

THE PRIORITY OF PUBLIC REASONS AND RELIGIOUS FORMS OF LIFE IN CONSTITUTIONAL DEMOCRACIES

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Abstract. In this essay I address the difficult question of how citizens with conflicting religious and secular views can fulfill the democratic obligation of justifying the imposition of coercive policies to others with reasons that they can also accept. After discussing the difficulties of proposals that either exclude religious beliefs from public deliberation or include them without any restrictions, I argue instead for a policy of mutual accountability that imposes the same deliberative rights and obligations on all democratic citizens. The main advantage of this proposal is that it recognizes the right of all democratic citizens to adopt their own cognitive stance (whether religious or secular) in political deliberation in the public sphere without giving up on the democratic obligation to provide reasons acceptable to everyone to justify coercive policies with which all citizens must comply.

I. INTRODUCTION

In debates about the proper place of religion in democratic societies a key issue is whether democracy and secularism are necessarily connected.¹ Fears of such a connection lead some critics of liberalism to the conclusion that liberal democratic institutions are ultimately incompatible with religious forms of life.² Needless to say, if there is no hope that secular and religious citizens can take ownership of and identify with these institutions in equal measure, then the future of democracy within pluralist societies is seriously threatened. These fears commonly arise in debates about the liberal criterion of democratic legitimacy, according to which citizens ought to justify the imposition of coercive policies on one another with reasons that everyone can reasonably accept.³ Since religious reasons are not generally acceptable to secular citizens and citizens of different faiths as legitimate basis for coercion, endorsing this criterion entails the claim that, for the purposes of political justification, public reasons should take priority over religious considerations.⁴ This view suggests that commitment to liberal democracy is most suitable for secular citizens and only suitable to religious citizens who are willing and able to leave their religious beliefs aside in forming their political convictions. In order to palliate the exclusionary effects of such requirement the secular state may need to find compensating accommodations for religious citizens whose

1 For an earlier version of this paper see Cristina Lafont, "Citizens in Robes: The Place of Religion in Constitutional Democracies", *Philosophy & Social Criticism* 43, no. 4-5 (2017).

2 For one of the most influential examples of this line of argument see Alasdair MacIntyre, *After Virtue* (Notre Dame Univ. Press, 1984); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame Univ. Press, 1988); Alasdair MacIntyre, *Three Rival Versions of Moral Inquiry* (Notre Dame Univ. Press, 1990). For an overview of current defenses of this line of argument among the so-called New Traditionalists see Christopher J. Eberle and Terence Cuneo, "Religion and Political Theory", <https://plato.stanford.edu/archives/spr2015/entries/religion-politics/>.

3 Defenses of mutual justifiability as a criterion of democratic legitimacy come in different varieties. For some paradigmatic examples see John Rawls, *Political Liberalism* (Columbia Univ. Press, 1993), 217–20 (Hereafter PL); Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1996), 107–11; Amy Gutmann and Dennis F. Thompson, *Why Deliberative Democracy* (Princeton Univ. Press, 2004), 133; Gerald Gaus, *Justificatory Liberalism* (Oxford Univ. Press, 1996) and Gerald Gaus, *The Order of Public Reason* (Cambridge Univ. Press, 2011).

4 E.g. see Robert Audi, *Religious Commitment and Secular Reason* (Cambridge Univ. Press, 2000) (Hereafter RCSR).

idiosyncratic religious beliefs and practices cannot be easily aligned with, translated, or integrated into a secular outlook. Religious citizens may be tolerated, perhaps even accommodated, but not politically integrated as equals.

Understandably, critics of this view argue that singling out religion for exclusion from political justification is unfair to religious citizens and incompatible with the democratic ideal of treating all citizens as free and equal. In their opinion, giving equal consideration to everyone's views is the only way to grant equal treatment to all citizens. This, in turn, requires the inclusion of religious reasons on equal footing with public reasons in political deliberation. Therefore they question the claim that commitment to liberal democracy requires accepting the priority of public reasons. In their view, the priority of public reasons is an *optional* feature of a specific family of *conceptions* of constitutional democracies, those that fall under the heading of "deliberative democracy," but by no means a *necessary* element of the very *concept* of constitutional democracy.⁵ If this is the case, then citizens seriously committed to the legitimacy of constitutional democracy do not have to subscribe to the priority of public reasons.

