Journal of Law and Policy

Volume 22 | Issue 2 Article 3

2014

Gender and (Religious) Attire: A Matter of (Free) Speech

Alejandro Madrazo

GENDER AND (RELIGIOUS) ATTIRE: A MATTER OF (FREE) SPEECH

*Alejandro Madrazo**

I. INTRODUCTION

Both gender and freedom of speech are topics of growing importance in Mexico. This is an undeniable observation when viewed in the light of constitutional development and debate. In recent years, the Mexican Supreme Court has decided a number of important cases affecting both gender and freedom of speech.[1]

* Professor, CIDE Región Centro, Aguascalientes, Mexico. Coordinator of the Right to Health Program. LL.B. 2012 at ITAM; LL.M. 2003 and J.S.D. 2006 at Yale Law School.

[1] For freedom of speech cases, not directly related to sexuality or gender, see Comisión federal de telecomunicaciones. El artículo 9o.-A, fracción XVI, de la ley federal de telecomunicaciones, al otorgarle facultades exclusivas en material de radio y television, no viola los artículos 49 y 89, fracción I, de la constitución federal, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Diciembre de 2007, Tesis P. XXVII/2007, 26/2006, Página 963 (Mex.); Libertades de expresión e imprenta y prohibición de la censura previa, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Febrero de 2007, Tesis 1a. LVIII/2007, 1595/2006, Página 655 (Mex.); Libertad de expression y el derecho a la información. Su importacia en una democracia constitucional, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXX, Diciembre de 2009, Tesis 1a. CCXV/2009, 2044/2008, Página 287 (Mex.); Primera Sala SCJN, amparo directo 6/2009, sentencia de 7 de octubre de 2009; Medios de comunicación. Su consideración como figuras públicas a efectos del análisis a los límites de la libertad de expresión, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo II, Noviembre de 2011, Tesis 1a. XXVIII/2011 (10a), 28/2010, Página 2914 (Mex.).

For cases regarding gender, reproduction or sexuality cases, not directly related to freedom of speech, see Primera Sala SCJN, acción de inconstitucionalidad 146/2007 & 147/2007, sentencia de 24 de abril de 2007; Violación. Se integra ese delito aún cuando entre el activo y pasivo exista el vínculo matrimonial (Legislación del estado de puebla), Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXIII, Enero de 2006, Tesis 1a./J. 10/94, 9/2005, Página 658 (Mex.); Divorcio necesario. Cuando se ejerce la acción relative con base en la causal de violencia intrafamiliar, en la demanda deben expresarse pormenorizadamente los hechos, precisando las circunstancias de tiempo, modo y lugar en que ocurrieron, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Enero de 2007, Tesis 1a./J. 69/2006, Página 173 (Mex.). For an analysis of these cases, see Alejandro Madrazo Lajous & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEXAS L. REV. 1863 (2011). And finally, for a more comprehensive list of cases, see *Sentencias*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, http://www.equidad.scjn.gob.mx/spip.php?page=lista_biblioteca_doc&id_rubrique=161.

The Mexican Supreme Court has decided several cases that are related to the expression of gender and sexuality. The first, and most prominent, is the Amparo Directo Civil 6/2008, in which the Court considered sexual and gender identity, and affirmed that the right to freely develop one's personality allows an individual to "project" his or her life "in all ambits of life," including one's identity. *See* Primera Sala SCJN, Amparo Directo Civil 6/2008, sentencia de 14 de mayo 2008, at 90. This line of argument was used by the Mexico City Assembly in its defense of same-sex marriage in the Acción de Inconstitucionalidad 2/2010. *See* Acción de inconstitucionalidad. La inclusion del artículo 391 del código civil para el distrito federal en el decreto de reforma a dicho ordenamiento, publicado en la gaceta official de la entidad el 29 de diciembre de 2009, así como su vinculación con un precepto que fue modificado en su texto, constituye un Nuevo acto legislative susceptible de impugnarse en aquella vía, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Agosto de 2011, Tesis P. XIX/2011, 2/2010, Página 869 (Mex.). The Mexico City Assembly argued that marriage is a form of freedom of expression both because of its connection to one's right to freely develop one's personality and contribution to public debate. The Supreme Court decided the case in August 2010. However, the Court did not explicitly affirm the expressive dimensions of marriage until 2012 in the Amparo en Revisión 581/2012, in which it spoke of the "expressive benefits" of marriage. Matrimonio entre personas del mismo sexo. Perspectivas para analizar su constitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme

I have published elsewhere on the intersection of gender and free speech, exploring the theoretical and normative implications of understanding gender as a form of expression.[2] Here, I hope to use that earlier work as a platform to address, specifically, the question of religious attire in public spaces and its intersection with gender equality.

I propose that we understand gender as a form of expression, and second, that we understand religious attire (e.g., head gear worn by women belonging to a particular religious group) as not only (or mainly) *religious* attire, but also as attire that expresses gender roles. Furthermore, that the main *function* of freedom of speech is the protection and promotion of *diversity* in speech. Starting from these premises, I propose we take the debate over religious, female-worn head gear (i.e., head scarves) and recast it in terms of freedom of speech. That is, instead of framing the issue as one where there is tension between (religious) *freedom* and (gender) *equality*, the debate can be framed under the free speech analytic framework and recast as a tension *within* free speech. On one hand, we have the importance of women's gender expressions; and on the other hand, a state's interest in promoting gender equality. Discussing these issues under the free speech

---

Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XIX, tomo I, Abril de 2013, Tesis 1a. XCVIII/2013 (10a.), 581/2012, Página 965 (Mex.).

Lastly, in 2012, the Court decided the Amparo Directo en Revisión 2806/2012, a case about homophobic expressions. *See* Primera Sala SCJN, Amparo Directo en Revisión 2806/2012, sentencia de 6 de marzo 2013. This case is not so much about what can be expressed through one's gender or sexuality, but about what others cannot discern about people's gender and sexuality.

I want to thank my colleague, Estefanía Vela, an acute and systematic observer of the Court, for keeping all these cases on the radar and, specifically, for helping me prepare this footnote.

[2] *See* Alejandro Madrazo, *Género y libertad de expresión*, *in* LIBERTAD DE EXPRESIÓN: ENTRE LA TRADICIÓN Y LA RENOVACIÓN. ENSAYOS EN HOMENAJE A OWEN FISS 257–87 (Esteban Restrepo Saldarriaga ed., 2013). The text was written for a Mexican legal audience, who was unfamiliar with both gender studies and the free speech doctrine in the United States. I use ample portions of that text here, and I would like to thank Pamela Ruiz Flores for her help with the translation of the sections used here.

framework allows us to accommodate both a woman's desire to wear religious head gear and the state's attempt to ban it, while simultaneously empowering those same women.

We tend to discuss the question of whether specific head gear used by specific groups (women) within a larger religious community (Muslim) should be banned as a tension between religious freedom and gender equality. This framework relies on some individuals' beliefs that wearing a headscarf is valuable and should be protected by law because it is a *religious* and *collectively-held* practice. Furthermore, it also assumes that the practice of having women wear headscarves disempowers them and subjects them to traditional gender roles, undermining gender equality. The question between these two sides then becomes whether religious freedom should prevail over gender equality.

The problem with this framework is twofold. First, it sets the stage for arbitrary solutions. That is, it requires us to choose between one of two incommensurable clashing values: religious freedom and gender equality. This dichotomous framework provides no common ground to resolve the conflict. Thus, it forces a choice that, in the end, is arbitrary: should freedom prevail over equality or vice versa? Second, by accepting this dichotomous framework, we are put in a position in which, by choosing equality over (religious) freedom, we conclude that prohibition of attire is an admissible policy. Needless to say, prohibiting voluntary conduct by others, which does not harm third parties, is always a difficult policy to support or accept. If, on the other hand, we choose (religious) freedom over equality we run the risk of legitimizing gender oppression yet again. Both alternatives disempower the actual women who choose to wear religious attire. Choosing equality over religious freedom makes gender inequality acceptable in the name of religion. Alternatively, choosing religious freedom over equality forces these women to be either victims or collaborators of their oppressors and disqualifies their choice about how they want to live *their* life and express *their* gender roles.

