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Muslim Reformists, Female Citizenship and the Public
Accommodation of Islam in Liberal Democracy

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Muslim Reformists, Female Citizenship and the Public Accommodation of Islam in Liberal Democracy*

Abstract

The European Court of Human Rights (“ECHR”), in a trilogy of cases involving Muslim claimants, has granted state parties to the European Convention on Human Rights a wide margin of appreciation with respect to the regulation of public manifestations of Islam. The ECHR has justified its decisions in these cases on the grounds that Islamic symbols, such as the ḥijāb, or Muslim commitments to the shari‘a – Islamic law – are inconsistent with the democratic order of Europe. This article raises the question of what kinds of commitments to gender equality and democratic decision-making are sufficient for a democratic order, and whether modernist Islamic teachings manifest a satisfactory normative commitment in this regard. It uses the arguments of two modern Muslim reformist scholars – Yūsuf al-Qaradāwī and ‘Abd al-Halīm Abū Shuqqa – as evidence to argue that if the relevant degree of commitment to gender equality is understood from the perspective political rather than comprehensive liberalism, doctrines such as those elaborated by these two religious scholars evidence sufficient commitment to the value of political equality between men and women. This makes less plausible the ECHR’s arguments justifying different treatment of Muslims on account of alleged Islamic commitments to gender hierarchy. It also argues that in light of Muslim modernist conceptions of the shari‘a, there is no normative justification to conclude that faithfulness to the shari‘a entails a categorical rejection of democracy as the ECHR suggested.

1. Introduction

In the ongoing battles regarding Europe’s “Muslim problem,”¹ Muslim adherence to gender equality has become a central demand. This has been manifested most

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¹ See, e.g., “Across Europe, Worries on Islam Spread to Center,” available at http://www.nytimes.com/2006/10/11/world/europe/11muslims.html?_r=1&scp=1&sq=&st=nyt (last visited March 12, 2010).

ubiquitously in European debates regarding the *ḥijāb*, the Islamic headscarf worn by large numbers of religiously observant Muslim women, and more recently, the prohibition in some European states of the *niqāb*, the Islamic face veil worn by a relatively small number of Muslim women.² In some European states, e.g. France, the desire to regulate the appearance of Muslim women is explicitly justified in the name of gender equality,³ while in other European states, e.g. Germany,⁴ the rhetoric used to justify a prohibition of the *ḥijāb* has instead relied on classifying it as a dangerous political symbol. Often these justifications are advanced simultaneously, reflecting both the common European belief that theological adherence to Islam entails both a normative commitment to a system of gender hierarchy⁵ and a fundamental rejection of European norms of civility and tolerance of others.⁶

² France completed a parliamentary inquiry into the *niqāb*, and despite finding that less than 2,000 women in France wore it out of a total population of 65,000,000, recommended that women wearing it be fined almost \$1,000 and be barred from public facilities. See “France Recommends Ban on Veil,” available at <http://english.aljazeera.net/news/europe/2010/01/201012661032640718.html> (last visited March 10, 2010). Despite the exceedingly small numbers of women in France that wear the *niqāb*, the French Parliament chose to ban it.

³ Pascale Fournier and Gökçe Yurdakul, “Unveiling Distribution: Muslim Women With Headscarves in France and Germany,” in Gökçe Yurdakul und Michal Bodemann, eds., *Staatsbürgerschaft, Migration und Minderheiten: Inklusion und Ausgrenzungsstrategien im Vergleich*, 1st ed. (Wiesbaden, Germany: VS Verlag, 2010) at p. 169. For a more extensive treatment of the controversy in France surrounding the Islamic head scarf, see John R. Bowen, *Why the French Don't Like Headscarves: Islam, the State and Public Space* (Princeton: Princeton University Press, 2007).

⁴ Fournier and Yurdakul, at p. 172.

⁵ For example, when a young Danish Muslim woman appeared on public television in Denmark wearing an Islamic headscarf as a host of a program intended to explore religious and cultural differences in Denmark, for example, many Danes protested her inclusion, with some feminists asserting that the Islamic head scarf was an insult to women, and for that reason, she should be dismissed. See “TV Host’s Headscarf Stirs Debate,” available at <http://www.spiegel.de/international/0,1518,411287,00.html> (last visited March 4, 2010).

⁶ Ronan McCrea, *Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam in the Public Order of the European Union* (December 2007). LSE Legal Studies Working Paper No. 18/2007; Islamic Law and Law of the Muslim World Paper No. 08-09. Available at SSRN: <http://ssrn.com/abstract=1033332> at pp. [XXX] (last visited February 4, 2010) (noting the common view in Europe that Islam, unlike Christianity, for example, represents a threat to both the autonomy of the public

These concerns have even recently led some European states to take steps to screen immigrants from Muslim countries (but not immigrants from “western” countries such as the United States, Canada and Australia) to determine whether their private “views and opinions” conform to European norms of gender equality with a view to excluding those whose views are deficient.⁷ France, meanwhile, has recently denied French citizenship to both a Muslim man (2010)⁸ and a Muslim woman (2008)⁹ on the grounds that their religious commitments were incompatible with both secularism and gender equality.

sphere and the private autonomy of citizens because, among other things, normative Islam does not distinguish between law and morality).

⁷ Id. at pp. 444, 455, and 457-458 (describing various tests proposed to be applied to immigrants from predominantly Muslim countries) (last visited February 4, 2010).

⁸ See “France Denies Citizenship to Man with Veiled Wife,” available at http://www.salon.com/news/story/index.html?story=/news/2010/02/04/eu_france_muslim_veil (last visited February 4, 2010).

⁹ See “The Young French Women Fighting to Defend the Full Face Veil,” <http://www.guardian.co.uk/world/2010/jan/31/french-muslim-burqa-veil-niqab> (last visited February 4, 2010). In the case of *Faiza A*, the French Conseil D’Etat upheld the denial of her application for French citizenship on the stated grounds of a failure to assimilate. Although the applicant had acquired mastery of the French language, the Conseil found that “she has nonetheless adopted a radical practice of her religion, incompatible with the essential values of the French community, and notably with the principle of equality of the sexes; that thus, she does not fulfill the requirement of assimilation enunciated by the above-cited article 21-4 of the Civil Code; that, consequently, the government could legally rely on this reason to oppose Ms. A’s acquisition of French citizenship by marriage.” CE, 27 June 2008, *Faiza A*, (2008) Rec 286798 (original translation from the French), available at: http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltPerPages=5&Pluriels=True&dec_id_t=286798 (last viewed December 13, 2010). The French government defended denial of her application for citizenship on the grounds that “it appears that Ms. M. has not made the values of the Republic her own, in particular the equality of the sexes. She lives in total submission to the men in her family, which submission manifests itself as much in her clothing as in the organization of her daily life.” (Original translation from the French.) Evidence of her total “submission” was, in addition to her clothing, the fact that she did not receive guests in her home; that she divided her time between cleaning the home, taking walks with her small children, and visiting her father and father-in-law; and the fact that she usually shopped only in the company of her husband. CE, 27 June 2008, *Faiza A*, (2008) Rec 286798 (Submission of the Commissaire de Gouvernement), available at <http://www.conseil-etat.fr/cde/node.php?mediaid=1173> (last viewed December 13, 2010).

Europe's focus on gender equality as a reason to exclude Muslims has found support in decisions of the European Court of Human Rights ("ECHR"). In two cases involving individual Muslim women as complainants, *Dahlab v. Switzerland*, and *Layla Şahin v. Turkey*,¹⁰ and one case involving a Turkish political party with Islamist roots, *Refah Partisi (The Welfare Party) and Others v. Turkey*,¹¹ the ECHR made sweeping pronouncements about the nature of Islam as a religion and a legal system, and the meaning of Islamic religious symbols, that went well beyond the individual facts of each case.

In *Dahlab* the ECHR characterized the Islamic headscarf as a "powerful external symbol . . . that was hard to reconcile with the principle of gender equality,"¹² and "that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination."¹³ In *Şahin* the ECHR reiterated the above-quoted dicta from *Dahlab* and added that the Islamic headscarf also had the potential to intimidate those women who did not choose to wear it.¹⁴ The ECHR's decision in *Refah*, moreover, made clear that these unsavory elements of Islam are an inherent to Islam, because they derive from the "sharia [i.e. Islamic law],

¹⁰ *Dahlab v. Switzerland*, app. no. 42393/98 (Feb. 15, 2001); *Layla Şahin v. Turkey*, no. 44774/98 (Nov. 10, 2005).

¹¹ *Refah Partisi (The Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II – (13.2.03) (Feb. 13, 2003).

¹² *Dahlab* at p. 13.

¹³ *Id.*

¹⁴ *Şahin* at ¶ 115 (suggesting that headscarf-wearing Muslim women might intimidate their non-headscarf wearing Muslim women colleagues because the Islamic headscarf is presented as a "compulsory religious duty").

which faithfully reflects the dogmas and divine rules laid down by religion, [and which] is *stable and invariable*.”¹⁵ (Emphasis added).

The ECHR, then, has provided Europe’s elected politicians with ample cover to target Muslims.¹⁶ Some academics, in light of these decisions, have openly called on European authorities to take even more drastic action against European Muslims, arguing that European states should adopt measures not only to limit the growth of their Muslim populations, but should also introduce measures designed to encourage Muslims to leave Europe entirely.¹⁷ What might be viewed as an extreme position is justified in part by the ECHR’s categorical language regarding Islam’s alleged commitment to anti-democratic principles, including Islam’s alleged rejection of equality for women.¹⁸

2. Islam, Gender Equality and a Democratic Public Order

The ECHR’s decisions involving Muslims have effectively granted European states a wider “margin of appreciation” with respect to their powers to regulate Islam than they enjoy with respect to other religions. In granting states this power, the ECHR has been willing to credit speculative arguments put forth by the respective state parties in justification of their respective policy decisions. This willingness to tolerate the restriction of Muslims’ rights on the basis of the harms that *might* occur to either the integrity of Europe’s democratic public order, the individual autonomy rights of others, or the public value of gender equality, is closely connected to the ECHR’s normative

¹⁵ *Refah* at ¶ 123.