In what follows I would like to question this claim. In my view, *the priority of public reasons* is a *necessary* component of any plausible account of the legitimacy of the institutions of constitutional democracy. Defenders of those institutions may disagree with specific interpretations of the priority of public reasons but, whichever version they favor, they cannot dispense with the priority. I will offer support for this claim in two steps. First, I critically analyze the main features of the alternative conception of constitutional democracy that liberal critics endorse. This analysis shows that, in the absence of some version of the priority of public reasons, these critics cannot give a plausible account of the legitimacy of some of the institutions that their own conception relies upon (1). In a second step, I then briefly sketch the contours of a conception of the priority of public reasons that, in my view, more accurately expresses what is at stake in the debate. By offering a more realistic and less restrictive interpretation of the priority of public reasons, I hope to show how religious and secular citizens can equally endorse the institutions of constitutional democracy (2).⁶

II. PLURALIST VS DELIBERATIVE DEMOCRACY

The public reason conception of political justification is characterized by three distinctive claims that liberal critics reject, namely, that (1) there is a set of reasons that are generally *acceptable to all* democratic citizens, that (2) these reasons are *independent from* religious or otherwise comprehensive doctrines, and that (3) they ought to have *priority* in determining coercive policies.⁷ As indicated above, critics question the first two claims on skeptical grounds and the third on normative grounds. In order to articulate an alternative view of political justification, they draw from pluralist models of democracy, which dispense with the assumption of shared public reasons characteristic of the model of deliberative democracy. Even defenders of aspirational models of political justification who endorse the regulative ideal of trying to offer reasons that other citizens may reasonably accept nonetheless contend that, since there is no guarantee that such efforts may succeed, the only alternative open to citizens in that situation is to vote on the basis of whatever considerations they think are right.⁸ If giving priority to some type of substantive

5 For an argument along these lines see e.g. Nicholas Wolterstorff, *The Mighty and the Almighty: An Essay in Political Theology* (Cambridge Univ. Press, 2012), 113.

6 In what follows I draw from some sections of Cristina Lafont, "Religion in the Public Sphere", in *The Oxford Handbook on Secularism*, ed. Phil Zuckerman and John Shook (Oxford Univ. Press, 2017).

7 I omit the additional claim that (4) public reasons are sufficient to decide all or nearly all fundamental political questions, what Rawls calls the "completeness of public reason," because this claim is not endorsed by all advocates of the public reason conception of political justification. See note 17 below.

8 The aspirational model comes in different varieties. See e.g. Kyla Ebels-Duggan, "The Beginning of Community: Politics in the Face of Disagreement", *The Philosophical Quarterly* 60, no. 238 (2010); Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge Univ. Press, 2002), 10.

reasons over others in making political decisions cannot be justified in a way that all citizens can accept, then the only option left is to fall back on a purely procedural solution such as majority rule.⁹

Some critics also point out that the pluralist model of democracy is not only more attractive than the deliberative model, but that it also offers a more accurate account of the institutional features of extant constitutional democracies. Given that all existent democracies endorse secret ballots, the norms embodied in actual democratic practices suggest that nothing is wrong with letting citizens vote on the basis of whatever reasons they see fit. The fact that the deliberative conception seems unable to account for the legitimacy of this institutional feature of liberal democracies is an additional factor that counts against the plausibility of such conception.¹⁰

I totally agree with the institutional perspective that underlies this criticism. Framing the debate on the proper conception of political justification exclusively in terms of the ethics of democratic citizenship and the duty of civility can be misleading. It may suggest that the debate turns on whether or not citizens should follow some ideal moral norms and principles when engaging in political activities, whereas in fact the fundamental question is whether or not citizens can, upon reflection, endorse the ideal norms and principles actually embodied in the democratic institutions and practices in which they participate.