I propose that we instead frame gender as a form of expression and attire as a form of gender expression. Using a specific understanding of both freedom of speech and gender, we

can tackle the question of religious attire in a manner that will allow us to resolve the apparent tension between gender equality and religious attire in a less arbitrary manner. Rather than simply choosing one value (gender equality) over another (religious freedom), we can take up the question in a manner that empowers—or at least refrains from disempowering—women who choose to wear religious attire. I suggest we see religious attire as a way women can express their adherence to specific aspects of gender roles they adopt and presumably value.

In Part II, I explain the analytic framework of both free speech and gender that I use to address these matters. In Part III, I propose that we understand gender as a form of speech and discuss the implications of this with regards to the tension between religious attire and gender discrimination. Finally, in Part IV, I argue that protecting religious attire as a form of gender speech better empowers women as opposed to denying religious attire constitutional protection in the name of gender equality.

One final word of warning: the platform for this proposal is taken from my previous work on the intersection of gender and freedom of speech, referenced above. My previous work addressed the specific issues of gender and free speech—notably, same-sex marriage—in the context of Mexican constitutional debates. In that previous work I brought American authors to bear on Mexico's development of free speech and gender debates, creating an enriching juxtaposition of constitutional traditions. Now, I bring Mexican constitutional cases and debates (along with the American authors on which I had previously relied) into the American forum, using direct translations from what I found pertinent from my previous work instead of refurbishing arguments. I do so because I wish to underline, not downplay, the origins of what I offer. Therefore, you will find references to Mexican law, authors, cases, and in particular, heavy reliance on one case (i.e., same-sex marriage as protected under the right to free speech). My hope is that this enriches the debate, but most important, I hope to avoid any pretention of discussing this issue within the confines of an American constitutional debate. Instead, I want to underscore that I am a Mexican constitutional scholar

engaging with my peers from elsewhere on topics of common interest everywhere.

II. UNDERSTANDING GENDER AND SPEECH

This section seeks to explain the understandings of gender and free speech from which I approach the question of religious attire. It is structured in three parts. First, I define gender and flesh out its importance in the debate on the freedom of speech. Second, I provide the theoretical and doctrinal framework for the fundamental right to freedom of speech, from which I undertake my analysis. Finally, I present some of the clichés evident in recent academic discussions about freedom of speech in Mexico and try to either avoid or contest them.

A. Gender

It is a common trope to define gender in contrast to sex. In its simplest form, the distinction tells us that sex refers to the physiological differences between men and women, while gender refers to the roles or identities constructed, transmitted, and expected by society. These roles or identities are linked or associated with one sex over another. My sex is *male* because I have certain physiological characteristics that allow me to identify as such;[3] my gender is *masculine* because as a child with the

[3] Identifying these characteristics is actually much more difficult to answer than it initially seems. Laura Saldivia offers a synthesis that illustrates the complexity of the problem by pointing out at least eight medically distinguishable variables:

> (1) genetic or chromosomal sex, such as XY or XX; (2) gonadal sex determined by sexual reproductive glands, like the testes and ovaries; (3) internal morphologic sex that is determined after three months of gestation, such as seminal vesicles, prostate or vagina, uterus, or fallopian tubes; (4) external morphological sex, or genitals, such as penis, scrotum, clitoris, or labia; (5) the hormonal sex, such as androgens and estrogens; (6) phenotypic sex, or secondary sexual characteristics like facial or chest hair; (7) assigned sex and gender of rearing; (8) sexual identity.

referred physiological characteristics, I was taught to prefer football to dolls, the color blue to pink, and later, to sexually desire women, not men.

Therefore, in its simplest form, sex refers to the body, while gender refers to the social role, constitutive of an identity, and associated with the (sexed) body. The concept of gender emerges precisely to avoid the biological determinism of assigning social roles as a function of differences in reproductive physiology. In this regard, Professor Joan Scott tells us:

> In its most recent usage, "gender" seems to have first appeared among American feminists who wanted to insist on the fundamentally social quality of distinctions based on sex. The word denoted a rejection of the biological determinism implicit in the use of such terms as "sex" or "sexual difference." "Gender" also stressed the relational aspect of normative definitions of femininity. Those who worried that women's studies scholarship focused too narrowly and separately on women used the term "gender" to introduce a relational notion into our analytic vocabulary. According to this view, women and men were defined in terms of one another, and no understanding of either could be achieved by entirely separate study.[4]

Consequently, discussing gender and not sex—as does the Mexican Constitution in the fifth paragraph of Article I[5]—emphasizes the social dimension, as opposed to the purely

---

Laura Saldivia, *Reexaminando la construcción binaria de la sexualidad*, Paper Presented at the Seminario en Latinoamérica de Teoría Constitucional y Política (SELA) (2009), (forthcoming in "Seminario") (manuscript at 4), *available at* http://www.law.yale.edu/documents/pdf/student_organizations/sela09_saldivia_sp_pv.pdf (translated by author). None of these variables seems necessary or sufficient. *See id.*

[4] Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053, 1054 (1986).

[5] Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended Diario Oficial de la Federación [DO] , 5 de Febrero de 1917, art. I.

biological, of dividing people into men and women. The use of the term gender does not exclude biology; but rather, it encompasses issues that go beyond it. In addition, gender refers to the *relational* character (that is, that gender roles are defined in relation to one another) of assigned social roles based on biological differences (mainly concerning reproductive capabilities). Gender and social roles are important for both men and women. Understanding the role of any one sex's gender roles requires comprehension of both. Therefore, I agree with Professor Scott when she says that in the dominant social scientific discourse,

> [t]he term gender becomes a way of denoting "cultural constructions"- the entire social creation of ideas about appropriate roles for women and men. [T]he use of gender emphasizes an entire system of relationships that may include sex, but is not directly determined by sex or directly determining of sexuality.[6]

However, the distinction between biology (sex) and social construction (gender) is not as sharp as it looks. The growing visibility of transsexuality and intersexuality directly controverts the distinction: sex has a strong component in social construction.[7] We assign sex depending on how we interpret the body, sometimes literally *intervening in the body itself* and constructing one sex. For instance, when an infant has ambiguous sexual characteristics (a smaller penis than average, a clitoris larger than average, penis and labia, or a long list of possibilities), we intervene. Parents will then often decide which

---

[6] Scott, *supra* note 4, at 1056–57.

[7] Transsexuality refers to a person changing his or her sex (from male to female or vice versa), who assumes the primary or secondary physiological sexual characteristics, conduct, and behaviors of the opposite sex. This does not necessarily question the binary distinction between the sexes, but rather questions whether the distinction is necessarily fixed. By contrast, intersexuality refers to people who do not completely fit into the physiological categories of male or female, and therefore resist the dominant binary classification of their physical bodies. *See* Saldivia, *supra* note 3, at 5.

of two socially accepted options—male or female—the body of the infant will be adjusted to. This is done by removing—through surgery, hormone treatment, or some other means—the characteristics that are not of the chosen sex. The concepts of transsexuality and intersexuality controvert the discrete and binary frame in which all people can be classified as male or female. These phenomena demand that the conceptual apparatus of two discrete categories of male and female yield to either a gradual understanding in which there are multiple possibilities between these two poles, or else both poles are rejected for not adequately representing the reality of certain bodies and certain people.

For the purposes of this piece, I will not address in detail the implications of transsexuality and intersexuality on the analytical contraption through which we strive to understand the body and social relations. I will also not explore thoroughly the theoretical and normative implications—multiple and deep—of renouncing the use of discrete and binary categories that now prevail in our law. To the extent that transsexuality and intersexuality challenge the established categories of gender and sex, they should be considered as an expression of gender or as a gender expression. To be, or to be understood, as a transsexual *expresses* something in the same way that being or understanding one's self as a heterosexual man *expresses* something. If someone refuses to be labeled explicitly as a specific gender, that refusal is an expression *about* gender. The most relevant aspect of transsexuality and intersexuality is what they tell us about the distinction between gender and sex for the purposes of free speech. Namely, that social construction is more important than it initially appears and that physiology is also a function of the cultural interpretations we make of the body. In this sense, transsexuality and intersexuality reinforce the importance of gender as a social construction and, thus, as an expression of what gender is or should be.