¹⁶ McCrea, *supra* n. 6, at pp. 436-440.

¹⁷ John Finnis, *Endorsing Discrimination Between Faiths: A Case of Extreme Speech?* at 12 (2008), available at <http://www.ssrn.com/abstract=1101522>.

¹⁸ Finnis at p. 6.

conception of how the *shari'a* constitutes a Muslim's religious and political commitments: first, it consists of a set of divinely mandated rules that are, by virtue of being divinely mandated, *immutable* and *invariable*, and thus is incompatible with the idea of democratic self-governance; and second, the specific norms of the *shari'a*, e.g., a principled commitment to gender hierarchy, are in direct conflict with the norms of a democratic order.¹⁹ Therefore, the ECHR's reasoning suggests, adherence to Islam is not consistent with Europe's public order and accordingly, need only be tolerated to the extent that Europe's political leaders – depending on the varying circumstances of each state – decide is prudent.²⁰

The ECHR's reasoning in these cases has been identified as a manifestation of the controversial concept of “militant democracy,” the notion that democracies are entitled to use extraordinary measures in order to combat threats to the public order of a democracy.²¹ Whether a theological, moral or political doctrine *deserves* tolerance or should only be tolerated prudentially, raises a host of complex questions, both normative (“What makes a doctrine worthy of tolerance?”) and empirical (“What is the *actual* content of the doctrine about which we are concerned?” and “Do the followers of this

¹⁹ Judge Kovler, in his concurrence in *Refah*, criticized the Court for its sweeping remarks about the *shari'a*. Academic criticism of *Refah* has likewise focused on its reductive approach to the *shari'a*. See, for example, Kevin Boyle, “Human Rights, Religion and Democracy: The *Refah* Party Case,” 1,1 *Essex Human Rights Review* (2004), pp. 1-16; Ann Mayer, “The Dubious Foundations of the *Refah* Decision,” and Christian Moe, “*Refah* Revisited: Strasbourg's Construction of Islam,” both chapters forthcoming in *Islam in Europe: Emerging Legal Issues – Critical Views*, edited by Rik Torfs, Cole Durham, Christine Scott and David Kirkham.

²⁰ Indeed, Boyle writes that “[t]he *Refah* case can be read to suggest that peaceful advocacy of the tenets of Islam is unprotected under the European convention.” Boyle, at p. 12.

²¹ *Id.*, at pp. 9-12 (discussing the applicability of the concept of “militant democracy” in the context of *Refah*).

intolerant doctrine actually represent a real threat?”).²² While a court is clearly neither well-positioned to engage in this kind of full-blown theological and philosophical inquiry, nor would we expect or encourage judicial institutions to engage in such inquiries, inquiries into the relationship of religion and democracy *are* legitimate topics of political philosophy. And so long as an inquiry into the compatibility of certain Islamic conceptions with democracy are conducted within generally accepted philosophical frameworks, subject to the ordinary circumspection that applies to scholarly inquiry, there is nothing objectionable in posing these questions to the Islamic tradition.²³ This article hopes to take a step in this direction by considering Islamic arguments in favor of the Islamic legitimacy of citizen rights for women put forth in the last quarter of the 20th century, and asking whether these arguments are “compatible” with the norms of a liberal democracy, not only from a substantive perspective, but also from an *evidentiary* perspective. In other words, it also asks whether the kind of analysis modernist Muslim thought brings to bear on questions of basic political justice such as the political rights of women is theological or is instead rooted in reasons that would be admissible from the perspective public reason.

The first step in such an engagement, however, is to determine the meaning of compatibility. The answer I offer draws on Rawls’ conception of the “overlapping

²² For these reasons, John Rawls argued in *A Theory of Justice* that as a general matter even the intolerant should enjoy equal democratic liberties unless the intolerant represent an immediate danger to the liberty of others. John Rawls, *A Theory of Justice* (Harvard University Press: Cambridge, 1971), § 35, pp. 218-220.

²³ In engaging in this kind of analysis, however, one must always be clear that there is no necessary relationship between the conduct and commitments of actual Muslims, and the normative Islamic doctrines that are the subject of normative analysis.

consensus” as laid out in *Political Liberalism*.²⁴ In the Rawlsian account, an overlapping consensus exists when a majority of the politically active citizens of a society endorse, for reasons they individually consider morally compelling (even if such reasons are likely to be in fact philosophically incompatible), the constitutional essentials of the well-ordered society. An overlapping consensus is distinct from a *modus vivendi* insofar as in the latter, political stability derives solely from a contingent balance of power. A *modus vivendi* is unstable because individuals comply with the constitution only to the extent that an unfavorable societal balance-of-power compels them; they are ready to defect as soon as the societal balance-of-power becomes more favorable. Fear of Islam, in Rawlsian terms, is essentially the fear that committed Muslims lack a genuine moral commitment to the public values of democracy, and accordingly, caution is warranted with respect to the political demands they make upon the public order.

In assessing a doctrine’s “compatibility” with “democracy,” therefore, a political liberal asks whether that doctrine provides its adherents with morally persuasive reasons, ideally, to endorse, or at a minimum, not to oppose, the principles of justice governing the well-ordered society. Accordingly, political liberalism is not only concerned with the *fact* of citizens’ adherence to the principles of justice, but their *motives* for doing so. In the case of a question such as Islam’s compatibility with gender equality, then, empirical data is ambiguous: doctrinal engagement with normative Islamic discourse is necessary.²⁵

²⁴ John Rawls, *Political Liberalism* (Columbia University Press: New York, 1996).

²⁵ Accordingly, an issue such as “honor crimes,” which are popularly associated with Muslim immigrant communities in Europe, represents a problem of law and order, and does not represent a *principled* challenge to the norms of a liberal public order because Islamic doctrines do not endorse “honor killings.” Thus, the presence of “honor killings” in Muslim immigrant communities, even assuming that such gender-based killings occur disproportionately in Muslim immigrant communities, does not raise a normative issue of compatibility. To the extent that reliable empirical evidence exists, however, it gives evidence that immigrant Muslims generally do not reject the political values of their adopted countries.

A political liberal engages Islamic doctrinal arguments to identify with greater precision both areas of agreement and disagreement; assess the normative grounds for the areas of agreement and disagreement; determine the prospects of achieving an overlapping consensus in light of the areas of agreement and disagreement; and, finally, in the most ambitious stage of inquiry, propose, using reasonable conjecture, plausible positions that could represent an overlapping consensus.²⁶

Application of this method of inquiry to the question of Islam and democracy therefore provides a useful tool for assessing both the breadth and the depth of Islamic commitments that both affirm and reject principles of justice inherent in the idea of a well-ordered society, and the doctrinal resources available to Muslims that are both supportive of and in conflict with, the principles of justice. Viewed from this perspective, providing a *categorical* answer to the question of Islam's compatibility with democracy is highly implausible: the most that can be done is to identify issues of agreement and disagreement, assess the range of views available on an issue, and point to possible routes of reconciliation that can only take place over time through the process that leads to a "reflective equilibrium."²⁷

See, for example, Jytte Klausen's *The Islamic Challenge: Politics and Religion in Western Europe* (Oxford: Oxford University Press, 2005) and Jocelyne Cesari's *When Islam and Democracy Meet: Muslims in Europe and in the United States* (New York: Palgrave Macmillan, 2004); and, Mathias Rohe, "The Formation of a European Sharī'a," in *Muslims in Europe: From the Margin to the Centre*, edited by Jamal Malik, pp. 161-184 (Münster: Lit Verlag, 2004).

²⁶ Andrew March, "Islamic Foundations for a Social Contract in non-Muslim Liberal Democracies," 101,2 *American Political Science Review* (May 2007), pp. 235-252, at 237-238.

²⁷ For an example of such an approach to broader questions of the relationship of Islam as a comprehensive doctrine to public reason that focuses on abstract Islamic theological and jurisprudential commitments, see Mohammad Fadel, *The True, the Good, and the Reasonable: The Islamic Roots of Public Reason*, 21,1 *The Canadian Journal of Law & Jurisprudence* (2008), pp. 5-69; for an example of such an approach to specific areas of legal conflict, see Mohammad Fadel, *Public Reason as a Strategy for Principled Reconciliation: the Case of International Human Rights Law and Islamic Law*, 8,1 *Chicago J. Int'l L.* (2007), pp. 1-20.

While it is not clear exactly why the ECHR concluded categorically that adherence to the *shari‘a* is incompatible with democracy, perhaps it believed that adherence to the *shari‘a* contradicts the idea of democracy because it implies that legitimate law is only law derived from the interpretation of revelation. According to this conception of the *shari‘a*, there would be no room for democratic deliberation because it would be, in the best of circumstances, superfluous, and in the worse of circumstances, heretical. Certain Islamist groups, for example, those inspired by the thought of the 20th century Egyptian Islamist thinker, Sayyid Qutb, may in fact believe that all law not derived from revelation is by definition illegitimate.

Most Muslim theologians, both traditionalist and modernist, however, reject a conception of Islamic law that excludes the possibility of political rule-making. Pre-modern Muslim states, including the Ottoman Empire, routinely (even if non-systematically) engaged in law-making under the broad jurisprudential rubric of *siyāsa shar‘iyya*.²⁸ Rule-making pursuant to *siyāsa shar‘iyya* represented a mode of non-theological reasoning whose legitimacy depended on its conformity with the public good, not conformity with revealed text. Under this power, revealed law served only to *limit* the power of public officials, but did not otherwise *define* the law’s content. Muslim modernists, as demonstrated in their arguments regarding the political capacities of women, which will be considered in greater detail below, moreover, reject the binding character of the pre-modern legal corpus. They instead favor political rule-making that

²⁸ For an introduction to the doctrine of *siyāsa shar‘iyya*, and its relationship to Islamic jurisprudence (*fiqh*), see Intisar Rabb, Colin Imber, “Administrative Decrees of the Political Authorities (Qānūn),” *The Oxford International Encyclopedia of Legal History*. Oxford University Press, 2009; see also, Mohammad Fadel, “Back to the Future: the Paradoxical Revival of the Aspirations for an Islamic State,” 41,1 *Review of Constitutional Studies* 105 (2009), at 108-113 (describing the relationship of political rule-making to rules derived from the interpretation of revelation in classical Muslim jurisprudence).

relies largely on political deliberation, albeit within the limits of revealed law. There does not appear to be a clear normative basis, then, for the ECHR's conclusion that normative adherence to the *shari'a* necessarily entails a rejection of democracy.