However, precisely if one adopts an institutional perspective, the claim that the pluralist approach accurately reflects the existing institutions of constitutional democracy seems plainly false. As mentioned above, the pluralist approach reflects the fact that the secret ballot allows citizens to vote on the basis of whatever reasons they wish. However, this is not the whole story. What also needs to be accounted for is the significant fact that such decisions may be overruled if they are deemed to be unconstitutional. That is, defenders of the pluralist approach need to account for the fact that constitutional democracies impose a constraint upon how insensitive to reasons political decisions taken by secret ballot and majority rule can be. However, since this is a *substantive* constraint the resort to *procedural* fairness won't do. Whereas secret ballot and majority rule can meet the fairness criterion of giving equal treatment to everyone's views, constitutional review cannot even get off the ground on the basis of such a criterion. Given its aim, this process must identify and reject those views, whichever they are, that support policies in fact incompatible with the equal protection of the fundamental rights and freedoms of all citizens. No matter what specific institutional form this review process might take in different democratic societies, it is of necessity a process sensitive to substantive considerations about appropriate standards, reasons, and arguments.

Now, since defenders of the pluralist approach endorse constitutional democracy, they are committed to the view that "the state is to protect a schedule of basic rights and liberties enjoyed by all its citizens." This indicates that their account of the proper behavior of citizens who engage in political advocacy and voting cannot be as unconstrained as advertised. As Wolterstorff points out, there is an important proviso: citizens should exercise their political voice on the basis of whatever reasons they wish, *provided their actions fall within the boundaries of the constitution*. However, once this crucial proviso is added, a tension between the key commitments of the pluralist conception surfaces: on the one hand, a commitment to the equal protection of the basic rights and freedoms of all citizens and, on the other, a commitment to the equal considerations of all points of view that grounds the rejection of the priority of public reasons. It is hard to see how the first commitment could find institutional expression without any deviation from the second commitment. If legislation is subject to constitutionality constraints, if the latter can legitimately overrule the former, then it must be because the reasons that are geared to test whether a piece of legislation is compatible with the equal protection of all citizens' constitutional rights can overrule other types of reasons and considerations in support of the policy in question, be they religious or otherwise compre-

⁹ For defenses of this conclusion see e.g. Ebels-Duggan, "The Beginning of Community", 70; Eberle, *Religious Conviction in Liberal Politics*, 10; Nicholas Wolterstorff, "The Role of Religion in Decision and Discussion of Political Issues", in *Religion in the Public Square*, ed. Robert Audi and Nicholas Wolterstorff (Rowman & Littlefield, 1997), 150; Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge Univ. Press, 2002), 3.

¹⁰ For a detailed articulation of this line of criticism of the deliberative conception of democracy see, Wolterstorff, *The Mighty and the Almighty* 143-176, esp. 145-147.

hensive. Thus, if institutionalizing constitutional review is feasible at all, if there is a way for this institution (e.g. judicial review) to do what it is set up to do, it must be because it is possible (1) to draw a distinction between the type of reasons and arguments that are relevant for reviewing the constitutionality of legislation, whatever those are, and the types of reasons and arguments that are relevant for justifying why some piece of legislation is good, beneficial, or whatever the case may be, and (2) to give some constraining priority to the former set of reasons and arguments over the latter. The very idea of constitutional review seems to rest on these two assumptions. If we adopt this institutional perspective, we can articulate an interpretation of the priority of public reasons and the duty of civility that reflects more accurately what is at stake behind the public reason conception of political justification.

III. THE PUBLIC REASONS CONCEPTION OF POLITICAL JUSTIFICATION FROM AN INSTITUTIONAL PERSPECTIVE

The public reason conception that I propose is based on a specific interpretation of the three claims mentioned above, namely, that (1) there is a set of reasons that are generally *acceptable to all* democratic citizens, that (2) these reasons are *independent from* religious or otherwise comprehensive doctrines, and that (3) they ought to have *priority* in determining coercive policies. A defense of the first claim requires identifying reasons and arguments of a certain kind that all democratic citizens, whether religious or secular, can reasonably accept ought to have priority for justifying coercive policies. However, I find the characterizations of public reasons in terms of special epistemic properties such as being “accessible”, “shareable”, “intelligible”, etc., highly misleading. Instead, my proposal follows Rawls in identifying public reasons as “properly political” reasons. These are reasons based on those political values and ideals that are the very condition of possibility for a democracy: the ideal of treating citizens as free and equal, and of society as a fair scheme of cooperation, which find expression in the constitutional principles to which citizens are bound in liberal democracies. These democratic values and principles embedded in the institutions of constitutional democracies provide a reservoir of generally acceptable reasons from which all citizens can draw to publically justify the coercive policies they endorse to their fellow citizens.¹¹