The social dimension—as opposed to the merely biological—and the relational character of gender are two important elements. A third important feature of the *gender* category is its necessarily *political* dimension. Foucault noted and analyzed the historical

and discursive construction of sexuality.[8] He argued that discourses that are generated around sexuality establish multiple and diverse power relations between people. The same happens when we talk about gender. Moreover, gender can be understood, among other things, as one such type of field, which has sprouted around the study of sexuality, as well as one of the specific categories that have been incorporated into different disciplines (history, political science, medicine, law, etc.). The important thing is that gender—practices, symbols, ideas, customs, activities, artistic expressions, legal, and political or religious doctrines, regarding gender—produces power relationships between people.

B. The Theoretical Framework of Freedom of Speech

The future of constitutional interpretation of freedom of speech in the Mexican judiciary is uncertain.[9] In a relatively short period, the Mexican Supreme Court has issued a number of opinions about the freedom of speech[10] that are noteworthy in their theoretical dispersion and methodological inconsistency. Some opinions virtually extinguish freedom of speech,[11] while

---

[8] *See generally* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Vintage Books 1990) (1976).

[9] Santiago J. Vázquez Camacho, *Introduction* to LIBERTAD DE EXPRESIÓN: ANÁLISIS DE CASOS JUDICIALES XXVII (Santiago J. Vázquez Camacho ed., 2007).

[10] *See* cases cited *supra* note 1.

[11] The most famous case was the ruling of the Primera Sala de la Suprema Corte in the legal protection in review 2676/2003, better known as the case of "El Poeta Maldito" that Sergio Witz issued in October 2005. Primera Sala SCJN, amparo en revisión 2676/2003, sentencia de 5 de octubre de 2005. In that case, the majority concluded that the existence of a constitutionally protected entity (patriotic symbols) should be interpreted, ipso iure, as a limit to freedom of expression.

As rightly pointed by Francisa Pou, the Court deemed Witz's poem punishable under criminal law, even though:

> [T]here could not be a better example of what is often considered the core type of speech protected by the Constitution. That was a case of linguistic expression, not

others are progressive and demand that the State concern itself with improving the public debate about freedom of speech and its constitutional partner, the right to information.[12] It is thus

> nonlinguistic or "symbolic" expressive behavior, as in the famous examples of burning American flags, books or crosses. The latter is generally analyzed as a regulation of expression, not a regulation of the conditions of the freedom of expression, as when discussing the influence of money in election campaigns, which is a regulation of expressive content. That is not simply a form and manner of expression, but rather one of indubitable political dimension. The expression had no individualized addressee, which excluded the need for complex weighing of judgments between freedom of expression and other fundamental rights of individuals (i.e. honor, privacy). The expression moved through an extremely classical channel, such as print media, and not a medium that stimulated discussion, such as television . . . . Finally, the case concerned the speech of an individual, not a subject with a less defined constitutional status (interest groups, legal people, cultural communities).

Francisca Pou, *El precio de disentir*, *in* LIBERTAD DE EXPRESIÓN: ANÁLISIS DE CASOS JUDICIALES XXVII 187–88 (Santiago J. Vázquez Camacho ed., 2007) (translated by author). If Witz's poem does not find that that type of expression deserves constitutional protection under the freedom of expression, it is difficult to imagine what kind of expression does deserve it.

[12] Known as the "Televisa Law," case 26/2006, the Supreme Court, sitting *en banc*, issued the final portion of its Fifteenth *Considerando* on June 7th, 2007. *See* Comisión federal de telecomunicaciones. El artículo 9o.-A, fracción XVI, de la ley federal de telecomunicaciones, al otorgarle facultades exclusivas en material de radio y television, no viola los artículos 49 y 89, fracción I, de la constitución federal, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Diciembre de 2007, Tesis P. XXVII/2007, 26/2006, Página 963 (Mex.). The supermajority opinion explicitly discussed the function of the State as guarantor of the freedom of expression and the citizen's right to information, which is a function that involves the obligation of the State to foster plurality and diversity in communication in order to achieve a society "more integrated, more educated and chiefly, more just."

It is important to note that there are good reasons to be optimistic about the Court's opinion on freedom of expression. It shows the underlying understanding of such an important fundamental right as having more weight in the evolution of the Court's constitutional doctrine than the "damned Poet" precedent. First, the ruling is more recent. Second, it is a supermajority ruling

impossible to predict or generalize the Court's treatment of freedom of speech. Whether the State takes the role of a censor or as a protector of the diversity of expressions that reach the public forum, its role in relation to freedom of speech has not been understood by the Mexican Court to be a passive one. While much remains undefined, what is clear is that—at least in Mexico—the borders of the fundamental right to free speech are defined by the function of its political and instrumental role; that is, its role as an instrument for collective self-government.

Given the embryonic nature of a judicially generated constitutional doctrine around freedom of speech in Mexico, the theoretical framework that achieves the objective of this piece must be found elsewhere. Unfortunately, discussion of the constitutional doctrine on freedom of speech from Mexican academic circles is not particularly wide or rich. Undoubtedly, the recent decisions of the Mexican Court have generated academia's interest in the subject, but there is no existing home grown theoretical framework sufficient to support the exploration of gender as an expression in the way this article contends.[13] For

---

by the Court sitting *en banc*, in contrast with a simple majority achieved in a Chamber. The ruling in *Televisa Law* was unanimous. Finally, the reaction and criticism from the legal community on the first ruling, and the overwhelming acceptance and celebration of the second one, should be read by the Court as an indicator of the quality of both rulings.

Further, the First Chamber seems to have honed its own criteria to issue a ruling in November 2006 in *amparo* 1595/2006. Libertades de expresión e imprenta y prohibición de la censura previa, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Febrero de 2007, Tesis 1a. LVIII/2007, 1595/2006, Página 655 (Mex.). While it does not paint the Court as progressive as the Court was in *Televisa Law*, it does speak of a more sensible and serious First Chamber than in the case of the "dammed Poet."

[13] Recently, authors have published several papers about freedom of expression that discuss the rulings of the Court referred *supra* note 1 on the compilation of Santiago Vazquez or Electoral Tribunal judgments. *See, e.g.*, Alejandro Madrazo Lajous, *Los límites a la libertad de expresión*, *in* 1 COMENTARIOS A LAS SENTENCIAS DEL TRIBUNAL ELECTORAL, Número 1 (2008). Or, the discussion has revolved around increasing visibility for constitutional issues. *See, e.g.*, Pedro Salazar Ugarte & Rodrigo Gutiérrez Rivas, *El derecho a la libertad de expresión frente al derecho a la no*

the purposes of this piece, the theoretical framework articulated by Professor Owen Fiss is useful.

Fiss questions the assumption that state censorship is a threat against which the fundamental right of free speech is erected.[14] Without denying the role of oppressor that a state can play against individuals who wish to express something, Fiss proposes that the state can also play the role of guarantor for the freedom of those same individuals. This is possible for two reasons. First, it is not only the state that can keep the individual from expressing herself; private power can also render individuals mute. Second, in Fiss's understanding, the values that freedom of speech protects are eminently social, not individual. If a state values speech (and demonstrates as much in its Constitution), it is not because discourse is a form of self-expression or self-actualization, but rather because it is essential for collective self-determination, and therefore, to democracy.[15]

Against the conception of freedom of speech that Fiss labels "libertarian"[16]—freedom of speech protected as a form of self-expression, valuable in itself—Fiss proposes we adopt a *democratic* conception. Under such a conception, the purpose of free speech is to enrich and amplify the scope of public debate in order to allow ordinary citizens to know the issues that must be addressed and the arguments supporting the various positions around them.

---

discriminación, *in* IIJ-UNAM Y CONSEJO NACIONAL PARA PREVENIR LA DISCRIMINACIÓN (2008). But most of the legal doctrinal work that deals with freedom of expression remains within textbooks about individual rights that are several decades old. I think the relevant academic analysis about freedom of expression in our country has just begun, and there is not yet doctrinal critical mass to build a robust and fertile theoretical framework that facilitates the construction and analysis of the constitutional judicial doctrine in this field.

[14] *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 1–4 (1998).

