discriminate against any employee any time. Only those religious jobs for which the religious-based discrimination is relevant (determined by the BFOQ standard) will be exempt; others will not. This seems like a reasonable balancing of the freedom of religion to reject homosexuality against the secular right of individuals not to be discriminated in employment because of their sexual orientation. It reminds me of the judicial inquiry that accompanies every equal protection claim under the U.S. Constitution: the court examines *both* the government interest *and* the tailoring of the discriminatory rule to achieve the government interest. If the discriminatory practice is not sufficiently relevant to achieving the governmental purpose, then the discriminatory practice is struck down. Likewise here, the religiosity of the job is only partly relevant to the inquiry. The crucial question is really whether the discrimination against homosexuals is sufficiently connected to performing that job.

The Court's inquiries into the religiosity of the job of service worker (comparing it to more proselytizing jobs like minister, religious teacher and organist) seem to me to be attempts to find some connection between the need for the discrimination for the performance of this job. It is in completing this inquiry that the Court concludes:

from 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.¹⁰

8. Scharffs, *supra* note 1 at 145.

9. *Id.*

10. Christian Horizons, 2010 ONSC at 64.

In other words, the connection would have been more clear to the Court if the job were of a proselytizing nature, but without more evidence, it does not see why Christian Horizons must hire only those not in a same-sex relationship for the support worker job.

I suspect the Christian Horizons lawyers might have failed their clients here. I can imagine quite a lot of additional facts they could have presented that might have helped the Court see that abstention from same-sex relationships was a BFOQ for the job in question. In doing so, they could also have emphasized that the job in question is not *just* the job of a service worker per se, but rather, the job of a service worker *in this particular Christian home environment* where it is likely that employees are expected to be role models of Christian behavior to all of the residents. I can imagine that a woman in a same-sex relationship might do things that would compromise that “role model” expectation — perhaps kissing her partner on the way to or from work, casually talking about her partner in conversations with others about their families, and so forth. If something along the lines of a “Christian role model” were expected of all Christian Horizons employees, I can see a direct connection between this discriminatory rule and this job. Therefore, I think it is quite possible that this case was decided wrongly, but not because, as Professor Scharffs argues, the Court “[took] sides about what kind of work is sufficiently religious to warrant protection.”¹¹ Rather, the problem seems to be that the lawyers and the Court oversimplified the job qualification question. The question was not whether a homosexual could do the job of service worker, but the much more specific one of whether an openly gay woman could do the job of service worker in this particular Christian environment? I think there is potentially a fairly good case to be made that the answer is no. But no one seems to have made it.¹² As in most constitutional balancing cases, sometimes everything rides on how you ask the question.

Brett Scharffs also seems to be stuck on the wrong question. He warns that we should all get nervous when “courts start declaring what is and is not ‘objectively’ religious.”¹³ Fair enough. But he seems so distracted by the Court’s inquiries into the religious nature of service work that he misses the importance of the connection between the (religious) job and the discriminatory rule. This connection is important because it is the way that the state has

11. Scharffs, *supra* note 1, at 145.

12. Brett Scharffs seems to be aware of the importance of role modeling (“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.” *Id.* at 140), and he complains that “the Court does not even consider whether the belief and conduct requirements that all Christian Horizons employees agree to abide are reasonably related to creating and maintaining this Evangelical Christian environment.” *Id.* at 140. Nevertheless, he doesn’t specify exactly how the role modeling piece of the puzzle, along with a more careful specification of the job qualification might have pushed the Court to pay more attention to exactly these factors. Instead, he slips into the same oversimplification problem. He says, “[A]ccording 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.” *Id.* at 136. As I have stated above, this is not the question the Court is answering. I would rewrite Professor Scharffs’s sentence thus: “[A]ccording 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 the type of job in nature to justify a requirement not to be in a same-sex relationship.”

13. *Id.* at 137.

chosen to balance the competition between two important rights — religious freedom and non-discrimination. Again, in this balancing, only certain *types* of religious employment discrimination are tolerated — those where the job is sufficiently related to the discriminatory rule. This balancing of rights makes the BFOQ the crucial legal question, not whether or not the job in question is religious. A different balancing could have chosen to allow no exemptions, not even for the most “religious” of jobs. For example, a church cannot use a slave to be its minister. The job of ministry is obviously religious. But that is not the only relevant issue. The religious freedom of a church to select its own ministers is balanced (and will lose) against the supreme fundamental law that prohibits slavery. That same religious freedom to select ministers is balanced (and will likely win) against state non-discrimination laws on sexual orientation. Those are the rights-balancing choices our public policies have made. And in this balance, it is never just the religiosity of the job that is the crucial question. It is whether in *this* case, *this* equality violation is of the type that the state’s balancing between equality and religious freedom can tolerate.

But where I see a balancing (imperfect though it may be), Brett Scharffs sees a “pattern of equality trumping liberty.”¹⁴ That is not to say that I don’t necessarily believe it is happening, it just means that I don’t see conclusive evidence for it in this paper. I wonder whether a wider swath of material might tell a more persuasive story. It strikes me that the problem with enforcing equality for equality’s sake has been a compelling question outside of the “religious freedom vs. equality” conflict. Equal protection jurisprudence itself has wrestled with this question, as the anti-classification view of Justices Thomas and Scalia has gained more majorities than the anti-subordination view of Justices Brennan and Marshall. The strict scrutiny treatment of affirmative action race classifications, despite the qualitative differences with the racially-classified schools of the 1950s, is still a point of social and jurisprudential debate in our society. I am sure there are other fields from which Professor Scharffs could draw to detail a fuller picture of the scope of equality “trumping” other fundamental principles and whether it is in fact happening in a dangerous way. Without more egregious and pervasive examples, I found his conclusions that equality is systematically trampling religious freedom ultimately unconvincing.