An advantage of the political interpretation of the content of public reasons is that it does not face the kind of skeptical doubts that plague epistemic interpretations. Since democratic citizens are precisely the citizens committed to the values and principles of constitutional democracies, it is platitudinous to claim that they share these reasons or that they find them generally acceptable. The standard objection is not that this set of reasons does not exist, but rather that the set is too thin to provide a sufficient basis for determining which coercive policies are justified. However, in contrast to Rawls, my proposal is not committed to the “completeness of public reason.”¹² To claim that public reasons take priority for the purposes of justifying coercive policies is not the same as the claim that public reasons alone must be sufficient to provide such justification or that they must be the only reasons that citizens can legitimately appeal to for that purpose. Perhaps the best way to explain the difference is by focusing on the second claim mentioned above, namely, that public reasons are *independent from* religious (or otherwise comprehensive) doctrines.

This claim is usually cashed out in terms of “neutrality” and, as such, it has been the target of the most vigorous criticisms of the public reason view.¹³ However, it is important to see why this is so. If, following Rawls, one endorses the completeness of public reason, namely, the view that there is a set of reasons

11 See Rawls, *Political Liberalism*, 212–54, and John Rawls, “The Idea of Public Reason Revisited”. In *The Law of Peoples* (Cambridge, MA: Harvard Univ. Press, 1999).

12 Rawls 1993 claims that public reason “is suitably complete, that is, for at least the great majority of fundamental questions, possibly for all, some combination and balance of political values alone reasonably shows the answer.” (241) This assumption has been forcefully criticized by many authors. For detailed versions of this critique see e.g. Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Harvard Univ. Press, 2005), 223ff., and Eberle, *Religious Conviction in Liberal Politics*, part III.

13 For some well-known examples see Joseph Raz, *The Morality of Freedom* (Oxford Univ. Press, 1986); George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge Univ. Press, 1997); Richard J. Arneson, “Liberal Neutrality on the Good: An Autopsy”, in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. George Klosko and Steven Wall (Rowman & Littlefield, 2003).

shared by all democratic citizens that are sufficient to determine all or nearly all policies that touch upon constitutional essentials and matters of basic justice, then the claim that this set of reasons is independent from all religious or otherwise comprehensive conceptions of the good becomes quite problematic. For it suggests that one could determine the policies that ought to be enforced without any consideration whatsoever as to why they are good. That can't be right. However, notice that what creates the problem is the assumption of "sufficiency" and not the assumption of "independence". The problem is not that public reasons are indistinguishable from reasons that are religious or otherwise comprehensive, but rather that the latter cannot be excluded from the set of reasons sufficient to determine the policies that ought to be enforced. Without the assumption of sufficiency, however, all that is needed to justify the claim that public reasons are independent from other types of reasons is the capacity to intuitively distinguish them for the purposes at hand.

My interpretation of the independence claim is based on the intuitive contrast between, on the one hand, reasons and arguments that aim to show whether or not some specific policy is good, desirable, beneficial, valuable, etc. and, on the other, reasons and arguments that aim to show whether or not the policy in question is compatible with the equal protection of the fundamental rights of all citizens. This contrast can be understood as a specific case of a more general distinction between *the rationale that motivates a practice* and its *justification*. This is a familiar contrast. The reason why people marry, travel, or go to the movies is because they find these practices good, valuable, desirable or whatever the case may be. However, this does not yet tell us whether or under which conditions these practices are justified. For present purposes, we can interpret the contrast in terms of Rawls's catchy characterization of the difference between the right and the good: "the right draws the limit; the good shows the point." (Rawls 2000, 231)