[15] "Speech is valued so importantly in the Constitution, I maintain, not because it is a form of self-expression or self-actualization but rather because it is essential for collective self-determination." *Id.* at 3. In considering gender as an expression, I think the goal of this Article is to contribute to the discussion of Fiss's position. Unfortunately, due to space restrictions, I will undertake this analysis in a future piece.

[16] *Id.*

If Fiss is right and a *democratic* conception of freedom of speech is the correct interpretation, then the state can have two distinct roles. First, it can play the role of censor, in which case the fundamental right to freedom of speech is a mechanism to prevent or stop certain abuse of political power. Second, it can play the role of *promoter* of vigorous public debate when powers different from the state are the ones censoring. In that case, the state must intervene to ensure that the weak are not silenced by the powerful.

Fiss tells us[17] that the U.S. Supreme Court initially decided cases involving freedom of speech by balancing the value of freedom (e.g., freedom of speech) against some counter-value (e.g., national security, the right to privacy and honor of the citizens, etc.). Under the *libertarian* model we would explain the conflict as a contest between two values which need to be balanced. If a value other than freedom prevails, a limit to freedom of speech exists that excludes certain types of speech from constitutional protection.

What are the consequences of adopting the *democratic* conception?[18] The problem with an approach which balances value and counter-value is that, when the counter-value has the same constitutional status as the value, the balance between the values becomes sterile casuistry and impossible to resolve by application of general principles. It therefore becomes, to some extent, arbitrary. Such is the case, for example, when the counter value is equality in the form of the fundamental right to nondiscrimination. Under the *libertarian* conception, it would be necessary, at some point, to choose between the freedom of the discriminator who uses his or her freedom of speech to discriminate, and the discriminated subject's right to equality. Fiss rightly proposes that under the *democratic* model, we can characterize the dichotomy in a more fruitful way: not as a conflict between freedom and equality, but rather as a conflict between freedom and freedom.[19] The balancing then would take

[17] *Id.* at 5.

[18] *Id.* at 3.

[19] *Id.* at 15.

place between two competing manifestations of the same value (free speech), and thus can be resolved starting from a common ground and seeking to achieve a common purpose: the enhancement of that value.

Fiss observes that the problem of discriminatory speech, for example, is not only that such speech infringes on the value of equality—i.e., the fundamental right to nondiscrimination—but that it also has the consequence of "silencing" those who are discriminated against (or those who are excluded, slandered, etc.), impoverishing collective deliberation.[20] Those who are discriminated against are effectively excluded from participating in the public debate, either because they are not heard or because, if they are heard, their voice is not valued because they have been previously disqualified. Fiss calls this *the silencing effect of speech*.[21] But the silencing effect of speech does not only occur in cases in which the content of one person's speech mutes the speech of others. It is also present in cases where, because the media through which competing discourses are expressed is asymmetric, the plurality of opinions is undermined. Asymmetric access to media has the effect of marginalizing one party's speech making it effectively inaudible.[22] Thus, plurality of opinions

---

[20] *Id.* at 16.

[21] *Id.* at 16–18.

[22] Mexico has recently considered this in the case of *Ley Televisa*. *See* Comisión federal de telecomunicaciones. El artículo 9o.-A, fracción XVI, de la ley federal de telecomunicaciones, al otorgarle facultades exclusivas en material de radio y television, no viola los artículos 49 y 89, fracción I, de la constitución federal, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Diciembre de 2007, Tesis P. XXVII/2007, 26/2006, Página 963 (Mex.). When the Court deliberated this case, Televisa and TV Azteca, the two main national broadcast television companies who were the most interested in the outcome of the ruling, broadcasted many notes accusing the Supreme Court as being "Chavista" (referring to Venezuelan president Hugo Chavez) and totalitarian. During its public deliberations, the Supreme Court was already outlining the defeat of television companies. The two senators who led the challenge to the law were accused of being, in one case, corrupt agents of foreign interests and, in another, a murderer.

However, the court and senators are far from being vulnerable groups. The court had media available, like Judicial Channel, and the Senate had

diminishes and public debate is rendered less robust.

The important aspect of the democratic model is that freedom of speech becomes an *instrumental* right with the immediate objective of ensuring inclusive public deliberation. This public deliberation is political because its goal is to enable collective self-government. The state is constitutionally entitled to intervene, restricting a speaker in order to contain the silencing effect of his or her speech. The state is entitled to do so in the name of freedom of speech per se, not on behalf of another value or in spite of free speech. When the state intervenes in this way, it plays a role analogous to that of a parliamentary moderator: it removes someone from the podium so that others can now have access. This allows the plurality of speech to be enhanced and the robustness of public debate is aggrandized.

C. Common Tropes

Some of the tropes frequently used in discussions about freedom of speech are, I believe, counterproductive. The first trope establishes that there are different *types* of speech, and that the classification of speech under a particular category is central to determining if it is constitutionally protected. According to this notion, certain categories of speech are protected while others are not (or not as well) because some types of speech are more valuable than others.[23] However, freedom of speech does not

---

extensive coverage in print media and some coverage on radio and cable television. But the *difference* between the ability of the court or senators to communicate with the two main national television networks was so abysmal that it had the effect of silencing these broadcasters from a large proportion of the national population.

[23] For example, in Mexico, Juan Antonio Cruz Parcero argues that there are categories of privileged discourse: artistic, political and religious discourse: "[T]here are especially three aspects of these freedoms that are at all times crucial in a free society. Freedom to manifest religious beliefs and political ideas, and one generally ignored in the theoretical writings: freedom of artistic creation, that is, to manifest artistically." Juan Antonio Cruz Parcero, *De poemas, banderas, delitos y malas decisiones. La sentencia de la Suprema Corte sobre el caso Witz*, 245 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 423, 430–31 (2006) (translated by author). He also

protect speech in and of itself. Instead, speech is protected by establishing a fundamental right because it has a specific function namely ensuring that diverse issues and positions are not suppressed from public deliberation. The exercise of classifying speech into different types of speech has the effect of prejudging which discourses contribute to public deliberation.

For example, society tends to accept that religious discourse deserves more protection than "obscene" speech (a category of speech which has historically been denied constitutional protection).[24] At first glance, it is not clear why society should presume that a theological doctrine is of necessarily greater value than a pornographic image. Imagine the possibility that a theological proposition contributes little or nothing at all to cultural, political, social, or theological discussions. As a hypothetical, imagine a Roman Catholic individual arguing in favor of adopting the thesis of the immaculate conception of Mary, which has been part of Catholic Church dogma since the nineteenth century. The matter is quite settled for Catholics and quite irrelevant to almost all other groups, so positing the dogma contributes little to current public deliberation. In contrast, suppose a pornographic image provides a new perspective on how to enjoy healthy eroticism for thousands of people. For example, feminist pornography, or post-porn, both of which challenge the male-dominating discourse of commercial pornography without sacrificing the celebration of eroticism. Why would we hold that an argument in favor of the Immaculate Conception is inherently worthier than feminist pornography, a priori? In a case having to choose between guarding—by either protecting or promoting—one discourse over another, it would be rather more sensible to look at what each contributes to today's individuals and/or today's society in the existing historical and cultural context.

Moreover, prejudging based on the topic rather than the

---

argues that "freedom of artistic creation is a way to express ideas that deserves special protection, that a human being can express themselves artistically is considered something intrinsically valuable . . . ." *Id.* at 443.

[24] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Miller v. California, 413 U.S. 15 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

substance impedes an analysis of the effects of specific speech and consequently on what that speech brings to democratic deliberation. Of course, it is easier to have categories into which speech can be classified and then, depending on its classification, afford it greater or lesser protection. But this type of categorization contributes little to collective deliberation because it diminishes the potential for understanding and interpretation. It is important not to focus on what *kind* of speech is granted or denied protection. Instead, it is important to ask what that speech contributes to the public discourse. The latter cannot be known *a priori* and therefore it should not matter if the message falls into a particular category of speech. It should matter *who* and under *what circumstances* the message is offered.

A second trope is that speech is different from action. This is not commonly accepted in U.S. Constitutional doctrine, but it is taken for granted elsewhere.[25] Contrary to what this trope assumes, I hold that what is relevant is not the means by which we express ourselves—language, symbols, pictures, objects, actions, silence—but whether we are actually *communicating* something. Marching, burning a flag, boycotting a product—these are all forms of expression. Expressions, whatever form they may take, contribute to public discourse.