Gender equality, and its relationship to the principles of justice, however, is more amenable to a precise answer than that of Islam and democracy. Demonstrating the incompatibility of *historical* Islamic doctrines on gender with *modern* democratic conceptions, however, is as easy as it is trivial, given the ubiquity of gender hierarchy in the pre-modern world.²⁹ Historical Islamic doctrines that assume a gender hierarchy, however, are often taken as representing “authentic” Islamic teachings on the common assumption that the rules of Islamic law, in the words of the ECHR, are “stable and invariable.” For someone interested in the prospect of achieving an overlapping consensus with doctrinally committed Muslims, he must determine the degree to which such Muslims retain these historical commitments, and if not, what kind of arguments do they deploy to justify departure from them; and, finally, whether those reasons are indicative of an overlapping consensus or merely of a *modus vivendi*.

There is also the vexing and controversial question of what the principles of justice demand with respect to gender equality. One plausible configuration of gender equality is that articulated by the American political philosopher John Rawls in *Political Liberalism*, which limits itself to equality of citizenship. From this perspective, what democracy requires is only that citizens share a moral commitment to the equal citizenship of women. Gender inequality in other areas of life, e.g., the family,

²⁹ See, for example, Mohammad Fadel, “Is Historicism a Viable Strategy for Islamic Legal Reform? The Case of ‘Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them,’” (forthcoming in *Islamic Law & Society*; draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1712968) (last visited, Dec. 11, 2010).

particularly if motivated by voluntary adherence to religion, would continue to be permissible.³⁰ Political equality does not, of course, exhaust the domain of gender equality. Certainly, many feminists would insist that the law ought to display a thicker commitment to comprehensive gender equality than what political liberalism requires.³¹ To this, a political liberal can reply that a state can enforce a more comprehensive form of gender equality only if it is willing to violate the principles of justice themselves.³² Working from a Rawlsian perspective on gender equality, then, a political liberal asks whether there are persuasive Islamic reasons for committed Muslims to affirm that women enjoy the two moral powers of citizens, namely, a capacity for justice (they are “reasonable”) and a capacity to adopt, pursue and revise their own conception of the good (they are “rational”). This article considers the arguments of two 20th century Muslim modernist reformers on the question of the status of women and their capacity for citizenship from the perspective of normative Islamic teachings in light of the concerns of political liberalism. The first thinker is the Egyptian-Qatari activist scholar Yūsuf al-Qaraḍāwī who wrote an essay in support of women’s citizenship rights in response to a question presented to him whether it is Islamically permissible for a woman to run for, and be elected to, a national parliament.³³ The second is ‘Abd al-Ḥalīm Abū Shuqqa, author of a four-volume treatise with the title *Tahrīr al-Mar’a fī ‘Aṣr al-Risāla* [“The

³⁰ John Rawls, *The Idea of Political Liberalism Revisited*, 64 U. Chi. L. Rev. (1997) 765, 792.

³¹ See Susan Moller Okin, ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, *Is Multiculturalism Bad for Women?* (Princeton University Press: Princeton, 1999).

³² Id, at pp. 105-114 (“A Plea for Difficulty,” Nussbaum’s reply to Okin in defense of political liberalism’s more narrow conception of gender equality).

³³ Yūsuf al-Qaraḍāwī, *Min Fiḡh al-Dawla fī al-Islām*, “Tarshīḥ al-Mar’a li-l-Majālis al-Niyābiyya bayn al-Ijāza wa-l-Man’,” (Cairo: Dar al-Shuruq, 1997), pp. 161-176 [*hereinafter* ‘*Tarshīḥ*’].

Liberation of Women During the Age of the Prophet [Muḥammad]’], who developed a novel theory regarding the relationship between political virtues and the perfection of Islamic virtues, on the one hand, and the duty of the public to provide individual men and women with the material support necessary to help them achieve moral perfection, on the other hand.³⁴

These two reformers are internal critics of the Islamic tradition with respect to its historical teachings on questions of women’s capacities, and take the position that a *correct* understanding of Islam, requires revisions of these historical doctrines. Additionally, by considering in some detail the justificatory structures of these doctrinal developments, this paper also aims at presenting an account of how doctrinal change can take place within Sunni Islam. This is important not only for assessing the theological plausibility of the revisionist arguments, but also disclosing the extent to which Islamic reasoning overlaps with the evidentiary demands of public reason.³⁵ Review of both the substance of these revisionist Islamic positions, as well as the evidence used to justify those revisions, demonstrates the realistic prospect of a *deep* overlapping consensus with respect to two elements necessary to the stability of a well-ordered society: first, the political equality of women and men; and second, the greater weight given to common sense observation over theological reasoning.

Of course, the fact that orthodox Muslims may have good doctrinal reasons to support the *political* equality of women does not mean that they will do so in fact. The

³⁴ ‘Abd al-Ḥalīm Maḥmūd Abū Shuqqa, 4 vols., *Taḥrīr al-Mar’a fī ‘Aṣr al-Risāla* (Dār al-Qalam: Kuwait, 1990).

³⁵ Rawls, *Political Liberalism*, *supra* n. 24, at. p. 224 (noting that public reason requires citizens, when discussing constitutional essentials and basic justice, “to appeal only to presently accepted beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”).

opposite, of course, is also just as true: the fact that historical Islamic doctrines may give Muslims good reasons not to endorse gender equality does not mean they will inevitably endorse gender hierarchy; they may simply exhibit unsystematic thinking with respect to certain areas of their conception of the good. This kind of normative analysis, however, is nevertheless important because it suggests that Islamic commitments do not necessarily *preclude* Muslims from endorsing the political values of equal citizenship, and indeed in some cases may serve to strength these values. To that extent, articulation of such reasons helps deepen the broader overlapping consensus in democratic societies with significant numbers of Muslim citizens.

3. *Ijtihād*, Islamic Doctrinal Reform and the Modernist Muslim Reflective Equilibrium

Rawls uses the concept of “reflective equilibrium” to describe the means by which we reconcile our current convictions about justice with the convictions we believe we ought to have in light of the conclusions we derive from solving the problem of the original position. In the course of achieving reflective equilibrium, we abandon those present convictions that are relatively weak in favor of stronger convictions derived from our theoretical reflection. Our stronger present convictions, however, function as “provisional fixed points which we presume any conception of justice must fit,” and cause us to revisit our theoretical conclusions, leading us to correct what we believe to have been errors in our theoretical inquiry. This dialectical process between our actual convictions and our theoretical ones therefore transforms both; moreover, this process continues until our actual convictions regarding justice have converged with the results of

our theoretical inquiry. Only when this convergence is achieved (if ever) do we reach the state of what Rawls calls “reflective equilibrium.”³⁶

An analogous process can be found in Islamic thought. Individual Muslim jurists and theologians who engage in the process of *ijtihad* attempt to reconcile their actual convictions – which may be the product of unreflective intuition, adherence to social convention or inherited norms – with the convictions they believe they should hold after they exercise *ijtihad*.³⁷ As Rawls suggests, a particular jurist/theologian’s pre-interpretive commitments may be more or less strong, and we can expect that the amount of interpretive effort a particular scholar will spend in reconciling the two will vary directly with the strength or weakness of those pre-interpretive commitments relative to what conclusions the interpreter would draw from an initial reading of revelatory sources. In the case of Sunni Muslim jurists/theologians, these pre-interpretive commitments will, to a large extent, also have to come to terms with historically ascendant positions within the tradition of Sunni Islam, at least to the extent that such positions are contradictory to, or in tension with, the contemporary interpreter’s views. A contemporary reformer’s interpretive labors, therefore, will almost certainly require both an affirmative *reinterpretation* of normative sources, e.g. the Quran, the Prophetic tradition (the *sunna*) or authoritative consensus (*ijmā’*), as well as a critique of the community’s received interpretation of these sources in connection with the particular doctrinal revisions the interpreter advocates. At the same time, his or her interpretive activities will be bounded

³⁶ John Rawls, *A Theory of Justice* (Harvard University Press: Cambridge, 1971) at pp. 19-21.

³⁷ For a brief description of the process by which Muslim jurists engage with revealed texts to derive norms, see Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press: New York, 2009), pp. 14-27.

by certain “fixed points” of justice and morality that any theory of Islamic commitments must include.

Normative Islamic commitments can be broken down into the three categories of the theological, ethical and legal, with theological commitments representing the most fundamental doctrinal commitments and legal commitments representing relatively weaker ones.³⁸ And while it will often be the case that it makes sense for a reformer to structure his argument using the least controversial normative register available to him, e.g. a legal argument as opposed to a theological one,³⁹ a reformer can also signal the *depth* of his commitment to a particular value by invoking theological justifications in addition to ethical and legal justifications. A theological argument signals a deeper commitment than a legal one precisely because the former is first and foremost a metaphysical claim about God and therefore is immutable, while a legal argument for reform may simply be a matter of arguing that the particular (and to that extent, a factually contingent) application of an otherwise valid universal norm is obsolete, without challenging the validity of the underlying rule.⁴⁰

³⁸ See Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21,1 Can. J. L. & Jur. 5, 21-29 and 67 (describing Islamic commitments as being made up of a hierarchy of normative discourses at the apex of which is theology, followed by ethics (or moral theology) and then followed by law).

³⁹ Andrew F. March, *Law as a Vanishing Mediator in the Theological Ethics of Tariq Ramadan* (describing what he calls the “Reformer’s Dilemma”) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478910, forthcoming in the European Journal of Political Theory), p. 32.

⁴⁰ See, e.g., Mohammad Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8,1 Chi. J. Int’l L. 1, 12-13 (2007) (providing examples). More generally, see Article 39 of the Mejlle, the 19th century Ottaman civil code, which states that “It is an accepted fact that the terms of law vary with the change in the times,” 1,4 Arab L.Q. 373, 375 (1986).