Because I am not convinced that equality is trumping religious freedom, I am frustrated by his conclusion. He ends his article with several statements that equality should not be taken to be an absolute value, and that it should be balanced against other values, like religious freedom. For example, he says that “we must find ways of accommodating, integrating, harmonizing, and hopefully vindicating the values of both freedom and equality[, because] equality alone is not sufficient as a political or moral ideal.”¹⁵ But, of course, no one really says it is. It may be very important, but I think we all agree that it should be balanced against other fundamental values. And, to my mind, it looks like that is what has been happening — even in the cases on which Professor Scharffs focuses his paper. Moreover, he does not give us any detailed idea of what the proper judicial analysis would look like under an ideal balancing. So, if the reader is not convinced that equality is taking over equality

14. *Id.* at 147.

15. *Id.* at 160.

religious freedom, his call for balancing sounds like a redundant call for the courts to do what they are already doing.

There is one other aspect of Professor Scharffs's paper that frustrates me: I want more from his secularity insights. That is, I wish that he would more aggressively apply his ideas about secularity and pluralism to this topic. Brett Scharffs is already known in the field for arguing 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."¹⁶ Professor Scharffs believes that there is something lost when secularism insists on the "monochromatic" imposition of conformity and uniformity, and that he is opposed to a "robust secularism muscling out difference."¹⁷ These are exciting words. His argument resonates strongly with me, because my own current work focuses on the inherent legal pluralism of *sharia* and what this should mean for modern Islamic constitutionalism. Moreover, I am among those who have long been frustrated with the negative effect that "monochromatic" colonial nation-states have had upon the legal and political systems of Muslim majority countries — places where, in pre-colonial times, legal and political authority was arranged so as to recognize and facilitate a multiplicity of Islamic legal schools, as well as those of other religious communities. I believe the monochromatic imposition of secularism in these countries made things worse, not better, in the long run.¹⁸

Because Professor Scharffs sees his presentation of equality trumping religious freedom as an illustration of the problem of "robust secularism muscling out difference," and because he insists that a "liberal democracy need not — ought not — demand conformity of its citizens,"¹⁹ I am curious about how creative he is willing to be to resolve the equality-freedom conflict that he presents here. We know that Professor Scharffs wants a balancing of equality with religious freedom, rather than (what he sees as) a consistent preference for equality. But what if he is unable to convince the relevant powers to change? What if our courts and legislatures ultimately disagree that there is any inappropriate trumping of religious freedom by equality, and the law continues to evolve in the direction that it is now. What then? Is there another way to address the neglected needs of these religious communities?

I wonder if some answers are hidden inside Professor Scharffs's insights about secularity and pluralism. I see some powerful potential in the fact that he cites John Locke for the idea that "respecting religious differences and creating a safe space for religious minorities would generate gratitude and loyalty towards the state."²⁰ Moreover, he asserts that "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."²¹ So, my

16. *Id.* at 161.

17. *Id.* at 162.

18. The details of this point are too complicated to explain here. For a brief summary, see Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY (Tilmann Roder & Rainer Grote eds., 2011).

19. Scharffs, *supra* note 1, at 160.

20. *Id.* at 164.

21. *Id.* at 161-62.

question to Professor Scharffs is, “How seriously do you mean that?” If the state continues to trump religious freedom with equality, is there another way to “carve out a safe space” for religious freedom? If taken to its most logical conclusions, does that mean that a “carving out” of legal realms would be the best protector of the freedoms implicated? That is to say, if one is serious about legal pluralism, then the most important work is not about finding an appropriate doctrinal legal balancing, but rather about effectively creating opt-out parallel legal realms. The Beth Din Jewish arbitration tribunals currently serving American orthodox Jewish communities seeking to have their legal disputes decided primarily by Jewish *halakha* is one example. Native American tribal autonomy over many indigenous people’s conflicts is another. So, do Professor Scharffs’s ideas about the religious pluralism created by secularity mean that he would be interested in the benefits of a “carving out” of legal realms for Christian religious institutions to adjudicate their own legal issues according to their own laws? Could such an arrangement operate as a sort of “religious legal federalism” where the “safe space” created for spiritually-based communities could ultimately lead to “laboratories of experimentation” that generated a wider variety of ideas about the social good?²² And would this scheme better protect religious freedom? Or would it encounter the same equality balancing controls that presently face religious freedom claims?

These are all very live questions that are being asked right now about the phenomenon of Muslims living by *sharia* in the secular west.²³ And Brett Scharffs’s emphasis on religious freedom and pluralism and the problems of monochromatic secularism seem to create a clear opportunity for him to take part in a much larger American conversation about religious freedom, pluralism, religious minorities, and legal autonomy. I had the good fortune of being able to ask him in person whether his ideas about secularity and pluralism, and his comments in this article about the power of institutional autonomy and jurisdiction, should be taken as implying anything about these “religious legal federalism” questions. He answered in the negative: he would not go quite that far. His present article, therefore, should be read simply as a doctrinal critique of existing laws and their application. But, in my opinion, this article touches on a small part of a very large topic of great relevance to many. I would not be surprised — and pleased — to find myself again sharing a podium with him sometime in the near future, where the larger questions about religious freedom and legal pluralism are placed in front of both of us. And I expect I will again learn much from our exchange.

22. For example, could a powerful realm of kosher and halal regulation generate valuable information about humane treatment of animals? Could Muslim regulations against wildly speculative business ventures offer some useful ideas about the causes of our global economic problems? Could Native American norms create new ideas for environmentalism?

23. For an example of the argument that this is a threat to American rule of law, see SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES (Center for Security Policy 2011), <http://shariahinamericancourts.com/> (last visited April 10, 2012).