The third trope is the notion that freedom of speech is a right enforceable against the state.[26] Historically, freedom of speech

---

[25] For example, Francisa Pou quotes Paul Salvador saying that what is spoken and what is written is as different from the facts as "spirit is from matter." Pou, *supra* note 11, at 188. However, the distinction between words and actions is becoming less relevant in the field of freedom of speech. The classic example is saying the word "fire" to a firing squad, which is no longer the exception to the rule. In an information society, words and actions are increasingly confused. For American constitutional doctrine that accepts freedom of speech protection for expressive conduct, see, for example, *United States v. Eichman*, 496 U.S. 310 (1990) and *Texas v. Johnson*, 491 U.S. 397 (1989).

[26] American constitutional doctrine still holds that *all* fundamental rights are justiciable against the State, but another constitutional doctrine recognizes that such a right protects against private citizens as well. In considering free speech, however, the idea of the State as the only censor is still prevalent outside the U.S. Once again, Pou quotes Paul Salvador maintaining that a key

may have originated as an effort to protect political dissidents from government violence. However, the genealogy of this fundamental right does not seem reason enough to limit its function. Today, oppression of private citizens by private power is more visible (and maybe more common). Private media can shut out a message; it can discredit a messenger; and it can project a specific message with a force unparalleled in the past. In the large political communities in which we live, private mass media is an example of a particularly important vehicle of communication and a particularly salient source of *the silencing effect of speech.*[27] It may be that private power can be deemed a more dangerous censor than public authority.

This last point is crucial. It has become a widely accepted thesis that large private powers are a potential threat to freedom of speech, but this is accepted by *analogy* with the State.[28] Namely that those who represent a threat to freedom of speech are the people or organizations who provide a public service (e.g., radio broadcasting), or are an economic power that has a disproportionate influence over the state, market, society, or all of the above. For example, a company or group of companies may monopolize basic services such as telephone services. Or else, a historic entity that having rivaled the state still holds sway over large portions of the populations—for instance, the Catholic Church. In all of these cases, the State as a paradigmatic censor remains near at hand in the imagination. We need to broaden our understanding of censorship by private actors in order to address some of the most ordinary forms of censorship at play in gender.

If we seriously consider that freedom of speech does not

---

premise of freedom of speech is that it has to protect those who "individually confront the established power, preferably the public, but also the private power." Pou, *supra* note 11, at 188–89.

[27] Fiss, *supra* note 14, at 5–26.

[28] For example, Pedro Salazar Ugarte and Rodrigo Gutierrez Rivas make this point, referring explicitly to the potential of actual private violators of freedom of speech in Mexico: the major economic powers, the media, multinational corporations, and criminal groups. They probably would not object to including noneconomic powers like churches, but they seem to have in mind a power similar to that of the State in *some* way. Ugarte & Rivas, *supra* note 13, 6–7.

protect speech itself without qualification, but instead protects the plurality and diversity of speeches for inclusion in political deliberation, then we have to unmoor ourselves from the dominant paradigm. I propose broadening our perspective of what constitutes an agent that is capable of impinging upon freedom of speech to include not only private agents who have disproportionate power in absolute terms, but also to those private agents who have disproportionate power *relative* to the silenced speaker.[29] For example, a man who believes that women are obligated to carry to term an unwanted pregnancy may not have a silencing effect on the candidate for public office that is running on a pro-choice platform, but may be able to silence his wife in a conversation with her pregnant daughter to decide whether she travels to Mexico City to terminate an unwanted pregnancy.[30] This expanded understanding of the censor may be irrelevant when discussing the regulation of political propaganda or the use of the electromagnetic spectrum for broadcast, but it is important when addressing gender.

III. GENDER AS EXPRESSION AND GENDER EXPRESSIONS

Gender should be understood as a form of expression. There are two different perspectives underlying the policy implications for understanding gender as a form of expression: gender constitutionally protected as expression, and gender as a form of expression that limits another's expressions *about* gender.

A. Gender as Expression

In order to understand in what sense gender is a form of

---

[29] For example, Salazar and Gutiérrez would easily coincide, since they rely in a relational conception of power and freedom when they explain how private agents may treat freedom of speech. *See id.* at 6–7.

[30] I do not suggest that the State should intervene directly between private parties, but I want to illustrate the silencing effect. I will conclude that privacy interests outweigh freedom of speech in a case like this one, but it does not mean that a silencing effect is not present. I thank Estefanía Vela Bara for suggesting that I clarify this idea.

expression, it is necessary to understand what is meant when the term "gender" is used on a daily basis. Professor Joan Scott's work is helpful in this understanding. After analyzing the historical evolution of the use of the concept of gender, Scott presents a rich and complex conception of gender using two propositions that help to understand gender as an expression: "The core of the definition rests on an integral connection between two propositions: gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power."[31]

The first proposition—gender as a constitutive element of social relationships—is split into four elements, analytically distinct but closely related.[32] The first of these elements is made of "available symbols that evoke multiple (and often contradictory) representations."[33] Scott uses Eve and Mary as examples of the Western Christian traditional gender symbols.[34] The second element is the "normative concepts" that guide the interpretation of these symbols, checking and limiting their possible interpretations.

> These [normative] concepts are expressed in religious, educational, scientific, legal, and political doctrines and typically take the form of a fixed binary opposition, categorically and unequivocally asserting the meaning of male and female, masculine and feminine. In fact, these normative statements depend on the refusal or repression of alternative possibilities, and, sometimes, overt contests about them take place . . . . The position that emerges as dominant, however, is stated as the only possible one. Subsequent history is written as if these normative positions were the product of social consensus

---

[31] Scott, *supra* note 4, at 1067.

[32] *Id.*

[33] *Id.*

[34] *Id.*

rather than of conflict.[35]

This second element is particularly relevant to freedom of speech. Specifically, with regard to the "normative concepts" or symbols, Scott proposes these concepts, which include legal, political, and religious doctrines, among others, that tell us how the interpretations of those symbols should be—or more precisely—how they can be interpreted.[36] These dominant normative concepts contrast and suppress other possible interpretations of such symbols, naturalizing the interpretative possibilities that prevail. This means that the interpretation of symbols is forged by contrasting interpretive alternatives, which, if one comes to be dominant over the others, can suppress the other symbols. What is at stake then is the *interpretation* of *symbols* that tells us what *we are* as men and women (and, in addition *that we are* men or women), and what we *should be* as men or women. Gender consists, in part, of an interpretation that seeks hegemony and suppresses different interpretations about what we are. In gender, we are in the field of *discourse*, and more specifically, a discourse to be imposed as a fixed fact that displaces alternatives.

The third element Scott describes is the social institutions and organizations that adopt and reproduce the interpretation of the symbols that are presented as fixed and as a product of consensus, when they really are not. Scott speaks of, at least, four institutions in which this takes place: kinship, work, education, and government.[37]

A fourth element is the subjective identity. The symbols, the indications of how we should interpret them (that is, the normative concepts), and the social institutions that adopt and reproduce these interpretations all have a direct impact on how we come to understand ourselves.

This understanding of gender enables one to see the intimate link between freedom of speech and gender. Gender is formed by a cluster of expressions: symbols, doctrines that tell us how to

---

[35] *Id.* at 1067–68.

[36] *Id.* at 1067.

[37] *Id.* at 1068.

interpret these symbols, institutions, and organizations that require us to accept those symbols and ideas about ourselves, and reinforce the workings of the cluster as a whole. Gender is one of the forms of speech that permeates through us and connects us with each other; gender infuses our institutions, our doctrines, and our symbols with meaning, and constitutes our subjective identities. When one acts according to one's gender role, one draws meaning from symbols and doctrines associated with that role. One uses that meaning in order to act within basic social organizations and institutions—such as family, school, religion, or government—and thereby confirms and reaffirms such meanings by understanding one's self through the resulting interpretative framework. Gender, like expression, and like discourse in general, provides meaning and defines persons, institutions, relations, and symbols. Dressing a newborn in blue *says something* of what is expected of him, of what, starting then, he *is*. That act conveys a message to him, and to the rest of us. Professor Scott tells us: "[t]he sketch I have offered of the process of constructing gender relationships could be used to discuss class, race, ethnicity, or, for that matter, any social process."[38] Scott is right, but this does not diminish the discursive and expressive dimension of gender.