Legal rules, while they generally will implicate some higher theological or ethical norm, are not wholly *determined* by them, and as a result, a reformer can make arguments for legal reform that, as a practical matter, can be quite substantial without ever challenging the theological basis of the rule in question. Take, for example, the verse in the Qur’ān that commands guardians of orphans to “test” their wards, and if they find them capable, to deliver to them their property.⁴¹ Muslim jurists, in the course of deriving the legal implications of this verse, had to resolve two questions, one interpretive, and the other evidentiary. The interpretive question was whether it was intended to apply to both males and females (it did). The second was whether the test for capacity was the same for males and females (it was not). The first rule can be meaningfully described as an immutable rule of Islamic law. The second rule on the other hand can be meaningfully described as contingent on specific social circumstances, and thus is amenable to revision in the light of social change without challenging Islamic law’s status as a revealed law.⁴²

Because of the graded nature of Islamic commitments, as well as their internal differentiation into transcendent and contingent commitments, principled doctrinal change is both a theoretical possibility, and as I will show in greater detail in this paper, a historical fact. One kind of doctrinal change occurs when a reformer wishes to challenge what amounts to a pure question of law. In this case the reformer has no choice but to

⁴¹ Qur’ān, 4:6 (*al-Nisā’*).

⁴² Pre-modern Muslim jurisprudence formally distinguished between these two types of interpretive activities. Interpretive activities centered on a proper understanding of revelation was known as *ijtihād fī al-shar’* while interpretation of the empirical world was known as *ijtihād fī al-sabab*. While the question of whether there was an ongoing obligation to perform the former was a matter of controversy among pre-modern Muslim jurists (giving rise to the claim that “the gate of *ijtihād* was closed”), it was a matter of agreement that interpretation of the empirical world must continue until the end of time. 4 Abū Ishāq Ibrāhīm b. Mūsā al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī’a* (Dār al-Ma’rifa: Beirut, 1975) 89, 95-96.

declare the historical formulation of the rule to be mistaken and inevitably involves an argument related to the proper understanding of revelation. In other cases the issue is that the continued application of a historical rule is no longer valid because the historical rule included, implicitly or explicitly, a factual assumption about the world that no longer holds true. In the case of al-Qaraḍāwī's and Abū Shuqqa's arguments considered here, both claims are made: that many historical rules regulating the capacities of women and the roles they could discharge in society, insofar as they are presented as immutable rules of Islamic law, were wrong as a matter of interpretation, and that other historical rules, insofar as they assumed a particular set of facts about the world, may have been legitimate in the past, but now they are obsolete and must be revised.

The ECHR's characterization of Islamic law as "stable and invariable" fails to take into account the capacity of Muslims, using *ijtihād*, to challenge either the normative status of a rule *ab initio* or to challenge its applicability in the world in which they live. The arguments of al-Qaraḍāwī and Abū Shuqqa on questions related to gender equality provide us a direct window into whether contemporary Muslim theologians distinguish between "immutable" Islamic principles (the Islamic equivalent of Rawls' "provisional fixed points of justice"), "contingent" Islamic principles, the extent to which historical Islamic commitments are amenable to revision, and if so, on what grounds, theological, empirical or some combination thereof.

The focus on theologically-minded reformers should not be taken to mean that the Muslim world lacks more ambitious reformers, especially in connection with the issue of women's rights;⁴³ instead, because we are interested in assaying the capacity of *Islamic*

⁴³ See, for example, Amina Wadud, *Insider the Gender Jihad: Women's Reform in Islam* (Oxford: One World, 2006).

doctrines to become more compatible with liberal democracy, it makes sense to consider the teachings of more conservative elements of the Muslim community on the assumption that Muslim reformers who have adopted a more substantially liberal conception of Islam, or even a thoroughgoing secularism already hold compatible views. On the other hand, if even conservative elements within the normative Islamic community endorse values consistent with the political equality of females, we can be more confident that there is a deep agreement between Muslims and non-Muslims with this particular element of liberal democracy.⁴⁴ Al-Qaraḍāwī's views in this regard may be especially important given his active role in advising European Muslims and his status as an Islamic scholar with a popular trans-national appeal.⁴⁵

What makes their arguments particularly interesting and significant is that they are only tangentially rooted in pragmatic reasoning. While pragmatism certainly plays an element in some of their arguments (particularly to the extent they make significant the doctrinal consequences of the views of non-Muslims or secular Muslims), al-Qaraḍāwī and Abū Shuqqa both deploy arguments that run the gamut of theological, ethical and legal rationales, thus indicating a greater depth to these commitments than would

⁴⁴ Fadel, *supra* n. 38, at p. 13 (stressing the importance in the evaluation of compatibility arguments to use sources that are plausible to those Muslims who might believe that democratic commitments are incompatible with Islam) and Andrew F. March, "Liberal Citizenship and the Search for an Overlapping Consensus: the Case of Muslim Minorities," 34 *Phil. & Pub. Affairs* 373, 374 and 375 n.2 (same).

⁴⁵ Al-Qaradawi is head of the European Council for Fatwa and Research, an organization whose goals consist of, among other things, coordinating between Muslim scholars of Europe and promulgation *fatwās* (religious opinions) that are consistent with the teachings of Islamic law, meet the needs of Muslim communities in Europe, and regulate their interaction with the non-Muslim majority. For the Council's Mission Statement, see <http://www.e-cfr.org/en/ECFR.pdf> (last visited March 12, 2010). For more on al-Qaraḍāwī's life, see "Qaraḍāwī, Yūsuf al-" in 4 *The Oxford Encyclopedia of the Islamic World*, ed. John L. Esposito (2009) at p. 454.

otherwise be the case if their reform arguments were only pragmatic.⁴⁶ In Rawlsian terms, therefore, the normative structure of their arguments are consistent with the conclusion that they affirm the political equality of women for “the right reasons” – and thus that a genuine overlapping consensus exists on this issue – rather than as a temporary concession reluctantly granted under the circumstances of an unfavorable balance of power which would be indicative only of a *modus vivendi*.

Abū Shuqqa, unlike al-Qaraḍāwī, who by virtue of his training in the prestigious Egyptian religious seminary, al-Azhar, had a long relationship with reformist-minded Egyptian clerics, was a student of the twentieth scholar of ḥadīth and arch-conservative, Nāṣir al-Dīn al-Albānī (d. 1999). According to Abū Shuqqa he had not intended to write a book on gender, but in the course of researching a biography of the Prophet Muḥammad, he confronted what he described as a radical disjuncture between commonly accepted religious limitations on women and the lives of women during the Prophet Muḥammad’s lifetime.⁴⁷ Because (and not in spite of) of Abū Shuqqa’s *salafī* heremeneutical commitments,⁴⁸ he believed he had a moral obligation to produce a systematic critique of historical Islamic teachings on the opportunities available to women within Islam.⁴⁹ Although both of these thinkers approach the problem of women’s capacity for citizenship using substantially different interpretive methods, they

⁴⁶ It is sometimes claimed that pragmatism (and a highly-unprincipled one at that) is now the most important theoretical principle in modern Islamic juristic thought. See, e.g., Wael Hallaq, *Sharī‘a: Theory, Practice, Transformations* (Cambridge University Press: New York, 2009) at pp. 508-510.

⁴⁷ 1 Abū Shuqqa, at p. 28.

⁴⁸ For more on Salafism, see “Salafīyah” in 5 *The Oxford Encyclopedia of the Islamic World*, ed. John L. Esposito (2009) at p. 28. Nāṣir al-Dīn al-Albānī belonged to a trend within Salafism that eschews politics and preaches obedience to government. See “Salafī Groups” in 5 *The Oxford Encyclopedia of the Islamic World*, ed. John L. Esposito (2009) at p. 26.

⁴⁹ 1 Abū Shuqqa, at p. 28.

both share a deep commitment to a religious conception of the person that governs both males and females. This religious conception is grounded in Islamic scriptural sources, and where they believe that these sources clearly communicate a rule that establishes a norm of gender difference, they do not hesitate to endorse it.⁵⁰

There are some important differences in their respective approaches, however. Al-Qaraḍāwī begins with a defeasible *hermeneutical* presumption that revelatory language applies equally to both genders, thus placing the burden of proof on the party claiming a gender-distinction.⁵¹ While al-Qaraḍāwī presents this principle in a matter of fact manner, the majority of pre-modern jurists took the opposite view, concluding that revelation’s use of the Arabic masculine plural form was to be understood as directed exclusively toward men in the absence of evidence to the contrary.⁵² For al-Qaraḍāwī the evidentiary bar for an Islamically grounded gender-distinction is rather high, with the result that he dismisses most pre-modern rules restricting females’ social and political freedoms as lacking sufficiently clear textual authority. Abū Shuqqa, on the other hand, establishes an explicit textual basis for a presumptive norm of gender equality, specifically, a saying of the Prophet Muḥammad in which he is reported to have said “Women are men’s twins (*al-nisā’ shaqā’iq al-rijāl*).”⁵³

⁵⁰ See, e.g., id. at 15 (al-Qaraḍāwī, in his introduction to Abū Shuqqa’s work, criticizes Muslim gender egalitarians who wish to award female heirs of the same class the same share as that allotted by the Qur’ān to male heirs of the same class, e.g. brothers and sisters, or wish to prohibit polygamy, because in each case the Qur’ān clearly allows these gender distinctions).

⁵¹ Al-Qaraḍāwī, *Tarshīh*, at p. 161.

⁵² Bernard Weiss, *The Search for God’s Law* (University of Utah Press: Salt Lake City, 1992) at p. 437.

⁵³ 2 Abū Shuqqa, at p. 15.

Otherwise, both scholars rely largely on immanent criticism of historical Islamic doctrines, at times exposing the weakness of the traditional readings of religious texts that served to subordinate women, while at other times they appeal to either changed empirical circumstances, e.g. increased female education and the increasing complexity of social life, or new experiences that gave the lie to what had been received opinion, e.g. that women were *naturally* incapable of serving in public office. Finally, both scholars also affirm revisionist substantive understandings of relevant religious texts in a fashion that furthers the cause of female political equality. The next two sections of this article will explore their arguments in detail.