Notice that this way of understanding the logical independence between both types of reasons does not involve any problematic assumption of neutrality. Indeed, if we interpret the claim of independence in this way, it becomes clear that arguments and reasons geared to show the *point* or rationale of a given practice cannot be "neutral" or independent of conceptions of the good, be they religious or secular, since their aim is to show why the practice in question is good, i.e. valuable, important, beneficial, etc. It seems clear that a crucial element of advocating for the adoption of a specific policy is to offer arguments and reasons that purport to show why the practices the policy regulates are good, worth protecting or whatever the case may be. However, it seems equally clear that offering these kinds of arguments or reasons may not be enough to *justify* the adoption of the policy in question. For its *justification* may also depend on other kinds of considerations or constraints, for example, whether it is compatible with other practices, whether its benefits and burdens can be fairly distributed, whether it would excessively constrain important rights and freedoms, whether it would have discriminatory effects, etc. This indicates a sense in which the latter considerations may have *constraining priority* over the former without in any way annulling their relevance and import. Take the example of same-sex marriage. LGTB citizens want to be able to marry because of the value of marriage, that is, because they find the institution good, beneficial, desirable or whatever the case may be. Certainly, no one wants to marry for the sake of freedom and equality. However, this does not mean that equal treatment or protection of freedom are not important considerations, perhaps even decisive ones, for justifying whether same-sex marriage should be permitted or its ban overruled as unconstitutional.

III.1 The Mutual Accountability Proviso

This intuitive distinction indicates how the *priority of public reasons* can be defended without the additional burden of a commitment to neutrality. In contrast to proposals that either exclude religious or otherwise comprehensive views from public debate or that include them without any restrictions, my proposal articulates a policy of mutual accountability that imposes the same deliberative rights and obligations upon all

democratic citizens.¹⁴ This proposal recognizes the right of all democratic citizens to adopt their own cognitive stance, whether religious or secular, in public political debates without giving up on the democratic obligation to justify the coercive policies with which all citizens must comply by providing reasons that are acceptable to everyone.

According to the accountability proviso I defend, citizens who participate in political advocacy can appeal to whatever reasons they wish in support of the policies they favor, provided they are prepared to show—against objections—that these policies are compatible with the democratic commitment to treat all citizens as free and equal, and can therefore be reasonably accepted by everyone. In order to fulfill this democratic obligation, citizens must be willing to engage in an argument on the compatibility of their favored policies with the equal protection of the fundamental rights and freedoms of all citizens, and they must be willing to accept the outcome of *that* argument as decisive in settling the question of whether these policies can be legitimately enforced. Objections to the compatibility of such policies with the equal protection of the fundamental rights and freedoms of all citizens must be (1) properly addressed in public debate, and (2) defeated with compelling arguments before citizens' support (or vote) for their enforcement can be considered legitimate.

It is in virtue of this democratic obligation that public reasons have constraining priority. They are the only reasons towards which no one can remain indifferent in their political advocacy. Whereas public reasons need not be the source from which a rationale in support of coercive policies must be crafted, they are the kind of reasons that cannot be ignored, disregarded or simply overridden once citizens bring them into public deliberation. They are the reasons that must be addressed and properly scrutinized in public debate if they are offered as objections to the coercive policies under discussion. Since citizens of a constitutional democracy are committed to the equal protection of all citizens' basic rights it is perfectly appropriate for them to call each other to account regarding the kind of reasons that they are considering or ignoring while advocating for the policies they favor, as this *allows them to establish whether or not these reasons are compatible with maintaining that commitment*. Granted, the shared commitment does not suffice to guarantee *agreement*. But it does give rise to forms of *argumentative entanglement* that allow members of a political community to transform public opinion over time by their continuous efforts to enlist the force of the better argument to their cause and change each other's minds.

III.2 Citizens' Right to Legal Contestation and Argumentative Entanglement

In constitutional democracies with judicial review, the right to legal contestation guarantees that all citizens can, on their own initiative, open or reopen a deliberative process in which reasons and justifications geared to show the constitutionality of a contested policy are made publically available, such that they can be scrutinized and challenged with counterarguments that might lead public opinion to be transformed and prior decisions to be overturned. The right of citizens to question the constitutionality of any policy or statute by initiating legal challenges, allows them to *structure* public debate on the policy in question as a debate about fundamental rights and therefore as a debate in which the priority of public reasons (with its corresponding standards of scrutiny) must be respected. They can do so even if such structuring did not seem antecedently plausible to the rest of the citizenry, perhaps because they had framed it in other terms or because they had failed to foresee the impact that the policy would have on the fundamental rights of certain citizens. Obviously, a claim that a contested statute violates a fundamental right may turn out to be mistaken, and litigants may not be able to change a prior decision or public opinion. But, even in such a case, they still have the right to receive an explicit reasoned justification about why exactly the statute in question does not violate their rights and why it is therefore compatible with treating them as free and equal. For those who continue to disagree, this reasoned justification in