Scott also provides a second proposition that specifically explores the political profile of what she thinks is specific to gender (without actually describing it as exclusive): its ability to articulate power relationships. Scott explains:

> [G]ender is a primary field within which or by means of which power is articulated. Gender is not the only field, but it seems to have been a persistent and recurrent way of enabling the signification of power in the West, in Judeo-Christian as well as Islamic traditions . . . . Established as an objective set of references, concepts of gender structure perception and the concrete and symbolic organization of all social life. To the extent that these references establish

[38] *Id.* at 1069.

> distributions of power (differential control over or access to material and symbolic resources) gender becomes implicated in the conception and construction of power itself.[39]

Gender provides guidelines that naturalize and legitimize the distribution of power. It is a deeply (but not exclusively) *political* discourse.

The political use of gender is not limited to the perceived sexual differences between men and women. Citing anthropologist Maurice Godelier, Scott argues that differences between the sexes are often invoked in relation to social phenomena that have nothing to do with sexuality but by being attached to sex differences, become socially legitimate.[40] That is, gender serves as a key to interpreting social relations that have nothing to do with sexuality, and legitimizes them. As Scott explains, "Gender has been employed literally or analogically in political theory to justify or criticize the reign of monarchs and to express the relationship between ruler and ruled."[41] She goes on:

> Gender is one of the recurrent references by which political power has been conceived, legitimated, and criticized. It refers to but also establishes the meaning of the male/female opposition. To vindicate political power, the reference must seem sure and fixed, outside human construction, part of the natural or divine order. In that way, the binary opposition and the social process of gender relationships both become part of the meaning of power itself; to question or alter any aspect

---

[39] *Id.*

[40] *Id.* (citing Maurice Godelier, *The Origins of Male Domination*, 127 NEW LEFT REV. 17 (1981)). For Scott, the legitimizing role of gender is manifested in many forms and is supported by multiple instances in which economic and political organization of a society, or a particular historical phenomenon, such as American colonial domination or medieval spirituality, is articulated in terms of the distinctions between men and women and understood as natural differences. *Cf. id.* at 1070.

[41] *Id.*

threatens the entire system.[42]

Gender is so embedded within the symbolic language of power that the enterprise of problematizing gender is necessarily a political one. Gender is political in both the strict and expansive sense of the word: it configures power relationships between individuals—whether in the bedroom, at school, in the office, or in court—and power is frequently read in terms of gender. In short, gender is an expression and, significantly, a political expression in all its senses.

B. The Protection of Gender as Expression

There are valid reasons to protect gender as an expression. Whether gender is manifested linguistically or through behavior, it reflects and informs interpretations of what we are as men and women (or, neither one nor the other). Equally important, gender is an important political expression.

The richness of the analysis that stems from the premise that gender is an expression can be perceived from two perspectives: whether we are trying to *reaffirm* a dominant gender role, or if we are trying to *question* a dominant gender role. In both cases, gender as *expression* must be preliminarily protected. In the end, however, such protection can be curtailed or even defeated depending on various issues, such as the possible or actual silencing effect of that expression on others.

Some gender expressions *reaffirm* established gender roles. The controversy over the use of the headscarves by Muslim women in certain public spaces in Western Europe has been widely discussed, specifically the legal ban on the use of head scarves by Muslim students in French schools. Most frequently, the matter has been analyzed as a conflict between the apparent *discrimination* that young women are subjected to in *wearing the veil* and their freedom of expression. Salazar and Gutiérrez take such an approach: "Such practices have a community-religious thrust, and according to the report of the Commission [Stasi, which conducted the preliminary work leading to prohibitive

---

[42] *Id.* at 1073.

legislation] they run counter to the principle of equality between men and women because they put the latter in a situation of marginalization."[43]

Thus, the conflict has been (partially) understood as one between the young Muslim's right to nondiscrimination, and the right to freedom of religion and religious speech. This approach is problematic from the onset. Who is understood as the title-holder of the right to freedom of religion/religious speech? The Stasi Report, upon which the French legislation is justified, assumes that wearing the veil is most often not a girl's voluntary decision, but an imposition by the girl's parents and communities.[44] The Legislature thus assumed that it is an expression or practice that is imposed, not chosen. As noted by Salazar and Gutierrez, this assumption dissolves the conflict: there isn't really a protected right to freedom of religion or speech, since the speech/practice is not free.[45] Under this assumption, the veil should be banned because it violates *two* of the fundamental rights of Muslim girls: nondiscrimination *and* free speech.

The problem is that the presumption that the headscarf is an imposition needs to be proven. Denying, ex ante, these girls' autonomy and attributing their religious expression not to them, but to their parents and communities, is a rhetorical and argumentative resource without empirical proof for such a supposition. Such proof can only be determined on a case-by-case basis, not through a general mandate. It may well be the case that such practices are imposed, coerced, or not voluntary, but the state should not presume so.

The controversy surrounding headscarves can be analyzed in a much more useful manner if the issue is rephrased as a conflict between two competing claims, both of which are grounded in freedom of speech: the expressive act of women who wear headscarves and the State's interest in promoting gender equality.

---

[43] Ugarte & Rivas, *supra* note 13, at 75.

[44] COMMISSION DE REFLEXION SUR L'APPLICATION DU PRÍNCIPE DE LAÏCITÉ DANS LA RÉPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE 46–47 (2003).

[45] *Id.* at 76.

To understand the first of these claims, we need first to ask ourselves if there is an important inaccuracy in how the expressive behavior of wearing the headscarf has been understood. Using a headscarf cannot be cast as an *exclusively* religious practice. Further empirical work is needed to better understand the phenomenon, but arguably, wearing a headscarf also expresses something about a woman's gender role. The headscarf says something about the wearer *as a woman* as much as it expresses something about her as a Muslim. Women wear the headscarf because they are Muslim *women*, not just because they are Muslim, period. Therefore, the veil is linked with how (Muslim) women relate to others *as women*. That the veil has as much to do with the fact of being a woman than with the fact of being a Muslim is illustrated by some countries, such as Saudi Arabia, Southern Sudan, and Iran, *all* (post-pubescent) women must be covered in public, whether they are Muslim. Of course, in cases in which women are forced to wear the veil, it may not be deemed an expressive act to be protected by free speech, but the point is that headgear is used by women *because they are women*, not exclusively or even necessarily because they are Muslim. For example, Muslim *men* do not wear headscarves, either at home or in public spaces. In addition, the profession of the Islamic faith is not represented directly by the headscarf: the headscarf does not have the same function among Muslims that the cross has among Catholics. The headscarf is not a symbol of the faith; non-Muslims are expected to wear it in certain contexts. The analogy is imprecise (and Christian-centric). The headscarf expresses something about what *women* are (or should be) and how they interact with men, with people outside their homes, and generally in public spaces, because *they are women.*

On the other hand, the State has a legitimate claim to promote both secularism and equal treatment between men and women and may deem that, in certain contexts, headscarves undermine both. Removing a practice that may hinder the achievement of a legitimate state interest in strategic contexts (such as schools where the young are in the process of defining their identity in the midst of their broader community) can be held to be legitimate. When banning headscarves from schools, the State is

sending a powerful message: at school, a space in which the young acquire what are deemed to be necessary and shared abilities and knowledge, religious and gender-biased attire is out of place; what we all share in common cannot accept gender (or religious) cleaving. Women, the State is saying, should not present themselves to their peers as women first, and then as peers. Rather, they should be deemed peers on equal footing first and foremost. In a gender-biased world, literally covering women singles them out and skews the way their interactions are received. The State's message can be seen as analogous to the policy of banning smoking from non-enclosed areas in educational facilities: such a ban has more to do with protecting the young from seeing—and potentially emulating—adults who are authority figures engage in destructive behavior than with protecting them from second-hand smoke. In banning all smoking from educational facilities the State conveys to the young a powerful message regarding smoking.