4. Al-Qaraḍāwī's Arguments in Favor of Women's Citizenship Rights

Al-Qaraḍāwī begins his argument by asserting the complete moral equality between men and women. He says “A woman is a human being subject to moral obligation like a man; she is obligated to serve God most high through worship, to establish His religion; to fulfill its duties; to avoid sin and not go beyond [God's] limits; to call others to it; and to command the good and to forbid the evil.”⁵⁴ He then states that men and women are equally responsible for the reform and improvement of society. Finally, he states that revelation's commands are not to be interpreted in a gender specific fashion unless they expressly use a gender classification.⁵⁵

While evidence for these three propositions existed in pre-modern Muslim thought,⁵⁶ no pre-modern Muslim theologian combined them to formulate a general

⁵⁴ Id. at p. 161.

⁵⁵ Id.

⁵⁶ See, e.g., Mohammad Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 Chicago J. Int'l L. 1, 14 (2007).

theory of equality between the sexes. Fakhr al-Dīn al-Rāzī (d. 1210), for example, believed that God subjected women to the moral law primarily in order to make them beneficial to men.⁵⁷ And while Fakhr al-Dīn al-Rāzī's view may represent an extreme in the spectrum of pre-modern Muslim theologians' views on women's moral lives, the overwhelming weight of pre-modern opinion was squarely opposed to the notion of women exercising political power. Some theologians expressed doubt, for example, regarding the historical accuracy of reports that an early caliph appointed a woman to serve as a supervisor of the marketplace,⁵⁸ and even though a substantial minority of Muslim jurists endorsed the possibility that women could serve as judges in non-capital cases, there is no historical evidence that any women were in fact so appointed.⁵⁹ Al-Qaraḍāwī's claim that women, like men, were obligated to engage in the public manifestation of Islam represents a substantial departure from pre-modern doctrines which largely required women to live a cloistered life separate from men unless exigent circumstances required her to leave her home.⁶⁰

⁵⁷ 5 Fakhr al-Dīn Muḥammad b. 'Umar al-Rāzī, *Maḥāṣin al-Ghayb* (Cairo: al-Maṭba'at al-Miṣriyya al-'Āmiriyya, 1862) at p. 185.

⁵⁸ Muḥammad b. 'Abdallāh b. al-'Arabī, *Aḥkām al-Qur'ān al-Ṣuḡhrā*, edited by Ahmad b. Farid b. Ahmad Mazīdī (Beirut: Dār al-Kutub al-'Ilmiyya, 2006) at p. 439.

⁵⁹ Mohammad Fadel, *Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought*, 29 Int'l J. Middle East Studies 185, 196 (1997) (noting minority views permitting women to be Islamic law judges).

⁶⁰ Abū Shuqqa, at p. 36-37 (Qaraḍāwī, in his introduction to the book, criticizing medieval doctrines declaring that a woman's obligation was to stay at home unless circumstances required her to leave it).

Another crucial step in al-Qaraḍāwī's revisionist interpretation of gender roles is the application of his broader commitment to "legal minimalism"⁶¹ to questions of gender, declaring that:

It is necessary that we [Muslims] do not bind ourselves to anything other than texts that are clear, historically well-documented, express and binding. As for those texts, like weak *ḥadīths* [i.e., precedents attributed to the Prophet Muhammad] or those whose meanings are ambiguous which can bear more than one meaning or more than one explanation, as in the case of those texts dealing with the Prophet's wives, no one can bind the community to one understanding instead of the other [with respect to such texts], especially with respect to general matters of society which effect everyone and are in need of facilitation.⁶²

Because al-Qaraḍāwī asserts that, with respect to secular affairs (*al-taṣarrufāt al-dunyāwiyya*), the default Islamic rule is one of permissibility (*ibāḥa*), the party that seeks to restrict this default state of freedom is obliged to produce incontrovertible evidence (*dalīl lā shubhata fīhi*) in support of that position.⁶³ If the religious text grounding a restriction of this default state of freedom is controvertible, Muslims are free to legislate in a flexible manner subject only to the limitation that the rule they adopt does not violate Islamic law. Al-Qaraḍāwī's legal minimalism not only functions to limit the set of religious texts that Muslims need to consider when considering political questions such as

⁶¹ For an overview of al-Qaraḍāwī's approach to Islamic law, see Yūsuf al-Qaraḍāwī, *Awāmil al-Sa'a wa al-Murūna fī al-Sharī'a al-Islāmiyya* (Kuwait: al-Majlis al-Waṭanī li-l-Thaqāfa wa-l-Funūn wa-l-Ādāb, 2002) and especially pp. 15-39 (explaining that God intentionally left most issues unaddressed by revelation so that Muslims could adopt flexible solutions based on changing social and historical circumstances). What I am calling "legal minimalism" is derivative of the theological doctrine known as *al-barā'a al-aṣliyya*, the idea that humans are naturally free from moral duties. Al-Qaraḍāwī's innovation is that he requires substantially greater evidence than that required by pre-modern jurists to overcome the theological presumption of moral non-obligation.

⁶² Al-Qaraḍāwī, *Tarshīh*, at p. 162..

⁶³ Id.

women's political rights, it also gives greater priority to the kind of evidence that public reason recognizes as probative in resolving public issues of justice.⁶⁴

Al-Qaraḍāwī dismisses the relevance of pre-modern Islamic law's restrictions on women for modern Muslims on both grounds of obsolescence and moral grounds. Thus, many historical rules were based on specific social problems facing that are non-existent in the modern world, and thus are obsolete. He explicitly criticizes pre-modern doctrines that restricted women's public freedoms as unjustifiable examples of a harsh spirit (*tashaddud*) that contradicted Islam's true nature, laying responsibility largely on the shoulders of pre-modern Muslim jurists who went too far in applying the precautionary principle of preventing harm (*sadd al-dharī'a*) arbitrarily to issues relating to women.⁶⁵

Al-Qaraḍāwī also introduces a consequentialist argument. He notes that the issue of gender discrimination has the potential to cause great *practical* damage to Islam in the modern world. He is cognizant of the centrality gender plays in secularist and non-Muslim critiques of Islam, noting that they accuse Islam of devaluing women by denying them the right to use their talents and abilities. This argument, al-Qaraḍāwī notes, takes its strength from some positions held by pre-modern Muslims as well as some contemporary Muslim zealots (*aqwāl ba'd al-mutashaddidīn min al-mu'aṣirīn*).⁶⁶ It behooves Muslims, he argues, to renounce such rules, not only because they are either

⁶⁴ Al-Qaraḍāwī's legal minimalism is consistent with what Charles Kurzman described as a mode of "Islamic liberalism" that is grounded in the "silent *sharī'a*." Charles Kurzman, *Liberal Islam: a Sourcebook* (New York: Oxford University Press, 1998) at pp. 13-14.

⁶⁵ Id. pp. 162-163; cf. Abū Shuqqa, at p. 5 (Muḥammad al-Ghazālī describing the pre-modern Islamic ideal of women leading a cloistered life away as being characteristic of "an Age of Ignorance (*Jāhiliyya*), not an Age of Islam").

⁶⁶ Al-Qaraḍāwī, *Tarshīh*, at p. 163.

non-obligatory or un-Islamic, but also because they harm Muslims' collective reputation in the modern world.

This consequentialist argument might cause one to pause before concluding whether al-Qaraḍāwī is committed to the political equality of women for the right reasons. Perhaps al-Qaraḍāwī is less motivated by an internal moral commitment to recognizing women's talents and abilities than by a contingent concern for what non-Muslims think of Islam. This might give rise to a suspicion that, should non-Muslims become indifferent to issues of gender equality or if Muslims became indifferent to such criticisms because of increased power, al-Qaraḍāwī might lose his zeal for reform. Such a concern would be most plausible if consequentialism were the only jurisprudential principle on which al-Qaraḍāwī relies. As we have seen, however, this is only the third leg of his argument (and a minor one at that), with the other two being consistent with a deeper moral commitment to the idea of women as morally entitled to participate in politics on an equal basis with men.

Moreover, it is not clear whether his consequentialist argument is a "bad" argument from the perspective of political liberalism. After all, it appears to take for granted the notion that women are morally independent agents having the capacity to formulate and revise their own conceptions of the good. In addition, the consequentialist concern for the effect of anti-Islamic propaganda on Muslim women has the potential to evolve into a more principled Islamic endorsement of gender equality: Muslim feminists have long criticized Islamic law as manifesting patriarchal bias because its rules were formulated almost exclusively by men. The consequentialist argument, implicitly, accepts this point and suggests that the rules of Islamic law on matters related to gender cannot be

legitimate, at least in the long run, if they fail to incorporate the points of view of Muslim women.

a. Al-Qaraḏāwī's Analysis of Women's Political Capacity

Al-Qaraḏāwī's positive argument in favor of the political participation of women relies on three broad principles: his strong theological/ethical defeasible presumption of gender equality; the jurisprudential presumption of freedom in secular affairs; and a consequentialist analysis of legal rules. I will describe his most important arguments below.

i. Textual Arguments: Ambiguous Texts and Revisionist Interpretation

Al-Qaraḏāwī rejects traditional references to a group of revelatory texts that had historically been used to justify the exclusion of women from the public sphere as either ambiguous, or more plausibly understood as inapplicable. Two themes were particularly important to the traditionalist case against the legitimacy of female participation in politics. The first was the ideal of female seclusion, which is said to derive from a verse in the Quran that includes the phrase "and stay in your homes" (*wa qarna fī buyūtikunna*).⁶⁷ The second was the norm that women should not exercise political power, a position said to derive from a statement widely attributed to the Prophet Muḥammad in which he was reported as saying "Never shall a folk prosper who have appointed a woman to rule them."⁶⁸ Traditionalists also cite language from the Quran which states that "men are the maintainers of women" in support of this second theme.⁶⁹

⁶⁷ 33:33 (*Al-Aḥzāb*).