14 I offer a detailed account of my proposal: Cristina Lafont, "Religious Pluralism in a Deliberative Democracy", in *Secular or Post-secular Democracies in Europe? The Challenge of Religious Pluralism in the 21st Century*, ed. Ferran Requejo Coll and Camil Ungureanu (Routledge, forthcoming).

turn highlights the reasons, arguments, and evidence that they would need to more effectively challenge in order to convince the majority of citizens to change their opinion on the matter.

From this perspective, the right to legal contestation guarantees all citizens that their communicative power, their ability to trigger political deliberation on issues of fundamental rights, won't fall below some unacceptable minimum regardless of how unpopular or idiosyncratic their views may seem to other citizens. The conception of public justification as mutual accountability that I defend emphasizes the contribution that structuring political debates in accordance with the priority of public reasons (and its corresponding standards of scrutiny) has upon the legitimacy of enforcing contested policies. It gives rise to forms of argumentative entanglement that allow members of a political community to gain traction within each other's views and transform them over time.

Although examples are always problematic, the development of the debate on same-sex marriage in the US offers a good illustration here. For decades the issue was treated in public debate as turning mainly on the meaning of marriage. On that question, there was widespread agreement that marriage is between a man and a woman. However, once political initiatives for state constitutional amendments to ban same-sex marriage became part of the political agenda, and citizens legally contested such initiatives in the courts, the focus of public deliberation shifted from an ethical and religious debate on the meaning of marriage to a constitutional debate on equal treatment and fundamental rights. Judicial review of the constitutionality of state bans on same-sex marriage led public debate to treat the issue as a matter of fundamental rights. Quite surprisingly, once the debate became structured in that way, a major shift in public opinion took place in favor of same-sex marriage. Although this development is a complex empirical issue, it is hard to avoid the impression that once the debate became a constitutional debate, many of the citizens who were against same-sex marriage on the basis of their religious or otherwise comprehensive views about the meaning of marriage could not find convincing reasons to justify unequal treatment under the law, and that they therefore changed their minds *about whether it should be legal*. There are good reasons to assume that without the extra political power that the right to legal contestation granted litigants, such that they could *structure* the political debate as a constitutional debate about fundamental rights, the 'unfettered' public debate would have continued to turn exclusively on religious and ethical questions about which citizens strongly disagree. As a consequence, the comprehensive views of the majority regarding the meaning of marriage would have continued to dictate policy.

By contrast, once the public debate became framed in constitutional terms the standards of scrutiny characteristic of judicial review (e.g. identifying legitimate government interests, investigating the proportionality of the means, weighing the empirical evidence, etc.) allowed litigants to get traction within and ultimately transform the views of the majority. Indeed, whereas it is unclear what standard of scrutiny could be used to resolve religious and ethical debates over the meaning of marriage amongst citizens holding different comprehensive views, it is quite clear that the standards of scrutiny appropriate for a constitutional debate give rise to forms of argumentative entanglement that allow citizens to call each other to account, gather and weigh factual evidence for and against proposals, and influence one another's views over time as a consequence. In the example of the debate over same-sex marriage, the review process required its opponents to identify legitimate government interests to justify the ban. Once such interests were publicly identified (e.g. protecting the health and welfare of children, fostering procreation within a marital setting, etc.) the debate began to turn on questions for which factual evidence could be decisive in settling the answer (e.g. statistical evidence about the welfare of children raised in same-sex couples households, the existence of married couples unable to procreate, etc.) But let me briefly focus on a different example that may help address the worry that acceptance of the liberal criterion of democratic legitimacy and the priority of public reason threatens religious forms of life.