The conflict we are concerned with should thus be recast as follows: on one hand, the state has an interest in communicating the importance of secularism and substantive equality between men and women; on the other hand, young Muslim women wearing a face veil[46] are expressing speech that seeks to convey something about what they are, should be, or should appear as (i.e., something about their gender role). Under this framework, the State's prohibition of headscarves is a message in favor of secularism and equality between men and women. Muslim women conceive of the headscarf as an expression of something about their identity as women, rather than (only as) exercising a religious practice or expressing (exclusively) something about their religion. Such tension between the state and the Muslim women can be resolved by working from a common platform: free speech.

The dispute is symbolic and discursive. To reframe the conflict in these terms does not require a particular solution. It

[46] I assume here that the expression of wearing a headscarf is voluntary. If not, there is no possible case for constitutional protection, at least not under the doctrine of freedom of speech.

could conceivably be argued that the state has a legitimate and compelling interest, or, indeed, an obligation, to promote secularism among its youth. One method the state could use is suppressing any symbol associated with (though not necessarily expressive of) a religion that distinguishes people by creed. For instance, Article III of the Mexican Constitution explicitly commands secular education.[47] But one could also argue that young Muslim women in France have the right to express, through the use of the headscarf, whatever they consider they *are* or *should be* as women. In any case, it seems that young Muslim women wearing the headscarf in school are expressing a view in France when wearing the headscarf in *accordance* with the *established gender role* in their cultural and religious environment. This is gender as speech, and it should be protected.

In casting the dispute this way—as (state) speech versus (women's) speech—the resolution can operate under the same principle and seek the same goal: safeguarding freedom of speech, promoting diversity, and plurality of positions in matters of public concern. For example, the solution could be tailored to both protect Muslim girls' gender expression from being suppressed, and authorize the state to manifest the importance of secular education and substantive equality between men and women. This solution could propose, not impose, that women—Muslim or not—need not accept a gender role that requires them to hide part of their body. Banning the headscarf would be unconstitutional, but the state could express—through other means—its desire for gender equality and secular public institutions. For instance, taking into consideration the age of the girls and their educational environment, the weighing of rights may favor the elimination of gender distinctions in their entirety, including those most accepted in French society. The State could, for instance, impose a policy in which both men and women use a standardized uniform consisting, for example, of shorts or long

[47] Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended Diario Oficial de la Federación [DO] , 5 de Febrero de 1917, art. III.

robes.[48] In any case, it is important to recognize that when the headscarf is freely taken and not imposed, Muslim women are expressing something about what they understand they are and something they understand women to *be*. While no fundamental right is absolute and the right to the free expression of gender can still be defeated depending on the circumstances, it is important to recognize gender's expressive dimension.

Another example that helps to clarify the importance of understanding the problem of gender under the freedom of speech conceptual architecture is where gender roles are controverted, not reaffirmed, by expressive behaviors: notably the case for same-sex marriage. One of the dominant expectations deriving from gender roles is that in most societies, women must be attracted to men, and men to women. Homosexuality counters this aspect of gender roles in our societies. Women who are attracted to other women and men who are attracted to other men are still often regarded as deviants, both from what is expected, and from the accepted virtues of their gender.

In Mexico City, the Legislative Assembly established the legal institution of domestic partnership (*sociedad de convivencia*) in 2006.[49] This institution gave partners most (some would argue all) of the rights and obligations that marriage gives to spouses. A few years later, in 2009,[50] the same legislative body decided to go further and change the definition of marriage in order to eliminate the requirement that the two people marrying be a man and a woman, thus legalizing same-sex marriages (and adoption).

In Mexico, why were domestic partnerships not enough? In Mexico City, the rights linked to sustenance, successions, interdictions, and even adoption do not differ greatly between marriage and domestic partnerships.[51] Adoption—–which drew

---

[48] This proposal, of course, may have other serious constitutional problems itself.

[49] *Ley de Sociedades de Convivencia*, GODF (Nov. 16, 2006).

[50] *Decreto por el que se reforman diversas disposiciones del Código Civil para el Distrito Federal y del Código de Procedimientos Civiles para el Distrito Federal*, GODF, 525–26 (Dec. 29, 2009).

[51] *See* Código Civil para el Distrito Federal [CC] [Federal Civil Code], Diario Oficial de la Federacion [DO], arts. 391, 392.

most energy of the ensuing debate—was not the reason because domestic partnership law was tailored to allow adoption by same-sex couples.[52] Seemingly, what justified and, more important, motivated the legalization of same-sex marriage in Mexico City (where the legal functional equivalent to marriage already existed), was the *expressive* dimension of the institution of marriage. Marriage has an important expressive function as a symbolic role. Couples communicate their commitment through the act of getting married. They do so to each other, to their communities, and to the state. If marriage did not have a communicative, expressive, and celebratory function, most couples would marry before the Civil Registry (i.e., Town Hall) as if they were getting driver's licenses (some do, certainly).

Most people get married for its symbolic value and because of what marriage represents. Few couples are primarily concerned with, or even aware of, the legal implications of getting married. In many cases, what matters—at least when you're getting married—is to communicate the existence of the union rather than to regulate it by law. Getting married and establishing a domestic partnership are acts which say different things to the people involved and to society. It is not a difference in importance, but a difference in kind.

Marriage as a speech act is protected under freedom of speech. The demand that same-sex *marriages* be recognized tells society something about the purported "deviant" character of homosexuality. Namely that if the law itself recognizes the equal legitimacy and status of a homosexual union in relation to a heterosexual union, it is saying that homosexuality *is not or should not be understood* as a deviation or variation. A gay couple that gets married is through that act saying something to society: our union is *as* legitimate, and *in the same ways*, that

---

[52] Article V of the Domestic Partnership Law for the Federal District equates partners with common law marriage for all legal purposes, while Articles 391 and 392 of the Civil Code for the Federal District equates common law spouses and formal spouses on the matter of adoption. *Ley de Sociedades de Convivencia*, GODF, art. V (Nov. 16, 2006); *see also* Código Civil para el Distrito Federal [CC] [Federal Civil Code], Diario Oficial de la Federacion [DO], arts. 391, 392.

heterosexual unions are. Through marriage, homosexual couples have a vehicle to contest the gender roles they challenge and are still often imposed on them. In this regard, the state has a *constitutional obligation* to give homosexual couples access to the means of expression through marriage. This is due not only, or not even mainly, because of right to nondiscrimination, (after all, one could argue that in terms of *personal and property rights*, the domestic partnership equates or can equate homosexuals and heterosexuals), but because of the protection of the right to freedom of speech.

The state has an obligation to allow diversity of expressions linked to gender roles, and fulfill its obligation by extending the use of marriage as a form of expression, *particularly* for those who express gender roles that diverge from dominant ones. That is, especially to those who bring diversity to the "market place of ideas"[53] about gender relations. Same-sex marriage should be constitutionally analyzed as expression through opposition of established gender roles, in addition to being analyzed under fundamental rights to equality, nondiscrimination, protection of the family, health, etc. Both wearing a headscarf and getting married are communicative acts that deserve constitutional protection under the right to freedom of speech.

C. Expressions about Gender

Starting from the democratic model of freedom of speech, the state's function as *moderator* is particularly relevant. The state must seek to eliminate or mitigate the *silencing effect of speech* of some individuals in order to protect the speech of others.

Gender as an expression (particularly, but not exclusively, the behaviors and gender expressions that contradict established gender roles) must be protected when other expressions regarding gender threaten to silence it. The silencing effect is accentuated to the extent that the silencing expression *disqualifies or intimidates* others. Disqualifying a speaker (that is, labeling him or her as not apt for participation in the debate or expressive act)—to the extent

[53] United States v. Rumely, 345 U.S. 41, 56 (1953).

that it says *something about the speaker* and not about the matter under discussion—has a particularly potent and harmful silencing effect, and contributes little or nothing to the general discussion.