⁶⁸ For one version of this report along with a pre-modern commentary on its significance, see 8 *Faḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, Aḥmad b. 'Alī al-'Asqalānī, ed. 'Abd al-'Aziz b. Baz (Dar al-Kutub al-

1. “And Stay in Your Homes”

Al-Qaraḍāwī raises three arguments against the political implications of this verse. First, the scope of the command is ambiguous: because the verse is directed in the first instance toward the Prophet’s wives, there is substantial doubt whether this command is generally applicable, as it is generally accepted by Muslim jurists that the Prophet’s wives were subject to particular rules on account of their special status within the Muslim community.⁷⁰ Second, the grammatical command, “stay in your homes,” is immediately followed by a negative command stating “and do not go out [in a display of beauty] in the manner of [the pre-Islamic] days of ignorance.” Al-Qaraḍāwī argues that this negative command would make no sense if the first phrase were a categorical prohibition. Third, ‘Ā’isha, the Prophet’s youngest wife and considered by Sunni Muslim tradition to be a leading legal authority in her own right, left her home at the head of an army to seek justice for ‘Uthmān b. ‘Affān, the slain third caliph, during the course of the first Muslim civil war. And, while she later regretted that decision, it was not her decision to leave her home in pursuit of a matter of grave public importance that she regretted, but rather her poor judgment in rebelling against the fourth caliph, ‘Alī b. Abī Ṭālib, that occasioned her regret.⁷¹

Al-Qaraḍāwī also raises two substantive arguments against the plausibility of a rule prohibiting women from leaving their homes. First, confinement to the home was

‘Ilmiyya: Beirut, 1989), at pp. 159-160. For a detailed treatment of the history of this text, as well as the uses to which it has been put by pre-modern Muslims, see Mohammad Fadel, “Historicism,” *supra*, n. 29.

⁶⁹ 4:34 (*al-Nisā’*).

⁷⁰ The special moral and legal status of the Prophet Muhammad’s wives is reflected, for example, in their title as “Mothers of the Believers.”

⁷¹ Al-Qaraḍāwī, *Tarshīh*, at p. 163.

imposed in the earliest stages of Islamic law as a punishment for sexual misconduct, so it is facially implausible that what began as a penal sanction became a general duty for all Muslim females.⁷² Second, a tacit consensus exists among *modern* Muslims that female participation in public affairs is permissible:

Women have actually left their homes; they go to school and the university; they work in different areas of social life, doctors, teachers, supervisors, administrators, as well as other matters, without anyone of importance expressing any objection, something that many consider a kind of consensus regarding the permissibility of women working outside the home, subject to its [Islamic] conditions.⁷³

Accordingly, al-Qaraḍāwī seems to suggest, any pre-modern Islamic norm that proscribed women’s freedom to leave their homes was either a contingent norm based on exaggerated precaution, or a cultural norm. In no case, however, can the historical rule prohibiting women from leaving their homes except in exigent circumstances be defended as an immutable rule of Islamic law.

2. “Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them” and “Men Are the Maintainers of Women”⁷⁴

Al-Qaraḍāwī follows the same approach with respect to this Prophetic statement and 4:34 that he took toward 33:33: he first casts doubt on the clarity of the language, and then suggests that a different reading of the texts – one that would permit women’s participation in politics – is more plausible.

Al-Qaraḍāwī argues that neither of these texts, whether alone or taken together, could reasonably be read to justify a categorical exclusion of women from politics or

⁷² Id. at p. 164.

⁷³ Id. at p. 163.

⁷⁴ *Al-Nisā*, 4:34.

public life. The Quranic verse, for example, speaks of family life, not social life in general. Even in family life where Islamic normative doctrine provides that the wife should defer to her husband (a doctrine that al-Qaraḍāwī does not challenge), al-Qaraḍāwī argues that the husband is not entitled to act as a dictator, commanding his wife arbitrarily without taking into account her views or that she lacks the right to criticize him or hold him accountable for his actions.⁷⁵ Moreover, politics in the Islamic conception according to al-Qaraḍāwī, is a form of commanding the good and forbidding the evil (*al-amr bi-l-ma'rūf wa-l-nahy 'an al-munkar*), an activity which applies to both men and women. Accordingly,

So long as a woman has the right to offer advice, to advise based on what she believes is correct, to command the good and to prohibit evil, and to say 'This is correct and that is false' in her capacity as an individual (*bi-ṣifatihā al-fardiyya*), there is no religious objection preventing her from undertaking these activities as a member of parliament [or as a citizen generally].⁷⁶

Moreover, Muslims have not, as a historical matter, agreed to the proposition that women were categorically prohibited from exercising power over men. First, there was unanimity that women could serve as *muftis* (individual scholars with expertise in the law who are qualified to answer the legal questions of non-specialists). Second, a minority of Muslims jurists, including the historically influential Ḥanafī school of law which dominated the Ottoman Empire, permitted women to serve as judges in all but capital cases. Third, any historical consensus regarding the exclusion of women from certain political offices was limited to the office of the caliphate, an office which no longer exists.

⁷⁵ Al-Qaraḍāwī, *Tarshīh*, at p. 165 and p. 167.

⁷⁶ Id. at p. 167.

Accordingly, he concludes that, at a minimum, there is nothing in Islamic religious texts that would prohibit *some* women from exercising political power over *some* men. In any case, the most plausible reading of the Prophet Muḥammad's words, according to al-Qaraḏāwī, is not that it communicates a universal norm disparaging the ability of women to be successful political leaders, but rather, given what is known about the historical circumstances of the Prophet's statement, that the Prophet Muḥammad was referring to the internal turmoil of the Persian state at the time, and the arbitrariness of their system of dynastic rule that led them to appoint the daughter of the late king as their leader despite the fact that more competent leaders were available. Indeed, al-Qaraḏāwī criticizes the traditional interpretation of this hadith as creating a contradiction with the Qur'ān, which includes a positive account of the leadership qualities and political acumen of Bilqīs, the Biblical Queen of Sheba.⁷⁷

ii. Qaraḏāwī's Empirical Arguments in Favor of Equal Citizenship

Historical Muslim objections to female participation in the political sphere were not solely based on revelation; they were also based on precautionary rules adopted to prevent sexual impropriety, and assumption about the natural differences between the sexes. Al-Qaraḏāwī responds to both sets of arguments. In so doing, he relies heavily on both changed social circumstances and awareness of new social possibilities that these changes have engendered. Two social developments stand out as particularly important in refuting these prudential and natural arguments against female participation in the political sphere: mass-education and democratic decision-making.

1. Prohibition of Female Participation in Politics as a Precautionary Rule

⁷⁷ Id. at pp. 174-175.

Islamic law accepts the legitimacy of certain kinds of precautionary regulation designed to prevent harm, a technique of reasoning called “blocking the means” (*sadd al-dharī‘a*). Essentially, this principle permits the proscription of otherwise innocent conduct because the proscribed conduct is a conduit to unlawful conduct. This kind of rule making is prudential, and relies explicitly on exigent circumstances or assessment of empirical risk of illegality in formulating rules, rather than representing categorical normative judgments.

Al-Qaraḏāwī accepts the legitimacy of “blocking the means”; however, he insists that its application requires substantial empirical justification, certainly more than the pre-modern period jurists would have required. When jurists restrict rights on the basis of weak empirical evidence of harm, he argues that they subvert the principles of Islamic law. This relatively skeptical approach to “blocking the means” permits him to reject a large swath of pre-modern restrictions on female participation in politics at once.

One particularly disabling class of precautionary rules barred women from mixing with men on the grounds that exclusion of females was necessary to prevent sexual impropriety. As applied to the issue of female political participation, the argument runs as follows: for a woman to participate in politics, particularly as a candidate for elective office, she will inevitably mix with crowds of strangers, and speak to them in public and private, giving rise to situations in which there is a high-risk that Islamic norms of sexual propriety will not be observed. If she is successful in her campaign, moreover, such situations will be multiplied and perhaps become a regular part of her daily life.

Such an argument would have been sufficient in the pre-modern period, and in fact, was regularly used to justify the exclusion of women from appointment to public

offices.⁷⁸ Because al-Qaraḏāwī is skeptical of these prudential arguments, he rejects them on the grounds that they are too speculative to justify exclusion of Muslim women who, he assumes, possess moral integrity and can be assumed to observe Islamic norms of sexual propriety. Accordingly, while he accepts the legitimacy of traditional Islamic norms of sexual propriety – including the notion that women should be careful to avoid casual mixing with males and that they should observe Islamic dress requirements – he rejects the notion that women who observe these requirements should nevertheless be excluded because of the *hypothetical* risk of sexual impropriety.

2. Natural Difference Between the Sexes

Another line of argument Muslim theologians and jurists traditionally used to exclude women from public life was rooted in a theory of natural distinctions between the sexes which lead to a gendered division of labor. Pursuant to this division of labor, women specialize in the household, both in terms of caring for the household and procreation. These functions require a more-finely developed emotional sense than that required by men, whose nature drives them to excel outside the home in public institutions such as the market. Thus women by their nature are emotional decision-makers in contrast to men who are rational decision-makers. Women’s biological functions, moreover, impose certain disabilities on them relative to men that make them ill-suited to public life: menstruation, pregnancy and nursing, all of which reduce women’s natural capacity and inclination to assume and discharge public responsibilities relative to men. The

⁷⁸ See Fadel, “Historicism,” *supra* n. 29, at p. 29 (manuscript on file with the author). It should be pointed out that such arguments were not exclusively Islamic. Thomas Jefferson, for example, wrote that “Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.” Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 *Washington University Law Quarterly* 161, 172.

traditionalists also claim that the Quran confirms this view of female nature in its criticisms of the Prophet's wives, who despite their great religious merit, were incapable of controlling their emotions.⁷⁹

Al-Qaraḏāwī criticizes this argument on two grounds, over-breadth and contemporary experience. Without denying either that biology plays a large role in determining the capabilities of men and women, or that women's biological functions may in some cases reduce their ability to discharge public responsibilities effectively, he denies that these possibilities could justify a categorical rule precluding *all* women from public office. Some women according to al-Qaraḏāwī will always be able to discharge the requirements of their office despite biological impediments: women are neither pregnant, nor lactating, nor engaged in child-rearing for the entirety of their lives. Moreover, both men and women are prone to poor decision-making when they let their emotions rule them instead of their reason. The evidence of the Quran is clear on this point: just as it criticized the behavior of the Prophet's wives on particular occasions, so too did it criticize the conduct of the Prophet Muhammad's male companions. And in any case, the specific evidence of the Prophet's wives refutes the traditionalist interpretation: after the Quran admonished their poor judgment, they accepted its criticism and acted in accordance with reason, not emotion.⁸⁰

Accordingly, the issue for al-Qaraḏāwī again turns on evidence, but instead of considering the evidence at the generic level of women, he argues that the relevant evidentiary judgment must be conducted at the level of the individual woman: if she, as

⁷⁹ Id. at p. 171.