III.3 *The Priority of Public Reasons and Religious Forms of Life*

Current debates in European countries on whether to ban the Islamic headscarf from public places seem to be following a very similar path. These debates have mainly focused on the meaning of the practice of wearing the Islamic headscarf. On that question there are deep disagreements. However, since political

initiatives to ban the Islamic headscarf from public places became part of the political agenda in most European countries and citizens began to legally contest such initiatives in the courts, the focus of the debate has started to shift from a debate on the cultural and religious meaning of wearing the headscarf to a debate on fundamental rights, equal treatment, and non-discrimination. The recent ruling of Germany's Highest Court that the ban on teachers wearing headscarves is not compatible with religious freedom and that excepting Christian symbols from the ban constitutes religious discrimination and is therefore unconstitutional is helping to structure public political debates in accordance with the priority of public reasons and the duty of mutual accountability.¹⁵ Here again there are good reasons to assume that without the extra political power that the right to legal contestation grants litigants, such that they might be able to *structure* the political debate as a constitutional debate about fundamental rights and freedoms, the 'unfettered' public debate would continue to turn on religious and secular comprehensive views about which citizens strongly disagree. As a consequence, the comprehensive secular views of the majority about the meaning of the Islamic headscarf would simply continue to dictate policy in European countries.

These examples reveal an important motivation behind the debate about the kinds of reasons that citizens should use to justify coercive policies. It is the danger that a majority could, simply on the basis of their *comprehensive* beliefs, whether religious or secular, illicitly restrict the fundamental rights and freedoms of their fellow citizens. However, framing the problem in such anti-majoritarian terms may obscure the democratic character of the interpretation of public reason as mutual accountability that I propose.

III.4 Citizens in Robes

In *Political Liberalism* Rawls claims that in constitutional democracies with judicial review the Supreme Court is the exemplar of public reason.¹⁶ According to my interpretation of public reason, this claim is trivially true. For supreme constitutional courts are precisely the institutions in charge of ensuring, among other things, that policies and statutes respect the priority of public reason, that is, that they do not violate the constitutional rights and freedoms of citizens. However, if we keep in mind the internal connection between judicial review and citizens' right to legal contestation we can draw two important conclusions on the democratic significance of the norms of political justification characteristic of constitutional democracies. On the one hand, if citizens endorse the institutions of constitutional democracy that means that they should behave like they expect the Court to behave, that is, *they should strive to meet the same standards of scrutiny and justification characteristic of public reason that the exemplar they have instituted is supposed to meet.*¹⁷ Contrary to what the inclusion and translation models suggest, it makes little sense for citizens to delegate the task of securing the equal protection of their fundamental rights to state officials and the courts while simultaneously undermining that task by letting ordinary citizens make political decisions about fundamental rights in a way that simply gives equal consideration to everyone's comprehensive views and lets the numbers decide. On the other hand, for that very same reason, the contribution of judicial review to political justification cannot be that the courts undertake constitutional review in isolation from political debates in the public sphere, as if justice needs to be in robes in order to properly preserve the priority of public reasons.¹⁸ To the contrary, the main way judicial review contributes to political justification is that it empowers citizens to call the rest of the citizenry to put on

15 In March of 2015, Germany's highest court ruled that a complete ban on teachers wearing headscarves is not compatible with religious freedom. This ruling also overturned another clause in North Rhine-Westphalian law that exempted manifestations "of Christian and Western educational and cultural values or traditions" at schools from the otherwise complete ban on ostensible demonstrations of religious affiliation. The court decided that this exception constituted a privileging of Christian symbols over those of other religions, which would go against the ban on discrimination on religious grounds that is enshrined in the German constitution. This decision overturned the Court's own ruling on 2003, which allowed states to pass laws banning the headscarf.

16 See Rawls, *Political Liberalism*, 231-40.

17 As Rawls 1993 puts it, "public reason sees the office of citizen with its duty of civility as analogous to that of judgeship with its duty of deciding cases." (p. lv)

18 See Ronald M. Dworkin, *Justice in Robes* (Harvard Univ. Press, 2006).

their robes in order to show how the policies they favor are compatible with the equal protection of the fundamental rights of all citizens to which they are all committed as democratic citizens. It is in virtue of this communicative power that all citizens, whether religious or secular, can participate as political equals in the ongoing process of shaping and forming a considered public opinion in support of political decisions they all can own and identify with.

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