For example, in the days following passage of the same-sex marriage law in Mexico City, Mexican Archbishop Norberto Rivera made several controversial declarations. He stated:

> [The legislative reform that allows same-sex marriages] has opened the gates to a *deviant* possibility which allows these couples to adopt *innocent* children, whose right to have a family built by a mother and a father will not be respected, with the consequential psychological and moral damage that this injustice and arbitrariness will therefore cause . . . .
>
> The Church considers an aberration to compare the union between same sex persons with marriage, because these are not able to reach the ends that gave origin to this essential institution that for Christians doesn't just follow a form of social organization, but it is rather the order instituted by God since the creation of the world, and above the divine will that rules over the morality of marriage, no human law can be.[54]

Rhetorically, same-sex couples are labeled as deviant and aberrant, and portrayed as a threat, not to the Archbishop, but to the innocent children who risk being adopted by them. Furthermore, same-sex couples are disqualified because of their fundamental betrayal of their gender roles: a person should be attracted to the opposite sex because the objective of sexual intercourse must be reproduction, which same sex couples can't achieve (by themselves, the Archbishop should have qualified). The Archbishop attributes to marriage a necessary goal that by its (divinely ordained) nature excludes same sex couples.[55]

---

[54] Gabriel Leon Zaragoza, *Inmorales y aberrantes, las reformas aprobadas: Norberto Rivera*, PERIÓDICO LA JORNADA, Dec. 22, 2009, at 29, *available at* http://www.jornada.unam.mx/2009/12/22/capital/029n2cap (emphasis added).

[55] *Id.*

The Archbishop's statements exemplify normative doctrines to which Scott makes reference:[56] they present the Archbishop's interpretation of symbols that give value to institutions (marriages) as naturally truthful and therefore invulnerable to criticism. With this, the statements render impossible any interpretation of alternative choices. Thus, the Archbishop's statements reinforce the monopoly of dominant ideas over the meaning of institutions; in this case, marriage. These statements create an interpretation of marriage that seeks to eliminate the opinions of the Archbishop's rivals.

I doubt the Archbishop's statements inhibited openly gay couples from getting married. I also doubt that homosexuals in Mexico ceased being homosexual because of what was said by the Church prelate. Nevertheless, I believe that, at least among the Catholic homosexual population of Mexico, the Archbishop's statements will make some couples or persons refrain from expressing their intimate commitments to each other through marriage. This is due in no small part to the message itself. In his message, the Archbishop threatens homosexuals, at least those that are believers in his faith, to adopt the behavior that he expects from them: he states that same-sex persons' marriages "have no future" because homosexuals that desire to get united under this scheme are "too few."[57]

If we accept the democratic model of freedom of speech, in which the state has to intervene by limiting a dominant speaker so as to ensure that others are not excluded from collective deliberation, normative consequences follow: under this model, the state should protect expression (i.e., the questioning of the role of gender established through the celebration of a marriage between people of the same sex) by restricting or containing (not suppressing)[58] the Archbishop's message, and thereby attenuating

---

[56] *See supra* Part III.A.

[57] *See* Zaragoza, *supra* note 54, at 29.

[58] By suppression, I mean the act of silencing or restricting expression. Intervention refers to actions seeking to regulate the manner and channel through which expressions are transmitted. Contention means actions geared toward countering the impact of the message, without affecting the message itself, or the manner in which it is transmitted. This may be a positive act,

his disqualifications and threats. The effect of the threatening and disqualifying tone of Archbishop Rivera's statements on same-sex couples, especially Catholics, that may want to express themselves through the celebration of a civil marriage, is that of inhibition.[59] To prevent this inhibition the state must provide some form of remedy to counter the Archbishop's statements. This could take the form of a monetary fine—symbolically communicating that the Archbishop's statements were reprehensible and impinged upon other's rights—the demand of a public apology, or the promotion of the use of marriage by same-sex couples who wish to publicly express their commitments.

IV. CONCLUSION: PROTECTING GENDER SPEECH THAT REINFORCES GENDER ROLES AS A FORM OF EMPOWERMENT

Regardless of the analytic soundness of the offered framework, individuals interested in advancing gender equality and challenging gender roles should strategically favor protecting expressive practices (such as wearing a headscarf), even if such practices reinforce traditional gender roles.

If we frame the issue of religious attire (e.g., headscarves) as one in which freedom of religion confronts gender inequality, then there are two possibilities. Either the title holder of the right in tension with gender equality is a religious community (wherever collective rights are ascribed to such groups); or else the title holder is a woman in so far as she is a member of that religious community. This means that the right is held by the community, as a community, and is protected as long as it conforms to that community's preexistent internal rules. By contrast, if we cast the question as a matter of free speech on

---

such as subsidizing rivaling speech. An example of suppression would be direct censorship. An example of intervention or restriction would be where and when the message can be transmitted (i.e., not in schools). And an example of contention would be, for instance, government subsidy to feminist porn (as an alternative to banning pornography deemed to be a form of violence against women).

[59] Under Mexican law, only civil marriages confer legal status; thus, the Archbishop can only inhibit, not prohibit, gay Catholics from marrying.

both sides of the equation, then the title holder of the fundamental right is the woman as an individual. Conceptually, this makes *her* the person entitled to decide whether or how to exercise the right.

If the fundamental right at stake is freedom of religion, then wearing a headscarf is a practice that is both rigid and reified, insofar as it is part of the paraphernalia or practices that are protected because it is embedded in tradition, or according to the religious groups' rules and hierarchies. Instead, free speech is a practice that is far more ductile: an expressive act emitted by an individual who wishes to convey a message, but can choose to do so in a different manner, through different forms of expression.

As to the effect each framework has with regard to the woman herself, the two could not be more different. Framing the matter as one involving religious freedom requires that the woman conform to the religious practice of her community in order to enjoy constitutional protection. Instead, if the matter is framed from the perspective of free speech then the woman is empowered independently of her community. Discussing her actions as expressions of freedom of religion subsumes the woman into her religious community, making her an instantiation of a group practice and, thus, disempowers her vis-a-vis the group. Her actions are not hers, but the community's. The community's rights (practices, beliefs) are protected; the woman is not responsible for her actions but merely an object of the group's traditions. However, casting her actions as an exercise in free speech, in contrast, simultaneously empowers her vis-a-vis both the state and any other entity—including her religious community—and holds her responsible for such actions. She chooses how to express her gender role, so she is responsible for such expressions.

In the end, I believe that the most powerful reason to prefer freedom of speech is the same reason why freedom of speech is valuable in the first place: because it provides a minimum safeguard for diversity in collective interaction. When wearing a headscarf is cast as valuable or protected because it is the time-honored religious practice of a group, such action actually contributes to stifling diversity both within and without religious communities. It stifles diversity between religious communities

because it requires that either a religious community entrench itself to defend a specific practice or else succumb to the majoritarian perspective (for example, secularism—as in France—or gender equality). Casting the choice to wear a headscarf as a religious practice also stifles diversity within religious communities because, in identifying the practice as belonging to a community, it fixes the practice and protects it only insofar as it is recognized as a collective practice. This view assumes that the message conveyed by the practice is inherently important to the religious community as a whole, disallowing the claim of dissenting messages within the community as legitimately expressing the community's identity.

In contrast, framing the matter as a question of free speech, by establishing that individual women—not the religious communities themselves—are the title holders of the right in question, protects diversity both within and outside the religious community. It does within the community, because it empowers the individual women as the right holders, and thus, the actors capable of demanding state protection. Outside the community this view protects a specific message regarding gender roles—the roles according to the status quo within the religious community—from being stifled by the broader status quo, which sees the gender roles conveyed and sanctioned by that community as unacceptable. For these reasons, I argue, approaching the tension between gender equality and religious attire is best done through free speech, at least for those of us committed to empowering women.

It is important to keep in mind that the broad doctrinal structures through which we frame specific problems do not determine specific outcomes. Regardless of how one frames the question, *legally*, the solution to the problem at hand can be constructed so that headscarves can or cannot be banned under law. However, choosing the framework does matter because it determines who the protagonist is—the individual women or the religious community—and what the value at stake is, freedom and diversity, or religion and tradition. While framing is not everything, it can determine much and is especially useful to describe and explain which issues are truly problematic and in

what sense.

In the end, the strongest case for protecting women who wear religious attire in public spaces stems from the importance of allowing women themselves to say and do what they feel they should as women. It is a question of taking women at their word, through what they are saying and through their actions. Respecting women's speech, whatever manner in which it takes, is something to which those of us who agree with the fundamental claims of feminism should always be committed.