⁸⁰ Id. at pp. 171-173.

an individual, is qualified to discharge the requirements of her office, then her gender should not bar her. Overbroad generalizations are not sufficient to meet the burden of proof required to proscribe an established right, if not obligation, of civic engagement.

His second argument is derived from modern experience: in the last 100 years, “millions of girls” have received educations and as a result, women are already serving public roles in very large numbers, without any evidence that they are less competent than men. Indeed, al-Qaraḏāwī points out that in today’s Muslim world, the number of educated women equals and perhaps exceeds that of men. Moreover, he says, “some [women] are geniuses who are superior to some men, genius not being limited to males. So, many women have talents that are difficult for many men to achieve.”⁸¹ The fact that in the past Muslim societies excluded women from political positions is not Islamically normative; rather, that was merely a reflection of the dearth of educational opportunities available to Muslim women at that time.⁸²

3. Institutional, not Personal, Rule

One the most significant normative arguments al-Qaraḏāwī deploys against the traditionalist Islamic rule prohibiting (or greatly limiting) the eligibility of women for public office is his characterization of democratic decision-making as one based on the rule of institutions, not particular individuals. In other words, when a woman serves as a member of parliament, or even as a prime minister, she is not exercising personal power. She is exercising the power of an institution that is regulated by generally applicable law, and she has no *individual* power over the formulation of such rules. It is valuable to quote his words directly in this context, because of their implications for his acceptance

⁸¹ Id. at p. 169.

⁸² Id.

of the importance and legitimacy of democratic rule, not just the implications of democracy for female participation in public governance:

A modern democratic society, when it appoints a woman to a general office such as a ministry, or a department or prosecutor's office or such, that does not mean that she has been given general authority in reality or that she has been given absolute responsibility over that task. Instead, observed reality is that responsibility is collective and authority is shared; it is discharged by a group of institutions and departments, and the woman simply discharges one of these various functions. Accordingly, the rule of Thatcher in the UK, or Indira Gandhi in India, or Golda Meir in Israel, is not the rule of single woman over a people, but rather the rule of institutions and it is the institutions that rule, even if at the top is a woman. The ruler is the cabinet in its collective capacity, not the prime minister by himself or herself; at any time, her party can lose power by a vote, and even within her own party, she is but one vote and can be dismissed at any time.⁸³

A democratic society, then, precisely because it is institutionalized rule through law, renders the whole question of gendered-qualifications for political office irrelevant.

b. al-Qaraḍāwī's Analysis of Women's Right to Political Participation and Democratic Compatibility

Al-Qaraḍāwī's arguments in favor of recognizing women's right to participate in public political life are grounded exclusively in Islamic justifications (i.e., the presumption of permissibility with respect to secular affairs), and are therefore indicative of the kinds of Islamic arguments that can be used to justify political equality. In his arguments, theological presumptions work hand-in-hand with common sense empirical observation, first to criticize historical Islamic doctrines, and second, to justify recognition of women's rights as citizens. The relationship of theological reasoning to empirical reasoning is particularly interesting from the perspective of political liberalism: because of his theological commitment to "legal minimalism," al-Qaraḍāwī's arguments consistently substitute empirical evidence as the basis for moral decision-making, at least on matters of public justice, in place of speculative theological reasoning. His arguments

⁸³ Id. at p. 176.

are not only important then for their substantive content, but also for displaying the kind of willingness to rely on generally accessible evidence that characterizes a commitment to public reason.

On the other hand, there remain significant ambiguities in Qaraḍāwī's account of political equality. To the same extent that he is committed to affirming Islamic grounds for female participation in politics, however, he is also committed to an Islamic framework for regulating their participation in politics. While his arguments make short order of traditional restrictions on women's participation in politics, his continued commitments to Islamic family creates tensions with his affirmation that women have equal rights as citizens. Al-Qaraḍāwī does not fully resolve this tension, but instead adopts an approach that seeks to reconcile these spheres of law when they conflict. Accordingly, al-Qaraḍāwī argues that a woman should not pursue a political vocation at the expense of the duties she owes to her husband or the duties she owes as a mother to her minor children. In short, in at least certain circumstances, a woman's pursuit of a public vocation is qualified by her family law obligations.⁸⁴

It would be wrong, however, to conclude that affirming the continued validity of Islamic family (in at least some form), al-Qaraḍāwī is subtly introducing other grounds to exclude women from the exercise of citizenship rights. First, unlike pre-modern authors, al-Qaraḍāwī recognizes these limitations as flowing directly from a Muslim woman's own moral commitments rather than her nature or as an entailment of divine text. More importantly, al-Qaraḍāwī points out that not all women are subject to conflicting family

⁸⁴ One can compare in this regard the recent public debate in the United States surrounding Sarah Palin and whether it was appropriate for a mother of a young infant to accept a nomination for the vice-presidency.

commitments, and even in respect of women who do, these obligations, by their very nature, are temporary and do not, in the ordinary case, consume the entirety of her life.

A more significant doctrinal issue arises out of the traditional doctrine that a wife is obliged to defer to her husband, a doctrine that al-Qaraḍāwī does not repudiate. A broad understanding of this duty could potentially eviscerate a married woman's rights as a citizen, in which case, whatever rights she theoretically enjoys under the constitution as a citizen could be negated by the husband's rights under family law to circumscribe those rights, for example, by imposing upon her unreasonable demands. While al-Qaraḍāwī does not deal directly with the potentially problematic relationship of the husband's Islamic right to obedience and his wife's political rights as a citizen, there are significant hints in his argument suggesting that he believes that obligations of spousal obedience do *not* permit a husband to prevent a wife from exercising her rights as a citizen. Consider the following passage in which he argues that there is no Islamic principle as such that prohibits women from exercising political power over men:

We now permit women many tasks that were previously unknown; we have established schools for [them] and colleges in which millions of girls are enrolled; they graduate teachers, doctors, accountants, and administrators. Some of them are directors of institutions which include men. It is not unusual for a male teacher to work in a girl's school whose principal is a woman; nor is it unusual for a male professor to teach in a female college whose dean is a woman. Many employees work in companies or establishments whose manager or owner is a woman. *Indeed, it might be the case that the woman's husband himself is subject to her control at the school, college, hospital or establishment which she manages, and she is subject to his control when she returns home.*⁸⁵ (Emphasis added)

In short, his argument implicitly limits the husband's right of obedience to matters *narrowly* connected to family life. It is difficult to read al-Qaraḍāwī, in light of this quote, as accepting the notion that husbands' rights as heads of households give them the

⁸⁵ Id. at p. 167.

authority to preclude their wives from exercising their rights as citizens outside the home. In short, al-Qaraḍāwī appears to solve the potential problem of the doctrine of obedience – at least from the political perspective – by radically restricting the *scope* of this duty.

From the perspective of political liberalism, then, the question is whether al-Qaraḍāwī's affirmation of a woman's family obligations in the context of a gendered system of family law, despite his affirmation of the Islamic legitimacy of a woman's civic commitments, can be taken as evidence of a sufficiently *moral* commitment to the political equality of women. I think the answer here is a qualified yes: Rawls, in his essay *The Idea of Public Reason Revisited*,⁸⁶ discusses at some length the relationship of the family to the basic structure, and concludes that the family is only *partially* subject to the principles of justice. Indeed, Rawls explicitly permits the continued existence of a gendered division of labor within the family so long as background conditions are reasonably just. This would entail providing a reasonable right of exit to women from hierarchical family structures whose associational terms they can no longer accept, and guarantees that women have sufficient access to goods such as education and the employment market so that they can make effective use of their liberties.⁸⁷ Accordingly, the mere fact that al-Qaraḍāwī supports a gendered conception of marriage is not, in itself, grounds to conclude that his conception of the family and its relationship to women's citizenship rights is necessarily incompatible with political equality between men and women.

⁸⁶ John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).

⁸⁷ *Id.* at 788-792. While one would have a reasonable basis to question whether these background conditions are satisfied in most Muslim-majority states, there is little reason to doubt that they are satisfied, or nearly so, in the liberal democracies of Europe and North America.

The better criticism, then, of al-Qaraḍāwī is that, whether by oversight or indifference to questions of distributive justice, he does not tie a woman's citizenship rights to a distributive scheme that would make women's citizenship rights effective. Abū Shuqqa's account of women's rights fills this gap. His theory articulates a theory of moral motivation that compels Muslim women to pursue some kind of a public life as part her desire to perfect her *Islamic* virtues. Because he ties the exercise of citizenship rights to moral virtues, he considers in some detail the affirmative obligations of society to provide women "the all-purpose means" that will enable them to fulfill this aspect of their moral personality.

5. Abū Shuqqa's Islamic Case for Gender-Based Affirmative Action

Abū Shuqqa, unlike al-Qaraḍāwī, does not provide a systematic argument for women's rights of political participation. Instead, he marshals what he believes are the relevant revelatory texts, organizes them thematically, and then makes his arguments in the form of a commentary. His general strategy is first to use the texts he cites to demonstrate that they contradict post-Prophetic, pre-modern Islamic ideals of gender segregation. Next, he uses these texts to argue affirmatively that they provide strong evidence that participation in public life is an important element in the good life of a Muslim woman. Like al-Qaraḍāwī, he is careful to separate himself from calls for gender equality that are rooted in western political theory, asserting in all cases that Islamic norms govern the conditions for female participation in public life, a fact that assures that inter-gender relations will be formal and business-like.⁸⁸ His views are also consistent with those of

⁸⁸ See, e.g., 2 Abū Shuqqa, at p. 16 (arguing that while a cloistered life for a woman is inconsistent with the Islamic conception of the good life, so too is casual mixing with men whose purpose is simply the hedonistic pleasure derived from their company (*istimtā'an bi-ṣuḥbatihim*)).

al-Qaraḍāwī insofar as he identifies a woman’s familial duties to be primary and thus override her right to engage in public activities if they conflict.⁸⁹

Unlike al-Qaraḍāwī, however, Abū Shuqqa recognizes that this potential conflict raises a question of distributive justice which Islamic law must answer. The specific question Abū Shuqqa raises is whether Muslims have an obligation to ameliorate this conflict so that Muslim women will be effectively able to pursue public lives. He argues that is impermissible for the institutions of a Muslim society to be structured so that women are generally unable to fulfill anything but their familial duties.

Thus, he dismisses arguments that women’s primary responsibility as caretakers precludes them from living a public life as being rooted either in pure fancy (*wahm*),⁹⁰ or if real, is indicative of defective public institutions (*‘ajz al-mu’assasāt al-‘amma*) rather than a justification for denying women a fair opportunity to have public lives.⁹¹

Accordingly, he recognizes an obligation on the part of both public institutions and individual family members to create institutions and other arrangements that will allow women to reconcile their primary familial duties with their interest in a public life. Public measures would include measures similar to affirmative action designed to compensate women for their domestic responsibilities, including providing women advantages in the work force.⁹² The obligation to incorporate women into the community’s public life is for him a political responsibility, a social responsibility, and

⁸⁹ Id. at 19.

⁹⁰ Id.

⁹¹ Id. at 20.

⁹² Cf. Rawls, *Public Reason Revisited*, *supra* n. 30, at pp. 792-793 (noting that justice requires only that women be fairly compensated for disproportionate burdens they undertake in connection with reproductive labor, not that it be distributed equally between members of a family).

the individual responsibility of couples and their extended families. Thus “the two spouses must strive [together], along with the institutions established by the state as well as social institutions, and along with them, the customs that society maintains, all of these must strive, together, to reconcile the primary obligation [of women] with [women’s] other [social and political] obligations.”⁹³

This demand is partially grounded in the public interest: at times, women will be called upon to assume responsibilities other than those of the home, and they must be prepared to do so.⁹⁴ More fundamentally, however, Abū Shuqqa’s call for a fundamental restructuring of Muslim society to permit women to reconcile their familial obligations with their desire (and at times their Islamic obligation) to live public lives is rooted in his conception of the relationship of a public life to the perfection of Islamic virtues: participation in public life is crucial to a woman’s moral development and moral perfection, and far from contradicting her role as a primary caretaker, it permits her to discharge that primary obligation more perfectly.⁹⁵ Thus, in order for a woman to develop her moral potential, she must have “[the opportunity] to attend meetings of religious instruction; [the opportunity] to acquire [secular] sciences and knowledge (*ṭalab al-‘ulūm wa al-ma‘ārif*); the right to marry and procreate; the right to a profession (*ḥaqq al-‘amal al-mihanī*) if she has time for a profession; and the right to participate in social and political life (*ḥaqq al-mushāraka fī nashāṭ ijtimā‘ī aw siyāsī*).”⁹⁶ Participation in public roles therefore interacts positively with a woman’s private roles, and produces a

⁹³ 2 Abū Shuqqa, at p. 20.

⁹⁴ 1 Abū Shuqqa, at p. 304.

⁹⁵ Id.

⁹⁶ Id.

virtuous cycle of moral and ethical development without which moral perfection cannot be attained.

Women are just as amenable to moral perfection as men, Abū Shuqqa argues, despite a report attributed to the Prophet Muḥammad implying the contrary.⁹⁷ The fact that women have historically been less accomplished than men speaks more to a history of unjust social conditions rather than the inherent capacities of women as such. Women, according to Abū Shuqqa, largely because of the pressures involved in procreation and child-rearing, have simply not been given a fair opportunity to achieve moral perfection. Women should not only strive individually to obtain all the tools required for moral perfection,⁹⁸ “it is obligatory [for society] to ensure equality between men and women with respect to educational opportunities, while taking care to insure that opportunities are structured in a manner sensitive to women’s particular circumstances in terms of time, place and manner because most institutions, unfortunately, are established based on the circumstances of men without regard to the circumstances of women.”⁹⁹

Abū Shuqqa’s argument for women’s participation in political and social life is therefore part of a larger argument about the role of such activities in the perfection of an Islamic conception of personhood. A woman can only achieve moral perfection if she participates in public political and social life, even if she must not abandon her primary role as supervisor of the family’s home and children. Thus, while he denies claims of unnamed westernizers that a woman, in order to perfect her personhood, must have actual

⁹⁷ Id. at p. 313.

⁹⁸ Id. at p. 313.

⁹⁹ Id. at p. 314.

independence from her family, he agrees that it is impossible for a woman to perfect herself unless she has a meaningful civic life alongside her domestic life.

6. Conclusion

The ECHR characterized the rules of Islamic law, because of their religious nature, as immutable and, relying presumably on historical doctrines of Islamic law, concluded that Islamic law is inherently committed to a regime of gender hierarchy. Superficially, the ECHR's conclusions appear plausible: Islamic law derives its legitimacy from its correspondence to the transcendental will of God, and so from the theological perspective, Islamic law, in an important sense, does make claims to immutability. Committed Muslims, moreover, respect this theological claim by adopting a language for discussing the norms of the *shari'a* that takes for granted the immutable nature of its norms. It would be an error, however, if Islam's theological claims regarding the immutability of Islamic law's norms are taken to mean, as a political matter, that Islamic law's actual rules are not capable of principled change. Even a Muslim committed to the theological underpinnings of Islamic law can accept a distinction between the immutability of Islamic law as a theological proposition with the historical fact that the rules of Islamic law have changed and continue to change, as evidenced by the arguments described in this paper.

When a Muslim argues for revision of the historical rules of Islamic law, however, he or she does so in a language that reflects these theological commitments, and accordingly, she will argue either that the historical rule was itself erroneous and that the rule she advocates represents the "correct" rule, or that the historical rule is correct but that its application is erroneous due to changed social circumstances. This kind of

doctrinal revision occurs through the Islamic interpretive process of *ijtihad*, which can take place either along a theological axis, an empirical one, or both. In short, although the *shari'a* as an ontological reality is immutable because of its status as God's will, human understanding of the *shari'a* is temporal and capable of revision through a complex process of theological, ethical, legal and empirical reasoning. A religious doctrine that is capable of internal correction through a method such as *ijtihad*, even if it denies the evolution of its values as such, would seem to be potentially compatible with the political commitments of democracy and therefore entitled to the same treatment as other religions.¹⁰⁰

I have argued that to answer the question of “compatibility” that so troubled the ECHR, particularly with respect to a specific norm such as gender equality, the proper framework to be used is the one provided by political liberalism. From this perspective, we ask whether contemporary Islamic doctrines provide committed Muslims *Islamically* persuasive reasons to affirm the political equality of women. Al-Qaraḍāwī and Abū Shuqqa do precisely that, not only substantively insofar as they reinterpret Islamic normative sources in a manner that makes them compatible with a conception of political equality, but also with respect to the importance empirical evidence plays in their arguments. The important role empirical evidence plays in their arguments ought to be of some significance from the perspective of political liberalism as well because it implies their agreement with political liberalism's insistence that political decision-making, at least with respect to basic question of justice, should be resolved using generally accessible evidence, not controversial, e.g., theological, premises.

¹⁰⁰ *Refah*, at ¶ 123 (stating that Islamic law rejects “the constant evolution of public freedoms”).

Our analysis, however, also shows areas of tension, primarily, with respect to issues within family law, and the extent to which continued commitments to hierarchy within the family should limit women's citizenship rights. Nevertheless, as al-Qaraḍāwī's example of the managerial wife and Abū Shuqqa's argument for affirmative action in favor of women show, there is reason for optimism to believe that even traditionalist Muslim theologians are less willing to use family law as a justification to reject citizenship rights for women.

Finally, there remains the issue of sexual freedom. The rejection of sexual freedom, whether for men or women, remains an "Islamic fixed-point of justice," at least as a matter of moral commitment. Neither author's work, however, suggests an answer regarding the extent to which Muslims must honor sexual freedom as a political value, but on the assumption that European Muslims can honor a *political* right to sexual freedom, the fact that they reject sexual freedom as part of *their* way of life should not disqualify them from an overlapping *political* consensus: political liberalism takes for granted the continued existence of incompatible ways of life in the well-ordered society, some of which will be religious.

The fact that an important and influential trend within even conservative strands of modern Muslim thought endorses for religious reasons the political equality of women provides persuasive evidence for both the existence and depth of the commitment to that value among modern Muslim communities. Given the reasonable possibility that individual Muslims will hold interpretations of Islam that are *at least as* broadly reasonable on questions of equal citizenship for women as those articulated by al-Qaraḍāwī and Abū Shuqqa, or are reasonably susceptible of evolution in a direction that

affirms the political equality of women, it seems that the best approach to questions of public accommodation raised by Muslims in liberal democracy ought to be no different than claims to accommodation presented by other minorities: case-by-case adjudication to determine first whether the rule violates a Muslim's religious freedom and second whether the right-restricting rule genuinely represents a necessary limit on individual freedom in a democratic society, without judicial indulgence of assumptions regarding the future dangerousness of the Muslim claimant.¹⁰¹ In other words, there is no normative basis to permit to states a greater "margin of appreciation" with respect to public manifestations of Islam than the law gives them when non-Muslim citizens make claims for accommodation.¹⁰²

¹⁰¹ Finnis, at pp. 3-4 (noting that the decision in *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 Appeal Cases 100, which denied a British Muslim girl's request to wear a *jilbāb*, a more demanding form of Islamic dress than the school-approved form of Islamic uniform, can only be understood by the court's willingness to restrict Muslim religious freedom without requiring the state to provide the kind of admissible evidence of necessity that is ordinarily required in claims involving restrictions of individual rights).

¹⁰² Rawls, for example, argues that the fact that a sect is intolerant, in itself, does not give sufficient reason to suppress it. The right to suppress only arises when the tolerant, "sincerely and with reason believe that intolerance is necessary for their own security." Rawls, *Theory*, *supra* note 36 at p. 218. On the other hand, "when the constitution itself is secure, there is no reason to deny freedom to the intolerant." *Id.* at p. 219.